INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE

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PART VIII

INTER-STATE DISPUTES AND THEIR SETTLEMENT

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qualified to litigate before the Court *ad hoc* (Albania, comp. the *Corfu Channel* case, *Preliminary Objection*, *I.C.J. Reports* 1948, pp. 14 *et seq.*, at p. 23).

Comp. for details on this entire subject Hans Kelsen, *The Law of the United Nations* (London, 1951), pp. 483-498.

Another question of general importance, which however relates more particularly to the jurisdiction of the Court (comp. Chapter XIV, *supra*, pp. 428-429, § 23), is that of the

legal consequences of the demise of the old Permanent Court and its replacement by the new International Court in 1946.[1]

This apparently so simple a problem has nonetheless caused legal complications of some gravity. What more obvious solution could have been devised for the substitution of the International for the Permanent Court than the two rules laid down in Articles 36(5) and 37 of the new Statute?

According to Article 36(5):

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms".

And according to Article 37:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

This issue of transitional law has played a major rôle in four cases brought before the International Court, three of them relating to the question of whether certain earlier jurisdiction engagements were "still in force" (as required by Article 36(5) or Article 37), the fourth to the question of whether certain legal instrument could be considered to be "a treaty or convention" in the sense of Article 37.

In the first of the three cases turning on the words "still in force", *viz.*, that between Israel and Bulgaria on account of the destruction of an El Al aircraft over Bulgarian territory, Bulgaria's objection to the Court's jurisdiction in virtue of Article 36(5) was upheld (1959). In the other two, those of Thailand against Cambodia and of Belgium against Spain, the corresponding objections were dismissed. But the situations differed.

Bulgaria's unilateral declaration of acceptance dated from as early as August 1921; it was made without any limitation of time and had, therefore, not yet expired at the moment when Article 36(5) became

operative together with the Charter of the United Nations on 14 December 1945. Bulgaria herself, however, was not admitted to the Organization until 14 December 1955 and consequently only became bound by its Charter, including the Statute, on the latter date. Could, under those circumstances, Bulgaria's declaration of 1921 be held to be "still in force" in the sense of Article 36(5)? The Court denied that. True, the declaration had not yet expired from the temporal point of view, but that did not dispose of the fact that the League of Nations had ceased to exist together with its Permanent Court on 19 April 1946 and that Bulgaria had remained free from any obligation under Article 36(5) in the period running since then up to 14 December 1955:

> "There is nothing in Article 36, paragraph 5, to reveal the intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter, regardless of the moment when a State having made a declaration became a party to the Statute. Such a course would have involved the suspending of a legal obligation to be revived subsequently" (comp. on this specious problem my *The Jurisprudence of the World Court*, vol. II, pp. 343 *et seq.*).

In the second case, that of Cambodia *v.* Thailand, concerning *the Temple of Préah Vihéar* (1961), the same difficulty with regard to Article 36(5) did not arise, at least not in exactly the same form: Thailand had indeed "renewed" her original declaration for a term of ten years on 20 September 1929 (already prolonged for another ten years term on 3 May 1940) by a fresh declaration of 20 May 1950. The declarations of 1929 and 1940 related of course to the Permanent Court. What Thailand asserted before the International Court in 1959 was that her "renewal" of 1950 was null and void because she could not legally "renew" a declaration referring to a meanwhile defunct Court. This argument was, in the light of Article 36(5) of the Statute, which (unlike the Bulgarian case) was binding upon Thailand, such an obvious sophism that the Court swept it aside, arguing that Thailand's intention in "renewing" her older declarations was crystal clear: she meant a submission to the compulsory jurisdiction of the new Court, the only one to which her declaration could possibly refer (comp. *loco cit.*, vol. II, pp. 425 *et seq.*).

But even that attempted escape route was not open to Spain in the third, the *Barcelona Power, Light and Traction* case of 1964. In that case also, the respondent (Spain) clung to the words "(still) in force", which, however, on that occasion obtained not in Article 36(5), but in Article 37 of the Statute. The assertion was the same: the treaty provision invoked (Article 17 of a Belgo-Spanish treaty of judicial settlement etc. of 19 July 1927) was no longer in force because the Court to which the provision referred had been dissolved after World War I. The caustic reply of the International Court was:

". . . it is difficult to suppose that those who framed Article 37 would willingly have contemplated, and would not have intended to avoid, a situation in which the nullification of the jurisdictional clauses whose continuation it was desired to preserve, would be brought about by the very event—the disappearance of the Permanent Court—the effects of which Article 37 both foresaw and was intended to parry".

The fourth case alluded to above, that of Liberia/Ethiopia *v.* South Africa (1962) concerning *South West Africa* (*Preliminary Objections*) also hinged on Article 37, but this time not on whether the South West Africa Mandate was (still) "in force", but on whether that instrument was "a treaty or convention". I will not return here to that case, analysed in my *The Jurisprudence of the World Court*, vol. II, pp. 497 *et seq.*

A third problem of a general nature, which was recently discussed by individual members of the Court, is that of

the requirement of the existence of a legal interest.

The famous adage of "point d'intérêt, point d'action", which had already played a major, and indeed highly controversial, rôle in the *South West Africa* cases between Ethiopia/Liberia and the Republic of South Africa (comp. Part III of this publication, pp. 461-472) emerged again in the *Nuclear Test* cases of 1974, where it was discussed in the context of the admissibility of the Applications in particular by Judge De Castro (Spain) in his dissenting opinion (*I.C.J. Reports* 1947, pp. 372 *et seq.*, at pp. 384-390).

After having remarked at p. 385 that "the idea of legal interest is at the very heart of the rules of procedure (cf. the maxim 'no interest, no action')" and recalled at pp. 386 *et seq.* the controversy concerning rights which are specific to an Applicant and rights based on a collective or general interest (resembling to an *actio popularis*). Judge De Castro argued at p. 387 that the Australian Application "(was) not admissible unless the Applicant (showed) the existence of a right of its own which it asserts to have been violated by the act of the Respondent" and that "the claim that the Court should declare that atmospheric nuclear tests are unlawful by virtue of a general rule of international law, and that all States, including the Applicant, have the right to call upon France to refrain from carrying out this sort of test, (gave) rise to numerous doubts." On the basis of these considerations Judge De Castro found

(1) that it would go beyond the judicial function of the Court to make a general and abstract declaration as to the existence of a rule of law;

(2) that, however, reliance by an Applicant on the right with regard to the deposit of radio-active fall-out on its territory makes the request for examination of the merits of the case admissible (reference to the

old prohibition of *immissio* (of water, smoke, fragments of stone) into a neighbouring property under Roman law (D. 8, 5, 8, para. 5), the precedent of the *Trail Smelter* case of 1938-1941 between the United States and Canada, and a dispute in the 1950's between the Swiss Cantons of Solothurn and Aargau);

(3) that, on the other hand, Australia's complaint against France based upon infringement of the principle of freedom of the high seas by restrictions on navigation and flying in certain forbidden zones was not admissible in the form in which it had been presented because the Applicant "had no legal title authorizing it to act as spokesman for the international community".

The same problem was discussed in the joint minority opinion of a group of four Judges at pp. 360 *et seq.* of the volume relating to the *Nuclear Tests* case (Australia-France). These Judges dwelt in particular upon the almost insoluble problem of qualifying certain preliminary questions as relating either to jurisdiction or to admissibility. In § 105 of their exposé they stated indeed that

"The matters raised by the issues of 'legal or political dispute' and 'legal interest', although intrinsically matters of admissibility, are at the same time matters which, under the terms of Article 17 of the 1928 Act, also go to the Court's jurisdiction in the present case. Accordingly, it would be pointless for us to characterize any particular issue as one of jurisdiction or of admissibility, more especially as the practice neither of the Permanent Court nor of this Court supports the drawing of a sharp distinction between preliminary objections to jurisdiction and admissibility. In the Court's practice the emphasis has been laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility (cf. Article 62 of the Rules of the Permanent Court, Article 62 of the old Rules of this Court and Article 67 of the new Rules). This is because, owing to the consensual nature of the jurisdiction of an international tribunal, an objection to jurisdiction no less than an objection to admissibility may involve matters which relate to the merits; and then the critical question is whether the objection can or cannot properly be decided in the preliminary proceedings without pleadings affording the parties the opportunity to plead to the merits. The answer to this question necessarily depends on whether the objection is genuinely of a preliminary character or whether it is too closely linked to be susceptible of a just decision without first having pleadings on the merits. So it is that, in specifying the task of the Court when disposing of preliminary objections, Article 67, paragraph 7, of the Rules expressly provides, as one possibility, that the Court should 'declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character'. These principles clearly apply in the present case . . ."

On the question of Australia's legal interest in respect of the claims which she advanced, the joint minority was far more positive than Judge De Castro. They rightly found that both the question of damage