THE SOUTH WEST AFRICA CASES
A PERSONAL ANALYSIS

C. A. W. MANNING

By what, with a hint of acerbity, Judge Padilla Nervo (Mexico)[1] referred to as "a technical or statutory majority, resulting from the exercise by the President of his prevailing vote", the International Court of Justice at the Hague, on July 18, 1966, rejected the cases initiated, in 1960, by Liberia and Ethiopia, as "members" of the League of Nations, against the then Union (now the Republic) of South Africa. To a substantial section of the international public this result came as a major instance of the colossal 'non-event'. It had all looked so obvious, so predictable. Could there really be any doubt that, had it come to a decision on what Judge Jessup (U.S.A.) referred to as the "real merits",[2] South Africa would have been branded as in the wrong?

"There was one matter", explained the Judgment, read by the President, Judge Sir Percy Spender (Australia), to a Court-room filled, for once, to capacity, "which . . . had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings".[3] The question was whether the various mandatories had any direct obligation towards the other members of the League individually. In such a setting, rights could not be derived from the mere fact of membership of the organisation in itself. Rights could not be presumed to exist merely because it might seem desirable that they should.

Each of the seven non-concurring judges wrote a dissenting opinion. Most terse on this point was Judge Forster (Senegal): "Cela dépasse mon entendement".[4] The relevant wording, noted Judge Koretsky (U.S.S.R.), "is quite clear to anyone who is not seeking to read into it what it does not contain"[5] "The Judgment . . . ", wrote Judge Jessup, "rests upon the assertion that even though—as the Court decided in 1962—the Applicants had *locus standi* to institute the actions in this case, this does not mean that they have the legal interest which would entitle them to a judgment on the merits. No authority is produced in support of this assertion which suggests a procedure of utter futility".[6]

It was not with the Judgment only that some dissenting opinions dealt. In six there was an indication of how the authors might have voted on the "real merits"—and of these six each except Judge Sir Louis Mbanefo (Nigeria) gave something on

[1] p. 441. All quotations from the Judgment and from the Separate and Dissenting Opinions, are from the duplicated "special edition" dated 18th July, 1966. But the page references are to the corresponding passages in the printed definitive text.
[2] p. 330.
[3] p. 18.
[4] p. 478.
[5] p. 248.
[6] p. 382.

his reasons. All this despite a presidential Declaration deprecating comment on matters going beyond the Judgment of the Court. Disagreeing, Judge Tanaka (Japan) insisted on each judge's right "to deal with all matters on the merits entirely irrespective of the content of the majority opinion".[7] Only Judge Koretsky, in dissenting, observed the reticence for which the President appealed.

Strange though it may seem, the question most inquirers must wish to ask is the one least possible to dispose of. What precisely was the legal confrontation about? Judge Jessup: ". . . the record shows continual disagreement on the nature of these claims and the final determination of their content and meaning were specifically reserved for subsequent decision by the Court . . . that decision has not been made".[8] But even if the judges might not know, the layman did. South Africa, bound by the Mandate conferred upon her in 1920, was, in 1960, accused of having violated its provisions. In particular, instead of promoting to the utmost "the moral and material well-being and the social progress of the inhabitants", she had practised apartheid. And from this the Court should now have been telling her to desist. The massive Pleadings in these cases offer instructive reading. First the Memorials, followed by the Counter-Memorial (in 10 volumes); and then the Reply, followed by the Rejoinder (in 2). In the end, if only for tactical reasons, the Applicants conceded virtually everything in the pleadings of Respondent, basing their amended submissions not specifically on the charges assembled in their Memorials but solely on Respondent's admitted laws, etc., by which status, rights, etc., were allotted differentially on the basis of race, etc.

"The end of German control", recalled the Memorials, "left a legacy of poverty for the natives and deep resentments. The Union of South Africa in 1920 assumed the duty to transform this legacy into a condition of well-being and social progress".[9]

What had happened in 1920? Already in 1915, with the military occupation, the realities of the local context had dictated certain choices. Already it was obvious that the needs, traditions, outlook, and stages of development of the various peoples in the Territory were so diverse that it was the merest prudence not to attempt to treat them all alike. And secondly, only by the creation, in an area wretchedly poor, of wealth, could there be any prospect of improvement: and what better way was there than by attracting into the Territory additional 'white' capital, technology, and entrepreneurial skills? There was nothing doctrinaire about this. It was in the spirit, so patently appropriate, of realistic social gardening. And never in the days of League supervision had its correctness been impugned. Only now, in

[7] p. 263.
[8] p. 429/430.
[9] Memorials, p. 8.

the new era of decolonisation, had the very principle of white administration anywhere in Africa begun to be questioned. The clash was not basically between ways of doing well what South Africa was attempting. Rather was it between the resolve to persevere with, and the demand for the renunciation of, the job. South Africa's real offence, in the eyes of the modern-minded, is that she holds at all a Mandate dating from 1920 administered under a Constitution dating from 1910. Though pledged to promote the well-being of the inhabitants, she is explicitly authorised to do this under her "own laws": she is not obligated to do it under the laws of, say, the United States. The spirit of the Mandates system is not precisely that of the United Nations. In particular the ideological imperialism which colours some current pressures was unknown in League of Nations days. Each Mandatory operated in terms of an administrative philosophy distinctively its own.

One of the issues in these cases concerned the continued refusal of South Africa, in the face of the Court's Advisory Opinion of 1950, to submit to supervision by the United Nations. What chance there was that—but for the nonsuiting of the Applicants—the finding of 1950 might now have been given binding effect, remains a question. Respondent's argument, based on "crucial new facts", invited no easy answer. Judge Jessup attempts none, merely noting that the 1950 Opinion survives. And the cases made by Judges Tanaka and Wellington Koo (China) are, legally speaking, scarcely compelling. It was true, admitted Mr. de Villiers (counsel for Respondent), that "the authors of the mandates system considered that mandatories should have the assistance by way of co-operation and collaboration of the Permanent Mandates Commission . . . Any assistance of that kind which is still offered by way of criticism is always welcome. The only stand which the Mandatory Government . . . takes in that regard . . . is that, when criticism is offered from outside, which is either politically motivated or uninformed, which is directed at forcing its hand in accepting a policy which the South African Government itself knows will have disastrous results, then that type of assistance from outside is not welcome and does not help".[10]

In order to get to grips with the questions on which South Africa remains at odds with so much of the world, Mr. Gross (eminent New York lawyer appearing as agent for the Applicants) should either have suggested why policy should never have been based on the manifest presence in the Territory of a plurality of peoples, or alternatively to have argued that, given the evident differences, South Africa had done her differentiating in irrelevant ways. Instead of that, Mr. Gross affected an outraged inability

[10]C.R. 65/21, p. 55. (Quotations from the oral proceedings are based on the *uncorrected* Verbatim Reports.)

to appreciate what this discussion of differences was all about. Individuals he knew; but abstractions, it seemed, meant nothing to him. You could not advance the welfare of a people: but only of the people individually who composed it. Or so he purported to believe.

This ideological confrontation—for that was really what it was—had been present already in the constitutional set-up of the Union of 1910. Differentiation between the peoples in South Africa was already a feature of her system when, with authority to apply her own laws in the Territory, her Mandate was conferred. There is a difference between asking what the Mandate did, and does today, require, and asking what world opinion would today prescribe.

It was thus that Mr. Gross could refer to "the clearly divergent views between the Applicants and the organised international community on the one hand and Respondent on the other concerning the role of the individual, the group and the social order".[11] The Applicants and the organised international community looked at the group in terms of protecting the individual; Respondent looked at the individual in terms of protecting the group. "It is clear from the record that in the Mandated Territory in the respect under discussion the individual is essentially looked upon as a Native; the Native is not looked upon as an individual".[12] And again: "The Applicants are not aware of any society which could fairly or reasonably be described as one which is 'single and integrated', whatever those words may mean".[13] This in uncomprehending comment on Mr. de Villiers, who accordingly further explained: "We shall demonstrate to the Court ... that in a sense and for this purpose it might be said that various parts and countries of the world fall into two categories: firstly, the category of those that have peculiar problems arising from the co-existence of different social, ethnic, and national groups, co-existing in close contiguity with one another, and in sufficiently substantial numbers to create a problem. That is the one category . . .: another . . . is that which does not have that problem . . . It is quite impossible to expect uniformity of approach and practice . . . An attempt to do so would necessarily amount to an attempt by the part of the world which does not have the problem to impose its views on the part of the world that does . . . as if the non-maritime States of the world were to say to the maritime States how they are to solve their coastal problems".[14]

Professor Possony, of the United States, one of South Africa's 14 witnesses, developed this theme. "The point", he said, ". . . is that there is an intellectual difficulty in Washington to under-

[11]C.R. 65/25, p. 13.
[12]C.R. 65/25, p. 17.
[13]C.R. 65/31, p. 18.
[14]C.R. 65/47, p. 60.

stand the significance of the ethnic factor and it is part of the national tradition . . . and it took the U.S. many, many years . . . to understand that with respect to the Indians".[15] And again: "I think that the UN, on reflection on this very type of problem, has finally come to realise that more research on these matters is necessary and that a lot of the texts which we have published immediately after World War II, under the psychological impact of World War II and Nazism, failed to take into account what the real facts of life are in the multi-ethnic societies".[16]

Applicants asked: "Is it or is it not true as a matter of history and of scientific observation that emphasis on the group rather than on the individual . . . may tend toward what is sometimes referred to as racist doctrines or concepts—would you agree with that as a consequence which it is observable frequently flows from emphasis upon a group rather than the individual as a matter of emphasis?". The Professor replied: "Yes, I have grown up in a society where precisely this sort of thing happened, but at the same time because disease happens it does not invalidate health. When you go into the whole intellectual history underlying the idea of nationhood—take Herder, or Rousseau if you want to—you talk about a different subject from when you read Mr. Hitler; that a diversity which exists . . . can be abused, there can be no question about that . . . the emphasis on differences does not *imply* an argument as to superiority or not".[17]

Likewise germane was the testimony of Dr. Eiselen, veteran social anthropologist and administrator. "I would like to put to you . . . why we refer to our country as a multi-community country, why we rather insist on not calling our country a multi-racial country, but speak of our country as a country whose inhabitants form a . . . number of communities . . . We think as a matter of fact that it is misleading to refer to our country as having a race problem, because . . . we are then confused with the countries that have only a race problem. In the U.S. they live there merely as a different race . . . To us, it is sometimes a matter of surprise that they should still be referred to as Negroes and not merely be called Americans".[18]

He spoke also of tribalism, which meant, he said, "a great deal to the Bantu people". It was not something that could be discarded. The efforts of the Government were not directed towards fostering tribalism, but to making tribalism, in as far as it had still to be reckoned with, a progressive force instead of being a retarding factor, as it had been in the past. "It is the policy of my government that the people, once they are able to express themselves and to state their views and wishes

[15]C.R. 65/85, p. 33.
[16]C.R. 65/85, p. 34.
[17]C.R. 65/86, p. 46.
[18]C.R. 65/48, pp. 38, 46.

clearly, should have the right to say of their own free will whether they desire to join in a larger whole and to govern that, no longer as separate bodies but as a united people of South West Africa". Liberty would be given them at a stage when they could be expected to make their choice fully knowing what the implications of such a choice were.[19]

A colloquy between Professor Bruwer, social anthropologist and one-time missionary, and Judge Sir Louis Mbanefo is worth recalling. Sir Louis: ". . . you mentioned certain distinguishing ethnic characteristics . . . would you accept that this is not peculiar to South West Africa?" Mr. Bruwer: "I accept that it is not peculiar . . ." Sir Louis: "In your system of separate development, you base it on the fact of these differences?" Mr. Bruwer: "That is correct". Sir Louis: "Would it surprise you that—take a country like Nigeria, every single thing you mention here exists in Nigeria, possibly in a greater degree because the population is about 40 times that of South West Africa". Mr. Bruwer: "I have no practical experience of Nigeria apart from what I have read about the country . . . But . . . the range of differences, in my opinion, in South West Africa is probably far greater than it ever was in Nigeria, that is, according to the sources that I have read".[20]

Mr. de Villiers was frank about separate development. ". . . we know that in respect of each one of the measures relied upon by the Applicants . . . each one of them involves official differentiation. That is common cause".[21] The authors of the Mandate had not distinguished among the different classes of the inhabitants, and the white population was as much a population group of South West Africa as any other. "It had a right, not only legalistically, not only by way of a vested economic interest, but a moral right to be there and to be considered".[22] He noted the "gusto" with which Mr. Gross had read his list of carefully selected measures seen as favouring the white group in comparison with all the rest.[23] Why had he excluded everything based on differences between the various non-white groups? Why also everything favouring the non-whites in comparison with the whites?

Mr. Gross contrasted the large numbers of Africans who suffered what he saw as disabilities in the 'white' areas with the small numbers of whites who, in the non-white areas, were correspondingly at a disadvantage. He affected not to perceive the explanation: namely, that in the non-white areas the whites were so markedly underprivileged that few of them felt any ambition to be there. Had they been free to become farmers where all that water was, the picture might have been different.

[19]C.R. 65/49, p. 33.
[20]C.R. 65/57, pp. 17, 19.
[21]C.R. 65/21, p. 44.
[22]C.R. 65/92, p. 29.
[23]C.R. 65/91, p. 47.

Mr. Gross centred only on the fact that in important areas non-whites were subject to "limitations" on their opportunities. This he saw as "racial discrimination". (In colleges where a garden is reserved for fellows only, the exclusion of the undergraduates is not usefully attributable to anti-undergraduate prejudice. The young men are excluded not so much because they happen to be undergraduates as because they do not happen to be dons).

Mr. Gross was seemingly not aware that 'hard cases make bad law'. Good government is concerned to make good law, even if at the cost of producing hard cases. Mr. Gross' thesis seemed to be that the Mandatory must do what no government in the world has ever been able to do—namely, make good law without causing any hard cases. "They referred", said Mr. de Villiers, "to the fact, or tried to establish, that some persons may have been detrimentally affected by Respondent's policies. Now, surely that must be true of every policy in the world . . . What is a very important factor is weighing the policy not *in vacuo,* not against suggested idealistic standards of perfection . . . but . . . against the pros and cons of the only alternative policies that may be possible in the particular circumstances; because that is the only realistic way in which to weigh a policy".[24] The truth is that in the League of Nations period South Africa had treated the population of South West Africa as a multiplicity of communities, legislating for each according to what appeared to be its needs and requiring of each according to what appeared to be its capabilities. And no fault was then found with a policy of attracting white immigrants from the Union, to create jobs for the local people and a source of revenue from which to pursue the purposes of the Mandate. Pointing even to the United Nations Charter, Article 73, "Again", said Mr. de Villiers, "one finds the concept of 'each territory' in the singular and 'its peoples' in the plural, indicating a contemplation of a plurality of peoples within one political unit, and therefore the need of possible differentiation on that basis. If it were not . . . for this clear meaning of these articles, then it would have been quite impossible for the Union of South Africa to become a signatory to the Charter . . .".[25]

"The difficulty", wrote Judge Jessup, of finding the meaning of the Applicants' submissions "arose mainly out of their use of the expression 'norm and/or standards' to indicate the criterion to be used to determine whether the practice of apartheid was compatible with the obligations of the Mandate. The problem . . . can best be clarified by reference to the oral proceedings". The Applicants had specified that their case was to be considered as depending on this theory of a norm and/or standards. Judge Jessup did not believe that the Court would have taken any

[24]C.R. 65/92, pp. 51, 52.
[25]C.R. 65/47, pp. 32/33.

other view of it. But others of course may not have agreed. For had not the generally understood purpose of the litigation been to get a fresh, independent, judicial pronouncement on the factual question, is the policy of apartheid, or is it not, compatible with the duty to promote well-being? Yet that was what Mr. Gross was now apparently labouring to avert. It was Mr. de Villiers who was striving to ensure it.

Besides trusting that the judges would have studied the Pleadings, including her answers to the charges originally made, South Africa seems to have pinned her hopes upon what interest individual judges might feel in the truth. She would withhold nothing, and hide nothing. From around the world she enlisted her 38 potential witnesses, to testify to the propriety, the relevance, and the essential wisdom of what she had done. "It is difficult", even Mr. Gross himself had said, "to understand the true nature of the premises and effects of apartheid in the daily lives of the inhabitants except on the basis of envisaging the situation from the angle of the individual".[26] Yet when Judge Sir Gerald Fitzmaurice (U.K.) asked if Applicants were in a position, and did they propose, to furnish the Court with factual evidence (*e.g.* the personal testimony of inhabitants of the mandated territory) showing what had been the actual effects of the Mandatory's measures and practices in individual cases,[27] the answer he got was, no. Applicants did indeed claim that petitions to the United Nations illustrated the manner in which the daily lives of the inhabitants were affected by the systematic implementation of the apartheid policy. The unreliability of these petitions was however to be demonstrated by the evidence, amplified under cross-examination, of Mr. Kurt Dahlmann, editor of the Windhoek *Algemeine Zeitung*. Mr. de Villiers sugested that the petitioners be called to the Hague. "We could consider quite seriously, if my learned friends should wish to call them, whether we ought not to offer to pay their witness fees so as to allow us the privilege of cross-examining them".[28] The suggestion was ignored. Their case, the Applicants insisted, stood or fell by their submission that the Mandatory's laws "are inherently and *per se*, as a matter of law, in violation . . . read in the light and interpreted in accordance with the applicable international legal norm and international standards".[29] South Africa was proposing that some or all of the judges should make an inspection *in loco* of the Territory. Such an inspection, she maintained, "could be of tremendous value . . . if it were to observe for itself what indeed are the differences between the various groups.[30] And again, "We ask the Court to look at all the phases raised by Applicants

[26]C.R. 65/23, p. 10.
[27]C.R. 65/25, p. 58.
[28]C.R. 65/25, p. 57.
[29]C.R. 65/24, p. 12.
[30]C.R. 65/25, p. 61.

in their Pleadings: the policy, the rights of residence, freedom of movement, security of the person, the phase of education, the phase of economics. We will ask the Court in the political sphere to have regard to this alternative policy which the Applicants suggest . . ."[31] And with reference to Mr. Gross' opposition to the inspection proposal: "I would suggest . . . that the real reason for this attitude . . . is a perfectly obvious one: namely that the Applicants cannot face up to this factual enquiry . . . to a comparison of standards of well-being and progress in their own countries as compared with those in South West Africa".[32]

But in the nature of the forensic situation it was not for Respondent to prescribe a *modus operandi* for the Court. Nor was it exclusively for the Court itself. It was the Applicants who, for the relevant purposes, were the masters of ceremonies, the callers of the tune. And whether wisely or not, it seems to have become the object of the Applicants' policy to render apparently otiose for the Respondent the calling of witnesses and to represent as pointless for the Court the proposed inspection on the spot. How was this done? Simply by proposing as the basis of the case a formula whereby the Court would be disembarrassed of all responsibility for anything beyond a finding that its business had all been disposed of for it beforehand—and unreviewably—by bodies in New York. Whatever the explanation, Applicants had said from the beginning that they proposed to demonstrate the impermissibility of apartheid by reference to "objective legal criteria".[33] ('You don't need to look at the girl to see if she is "lovely". All you need is to get her measurements, and set them against a formula in a book'). Is that how a Court would think it sensible to proceed? Much better surely to make an inspection *in loco*? But the Applicants were, as Mr. de Villiers acknowledged, *domini litis*, and, their line having once become sufficiently clear, Respondent, with declared reluctance, gave in: "In a way we regret that we have been deprived of the opportunity of putting our full case before the Court in respect of those original charges".[34] (The separate charge, alleging militarization, was demolished—as Judges Jessup and Tanaka freely admitted—in the testimony of General S. L. A. Marshall of the United States.) And again, "Mr. President, when a Party makes it so clear that that is his case and nothing else, then, however inconsistent that might be with what he said before, it would seem that the other Party, being called into court to answer a case made against it, has no alternative but to accept that that is the situation".[35] Said Respondent, in effect: 'To convict me, you have only two possibilities: either to show that

[31]C.R. 65/25, p. 59.
[32]C.R. 65/25, p. 54.
[33]C.R. 65/2, p. 18.
[34]C.R. 65/40, p. 15.
[35]C.R. 65/40, p. 38.

my policies have bad motives or to show that they have bad effects'. Applicants in reply: 'On the contrary, we have a third possibility—to show your policies as contravening, if not a legal norm, then at least a standard, proscribing just what your admitted laws and other measures amount to—and the Court will have no option but to declare that this is so'.

Simplest is it—as a way of presenting Mr. Gross' minimum position—to ask oneself just what combination of propositions a judge, in order to found his conclusions on Mr. Gross' argument, would have needed to accept. Substantially the answer seems to be: 1. that the Mandate still existed; 2. that, as stated in the Court's 1950 Advisory Opinion, the United Nations had competence to supervise the Mandate; 3. that this competence included a capacity to establish standards binding upon the Mandatory; 4. that a standard affirming the incompatibility of certain sorts of policy and practice with the promotion of well-being and social progress had so been established—and this as a matter of unambiguous law (like a statutory speed limit); 5. that the condemnation, in the light of this standard, of South Africa's policies had already been effected; 6. that neither the formulation of the standard nor its application in condemnation of the policies was reviewable by the Court; and 7. that it was the duty of the Court to hold all this to be so.

To the individual judge there were thus three alternatives open: either to accept the arguments offered by Mr. Gross in support of these combined propositions; or, to find against South Africa on some different ground; or, not to find against South Africa. What we can see is the following: Though Judge Tanaka was with Mr. Gross on certain details, and Judge Mbanefo did not say if he was with him or not, and though Judge Jessup seemed to think—albeit apparently incorrectly—that he was close to Mr. Gross, it seems that no one of those seven dissenting judges who at all revealed his position can be shown as having accepted Mr. Gross' contentions as they stood. Nor did any two of them agree wholly with one another.

"If", Judge Sir Gerald Fitzmaurice (UK) had asked, "there may be circumstances in which measures of group differentiation might have some justification, would the Applicants still wish to maintain that an investigation of the factual situation by hearing evidence or by local inspection would be wholly superfluous?"[36] "In the Applicants' view", said Mr. Gross, "the value judgment whether apartheid is 'good or bad' already has been made. It has been made as a normative judgment by the organised international community acting and speaking over the years through the competent organs".[37] And again: "This theory of the case, if sustained, eliminates extra-judicial considerations. It

[36]C.R. 65/25, p. 31.
[37]C.R. 65/24, p. 16.

has never been part of the Applicants' case that the Court make a subjective evaluation of Respondent's policies of discrimination and separation".[38]

There was nothing particularly inconceivable in the *idea* of a rule, binding at least upon the Mandatory, whereby apartheid would be proscribed. The problem was how to *show* it so to be binding. For this, its validity must in effect be deducible from the wording of the Mandate itself. So it must have the form of a dogmatic say-so, asserting the inherent incompatibility of apartheid with the promotion of well-being. Whose say-so? That presumably of those having the function of supervision of the Mandate. That is, the United Nations, provided the Court could be got to re-affirm its controversial 1950 opinion on this point. No great difficulty after that, if enough of the vocal UN bodies were brought into the account. This became the easier if, instead of the United Nations, one spoke of that even more eligible discovery of the wishful mind, the organised international community (hereinafter the OIC), *alias* the competent organs. Whereas except by postulating this incorporeal *deus ex machina,* identical in its enduring essence but plural in its discontinuous manifestations, Mr. Gross must have been without a theoretical peg on which to hang his ostensibly legalistic case. Yet had he attributed constitutional responsibilities to say 'posterity' or even 'the human race', his feet would have been closer to the tarmac. With no charter, no constitutive instrument, there was just nothing that such an entity could not (or could?) do. Or better, be 'deemed' to have done. Thus, ". . . the competent organs (sic) have perceived and characterised (sic) Respondent's policies as based upon a concept of racial superiority or racial hatred . . ."![39]

For some at least of Mr. Gross' inspiration we may look to *Brown v. The Board of Education* (347 U.S. Reports, 483), where, in 1954, on the basis of an apparently scientific say-so, the U.S. Supreme Court had uttered, in the shape of a decision, a judicial say-so, and, in the shape of a basis for this decision, a legislative say-so—to the effect that separate educational facilities were "inherently" unequal. So, now, the OIC — allowing a say-so (scarcely scientific) to the self-styled spokesmen for the people of the Territory—had comparably exercised a quasi-legislative say-so in setting up its standard, and a quasi-judicial say-so in applying it to the apartheid way of life. For, as Mr. Gross explained: "When the Applicants say that a certain practice . . . is inherently whatever it is, the Applicants think they are making a legal argument and not a submission of fact".[40] The facts, the Applicants insisted, were common ground. Yes perhaps, one may say: but what of those characterisations? "The characterisations", replied

[38]C.R. 65/33, p. 57.
[39]C.R. 65/31, p. 31.
[40]C.R. 65/32, p. 27.

Mr. Gross, "are those which, the Applicants understand, correspond to the judgments (sic) reached by the OIC and its constituent institutions . . ."![41] (It was as if, the school being given ginger-beer, some teetotal parent were to denounce the headmaster as confessedly (sic) having 'poisoned' the boys).

Into what sort of a realm was Mr. Gross taking the judges in imagination with him? Was this the idiom of the black-robed orthodoxy in which they should be professionally at home? Whoso refers to the League or the United Nations as *an* OIC indulges in nothing more audacious than a trite literary conceit. But *the* OIC? As Mr. de Villiers in effect pointed out, no such animal existed.

Yet how could anyone be certain that the *thought* of such an animal might not find sufficient favour among the judges to make the implausible ploy worth while?

It was a hard enough theory to argue. The Mandatory in particular must be portrayed as having been party to a plan whereby the OIC of the then indefinite future would have powers more extensive than ever were suggested for the OIC of the days of the infant League, and larger than any it was itself to claim with respect to trusteeships of its own. And even so, there was in the argument a final flaw which even the South African lawyers might more firmly have pinpointed. Persistently they demanded clarity on whether any value judgment remained to be made by the Court. None, reiterated Mr. Gross: that had all been taken care of by the OIC. It was here that the distinction might pertinently have been highlighted between two independent species of value judgment—the quasi-legislative, for the propounding of a standard, and the quasi-judicial, for its application to a case. The second should never have slipped through so easily under the umbrella of the first. It was one thing to tell the judges that an OIC with norm-creating powers could meet a long-felt need. Quite another thing to get it invested with verdict-giving powers as well. Was the embryo world quasi-parliament to serve also as an international quasi-court? Would the Hague judges ever really have been willing, with their minds alert, so to adjudicate themselves out of a job?!

Why Respondent's lawyers rather overlooked this cue is perhaps because at that stage they still were under a Gross-fostered delusion that his standard was one not of non-unfairness, as it was eventually to become, but of non-differentiation—in which guise its violation by apartheid was anyhow not in dispute. According to the Oxford dictionary, "discrimination" has two meanings, only one of which is pejorative. And Mr. Gross had spoken of its "prevalent and customary sense", with specifications of a seemingly non-pejorative nature. By the time his norm was revealed as proscribing adverse and unfair racial discrimination

[41]C.R. 65/25, p. 7.

it was too late for South Africa's 24 best qualified witnesses—on that issue—to be called. Mr. Gross could be limpid and lapidary when he wanted to be. But he did not always want. It would be hard to overpraise the virtuosity with which he exploited the American tongue. But what belief, if any, he will himself have had in some of his novelties—is another question. Like his cross-examining, he seems to have used them because he thought they would "pay dividends" to his case.[42] And so they may have—even though he was formally followed in them by no particular judge. Certainly not by Judge Jessup. With him the standards were of the conventional pre-Gross variety, not for mechanical application, and reserving a residue of discretion for the judge. This Mr. Gross could never have officially stood for without forgoing his entire argument against the witnesses and the visit. It must be hoped that Judge Jessup will have been among that minority of the judges who, when the voting came, favoured such an expedition to the spot. Rightly he had seen, as Judge Tanaka, for instance, had not, that the "well-being" issue was indeed intrinsically justiciable. Rightly he had seen that, for ruling upon such an issue, judges should be glad of expert help. Rightly he had seen that the old Permanent Court, in similar circumstances, might well have sought it. And significantly he had assumed that it would have sought that help, not from the League Assembly, as the then OIC—not, that is, from the petitioners and politicians—but from the Permanent Mandates Commission, as the connoisseurs. It is a pity he went further, with his personal inkling of what the Commission's answer would have been. Every judge his own connoisseur? Apparently yes. For, ignoring Mr. Gross, all six of them made confident autonomous value judgments of their own—on the fairness, or unfairness, of apartheid—the one crucial issue on which South Africa had never been given formal occasion specifically to speak. (For on Mr. Gross' theory the characterising had long since been *unreviewably* done, by the "competent organs". *Vox mundi vox veritatis,* and *vox justitiae* too!). It is intriguing to speculate on where, had it come to the "real merits", the Applicants would have found, from among those coolheaded lawyers who on July 18 supported the Judgment, that eighth judge whose vote they would have needed, to win. It is not obviously they who have on the whole the stronger reasons for regretting that those merits were left unappreciated by the Court.

21st August, 1966.

[42]C.R. 65/96, p. 29.