# THOSE SOUTH WEST AFRICA CASES—A SECOND LOOK

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MOST things tend to happen to most of us sooner or later, if we live sufficiently long. And there is one thing that, as what it is alas becoming customary to call ' academic ', has now for the first time happened to me. I have been approached for a written contribution reflecting, not the fruits of any effort of research, but simply my ' feelings ', on a topic in which I am taken, quite correctly, as having a personal interest : to wit, the South West Africa question with particular reference to that phase of it which was enacted between 1960 and 1966 before the International Court of Justice at the Hague. An enticing opportunity, of which I am availing myself here.

There are certain facts about those Cases—for there were two of them, treated in practice as one—which are pretty generally known. In particular—that great importance had been attached, in the Afro-Asian countries, in the American State Department, at the United Nations, and elsewhere, to the rather confidently expected outcome ; that the proceedings were inordinately long drawn out ; that the end-result was decided on a preliminary issue of which it might have been thought more appropriate to have disposed much earlier on ; that the decision was arrived at through the use by the President of his casting vote ; that the technical correctness of the conclusion reached was widely called in question ; and that on the matters of substance that the Cases were really all about, no answers were given at all, at least by the Court as such ; what some individual judges found to say was a different matter.

Disappointment, tinged with astonishment, was expressed not only over the suggested impropriety, in point of law, of what had been decided but also, to a remarkable extent, if mostly by implication, over the doubtful desirability of what half of the judges had done, when viewed from a general political point of view. Ought they not to have thought about the likely effects of what they were doing upon the future standing, in the eyes of important blocs of world opinion, of the Court ?

My own interest in the then German South-West Africa goes back to my Edwardian schooldays, when it loomed in my untutored imagination as the large, not distant, region from which some day there might be mounted an assault upon the country which was mine. There are said to be those in the world who see it in somewhat that same sort of light today : whence the efforts they are deploying to engineer the establishment of a United Nations ' presence ' in the Territory. And when, in 1914, myself now in England, I learnt that forces from the Union (as it then was) of South Africa were moving toward the prospective conquest of the area, this seemed to me the sensible sort of enterprise in which I half envied those, lately my comrades in the Union Defence Force, who were having the opportunity to share. Not until years later was I to read of how reluctantly the South African government and people had yielded to the urging of the Asquith government in London, that they should undertake what to perhaps most of them seemed this unalluring assignment.

Later, in the early 1920s, as a rather privileged junior member of the League of Nations Secretariat, I used sometimes to ' sit in ' on private

meetings of the Permanent Mandates Commission at which the Territory, and South Africa's administration of it, were discussed. In those days it had not yet been widely forgotten that South Africa's—as a ' C ' Mandate, not a ' B '—involved, as someone said, ' annexation in all but name ', carrying no implied promise of an eventual independence : and that the mandatory Power, authorised to administer the territory "as an integral part" of its own and "under its own laws" was not a democracy, but a country where only members of the European-descended minority could sit in parliament, and few others had the vote.

More than forty years on, and among my more improbable experiences was my eventual appearance in 1965 as a so-called ' expert ' witness—on the self determination of peoples—in the Cases, or Case. Also I was to be fortunate enough the following summer to be present in the Court for the long-awaited revelation of the result. Whereupon, at unseemly and uncomfortable speed, I concocted, to an August deadline, for the ' October ' issue of a learned periodical, an article on the subject which came out, a shade belatedly, in December.*,

In that article I more than hinted that, if anyone had cause to be regretful that the ' merits ' had not after all been dealt with, it was less the Applicant countries, Liberia and Ethiopia, and their friends, than the Respondent, South Africa. For it seemed to me rather more likely than not that those of the fourteen judges who had, so to speak, spared South Africa on the preliminary issue, would, had the occasion arisen, have spared her on the merits as well. For the preliminary issue was such a classically ' open ' one—arguable, most persuasively, either way—that no-one who might have been reluctant to spare South Africa on the merits need have felt himself under any particularly compelling necessity to spare her on the preliminary issue instead. It seemed to me at any rate easier to conceive the case of someone, persuaded that South Africa ought in any case to be spared, preferring that this should happen on the preliminary issue and perhaps even stretching a point, in his professional deliberations, in the interests of bringing this about. Better to be pilloried as technically inept in the treatment of a miserable quibble than as the ally and protector of a system widely seen as the very quintessence of so much that was wrong. Mere speculation all this, no doubt. But on a weighing of hypothetical probabilities that was now it looked, to me.

What does it feel like to see one's country arraigned on imperfectly-substantiated charges before the most elevated judicial tribunal in the world ? Unendurably painful ? Perhaps it might do, were it coming as an isolated experience. So equally might a sudden punch upon the nose, if coming as an isolated experience. Whereas if the punch were to be received in the course of a prize fight it might pass to all intents unremarked. The campaign over South West Africa, albeit a major operation, is yet strictly only a sort of side-show in the war—not consistently a cold one—which during the past couple of decades has been prosecuted with such ferocity against her by so influential a combination of her co-signatories of the United Nations Charter. It is in short the openly avowed aim of a numerically formidable confraternity of African states, and of those who ' travel ' with them, to promote the earliest possible displacement of elements of European provenance from all positions of political

*_The South West Africa Cases—a Personal Analysis_, International Relations, October 1966.

dominance in a continent not originally their own. It was in these circumstances perhaps only to be expected that someone sooner or later would ' have a go ' with the weapon of litigation, if anyone were to be found advising him that there might be anything effective in it at all. Odd, was it not, when you came to think of it, that no-one seemed to have thought of it before ? For, if it was indeed within the competence of two mere former members of the League to embarrass a mandatory Power in such a manner in the Sixties, why would it not have been at least equally open to a then actual League member, such as Germany, in the Thirties, or to Haiti in the very infancy of the League ? It was little Haiti that in 1922 made so famous an onslaught on South Africa from the Assembly rostrum in the old *Salle de la Réformation* in Geneva : but, unless memory betrays me, she never talked then or, presumably, thought, of taking the target of her accusations to the Permanent Court.

Whether it was, or ever had been, within the proper powers of the individual member of the Geneva institution so to concern itself, unilaterally, with what someone once spoke of as ' the policing of the sacred trust ', was of course a contested issue. It was by the narrowest of margins (8 votes to 7) that in 1962, at the ' interlocutory ' stage of the Case, South Africa's four objections to the Court's jurisdiction in the matter were rejected by the Court. Sir Percy Spender, the Australian, who with Sir Gerald Fitzmaurice, the British judge, had then, in a dissenting opinion, endorsed all four of South Africa's objections, adding others of their own, was, by 1966, himself President of the Court. He might now only too easily have found himself having to deliver, against South Africa, a judgment which in his own opinion the Court should never have had the opportunity to form.

Easily ? Very : at least in the sense that this had certainly been on the cards. It was only when the Case was nearing its concluding stages that a distinguished Egyptian member of the Court, Judge Badawi, was withdrawn, by the hand of death, from further participation in the proceedings. And, could he but have stayed the course, remaining in his place there on the bench, it was certainly on the cards that the occasion would never have presented itself for the President to cast a second vote. And in that event it was patently on the cards that, the Court proceeding to the merits, those for sparing South Africa on the merits might at most have made up a minority of the Court. And in that event it may well be that, for the second time in the story, those two Anglo-Saxon judges would have been the joint subscribers to a dissenting opinion which in at least one sunny country would have been appreciatively read.

All this might so easily have come about. But alternatively there might equally have happened a restoration of the antecedent numerical balance if death, while he was at it, had elected to pick upon some other judge as well. There were indeed absences through illness during those closing months, and anxious inquiries after people's health. And relief there was when all was well, insomuch as all once more were sufficiently well.

And yet some folk seem to imagine that with improved means of gathering, storing, recovering, and exploiting information, it should some day almost be possible to plot beforehand the future development of world events. Be that as it may be, for the present it all looks disturbingly chancy. Perhaps some day the Court's rules, if not its Statute, will be revised, prescribing that each judge have an understudy, with whom from

hour to hour and day to day to share his thoughts, so that ' should anything happen' to him, the play may continue unaffected. *Le juge est mort : vive le juge* ! But somehow I doubt if the problem will ever be dealt with in just this manner. If at all.

As it was, the play went on, *not* unaffected. And at long last, in December 1965, following the time-table applicable in that behalf, the Court met together for the then at last appropriate exchange of ideas on the possible answers to be given by the Court. It was presumably then, and only then, that the point will have begun to be ventilated on which the anti-climatic conclusion was to turn. Whatever may eventually be done towards the filling of vacancies caused by death, it really does appear as if some procedural means must someday be adopted, for ensuring that if preliminary issues are to be considered they shall be disposed of at the earliest possible point, rather than at the latest, in the proceedings. That, of course, is just one of those ' feelings ' that one has.

Given the way things actually happened, it can in retrospect be concluded that a great part of what was done on the Case—including all the hearing of evidence, and the bulk of the oral argumentation—will have been logically speaking premature and in an essential sense unnecessary. But whether necessary or not the debate on the merits had taken place and opinions upon them had taken shape in the lucubrations of individual members of the Court. Yet it was technically inappropriate that anything directly bearing on the merits should figure in the Judgment, on the preliminary issue, to be delivered by the Court. And it was entirely right and proper that, for what effect it might have, the President should make his earnest formal plea that individual judges, if availing themselves of their right to place on record their separate opinions, should restrict themselves to that same preliminary issue, eschewing those matters of substance on which the Court itself, as such, must in the circumstances have nothing to say. But equally it was natural that individual judges should some of them be allergic to the idea of toeing, in this matter, the President's line, Whereas others would, for whatever reasons, deem it their duty to pay heed to his appeal, and personal example. For although he clearly indicated that he too had his views, he firmly refrained from disclosing just what they were.

Here again was something on which it was legitimate to have one's ' feelings '. Surely it was in a sense unfortunate, and not for South Africa only, that, with the understandable exception of Judge van Wyk, South Africa's nominee, any sympathisers that South Africa might have had, among the judges, upon the merits, in practice held their peace : whereas, with the single exception of Judge Koretsky, the Russian, the dissenting ' minority ' who, on the preliminary issue, would not have spared South Africa, gave tongue, to her obvious disadvantage, on the merits as well. So that, from all that there is to be discovered, in the published records, there might have been nobody independently situated with whom South Africa, and her fourteen witnesses, in relation to the merits, had cut much ice at all. Whereas the anti-apartheid orthodoxies, so familiar to the world, were given yet one more solemn airing with all that aura of respectability, not to say authority, that goes with their endorsement by personalities, whether politically actuated or not, who are clothed at the highest level, in the so-called majesty of the law. My ' feeling ' is that this could all be just a little bit unfair.

The crux here is in the status of the judges' opinions as published

material. It was not as if South Africa's angle, as opposed to the conventional wisdom, on South Africa's problems, was in any systematic sense restricted in its opportunities for presenting itself at the Court. The relevant records, that is the duplicated provisional verbatim records, of a full one-hundred days of oral proceedings, with the hearing and cross-examination of South Africa's witnesses, are rich in cogently developed and solidly documented thinking, as well as hard information, on Southern African circumstances and problems, seen from South African points of view. Had the evidence been that of witnesses ' for the prosecution ', who can doubt that it would long since have been available in the Court's official print. But, though the Court, in the exercise of its functions, is independent, with no-one but itself, constitutionally speaking to call its tune, it is the General Assembly of the United Nations which pays the piper, or rather the printer, when it comes to the publicising of what has been done.

As for what in this case happened, there was certainly no precedent for it. Theretofore the International Court, like its predecessor the old Permanent Court of International Justice, had been voted all the funds that for the effectiveness of its functioning, and equally for the printing in stately bindings of its proceedings in their corrected, definitive, form, it might at any time require. But times are changing. Majorities at the United Nations now have an ethos of their novel own. And in the interests ostensibly of economy—not always the dominating consideration in United Nations decision-making—the supplementary vote for the printing of the verbatim procedings in a great part of the South West Africa Cases, was rejected by the General Assembly. This is an aspect of the South West Africa story on which one ageing observer of modes and manners in the family of nations may perhaps be pardoned for preferring to keep his ' feelings ' to himself. If any reader likes to mutter that these are of course, the feelings of one who was himself a witness, that reader is welcome enough to do so, if he must.

Meanwhile, here and there in some privileged library some more or less complete set of the verbatim records (provisional and uncorrected) may be found. Curious things may be encountered in what has resulted from some baffled typist's attempt to make a coherent transcript from the replaying, in tranquility, of what, from the voices of the witnesses, had been taken on the tape. In one remembered instance, the remark "That would be ideological imperialism" emerged as "That would be ideologically imperilous". And, in my own case, at a point where, doubtless inadvisedly, I had availed myself of the German term "Volksseele"—or folkish soul—there was credited to me the dramatically interesting though in the context unlikely-looking neologism "Hawsktealer". (Has anybody seen my hawk ?). It is as well perhaps that in their uncorrected form the verbatims have not been coming out in print. Corrected they doubtless exist there, at least in a single copy, in the Library of the Peace Palace at the Hague. So all is not lost to view. Posterity can see what it wants to, if it knows where to look.

That concerns the oral evidence. In the Pleadings—that is, the Applicants' Memorials and their Reply to the Respondent's Counter-memorial —and at the earlier stages of the Case, the Applicants furnished the Court, in ample measure, with these allegations against the mandatory government which have long been made so familiar through the hearings accorded to the authorised, or self-styled spokesmen of the inhabitants of the

Territory in their capacity as ' petitioners ' in New York. It was no doubt partly for this reason that the Respondent not merely challenged the Applicants to call those petitioners to testify, and face cross-examination before the Court (hinting that the Respondent might even be willing to meet the costs of it) ; and not merely invited so many of the judges as might care to visit South West Africa, to see there everything to which the Applicants might wish their attention drawn (suggesting that this tour of inspection might also usefully include, for the sake of comparisons, parts of Africa under trusteeship, if not the Applicants' countries as well) ; but made their arrangements for bringing as witnesses to the Hague as many as 38 individuals qualified in their various ways to contribute something pertinent to the enlightenment of the Court. But the challenge was not taken up, and neither in the end was the invitation (though 6 out of the 14 judges were stated to have favoured its acceptance). And when Dr. Gross, as Counsel for the Applicants, declared formally that he was no longer proposing to contest South Africa's version of the facts, which could therefore be taken as admitted, South Africa waived, with respect to 24 of her intended witnesses, her plans for calling them to the Hague. For if the Respondent's account of things contrasting so sharply with that so generally accepted at the United Nations, was to be admitted for the further development of the Case, what need now for the underpinning, by oral testimony, however uniquely knowledgeable, of that account ? And so some time was saved. And a quantity of paper. None of which was however to inhibit Dr. Gross, in his closing address to the Court in December 1965, from resurrecting for the convenience of the judges the harsh picture of conditions in the Territory which in the beginning he had made it his business to paint. All's fair, it is said, in war. And war, after all, this was.

How, it may be asked, could Dr. Gross ever have thought to dispense with his version of the disputed facts ? The answer is that he was in a sense only asking the judges to concern themselves with the terms of the Mandatory's legislation, which were not in dispute ; and also with those collective verdicts on the mandatory's conduct which had already been arrived at in New York. He came indeed even to the point of maintaining that the judges had really very little left to do, beyond taking cognisance of the adverse judgements passed upon the mandatory by those bodies of diplomats and politicians at the United Nations. It would not, he thus suggested, have been open to the judges, even had they seen the situation on the spot, to record that at some point or another they saw the accustomed strictures upon the mandatory as in need of qualification. This at least was the implication of his argument, in its bearing upon the respective functions in such a matter of United Nations bodies, on the one hand, and the International Court of Justice on the other.

Not that these tactics of the forensic battlefield can necessarily be seen, in one of Dr. Gross's own phrases, to have paid additional ' dividends ' to his case. For, although several of the dissenting seven touched freely in their opinions on matters of fact, it was not apparent that their findings in regard to them owed very much to what had been said, or made available, at the Hague. And, if they had in fact borrowed their impressions from the politicians, they did this without formal acknowledgment, presenting them as if independently arrived at. Meanwhile there was nothing, in their written opinions, in the nature of that disciplined analysis of the evidence heard in open court which is ordinarily performed by the pre-

siding judge in criminal, or civil, proceedings in a municipal court of law. It was much rather as if the judges were taking judicial notice of findings sufficiently familiar, with respect to apartheid, to all the world (and not to the New York bodies only), rather than attempting, in the light of what any witnesses had to say, from first-hand experience or otherwise, to come to fresh assessments of their own.

To this generalisation there is one exception to be made. Among the charges repeatedly levelled, by petitioners, against the mandatory had been that of transgressing against the terms of the mandate by militarisation of the Territory. It was in order to cope with this particular accusation that South Africa had enlisted, as an expert witness, the help of General S. L. A. Marshall, an American of repute, who, having twice visited the Territory, to see there all that there was to be seen, assured the Court that the charges were totally unfounded. To this piece of plain and unsuspect information Judges Jessup and Tanaka, in particular, did pay heed. Thus Judge Tanaka: "The Applicants allege that the Respondent maintains three military bases within the Territory . . . The Applicants, however, presented no direct evidence to establish their charge. Their charge was based simply on 'information and belief' (Memorials, p. 181) on which the Applicants refrained from calling evidence on the part of their informants. On the contrary, the Respondent produced direct evidence in contradiction of the evidence of the Applicants based on information and belief . . . On the evidence before the Court the Respondent did not establish any military or naval bases in the Territory. Therefore, Applicants' Submission No. 6 is not well-founded." I.C.J. South West Africa (Second Phase) Judgement, 1966, p. 322.

What bearing this might have had upon the credit-worthiness on other subjects of similar unsubstantiated 'information and belief', was derived from the same or similar sources, was a point to which the judges did not advert.

In the case more particularly of Judge Jessup, the New York Professor of Law, the analytical caution and scholarly austerity informing most of his opinion was such as might excite envy of those who, as such a man's students, will have sat at his feet. And yet, in his dignified handling of the apartheid issue, one's 'feeling' is that there still remained something to be desired. It is a question on which one offers one's feeling simply for what it may be worth.

There is a distinction, with which students of the Gospels should be familiar between the existential, and the formal or doctrinaire, approaches to matters of moral evaluation. Though the point has not so far as I have noticed been made by anyone in so many words, the main question on the merits, that namely of the compatibility of apartheid with the requirements of the mandate, was what the English lawyer is accustomed to categorising as a 'mixed question of fact and law'. It involved on the one hand the correct interpretation of the wording of an article in the Mandate and, on the other hand, the realities of a particular, concrete situation in the world of historical fact. What experienced judge, properly conscious of his duty, would content himself, for his appreciation of the facts of a concrete human situation, with the doctrinaire approach? How, except by considering, in the concrete, what effect apartheid policies were actually having upon "the moral and material well-being and social progress" of the inhabitants of South West Africa, could anyone seriously hope to arrive at a responsible, as opposed to a second-hand, conclusion,

whether one way or the other, on whether the apartheid policies were consistent with the mandatory's duty of promoting to the utmost that well-being and that progress? South Africa's contention was that, in the circumstances obtaining in the Territory, the policies in question were governed by a determination to comply with the aforesaid duty. Her assertion was that in the given conditions they were in fact the policies best calculated with a view to such compliance. Such being the Respondent's position, was it not incumbent upon a judge, before pronouncing an adverse judgment, to direct his mind to the hypothetical possibility that the Respondent country, as 'the man on the job' and best acquainted with those conditions, might just conceivably be right?

But that was scarcely Judge Jessup's line of thought. The judicial evaluation of the mandatory's policies had, for him, to be made in the light of a 'standard', which in this instance was simply the allegedly considered opinion of mankind. In short, there obtained at the United Nations, but not there only, an orthodoxy, on the propriety or otherwise of apartheid, and it was by reference to that, and to that alone, that the Court should come to its conclusion in the case. It was as though, consulted on an appendix condition, a supposedly top-class specialist were to prescribe a bottle of guinness, having somewhere seen a statement that guinness is good for you. Or as if an American investigator, charged to advise on whether Britain's national health service had made for an improvement in the general level of the public's health, were simply to report that the system was a socialistic development, and therefore, as by definition, incapable of contributing to the improvement of anything at all. What, one wondered, could have been the point of bringing such an issue before such a tribunal in the first place? If that was to have been its method of approach, its decision, had it reached one, could have been predicted, by almost anybody, from the start. As indeed it was, by many —for they had reckoned without that irksome preliminary issue. But for which, we know, since Judge Jessup has told us, what he, for his part, would have proposed that the Court's decision should be. My 'feeling' is that this was an example of how *not* to deal judicially with a mixed question of fact and law. Was Judge Jessup, I have wondered, among the six judges who voted for an acceptance of the invitation to see conditions in the Territory for themselves? It is hard to suppose that he would have been. And yet, given that the Court was being asked whether or not the mandatory had failed in its duty, and given that this duty was defined in the Mandate itself as that of promoting to the utmost . . . how, save in terms of the concrete situation in the territory in question could anyone hope to be able to tell whether a given apparatus of laws and regulations was or was not as aptly and honestly aimed, and as wisely conceived, as it might be, from the point of view of those, the Government in Pretoria, and their agents on the spot, whose task it was to work out in detail the ways and means for the fulfilment by the mandatory of its duty? Almost one might suspect that information as to true alternative possibilities locally open to be tried was not what Judge Jessup would have thought worth seeking. One is reminded of those armchair strategists who in wartime turn an honest penny by pontificating in a weekly column on the failings and failures of campaigners in a distant theatre of war, without reference to the logistic feasibility of the operations they would favour. Even so experienced a practical soldier as the late Field Marshal Smuts, whose ideas, arriving in coded telegrams from South Africa, Mr. Winston

Churchill at the wartime helm in London was always so willing to entertain, had occasionally to be reminded that in the applying of general principles, not everything was always as simple as it might seem. Even Churchill himself, in his demands for 'Action this day', must sometimes have found himself frustrated. Whether all this is relevant to the question of the Jessup approach, some may wonder. But I have a 'feeling' that it is.

As for Judge Tanaka, the grave and erudite Japanese, he too had a dis inctive approach. Apartheid, as he conceived it, was a breach of 'natural law'. True, the Case concerned, specifically, the Mandate: but a possible incompatibility between the requirements of the Mandate and those of natural law was not to be assumed. And for him too a visit of inspection to the Territory would presumably have been potiose.

This essentially, or somethig like it, was what Dr. Gross, at great length, had indicated his hope that the Court, as a Court, would say. True, he did not explicitly invoke the contentious old concept of natural law. But he did have a lot to say of 'standards'—with a theory about new ones becoming established by dint of the oft-reiterated expressions of official opinion by organs of the United Nations. What in effect he claimed was that the Mandate must be so construed as to require the mandatory, in judging what the well-being of the inhabitants of the Territory might demand, to have an overriding regard to any ideas upon the subject that international bodies might happen to have voiced. Which was near akin to, but not quite identical with, Professor Jessup's above-mentioned opinion. For, on the whole, my 'feeling' is that Dr. Gross will hardly have seen in Judge Jessup's clearly worded views, specific adoption of that theory, on the evolution of new 'standards', which he, Dr. Gross, had so laboriously deployed.

But if even on this point disappointed, he could surely have been more so by the manner of Judge Jessup's rejection of his, Dr. Gross's, up-to-the-minute position on the engendering, through the passing of politically inspired resolutions, of new rules of customary law—new 'norms' as he called them, on which the Mandate, of 1920, must likewise be construed at enjoining the mandatory, in its interpreting of the Mandate, to rely. Many hours of anxious research, plenty of paper, and much oral argument, were expended over a period of months upon Dr. Gross's enterprising and sensible-seeming doctrine. Custom presumably reflects what states feel to be the law. Why not equally so the manifestations of their opinion through their delegates in New York. No doubt custom is born not just of thinking, and of saying, but of doing. But what are statesmen doing, in giving instructions to their spokesmen, if not telling them what to *do*? (The trouble here, I suggest, is that the practice of supporting resolutions is one sort of doing, and the practice of not applying apartheid would be another, and how the latter sort of doing could become a matter of customary law simply through the former sort of doing becoming customary is hard to see—even though Dr. Gross and others like him have purportedly been seeing it with growing assurance in recent years.)

Would the Court 'fall' for it, or not? The Respondent seemed to find it all but unthinkable that it could. And yet. since the possibility of its doing so, however remote, was to be formally excluded, it was necessary not merely to think of it, but to minimise it by bombarding the novel doctrine with every available argumentative and evidential gun. Not enough to show the inherent weakness of such a theory of norm-engendering resolutions. It was necessary, by far-ranging and exhaustive en-

quiries, to build a dossier of examples of state practice, from countries around the world, which would be in conflict with the particular norms for whose existence Dr. Gross was arguing, had they in fact existed.

And, given Dr. Gross's tactics, these absorbing exercises were unavoidable, even though one might wonder whether he ever had much of a personal belief in his norm himself. Will it really have ever been much more than a screen behind which he would be hoping to infiltrate with his marginally more viable theory of the ' standard ' ? Seen in this light, it might indeed have been found to have served a purpose, though falling by the wayside on the way. What meanwhile seems important is not so much the ingenuity with which Dr. Gross did battle for his norm-theory, or the vigour with which Respondent strove against it, but the firmness of its repudiation by so admired an authority as Judge Jessup. Before the progressive young lawyers of tomorrow assimilate from writings that we know of, this latest notion on how new finding custom comes to be, they should be referred to what this Professor has had to say about it in his opinion in this case. It is my ' feeling ' that this could do them good.

Meanwhile, if Dr. Gross's only purpose in this connection will have been to provide the South African legel kennel with a bone at which to gnaw, just to keep the animals busy, he certainly succeeded in this. My ' feeling ' is that it is a pity that in such proceedings there is not a point at which, from the bench and in the name of the Court as a whole, the proponent of some new-fangled legal hypothesis could be firmly informed that there will be no ' dividends ' in that one, and that, at best, he might do better to try it out in the form of an article in some *avantgarde* legal journal.

But this of course assumes that in tomorrow's world the World Court bench of tomorrow will continue to be manned by jurists of Jessup's rather than Tanaka's way of thinking. For, if I have properly understood him, Judge Tanaka comes close in his opinion to aligning himself, in his theory of the law-engendering process, with Gross. And who is to know what sorts of judges, with what sorts of views, will be voted for, as candidates for the Court, in the United Nations General Assembly of a future day ? The procedure for elections was devised in the early twenties when the moral and political standing of law, as law, in bodies such as the League Assembly was very different from what it has now become. Perhaps even a Jessup may yet come to be thought of as some kind of a King Canute, vainly striving with his archaic modes of reasoning to stem the advancing breakers of an ocean of revolutionary new perspectives by which many such ancient landmarks such as sovereignty, prescription, mandates and the like will all be swept away. One doubts this, but the picture is perhaps worth painting, if only as a warning for the wise.

Whether Dr. Gross has ever anywhere disclosed the true motive behind his flying of so inherently unhopeful a kite, I myself do not know. Perhaps the most plausible surmise would be that, conscious of the ' losses ' to his case that might have flowed from any focussing of attention on the concrete facts (whence his deprecating of the suggested visit of inspection, his omission to call witnesses of his own, and his apparent dropping at a crucial stage of most of his original accusations) ; and alive to the probable difficulty of establishing, to the satisfaction of judges, that practices of a type understood and acquiesced in by the Permanent Mandates Commission of the League of Nations had throughout been legally inconsistent with the mandate's explicit terms ; he, Dr. Gross, had snatched at this flimsy plank of a norms-theory, and thrown it to the judges, in case there

should among them be some, unsympathetic to South Africa's cause, who might themselves be in need of a plank at which to snatch. After all, supposing the Court had indeed reached the merits, and at that stage condemned South Africa on the basis of nothing more substantial than the norms-theory, who in the world, except the unpopular South Africa, would have taken this amiss? 'Bold', 'imaginative', 'path-breaking' such are some the adjectives that we then might well have heard. Even at the worst, Dr. Gross had little to lose by just trying it on, and everything, with luck, to gain. He tried it. But his luck, at this final stage of the Case, was out.

At the opening stage, of course, in 1962, his luck had been decidedly in. Not only had he persuaded 8 judges out of 15 that the Applicants should still be deemed members, or seen as if members, of an organisation, the League, which had expired in 1946; but he had succeeded in getting them further to hold that the issues in the Case—meaning the legal, that is the justiciable, ones, presumably—had antecedently been a matter of negotiation between the Applicant countries, Liberia and Ethiopia, and the Respondent, South Africa before they, the Applicants, had, as their procedural last resort, decided to take their quarrel to the Hague. If the justiciable issues had indeed been in debate between the respective sides in the manner so presupposed, how was it that, even in the closing months of the affair, when Judge Jessup was writing his opinion, he had to confess his inability to specify just exactly what the issues must be taken to have been. Dr. Gross had been astute to keep this indeterminate, switching from one formulation to another, so that, as this Judge remarked, it would have been a problem for the Court itself to settle—the problem, that is, of what question they must now be trying to answer. In Common Law practice, it is the pleadings which provide a court of law with the carefully worded definition of what it is that divides the parties. This does not have to happen in respect of proceedings at the Hague. And Dr. Gross, bless his heart, made the most of it.

Given the majority decision against her in 1962 at the 'interlocutory' stage when her objections to the Court's jurisdiction in the matter were so narrowly rejected, South Africa can hardly even have hoped for what precisely happened, in her apparent favour, in 1966. Even to her legal team, the decision, in the form it took, seems likely to have been wholly unexpected. And yet the reasoning, as developed in some two hours by the President of the Court, was cool, lucid and impressive. My own immediate reaction was that, though not on the face of it a victory for apartheid, this was obviously a victory for international law. The judgment made good sense to me. But, while still believing that the decision was a good one, I have considerable sympathy for those who cannot see this. Perhaps it really was one of those cases where the scales in an evenly balanced legal argument are tipped by such extra-legal factors as the temperament and affiliations of some individual judge.

The irony of course lies in the contrast between the nature of the controversy and that of the conclusion so obtained. We know of course that this has not ended the controversy, and everybody understands why. The invoking of the Court had never been more than just one adventurous move in an unending political struggle. From the outset in 1946 South Africa, chided at the United Nations, had stuck, with infuriating consistency, to her well-found legal guns, her technically impregnable positions. The prize to be collected by a successful recourse to the Court would

have been a new phase in the long fight, with South Africa no longer legally at a clear advantage, and with the Security Council under formidable pressures to avail itself of the teeth provided for it by Article 94 of the Charter. The interests involved were so massively political, the motivations of the outcome so pedantically legalistic. "The law', said a Dickens character, 'is an ass'. At least it must be conceded that one never knows just where one is with the law. 'They that take the sword . . .' 'They that invoke the law'? Don't litigate, arbitrate! Perhaps one should rather say, don't even do that. Agree, rather, with thine adversary, if thou canst.

But which among the up-and-coming new African states would want—or feel diplomatically at liberty—to agree with South Africa about anything? That would be a breach of the solidarity to which so many of them are collectively pledged. And even now, though they must be admitting amongst themselves that they have lost a battle, they cannot be allowing that they have lost their war. After a few minutes of injury time, the game went on, now no longer at the Court, but back again at the United Nations. If that is all that the law can do for us, men seemed to be saying, so much the worse for the law. The law, after all, was made for man. We'll show who's master. And, throwing legal niceties to the winds, the General Assembly itself proceeded purportedly to function in the role of a self-appointed judge, pronouncing as if with authority on the legitimacy or otherwise of South Africa's continued retention of South West Africa. It might be mildly comic, were it not so pathetic: an organisation, the hope of mankind—founded upon a solemn instrument, whose pretensions to any notable moral status at all are derivative from the ostensible sanctity of that law in terms of which it is worded—seeking to kick contemptuously away in a moment of pique that very plinth upon which it stands. Even on the showing of that Advisory Opinion of 1950 which forms the precarious platform* from which the United Nations is aspiring to exercise in respect of mandates what formerly were the functions of the League—even on that doubtful showing, there could never be any process by which, unilaterally, an organ of the United Nations could affect the international status of the Territory. But who, at the United Nations, cares?

It seems indeed a pity that the United Nations as an institution should have so little apparent concern for fair and honourable dealing. If, as is evident, the moral authority of the organisation in the eyes of the South African public has sunk to just about zero, this can hardly astonish anyone who has closely followed the treatment, over the years, by the United Nations, of this one of its founder member-states.

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*The quality of this platform is perhaps best to be gathered from a careful analysis of the relevant parts of the two dissenting opinions—those of Judges Tanaka and Wellington Koo—in which the matter is discussed.