

COMMUNICATIONS

The South-West Africa Case—A Reply from South Africa.

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This is a continuation of the discussion of the South-West Africa Case initiated at the Section's Symposium in Montreal on August 8, 1966, reported in 1 Int. Lawyer 12 et seq. When Ernest A. Gross accepted the editor's invitation to comment, the editor then invited the Ambassador from South Africa to present the views of his government on Mr. Gross' comments, which were reported in 1 Int. Lawyer 256-72 (1967).

These columns are available for signed communications from readers on matters of current interest. Usually, they should be brief.

In the January issue of *The International Lawyer* there appeared a contribution on the South-West Africa Case by Ernest A. Gross, who had acted as counsel for the Applicant States, Ethiopia and Liberia. (2 *Int. Lawyer* 256-72 [1967].) At the invitation of the Editor-in-Chief of this journal we, who served South Africa in similar capacities, present this reply to Mr. Gross. At the outset, we would express our appreciation for the opportunity thus afforded to us to state the South African point of view in a journal with as influential and informed a readership as *The International Lawyer* of the American Bar Association.

Mr. Gross commented upon the Symposium on the Judgment in the South-West Africa case held by the Section of International and Comparative Law of the American Bar Association in Montreal on August 8, 1966. (1 *Int. Lawyer* 12-38 [1966].) In this Symposium, a discussion was held on the merits of the Court's judgment. In passing, some reference was made also to certain aspects of the proceedings on which no decision was ultimately given by the Court. Mr. Gross has placed the main emphasis of his article on these passing references, ignoring the actual point at issue, namely the correctness

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of the Judgment. We propose to limit this article to matters discussed by Mr. Gross. We do so with some relief; for the persuasiveness of what was stated at the Symposium in support of the Judgment and, indeed, the cogency of the reasoning of the Judgment itself would have rendered it extremely difficult, if not impossible, to present arguments additional to those which have already been presented.

Mr. Gross' article is mainly devoted to an explanation of the case presented by him on behalf of the Applicant States in respect of the so-called welfare provision of the Mandate—the provision which required the Mandatory to “promote to the utmost the material and moral well-being and social progress” of the inhabitants of South-West Africa. In particular he objects to certain statements by Mr. Hynning which were to the following effect: that the Applicants had withdrawn all charges of oppression or mistreatment of the indigenous population; that they had ruled out all dispute of fact by admitting as true all South Africa's allegations and denials; and that they had then drawn only one issue, viz., whether measures comprised in the so-called policy of *apartheid*, in admittedly providing for separate treatment of the population groups in various aspects of their lives, constituted a per se violation of the welfare provision of the Mandate. (1 *Int. Lawyer* 17-18, 33.) At times Mr. Gross' article smacks of an attempt at personal justification. Thus he states that the African States “would have been justified—to say the least—in rebuking and disavowing Counsel” if he had admitted the truth of all South Africa's averments concerning the effects of *apartheid*. It may be appropriate therefore to stress at the outset that the South African Government or representatives have not at any stage sought to criticize Mr. Gross' handling of his case or his professional competence. Moreover, the demonstration proposed to be given in this article that Mr. Gross did, indeed, make the admission in question, is also not intended to reflect any such criticism. As we shall show, the Applicants changed the basis of their case from time to time not through any incompetence or tendency towards vacillation, but for tactical reasons arising from the needs of the situation in which they found themselves.

This article thus relates to the welfare provision of the Mandate, violations of which were alleged in Applicants' Submissions 3 and 4. The various changes in Applicants' case have unfortunately led to a certain measure of confusion in their pleadings and oral presentation, rendering it necessary, in Judge Jessup's words, “to extricate the basic contention from the semantic swamp in which the argument frequently

bogged down.”¹ A large part of the confusion arose from the use by Applicants, in unusual and, indeed, varying senses, of words like “norms,” “standards,” or even “facts.” The reason for this will appear below.

In view of the basic concepts involved, we may be excused if we refer briefly to the very first principles regarding the legal process. Most of our propositions in this regard would hardly appear to require authority. Nevertheless we propose quoting some passages from Wigmore on *Evidence*, a work which is undoubtedly as well known to the readers of *The International Lawyer* as it is to all other English-speaking lawyers throughout the world. The basic elements in legal proceedings are stated by this eminent author as follows:

The establishment of a given claim, then, involves the demonstration (1) that certain facts or groups of facts exist, (2) that to the contingency of their existence the State attaches the legal consequence now asserted by the claimant. He has thus to satisfy the tribunal in two respects, (1) as to these facts, (2) as to the legal consequence asserted to be attached.²

This analysis would apply equally to proceedings before international tribunals, save, of course, that international law is not created or enforced by “the State.”

The existence of facts is established by means of evidence. In regard to this process, Wigmore says:

Evidence is *always a relative term*. It signifies a relation between two facts, the *factum probandum*, or proposition to be established, and the *factum probans*, or material evidencing the proposition. The former is necessarily to be conceived of as hypothetical; it is that which the one party affirms and the other denies, the tribunal being as yet not committed in either direction. The latter is conceived of for practical purposes as existent, and is offered as such for the consideration of the tribunal. The latter is brought forward as a reality for the purpose of convincing the tribunal that the former is also a reality.³

As appears from this passage, both the *factum probandum* and the *factum probans* are facts. And the *factum probandum* does not cease being a fact if the evidence by which it is sought to be proved is of

¹ Judgment, p. 432. Also see Editor's Note *infra*, pp. 471-74.

² 3rd ed., Vol. I, p. 2.

³ *Ibid.*, p. 6.

a circumstantial or inferential nature. Indeed, Wigmore says, proof of the *factum probandum* can ordinarily

be accomplished by the use of a number of facts, the final logical result being the establishment of the total fact. The process would consist in the presentation of these elemental facts and in the piecing of them together so as to reach the conclusion.⁴

These propositions are clear, indeed obvious, to any lawyer. If it is alleged that *A* killed *B*, such an allegation is an allegation of fact. If *A* admits the allegation it is a fact which he is admitting. If *A* denies it, proof thereof will be tendered in court. Such proof may be, and often is, by way of circumstantial evidence. Thus it may be shown that *A* and *B* were alone in the room when *B* was stabbed, and they were known to be on terms of enmity, that the knife with which *B* was stabbed belonged to *A*, etc. In such circumstances the Court may draw the inference or conclusion that *A* stabbed *B*. Such a conclusion is one of fact—it is a case where the *factum probandum* is deducted from the *facta probantia* by a process of inference.

In view of the elementary nature of these propositions, it is with some surprise that we read Mr. Gross' repeated charge in the article under reply that South Africa has been guilty of a "confusion between fact and conclusion." As is shown by the discussion above, a conclusion of fact is a fact which has been established by evidence, circumstantial or inferential or otherwise. Of course, conclusions of law stand on a different footing; but then Mr. Gross does not charge us with having confused fact and law. Indeed, in the light of the history of the proceedings, such a charge would have been ludicrous.

The reason why Mr. Gross wants to cut down the ordinary meaning of the word "fact" appears from the actual course of the proceedings, to which we now turn.

This can best be explained by demonstrating what was the *factum probandum* at various stages of the proceedings. Such a demonstration, of course, primarily involves an analysis of the pleadings, and, in particular, the formal Submissions. Some of the passages to which we shall refer have been quoted in previous editions of *The International Lawyer*. However, for the convenience of the reader and in the interests of continuity, we propose again citing the pertinent extracts. The relevant Submissions read as follows in the Applicants' *Memorials*:

⁴ *Ibid.*, p. 3.

Submission No. 3

The Union, in the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practiced apartheid, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of apartheid in the Territory.⁵ (Italics added.)

Submission No. 4

The Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfill its duties under such Articles.⁶ (Italics added.)

It will have been noted, especially from the italicized words, that in these Submissions Chapter V of the *Memorials*, and particularly paragraphs 189 and 190 thereof, was explicitly incorporated by reference. Chapter V was replete with allegations of deliberate oppression of the native peoples of the Territory for the benefit of the white minority in all spheres of life. These allegations were summarized in paragraphs 189 and 190. In quoting from them below, certain words are italicized to bring out clearly what the *facta probanda* were as set out in the *Memorials*.

Paragraph 189

As the Applicants have previously pointed out, the policy and practice of apartheid has shaped the Mandatory's behavior and permeates the *factual record*. The meaning of apartheid in the Territory has already been explained hereinabove. The explanation warrants repeating. Under apartheid, the status, rights, duties, opportunities and burdens of the population are fixed and allocated *arbitrarily* on the basis of race, color and tribe, *without any regard for the actual needs and capacities* of the groups and

⁵ *Memorials*, p. 168.

⁶ *Ibid.*

individuals affected. Under apartheid, the *rights and interests* of the great majority of the people of the Territory *are subordinated to the desires and conveniences* of a minority. *We here speak of apartheid, as we have throughout this Memorial, as a fact and not as a word, as a practice and not as an abstraction.* Apartheid, *as it actually is and as it actually has been* in the life of the people of the Territory, is a process by which the Mandatory *excludes the 'Natives' of the Territory from any significant participation in the life of the Territory except* insofar as the Mandatory finds it necessary to use the 'Natives' *as an indispensable source of common labor or menial service.*⁷ (Italics added.)

Paragraph 190

Deliberately, systematically and consistently, the Mandatory *has discriminated against the 'Native' population* of South West Africa, which constitutes overwhelmingly the larger part of the population of the Territory. *In so doing,* the Mandatory has not only failed to promote *'to the utmost'* the material and moral well-being, the social progress and the development of the people of South West Africa, *but it has failed to promote* such well-being and social progress *in any significant degree whatever.* To the contrary, the Mandatory *has thwarted* the well-being, the social progress and the development of the people of South West Africa, *throughout varied aspects of their lives;* in agriculture; in industry, industrial employment and labor relations; in government, whether territorial, local or tribal, and whether at the political or administrative levels; in respect of security of the person, rights of residence and freedom of movement; and in education. The grim past and present reality in the condition of the 'Natives' *is unrelieved by promise of future amelioration.* The Mandatory *offers no horizon of hope* to the 'Native' population.⁸ (Italics added.)

Paragraph 190 then proceeded to set out a more detailed summary, running over several pages, of alleged acts and omissions of the South African Government in the various spheres of life in the Territory, economic, political, educational, and social. These acts and omissions, in the version given by the Applicants, favoured the European population vis-à-vis the native population and deliberately harmed, neglected, or oppressed the latter for the benefit of the former.⁹

In its *Counter-Memorial*, South Africa dealt in detail with these charges. It was conceded that, if the welfare provision of the Mandate were justiciable at all, deliberate oppression of one section of the

⁷ *Memorials*, p. 132.

⁸ *Memorials*, p. 133.

⁹ *Memorials*, pp. 133-137.

population for the benefit of another would constitute a violation thereof. Sharp issue was, however, joined by South Africa on the allegations of fact. In detail and at length, with copious reference to sources and ample comparison with other States in Africa and elsewhere, South Africa sought to refute the factual allegations summarized in the passages quoted above.¹⁰

Ethiopia and Liberia then filed their *Reply*. Their attitude in this pleading was a somewhat inconsistent one. For the first time they relied on a so-called "norm of non-discrimination or non-separation," later, during the oral proceedings, to be pushed into the background by a "standard" of the same content. However, before we proceed to this new aspect of the case, it is to be noted that Applicants still retained their allegations of oppression. Thus they undertook to show, *inter alia*, that South Africa's policy and practice with respect to every aspect of life in South-West Africa was "directed toward the primary end of assuring an adequate 'Native' labour supply in the Territory. . . ." ¹¹ And the formal Submissions were confirmed without amendment, thus still containing the references to the *Memorials* quoted above.

If words have any meaning, the Submissions as set out above can be read only as alleging that South Africa was guilty of deliberately oppressive conduct. It seems incontestable that such an allegation was one of fact; indeed, that it comprised the *factum probandum* in the case; and it was treated by South Africa as such. But what does Mr. Gross now say? He says:

- (1) their [i.e. the Applicants'] 'charge' was not, and never had been, that South Africa's violation of the 'welfare clause' of the Mandate consisted in the *purpose* of its officials who might be in office from time to time, but in the objectively determined *consequences* of its undisputed racial policy and practices, and
- (2) that, in any event, the 'oppressive' or 'injurious' effect of a policy of official racial discrimination is an inference or conclusion to be drawn from the facts, rather than an averment of fact.

We could understand it if Mr. Gross says that he did not dispute the good intentions of the South African officials, but contended that the consequences of their acts were harmful. Such a statement would hardly have been borne out by the passages quoted above, but would

¹⁰ *Counter-Memorial*, Vols. III to VIII.

¹¹ *Reply*, p. 53.

at least have been comprehensible. A case of that sort (if supportable in law) would then have required investigation of the consequences of the South African policies. That again would essentially have been a factual question. It would not cease being such if it had to be answered by the piecing together of what Wigmore calls "elemental facts" leading to a conclusion.

The real position is that Mr. Gross does not want to concede that his initial complaint involved a *factum probandum* either of deliberately oppressive conduct or of harmful consequences. This is so for a particular reason; namely, that as from the *Reply* stage, his case was gradually and deliberately changed so as ultimately to render unnecessary any factual enquiry into the purposes or results of the Mandatory's conduct. In the *Reply* itself the Applicants' attitude was, as noted above, still ambivalent. The original factual charges were repeated and confirmed, although no attempt was made to deal systematically with the factual refutation supplied by South Africa. At the same time the Applicants introduced a so-called "norm of non-discrimination or non-separation" which was said to govern the Mandate. This norm was defined as follows at p. 274 of the *Reply*:

The terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such.

In its *Rejoinder* South Africa drew attention to this new extension of Applicants' case at such a late stage of the proceedings. It was pointed out that the case then presented by the Applicants had two basic aspects, namely:

(1) the factual aspect concerning the Applicants' charges of oppression;

(2) a legal aspect concerning the alleged norm (and certain undefined standards, which need not detain us since they were subsequently assimilated in content to the norm).

The former aspect was dealt with by South Africa as before, i.e., by disputing the Applicants' factual averments and providing evidence in disproof thereof. With regard to the latter aspect, South Africa commented as follows in its *Rejoinder*:

If this alleged norm exists as part of the Mandate, it would have the consequence that Respondent's admitted policies of differentiation would constitute a contravention of the Mandate *even if the Court were to hold that such policies were intended to enure, and did in fact enure, to the benefit of the population as a whole*. Consequently the sole issue between the parties on this aspect of the case is a legal one, viz., whether or not the Mandate contains such a norm.¹² (Italics added.)

As will be indicated later, Applicants in the course of the oral proceedings expressed full agreement with this proposition. This aspect of the case was disputed by South Africa on legal grounds. South Africa denied that any such norm existed, or was binding on South Africa, or that the Court would have jurisdiction under the Mandate to enforce the norm if it did exist. Legal argument, with authority, was advanced in support of this attitude.¹³

South Africa entered the oral proceedings stage of the case with the declared intention of meeting the Applicants on both the bases set out above. In particular, regarding the charges of oppression, South Africa was prepared to enter into a full factual enquiry. It consequently gave notice of its intention to call a large number of witnesses and it also extended an invitation to the Court for an inspection *in loco*.

It was at this stage that Applicants finally abandoned the factual charges formulated in the *Memorials* and rested their whole case on the norm or standard of non-discrimination or non-separation. This was done basically in two ways. Firstly, in point of time, there was the admission of fact. This read as follows:

The Applicants have advised Respondent as well as this Honourable Court that all and any averments of fact in Respondent's written pleadings will be and are accepted as true, unless specifically denied. And the Applicants have not found it necessary and do not find it necessary to controvert any such averments of fact. Hence, for the purposes of these proceedings, such averments of fact, although made by Respondent in a copious and unusually voluminous record, may be treated as if incorporated by reference into the Applicants' pleadings.¹⁴

The term used, i.e., "averments of fact," would appear to be clear and unambiguous. Nevertheless, in their final comment on the evi-

¹² *Rejoinder*, Vol. I, p. 131.

¹³ *Rejoinder*, Vol. I, p. 110-115.

¹⁴ C.R. 65/22, 27 April 1965, p. 39. It will be noted that in this statement [quoted *in haec verba* in 1 *Int. Lawyer* 12, at p. 18, n. 7] Applicants abandoned qualifications which had been attached to an earlier admission, as quoted by Mr. Gross in his article.

dence, Applicants commenced their attempt to water down the full effect of this admission by seeking to distinguish between facts and conclusions. As demonstrated above, there is no merit in the distinction. But let us take some concrete examples. South Africa contended, on the basis of detailed evidence, that its intention and purpose was always to promote the best interests of the whole population, and, in particular, the native population, of South-West Africa. Was this contention an "avertment of fact," falling within the terms of Applicants' admission? Applicants themselves provided the answer. They said:

that motive or purpose is a fact, [is] a self-evident proposition;¹⁵

and

Many situations of course are known to the law in which motive, or intent, is not merely a relevant fact but, indeed, may be a decisive one. . . . Further discussion of so elementary a matter as to whether motive, or state of mind, is a fact, and provable as such, would be a waste of the Court's time.¹⁶

Then there are the consequences or effects of South Africa's policies. South Africa contended, again on the basis of detailed evidence, that under its policies the native population in South-West Africa had attained a higher level of school attendance and standard of living than the inhabitants of other States in Africa, including in particular the two Applicant States.¹⁷ Would these contentions constitute "avertments of fact," which were admitted by Applicants? The answer must surely be obvious. In the same vein, many other examples may be given of factual averments in the South African pleadings regarding the beneficial effects of its policies.

Mr. Gross now says in his article under reply: "The oppressive, or detrimental, effects of a policy of official racial discrimination are judgments flowing from the policies and practices themselves." And reference has been made above to his purported distinction between "facts" and "conclusions."

Perhaps the readers of *The International Lawyer* will understand how the "effects of a policy" can be a "judgment." But apart from the infelicity of language, as a matter of common sense the effects of any policy must necessarily be a question of fact on which evi-

¹⁵ C.R. 65/22, 27 April 1965, at p. 48.

¹⁶ *Ibid.*, p. 50.

¹⁷ *Vide*, e.g., *Counter-Memorial*, Vol. VII, pp. 112-117, and *Rejoinder*, Vol. II, pp. 140-141.

dence may be led and a judgment given. And the use of emotionally charged expressions like "racial discrimination," which do not appear in the formal Submissions, cannot alter this basic reality.

The truth of the matter is that the admission of the correctness of Respondent's averments of fact marked the final abandonment of the *factum probandum* originally set out in the Submissions. No longer were the Applicants requesting the Court to stigmatize the South African policies as oppressive in intent or effect, but they then merely requested a finding that the policies were contrary to a legal norm or standard of the content defined at p. 274 of the *Reply*. Effect was given to this change by amendment of the Submissions. They now read:

Upon the basis of allegations of fact, and statements of law set forth in the written pleadings and oral proceedings herein, may it please the Court to adjudge and declare . . . that:

Submission No. 3

Respondent, *by laws and regulations, and official methods and measures, which are set out in the pleadings herein*, has practiced apartheid, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that Respondent has the duty forthwith to cease the practice of apartheid in the Territory;

Submission No. 4

Respondent, by virtue of economic, political, social and educational policies applied within the Territory, *by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein*, has, *in the light of applicable international standards or international legal norm*, or both, failed to promote, to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfill its duties under such articles.¹⁸ (Italics added.)

The main changes in the Submissions were that Applicants deleted all reference to Chapter V of the *Memorials*, and particularly paragraphs

¹⁸ C.R. 65/35, 19 May 1965, pp. 69-70.

189 and 190 thereof, which, as indicated above, contained their original charges of oppression.

Then, to render it abundantly clear that they were relying only on a rule of "non-discrimination or non-separation," Applicants added to the amended Submissions the following "formal interpretations and explanatory comments":

1. The formulation of Submission No. 4 is not intended in any manner to suggest an alternative basis upon which the Applicants make or rest their case other than the basis upon which the Applicants present in Submission No. 3 itself . . . the distinction between the two Submissions 3 and 4 being verbal only . . .
2. The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, as described and defined in the Reply at page 274, and solely and exclusively as there described and defined. . . .¹⁹

In informal explanations Applicants also confirmed that they were no longer requesting a finding from the Court either that South Africa was imbued with oppressive intentions toward the native inhabitants of the Territory or that its policies gave rise to detrimental consequences. Indeed, they expressly affirmed the correctness of the passage from the *Rejoinder* quoted above in which South Africa pointed out that the norm would, if it existed, strike at differential measures "even if the Court were to hold that such policies were intended to enure, and did in fact enure, to the benefit of the population as a whole."²⁰

They similarly expressly approved of the following passage:

It is true by reference to their alleged 'norm of non-discrimination or non-separation' Applicants can plausibly contend that evidence tending to show an absence of any intention on Respondent's part other than one to promote the interests of the inhabitants, would be immaterial. If indeed Article 2 of the Mandate must be read as containing an absolute prohibition on 'the allotment, by governmental policy and action, of rights and burdens on the basis of membership in a "group"', Applicants would sufficiently establish a violation of the Article by proving such an allotment, *irrespective of whether it was intended to operate, or does in fact operate, for the benefit of the inhabitants of the Territory.*²¹ (Italics added.)

¹⁹ C.R. 65/35, 19 May 1965, pp. 71-72.

²⁰ C.R. 65/24, 30 April 1965, p. 16.

²¹ C.R. 65/24, 30 April 1965, p. 17.

Now what was the *factum probandum* at that stage of the proceedings? Quite clearly it involved only the existence of certain legislative and administrative measures which were admitted on the pleadings and which distinguished in various ways between different population groups. Indeed, Applicants explicitly and repeatedly said so in their informal explanations in Court, referring to the admitted measures as the “*corpus of fact*” or “conduct complained of,” which was “to be judicially determined to be *per se* and inherently in violation of such international norm and international standards, or either.”²² It was also admitted between the parties that these measures allotted status, rights, duties, privileges, or burdens on the basis of membership in a group, class, or race.

By virtue of Applicants’ admission of Respondent’s factual averments, it was also common cause that the South African policies were intended to promote the well-being of all population groups, that they bore the approval of the great majority of the population,²³ and that they had resulted in a high standard of well-being among all population groups.

The only remaining questions were the legal ones—whether there existed a legal prohibition on such an allotment, however well-intentioned or beneficial it might be, and whether the Court would in any event have jurisdiction to enforce such a rule, if it did exist. It is not proposed to re-argue these questions here. Those who are interested can read and contrast the Separate Opinions of Judge (*ad hoc*) van Wyk and some of the minority Judges, particularly Judges Tanaka and Jessup. It is noteworthy, however, that Applicants eventually relied almost solely on a standard (as distinct from a norm) of non-discrimination or non-separation (as defined above) which was said to have arisen in recent years and to govern the interpretation of the Mandate. It is difficult to see how events transpiring more than a quarter of a century after drafting of the Mandate could be of decisive importance (or even of any assistance) in its interpretation. In this respect the reader is referred to the rejection of *ex post facto* interpretation of this sort by the International Court, both in the South-West Africa case²⁴ and in the case of the Rights of United States Nationals in Morocco.²⁵ It is also noteworthy that uncontested testimony was

²² C.R. 65/33, 17 May 1965, p. 11. See also p. 35.

²³ *Vide*, e.g., *Rejoinder*, Vol. I, pp. 316-327.

²⁴ *Judgment*, p. 23.

²⁵ 1952 *I.C.J. Reports* at p. 189.

given by an expert from the United States²⁶ showing that there were at least 50 states and territories in the world in which, to a greater or lesser extent, status, rights, duties, privileges, or burdens were officially allotted on the basis of membership in a group, class, or race; these included 40 members of the United Nations and both Applicant States.²⁷

The question then remains: why did Applicants not take up the challenge? Why did they not pursue the allegations of oppressive intent and harmful consequences so vigorously stated in their initial pleadings? Similar allegations, it will be recalled, had also been freely bandied about before the United Nations for many years. Why did Applicants resist an inspection *in loco* by the Court, when their representatives were always clamoring for United Nations inspection of the Territory? It is hardly credible that if Mr. Gross thought he could obtain a finding of fact from the Court that the South African policies were oppressive in intent or effect or both, he would not have pressed these issues, even if it did add another year to the case. The only possible inference is that Mr. Gross realised that he did not have the evidence to convince the Court, and consequently rather confined himself to the purely legal case based on the norm or standards.

This inference is supported by Mr. Gross' clear disenchantment with his potential witnesses. Over the years a number of Petitioners have given evidence of a very lurid nature before the United Nations about conditions in South-West Africa. This evidence formed the basis of many United Nations reports, and, indeed, also of Applicants' allegations in their *Memorials*. But in addition to adopting as their own many of the averments regularly made by the Petitioners, Applicants also devoted a Chapter of their *Memorials* to direct quotations of statements of Petitioners. In this regard Applicants said:

The manner in which the daily lives of inhabitants are affected [by the South African policies] is illustrated in petitions received by the United Nations Committee on South West Africa from various persons and organizations in the Territory. . . .The cumulative effect and thrust of the petitions, received from so wide a variety of independent sources, *reinforce*, in general, *the factual allegations in Chapter V of this Memorial*. Their probable accuracy in substance is confirmed by the fact that

²⁶ Prof. Stefan Possony, Director of the International Political Studies Programme at the Hoover Institution for War, Revolution and Peace, Stanford University, California.

²⁷ C.R. 65/84, 19 October 1965, pp. 7-11 and 16.

many incidents recounted in the petitions are predictable consequences of the pattern of the Union's administration in the Territory, more fully described in Chapter V.²⁸

In the *Counter-Memorial*, South Africa demonstrated the falsity and inaccuracy of these statements by the Petitioners.²⁹ Save for one final incident, that was the end of Applicants' reliance upon the Petitioners. On April 28, 1965, we were told: "The Applicants have not relied upon the accuracy of statements in such petitions. . . ." ³⁰ Why were they then referred to in the first place?

The final incident mentioned above occurred during the debate on the inspection proposal. Mr. Gross then, as now in the article under reply, raised as one of the objections to the proposal the point that the proposal did not involve provision for hearing evidence, particularly of the Petitioners.³¹ The South African representative replied *inter alia* as follows:

We certainly do not propose to call petitioners, either here or elsewhere, as witnesses because we know, and we have demonstrated on the pleadings already, that no reliance can be placed upon their evidence. 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. ³²

Needless to say, the invitation was not accepted.

In the result it will be seen that the statements made at the Montreal Symposium and objected to by Mr. Gross were in fact correct; and it will also be appreciated that to endorse the statements is not to cast reflections upon the Applicants' Counsel but rather to point at some of the fundamental weaknesses of the case which they sought to present to the Court.

EDITOR'S NOTE:

The dissenting opinions of Judge Jessup and Sir Louis Mbanefo, judge ad hoc designated by the Applicants, and the separate opinion

²⁸ *Memorials*, p. 138. The reader will have noted the italicized words, and kept in mind that Chapter V was expressly incorporated by reference in the formal Submissions.

²⁹ *Counter-Memorial*, Vol. VIII, pp. 44-52.

³⁰ C.R. 65/23, 28 April 1965, at p. 42.

³¹ It is difficult to see the force of this objection since Applicants were in any event totally opposed to the hearing of any witnesses anywhere, as indeed appears from Mr. Gross' article.

³² C.R. 65/25, 3 May 1965, at p. 57.

of Judge van Wyk, judge ad hoc designated by the Respondent, contain, *inter alia*, the following on the international norm or standard concept of the Applicants:

A. From Judge Jessup's dissenting opinion:

Applicants kept stressing the point that their argument had two alternative aspects; one aspect was based on the argument of the existence of a norm as a rule of law and the other aspect was reliance on a standard of interpretation to which the governing effect of a legal rule was not attributed.

The misunderstanding between Counsel persisted and Counsel for Applicants raised objections time and again.¹ The issue was at times stated to be—as Respondent contended—what was “the case” made out by Applicants upon which they rested? As the President stated, “it will be a matter for the Court to determine what was the case which you made out. . . .” (20 October 1965, C.R. 65/85, p. 57.) If the Court, instead of rejecting the Applicants' claim, had considered the instant case on the full merits, it would have had to make a finding as to the nature of the Applicants' submissions or “case.” It would scarcely seem credible that the Court, in a full review of the matter, could have failed to accept the alternative character of Applicants' arguments based, on the one hand, on an international legal norm, and on the other hand, on an international standard as an aid to interpretation. The Court would have had to extricate the basic contention from the semantic swamp in which the argument frequently bogged down.

The importance of the issue lies in the fact that at times the argument of Applicants seemed to suggest that the so-called norm of non-discrimination had become a rule of international law through reiterated statements in resolutions of the General Assembly, of the International Labour Organisation, and of other international bodies. Such a contention would be open to a double attack: first, that since these international bodies lack a true legislative character, their resolutions alone cannot create law²; and second, that if Applicants' case rested upon the thesis that apartheid should be declared illegal because it conflicted with a general rule of international law, it might be questioned whether such a claim would fairly fall within the ambit of paragraph 2 of Article 7 which refers to disputes about the interpretation or application of the provisions of the Mandate. If the Court were to hold that the practice of apartheid is a violation of a general rule (norm) of international law, it might seem to be passing on the legality of acts performed within the Republic of South Africa itself, a matter, which, as already noted, would be outside the Court's jurisdiction. On the other hand, if the Court had considered the question of the existence of an international standard or criterion as an aid to interpretation of the

¹ In a statement on 9 November, C.R. 65/96, Counsel recalled in detail and with specific citations the occasion on which he had objected.

² The literature on this point is abundant.

Mandate, it would have been pursuing a course to which no objection could be raised. In my opinion, such a standard exists and could have been and should have been utilized by the Court in performing what would then be seen as the purely judicial function of measuring by an objective standard whether the practice of apartheid in the mandated territory of South West Africa was a violation of the Mandatory's obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory."

South-West Africa, Second Phase, Judgment, I.C.J. Reports 1966, pp. 432-434.

B. From the dissenting opinion of Sir Louis Mbanefo:

[After enumerating 15 types of facts relating to "certain laws, regulations and official measures introduced in the territory by the Respondent" (p. 486), as alleged by the Applicants, the dissenting opinion of Judge Mbanefo continued:]

These facts and their sources are not in dispute between the Parties. The Applicants by the amendments say that as a matter of governmental policy they are, judged by acceptable international norms and/or standards, in violation of the Respondent's Mandate obligations. By doing so the Applicants were introducing a measure by which the conduct of the Respondent should be judged. What the amendments have done is to bring out the essentially legal character of the dispute as one relating to the interpretation and application of the provisions of the Mandate. They have not in any material sense altered the basic complaint of the Applicants which is that the practice of apartheid is discriminatory, unwarranted, inhuman and, therefore, inherently and *per se* incompatible with, and in violation of, Article 2, paragraph 2, of the Mandate. The obligation of the Mandatory under Article 2, paragraph 2, of the Mandate to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory is in terms mandatory and any action of the Respondent with respect to the Territory must be judged in that light. *Ibid.*, p. 489.

See 1 *Int. Lawyer* 270-72 in which are reprinted *in haec verba* the original applications of Ethiopia and Liberia to the Court and the submissions as presented to the Court at its oral proceedings, insofar as they relate to apartheid and the conduct of South Africa which, in the Applications, had been labeled "arbitrary, unreasonable, unjust and detrimental to human dignity" or "which suppress the rights and liberties of the inhabitants."

C. From the separate opinion of Judge van Wyk:

[After reviewing what Judge van Wyk called the “change in Applicant’s case,” the separate opinion of Judge van Wyk continued:]

If one now compares the final submissions with the original statement of the precise nature of Applicants’ claims in the Applications, it appears that the claims based upon allegations of arbitrary, unreasonable; and unjust actions, and on conduct detrimental to human dignity, have disappeared from the final submissions. The same applies to claims based on allegations that Respondent had in fact failed to achieve the results contemplated by Article 2(2) of the Mandate. Indeed it appears quite clearly that the allegation of failure on the part of the Respondent to perform its duties has been narrowed down to breaches of an alleged international norm and/or standards as defined at page 274 of the Reply. As I have noted, the amended submissions in all these respects correspond entirely with informal explanations repeatedly given by Applicants’ Agent during the course of the oral proceedings.

South-West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 147.