Legal and Political Strategies of the South West Africa Litigation, by Anthony D'Amato, 4 Law in Transition 8 (1967) Code A67c

The longer the South West Africa Case dragged on at the Hague, the more the anticipation was built up that the eventual decision would be of critical importance. Waldemar Nielsen, for example, wrote in 1965, in the fifth year of the litigation:

> The South West Africa Case may be, as some have said, the Achilles' heel of apartheid. It could also be the Achilles' heel of the International Court, of the United Nations, and of the concepts of the rule of law and of human rights under the United Nations Charter.[1]

The Court's decision was handed down on July 18, 1966. Almost as if it were determined to ensure that its decision would not be an Achilles' heel of anything, the Court surprised everyone by ruling that the Applicants, Ethiopia and Liberia, had no standing to bring their suit against the Republic of South Africa (the "Respondent"). More precisely, they had no "legal right or interest" in the "subject matter" of the dispute.

The surprise stemmed from the fact that in 1962, in the "jurisdictional" phase of the South West Africa Case, the Court found that it had "jurisdiction to adjudicate upon the merits of the dispute." Between 1962 and 1966 there occurred by far the most voluminous written arguments and most protracted oral hearings on the merits of a dispute in the World Court's history. The arguments touched every phase of South Africa's responsibilities, under a Mandate of the League of Nations issued in 1920, to the inhabitants of South West Africa. In August 1965, when the most important portion of the oral proceedings at the Hague had been concluded, Judge Badawi of the United Arab Republic died. By November 1965, when the Case finally ended, Judge Bustamante of Peru had not yet recovered from the illness which kept him away from the oral proceedings. Both of these judges had been firmly on the side of the Applicants, but the Court follows a rule that a judge who has not taken part in the proceedings cannot vote in the final judgment. As a result of these two major changes and some less important compositional modifications, the final vote in July 1966 was 7 to 7. Since the President of the Court has, in case of tie, an extra (or "casting") vote, and since President Spender of Australia was firmly on the side of South Africa, the final decision was 8 to 7 against the Applicants. However, the 8 votes were not used to sustain South Africa's side of the case on the merits, but to throw the case out of court for the lack of the Applicants' capacity to sue.

Reporters covering the Case concluded that the changes in the composition of the Court made all the difference. But this view would not explain why the dissenting judges in 1962, who became the voice of the Court in 1966, would have taken a procedurally tricky step which would appear to the public as a violation of the 1962 opinion and thus perhaps reflect badly upon the World Court in its first chance to decide a case of truly major political importance. Moreover, simply counting the judges does not show why the Court chose to wash out the case rather than handing South Africa a victory on the merits. What was the basis of the case in the first place?

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[1]NIELSEN, AFRICAN BATTLELINE 110 (1965).

What issues were involved and what relief did the Applicants seek? What were their legal and political tactics? What was South Africa's position? How did the United States view the proceedings? What was the political context of the Case? All of these questions are relevant to an assessment of the 1966 decision and its probable impact on the institutions mentioned by Waldemar Nielsen.

This paper is an attempt to examine the 1966 result and speculate upon its political implications primarily by means of an analysis of the strategy of the litigation. I shall first discuss the theoretical basis for the present analysis, and then take up the strategy of the litigation, the July 1966 decision, and its short-term political implications.

THEORETICAL BASIS FOR ANALYSIS

The most economical way to analyze the South West Africa litigation is to make use of the concepts of game theory. This would seem quite natural in any study of a lawsuit although surprisingly the effort does not appear to have been made. Professor Walter Murphy's *Elements of Judicial Strategy* (1964) uses some game theory concepts but does not focus on particular litigations; rather it concentrates on judicial bargaining. As far as I am aware, political scientists have not noted the fact that a lawsuit would appear to be the rare real-life paradigm of a two-person zero-sum game: The plaintiff and defendant stand to win or lose the same precisely defined amount, and even a pre-trial settlement does not denote mutuality of interest but rather can be thought of as the price paid for the expectation of winning discounted by the calculated uncertainty attached thereto. The Court is the "umpire" in the game, and the "rules" are the rules of law and legal procedure.

But a complication immediately arises in considering the South West Africa Case, for the International Court was not asked to award damages in a dollar amount. Rather, the Applicants asked the Court to make several declarations of law and obligation. In addition, the issues presented by the parties were subject to modification by the Court. Finally, the Court's reasoning and clarity of articulation would be just as important as its decision, since the official opinion would provide the framework for subsequent action in the United Nations in reaction to, or implementation of, the Court's verdict. Even as the litigation evolved the parties' goals and strategies shifted and were redefined, and thus the substance of the case underwent dynamic alteration. Nevertheless, this does not mean that game theory analysis is inapplicable in the South West Africa Case. On the contrary, as Professor Schelling has proved in *The Strategy of Conflict* (1960), analytical possibilities become immensely richer and more interesting when we break out of the zero-sum category. The present Case, in particular, appears to be a complex variable-sum game containing many elements of conflict and cooperation.

Thus we shall be looking for elements of mutuality of interest as well as stark opposition. To what extent, and for what reasons (legal or political) was there, or should there have been, cooperation between the Applicants and the Respondent? Was the Court itself a player in the game? What were the elements of mutual dependence, collaboration, accommodation and cooperation among the United Nations, the United States, Great Britain, and the parties to the Case? No adequate description of the strategy of the litigation can omit searching for these

elements and lines of action.

Here also there is need to examine a glossed-over theoretical problem in strategic analysis: to what extent can there be a strategy that was not wholly thought through or even perceived as such by the player making it? Can there be an inadvertent strategy? Even though Professor Schelling reoriented the previously narrow concepts of game theory in *The Strategy of Conflict*, his analysis remained highly rationalistic. Perhaps there is need for further broadening. For strategy in the militaristic, rationalistic, Schellingesque sense implies the conscious selection of a line of action from plausible alternatives and a perception of the goal that the selected line of action is directed toward. Thus if alternative policies do not occur to the decision-maker, or if he is not one of the few human beings whom Pareto characterized as behaving logically *i.e.*, perceiving that the line of action selected will best effectuate a conscious desired goal then he is not a "strategist" in the traditional sense. But if we want to use the rich notion of strategy to describe a more normal sort of human behavior, we may need a concept of inadvertent strategy.

To some extent this notion may be derived[2] from grafting Cyert and March's *A Behavioral Theory of the Firm*[3] onto Braybrooke and Lindblom's *A Strategy of Decision*[4]. The latter refer to incrementalism as a strategy, yet we find in Cyert and March (who do not use the term "incrementalism" but clearly imply it) the idea that incremental decision-making is in part a way of reacting to feedback rather than forecasting the environment.[5] Additionally, "the first satisfactory alternative evoked is accepted."[6] These prescriptions do violence to the idea of rationalistic strategy, yet who is to say that businessmen, or decision-makers in general, therefore do not behave strategically? Decision-makers tend to act incrementally, and in most complex situations decisions are typically made along an entire spectrum of issues ranging from the seemingly least to seemingly most important. Any given decision will interact, and will be expected to react, polycentrically with variously graded levels of other possible lines of strategy. Moreover, all decisions have varying lives of their own (the amount of time before they need reassertion by the decision-maker in order to be reactivated); these varying lengths may themselves reshape the decision-maker's approach by what appears to him as the untimely demise or duration of his prior decisions. Decisions in the broad sense of acting or refraining from action are made constantly and at varying levels of importance, but their effects exert a cumulative polycentric pressure on the entire stream of decision-making. To the analyst in retrospect these decisions could appear to have all the attributes of a strategy and indeed might be most parsimoniously comprehensible as such.[7]

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[2]Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 LAW IN TRANS. Q. 134, 136-41 (1965).

[3]CYERT & MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963).

[4]BRAYBROOKE & LINDBLOM, A STRATEGY OF DECISION (1963).

[5]CYERT & MARCH, *supra* note 3, at 113.

[6]*Ibid.*

[7]It is hard to find a real-life example of a strategy that, unlike the description given in this paragraph, consists of a linear series of decisions. A game-theory analogue would be chess. Here it is interesting to note that Alekhine's own annotated games show his inability to articulate any

We might label "strategic error" as the contrapositive of inadvertent strategy, and "inadvertent error" as the contrapositive of strategy. Clearly a mistake that results in a loss can either be the effect of bad strategy or unlucky random behavior. The term "miscalculation" is often used in game-theory contexts to mean strategic error, though it sometimes denotes a non-strategic error (e.g., an arithmetical mistake).

The term "inadvertent strategy" would appear less paradoxical if we started from a premise of complete disinterest in the state of mind of the decision-maker. Some schools of thought claim that we should abandon entirely the search for what was going on in the mind of the decision-maker when he made his decision. Followers of the *Journal of the Experimental Analysis of Behavior* would hold such a search superfluous. Indeed, the Skinnerian view of operant conditioning would seem quite comprehensible without the necessity of positioning awareness of choice. On a philosophical level, G. E. Moore and Wittgenstein have shown that awareness of choice need not be viewed as a necessary precondition for free will (read: strategy). In foreign policy analysis, Professor Morgenthau has cautioned students to avoid motivational analysis because of its elusiveness.[8]

It is not necessary to go quite this far, however, for one may always take refuge in the position that the issue depends on the extent to which we are interested in the decision-maker's own conscious mental processes. If we are psychoanalyzing *him*, then they are of course relevant. But if we are attempting to describe decisional behavior, and if we do not know the actor's mental state *or* we suspect that the actor was not wholly aware of alternate lines of policy or the relation of selected policies to desired goals, we may still be in a better position to describe such behavior if we use concepts borrowed from the highly rationalistic theory of games.

THE DECISION TO COMMENCE LEGAL ACTION

The broader policy aspects of the situation of which the South West Africa Case is a part may be categorized at the outset in terms of three basic international reactions to apartheid in Southern Africa: (A) support for "White" supremacy; (B) pressure for reforming the system bloodlessly so that eventually the vastly more populous "Natives" will achieve political supremacy but the "Whites" remain an important, propertied, and perhaps respected segment of the citizenry; and (C) advocacy of immediate overthrow of "White" supremacy, disregarding the safety of the "Whites." After World War II and through the 1950's, the effect of the policies of the United States and Great Britain was a vacillation between the A and B positions (although their verbal declaratory policy in the United Nations was to condemn apartheid). In the United Nations itself during this period, the Asian and African blocs led the fight for a B policy with occasional

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comprehensive strategies, yet all his games display his own strategic stamp. In contrast, Capablanca's games and annotations are more articulate in forming over-the-board strategies and combinations, yet Capablanca was not as intricate nor subtle a strategist as Alekhine. Nor is Botvinnik, who finds it even harder than Alekhine to articulate his own strategies, though the difference here is that Botvinnik may well be less a strategist than a brilliant improvisor.

[8]See MORGENTHAU, POLITICS AMONG NATIONS 6 (3d ed. 1961).

leanings, perhaps to dramatize the situation, on C. But in 1960 matters changed rapidly. Great Britain and the United States perceptibly shifted to square advocacy of the B alternative, which Great Britain is of course currently pursuing with respect to Rhodesia, whereas the United Nations now led by the African bloc alone moved very close to a complete C policy. The Case, formulated in 1960, came at the turning point in this radicalization of policy, yet it clearly reflected a victory for the B policy. Since most lawsuits freeze an initial position even if they drag on for years in the courts, it would be natural to expect a similar result in the South West Africa Case which lasted six years. But this did not happen, as I shall try to show.

Within the context of the foregoing general policies, I shall now attempt to examine the motives and expectations of the players, hopefully to reveal the basic strategic context of the litigation and to serve as well as an introduction to the judicial and legal rules of the non-zero-sum game.

(1) *The United Nations*. In its political battle against South Africa the UN has had minuscule success and has seemingly resigned itself to perennial frustration. What little leverage the UN had in 1946 has evaporated through a series of condemnatory resolutions which only made South Africa increasingly defensive. Failing on a direct-action front, the UN has looked for possible weaknesses in South Africa's armor. One important "Achilles' heel" is South West Africa because of its special status as a mandated territory under the League of Nations. A second is the International Court of Justice, which although technically a branch of the United Nations, has preserved to a large extent its tradition of political impartiality. Early in its history the UN tried to persuade South Africa to turn South West Africa into a trust territory; South Africa was not interested.[9] In 1950 the UN decided to combine the two "weaknesses"; it asked the International Court to rule in an advisory opinion on the status of South West Africa and whether South Africa as administering authority had a duty to turn the territory into a trusteeship.[10]

As is common in reaching World Court advisory opinions, any nation having an interest in the proceeding is invited to participate. In 1950, lawyers from South Africa showed up and argued the case thoroughly; their participation had effect. Although the Court ruled that South West Africa is still a mandate despite the League's demise, and that the United Nations through its General Assembly inherited the supervisory functions (receiving annual reports from the administering authority and petitions from the inhabitants) of the League Council, it held in South Africa's favor on the vital issue of trusteeship. The Court decided that Article 75 of the Charter meant what it said: that a territory "may" be placed under trusteeship if both sides agree. (Surprisingly, six out of fourteen judges dissented on this point.)

South Africa never set up a trusteeship for South West Africa, nor did it comply with the Court's opinion as to the supervisory capacity of the UN. It was under no legal obligation to comply because the 1950 opinion was purely advisory. Yet, in part because they were so much on the defensive, South African representatives in the UN throughout the 1950s stressed that the

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[9]One basic reason for South Africa's rejection, unique among the mandatories, is usually overlooked by commentators. It is that Article 76 of the UN Charter relating to trusteeships has an anti-racial distinction clause.

[10]International Status of South West Africa (Advisory Opinion), 1950 I.C.J. Rep. 128.

basic reason for their noncompliance was that the opinion was merely advisory. Apparently they did not want to attack the Court *in toto* or dismiss the opinion as erroneous or politically motivated, for part of the opinion was in their favor and served visibly to frustrate the UN's desire for a trusteeship for South West Africa.

This reliance by South Africa in the UN on the non-binding nature of the 1950 decision suggested the possibility that if some sort of contentious action could be devised involving South Africa as a defendant, she would be hard put to disclaim the authoritativeness of the resulting decision by the Court. But what sort of contentious case would this be? An unsubtle hint was actually given in the 1950 case in the separate opinions of Judges McNair and Reid. Judge McNair suggested that "every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate." He cited article 7 of the Mandate instrument accepted by South Africa which gives compulsory jurisdiction to the Hague Court over "any dispute whatever" arising between South Africa and any other member of the League "relating to the interpretation or the application of the provisions of the Mandate." (In July 1966 this clause would be given an extremely narrow construction.)

Strangely, it took seven years for Judge McNair's hint to penetrate. One reason for the delay was probably a feeling that the Court could have given the same hint by way of dictum had it felt that there could be a "dispute" under article 7 on an indirect issue not having immediate legal interest to the plaintiff such as the proper exercise of the Mandate. As things turned out in 1966, the precise basis for the decision was that such a direct legal right or interest did not exist, but no one could have been sure of this in the 1950's. Indeed, judging from the Court's other opinions in the 1950's, the judges at that time would have been very favorable to a legal action against South Africa. But the chance was missed, perhaps primarily because of a lack of legal imagination on the part of those persons or States most interested in the early 1950's in bringing this matter to a head.

In the meanwhile, the United Nations tried two more advisory opinion gambits, in 1955 and 1956, hoping to increase the feeble pressure of the 1950 opinion.[11] These decisions clarified and somewhat expanded the terms of the 1950 opinion (*e.g.*, allowing oral petitions as well as the nonexistent written ones). Then in 1957 the General Assembly woke up and asked the Committee on South West Africa to investigate the possibility of a contentious action against South Africa. The Committee reported that former members of the League of Nations could try to bring a suit over the administration of the Mandate.[12] But there were still doubts as to what kind of "dispute" was necessary under article 7. Further referrals to the Committee finally resulted, in 1959, in the Committee's noncommittal but significant finding that it "was for the individual States to decide whether they had a dispute with the Union of South Africa in regard to South West Africa.[13]

Conspicuous in all these stirrings in the United Nations was the absence of consideration as to the kind of relief the plaintiff States, in a possible contentious action, would want the Court

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[11]Voting Procedure on Reports and Petitions (Advisory Opinion), 1955 I.C.J. Rep. 67; Admissibility of Hearings of Petitioners (Advisory Opinion), 1956 I.C.J. Rep. 23.

[12]A/3625. (References to UN reports use A for Assembly.)

[13]A/AC.73/2. (Reference to Assembly Committee.)

to grant whether it would be, for instance, a mere reaffirmation of the 1950 advisory opinion on supervision or whether it would extend to something as radical as asking the Court to declare a dissolution of the Mandate with the United Nations stepping in to administer the territory. Through 1959 the UN seemed only to be interested in finding another legal means for leverage, on general principles, against South Africa via the International Court of Justice.

(2) *Liberia and other African States*. In 1960 the African States took the play away from the United Nations. On May 11 Ambassador George Padmore of Liberia requested the Honorable Ernest A. Gross of the New York Bar to prepare a memorandum of law concerning the problems involved in bringing a contentious proceeding against South Africa. Liberia was clearly acting at the behest of the other African States, which promptly approved Mr. Gross's suggestions in June at the Second Conference of the Independent African States at Addis Ababa. The Memorandum of Law suggested that African States which were former members of the League of Nations might sue South Africa, and that the Court probably would find that it had jurisdiction as to such a "dispute." Then the Court at least could be asked to declare that South Africa has all the legal obligations (reports, petitions, submission to the UN, no unilateral annexation of South West Africa) that the Court said it had in the 1950 advisory opinion.

What good would this much do, given South Africa's attitude of defiance? One can only surmise, pending the book on the Case which Mr. Gross will surely write some day, that the African statesmen were privately convinced that a binding decision by the International Court would provide leverage not so much against South Africa but against England and the United States, the two biggest foot-draggers with respect to apartheid in the United Nations. Since these two countries have proclaimed so loudly and often that nations must abide by the rule of law, they would be hard put to stall implementation of a World Court decision against South Africa. The US and UK in the 1950s had, quite properly, refrained from branding apartheid as a "threat to the peace" as the African nations had suggested in a sort of Queen of Hearts posture (the only threat to the peace would come from the African States themselves in an attack on South Africa). But the African States had wanted to use this language in the UN in order to bring to bear the Security Council's enforcement machinery which can be employed in cases of a threat to the peace. Now, perhaps, the same result could be reached if Liberia won her case in the World Court, for there need not be a threat to the peace for the Security Council to use sanctions if the purpose is that of giving effect to a judgment of the World Court (Article 94). With world order and the rule of law clearly at stake, the US and UK would probably not use their veto in the Security Council. Thus the idea of resorting to the Court began to look interesting, and this was probably reinforced bv the suggestion of hiring as prominent an American as Mr. Gross to handle the litigation. Mr. Gross had been Assistant Secretary of State in 1949, Deputy US Representative to the United Nations in 1949-1953, and US Representative to the General Assembly in 1952-1953. If he won the case, the US would look bad if it tried to hinder the implementation of the Court's decision.

But the stakes were even higher. For the African nations were more perturbed about apartheid in South Africa than they were about its extension in the less populous and less publicized area of South West Africa. Thus Mr. Gross's memorandum suggested that the Court be asked to declare that apartheid itself and its consequences were a violation of the Mandate. Such a declaration, if issued, would put South Africa in a *zugzwang*: her policies in South West

Africa were so much part and parcel of her general policies in the Union that the government "would have little reason or justification for abandoning its obnoxious policies in one place while preserving them in another."[14] Adding support to this is the fact that South West Africa has been administered almost entirely as an integral part of South Africa, and is referred to in domestic parlance as South Africa's fifth province. It would be politically infeasible domestically to desegregate South West while keeping apartheid at home. Thus the Court's decision could reach and profoundly affect apartheid in South Africa itself.

Yet if this *zugzwang* strategy were valid, surely South Africa would never comply with a Court declaration that apartheid is illegal. Additionally, the Court, knowing this, might not issue such a declaration. South Africa, presumably, would sooner give up South West Africa than abolish apartheid there but still administer the territory. Why not, then, ask the Court to declare that the Mandate had been so badly violated that South Africa should be divested of its mandatory power and that the UN should step in and administer the territory? Such a goal had considerable appeal to some of the States at the 1960 Addis Ababa conference, yet it was rejected. There are three reasons why such a strategy might be objectionable. First, if the Court were asked in a single proceeding (a) to find that it had jurisdiction under article 7 of the Mandate as to a dispute about administration of the Mandate, and (b) that the Mandate should be dissolved because of maladministration, the Court could decide in a sort of reverse-bootstrap logic that an affirmative finding on (b) would entail a negative finding on (a). Moreover, if this were the Applicant's request, South Africa might not show up in Court, accept a default judgment against itself, and then argue that such a tricky decision finding both (a) and (b) was a mere capstone to a series of bungling UN attempts to declare its regime illegal. Such an argument might sound persuasive enough for the United States and United Kingdom to espouse it in the Security Council. Or it might provide the pretext for immediate South African annexation of the territory before the UN could act to implement the decision. Third, there is no particular necessity to have the Court declare the Mandate terminated if the Court would declare that South Africa is accountable to the United Nations. For it would be possible for the General Assembly to declare the Mandate terminated at a later date. Fourth, if the Court terminated the Mandate, it is conceivable that South Africa would give up the territory, retreat into domestic isolation, and enforce apartheid even more strenuously at home. It would not be put in the *zugzwang* position of having to move to eliminate apartheid in its mandated territory. Of course, this reasoning assumes a complex game theory matrix where the opponent is hurt more by having a partner than he would be if he played against all other players. Thus a more understandable variant in 1960 might have been an argument that if South Africa failed to comply with the Court's declarations as to what South Africa must do in South West Africa, then the UN could apply sanctions against South Africa itself as the mandatory power. This would not be true if the Mandate were terminated. Thus there would be a prospect of using the Case to bring about economic and possibly military action against South Africa itself.

Despite these considerations, African States have increasingly come to feel that they made a strategic error, or something was put over them, to agree in 1960 to a long lawsuit grounded in the theory that South Africa is the rightful mandatory power. Rather their position

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[14]Memorandum at p. 36.

has come to be that South West Africa should be given its independence immediately and that the "colonialist" South African government should be expelled. Russia and Communist China support this position strenuously. The feeling is probably that an independent South West Africa could serve as a base for guerrilla action against South Africa with which it shares a long unfortified border. This is the C policy described earlier, whereas the Case to the African States represents the B policy.

(3) *The United States*. In 1960 the United States was not in much of a position to stop the litigation from taking place, and perhaps the State Department felt somewhat appeased at having one of its own former Assistant Secretaries handling the litigation. More importantly, the US probably felt that the Case would be a good way of buying time. Procrastination and the postponement of crises is appealing to the State Department and perhaps to any system of government having periodic elections of top officials (including South Africa). First, American and British officials do not want to rock prematurely the private investment boat which is considerable in South Africa. Second and more important to the United States, South Africa's annual gold exports of one billion dollars is a significant reassuring factor in international liquidity. A political crisis in South Africa might cause a speculative panic resulting in rapid depletion of the US gold supply which is already mortgaged twice over in foreign short-term credits. A gold drain of panic proportions would force an increase in the price of gold, thus "destroying" the "credibility" of the dollar which since 1934 we have paid billions of dollars in interest to maintain. In the eyes of top US policy-makers, devaluation of the dollar would be a serious blow to capitalism, free enterprise, US influence abroad, and the American Way of Life — or at least, they argue in private, no one can predict the extent of the damage. But buying time might alleviate the problem; for instance, Secretary Fowler might persuade central bankers in Europe to substitute Composite Reserve Units for gold in international monetary transfers.

Yet until July 1966 the price paid for procrastination seemed very high. This came about as a result of a possibly inadvertent African strategy at the UN. Since 1960, the African States have pushed for increasingly sharp resolutions against South Africa, such as breaking off diplomatic relations and trade, and instituting sanctions. These resolutions, which often include South West Africa, risked undercutting the judicial proceedings at the Hague by interfering with an issue that was *sub judice*. They seem to have been actuated by impatience, a desire to achieve direct results, and the need to impress domestic constituents. Nevertheless, the resolutions have had an important strategic result: they have forced the US and UK to argue against the resolutions on the primary basis that the legal issues have not been clarified because the Court was considering the South West Africa Case. Thus the African States became the beneficiaries of a commitment — a far more explicit one than the vaunted American commitment to defend South Vietnam — to support the eventual decision of the Court.

Of course the United States did not make this commitment blindly. For it has probably been determined to be in the national interest eventually to support the "Natives" of South West and South Africa against the small "White" minority. The more time goes by, the more certain it appears that they will emerge on top, a calculation that the Russians and Chinese made a number of years ago. Committing the United States to the "rule of law" in 1960 thus seemed a good "my-hands-are-tied" strategy vis-a-vis the South African government and domestic investors in South Africa.

(4) *South Africa*. The foregoing considerations underline the great risk that South Africa took in contesting a case that could have such a decisive influence over the only two important friends it had left in the entire hostile world the United States and United Kingdom. Of course the risk paid off in 1966; there was a great rejoicing among the "Whites" in South Africa when the Court's decision was announced in July. Yet the victory was by the slimmest possible margin, and could be said to have been made possible by the incapacity of two judges. We must therefore examine briefly the possible motives for South Africa's decision in 1960 to contest the case rather than to boycott the proceedings as many observers felt they might do:

First, not showing up in Court would probably mean an adverse default judgment which would be just as legally binding as a contested decision, although there would be ways, as suggested previously, to minimize it politically. Second, South Africa was rocked in 1960 by the Sharpeville episode, a stock market crash, and the attempted assassination of the Prime Minister. The "winds of change" were sweeping Africa; racial matters seemed to be peaking in the Rhodesias; and South Africa was feeling the initial pangs of separation from the Commonwealth, which was finally effected on May 31, 1961. Thus the prospect of a protracted World Court case seemed to be a good way of buying time. Third, there was a good prospect of actually winning the decision. The World Court, because of its decision in 1950 on trusteeships, must have appeared to be an oasis of rationality in the bleak Sahara of United Nations hostility. Also, the Cape Town lawyers had become masters of the legal intricacies of the Mandate history since they argued these issues at the Hague in 1950, 1955 and 1956. The feeling of victory was almost vindicated, and of course foreshadowed, in 1962 when the Court came within one vote of throwing the case out of Court for want of jurisdiction. When it was announced in the South African House of Assembly that the Court upheld jurisdiction by a vote of 8 to 7, a loud cheer went up! Fourth, the marvelous institution of the *ad hoc* judge in international law must be mentioned. The applicant and respondent States are each entitled to have a Judge of their own nationality on the bench; if one is not already there, they may select an *ad hoc* judge. This guarantees that the State's point of view will be argued in the Court's secret deliberations. It also ensures that the final vote will not be unanimous and that a strong dissent will be given for the losing State, both of which help to save face. These factors in turn help slightly to induce a government to be sued. Fifth, the Applicants' case was grounded on the premise that South Africa was the rightful administering authority over South West Africa, and the Court was asked to enforce the Mandate, not terminate it. South Africa may have decided to argue the case on a shrewd forecast in 1960 that in a few years African opinion would shift radically in favor of independence for South West Africa, and thus the pending litigation would forestall more radical steps. Finally, one should not underestimate the sincere and widespread feeling in South Africa that if only the rest of the world knew the *facts* they would surely understand the necessity for apartheid. This desire to be heard, understood, and forgiven had been repeatedly frustrated in the United Nations when delegates would walk out of the room if any South African official attempted to defend apartheid. But a Court case would be different. (To the extent that this factor is operative, the African delegates in the UN had adopted an inadvertent strategy.) In Court South Africa could paint a picture of "African reality" and the other side would have to listen. Here South African counsel could demolish the biased reports of "professional petitioners" who had spread gross lies about conditions in Southern Africa. And it would not be

possible for the Applicants to make false accusations without supporting evidence in the World Court. This last motive was translated into a strategy which scored unbelievable gains for the South Africans in Court and yet made no appreciable dent on world public opinion.

THE BASIC LEGAL STRATEGIES OF THE LITIGATION

I shall try briefly to convey something of the flavor of the litigation. To South Africa money was no object, and fifty of the top lawyers in Cape Town worked full time on the Case. Out of the record total of 3,756 pages of written pleadings in the Case, South Africa was responsible for 3,105. Their style was exceedingly logical, precise, complete, and pedantic. They relied heavily on verbal distinctions and at times seemed to feel that the complete answer to a legal problem could be found in definitions. By way of contrast, Mr. Gross in his oral presentation used a complex, multi-claused, verbally involuted though over-all concise approach which was well suited to the rather novel nature of the Applicants' legal position, of which more shall be said below.

South Africa made a few isolated attempts in the voluminous proceedings to charge that the Case was nothing other than the "culmination of a vehement campaign which has been waged against the South African Government . . . in the United Nations . . . a campaign of abuse and vilification motivated on the part of its leaders by purely political objectives."[15] The Applicants countered by saying that such a charge "strikes at the heart of the judicial process itself."[16] In their briefs the Applicants had carefully eschewed reliance on statements from Communist countries, even though the Soviet Union, for instance, has been one of the most articulate spokesmen against discrimination. Thus it was impossible for South Africa to find any Red herrings in the Case. Finally as a capstone to this little battle over motivation, the Applicants used to their advantage what turned out over a year later to be the very ground on which the Court dismissed the Case the fact that a direct and immediate "dispute" did not really exist betveen the Applicants and South Africa. On the opening day of legal argument on the merits at the Hague, Mr. Gross declared that "the Applicants have not sought judicial recourse in order to secure a narrow material or selfish interest peculiar to themselves. . . . Their legal interest encompasses nothing less than observance by the Respondent of the totality of its legal obligations under the 'sacred trust' of the Mandate."[17]

Before considering the substance of the Case on the merits, we must look back to the all-important preliminary decision of December 1962 on the question of jurisdiction. The Court could have declined jurisdiction on any number of grounds, *including* the ground which triumphed in 1966: that the Applicants had no legal right or interest in the subject matter of the dispute. For this is the ground relied upon by Judges Spender and Fitzmaurice in their dissenting opinion in 1962. Behind the legal issues a good argument of Frankfurterian restraint could be made: that the Court, in taking on such a politically charged and important dispute, would surely suffer in prestige and influence no matter what decision it handed down. The chances were good

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[15]Verbatim Records, C.R. 65/7 at p. 11. (Reference to *Compte Rendu*.)

[16]Verbatim Record, C.R. 65/22 at p. 16.

[17]Verbatim Record, C.R. 65/2 at p. 8.

that either the United Nations or South Africa would ignore the decision. Yet eight out of the fifteen judges motivated either by legal considerations, humanitarian considerations, or the opportunity to decide for once a truly significant and substantial problem, voted in favor of the Applicants that article 7 of the Mandate conferred jurisdiction on the Court.

It appeared that the 1962 decision necessarily affirmed one of the Applicants' contentions that the Mandate was still in force, despite the fact that the League of Nations was not. Indeed, the Court expressly found that the Mandate was in force, stating that without such a finding it would not make sense to rule that Article 7 of the Mandate, which conferred jurisdiction on the Court, was operative. Yet the 1966 opinion found a way out of this, which I shall consider later, so that at the present time it can not be said that the 1962 decision affirmed the existence of the Mandate.

Prior to July 1966 the Applicants would not have been content with a victory only on the issue of the existence of the Mandate. Nor would they have been happy if three other submissions were affirmed and the rest denied, the three being that South Africa has a duty to submit annual reports on the territory to the UN, to transrnit petitions, and not to modify unilaterally the terms of the Mandate. These submissions could be derived from the 1950 advisory opinion. Yet one point in the 1950 opinion would have been very important if reaffirmed by the Court in the contentious case: the duty of South Africa to submit to the supervision of the General Assembly with respect to the Mandate.

Yet from the Applicants' point of view, the most important submissions in the Case concerned apartheid, which was not at issue in the 1950 opinion. In their initial brief the Applicants argued that apartheid or its effects constituted a violation of one of the provisions in the Mandate instrument, namely, the duty to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory." The following is typical of the strong language used in the initial brief:

> 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; in respect of security of the person, rights of residence and freedom of movement; and in education.[18]

One other submission rounds out the picture. The Applicants charged that, in violation of another specific provision of the Mandate instrument, South Africa had established military bases within South West Africa. They asked the Court to declare that

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[18]South West Africa Cases, Memorials, at p. 133.

South Africa has the duty to remove such bases.

The Applicants' Memorials bear the ear-marks of hurriedly drafted documents with considerable legal vagueness couched in highly contentious language. Yet this proved to be of vital inadvertent strategic importance. First, the legal vagueness may have helped lure South Africa into showing up in Court to argue the case. Second, it helped to throw South Africa somewhat off base in answering the charges. Third, it provided a convenient umbrella for the sharp turns that the case later took by allowing the Applicants to argue that their seemingly new positions could be found somewhere or other in the Memorials if they were properly construed.

In any event, South Africa had a field day with the Memorials. The Respondent submitted ten volumes of Counter-Memorials which dealt with in precise detail every single charge contained in the Memorials. The Counter-Memorials produced an incredible amount of hitherto unavailable information about South West Africa and presented as well a complete explanation of the policy of apartheid. Apartheid is grounded, the Respondent argued, in sheer political necessity; without it there would be a repetition, with greater bloodshed and chaos, of the "Congo" and the "Mau Mau" in South West Africa. For "African reality" demands that the "White" "bearers of civilization" treat the "Natives" as their wards, protect them against exploitation by not allowing them to own their own land, and give them the benefits of modern government without the burden, which might be abused, of direct political representation. Moreover, the Respondent contended, there is an object lesson in the racial problems that other countries are experiencing (such as the United States) where the Negroes constitute only a small fraction of the population rather than the overwhelming majority. More tellingly, the Respondent pointed out the benefits to the "Natives" of the system of apartheid: the standard of living of the "Natives" of South West Africa is high compared to "Blacks" in other African countries, including Ethiopia and Liberia. This is true in education, income, hospitals, and other indicia of well-being and social progress.

But the Counter-Memorials were not simply a collection of assertions and refutations. They were boldly attuned to a single theme, repeated at every turn, that gave them great power and unity. This single theme was that the Applicants' case boiled down to a charge of "bad faith" on the part of South Africa as administrator of the Mandate. The Applicants' charges of "deliberate, systematic, and consistent" discrimination could only amount to a charge of *mala fides*. By thus reducing the Applicants' case to this one charge, South Africa could then demolish the case in two ways. First, the Respondent argued that it did not act and had not acted in bad faith, specifying not only the improvement in the living conditions of the "Natives" since 1920, but also arguing that all the appurtenances of apartheid pass laws, influx control legislation, wage contracts, detention laws, curfew regulations, etc. evidenced a sincere desire on the part of the administering authority to prevent social friction. Without these laws, many of the "Whites" (whom any impartial observer would agree are far more "right-wing" on this issue than the Verwoerd government) might misbehave toward the "Natives." Thus the laws operated to protect the "Natives" as well as possible in a difficult situation, and therefore the government officials could not be considered to have acted in bad faith. Moreover, the "good faith" of the Respondent is shown by its lengthy argument in this very Court, by its willingness to spread all the facts out for the world to see, by its submission

to the rule of law in the teeth of its own conviction that the Mandate has lapsed and that Ethiopia and Liberia have no standing to sue. Second, by characterizing the Applicants' case as resting on "bad faith," the Respondent could and did argue that a Court cannot judicially determine such a vague problem as good or bad faith anyway, and thus the case should be dismissed as not justiciable.

Surprised by the detail, cogency, and boldness of the Counter-Memorials, the Applicants responded with a Reply Brief 2.2 times as long as their initial Memorials and far more precise and legally sophisticated. They contended that the "bad faith" characterization was completely erroneous and in any event irrelevant since it would not give a Court any legal basis upon which to judge with sufficient clarity whether South Africa violated the Mandate (and thus on this point there was complete agreement with the Respondent). In addition, Mr. Gross argued eloquently in the oral proceedings that "without any purpose or intimation of comparison . . . history teaches that the greatest excesses of policy, and the most reprehensible doctrines, frequently are propounded and executed with professions of good faith and lofty purpose . . . . When sincerity of purpose is carried to unreasonable lengths, or improper ends, it is often difficult to distinguish from obsession."[19]

The Applicants also argued that it was irrelevant to compare the conditions in South West Africa with those in independent, non-mandated countries such as Ethiopia, Liberia, and the United States; what was relevant was the living standard of the "Natives" of South West Africa compared with the extremely higher living standard of the "Whites." This latter argument of irrelevancy of comparison won out over the other tack that the Applicants could have taken, of actually contrasting conditions in South West Africa with the rest of the world and showing the slow but steady progress of desegregation elsewhere. For such a strategy would have led to interminable argument about conditions in 110 other countries and might have led to mixed evidence which could divert the Court from its main concern and also stretch out the proceedings.

But it was not enough for the Applicants to charge that the Respondent had misread the Memorials. For, what exactly was the legal basis of the Applicants' case? Two bases emerged in the Reply Brief. The first and most radical was that it was contrary to international law for a government to allot status, rights, duties, privileges or burdens upon the basis of membership in a group, class or race, rather than on the basis of individual merit, capacity or potential. This argument was not pressed heavily in the Reply Brief, probably out of conviction that the legally conservative judges would not accept it. For it is difficult to find an explicit rule of customary international law grounded in the practice of States that prohibits such differentiation. Indeed South Africa might have argued (but apparently never thought of it) that international law itself allots rights and duties on the basis of membership in groups called "States" and thus the Applicants' suggested norm of non-separation, pressed to the limit of its logic, would result in international law being in violation of international law. South Africa did not fail to argue, however, that the Mandate instrument which gave the Court its jurisdiction contained clauses that differentiated according to groups. For instance, the Mandate prohibits the "supply of intoxicating spirits and beverages to the natives" (article

[19]Verbatim Record, C.R. 65/ 6, at p. 20.

3) and the "military training of the natives" (article 4). Yet the Applicants' argument may have been worth making because a victory on this point would be enormous for them: it would mean that the South African government could not justify in law or by any recitations of fact the system of apartheid. Nor could the government get out from under an adverse decision by relocating the "Natives" in "homelands" or "Bantustans" (which shall be discussed below). Furthermore, an international norm against differentiation according to groups would apply as much to South Africa as to South West Africa.

The second basis for the Applicants' legal position was much more conservative. Rather than invoking international law as a whole, it focused on article 2 of the Mandate. The argument was that the effects of apartheid, and not group differentiation per se, resulted factually in below-standard treatment for the "Natives" in violation of article 2. A difficulty was that article 2 ("well-being and social progress") was extremely vague, and it was not helpful to look to its application by the Permanent Mandates Commission under the League of Nations since the P.M.C. did not strenuously complain about the treatment of the "Natives." Rather it was necessary to argue that given the Court's finding in the jurisdiction aspect of the case in 1962 that the Mandate is still in force, and given the fact that but for its demise with the League of Nations the P.M.C. would still be supervising the territory, we are compelled to find present-day standards which would be used by the P.M.C. if it were in existence today. Fortunately there are organs of the United Nations set up under Charter provisions very close in wording to the Mandate provisions in the League Covenant. The Trusteeship Council is one such organ; it is more strict from South Africa's point of view than the P.M.C. The Committee on Information (subsequently the Committee of Seventeen and then the Committee of Twenty-Four) is another; it balances the picture by being less strict. In addition, the General Assembly exercises supervision over both these organs. Thus if we could find general rules or standards that were applied by both the Trusteeship Council and the Committee on Information, and moreover were accepted by the General Assembly, then these rules would clearly represent the boundaries for standards that the P.M.C. would be applying today if it were in existence. An examination of Trusteeship Council and Committee on Information reports and General Assembly resolutions approving these reports revealed a large number of specific standards on the treatment of indigenous populations by administering authorities. Then by a factual examination of the fields of education, economic development, civil freedoms, government, and citizenship, it was argued that South Africa's treatment of the "Natives" and "Coloured persons" of South West Africa violated these standards of administration.

This second basis was more conservative than the norm of nonseparation because it did not condemn apartheid per se and thus would not put the Court in the position of issuing a judgment that would not be obeyed by South Africa. Yet if the Court accepted this argument, it would still mean that South Africa could only comply by undertaking a crash program of betterment for the "Natives" to train them in school subjects relevant to the management of a complex industrial society and not just in handicrafts, to teach them English and Afrikaans and not their tribal languages which are unsuited to the comprehension of abstract ideas, to educate them politically as other administering authorities have done with the people under their tutelage, to start a program of political enfranchisement, to repeal the "pass" and

"curfew" laws, to allow "Natives" to own land, to provide them with low-cost loans to set up business enterprises, and so forth. These reforms could be undertaken on a "group" basis; indeed, they call for preferential treatment for the "Native" and "Coloured" groups for a time until all the groups are brought to the same level of social and economic status. Thus the current-standards-of-administration basis was clearly separate from the norm of non-separation.

THE BANTUSTAN INTERLUDE

The case was abruptly interrupted in February 1964 when the Respondent announced to the Court its intention to include the report of the Odendaal Commission of Enquiry into South West Africa Affairs in the documents of the litigation. The Odendaal Commission a top-priority rush job completed in seventeen months recommended a large number of specific programs for the economic and social betterment of the inhabitants of South West Africa. But it also recommended that the territory be divided into eleven separate entities, one for the "Whites" comprising 3/7 of the area including all the developed portions, and ten "Bantustans" for the nine "Native" tribes and the "Coloured" group. These Bantustans would be given limited self-government according to the Transkei model in South Africa, the only operative Bantustan at the present time.

The Applicants shared the general African sentirnent: that the Bantustan plan was a scheme to divide and conquer the politically awakening population and was completely at odds with the modern needs of the people. In their Reply Brief the Applicants characterized the Bantustans as the "ultimate implementation and logical extension" of the policy of apartheid (p. 99) and argued that if apartheid is illegal the Bantustan scheme is illegal *a fortiori*.[20] Yet there was a danger that South Africa would move to implement the Bantustan proposals of the Odendaal Commission before the Case came to a close (the difficulties of relocating people are enormous, yet there was some chance of it in South West Africa which is less populous and less urbanized than South Africa). Thus the Applicants moved quickly. A letter to the Court dated February 25, 1964 conveyed the veiled threat of an injunction against implementation of the Odendaal proposals. For it is a principle of the World Court that the Court may issue an injunction (called "interim measures of protection") against any party undertaking action that would prejudice the result in the case.

After consultations with the Applicants' counsel and with the foreign office of Liberia, the United States and Great Britain undertook strenuous diplomatic efforts to dissuade South Africa from implementing the Odendaal Report while the Case was pending. Commentators

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[20]There is a respectable body of opinion in this country and in England that the Bantustans represent the only bloodless way out for the "Whites" in Southern Africa and that they are substantially fair and reasonable. In *TheBantustan Proposal forSouth West Africa*, 4 J. OF MODERN AFRICAN STUDIES 177 (1966), I consider this problem in light of the statistics and proposals in the Odendaal Report and conclude that for a number of reasons the Bantustan proposals for South West Africa are unfair and unreasonable to the "Native" and "Coloured" groups.

have made much of this diplomatic demarche, suggesting that it demonstrated the leverage that the US and UK still have against South Africa, but it is quite possible that diplomacy had little to do with the matter. Indeed it may have slowed up South Africa's eventual decision to capitulate since the debates in the South African House of Assembly show that the government was very touchy about criticism from the United Party opposition that it bowed to American and British pressures. The government might actually have waited two months just to show that it was acting independently. The real reasons why South Africa tabled a Memorandum in Parliament on April 29th to the effect that the Bantustan proposals would not be decided upon but that the economic-development aspects of the Odendaal Report would be implemented may be as follows:

First, the Respondent's lawyers were probably engaged in hasty research on "interim measures of protection" at the same time that the Applicants' lawyers were researching the point and coming to the same conclusion that International Court precedents pointed the way for an easy victory for the Applicants. Such a victory would force South Africa to reverse its policy at the expense of its general legal and propaganda position, and at worst might unite the US and U.K in the Security Council (for no one would dare veto a temporary injunction by the Court). Second, the original motives for introducing the Bantustan proposals into the pending litigation must have been based upon premises which now seemed erroneous. South Africa was perhaps shocked that the world did not look kindly upon the Odendaal Report as the best answer to South West Africa's racial problem. Moreover, the Respondent's counsel probably did not anticipate the Applicants' quick reaction to set the stage for interim measures. They probably did not even foresee that the Applicants would consider the Bantustan proposals prejudicial to the Case, particularly when they were wrapped in positive and costly programs for economic development of the territory.

This, then, was the story of the Bantustan interlude in the litigation, but in game-theory terms there are several loose ends. In the first place, was South Africa's capitulation the expression of conflict or of cooperation? A victory in Court on interim measures of protection would have given a big lift to the Applicants' case in legal and propaganda terms, would have put South Africa psychologically on the defensive, might have united the US and UK in the Security Council against South Africa, and might also have made it a bit harder for the Court in 1966 to decide at that late stage that the Applicants lacked standing to sue. But, then, why take diplomatic steps to persuade South Africa not to go ahead with the implementation? Were the US and UK in their diplomacy sincerely trying to help South Africa avoid the consequences of an interim order? Secondly, it is not clear, apart from the reasons given previously, why South Africa introduced the Bantustan issue into the litigation. By withholding the matter until after the final decision, South Africa would have been in the position to alleviate the consequences of an adverse verdict by asking the Court to re-open its judgment in the light of material new facts concerning Bantustans. Thus at least the Odendaal proposals could be used to stall the whole legal issue for a few more years.

It is conceivable that the South African lawyers realized this latter strategy after they concluded that interim measures of protection would probably be issued by the Court. The avoidance of cognitive dissonance by thinking up reasons why one desires to make an unpleasant decision is a universal phenomenon. At any rate, the July 1966 decision

accomplished the result of opening the way for implementation of the Bantustans. Even though the Bantustan program in the Republic of South Africa has slowed down to a standstill, one must not infer from this that the Verwoerd government will not press vigorously for implementation in South West Africa which despite the July 1966 decision is still more vulnerable from the international standpoint than the sovereign Republic.

THE SAFARI GAMBIT

At a pretrail conference on March 12, 1965 at the Hague, some unexpected moves were made which resulted in radical changes in the Case. The first was a seemingly innocuous ruling by the President of the Court that the case would be divided into two phases, arguments first on law and then on facts. Second, on obvious orders from Pretoria, the Respondent's counsel proposed that the judges of the Court undertake a personal inspection visit to South West Africa to see firsthand "African reality." The Respondent asked Mr. Gross, who would have the floor for his opening argument, to yield the floor briefly for the purposes of this proposal.

It was then the Respondent's turn to be surprised. The Applicants objected vigorously to the "safari" and declined to yield the floor. The latter was in itself sensible since the Court would be packed on opening day with representatives of the world's press and it would be foolish to allow the South African counsel to make a grandiloquent speech on the order of "we have nothing to hide; let the Court come and see for itself whether the charges levelled against us all these years are true." But it is less understandable strategically why the Applicants opposed the safari gambit in the pretrial conference and again when it was finally introduced in open session. Of course they were concerned with delay of the Case; Ethiopia and Liberia were chafing at the unexpected expenses involved. Moreover the judges were old and not active; the trip might result in serious illness for some of them and thus delay the case even more. Yet these reasons do not seem compelling nor adequate to explain the apparent conflict on the safari proposal between Applicants and Respondent. In the first place, a visit by the judges would enhance the stature of the Case and its public importance, and thus increase the chances that the US and UK would not be able to veto implementing the final decision in the Security Council. Moreover, in retrospect, it is possible that a thorough safari might have convinced at least one of the seven judges who wrote the final opinion that it was far too late to throw the Case out on a jurisdictional issue. In addition, unless the Court accepted the invitation South Africa could always claim that the Court did not really understand the facts, that the Applicants were afraid lest the Court see the true facts, and that South Africa was not given a full fair chance to prove that its policies over the years had been beneficial to the people. Finally, a careful examination of the terms of South Africa's invitation demonstrated that South Africa was proposing a mere inspection trip where the judges could see anything they desired but could not question the inhabitants or take oral evidence. When Mr. Gross pointed out the exclusion of oral evidence from the proposal, the South African lawyers became very defensive and stated that there was no need to take such evidence. This reaction could have signalled an effective countergambit. The Applicants could have agreed to the safari on condition that the judges take oral evidence. Then the burden would have shifted to the Respondent to explain why, if it had nothing to hide, the judges could not question

dissatisfied "Native" leaders, political prisoners, shanty-town laborers, subsistence-level farmers, and so forth. But this counter-gambit was never made, and the oral-evidence exclusion was merely cited as a reason why the inspection proposal was incomplete and thus would be a relative waste of time for the Court to undertake.

Naturally the mere reason that the safari would delay the Case was not enough to convince the Court not to undertake it, since the Court has always done its utmost to please both sovereign parties to an international dispute. Yet the Applicants felt so strongly that the safari proposal should be defeated that their entire case underwent a tremendous radicalization in order to convince the Court not to go on the safari.

The sequence of events was as follows: Mr. Gross gave his opening arguments on the "law" of the case, stating that he would consider certain matters of "fact" later in the factual half of the proceedings. Then Mr. de Villiers for the Respondent took the floor, invited the Court to go on an inspection trip, and proceeded to give his rebuttal on the "law." After that Mr. Gross replied both to the "law" points and to the safari proposal. It was at this stage that the safari gambit acted as the impetus for a great change in the Applicants' position. Mr. Gross argued that the safari was superfluous since there were no facts substantially in dispute in this case; the Applicants should prevail on the admitted fact of apartheid alone. All that was at issue was the legality of the Respondent's policy of allotting rights and duties on the basis of group membership and not on individual qualities. Whether this allocation was reasonable, sincere, or even beneficial is irrelevant; all that matters is that some "Natives" of unusual ability or talent are forced, because of group affiliation, to accept a lower standard of living and fewer political rights than they would have merited on the basis of their ability.

The Respondent's lawyers were shocked by this turn in the argument. At first they could not believe that they had actually been conceded all the facts in the case. For this meant that previous charges in the United Nations that South Africa was engaged in deliberate oppression, including genocide and police terrorization, were now conceded to be untrue. Moreover, the Applicants' own charge of militarization of the territory contrary to article 4 of the Mandate was presumably abandoned since the Respondent's alleged facts on this point showed no militarization. In short, the Applicants' concession to South Africa appeared to be the complete vindication of South Africa's side of the story that the UN had refused to listen to, and South Africa of course made full use of this fact in later public relations releases. Second and more importantly, the South African lawyers now had the chance to press their arguments on the "law" to the hilt, for contradictions might show up in the Applicants' case given their acceptance of South Africa's version of the facts.

Still there was an issue as to the meaning of "facts" did it include implications to be drawn from the facts? Mr. Gross argued that he was not admitting to South Africa's own interpretations from their facts, but that he was free to draw his own implications. But what was he trying to imply? questioned the judges and the opposing counsel. Was he interested in whether apartheid was good or bad? Was he concerned with the issue of whether apartheid in fact promoted to the utmost the moral and material well-being of the inhabitants? Pressed to reply to these questions, Mr. Gross began to take the extreme position that although he did not "concede" either the facts or their implications, facts were superfluous. There was no need to inquire as to the facts of apartheid; nothing South Africa could prove on this point was

relevant. The safari was superfluous, and so were the "witnesses" that South Africa indicated it would call to testify in the case. Nor was there any need to have oral argument on the facts as originally planned by the Court and agreed to by Mr. Gross in his opening argument. All that mattered was that apartheid was contrary to an international norm and/or standard of non-discrimination or non-separation. The Applicants rested their case.

With the entire cumbersome case resting like an inverted pyramid on this narrow point of the illegality of apartheid, the safari proposal surely had become irrelevant. Eight out of fourteen judges agreed. However, South Africa was allowed to call fourteen out of their contemplated thirty-eight witnesses.

A more important consequence of the Applicants' decision to rest the case on the legal issue was the abandonment of the second more "conservative" basis for the case the current standards of administration of dependent territories. The earlier term "standards of administration" now metamorphosed into a "standard of non-discrimination" having exactly the same content as the international norm of non-discrimination (the reason for this will appear below). Indeed the original second basis for the case may have been discarded permanently, for when Mr. Gross was asked by a judge whether there was any difference now between his submissions 3 and 4 which originally had distinguished between the fact of apartheid and the effects of apartheid, he replied that they were one and the same.

What were the reasons for the Applicants' new position? The most important has been suggested: defeating the safari proposal. Coupled with this may have been a fear of getting too enmeshed in a "factual" dispute with South Africa who had the upper hand because of access to the facts. Also, pressures from the African States to get a quick decision played a part. Fourth, the norm of non-separation would, if the Court accepted it, preclude the Bantustan proposal even after the decision was handed down. Fifth, a straight anti-apartheid position would put the case on its most solid moral foundation. Sixth, it was probably felt that focusing solely on apartheid would force even the most conservative judge to acquiesce in a general condemnation. Seventh, a norm of law against apartheid would apply equally to South Africa, though it would still be diflicult to bring that matter before a court. Finally, the Verwoerd government certainly would not be able to comply with an anti-apartheid decision, and thus sanctions might be voted by the Security Council against South Africa itself. The only trouble was that the Court, knowing South Africa would not comply, might look for a way to avoid deciding the Case on this issue so that the Court's own authority might not be compromised.

THE FINAL LEGAL-ARGUMENTATIVE STRATEGIES

The focal point of the entire case now became the Applicants' alleged norm and/or standard of non-discrimination or nonseparation. Difficult conceptual issues were involved, the most important being that of "discrimination." South Africa boldly agreed that discrimination would be a violation of the Mandate, but argued that apartheid did not involve discrimination but was merely a policy of separate development of the races. If apartheid was more than a mere separate development, then a factual inquiry would be necessary to see if apartheid involved unfair, unequal, undesirable or discriminatory

treatment.

But the Applicants had now based their case on an avoidance of a factual inquiry. Were they arguing then that any policy of differentiation according to race violated the alleged norm of nondiscrimination? Although South Africa tried to characterize the norm as being a norm of non-differentiation, the Applicants objected violently to this. Their reason for objecting is clear: the Mandate itself differentiates according to racial groups, and the many "minorities provisions" in treaties concluded after World War I were explicitly designed to protect the existence of population minorities as separate groups. It would be virtually impossible to prove that non-differentiation per se was illegal under international law.

Yet how could a distinction be articulated between differentiation and discrimination? At one point the Applicants suggested that the difference was that differentiation in the Mandate was protective, whereas apartheid is coercive. Mr. de Villiers countered by arguing that protection and coercion are two sides of a coin; *e.g.*, if the clause in the Mandate prohibiting the sale of intoxicating spirits to the "Natives" operates to protect them, it must also be coercively enforced against any "White" person who would privately try to engage in the sale of liquor. At another point Mr. Gross argued that the difference is that allotment of rights on a group basis is differentiation without being discrimination if it concerns a group which an individual is normally free to quit. Mr. de Villiers rejoined that laws in most countries give different rights to minors as opposed to adults, men as opposed to women, or in some countries to people of certain religions. Yet people are not normally free to quit these groups or, in the case of religion, it would be onerous to require someone to give up his faith in order to be dissociated from the group. Thus Mr. de Villiers concluded by admitting that South Africa differentiates, but argued that the Applicants were really trying to use the *term* "discrimination" to mean "differentiation" so that it would apply automatically to South West Africa without the need for factual inquiries. Indeed, he stressed, the Applicants had argued that even if apartheid were a benefit to the inhabitants it would be illegal, a position which seemed to the Respondent to come a long way from the factual allegations in the Memorials of "deliberate, systematic and consistent" discrimination to the detriment of the moral and material well-being of the inhabitants.

The Applicants countered by resort to international law. Resolutions of the General Assembly had made it clear, they argued, that apartheid itself was illegal and discriminatory. And the Court must follow what the UN has resolved. Nevertheless, there are difficulties with this position. The Applicants had to concede that resolutions of the UN are not binding upon member states. They may express a near-universal sentiment, but customary international law that is binding on everyone must be grounded in actual state practice and acquiescence; it is not enough for most States to say that a dissenting State should change its own practice, a position which Mr. de Villiers termed a "collectivist approach." On the general question, the Applicants conceded that their contention on the norm issue perhaps rested on a law-creating process "which has not heretofore been

considered or passed upon by this honourable Court."[21]

The Applicants then tried arguing that even if the Court were to find no generally binding norm of international law, nevertheless South Africa was bound by a "standard" of precisely the same (anti-apartheid) content of the norm solely because of South Africa's duties as a Mandatory. But the Respondent soon pointed out that this reliance on a standard to bolster the norm argument really meant the abandonment of the norm and thus the abandonment of the effort of trying to get the Court to declare that apartheid itself was illegal. This point was clarified by a question from the bench: Judge Fitzmaurice elicited from Mr. Gross a concession that there was no attempt to prove in the present case that apartheid was illegal in general, but merely that it was illegal for South West Africa. Thus it may have been a strategic error to argue on the basis of the norm, even though a motive may have been a desire to create a salutary rule of international law, for such an argument created a risk that a loss in Court on the norm might carry with it a loss on the companion argument of standards.

The Applicants' case on the standard seemed more solid than the case on the norm, although it still created for the Court the problem of condemning apartheid outright. The Respondent's best counter-arguments were that since apartheid did not exist in other dependent territories it was hard to find an anti-apartheid standard (South Africa being perfectly willing to concede an antidiscrimination standard), and that the UN resolutions based on apartheid were grounded on distorted and untrue facts alleged by professional petitioners and publicity-seekers. The present Case would have been the proper place to look at the true facts, but the Applicants avoided a factual inquiry and indeed accepted the Respondent's version of the facts!

South Africa concluded by showing its distress at the use of the norm and/or standard borrowed from condemnatory UN resolutions. It characterized the Applicants as assigning to the Court "a most unworthy role," that of a "revolutionary tribunal to aid and abet, and to rubber-stamp, the usurpation by the political majorities in international organizations of legislative powers which have not been granted to them in the constitutive instruments."[22] The Court's only function would be to "blindly adopt standards laid down by others," letting the organized international society become legislator, witness, judge, jury and executioner.[23] The use of this language as a capstone to extremely protracted argumentation may have had great effect upon the Court.

THE JULY 1966 DECISION

The final decision of July 18, 1966 might best be explained by an analogy. Suppose that a treaty between the United States and China gives certain rights to Chinese aliens, and a Japanese alien sues the United States government under a clause in the treaty providing for

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[21]Verbatim Record, C.R. 65/23 at p. 43.

[22]Verbatim Record, C.R. 65/48 at pp. 9-10.

[23]Verbatim Record, C.R. 65/20 at p. 57.

suit by any alien in the US Court of Claims to enforce the treaty's articles. The United States government shows up and argues that the treaty is no longer in force, but the Court decides otherwise. Then, while the argument proceeds on the merits, it is suddenly discovered that the alien is not a Chinese citizen. The Court in its final judgment decides not to issue a decision on the merits because the plaintiff lacks capacity to sue.

The question in this example analogous to the problem in the South West Africa Case whether the Mandate still exists, would be whether in a new case the United States would be precluded from arguing that the Chinese treaty is no longer in force. The United States clearly would not be precluded, since the plaintiff in the prior case had no capacity to bring the suit and thus the Court may be argued to have had no power to issue any legally binding decision. Although the Court had previously stated that the treaty was in force, that decision must now be taken to be purely an interim finding for the purpose of establishing preliminary jurisdiction.

The new legal fact in the South West Africa Case (apart from the compositional fact of the death of Judge Badawi) was that the Applicants failed to prove in the argument on the merits that they had any direct legal right or interest in the subject-matter of the dispute, apart from their desire to see justice done to the inhabitants of South West Africa. Therefore the Court in 1966 concluded that they lacked capacity to bring the Case. However, the Court did not cite any evidence that anything had changed since 1962, or that any new facts had come to light; indeed the 1966 opinion could clearly have been derived from an examination of the initial pleadings. Thus the Court opened itself up to the charge that it simply changed its collective mind now that new judges were on the bench. The South African *ad hoc* judge almost confirmed this when he stated in his concurring opinion that the 1966 Court was not "bound to perpetuate [the] faulty reasoning" of the 1962 decision.[24] On the other hand, the radicalization of the Case to the point of asking for a condemnation of apartheid without examination of the facts, and the great resistance at every turn by the Respondent, may have convinced the Court that the only way out was to decline jurisdiction, however tricky it must be to do so.

It is my general impression based on observation of judicial behavior on "large cases" in many countries that a Court is likely to dismiss a case on a "political question" or analogous ground if the defendant raises a tremendous battle about the political consequences of the decision *and* the plaintiff adopts a subdued, concise and moderate "legal" approach (presumably in the attempt to show the Court that a purely "legal" decision is possible). On the other hand, if the plaintiff raises at least an equally thunderous and extensive plea that conditions would be intolerable without an affirmative decision, there seems in practice to be a much better chance that the Court will take the plunge. For if both sides, and not just the defendant, engage in equally vigorous and protracted arguments, the Court tends to realize that it does not solve anything by dismissing the case.

In the South West Africa Case, the Applicants pared down and constantly condensed arguments from their briefs in order to make the briefs appear manageable and

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[24]South West Africa Cases, 1966 I.C.J. Rep. 4, 65 (separate opinion of Judge Van Wyk).

legal. Their oral arguments were much shorter than the Respondent's. They did not appear to welcome a chance to fight South Africa on the Bantustan proposals by seeking interim measures of protection. They opposed the safari. And they refrained from calling any witnesses although South Africa called fourteen and although the Applicants could have come up with extremely impressive witnesses on the question of the moral and material effects of apartheid (such as high officials of all the States of the judges on the Court, religious leaders, Nobel Prize winners, educators, etc.). Clearly the Applicants were trying to expedite the Case and present it in a highly "legal" posture so that the Court might not throw up its hands in despair of ever resolving the complex issues. Yet the Court in its questions throughout, and especially when South Africa called its fourteen experts, demonstrated an intense interest in the "facts" of South West Africa. Moreover, despite their resistance, the Applicants could not block all the attempts by South Africa to elongate the proceedings, with the net result that the Case was protracted and extensive anyway.

On the other hand, the Applicants' strategy came close to being vindicated. It is very dangerous to criticize broad strategic operations because of the wealth of detail upon which each decision was made being impossible for the researcher to recapture. It is particularly difficult in a lawsuit where the suggested strategies of counsel are subject to being overruled by the countries who are the parties in interest.

With respect to the individual submissions in the Case, it is not at all clear that the Applicants would have won easily had Judge Badawi not died, Judge Bustamante not been ill, and Judge Khan not been disqualified (he had previously been an *ad hoc* judge for the Applicants). By examining each of the seven dissenting opinions, we see that of the four judges who took up the individual submissions of the Applicants only two stated that apartheid violates an international norm and/or standard. Judge Jessup of the United States, who wrote the longest dissenting opinion, confined his remarks largely to the question of standing of the Applicants but went out of his way at the end to state that there was no basis for the international norm contended for by the Applicants. On the issue of whether South Africa violated the status of the territory, or attempted to modify it unilaterally, only one judge agreed with the Applicants while Judge Tanaka of Japan explicitiy disagreed (the others did not discuss the point). The allegation of militarization of the territory in violation of article 4 of the Mandate convinced no one; Judge Tanaka explicitly found that the Applicants should have lost on that issue had the Court taken up the merits of the dispute. On the other hand, the dissenting judges who alluded to the issues agreed that the United Nations should have supervision over an existing Mandate, and that South Africa had a duty to submit reports and petitions.

The Court's opinion touched upon none of these issues, but confined itself solely to the question of the Applicants' capacity to sue. The Court stated explicitly that it was not pronouncing either way on the issue of whether the Mandate was in force, and also stressed that no implication can now be drawn from the 1962 opinion on this point. The Court elaborated on the 1962 dissenting opinion of Judges Spender and Fitzmaurice to the effect that the jurisdictional clause of the Mandate (article 7) was intended only to confer jurisdiction on the other members of the League of Nations with respect to "special interests" (*e.g.*, economic concessions, missionaries) in the mandated territory, but that

there was no jurisdiction intended for the purpose of policing the Mandatory power in its administration of the territory. This latter function was for the League Council, on which the Mandatory would have a seat and a veto on issues relating to administration of the mandated territory.

The Court lumped together in the latter "conduct" provisions of the Mandate the Mandatory's responsibilities to the inhabitants of the territory and its responsibilities to the League, but the arguments given by the Court to support its position were addressed to the question of responsibilities to the inhabitants. For instance, the Court stated that if any member of the League could sue South Africa to enforce the member's concept of what South Africa should be doing in South West Africa, then South Africa would be caught between the different expressions of view of some forty or fifty States as well as the League Council. This is a good argument to suggest that article 7 of the Mandate was not meant to cover cases of enforcement of the Mandatory's obligations to the inhabitants (although a good argument can be made on the other side of this issue, as Judge Jessup did in his dissent), but it is not a convincing argument as to the issue of the Mandatory's responsibilities to the League (*e.g.*, reports, petitions, submission to supervision). For in the latter case there could only be one result, not forty or fifty different ones. Thus it is conceivable, although not at all likely, that if a new case could possibly be brought against South Africa as to its obligations to the United Nations under the Mandate, the Court might reach a different result on this point.

The widespread African dissatisfaction with the Court's judgment resulted in a General Assembly resolution of October 28, 1966 terminating the South West African Mandate and vesting responsibility for the administration of South West Africa directly in the United Nations.[25] As if realizing that this resolution will in no way be heeded by South Africa, an additional clause established an *ad hoc* committee to report back to the General Assembly no later than April 1967 as to practical means for implementing the resolution. There is almost a feeling of relief among the African states that action will no longer have to await judicial procedures, but may now be direct and to the point, and the convergence of the South West African situation with the precedent-breaking resolution in the same session of the General Assembly calling for mandatory sanctions against Rhodesia may bring the issues to a head sooner than is generally expected.[26]

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[25]G. A. Res. 2145 (XXI).

[26]*See* D'Amato, "Apartheid: Catalyst at the U.N.," 83 Christian Century 1303 (1966).