

Untying the Grotian Knot

How Tanaka Kōtarō's Christian approach to international law disentangled the moral quandary of the *South West Africa* cases

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The *South West Africa* Cases presented the International Court of Justice (ICJ) with a seemingly intractable problem. The Petitioners in the Cases, Ethiopia and Liberia, alleged that the Respondent, the Union of South Africa, was failing to abide by the Mandate System under which South Africa had come into possession of the former German territory of South West Africa (today, Namibia). South Africa, however, argued that the way in which the mandate was governed was essentially no concern of other states. This argument presented a serious, and seemingly unresolvable, problem for the ICJ. South Africa displayed flagrant disregard for human dignity in planning and enforcing a system of racial segregation, apartheid, which relegated millions of people to lower social strata. However, the secularized international law paradigm on which the ICJ relied had no way to counter South Africa's arguments. While it was clear that South Africa was acting unjustly, the deracinated natural law system of Hugo de Grotius (1583-1645) on which international law was premised had no way to untie this Grotian knot and permit of more substantive legal arguments on the grounds of the dignity of the human person or human rights. Procedure, in other words, trumped morality. The case seemed stuck. However, ICJ jurist Tanaka Kōtarō (1890-1974), a practicing Catholic, deployed strongly metaphysical—that is, Christian—natural law reasoning in his dissenting *South West Africa* Cases judgment to untie the Grotian knot and solve the moral dilemma of apartheid within an international law framework. In this paper, I examine Tanaka's rulings (in particular his now-classic 1966 dissent) and show that his application of Catholic natural law in the *South West Africa* Cases not only solved the problem at hand, but also allowed for a much more robust vision of the moral law to prevail in international relations in the future.

Keywords: Tanaka Kōtarō; *South West Africa* Cases; International Court of Justice; apartheid; natural law; Hugo Grotius

1. Introduction

In 1920, following Germany’s defeat in World War I, the Union of South Africa was granted oversight of the former German territory of South West Africa under the Mandatory System of the new League of Nations. International law scholar Richard A. Falk notes:

South West Africa was a German colony from 1892 to 1915. It was occupied by South African armies during World War I. Germany renounced its colonial interests in the territory by Articles 118 and 119 of the Treaty of Versailles in favor of the principal victorious powers. After a major diplomatic effort the views of President Woodrow Wilson prevailed and these colonies were not recolonized or annexed as spoils of war. Instead, the mandates system was evolved to establish a tutelary responsibility on the part of the organized international community for the welfare of the inhabitants of mandated territories. The essential features of the mandates system are spelled out in Article 22 of the Covenant of the League of Nations and in the text of each mandate agreement. In essence, an advanced country was selected as Mandatory to give practical effect to the intention of the League to promote the well-being of the inhabitants (Falk 1967: 2).

Under the Trusteeship arrangement of the new United Nations which took over from the defunct League of Nations in 1946, the Union of South Africa was to relinquish South West Africa to international oversight (Hayden 1951: 226-227; Haas 1953: 15). This South Africa refused to do. International oversight was the last thing that South Africa wanted in its racially-segregated territories (Sayre 1948: 267, 272-273; *The American Journal of International Law* 1950).

Geographically, ceding South West Africa to South Africa was a sensible thing to do, because South West Africa and South Africa shared a long border, and so South Africa would be readily able to administer South West Africa. However, there were also very good reasons not to cede South West Africa to South Africa. The most obvious reason was the system of apartheid, which South Africa formalized in a series of laws and restrictions beginning in 1948 (Morgan 2021: 386). Apartheid was a racist caste system (Polymenopoulou 2014: 461). People of European extraction were at the top of the system and enjoyed the plenary of rights and privileges accruing to South African citizenship. The lower one went on the caste scale, though, from Indians to “Coloureds” to Africans, the more rights and privileges were exchanged for burdensome oppression. At the bottom of the apartheid system were native South Africans, who lacked even basic rights and were furthermore quarantined from European citizens and subjected to daily insults to human dignity.

Pretoria, the capital of South Africa, extended this system to South West Africa when the latter came under its mandatory guardianship. South West Africa had been the scene of genocide under the

former colonial masters, even before those masters had organized their discriminatory politics into the National Socialism which had held Germany in its grip since 1933, and expanding swaths of Europe since 1939 (Reitz and Mannitz 2021; Bollig 2008; Samudzi 2020/2021; Bachmann 2018). South Africa was a haven for many former National Socialists after their Third Reich ended in Germany, and even though South Africa ostensibly fought against Germany in World War II, sympathies for the Nazi regime ran high (Tenorio 2021; Chossudovsky 1997; Jacoby 2016: 456, 459-462; Ellis 1998; Bunting and Segal 1964; see also Herzog and Geroulanos 2021: 80). It was therefore not a surprise when South Africa extended its apartheid regime into South West Africa after South West Africa was delegated to South Africa under the Mandate program (Leslie 1994). If anything, some form of racist governance of South West Africa may have been accepted as unavoidable by the League in the prewar period. “South African policies in South West Africa were mildly challenged at various points during the period of League history,” Falk writes, “but the organs of the League were dominated by the spirit of colonial paternalism and nothing much was done to interfere with the quality or quantity of South African governance of South West Africa” (Falk 1967: 3).

Things changed after the Second World War, however. “Since the existence of the United Nations,” Falk continues, “the double attempt of the General Assembly to achieve rapid decolonization and to eliminate racial discrimination has produced increased criticism of the way in which South Africa was discharging its role as Mandatory” (Falk 1967: 3). The General Assembly therefore asked the International Court of Justice for legal advisory opinions three times in regard to South West Africa. The ICJ acknowledged the United Nation’s authority as League successor over South Africa’s Mandatory. But South Africa dug in its heels (Falk 1967: 3). Not only did South Africa intend to continue administering South West Africa under its apartheid regime, but it also announced its intention “to incorporate the mandated territory into the Union [of South Africa]. [...] When the Trusteeship System was instituted, the Union of South Africa was the only mandatory which refused to yield its dominion over a mandated territory” (University of Pennsylvania Law Review 1967: 1170). Already in 1949, South Africa had “expanded its Parliament to include South West African representatives elected by Europeans only. That same year the submission of annual reports, as provided for in the Mandate, was unilaterally curtailed by the Union [of South Africa]. Thus, the Union had, in effect, ceased functioning as a mandatory”¹ (Washington University Law Quarterly 1967: 165).

¹ Some claim that it was the Union of South Africa, on the contrary, which should have lost legitimacy due to apartheid (Talmon 2004: 123-129).

In 1960, Ethiopia and Liberia brought suit before the International Court of Justice (Stevenson 1967: 116-118). The suit charged South Africa with failing to abide by the terms of the Mandate as envisioned by the former League of Nations, under which the Mandate system had first been established (Falk 1967: 1). The League of Nations charged Mandatory guardian states with upholding the “sacred trust of civilization” in administering territories and peoples under mandatory supervision (The South West Africa Cases 1967: 175-176). In addition, the League exhorted each Mandatory to “promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory” under the Mandatory’s purview (Pollock 1969: 767). Ethiopia and Liberia argued that the systematic and legalized racist regime in South Africa, and by extension in South West Africa, did not evince much regard for the “sacred trust of civilization” vouchsafed to South Africa as a Mandatory.

However, South Africa counterargued that the “sacred trust of civilization” was not an actionable clause, being general language without specific detail. Whether South Africa’s methods of administering territory countenanced the “sacred trust of civilization” was not a matter which could be debated, as the term was too vague to allow for any final pronouncements. Furthermore, South Africa argued that the Mandate system had been established under the League of Nations, which no longer existed. Therefore, the “sacred trust of civilization” language, which appeared in the original League of Nations documents, was not carried over when the League of Nations was dissolved and the United Nations was subsequently formed, and was therefore not binding on mandate powers. And at any rate, South Africa contended, the Applicants in the case did not have standing to bring action against South Africa, because this action could arise only from the vague, and now dead, language about the “sacred trust of civilization” from the defunct League of Nations (Alexandrowicz 1971).

As an anonymous reviewer of a draft of this essay pointed out—a possibility which had not occurred to me at all—Liberia and/or Ethiopia may very well have had ulterior motives in bringing the case against South Africa. In the documents submitted to the ICJ, Ethiopia and Liberia focused on civilization. Apartheid was clearly counter to this. But either or both countries may have been using such arguments as cover for other motivations. For example, economic or political rivalry certainly cannot be ruled out. Therefore, the “standing” issue could be more complex than the procedural framing that South Africa advanced. In any event, the International Court of Justice wavered in its rulings until, in 1966, after a series of appeals and reversals, the ICJ found in favor of South Africa. In doing this, the ICJ followed the strictly procedural line of reasoning which South Africa had advanced. The Applicants, for the reasons given by South Africa, lacked standing, the ICJ ruled, and so therefore

the ICJ could not take up the much broader civilizational and moral claims which the Applicants had raised (Shelton 2006: 309).

In the *South West Africa* Cases ruling of 1966, the majority of justices on the ICJ had followed a narrow proceduralism which looks to the means of law and not to its ends (see Talmon 2012 on substantive and procedural rules; see also Rosenne 1961: 859-860). Standing is important, to be sure, and there is much more to decisions of standing than procedure.² But standing still does not give us the final scope that substantive justice readings do. Standing prescinded from much—most—of the meat of the Applicants' complaints. But why was standing able to trump more substantive justice? The basis for this line of thought, as international relations researcher Alexander J. Pollock understood it, was "the emphasis on nation-states as the relevant actors in international affairs" (Pollock 1969: 769). Article 2 of the original Mandate granted that "The Mandatory shall have full power of administration over the territory [...] as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require" (Pollock 1969: 769). On the face of it, South Africa appeared to have an impregnable position. There were no moral considerations to parse. South Africa had "full power of administration over the territory [...] as an integral portion of the Union of South Africa," and furthermore had leave to "apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require." On the more narrowly procedural reading, then, case closed.

This is indeed the line of argument which South Africa pursued, and the ICJ largely agreed. The Union of South Africa had only to pair the above language from Article 2 of the Mandate with Article 2, Section 7 of the United Nations Charter to convince a majority of justices on the ICJ that apartheid was within the sovereign rights of South Africa as a nation-state, and that other states had no standing to bring petitions or suits on grounds of offended morals. The United Nations Charter, Article 2, Section 7 states that "nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters for settlement under the present Charter" (Pollock 1969: 770; see also Higgins 1970: 42-43; Venzke 2017).³ Yet another fenceline separating South Africa from whatever moral considerations international law justices might wish to bring to bear on apartheid.

² I am grateful to an anonymous reviewer for comments on standing, which I had mistakenly characterized in an earlier draft as "merely procedural." Standing, however, as the reviewer pointed out, is not merely procedural, but takes in the full measure of what a case is about and what a court may and may not decide.

³ South Africa also argued that, as a "C" Mandate "brought under the Trusteeship System [without] any reference to judicial supervision," the ICJ could not thus interfere in South African affairs. This argument was dismissed by the court, but was

And the majority of the justices on the ICJ stayed well outside that fenceline. In the second phase of the *South West Africa* cases, the International Court of Justice declared that “[h]umanitarian considerations [are] not in themselves sufficient to generate legal rights and duties. A court of law [cannot] take account of moral principles unclothed in legal form” (Hernández 2013: 30-31). This was in keeping with the older “law of coexistence” norms in international law, as international law scholar Gleider I. Hernández argues in a separate context, before the more robust “law of cooperation” and the “underlying principles” of that cooperation took hold (Hernández 2013: 15; see also generally Alderton 2011; Zander 1959; Lloyd-Jones 2019; and Nicholson 2015; see also McKean 1966: 141, re: the “Tanganyika clause”). In other words, the ICJ adopted a Westphalian, Grotian interpretation of the *South West Africa* Cases. What happens in Cape Town stays in Cape Town. Again, case closed.

However, while the majority ruled in favor of South Africa in 1966, the ruling was not unanimous. The ICJ split evenly for and against, and the deciding, tie-breaking vote was cast by Australian court president Sir Percy Spender (1897-1985) (Kattan 2018). The case was not as cut and dry as it might first seem. Among the dissenters was a Japanese justice named Tanaka Kōtarō (1890-1974). His 1966 dissent followed the proceduralist line of reasoning to a point. Tanaka allowed that there was merit to many of South Africa’s legal claims, and he made no attempt to dismiss South Africa’s arguments in toto by linking the entire case in all its details to the pernicious practice of apartheid. But at the same time, Tanaka did not close his eyes to apartheid, as Westphalia and Grotius would have us do, and declare the ICJ incapable of taking on moral questions simply because those questions arose within a Grotian national boundary. Tanaka did not allow procedure to defeat law’s higher calling, which is to effect justice, and not just to be effective at settling disputes. Tanaka touched on the bigger moral questions at stake in the *South West Africa* Cases, notably the dignity of the human person and the consequences for that dignity when racist discrimination was allowed to continue under the cover of law (see McCrudden 2008: 682). It is in this approach that Tanaka quietly worked to help overturn the old Grotian persuasion of international law and set international legal scholars and practitioners onto a course of greater awareness to the substance of the issues which international law is often asked to decide.

Many scholars have examined the *South West Africa* Cases from a variety of angles. Some scholars stress the sovereign immunity or evolutionary law angles (see, e.g., Shelton 2006; Shelton 2003; see also generally Levy 1998). Other scholars stress the natural law or *jus cogens* (Doak 2019; Zamora 2014: 224;

heavily debated at the time and appears to me not to have lacked merit (Green 1967: 55). But it is parallel to the issue of standing so I elide discussion of it.

Thomas and Small 2003 on the larger issue of apartheid). Yet others follow the threads of procedure and process, of institutional context and the ways in which deliberative bodies influence the ICJ (Öberg 2006: 883-884). There is one angle, however, that appears to have been overlooked. That is the kind of natural law upon which I believe Tanaka relied in arriving at his dissent. International law at the time was largely rooted in the natural law thinking of Hugo Grotius (1583-1645). Grotius' conception of natural law was one of secular virtue rooted in state sovereignty. According to natural law scholar and historian Heinrich A. Rommen, Grotius taught, "in order fully to bring out its immutability, that the natural law would have force even if there were no God" (Rommen 1998: 57). This is a hypothetical, yes, but one the mere posing of which strikes at the heart of the subject at hand. A natural law that works without God is, on the Catholic reading at least, most unnatural. And yet, for most of the history of international law Grotius' views held great sway (Hall 2001: 269-270). Tanaka, however, was a Catholic, and was influenced by the natural law thinking of St. Thomas Aquinas (1225-1274). As a Catholic, Tanaka would also have known of Pope Pius XII's (Eugenio Maria Giuseppe Giovanni Pacelli, 1876-1958) Christmas Allocution of December 24, 1942, in which the Holy Father taught that "outside of the Church of Christ, juridical positivism has reigned supreme, attributing a deceptive majesty to the enactment of purely human laws, and effectuating the fateful divorce of law from morality" (Notre Dame Law School 1949: 126). This "divorce of law from morality" would surely have seemed "fateful" to Tanaka as he read through the briefs on the *South West Africa* Cases and learned how Africans were treated in southern Africa—abuses seemingly untouchable by the Grotian, secularized variety of the natural law.

Under the Grotian system, Tanaka might have been left without a way forward. The Catholic natural law tradition, however, is a substantive justice tradition. Catholic natural lawyers who take the metaphysical nature of the natural law seriously cannot be content merely to have followed the law in books. They must seek to follow the law in the heart, which at times requires that laws written in books be creatively interpreted (Romans 2:12). One way, therefore, to think about Justice Tanaka's 1966 minority ruling in the *South West Africa* Cases is to see it as a Catholic response to the Gordian knot of procedure which Grotius had left behind in his attempt to secularize the natural law, the Grotian knot of de-Christianized international proceduralism.

2. The deracination of the natural law

The idea of a law written on the heart was perhaps most famously articulated by St. Paul in his Letter to the Romans, cited above. Even before St. Paul's time, however, the idea of a universal and internal compulsion toward the good was taken up by thinkers, fittingly enough, East and West. Roman political

philosopher Cicero (106-43 BC) wrote of the natural law in *The Laws* (*De legibus*). “We are born for justice,” Cicero writes; “what is just is based, not on opinion, but on nature.” (Cicero, tr. Rudd 1998: 107; see also Cicero, *De legibus*, Book I, 6-7) Confucius (ca. 551-479 BC), too, and also his posthumous disciple Mencius (ca. 372-289 BC), advocated a theory of human nature and government which some have interpreted as a form of natural law (Hu 2013: 138, 140; Wu 1954; Dionisio 2014; Rošker 2017: 850-851, 860; Zhang 2018: 96-105; but see also Hu 1927: 37-41). Sophocles (ca. 497-406 BC) had Antigone make a strong endorsement of natural law in burying her brother against the unjust command of the king (Padoa-Schioppa 2017: 111). St. Thomas Aquinas brought natural law thought to a high point in the thirteenth century. Aquinas’ teachings, in turn, were a Christian reformulation of the ideas of Aristotle (384-322 BC) (see Duke 2020; Lane 2021: 329-330; Needham 1951: 8-9). Natural law was everywhere before the global twilight of the gods with the rise of pre-Enlightenment and Enlightenment rationalism.

Natural law thinking is also an often-overlooked component of the conquest of the New World. Bartolome de las Casas’ (1484-1566) Valladolid Debates (1550-1551) with Juan Ginés de Sepúlveda (1494-1573) were central to the conceptual framing of the conquest, for example. Contemporary natural law thinker Graham McAleer holds that Thomist Francisco di Vitoria (1483-1546), founder of the Salamanca School, “was the first person to articulate the idea of regime change on the basis of natural law” (McAleer 2022). Vitoria also argued that the natives of the Americas had rights (Hernández 1991). Wherever one turns, old world or new, eastern hemisphere or western, one finds some version of a natural law rooted in divine sanction.

During the sixteenth and seventeenth centuries, however, the Europe which had begun to conquer the world entered into a period of political and religious fracturing. The Protestant Reformation and the subsequent Thirty Years War brought violence to Europe on a scale possibly never before seen there over such a sustained period of time. Some estimates place the number of dead over the Thirty Years War at one-third to one-half the population of the countries and regions involved. Out of this carnage emerged an armed truce known as the Peace of Westphalia (1648). The premise of this new political arrangement for Europe was *cuius regio, eius religio*. Politics determined religion. The polarity of the old world order had been flipped. The metaphysical backdrop to the natural law was removed, leaving only a balance-of-power, quasi-natural law in its place. This new natural law—a law not of human nature as subject to the divine command, but of human nature prone to violence and in need of balancing-out against other, equally violence-prone human powers—was developed in large part by Hugo Grotius (Rommen 1998: 62).

The work of Grotius must be understood as a product of its time. The entire spirit of Grotius' age was the elevation, even apotheosis, of reason. More and more, God took a backseat to the logical patterning of the human mind. As legal scholar of Europe Antonio Padoa-Schioppa writes:

[...]jurisprudence in the seventeenth century took a fundamental turn. From this moment on natural law became a visible presence in the sphere of law, and was to profoundly influence its development both in the theoretical treatment and in the work of all those who proposed new legal rules for the future. It was founded on a conception in which man was seen as a creature that united reason to instinctive needs, reason being, as we have said, an essential element of his nature: a secular approach which turns away from the medieval vision (Padoa-Schioppa 2017: 342).

While Grotius was not a secularist himself, his natural law doctrines were intended to be applicable in a Europe shattered by religious discord. Grotius, writes Padoa-Schioppa, “aimed to identify a set of general principles and rules based on reason, and thus shared by all human beings. This aim is clear [...] if we consider the historic condition of early seventeenth-century Europe, in which [...] not only was a superior authority of a temporal nature (as the medieval Empire had been) no longer recognised, but neither was that of the Roman Pope as a spiritual authority as it had been before the religious Reformation” (Padoa-Schioppa 2017: 345). In this way, Grotius' work *De iure belli ac pacis* (1625) “expresses the idea that the fundamental element of natural law resides in the rational nature of mankind and not in God's will. Grotius' well-known statement—that natural law would be true and just even in the absurd hypothesis that God did not exist—meant precisely this” (Padoa-Schioppa 2017: 346; but see Haggemacher 2012: 1099). In an age in which religion had stopped acting as a unifying force in Europe, and instead had become a creature of human politics and, often as such, also a pretense for war, the natural law was concomitantly deracinated into a shorthand version independent of not only creed, but also of faith in God entire.

This is all a far cry from, indeed a fundamental break with, St. Thomas Aquinas' understanding of natural law as “nothing else than the rational creature's participation of the eternal law” (*Summa Theologica*, Q. 91, Art. 2, in Pegis 1948: 618). Here, “participation” is key. St. Thomas does not advance the “absurd hypothesis” that God does not exist, because it is absurd. Reason does not stand alone. It takes part in something greater than itself. As St. Thomas puts it in the same passage:

[the rational creature] has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist, after saying (*Ps. Iv, 6*): *Offer*

up the sacrifice of justice, as though someone asked what the works of justice are, adds: Many say, Who showeth us good things? in answer to which question he says: The light of Thy countenance, O Lord, is signed upon us. He thus implies that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the divine light (*Summa Theologica*, Q. 91, Art. 2, in Pegis 1948: 618; emphasis in original).

Not only this, but reliance upon the individual reason, even in pursuit of a shared understanding as Grotius declared himself to be, would seem to defy the commonality of justice, which appears to be prior to reason alone. “The just and the unjust,” writes Aristotle, mentor across the centuries to St. Thomas, “always involve more than one person” (*Nicomachean Ethics*, V, xi (1138a 19-20), in McKeon 1941: 1021; see also Duke 2020: 3). This is key to the natural law thinking of Aquinas, and also Tanaka. One cannot abstract from persons to states and then act as though the persons do not remain. States have rights of their own, but those can be, and sometimes must be, outclassed by the rights of the human person.

For Grotius, however, contra Aristotle, Aquinas, and Tanaka, only contractual justice (“expletive justice (*iustitia expletrix*)”) was true justice—a rejection of Aristotle’s much more substantial notion of distributive justice (“attributive justice (*iustitia attributrix*)”). Grotius favored the “minimal” justice of contracting parties. (Forde 1998: 640) This “moral minimalism,” argues political science scholar Steven Forde, was one way in which Grotius “create[d] greater flexibility to cope with the ‘realist’ pressures of international politics and war” (Forde 1998: 641; see also Hall 2001: 273-274). Moral minimalism may be expedient. But it is not the natural law, not by a long shot.

After Grotius as well, Immanuel Kant (1724-1804), too, sought to formulate a natural law without God behind it, a “categorical imperative” which, at bottom, is an attempt to replace substantive justice with a maximalization of contentless procedure (see Duke 2016). Much later, natural law thinkers such as Erich Przywara (1889-1972), came to realize that the natural law was defective in its secularized iteration (McAleer 2019; Przywara 2014). In recent years, the battle to re-metaphysicalize the natural law continues (Blake 2011; Duke 2013; Murphy 2007, Hinton 2003; Duke 2016; Tollefsen 2021; George 2008; Barnett 1997; Hittinger 1988). The general progression, from the Peace of Westphalia to today, has been away from metaphysical content and moral certainty, and toward a pragmatism of the natural law, a “law of nature” for regulating the conduct of individuals more than a law written on the heart for guiding the moral progress of human persons (see Budziszewski 1997). One of the first to take action to arrest the de-Christianization of the natural law and return international law to its metaphysical roots, away from Grotius and toward Aquinas, Aristotle, and St. Paul, was Tanaka Kōtarō.

3. The Tanaka dissent

Across the transformations of natural law thought from universal and inner moral driver, to divine command, to Christian expression of God's will for mankind, to privatizable framework for peaceful political co-existence, to telescoped and amplified procedure meant to stand in for the formerly transcendent, we can glimpse the dilemma which Tanaka Kōtarō faced in deciding the *South West Africa* Cases. Under older and more robust iterations of natural law thought, Tanaka would have been able much more readily to move beyond the procedural constraints imposed by the various charters and other legal instruments behind which South Africa was conducting its dehumanizing business. Under what was essentially a Grotian understanding of natural law, however, Tanaka and the other ICJ justices were stuck. As long as South Africa was adhering to the letter of the Mandate—which it was, or which it could at least plausibly argue that it was—it was difficult, if not impossible, to charge South Africa with violations which would necessitate piercing the “veil” of its state sovereignty. What went on inside of states was, after all, a question of Westphalian discretion. Grotius did not subscribe to such a hard distinction, but his framing unfortunately left later international lawyers with precious little with which to work when shifting the focus of international law questions from what went on between states to what went on inside of them.

This maximalist sovereignty, a carapace of assumptions rooted in the Westphalian motto of *cuius regio eius religio*, denatured natural law. This form of latter-day Grotian natural law was impotent in the face of violations of due process with grave moral consequences (see generally Koskenniemi 2001). As Grotius understood the rights of states and sovereigns, according to political science scholar Forde cited above, “When a manifestly unjust legal decision is rendered, it does not carry any moral obligation, though citizens cannot legally (*licite*) resist the decision. If another nation or its citizens are harmed by such a decision, they may prosecute their claim by force” (Forde 1998: 646). Tanaka had to find a way to reset the natural law onto its original transcendental, even Catholic, foundations in order to speak honestly about South Africa's apartheid administration of South West Africa (and of South Africa, too). But as a justice with the ICJ, Tanaka couldn't make his points by force of arms. He had to rely on reason, but, where reason fell short, also on the Christian understanding of the natural law.

Tanaka's lengthy dissent in the *South West Africa* Cases should be read as not just a ruling on the matter at hand, then, but as a strategic attempt to shift international law jurisprudence away from a Grotian natural law focus on procedure, and toward a Catholic natural law focus on justice. Tanaka signals this move very early in his opinion, on the second page, by framing his argument in what I read as a stand-in choice between a narrow or broad interpretation of the “interests which may be possessed

by the member States of the League [of Nations] in connection with the mandates system” (Tanaka 1966: 251). These interests “are usually classified in two categories,” Tanaka argues.

The first one is the so-called national interest which includes both the interest of the member States as States and the interest of other nationals (Article 5 of the Mandate). The second one is the common or general interest, which the member States possess in the proper performance by the mandatory of the mandate obligations (Tanaka 1966: 251).

It was not until I had read to nearly the end of Tanaka’s opinion that it dawned on me what he had been doing, here, from the beginning. By contrasting the national, state-level interpretation of mandate obligations against the “common or general interest” interpretation of those mandate obligations, Tanaka is already setting up his argument as a contest between the Grotian approach to the natural law (i.e., the state-level approach) and the more catholic, that is to say Catholic, approach (i.e., “the common or general interest;” see Rice 1993: 64-65).

In this framing, “Common or general interest” could just as easily be read as “distributive justice,” an Aristotelian principle which St. Thomas Aquinas incorporated into his own thinking about the natural law. “Law belongs to that which is a principle of human acts,” St. Thomas writes. And the reason for this is:

because it is their rule and measure. [...] Now, the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is happiness or beatitude. [...] Consequently, law must needs concern itself mainly with the order that is in beatitude. Moreover, since every part is ordained to the whole as the imperfect to the perfect, and since one man is a part of the perfect community, law must needs concern itself properly with the order directed to universal happiness. Therefore the Philosopher [i.e., Aristotle] [...] mentions both happiness and the body politic [in his “definition of legal matters”], since he says that we call those legal matters *just which are adapted to produce and preserve happiness and its parts for the body politic*. For the state is the perfect community, as he says in *Politics* i (*Summa Theologica* Q. 90, Art. 2, in Pegis 1948: 612, citing *Nicomachean Ethics*, Book V, i (1129b 17) and *Politics*, I, i (1252a 5), emphasis in original).

In an Aristotelian-Thomistic way, Tanaka is proposing to decide not only whether South Africa may continue to rule South West Africa under an apartheid regime, but also, in a much bigger way, whether the Grotian interpretation of the natural law may pertain in the face of clear injustices which mere procedural jurisprudence does not and cannot rectify. “Whether the adjudication clause, namely Article 7, paragraph 2, of the Mandate can cover both kinds of interests, or only the first one, namely

national interest, is the question that has to be answered in the present cases,” Tanaka affirms (Tanaka 1966: 251). In pitting the two interests against one another in this way, Tanaka is disentangling them and also setting the stage for the common interest to prevail over the national interest, contra Grotius.

Another big clue as to what Tanaka is doing comes in the following paragraph. Here, Tanaka can be seen as incorporating substantive justice within the Grotian framework. He does this by viewing the member states of the League of Nations, not as discrete entities walled off from one another by state sovereignty, but as having a “personal” quality which imbues them with an “interest [...] in the realization of the objectives of the mandates system and in the proper administration of mandated territories” (Tanaka 1966: 251). This makes the “common or general interest” considered above “different” from the “national interest,” and also makes:

the interest which the member States possess concerning the Mandate [...], in its content, the same for all members of the League. [...] However, the fact that it is of this nature does not prevent it from possessing the nature of interest. There is no reason why an immaterial, intangible interest, particularly one inspired by the lofty humanitarian idea of a “sacred trust of civilization” cannot be called “interest” (Tanaka 1966: 251-252).

Tanaka here removes the procedural justification which South Africa had been using to wall off insight into and commentary on the moral nature of its apartheid practices. The “sacred trust of civilization” is a kind of common interest. It can trump national interest where warranted. In other words, international law can be Thomistic as well as Grotian. The “absurd hypothesis” does not have to frame international law. The Thomistic-Aristotelian hypothesis, the one that takes metaphysics seriously, can do a much better job.

This reframing of the natural law basis of international law as Thomistic would surely have struck many at the time (as it would today) as retrograde. In that sense, what Tanaka does next is a misdirection of great subtlety and art. For he conceals his return to the Catholic understanding of the natural law under the cover of legal progressivism. He couches his *ressourcement* in the language of the evolution of legal norms in light of human development (see Lachs 1992: 698; Zybert 2008). It is a masterful misdirection.

The historical development of law demonstrates the continual process of the cultural enrichment of the legal order by taking into consideration values or interests which had previously been excluded from the sphere of law. In particular, the extension of the object of rights to cultural, and therefore intangible, matters and the legalization of social justice

and of humanitarian ideas which cannot be separated from the gradual realization of world peace, are worthy of our attention.

The fact that international law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other “material” or so-called “physical” or “tangible” interests was exhaustively pointed out by Judge Phillip C. Jessup in his separate opinion in the *South West Africa* cases, 1962 judgment (*I.C.J. Reports 1962: 425-428*). As outstanding examples of the recognition of the legal interests of States in general humanitarian causes, the international efforts to suppress the slave trade, the minorities treaties, the Genocide Convention [1948/1951] and the Constitution of the International Labour Organization [1919 et seq.] are cited (Tanaka 1966: 252; see also 291-294).

Tanaka thus gives readers the impression that his thinking is in line with the forward progress of legal development. He cites the Genocide Convention and ILO constitution, both of which of course far postdate anything by St. Thomas Aquinas, let alone Aristotle. But what Tanaka is doing beneath these modern citations is to reframe international law on the thought-lines of precisely those much older thinkers.

Now, it is true, of course, that Christians have not always been as progressive as twentieth-century human rights advocates were. As a reviewer of this essay rightly pointed out, St. Paul did not encourage slaves to rebel. A further complication pointed out by the same reviewer is the overlap, perhaps conflation, between Christianity missionary movements and human rights movements in the twentieth century, a space in which Tanaka may in part have formed some of his ideas. Progressivism as Christianity, and Christianity as Progressivism, is a major roadblock facing my reading of what Tanaka is doing in this part of his dissent. However, I believe these misgivings can be alleviated by understanding Tanaka’s as a Catholic natural law reading of international law, and not as a specifically Biblical or even missionary reading. What Tanaka is trying to do is bring to bear the Christian justice of St. Thomas Aquinas on the *South West Africa* Cases, and not a vague notion of human rights which are perhaps themselves, as with the Grotian concept of international law, deracinated strains of Protestant Christianity.

The “Progressivist *ressourcement*” continues. In the next two, short paragraphs, Tanaka “incorporate[s]” the natural law into Grotian proceduralism, right before the reader’s eyes although seemingly in deference to a progressivist interpretation of law.

We consider that in these treaties and organizations [i.e., those cited above in the context of the discussion of the Jessup ruling] common and humanitarian interests are incorporated. By being given organizational form, these interests take the nature of “legal interest” and require to be protected by specific procedural means.

The mandates system which was created under the League, presents itself as nothing other than an historical manifestation of the trend of thought which contributed to establish the above-mentioned treaties and organizations. The mandates system as a whole, by incorporating humanitarian and legal interests, can be said to be a “legal interest” (Tanaka 1966: 252).

Following this “incorporation” of the ideals of justice into the proceduralism of the prevailing international law order—a proceduralism which Tanaka primes for receptivity to Catholic natural law by presenting it as progressing along a course of enhanced sensitivity to “general humanitarian causes”—Tanaka then personalizes it, turning in his next discussion to argue that the legal interest of the Mandate must be realized by states for the sake of “each member of [...] human society,” a realization in which other states “may possess a legal interest” (Tanaka 1966: 252-253).

The stage is now set for Tanaka to frame Article 7, paragraph 2 of the Mandate as providing the Applicants, namely Ethiopia and Liberia, with the standing to petition the International Court of Justice for redress of grievances. The grievances themselves are manifest. It is the procedural breastworks behind which the grievances shelter which must be torn down. Tanaka does this in part by generalizing the standing of the Applicants, that is, by emphasizing (without mentioning) the common good. “In the present cases,” Tanaka writes:

the Applicants appear formally in an individual capacity as Members of the League, but they are acting substantially in a representative capacity. That not only the Council, but the Member States of the League are equally interested in the proper administration of the mandated territory, is quite natural and significant. In this respect, the individual Member States of the League penetrate the corporate veil of the League and function independently of the League (Tanaka 1966: 254).

Tanaka has demolished the old Grotian pretenses of indifference to substantial, commutative justice and incorporated Catholic natural law principles into Grotian balance-of-power-ism. He has done this by “penetrat[ing] the corporate veil of the League,” thus clearing the way for a different kind of incorporation to follow.

4. The human person as the context for *Jus Cogens*

The rest of the Tanaka opinion is a variation on the themes presented at the opinion’s outset. Throughout, Tanaka skillfully dismantles the procedural, Grotian obstacles to justice which the Respondents have thrown up and which the majority of the ICJ remains too timid to topple. In the place

of those obstacles, Tanaka cultivates a regard for the common good and the object of that good, which is the flourishing of every human person. “The realization of the ‘sacred trust of civilization,’” Tanaka says, for example, “is an interest of a public nature” (Tanaka 1966: 266). And this public nature demands a substantial judicial response, not deference to formalities. It will not do to disengage human judgment in favor of lesser procedural form. “The obligations incumbent upon the Mandatory,” Tanaka argues, following his citation of a passage from the mandate agreement, “are of an ethical nature, therefore unlimited. The mandate agreement is of the nature of a bona fide contract. For its performance the utmost wisdom and delicacy are required” (Tanaka 1966: 267). The “international mandate,” again, is not “purely a relationship, but an objective institution, in which several kinds of interests and values are incorporated and which maintains independent existence against third parties” (Tanaka 1966: 268). The Mandate is “a social organism” (Tanaka 1966: 271). The Mandate is “a social entity” (Tanaka 1966: 271). There can be no “severability of right from [...] obligations” on the part of the Respondent, as this would “not [be] in conformity with the spirit of the mandates system” (Tanaka 1966: 273).

Tanaka continuously shifts the focus in these two directions, toward the human person and, simultaneously, toward the higher ideal. He signaled this at the beginning of his 1966 dissent by raising the distinction between “the so-called national interest which includes both the interest of the member States as States and the interest of other nationals (Article 5 of the Mandate)” and “the common or general interest, which the member States possess in the proper performance by the mandatory of the mandate obligations.” He reinforces this distinction with reference to an “amended Submission No. 4 in the Memorials” which the Applicants submitted, for example. Here, the Applicants allege that South Africa is in violation of mandatory obligations “in the light of applicable international standards or international legal norm” (Tanaka 1966: 285-286). But the hinge of this distinction, and the site where justice is to be performed, is neither the state nor the ideal, but the human person. Tanaka reasons, “Applicants’ cause is no longer based directly on a violation of the well-being and progress by the practice of apartheid, but on the alleged violations of certain international standards or international legal norm and not directly on the obligation to promote the well-being and social progress of the inhabitants” (Tanaka 1966: 286). It is not the personal that is the basis here, Tanaka says. That would shift the focus too far from the international legal realm and leave the ICJ without standing of its own in the case. But the human person remains in the scope of the law, and the attention which Tanaka pays to “certain international standards or international legal norm” is a stand-in for the people on the ground in South West Africa who deserve to be treated fairly.

These two directions, specificity and infinity of moral reference, are just those of the Catholic understanding of the natural law. Tanaka brings these two directionalities into complete natural law harmony in the following passage, in which he also draws at length (omitted here for brevity) from the ICJ ruling on the *Reservations to the Genocide Convention* case (*I.C.J. Reports 1951: 23*):

The question here is not of an “international,” that is to say, inter-State nature, but it is concerned with the question of the international validity of human rights, that is to say, the question whether a State is obliged to protect human rights in the international sphere as it is obliged in the domestic sphere.

The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element.

A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory. It is exactly the same as the International Court of Justice ruling concerning the Reservations to the Genocide Convention case. [quote omitted]

Human rights have always existed with the human being. They existed independently of, and before, the State. [...]

If a law exists independently of the will of the State and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called “natural law” in contrast to “positive law.” [...]

[...] [T]he law concerning the protection of human rights may be considered to belong to *jus cogens* (Tanaka 1966: 297-298, emphasis in original; see also Paust 2013: 253-256; Charney 1993; Wythes 2010: 251-252; Stevenson 1967: 159; and Hall 2001: 297-298).

Human rights, the ways in which humans should be treated, are here wedded to *jus cogens*, solidifying Tanaka’s personalist, but still international legalist (albeit anti-Grotian) stance.

There is even more going on that just this. In mentioning *jus cogens*, Tanaka was participating in a postwar, “more value-laden” vision of international law, one which was enshrined in a 1953 draft report for the United Nations International Law Commission by “Special Rapporteur on the law of treaties,” the famed Hersch Lauterpacht (1897-1960), and taken up by “Lauterpacht’s successors,” including Sir Gerald Fitzmaurice (1901-1982), who would go on to issue a dissent alongside Tanaka in the *South West Africa Cases* (Lange 2018: 831-832; see also Galindo 2005: 545). This “more value-laden” mode of international law Tanaka camouflaged largely as a natural development and couched in non-

religious terminology, such as *jus cogens* and *erga omnes*.⁴ But the thrust of the move became clear when discussing natural law (see, e.g., Jain 2021). Indeed, Lauterpacht has been hailed as a representative of the “neo-Grotian school of natural law,” which emphasized the human figure, hidden behind nation-states, as the true recipient of international law (Rosenne 1961: 829). In building on Lauterpacht, Tanaka was also going beyond the half-renewal of Grotian proceduralism and endorsing a full, Catholic natural law understanding of the human person and the communal nature of justice overarching all states. Not neo-Grotian. Thomistic.

Tanaka outlines a dispute in the drafting of Article 38, paragraph 1 (c) of the Statute between those of a natural law school (typified, in Tanaka’s estimation, by the “original proposal made by Baron Descamps”⁵ in which Descamps “referred to ‘la conscience juridique des peuples civilisés’”) and “the positivist members of the Committee,” the “final draft [of the passage in question being] the product of a compromise between two schools, naturalist and positivist” (Tanaka 1966: 298-299). Tanaka states that Article 38, paragraph 1 (c) can play “an important role [...] in filling in gaps in the positive sources in order to avoid *non liquet* decisions,” a role which “can only be derived from the natural law character of this provision” (Tanaka 1966: 299; see also Quane 2014: 242-246, 264-268). Quoting J.L. Brierly’s⁶ *The Law of Nations* [1963] (6e, p. 63), Tanaka adds, the inclusion of Article 38, paragraph 1 (c) “is important as a rejection of the positivistic doctrine, according to which international law consists solely of rules to which States have given their consent” (Tanaka 1966: 299). Next, Tanaka quotes from Shabtai Rosenne [1917-2010] (*The International Court of Justice*, 1965, Vol. II: 610) to argue that the validity of the “general principles of law” as “legal norms does not derive from the consent of the parties as such” but instead is “positivist recognitions of the Grotian concept of the co-existence implying no subjugation of positive law and so-called natural law of nations in the Grotian sense” (Tanaka 1966: 299).

Tanaka has thus seemed to build on top of the secularist Grotian concept of natural law to arrive at the more robust conception of natural law in the Catholic sense which allows for human rights to take precedence over rules and procedures (see von Ungern-Sternberg 2012: 296-298). In reality, I see Tanaka as having cleared away the older Grotian notions of secularized natural law in favor of the morally-rich, Catholic (and Aristotelian) conceptions of the same. The evil of apartheid forced Tanaka

⁴ “In international law, the concept of *erga omnes* obligations refers to specifically determined obligations that states have towards the international community as a whole” (Memeti and Nuhija 2013: 1).

⁵ Baron Édouard Eugène François Descamps (1847-1933).

⁶ James Leslie Brierly (1881-1955).

to reach for the higher good to confront it. As natural law scholar Heinrich A. Rommen noted, “The idea of natural law always returns after its banishment from the universities and law courts on account of the dominance of positivism. Positivism is a paltry philosophy and may satisfy the human mind at times [...] yet man does not live by bread alone” (Rommen 2016: 173-174).

Tanaka does this in one more important way, too, namely by arguing that “the content of the principle of equality [...] must be applied to the question of apartheid,” and that “the objectives of the mandates system, being the material and moral well-being and social progress of the inhabitants of the territory, are in themselves of a political nature” (Tanaka 1966: 301; see also Keal 2007: 299; Cullet 1999: 555). This runs contrary to the Grotian and Westphalian conceptions of the natural law, which eschew substantive political interactions between and among states in favor of an inherently apolitical (that is, not negotiable on principles and by debate) balance of power and collective security (but see Jonas 2004: 12-13). It also trumps the influential theory of Hans Kelsen, “who argues that the rules of equality of states are ‘valid not because the States are sovereign, but because these rules are norms of positive international law’” (Hjorth 2011: 2586). The Catholic natural law is not rules and norms. It is not even really natural. It is the eternal law, God’s law, set to words that fallen men can understand.

Furthermore, the political nature of the “principle of equality” which Tanaka argues must prevail over South Africa’s system of apartheid was “historically [...] derived from the Christian idea of the equality of all men before God” (Tanaka 1966: 304). Tanaka redraws the genealogy of the natural law (a term he explicitly mentions), finding that the “idea [i.e., of the natural law] existed already in the Stoic philosophy, and was developed by the scholastic philosophers and treated by natural law scholars and encyclopedists of the seventeenth and eighteenth centuries,” later receiving “legislative formulation” in:

the Bills of Rights of some American states, next by the Declaration [of the Rights of Man and Citizen] of the French Revolution, and then in the course of the nineteenth century [in] the equality clause [which] became one of the common elements of the constitution of modern European and other countries (Tanaka 1966: 304-305).

The “most fundamental point in the equality principle,” Tanaka continues, here driving the stake home in the heart of Grotian natural law, “is that all human beings as persons have an equal value in themselves,” and that “the idea of equality of men as persons and equal treatment as such is of a metaphysical nature” (Tanaka 1966: 305; see also Arlettaz 2013: 910; Xanthaki 2010: 30). There had been, and still often are, problems in interpreting general notions of equality, dignity, and human rights, as actionable and specific rights in concrete circumstances (Meron 1986: 16-17; Van Dyke 1973: 1270-

1274). Tanaka was proposing a way to bridge that gap through a personalism which could work on both the natural law and specific, national law registers.

5. The realization of world law as international Catholic jurisprudence

Tanaka was not successful in the *South West Africa* Cases. However, as Tanaka scholar Kevin Doak argues:

Tanaka may have lost the battle [in the *South West Africa* Cases], but he won the war. On October 27, just three months after Tanaka lost the vote on the *South West Africa* Case, the General Assembly of the United Nations passed Resolution 2145 that declared the Republic of South Africa had no further right to administer South West Africa. (Dugard 1968) In 1971, acting on a request for an Advisory Opinion from the United Nations Security Council, the ICJ ruled that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw from Namibia immediately. It did not, so war between Namibia and South Africa continued, until 1989. But the trends in world opinion—and eventually the world court—definitely supported Tanaka’s 1966 dissent, as did the ultimate resolution of the conflict (Doak 2019: 104; see generally Mistry 2019; see also Meron 1986: 2; Miller 2002: 488; University of Pennsylvania Law Review 1967: 1190; Crawford 2013: 533-538; Kattan 2015).

The moral rejuvenation of the natural law which Tanaka had effected in the *South West Africa* Cases opened the floodgates for similarly difficult cases in the years ahead (but see Dugard 1976 for a complicating view).

For example, the “Barcelona Traction dictum,” which many see as an attempt to modulate the stark separation of procedure from substance in the majority ruling in the *South West Africa* Cases, may also be read as a vindication of Tanaka. International law scholar Gleider I. Hernández, cited above, writes that:

an essential distinction should be drawn between obligations of a State towards the international community as a whole and those arising *vis-à-vis* another State in the field of diplomatic protection. By their nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* (Hernández 2013: 31; Pollock 1969: 772-775, citing inter alia Jessup 1966: 373, Dugard 1968, and Tanaka 1966: 270).

The “common or general interest,” which Tanaka had used as a lever for shifting the Grotian natural law onto its older, much more solid metaphysical foundation, was now appearing in other cases, and influencing international legal thinking in similarly moral ways.

The internationalization of the Tanaka style of natural law, if one may call it that, was a fitting tribute to the man himself. In all of this, and especially in the *South West Africa* Cases, one of his crowning achievements, Tanaka was attempting to carry forward a project which he had set for himself early in his career and “inspired by [a 1919 reprint of civil law scholar] Ernst Zitelmann’s [(1852-1923)] short [1889] essay [“Die Möglichkeit eines Weltrechtes” (The Possibility of World Law)] [...] suggest[ing] the possibility of World Law” (Doak 2019: 41, 44). Doak argues that Tanaka wanted to show “the existence of law in society” and to point “out that some forms of society were global (“above the State”),” which would thus clear the way for the development of “a jurisprudence that might reconcile universalism and particularism, nationalism and internationalism, the State and the ethnic nation” (Doak 2019: 44, 46). Tanaka wanted to decouple law from “the State (*kokka*)” and the “ethnic nationality (*minzoku*)” (Doak 2019: 45) in order to re-establish natural law as the basis of both World Law and municipal law (Doak 2019: 51). In my view, in Tanaka’s 1966 dissent in the *South West Africa* cases, this was nothing short of an attempt to make natural law the basis for international law. Doak is much more modest in his assessment of Tanaka’s motives, arguing that Tanaka, in World Law and for certain kinds of cases (such as, for example, those involving stateless persons), wanted to include “the concepts of distributive justice (*iustitia distributiva*) or legal or general justice (*iustitia legalis od. generalis*)” and “the concept of commutative justice (*iustitia commutativa*),” the concept which until Tanaka’s time had “governed [...] conflicts between States” (Doak 2019: 50-51). For my part, however, I see Tanaka’s citation, in a 1927 work, of Pope Pius X’s 1905 encyclical *Vehementer Nos* (in defense of the Church’s and the faithful’s rights in France and against the French state’s abrogation of the Concordat of 1801), and Pope Pius XI’s 1926 encyclical *Iniquis Afflictisque* (against the state persecution of Catholics in Mexico), (Doak 2019: 26-27) as evidence of a much broader and deeper change in Tanaka’s thought, one which came to full flower in his *South West Africa* dissent. The Catholic underpinnings, for Tanaka, of a jurisprudential move toward plenary justice should be very familiar to readers by now. For, this is precisely what Tanaka did in his 1966 dissent in the *South West Africa* Cases.

Indeed, considered in this full religious context, Tanaka’s 1966 effort takes on its plenary significance. Tanaka “reject[ed] [...] the Natural Law of Enlightenment Rationalism that considered subjective decisions by legislators or judges or scholars as ipso facto rational and thus universal” (Doak 2019: 33). There had to be something more substantial to a planetary law than just procedure, in order to make law “a universal force for good” (Doak 2019: 19). In my view, this globalized natural law was a break with the Grotian natural law, and was also closely related to Catholicism. It was, in other words, the search for a true substantive internationalism, and not just an international framework. We must bear in mind that Tanaka sought a church which would be a “*Gemeinschaft* of all humanity as it exists

in spiritual life” and “based on a trans-ethnic, trans-State, trans-class principle of organization that includes all the world’s people” (Doak 2019: 42, citing Tanaka 1930: 605-606). This, for Tanaka, was the Catholic Church (Doak 2019: 42, citing Tanaka 1930: 605-606). This was formative, and transformative, for Tanaka. And the forming and transforming had been underway for a long time before 1966. Tanaka had arguably taken a big step in the direction of World Law with his decision in the *Sunakawa Case* of 1959 (*Sakata v. Japan*), in which he found for a precedence of the protection of natural rights over even a national constitution, and also for an interdependency of states which did not allow one state to arbitrarily decide questions impinging on other states (Oppler 1961: 250-251). In 1966, Tanaka took this interdependency into an even stronger register, finding that states could be harmed by injustices even over the procedural bulwarks of the Grotian arrangement.

There may be even more to the story than this. It is possible that Tanaka drew inspiration for his *South West Africa* Cases dissent also from Pope Pius XII’s August 26, 1947 letter to President Harry Truman, which read in part:

Truth has lost none of its power to rally to its cause the most enlightened minds and noblest spirits. Their ardour is fed by the flame of righteous freedom struggling to break through injustice and lying. But those who possess the truth must be conscientious to define it clearly when its foes cleverly distort it, bold to defend it and generous enough to set the course of their lives, both national and personal, by its dictates. This will require, moreover, correcting not a few aberrations. Social injustices, racial injustices and religious animosities exist today among men and groups who boast of Christian civilization, and they are a very useful and often effective weapon in the hands of those who are bent on destroying all the good which that civilization has brought to man. It is for all sincere lovers of the great human family to unite in wresting those weapons from hostile hands. With that union will come hope that the enemies of God and free men will not prevail (Notre Dame Law School 1949: 127-128).

This is not to say that Grotius was an “enem[y] of God” or that he willfully “distort[ed]” the truth. But Tanaka lived in a world in which the thinness of the moral law and the poverty of international law’s regard for the human person were leading to real and lasting harms. As a Japanese who had lived through the horrors of World War II, Tanaka would have known more than most the urgency for “all sincere lovers of the great human family to unite” in overcoming injustice worldwide, one case at a time.

To do this, Tanaka insisted on both the ideal aspect of Christian natural law and its concrete iteration in specific circumstances. Tanaka’s was no free-floating notion of *ex aequo et bono*. Tanaka

effected an overthrow, albeit a stealthy one, of the Grotian natural law divorced from God (Friedmann 1970: 236-237).

6. Conclusion

In the *South West Africa* Cases, the International Court of Justice was faced with a quandary, and also with a paradox. On the one hand, the ICJ was to bring justice to the people of South West Africa, who were trapped under the apartheid system imposed by their neighbors in South Africa, who were abusing the “sacred trust of civilization” entrusted to them in a League of Nations Mandate from 1920. The quandary was that, on the other hand, the ICJ did not have the means at its disposal to remedy this injustice under the prevailing paradigm of international law. This is also the paradox, for the ICJ’s very name was shown, in the *South West Africa* Cases, to be a contradiction in terms. International law, it seemed, could not, in the end, effect justice. There was a Grotian procedural loophole at the heart of the international system.

In this apparently intractable situation, Japanese ICJ justice Tanaka Kōtarō applied a new, and very old, alternative to the prevailing natural law paradigm upon which the ICJ and international law in general rested. In bringing the substantive justice elements of the Catholic natural law to bear on the Grotian, apolitical, rules-based, anti-metaphysical proceduralism of the prevailing natural law regime, Tanaka was able to cut the “Grotian Knot” and show the way forward for justice and meaningful equality in South West Africa—and also in South Africa and anywhere else in the world that the new, old style of natural law internationalism could be applied.

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