INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

ADVISORY OPINION OF 21 JUNE 1971

1971

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CONSÉQUENCES JURIDIQUES POUR LES ÉTATS DE LA PRÉSENCE CONTINUE DE L'AFRIQUE DU SUD EN NAMIBIE (SUD-OUEST AFRICAIN) NONOBSTANT LA RÉSOLUTION 276 (1970) DU CONSEIL DE SÉCURITÉ

AVIS CONSULTATIF DU 21 JUIN 1971

Official citation:

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

Mode officiel de citation:

Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971, p. 16.

Sales number
N° de vente: 352

INTERNATIONAL COURT OF JUSTICE

YEAR 1971

1971
21 June
General List
No. 53

21 June 1971

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

Composition and competence of the Court—Propriety of the Court's giving the Opinion—Concept of mandates—Characteristics of the League of Nations Mandate for South West Africa—Situation on the dissolution of the League of Nations and the setting-up of the United Nations: survival of the Mandate and transference of supervision and accountability to the United Nations—Developments in the United Nations prior to the termination of the Mandate—Revocability of the Mandate—Termination of the Mandate by the General Assembly—Action in the Security Council and effect of Security Council resolutions leading to the request for Opinion—Requests by South Africa to supply further factual information and for the holding of a plebiscite—Legal consequences for States

ADVISORY OPINION

Present: *President* Sir Muhammad ZAFRULLA KHAN; *Vice-President* AMMOUN; *Judges* Sir Gerald FITZMAURICE, PADILLA NERVO, FORSTER, GROS, BENGZON, PETRÉN, LACHS, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA; *Registrar* AQUARONE.

Concerning the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970),

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been asked was laid before the Court by a letter dated 29 July 1970, filed in the Registry on 10 August, and addressed by the Secretary-General of the United Nations to the President of the Court. In his letter the Secretary-General informed the Court that, by resolution 284 (1970) adopted on 29 July 1970, certified true copies of the English and French texts of which were transmitted with his letter, the Security Council of the United Nations had decided to submit to the Court, with the request for an advisory opinion to be transmitted to the Security Council at an early date, the question set out in the resolution, which was in the following terms:

> "*The Security Council,*
>
> *Reaffirming* the special responsibility of the United Nations with regard to the territory and the people of Namibia,
>
> *Recalling* Security Council resolution 276 (1970) on the question of Namibia,
>
> *Taking note* of the report and recommendations submitted by the *Ad Hoc* Sub-Committee established in pursuance of Security Council resolution 276 (1970),
>
> *Taking further note* of the recommendation of the *Ad Hoc* Sub-Committee on the possibility of requesting an advisory opinion from the International Court of Justice,
>
> *Considering* that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking
>
> 1. *Decides* to submit in accordance with Article 96 (1) of the Charter, the following question to the International Court of Justice with the request for an advisory opinion which shall be transmitted to the Security Council at an early date:
>
> 'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?'
>
> 2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question."

2. On 5 August 1970, that is to say, after the despatch of the Secretary-General's letter but before its receipt by the Registry, the English and French texts of resolution 284 (1970) of the Security Council were communicated to the President of the Court by telegram from the United Nations Secretariat. The President thereupon decided that the States Members of the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and by an Order dated 5 August 1970, the President fixed 23 September 1970 as the time-limit within which the

Court would be prepared to receive written statements from them. The same day, the Registrar sent to the States Members of the United Nations the special and direct communication provided for in Article 66 of the Statute.

3. The notice of the request for advisory opinion, prescribed by Article 66, paragraph 1, of the Statute, was given by the Registrar to all States entitled to appear before the Court by letter of 14 August 1970.

4. On 21 August 1970, the President decided that in addition to the States Members of the United Nations, the non-member States entitled to appear before the Court were also likely to be able to furnish information on the question. The same day the Registrar sent to those States the special and direct communication provided for in Article 66 of the Statute.

5. On 24 August 1970, a letter was received by the Registrar from the Secretary for Foreign Affairs of South Africa, whereby the Government of South Africa, for the reasons therein set out, requested the extension to 31 January 1971 of the time-limit for the submission of a written statement. The President of the Court, by an Order dated 28 August 1970, extended the time-limit for the submission of written statements to 19 November 1970.

6. The Secretary-General of the United Nations, in two instalments, and the following States submitted to the Court written statements or letters setting forth their views: Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States of America, Yugoslavia. Copies of these communications were transmitted to all States entitled to appear before the Court, and to the Secretary-General of the United Nations, and, in pursuance of Articles 44, paragraph 3, and 82, paragraph 1, of the Rules of Court, they were made accessible to the public as from 5 February 1971.

7. The Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; these documents were received in the Registry in instalments between 5 November and 29 December 1970.

8. Before holding public sittings to hear oral statements in accordance with Article 66, paragraph 2, of the Statute, the Court had first to resolve two questions relating to its composition for the further proceedings.

9. In its written statement, filed on 19 November 1970, the Government of South Africa had taken objection to the participation of three Members of the Court in the proceedings. Its objections were based on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South West Africa. The Court gave careful consideration to the objections raised by the Government of South Africa, examining each case separately. In each of them the Court reached the conclusion that the participation of the Member concerned in his former capacity as representative of his Government, to which objection was taken in the South African Government's written statement, did not attract the application of Article 17, paragraph 2, of the Statute of the Court. In making Order No. 2 of 26 January 1971, the Court found no reason to depart in the present advisory proceedings from the decision adopted by the Court in the Order of 18 March 1965 in the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) after hearing the same contentions as have now been advanced by the Government of South Africa. In deciding the other two objections, the

Court took into consideration that the activities in United Nations organs of the Members concerned, prior to their election to the Court, and which are referred to in the written statement of the Government of South Africa, do not furnish grounds for treating these objections differently from those raised in the application to which the Court decided not to accede in 1965, a decision confirmed by its Order No. 2 of 26 January 1971. With reference to Order No. 3 of the same date, the Court also took into consideration a circumstance to which its attention was drawn, although it was not mentioned in the written statement of the Government of South Africa, namely the participation of the Member concerned, prior to his election to the Court, in the formulation of Security Council resolution 246 (1968), which concerned the trial at Pretoria of thirty-seven South West Africans and which in its preamble took into account General Assembly resolution 2145 (XXI). The Court considered that this participation of the Member concerned in the work of the United Nations, as a representative of his Government, did not justify a conclusion different from that already reached with regard to the objections raised by the Government of South Africa. Account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret. (*P.C.I.J., Series A, No. 1*, p. 11; *P.C.I.J., Series C, No. 84*, p. 535; *P.C.I.J., Series E, No. 4*, p. 270; *P.C.I.J., Series E, No. 8*, p. 251.) After deliberation, the Court decided, by three Orders dated 26 January 1971, and made public on that date, not to accede to the objections which had been raised.

10. By a letter from the Secretary for Foreign Affairs dated 13 November 1970, the Government of South Africa made an application for the appointment of a judge *ad hoc* to sit in the proceedings, in terms of Article 31, paragraph 2, of the Statute of the Court. The Court decided, in accordance with the terms of Article 46 of the Statute of the Court, to hear the contentions of South Africa on this point in camera, and a closed hearing, at which representatives of India, the Netherlands, Nigeria and the United States of America were also present, was held for the purpose on 27 January 1971.

11. By an Order dated 29 January 1971, the Court decided to reject the application of the Government of South Africa. The Court thereafter decided that the record of the closed hearing should be made accessible to the public.

12. On 29 January 1971, the Court decided, upon the application of the Organization of African Unity, that that Organization was also likely to be able to furnish information on the question before the Court, and that the Court would therefore be prepared to hear an oral statement on behalf of the Organization.

13. The States entitled to appear before the Court had been informed by the Registrar on 27 November 1970 that oral proceedings in the case would be likely to open at the beginning of February 1971. On 4 February 1971, notification was given to those States which had expressed an intention to make oral statements, and to the Secretary-General of the United Nations and the Organization of African Unity, that 8 February had been fixed as the opening date. At 23 public sittings held between 8 February and 17 March 1971, oral statements were made to the Court by the following representatives:

for the Secretary-General of the United Nations:	Mr. C. A. Stavropoulos, Under-Secretary-General, Legal Counsel of the United Nations, and Mr. D. B. H. Vickers, Senior Legal Officer, Office of Legal Affairs;
for Finland:	Mr. E. J. S. Castrén, Professor of International Law in the University of Helsinki;
for the Organization of African Unity:	Mr. T. O. Elias, Attorney-General and Commissioner for Justice of Nigeria;
for India:	Mr. M. C. Chagla, M.P., Former Minister for Foreign Affairs in the Government of India;
for the Netherlands:	Mr. W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs;
for Nigeria:	Mr. T. O. Elias, Attorney-General and Commissioner for Justice;
for Pakistan:	Mr. S. S. Pirzada, S.Pk., Attorney-General of Pakistan;
for South Africa:	Mr. J. D. Viall, Legal Adviser to the Department of Foreign Affairs, Mr. D. P. de Villiers, S.C., Advocate of the Supreme Court of South Africa, Mr. E. M. Grosskopf, S.C., Member of the South African Bar, Mr. H. J. O. van Heerden, Member of the South African Bar, Mr. R. F. Botha, Member of the South African Bar, Mr. M. Wiechers, Professor of Law in the University of South Africa;
for the Republic of Viet-Nam:	Mr. Le Tai Trien, Attorney-General, Supreme Court of Viet-Nam;
for the United States of America:	Mr. J. R. Stevenson, The Legal Adviser, Department of State.

14. Prior to the opening of the public sittings, the Court decided to examine first of all certain observations made by the Government of South Africa in its written statement, and in a letter dated 14 January 1971, in support of its submission that the Court should decline to give an advisory opinion.

15. At the opening of the public sittings on 8 February 1971, the President of the Court announced that the Court had reached a unanimous decision thereon. The substance of the submission of the Government of South Africa and the decision of the Court are dealt with in paragraphs 28 and 29 of the Advisory Opinion, below.

16. By a letter of 27 January 1971, the Government of South Africa had submitted a proposal to the Court regarding the holding of a plebiscite in the Territory of Namibia (South West Africa), and this proposal was elaborated in a further letter of 6 February 1971, which explained that the plebiscite was to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations".

17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

> "The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.
>
> The Court cannot prónounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.
>
> The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.
>
> If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings."

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

> "I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last . . . , to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa *(a)* for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and *(b)* to be allowed to supply the Court with further factual material concerning the situation there.
>
> I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

* * *

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested

the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted. However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them.

21. The first objection is that in the voting on the resolution two permanent members of the Security Council abstained. It is contended that the resolution was consequently not adopted by an affirmative vote of nine members, including the concurring votes of the permanent members, as required by Article 27, paragraph 3, of the Charter of the United Nations.

22. However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter, requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

25. The question of Namibia was placed on the agenda of the Security Council as a "situation" and not as a "dispute". No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question

on the Security Council's agenda under the title "Situation in Namibia". Had the Government of South Africa considered that the question should have been treated in the Security Council as a dispute, it should have drawn the Council's attention to that aspect of the matter. Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage.

26. A similar answer must be given to the related objection based on the proviso to paragraph 3 of Article 27 of the Charter. This proviso also requires for its application the prior determination by the Security Council that a dispute exists and that certain members of the Council are involved as parties to such a dispute.

* * *

27. In the alternative the Government of South Africa has contended that even if the Court had competence to give the opinion requested, it should nevertheless, as a matter of judicial propriety, refuse to exercise its competence.

28. The first reason invoked in support of this contention is the supposed disability of the Court to give the opinion requested by the Security Council, because of political pressure to which the Court, according to the Government of South Africa, has been or might be subjected.

29. It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.

30. The second reason advanced on behalf of the Government of South Africa in support of its contention that the Court should refuse to accede to the request of the Security Council is that the relevant legal question relates to an existing dispute between South Africa and other States. In this context it relies on the case of *Eastern Carelia* and argues that the Permanent Court of International Justice declined to rule upon the question referred to it because it was directly related to the main point of a dispute actually pending between two States.

31. However, that case is not relevant, as it differs from the present one. For instance one of the States concerned in that case was not at the time a Member of the League of Nations and did not appear before the Permanent Court. South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question. It has appeared before the Court, participated in both the written and oral pro-

ceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question.

32. Nor does the Court find that in this case the Security Council's request relates to a legal dispute actually pending between two or more States. It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions. This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated "that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking". It is worth recalling that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court stated: "The object of this request for an Opinion is to guide the United Nations in respect of its own action" (*I.C.J. Reports 1951*, p. 19).

33. The Court does not find either that in this case the advisory opinion concerns a dispute between South Africa and the United Nations. In the course of the oral proceedings Counsel for the Government of South Africa stated:

> "... our submission is not that the question is a dispute, but that in order to answer the question the Court will have to decide legal and factual issues which are actually in dispute between South Africa and other States"

34. The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court. A similar position existed in the three previous advisory proceedings concerning South West Africa: in none of them did South Africa claim that there was a dispute, nor did the Court feel it necessary to apply the Rules of Court concerning "a legal question actually pending between two or more States". Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.

35. In accordance with Article 83 of the Rules of Court, the question whether the advisory opinion had been requested "upon a legal question actually pending between two or more States" was also of decisive im-

portance in the Court's consideration of the request made by the Government of South Africa for the appointment of a judge *ad hoc*. As already indicated, the Court heard argument in support of that request and, after due deliberation, decided, by an Order of 29 January 1971, not to accede to it. This decision was based on the conclusion that the terms of the request for advisory opinion, the circumstances in which it had been submitted (which are described in para. 32 above), as well as the considerations set forth in paragraphs 33 and 34 above, were such as to preclude the interpretation that an opinion had been "requested upon a legal question actually pending between two or more States". Thus, in the opinion of the Court, South Africa was not entitled under Article 83 of the Rules of Court to the appointment of a judge *ad hoc*.

36. It has been urged that the possible existence of a dispute was a point of substance which was prematurely disposed of by the Order of 29 January 1971. Now the question whether a judge *ad hoc* should be appointed is of course a matter concerning the composition of the Bench and possesses, as the Government of South Africa recognized, absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge *ad hoc* must be treated as a preliminary matter on the basis of a prima facie appreciation of the facts and the law. This cannot be construed as meaning that the Court's decision thereon may involve the irrevocable disposal of a point of substance or of one related to the Court's competence. Thus, in a contentious case, when preliminary objections have been raised, the appointment of judges *ad hoc* must be decided before the hearing of those objections. That decision, however, does not prejudge the Court's competence if, for instance, it is claimed that no dispute exists. Conversely, to assert that the question of the judge *ad hoc* could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.

37. The only question which was in fact settled with finality by the Order of 29 January 1971 was the one relating to the Court's composition for the purpose of the present case. That decision was adopted on the authority of Article 3, paragraph 1, of the Rules of Court and in accordance with Article 55, paragraph 1, of the Statute. Consequently, after the adoption of that decision, while differing views might still be held as to the applicability of Article 83 of the Rules of Court in the present case, the regularity of the composition of the Court for the

purposes of delivering the present Advisory Opinion, in accordance with the Statute and the Rules of Court, is no longer open to question.

38. In connection with the possible appointment of judges *ad hoc*, it has further been suggested that the final clause in paragraph 1 of Article 82 of the Rules of Court obliges the Court to determine as a preliminary question whether the request relates to a legal question actually pending between two or more States. The Court cannot accept this reading, which overstrains the literal meaning of the words "*avant tout*". It is difficult to conceive that an Article providing general guidelines in the relatively unschematic context of advisory proceedings should prescribe a rigid sequence in the action of the Court. This is confirmed by the practice of the Court, which in no previous advisory proceedings has found it necessary to make an independent preliminary determination of this question or of its own competence, even when specifically requested to do so. Likewise, the interpretation of the Rules of Court as imposing a procedure *in limine litis*, which has been suggested, corresponds neither to the text of the Article nor to its purpose, which is to regulate advisory proceedings without impairing the flexibility which Articles 66, paragraph 4, and 68 of the Statute allow the Court so that it may adjust its procedure to the requirements of each particular case. The phrase in question merely indicates that the test of legal pendency is to be considered "above all" by the Court for the purpose of exercising the latitude granted by Article 68 of the Statute to be guided by the provisions which apply in contentious cases to the extent to which the Court recognizes them to be applicable. From a practical point of view it may be added that the procedure suggested, analogous to that followed in contentious procedure with respect to preliminary objections, would not have dispensed with the need to decide on the request for the appointment of a judge *ad hoc* as a previous, independent decision, just as in contentious cases the question of judges *ad hoc* must be settled before any hearings on the preliminary objections may be proceeded with. Finally, it must be observed that such proposed preliminary decision under Article 82 of the Rules of Court would not necessarily have predetermined the decision which it is suggested should have been taken subsequently under Article 83, since the latter provision envisages a more restricted hypothesis: that the advisory opinion is requested *upon* a legal question actually pending and not that it *relates* to such a question.

39. The view has also been expressed that even if South Africa is not entitled to a judge *ad hoc* as a matter of right, the Court should, in the exercise of the discretion granted by Article 68 of the Statute, have allowed such an appointment, in recognition of the fact that South Africa's interests are specially affected in the present case. In this connection the Court wishes to recall a decision taken by the Permanent Court at a time when the Statute did not include any provision concerning advisory opinions, the entire regulation of the procedure in the matter being thus left to the Court (*P.C.I.J., Series E, No. 4*, p. 76). Confronted with a

request for the appointment of a judge *ad hoc* in a case in which it found there was no dispute, the Court, in rejecting the request, stated that "the decision of the Court must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute" (Order of 31 October 1935, *P.C.I.J., Series A/B, No. 65*, Annex 1, p. 69 at p. 70). It found further that the "exception cannot be given a wider application than is provided for by the Rules" (*ibid.*, p. 71). In the present case the Court, having regard to the Rules of Court adopted under Article 30 of the Statute, came to the conclusion that it was unable to exercise discretion in this respect.

40. The Government of South Africa has also expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues. In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

41. The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: "A reply to a request for an Opinion should not, in principle, be refused." (*I.C.J. Reports 1951*, p. 19.) The Court has considered whether there are any "compelling reasons", as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only "remain faithful to the requirements of its judicial character" (*I.C.J. Reports 1960*, p. 153), but also discharge its functions as "the principal judicial organ of the United Nations" (Art. 92 of the Charter).

* * *

42. Having established that it is properly seised of a request for an advisory opinion, the Court will now proceed to an analysis of the question placed before it: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

43. The Government of South Africa in both its written and oral statements has covered a wide field of history, going back to the origin and functioning of the Mandate. The same and similar problems were

dealt with by other governments, the Secretary-General of the United Nations and the Organization of African Unity in their written and oral statements.

44. A series of important issues is involved: the nature of the Mandate, its working under the League of Nations, the consequences of the demise of the League and of the establishment of the United Nations and the impact of further developments within the new organization. While the Court is aware that this is the sixth time it has had to deal with the issues involved in the Mandate for South West Africa, it has nonetheless reached the conclusion that it is necessary for it to consider and summarize some of the issues underlying the question addressed to it. In particular, the Court will examine the substance and scope of Article 22 of the League Covenant and the nature of "C" mandates.

45. The Government of South Africa, in its written statement, presented a detailed analysis of the intentions of some of the participants in the Paris Peace Conference, who approved a resolution which, with some alterations and additions, eventually became Article 22 of the Covenant. At the conclusion and in the light of this analysis it suggested that it was quite natural for commentators to refer to "'C' mandates as being in their practical effect not far removed from annexation". This view, which the Government of South Africa appears to have adopted, would be tantamount to admitting that the relevant provisions of the Covenant were of a purely nominal character and that the rights they enshrined were of their very nature imperfect and unenforceable. It puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from those negotiations. It is thus necessary to refer to the actual text of Article 22 of the Covenant, paragraph 1 of which declares:

> "1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant."

As the Court recalled in its 1950 Advisory Opinion on the *International Status of South-West Africa*, in the setting-up of the mandates system "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'" (*I.C.J. Reports 1950*, p. 131).

46. It is self-evident that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their

own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be "able to stand by themselves". The requisite means of assistance to that end is dealt with in paragraph 2 of Article 22:

> "2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

This made it clear that those Powers which were to undertake the task envisaged would be acting exclusively as mandatories on behalf of the League. As to the position of the League, the Court found in its 1950 Advisory Opinion that: "The League was not, as alleged by [the South African] Government, a 'mandator' in the sense in which this term is used in the national law of certain States." The Court pointed out that: "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Therefore, the Court found, the League "had only assumed an international function of supervision and control" (*I.C.J. Reports 1950*, p. 132).

47. The acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character; and, as a corollary of the trust, "securities for [its] performance" were instituted (para. 7 of Art. 22) in the form of legal accountability for its discharge and fulfilment:

> "7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

48. A further security for the performance of the trust was embodied in paragraph 9 of Article 22:

> "9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

Thus the reply to the essential question, *quis custodiet ipsos custodes?*, was given in terms of the mandatory's accountability to international

organs. An additional measure of supervision was introduced by a resolution of the Council of the League of Nations, adopted on 31 January 1923. Under this resolution the mandatory Governments were to transmit to the League petitions from communities or sections of the populations of mandated territories.

49. Paragraph 8 of Article 22 of the Covenant gave the following directive:

> "8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council."

In pursuance of this directive, a Mandate for German South West Africa was drawn up which defined the terms of the Mandatory's administration in seven articles. Of these, Article 6 made explicit the obligation of the Mandatory under paragraph 7 of Article 22 of the Covenant by providing that "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5" of the Mandate. As the Court said in 1950: "the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled" (*I.C.J. Reports 1950*, p. 132). In sum the relevant provisions of the Covenant and those of the Mandate itself preclude any doubt as to the establishment of definite legal obligations designed for the attainment of the object and purpose of the Mandate.

50. As indicated in paragraph 45 above, the Government of South Africa has dwelt at some length on the negotiations which preceded the adoption of the final version of Article 22 of the League Covenant, and has suggested that they lead to a different reading of its provisions. It is true that as that Government points out, there had been a strong tendency to annex former enemy colonial territories. Be that as it may, the final outcome of the negotiations, however difficult of achievement, was a rejection of the notion of annexation. It cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose.

51. Events subsequent to the adoption of the instruments in question should also be considered. The Allied and Associated Powers, in their Reply to Observations of the German Delegation, referred in 1919 to "the mandatory Powers, which in so far as they may be appointed trustees by the League of Nations will derive no benefit from such trusteeship". As to the Mandate for South West Africa, its preamble

recited that "His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations".

52. Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been

considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In the light of the foregoing, the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" or "B" mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under "C" mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatory as integral portions of its territory" (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with "A" or "B" mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the *South West Africa* cases as applying to all categories of mandate:

> "The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations." (*I.C.J. Reports 1962*, p. 329.)

* * *

55. The Court will now turn to the situation which arose on the demise of the League and with the birth of the United Nations. As already recalled, the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution. That is why, in 1950, the Court remarked, in connection with the obligations corresponding to the sacred trust:

> "Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory

organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J. Reports 1950*, p. 133.)

In the particular case, specific provisions were made and decisions taken for the transfer of functions from the organization which was to be wound up to that which came into being.

56. Within the framework of the United Nations an international trusteeship system was established and it was clearly contemplated that mandated territories considered as not yet ready for independence would be converted into trust territories under the United Nations international trusteeship system. This system established a wider and more effective international supervision than had been the case under the mandates of the League of Nations.

57. It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision. To accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920.

58. These compelling considerations brought about the insertion in the Charter of the United Nations of the safeguarding clause contained in Article 80, paragraph 1, of the Charter, which reads as follows:

> "1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

59. A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations. These rights were thus confirmed to have an existence independent of that of the League of Nations. The Court, in the 1950 Advisory Opinion on the *International Status of South-West Africa*, relied on this provision to reach the conclusion that "no such rights of the peoples could be effectively safeguarded without inter-

national supervision and a duty to render reports to a supervisory organ" (*I.C.J. Reports 1950*, p. 137). In 1956 the Court confirmed the conclusion that "the effect of Article 80 (1) of the Charter" was that of "preserving the rights of States and peoples" (*I.C.J. Reports 1956*, p. 27).

60. Article 80, paragraph 1, of the Charter was thus interpreted by the Court as providing that the system of replacement of mandates by trusteeship agreements, resulting from Chapter XII of the Charter, shall not "be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples".

61. The exception made in the initial words of the provision, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded", established a particular method for changing the status quo of a mandate régime. This could be achieved only by means of a trusteeship agreement, unless the "sacred trust" had come to an end by the implementation of its objective, that is, the attainment of independent existence. In this way, by the use of the expression "until such agreements have been concluded", a legal hiatus between the two systems was obviated.

62. The final words of Article 80, paragraph 1, refer to "the terms of existing international instruments to which Members of the United Nations may respectively be parties". The records of the San Francisco Conference show that these words were inserted in replacement of the words "any mandate" in an earlier draft in order to preserve "any rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations".

63. In approving this amendment and inserting these words in the report of Committee II/4, the States participating at the San Francisco Conference obviously took into account the fact that the adoption of the Charter of the United Nations would render the disappearance of the League of Nations inevitable. This shows the common understanding and intention at San Francisco that Article 80, paragraph 1, of the Charter had the purpose and effect of keeping in force all rights whatsoever, including those contained in the Covenant itself, against any claim as to their possible lapse with the dissolution of the League.

64. The demise of the League could thus not be considered as an unexpected supervening event entailing a possible termination of those rights, entirely alien to Chapter XII of the Charter and not foreseen by the safeguarding provisions of Article 80, paragraph 1. The Members of the League, upon effecting the dissolution of that organization, did not declare, or accept even by implication, that the mandates would be cancelled or lapse with the dissolution of the League. On the contrary,

paragraph 4 of the resolution on mandates of 18 April 1946 clearly assumed their continuation.

65. The Government of South Africa, in asking the Court to reappraise the 1950 Advisory Opinion, has argued that Article 80, paragraph 1, must be interpreted as a mere saving clause having a purely negative effect.

66. If Article 80, paragraph 1, were to be understood as a mere interpretative provision preventing the operation of Chapter XII from affecting any rights, then it would be deprived of all practical effect. There is nothing in Chapter XII—which, as interpreted by the Court in 1950, constitutes a framework for future agreements—susceptible of affecting existing rights of States or of peoples under the mandates system. Likewise, if paragraph 1 of Article 80 were to be understood as a mere saving clause, paragraph 2 of the same Article would have no purpose. This paragraph provides as follows:

> "2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

This provision was obviously intended to prevent a mandatory Power from invoking the preservation of its rights resulting from paragraph 1 as a ground for delaying or postponing what the Court described as "the normal course indicated by the Charter, namely, conclude Trusteeship Agreements" (*I.C.J. Reports 1950*, p. 140). No method of interpretation would warrant the conclusion that Article 80 as a whole is meaningless.

67. In considering whether negative effects only may be attributed to Article 80, paragraph 1, as contended by South Africa, account must be taken of the words at the end of Article 76 *(d)* of the Charter, which, as one of the basic objectives of the trusteeship system, ensures equal treatment in commercial matters for all Members of the United Nations and their nationals. The proviso "subject to the provisions of Article 80" was included at the San Francisco Conference in order to preserve the existing right of preference of the mandatory Powers in "C" mandates. The delegate of the Union of South Africa at the Conference had pointed out earlier that "the 'open door' had not previously applied to the 'C' mandates", adding that "his Government could not contemplate its application to their mandated territory". If Article 80, paragraph 1, had no conservatory and positive effects, and if the rights therein preserved could have been extinguished with the disappearance of the League of Nations, then the proviso in Article 76 *(d) in fine* would be deprived of any practical meaning.

68. The Government of South Africa has invoked as "new facts" not fully before the Court in 1950 a proposal introduced by the Chinese delegation at the final Assembly of the League of Nations and another submitted by the Executive Committee to the United Nations Preparatory Commission, both providing in explicit terms for the transfer of supervisory functions over mandates from the League of Nations to United Nations organs. It is argued that, since neither of these two proposals was adopted, no such transfer was envisaged.

69. The Court is unable to accept the argument advanced. The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval. For instance, the Chinese proposal, which was never considered but was ruled out of order, would have subjected mandated territories to a form of supervision which went beyond the scope of the existing supervisory authority in respect of mandates, and could have raised difficulties with respect to Article 82 of the Charter. As to the establishment of a Temporary Trusteeship Committee, it was opposed because it was felt that the setting up of such an organ might delay the negotiation and conclusion of trusteeship agreements. Consequently two United States proposals, intended to authorize this Committee to undertake the functions previously performed by the Mandates Commission, could not be acted upon. The non-establishment of a temporary subsidiary body empowered to assist the General Assembly in the exercise of its supervisory functions over mandates cannot be interpreted as implying that the General Assembly lacked competence or could not itself exercise its functions in that field. On the contrary, the general assumption appeared to be that the supervisory functions over mandates previously performed by the League were to be exercised by the United Nations. Thus, in the discussions concerning the proposed setting-up of the Temporary Trusteeship Committee, no observation was made to the effect that the League's supervisory functions had not been transferred to the United Nations. Indeed, the South African representative at the United Nations Preparatory Commission declared on 29 November 1945 that "it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report".

70. The Government of South Africa has further contended that the provision in Article 80, paragraph 1, that the terms of "existing international instruments" shall not be construed as altered by anything in Chapter XII of the Charter, cannot justify the conclusion that the duty to report under the Mandate was transferred from the Council of the

League to the United Nations.

71. This objection fails to take into consideration Article 10 in Chapter IV of the Charter, a provision which was relied upon in the 1950 Opinion to justify the transference of supervisory powers from the League Council to the General Assembly of the United Nations. The Court then said:

> "The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations." (*I.C.J. Reports 1950*, p. 137.)

72. Since a provision of the Charter—Article 80, paragraph 1—had maintained the obligations of the Mandatory, the United Nations had become the appropriate forum for supervising the fulfilment of those obligations. Thus, by virtue of Article 10 of the Charter, South Africa agreed to submit its administration of South West Africa to the scrutiny of the General Assembly, on the basis of the information furnished by the Mandatory or obtained from other sources. The transfer of the obligation to report, from the League Council to the General Assembly, was merely a corollary of the powers granted to the General Assembly. These powers were in fact exercised by it, as found by the Court in the 1950 Advisory Opinion. The Court rightly concluded in 1950 that—

> "... the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it" (*I.C.J. Reports 1950*, p. 137).

In its 1955 Advisory Opinion on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, after recalling some passages from the 1950 Advisory Opinion, the Court stated:

> "Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter." (*I.C.J. Reports 1955*, p. 76.)

In the 1956 Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, again after referring to certain passages from the 1950 Advisory Opinion, the Court stated:

"Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations." (*I.C.J. Reports 1956*, p. 27.)

In the same Opinion the Court further stated:

"... the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory" (*ibid.*, p. 28).

* * *

73. With regard to the intention of the League, it is essential to recall that, at its last session, the Assembly of the League, by a resolution adopted on 12 April 1946, attributed to itself the responsibilities of the Council in the following terms:

"The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council."

Thereupon, before finally dissolving the League, the Assembly on 18 April 1946, adopted a resolution providing as follows for the continuation of the mandates and the mandates system:

"The Assembly . . .

. . . . . .

3. Recognises that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

As stated in the Court's 1962 Judgment:

> "... the League of Nations in ending its own existence did not terminate the Mandates but ... definitely intended to continue them by its resolution of 18 April 1946" (*I.C.J. Reports 1962*, p. 334).

74. That the Mandate had not lapsed was also admitted by the Government of South Africa on several occasions during the early period of transition, when the United Nations was being formed and the League dissolved. In particular, on 9 April 1946, the representative of South Africa, after announcing his Government's intention to transform South West Africa into an integral part of the Union, declared before the Assembly of the League:

> "In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.
>
> The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."

The Court referred to this statement in its Judgment of 1962, finding that "there could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate after the dissolution of the League of Nations" (*I.C.J. Reports 1962*, p. 340).

75. Similar assurances were given on behalf of South Africa in a memorandum transmitted on 17 October 1946 to the Secretary-General of the United Nations, and in statements to the Fourth Committee of the General Assembly on 4 November and 13 November 1946. Referring to some of these and other assurances the Court stated in 1950: "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government." (*I.C.J. Reports 1950*, p. 135.)

76. Even before the dissolution of the League, on 22 January 1946, the Government of the Union of South Africa had announced to the General Assembly of the United Nations its intention to ascertain the

views of the population of South West Africa, stating that "when that had been done, the decision of the Union would be submitted to the General Assembly for judgment". Thereafter, the representative of the Union of South Africa submitted a proposal to the Second Part of the First Session of the General Assembly in 1946, requesting the approval of the incorporation of South West Africa into the Union. On 14 December 1946 the General Assembly adopted resolution 65 (I) noting—

> ". . . *with satisfaction* that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate"

and declared that it was—

> ". . . *unable to accede* to the incorporation of the territory of South West Africa in the Union of South Africa".

The General Assembly, the resolution went on,

> "*Recommends* that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory."

A year later the General Assembly, by resolution 141 (II) of 1 November 1947, took note of the South African Government's decision not to proceed with its plan for the incorporation of the Territory. As the Court stated in 1950:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." (*I.C.J. Reports 1950*, p. 142.)

77. In the course of the following years South Africa's acts and declarations made in the United Nations in regard to South West Africa were characterized by contradictions. Some of these acts and declarations confirmed the recognition of the supervisory authority of the United Nations and South Africa's obligations towards it, while others clearly signified an intention to withdraw such recognition. It was only on 11 July 1949 that the South African Government addressed to the Secretary-General a letter in which it stated that it could "no longer see that any

real benefit is to be derived from the submission of special reports on South West Africa to the United Nations and [had] regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded".

78. In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years. Thus the supervisory element, an integral part of the Mandate, was bound to survive, and the Mandatory continued to be accountable for the performance of the sacred trust. To restrict the responsibility of the Mandatory to the sphere of conscience or of moral obligation would amount to conferring upon that Power rights to which it was not entitled, and at the same time to depriving the peoples of the Territory of rights which they had been guaranteed. It would mean that the Mandatory would be unilaterally entitled to decide the destiny of the people of South West Africa at its discretion. As the Court, referring to its Advisory Opinion of 1950, stated in 1962:

> "The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." (*I.C.J. Reports 1962*, p. 334.)

79. The cogency of this finding is well illustrated by the views presented on behalf of South Africa, which, in its final submissions in the *South West Africa* cases, presented as an alternative submission, "in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations",

> ". . . that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body" (*I.C.J. Reports 1966*, p. 16).

The principal submission, however, had been:

> "That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder." *(Ibid.)*

80. In the present proceedings, at the public sitting of 15 March 1971, the representative of South Africa summed up his Government's position in the following terms:

> "Our contentions concerning the falling away of supervisory and accountability provisions are, accordingly, absolute and unqualified. On the other hand, our contentions concerning the possible lapse of the Mandate as a whole are secondary and consequential and depend on our primary contention that the supervision and the accountability provisions fell away on the dissolution of the League.
>
> In the present proceedings we accordingly make the formal submission that the Mandate has lapsed as a whole by reason of the falling away of supervision by the League, but for the rest we assume that the Mandate still continued . . .
>
> . . . on either hypothesis we contend that after dissolution of the League there no longer was any obligation to report and account under the Mandate."

He thus placed the emphasis on the "falling-away" of the "supervisory and accountability provisions" and treated "the possible lapse of the Mandate as a whole" as a "secondary and consequential" consideration.

81. Thus, by South Africa's own admission, "supervision and accountability" were of the essence of the Mandate, as the Court had consistently maintained. The theory of the lapse of the Mandate on the demise of the League of Nations is in fact inseparable from the claim that there is no obligation to submit to the supervision of the United Nations, and vice versa. Consequently, both or either of the claims advanced, namely that the Mandate has lapsed and/or that there is no obligation to submit to international supervision by the United Nations, are destructive of the very institution upon which the presence of South Africa in Namibia rests, for:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, p. 133; cited in *I.C.J. Reports 1962*, p. 333.)

82. Of this South Africa would appear to be aware, as is evidenced by its assertion at various times of other titles to justify its continued presence in Namibia, for example before the General Assembly on 5 October 1966:

"South Africa has for a long time contended that the Mandate is no longer legally in force, and that South Africa's right to administer the Territory is not derived from the Mandate but from military conquest, together with South Africa's openly declared and consistent practice of continuing to administer the Territory as a sacred trust towards the inhabitants."

In the present proceedings the representative of South Africa maintained on 15 March 1971:

". . . if it is accepted that the Mandate has lapsed, the South African Government would have the right to administer the Territory by reason of a combination of factors, being *(a)* its original conquest; *(b)* its long occupation; *(c)* the continuation of the sacred trust basis agreed upon in 1920; and, finally *(d)* because its administration is to the benefit of the inhabitants of the Territory and is desired by them. In these circumstances the South African Government cannot accept that any State or organization can have a better title to the Territory."

83. These claims of title, which apart from other considerations are inadmissible in regard to a mandated territory, lead by South Africa's own admission to a situation which vitiates the object and purpose of the Mandate. Their significance in the context of the sacred trust has best been revealed by a statement made by the representative of South Africa in the present proceedings on 15 March 1971: "it is the view of the South African Government that no legal provision prevents its annexing South West Africa." As the Court pointed out in its Advisory Opinion on the *International Status of South-West Africa*, "the principle of non-annexation" was "considered to be of paramount importance" when the future of South West Africa and other territories was the subject of decision after the First World War (*I.C.J. Reports 1950*, p. 131). What was in consequence excluded by Article 22 of the League Covenant is even less acceptable today.

* * *

84. Where the United Nations is concerned, the records show that, throughout a period of twenty years, the General Assembly, by virtue of the powers vested in it by the Charter, called upon the South African Government to perform its obligations arising out of the Mandate. On 9 February 1946 the General Assembly, by resolution 9 (I), invited all States administering territories held under mandate to submit trusteeship agreements. All, with the exception of South Africa, responded by placing the respective territories under the trusteeship system or offering

them independence. The General Assembly further made a special recommendation to this effect in resolution 65 (I) of 14 December 1946; on 1 November 1947, in resolution 141 (II), it "urged" the Government of the Union of South Africa to propose a trusteeship agreement; by resolution 227 (III) of 26 November 1948 it maintained its earlier recommendations. A year later, in resolution 337 (IV) of 6 December 1949, it expressed "regret that the Government of the Union of South Africa has withdrawn its previous undertaking to submit reports on its administration of the Territory of South West Africa for the information of the United Nations", reiterated its previous resolutions and invited South Africa "to resume the submission of such reports to the General Assembly". At the same time, in resolution 338 (IV), it addressed specific questions concerning the international status of South West Africa to this Court. In 1950, by resolution 449 (V) of 13 December, it accepted the resultant Advisory Opinion and urged the Government of the Union of South Africa "to take the necessary steps to give effect to the Opinion of the International Court of Justice". By the same resolution, it established a committee "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the Advisory Opinion . . .". In the course of the ensuing negotiations South Africa continued to maintain that neither the United Nations nor any other international organization had succeeded to the supervisory functions of the League. The Committee, for its part, presented a proposal closely following the terms of the Mandate and providing for implementation "through the United Nations by a procedure as nearly as possible analogous to that which existed under the League of Nations, thus providing terms no more extensive or onerous than those which existed before". This procedure would have involved the submission by South Africa of reports to a General Assembly committee, which would further set up a special commission to take over the functions of the Permanent Mandates Commission. Thus the United Nations, which undoubtedly conducted the negotiations in good faith, did not insist on the conclusion of a trusteeship agreement; it suggested a system of supervision which "should not exceed that which applied under the Mandates System . . .". These proposals were rejected by South Africa, which refused to accept the principle of the supervision of its administration of the Territory by the United Nations.

85. Further fruitless negotiations were held from 1952 to 1959. In total, negotiations extended over a period of thirteen years, from 1946 to 1959. In practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise. In the case of Namibia (South West Africa) this

stage had patently been reached long before the United Nations finally abandoned its efforts to reach agreement. Even so, for so long as South Africa was the mandatory Power the way was still open for it to seek an arrangement. But that chapter came to an end with the termination of the Mandate.

86. To complete this brief summary of the events preceding the present request for advisory opinion, it must be recalled that in 1955 and 1956 the Court gave at the request of the General Assembly two further advisory opinions on matters concerning the Territory. Eventually the General Assembly adopted resolution 2145 (XXI) on the termination of the Mandate for South West Africa. Subsequently the Security Council adopted resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon States to act accordingly.

* * *

87. The Government of France in its written statement and the Government of South Africa throughout the present proceedings have raised the objection that the General Assembly, in adopting resolution 2145 (XXI), acted *ultra vires*.

88. Before considering this objection, it is necessary for the Court to examine the observations made and the contentions advanced as to whether the Court should go into this question. It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry. On the other hand it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions. It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.

89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.

90. As indicated earlier, with the entry into force of the Charter of the United Nations a relationship was established between all Members of the United Nations on the one side, and each mandatory Power on the other. The mandatory Powers while retaining their mandates assumed,

under Article 80 of the Charter, vis-à-vis all United Nations Members, the obligation to keep intact and preserve, until trusteeship agreements were executed, the rights of other States and of the peoples of mandated territories, which resulted from the existing mandate agreements and related instruments, such as Article 22 of the Covenant and the League Council's resolution of 31 January 1923 concerning petitions. The mandatory Powers also bound themselves to exercise their functions of administration in conformity with the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in all their international relations.

91. One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.

92. The terms of the preamble and operative part of resolution 2145 (XXI) leave no doubt as to the character of the resolution. In the preamble the General Assembly declares itself "*Convinced* that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary" to the two basic international instruments directly imposing obligations upon South Africa, the Mandate and the Charter of the United Nations, as well as to the Universal Declaration of Human Rights. In another paragraph of the preamble the conclusion is reached that, after having insisted with no avail upon performance for more than twenty years, the moment has arrived for the General Assembly to exercise the right to treat such violation as a ground for termination.

93. In paragraph 3 of the operative part of the resolution the General Assembly "*Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate". In paragraph 4 the decision is reached, as a consequence of the previous declaration "that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is *therefore* terminated . . .". (Emphasis added.) It is this part of the resolution which is relevant in the present proceedings.

94. In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application. As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement . . ." (*I.C.J. Reports 1962*, p. 331). The Court stated conclusively in that Judgment that the

Mandate ". . . in fact and in law, is an international agreement having the character of a treaty or convention" (*I.C.J. Reports 1962*, p. 330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

"*(a)* a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty" (Art. 60, para. 3).

95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact, disavowed the Mandate", the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.

* * *

96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

97. The Government of South Africa has contended that it was the intention of the drafters of the mandates that they should not be revocable even in cases of serious breach of obligation or gross misconduct on the part of the mandatory. This contention seeks to draw support from the fact that at the Paris Peace Conference a resolution was adopted in which the proposal contained in President Wilson's draft of the Covenant regarding a right of appeal for the substitution of the mandatory was not

included. It should be recalled that the discussions at the Paris Peace Conference relied upon by South Africa were not directly addressed to an examination of President Wilson's proposals concerning the regulation of the mandates system in the League Covenant, and the participants were not contesting these particular proposals. What took place was a general exchange of views, on a political plane, regarding the questions of the disposal of the former German colonies and whether the principle of annexation or the mandatory principle should apply to them.

98. President Wilson's proposed draft did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving "to the people of any such territory or governmental unit the right to appeal to the League for the redress or correction of any breach of the mandate by the mandatory State or agency or for the substitution of some other State or agency, as mandatory". That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement.

99. As indicated earlier, at the Paris Peace Conference there was opposition to the institution of the mandates since a mandate would be inherently revocable, so that there would be no guarantee of long-term continuance of administration by the mandatory Power. The difficulties thus arising were eventually resolved by the assurance that the Council of the League would not interfere with the day-to-day administration of the territories and that the Council would intervene only in case of a fundamental breach of its obligations by the mandatory Power.

100. The revocability of a mandate was envisaged by the first proposal which was made concerning a mandates system:

> "In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate and entrusting it to some other State if necessary." (J. C. Smuts, *The League of Nations: A Practical Suggestion*, 1918, pp. 21-22.)

Although this proposal referred to different territories, the principle remains the same. The possibility of revocation in the event of gross violation of the mandate was subsequently confirmed by authorities on international law and members of the Permanent Mandates Commission

who interpreted and applied the mandates system under the League of Nations.

101. It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

102. In a further objection to General Assembly resolution 2145 (XXI) it is contended that it made pronouncements which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make. Without dwelling on the conclusions reached in the 1966 Judgment in the *South West Africa* contentious cases, it is worth recalling that in those cases the applicant States, which complained of material breaches of substantive provisions of the Mandate, were held not to "possess any separate self-contained right which they could assert ... to require the due performance of the Mandate in discharge of the 'sacred trust' " (*I.C.J. Reports 1966*, pp. 29 and 51). On the other hand, the Court declared that: "... any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League" (*ibid.*, p. 45). To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

103. The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgment in the *South West Africa* cases, referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League "in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust' ", was specifically recognized (*ibid.*, p. 29). Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the man-

datory with respect to its international obligations, and competent to act accordingly.

* * *

104. It is argued on behalf of South Africa that the consideration set forth in paragraph 3 of resolution 2145 (XXI) of the General Assembly, relating to the failure of South Africa to fulfil its obligations in respect of the administration of the mandated territory, called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity. The failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the Court adheres to its own jurisprudence.

* * *

105. General Assembly resolution 2145 (XXI), after declaring the termination of the Mandate, added in operative paragraph 4 "that South Africa has no other right to administer the Territory". This part of the resolution has been objected to as deciding a transfer of territory. That in fact is not so. The pronouncement made by the General Assembly is based on a conclusion, referred to earlier, reached by the Court in 1950:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed." (*I.C.J. Reports 1950*, p. 133.)

This was confirmed by the Court in its Judgment of 21 December 1962 in the *South West Africa* cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) (*I.C.J. Reports 1962*, p. 333). Relying on these decisions of the Court, the General Assembly declared that the Mandate having been terminated "South Africa has no other right to administer the Territory". This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.

* * *

106. By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter's attention to the resolution, thus acting in accordance with Article 11, paragraph 2, of the Charter.

107. The Security Council responded to the call of the General Assembly. It "took note" of General Assembly resolution 2145 (XXI) in the preamble of its resolution 245 (1968); it took it "into account" in resolution 246 (1968); in resolutions 264 (1969) and 269 (1969) it adopted certain measures directed towards the implementation of General Assembly resolution 2145 (XXI) and, finally, in resolution 276 (1970), it reaffirmed resolution 264 (1969) and recalled resolution 269 (1969).

108. Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and a cumulative effect. Resolution 264 (1969), in paragraph 3 of its operative part, calls upon South Africa to withdraw its administration from Namibia immediately. Resolution 269 (1969), in view of South Africa's lack of compliance, after recalling the obligations of Members under Article 25 of the Charter, calls upon the Government of South Africa, in paragraph 5 of its operative part, "to withdraw its administration from the territory immediately and in any case before 4 October 1969". The preamble of resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI) and espouses it, by referring to the decision, not merely of the General Assembly, but of the United Nations "that the Mandate of South-West Africa was terminated". In the operative part, after condemning the non-compliance by South Africa with General Assembly and Security Council resolutions pertaining to Namibia, the Security Council declares, in paragraph 2, that "the continued presence of the South African authorities in Namibia is illegal" and that consequently all acts taken by the Government of South Africa "on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid". In paragraph 5 the Security Council "*Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution".

109. It emerges from the communications bringing the matter to the Security Council's attention, from the discussions held and particularly from the text of the resolutions themselves, that the Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might

lead to a breach of the peace. (Art. 1, para. 1.) In the preamble of resolution 264 (1969) the Security Council was "*Mindful* of the grave consequences of South Africa's continued occupation of Namibia" and in paragraph 4 of that resolution it declared "that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter". In operative paragraph 3 of resolution 269 (1969) the Security Council decided "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, . . .". In operative paragraph 3 of resolution 276 (1970) the Security Council declared further "that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations".

110. As to the legal basis of the resolution, Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII ... the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."

111. As to the effect to be attributed to the declaration contained in paragraph 2 of resolution 276 (1970), the Court considers that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.

112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter.

113. It has been contended that Article 25 of the Charter applies only

to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.

114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

115. Applying these tests, the Court recalls that in the preamble of resolution 269 (1969), the Security Council was "*Mindful* of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations". The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.

116. In pronouncing upon the binding nature of the Security Council decisions in question, the Court would recall the following passage in its Advisory Opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*:

> "The Charter has not been content to make the Organization created by it merely a centre 'for harmonizing the actions of nations in the attainment of these common ends' (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization

by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council." (*I.C.J. Reports 1949*, p. 178.)

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

* * *

117. Having reached these conclusions, the Court will now address itself to the legal consequences arising for States from the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: "This decision entails a legal consequence, namely that of putting an end to an illegal situation" (*I.C.J. Reports 1951*, p. 82).

118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

119. The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below.

120. The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia. In this context the Court notes that at the same meeting of the Security Council in which the request for advisory opinion was made, the Security Council also adopted resolution 283 (1970) which defined some of the steps to be taken. The Court has not been called upon to advise on the legal effects of that resolution.

121. The Court will in consequence confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal.

122. For the reasons given above, and subject to the observations contained in paragraph 125 below, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship

or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

126. As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

127. As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

* * *

128. In its oral statement and in written communications to the Court, the Government of South Africa expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa's policy of separate development or *apartheid*, contending that to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is

shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.

129. The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

130. It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

* * *

132. The Government of South Africa also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa (para. 16 above). This proposal was presented in connection with the request to submit additional factual evidence and as a means of bringing evidence before the Court. The Court having concluded that no further evidence

was required, that the Mandate was validly terminated and that in consequence South Africa's presence in Namibia is illegal and its acts on behalf of or concerning Namibia are illegal and invalid, it follows that it cannot entertain this proposal.

* * *

133. For these reasons,

THE COURT IS OF OPINION,

in reply to the question:

> "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of June, one thousand nine hundred and seventy-one, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in entire agreement with the Opinion of the Court but would wish to add some observations on two or three aspects of the presentation made to the Court on behalf of South Africa.

It was contended that under the supervisory system as devised in the Covenant of the League and the different mandate agreements, the mandatory could, in the last resort, flout the wishes of the Council of the League by casting its vote in opposition to the directions which the Council might propose to give to the mandatory. The argument runs that this system was deliberately so devised, with open eyes, as to leave the Council powerless in face of the veto of the mandatory if the latter chose to exercise it. In support of this contention reliance was placed on paragraph 5 of Article 4 of the Covenant of the League by virtue of which any Member of the League not represented on the Council was to be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. This entitled the mandatory to sit as a member at any meeting of the Council in which a matter affecting its interests as a mandatory came under consideration. Under paragraph 1 of Article 5 of the Covenant decisions of the Council required the agreement of all the Members of the League represented at the meeting. This is known as the unanimity rule and by virtue thereof it was claimed that a mandatory possessed a right of veto when attending a meeting of the Council in pursuance of paragraph 5 of Article 4 and consequently the last word on the manner and method of the administration of the mandate rested with the mandatory. This contention is untenable. Were it well founded it would reduce the whole system of mandates to mockery. As the Court, in its Judgment of 1966, observed:

> "In practice, the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory 'vetoed' what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions." (*I.C.J. Reports 1966*, pp. 44-45.)

The representative of South Africa, in answer to a question by a Member of the Court, confessed that there was not a single case on record in which the representative of a mandatory Power ever cast a negative vote in a meeting of the Council so as to block a decision of the Council. It is thus established that in practice the last word always rested with the Council of the League and not with the mandatory.

The Covenant of the League made ample provision to secure the effectiveness of the Covenant and conformity to its provisions in respect of the obligations entailed by membership of the League. A Member of the League which had violated any covenant of the League could be declared to be no longer a Member of the League by a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon (para. 4, Art. 16, of the Covenant).

The representative of South Africa conceded that:

> ". . . if a conflict between a mandatory and the Council occurred and if all the Members of the Council were of the opinion that the mandatory had violated a covenant of the League, it would have been legally possible for the Council to expel the mandatory from the League and thereafter decisions of the Council could no longer be thwarted by the particular mandatory—for instance, a decision to revoke the mandate. The mandatory would then no longer be a Member of the League and would then accordingly no longer be entitled to attend and vote in Council meetings.
> . . . we agree that by expelling a mandatory the Council could have overcome the practical or mechanical difficulties created by the unanimity requirement." (Hearing of 15 March 1971.)

It was no doubt the consciousness of this position which prompted the deliberate absence of a mandatory from a meeting of the Council of the League which enabled the Council to take decisions that the mandatory might have felt obliged to vote against if it had been present.

If a mandatory ceased to be a Member of the League and the Council felt that the presence of its representative in a meeting of the Council dealing with matters affecting the mandate would be helpful, it could still be invited to attend as happened in the case of Japan after it ceased to be a Member of the League. But it could not attend as of right under paragraph 5 of Article 4 of the Covenant.

In addition, if need arose the Covenant could be amended under Article 26 of the Covenant. In fact no such need arose but the authority was provided in the Covenant. It would thus be idle to contend that the mandates system was deliberately devised, with open eyes, so as to leave the Council of the League powerless against the veto of the mandatory if the latter chose to exercise it.

Those responsible for the Covenant were anxious and worked hard

to institute a system which would be effective in carrying out to the full the sacred trust of civilization. Had they deliberately devised a framework which might enable a mandatory so inclined to defy the system with impunity, they would have been guilty of defeating the declared purpose of the mandates system and this is not to be thought of; nor is it to be imagined that these wise statesmen, despite all the care that they took and the reasoning and persuasion that they brought into play, were finally persuaded into accepting as reality that which could so easily be turned into a fiction.

* * *

In my view the supervisory authority of the General Assembly of the United Nations in respect of the mandated territory, being derived from the Covenant of the League and the Mandate Agreement, is not restricted by any provision of the Charter of the United Nations. The extent of that authority must be determined by reference to the relevant provisions of the Covenant of the League and the Mandate Agreement. The General Assembly was entitled to exercise the same authority in respect of the administration of the Territory by the Mandatory as was possessed by the Council of the League and its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League. This was well illustrated in the case of General Assembly resolution 289 (IV), adopted on 21 November 1949 recommending that Libya shall become independent as soon as possible and in any case not later than 1 January 1952. A detailed procedure for the achievement of this objective was laid down, including the appointment by the General Assembly of a United Nations Commissioner in Libya and a Council to aid and advise him, etc. All the recommendations contained in this resolution constituted binding decisions; decisions which had been adopted in accordance with the provisions of the Charter but whose binding character was derived from Annex XI to the Treaty of Peace with Italy.

* * *

The representative of South Africa, during the course of his oral submission, refrained from using the expression "*apartheid*" but urged:

> "... South Africa is in the position that its conduct would be unlawful if the differentiation which it admittedly practises should be directed at, and have the result of subordinating the interests of one or certain groups on a racial or ethnic basis to those of others, ... If that can be established in fact, then South Africa would be guilty of violation of its obligations in that respect, otherwise not." (Hearing of 17 March 1971.)

The policy of *apartheid* was initiated by Prime Minister Malan and was then vigorously put into effect by his successors, Strijdom and Verwoerd. It has been continuously proclaimed that the purpose and object of the policy are the maintenance of White domination. Speaking to the South African House of Assembly, as late as 1963, Dr. Verwoerd said:

> "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . Keeping it White can only mean one thing, namely, White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development." (*I.C.J. Pleadings, South West Africa*, Vol. IV, p. 264.)

South Africa's reply to this in its Rejoinder in the 1966 cases was in effect that these and other similar pronouncements were qualified by "the promise to provide separate homelands for the Bantu groups" wherein the Bantu would be free to develop his capacities to the same degree as the White could do in the rest of the country. But this promise itself was always subject to the qualification that the Bantu homelands would develop under the guardianship of the White. In this connection it was urged that in 1961 the "Prime Minister spoke of a greater degree of ultimate independence for Bantu homelands than he had mentioned a decade earlier". This makes little difference in respect of the main purpose of the policy which continued to be the domination of the White.

It needs to be remembered, however, that the Court is not concerned in these proceedings with conditions in South Africa. The Court is concerned with the administration of South West Africa as carried on by the Mandatory in discharge of his obligations under the Mandate which prescribed that the well-being and development of people who were not yet able to stand by themselves under the strenuous conditions of the modern world constituted a sacred trust of civilization and that the best method of giving effect to this principle was that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience and their geographical position could best undertake this responsibility (Art. 22, paras. 1 and 2, of the Covenant of the League of Nations).

The administration was to be carried on "in the interests of the indigenous population" (para. 6, Art. 22). For the discharge of this obligation it is not enough that the administration should believe in good faith that the policy it proposes to follow is in the best interests of all sections of the population. The supervisory authority must be satisfied that it is in the

best interests of the indigenous population of the Territory. This follows from Article 6 of the Mandate Agreement for South West Africa, read with paragraph 6 of Article 22 of the Covenant.

The representative of South Africa, while admitting the right of the people of South West Africa to self-determination, urged in his oral statement that the exercise of that right must take into full account the limitations imposed, according to him, on such exercise by the tribal and cultural divisions in the Territory. He concluded that in the case of South West Africa self-determination "may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation" (hearing of 17 March 1971). This in effect means a denial of self-determination as envisaged in the Charter of the United Nations.

Whatever may have been the conditions in South Africa calling for special measures, those conditions did not exist in the case of South West Africa at the time when South Africa assumed the obligation of a mandatory in respect of the Territory, nor have they come into existence since. In South West Africa the small White element was not and is not indigenous to the Territory. There can be no excuse in the case of South West Africa for the application of the policy of *apartheid* so far as the interests of the White population are concerned. It is claimed, however, that the various indigenous groups of the population have reached different stages of development and that there are serious ethnic considerations which call for the application of the policy of separate development of each group. The following observations of the Director of the Institute of Race Relations, London, are apposite in this context:

> "... White South African arguments are based on the different stages of development reached by various groups of people. It is undisputed fact that groups have developed at different paces in respect of the control of environment (although understanding of other aspects of life has not always grown at the same pace). But the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group. His ties with it may be strong; indeed, when considering politics and national survival, the assumption that they will be strong is altogether reasonable. Again, as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior. It is this that rankles. 'Separate but equal' is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humiliation, and far more so if it applies not only

to the group as a whole but to individuals. In fact, of course, what separate development has meant has been anything but equal.

These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants." (Quoted in *I.C.J. Pleadings, South West Africa*, Vol. IV, p. 339.)

* * *

Towards the close of his oral presentation the representative of South Africa made a plea to the Court in the following terms:

"In our submission, the general requirement placed by the Charter on all United Nations activities is that they must further peace, friendly relations, and co-operation between nations, and especially between member States. South Africa, as a member State, is under a duty to contribute towards those ends, and she desires to do so, although she has no intention of abdicating what she regards as her responsibilities on the sub-continent of southern Africa.

If there are to be genuine efforts at achieving a peaceful solution, they will have to satisfy certain criteria. They will have to respect the will of the self-determining peoples of South West Africa. They will have to take into account the facts of geography, of economics, of budgetary requirements, of the ethnic conditions and of the state of development.

If this Court, even in an opinion on legal questions, could indicate the road towards a peaceful and constructive solution along these lines, then the Court would have made a great contribution, in our respectful submission, to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men." (Hearing of 5 March 1971.)

The representative of the United States of America, in his oral presentation, observed that:

". . . the question of holding a free and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a fair and informed expression of the will of the people of Namibia deserves study. It is a matter which might be properly submitted to the competent political organs of the United Nations, which have consistently manifested their concern that the

Namibians achieve self-determination. The Court may wish to so indicate in its opinion to the Security Council." (Hearing of 9 March 1971.)

The Court having arrived at the conclusion that the Mandate has been terminated and that the presence of South Africa in South West Africa is illegal, I would, in response to the plea made by the representative of South Africa, suggest that South Africa should offer to withdraw its administration from South West Africa in consultation with the United Nations so that a process of withdrawal and substitution in its place of United Nations' control may be agreed upon and carried into effect with the minimum disturbance of present administrative arrangements. It should also be agreed upon that, after the expiry of a certain period but not later than a reasonable time-limit thereafter, a plebiscite may be held under the supervision of the United Nations, which should ensure the freedom and impartiality of the plebiscite, to ascertain the wishes of the inhabitants of the Territory with regard to their political future. If the result of the plebiscite should reveal a clear preponderance of views in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible.

South Africa's insistence upon giving effect to the will of the peoples of South West Africa proceeds presumably from the conviction that an overwhelming majority of the peoples of the Territory desire closer political integration with the Republic of South Africa. Should that prove in fact to be the case the United Nations, being wholly committed to the principle of self-determination of peoples, would be expected to readily give effect to the clearly expressed wishes of the peoples of the Territory. Should the result of the plebiscite disclose their preference for a different solution, South Africa should equally readily accept and respect such manifestation of the will of the peoples concerned and should co-operate with the United Nations in giving effect to it.

The Government of South Africa, being convinced that an overwhelming majority of the peoples of South West Africa truly desire incorporation with the Republic, would run little risk of a contrary decision through the adoption of the procedure here suggested. If some such procedure is adopted and the conclusion that may emerge therefrom, whatever it may prove to be, is put into effect, South Africa would have vindicated itself in the eyes of the world and in the estimation of the peoples of South West Africa, whose freely expressed wishes must be supreme. There would still remain the possibility, and, if South Africa's estimation of the situation is close enough to reality, the strong probability, that once the peoples of South West Africa have been put in a position to manage their own affairs without any outside influence or control and they have had greater experience of the difficulties and problems with which they would be confronted, they may freely decide, in the exercise of their sovereignty, to establish a closer political relationship with South Africa. The adoption

of the course here suggested would indeed make a great contribution "to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men".

Vice-President AMMOUN and Judges PADILLA NERVO, PETRÉN, ONYEAMA, DILLARD and DE CASTRO append separate opinions to the Opinion of the Court.

Judges Sir Gerald FITZMAURICE and GROS append dissenting opinions to the Opinion of the Court.

(Initialled) Z.K.
(Initialled) S.A.

SEPARATE OPINION OF VICE-PRESIDENT AMMOUN

[Translation]

1. The Security Council having requested from the International Court of Justice, within the framework of the latter's advisory jurisdiction, an authoritative opinion concerning the legal consequences of the continued presence of South Africa in Namibia (formerly South West Africa) notwithstanding the termination in 1966 of the tutelary Mandate which the League of Nations had conferred upon that Power in 1920, the Court has been called upon to pronounce, for the first time in regard to certain fundamental principles of international law, on a number of problems raised by the request for an opinion. These are, in particular, the sovereignty of dependent peoples, the mandate institution, its nature and its objects, the right of peoples to self-determination and decolonization, equality between nations and between individuals, racial discrimination as expressed in the doctrine of *apartheid* in South Africa and in Namibia and, in sum, the whole body of human rights and their imperative universal character.

All these notions are the outward expression of a new body of international law, the consequence of an irreversible social and political evolution of the modern world. The Court, in its Advisory Opinion, has not overlooked them. In my view, however, it has not always gone far enough in spelling out the legal conclusions to which they point.

Furthermore, I find that neither the reasons given for the operative part nor the wording of those paragraphs are sufficiently explicit and decisive in regard to the legal qualification of the presence of South Africa in Namibia and the obligations for States that flow therefrom.

I have therefore felt it my duty to compose this separate opinion with a view to contributing to the Advisory Opinion of the Court, whose views I share, some further support, however modest it may be.

2. The Republic of South Africa, having, like certain other States, availed itself of Article 66 of the Statute of the Court in order to furnish information in connection with the request for an advisory opinion, presented itself as a party to a dispute between it and the majority of States which had taken part in voting the United Nations General Assembly and Security Council resolutions relating to Namibia. On that ground, it requested permission to choose a judge *ad hoc* to participate, with the Members of the Court, in the giving of the opinion.

Having rejected South Africa's application by a majority decision in an Order made on 29 January 1971, the Court has explained that one

of its reasons lay in the absence of a dispute between parties. To justify the appointment of a judge *ad hoc*, not only would a dispute have had to be present but there would have had to be on the Bench no judge of the nationality of one of the parties while the Bench did include a judge of the nationality of the opposing party. But what, in the present proceedings, would have been the identity of that opposing party? The States which voted against South Africa? But in that case those which voted for South Africa are *in the same interest* as it, within the meaning of Article 31 of the Statute, and as such are already represented. To have ignored this and allowed South Africa a judge *ad hoc* would in such circumstances have contravened the rule of that very equality which the Statute seeks to safeguard through the institution of judges *ad hoc*. *A fortiori* this rules out any discretionary power that some might wish to deduce from Article 68 of the Statute, for the Court may not, on the pretext of interpretation, contravene the fundamental rule and *raison d'être* of that institution. In any case, if the opinion of the minority had been accepted, the Court ought, in my view, to have permitted the choice of a judge *ad hoc* both for South Africa and for Namibia. The legal personality of Namibia would thus have been judicially recognized and Namibia would have appeared for the first time in international proceedings [1].

Namibia, even at the periods when it had been reduced to the status of a German colony or was subject to the South African Mandate, possessed a legal personality which was denied to it only by the law now obsolete. It was considered by the Powers of the day as a merely geographical concept taking its name from its location in the South-West of the African Continent. It nevertheless constituted a subject of law that was distinct from the German State, possessing national sovereignty but lacking the exercise thereof. The institution of the Mandate, *a fortiori*, did not connote the annexation of the country which was subject to it, as the Court has made clear by its reference to its earlier Advisory Opinion of 18 July 1950. Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression. General Smuts, the Prime Minister of the Union of South Africa, already recognized this in his study on what was to be the mandate institution [2]. As the beneficiaries on whose behalf the mandate agreements were to be concluded, it was right that some of the peoples who were to be subjected to them should be consulted on the selection of the mandatory. That is what was stipulated in paragraph 4 of Article 22 of the Covenant, for the peoples severed from the Ottoman Empire. In fact the commission of inquiry, reduced to its

[1] It was only as an observer that Namibia was admitted to the United Nations Economic Commission for Africa.

[2] *The League of Nations: A Practical Suggestion.*

American members, King and Crane, conducted such consultations in Lebanon, Syria, Palestine and Iraq; the United Kingdom and France having declined the American President Woodrow Wilson's invitation to take part because they had come to an agreement as to the allocation of the mandates and were already in position on the spot. The majority of the populations consulted demanded immediate independence, but the right of peoples to self-determination had not yet come to maturity and it was only in the wake of the Second World War that the four countries mentioned were to obtain their independence.

The opinion expressed by Paul Fauchille, writing in 1922, deserves attention solely as a historical illustration, since today it has lost all relevance. "It seems clear," he averred, "that, whereas in the case of mandates of the second and third categories full sovereignty is attributed to the Mandatory, there is in the case of mandates of the first category, as in a protectorate properly so called, a sharing of sovereignty between the independent communities or nations and the Mandatory [1]." Fauchille thus assimilated "B" and "C" Mandates to the colonies of his period. He conceived of a sharing of sovereignty in the case of "A" Mandates, whereas it must surely be agreed that sovereignty is indivisible, as is liberty, and that all that is conceivable is a distinction between the possession of sovereignty and its exercise. Stoyanovsky, writing three years later, took a more accurate view when he upheld the notion of virtual sovereignty residing in a people deprived of its exercise by domination or tutelage [2]. Those were also the views of Paul Pic [3].

It is true that the Namibians' status of a people, which was recognized by the General Assembly of the United Nations in its resolution 2372 (XXII) of 12 June 1968, has been disputed by the South African Government so as to justify dividing—and ruling—the country under the euphemism of separate development, known in Afrikaans as *apartheid.* But the Namibian people, whose existence and unity the Court has, in its turn, recognized in the present Advisory Opinion, has itself asserted its international personality by taking up the struggle for freedom. Since South Africa has opposed the achievement of the objects of the Mandate and blocked Namibia's path to independence and the enjoyment of its full sovereignty, Namibia has decided to fight. The legitimacy of the Namibian national struggle has been recognized in four resolutions of the General Assembly [4] and in Security Council resolution 269 (1969). This struggle, by analogy, continues the line of those waged by other members of the international community, during the First World War, before they were recognized as States, such as the Polish, Czech and

---

[1] *Traité de droit international public*, 1922, Vol. I, p. 298.

[2] *La théorie générale des mandats internationaux*, 1925, pp. 83 ff.

[3] "Le régime des mandats d'après le traité de Versailles", *Revue générale de droit international public*, 1923, 2nd Series, IV, No. 5, p. 334.

[4] Resolutions 2372 (XXII), 2403 (XXIII), 2498 (XXIV) and 2517 (XXIV).

Slovak peoples; or of the French national movement [1] at the time when France was under the domination of Nazi Germany.

In law, the legitimacy of the peoples' struggle cannot be in any doubt, for it follows from the right of self-defence, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter. It is also an accepted principle that self-defence may be collective; thus we see the other peoples of Africa, members of the Organization of African Unity, associated with the Namibians in their fight for freedom. The rightness of this is also confirmed by the Universal Declaration of Human Rights, which stresses in its preamble that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The struggle of the Namibian people thus takes its place within the framework of international law, not least because the struggle of peoples in general has been one, if not indeed the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized. I could therefore have wished that the Court, like the General Assembly and the Security Council, had mentioned in its Opinion the legitimate struggle of the Namibian people. But its silence on this subject does not exclude its agreement, since it has referred to the relevant resolutions of the other two organs of the United Nations.

The Court has not mentioned the General Assembly's decision to the effect that "henceforth South West Africa comes under the direct responsibility of the United Nations" (para. 4 of General Assembly resolution 2145 (XXI)). That should have been said in order to make clear the nature of the relationships between the Organization, on the one hand, and Namibia and the Republic of South Africa on the other. Nor has the Court referred to the setting-up of a United Nations Council for South West Africa (para. 6 of the same resolution), the name of which was changed by resolution 2372 (XXII) to United Nations Council for Namibia and which resolution 2248 (S-V) had vested with powers of statehood. These are the powers which it was for the Mandatory to exercise until the expiry of the Mandate, and they entitle the Council, acting on behalf of the United Nations, to exercise legislative competence and administrative authority in Namibia as well as to represent it diplomatically and exercise diplomatic protection of its nationals. It is to this body that it would in other circumstances have fallen to choose a judge *ad hoc* for Namibia, and it might also have presented the Court with a written statement and an oral statement as did the Government of South Africa. However it did not receive the communication referred to in Article 66 which would have authorized it to do so.

---

[1] These are the terms used by L. Cavaré, *Droit international public positif*, Vol. II, 2nd ed., pp. 334 f.

3. The revocation of South Africa's Mandate for Namibia which was decided upon by the General Assembly of the United Nations is based on three grounds which are mentioned in the fifth paragraph of the preamble to resolution 2145 (XXI) of 27 October 1966, reading as follows:

> "*Convinced* that the administration of the mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights."

The General Assembly had reached this decision after finding, in the eighth paragraph of the preamble to the same resolution,

> ". . . that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail".

The revocation of the Mandate was thus explicitly based on three grounds relating to international instruments of the first importance. In refusing, quite rightly, to question the formal or intrinsic validity of the resolutions concerned, the Court nevertheless felt it necessary to refute the arguments advanced in this connection by certain States. In doing this it had in addition to direct its consideration to each of the three grounds stated in resolution 2145 (XXI) as justifying the termination of the Mandate and entailing the illegality of the presence in Namibia of the South African authorities thus bereft of title.

The Court considered the first ground, namely that of the violation of Article 22 of the Covenant of the League of Nations and of Article 2 of the mandate agreement, according to which:

> "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

The Court could not content itself with finding that the Mandatory had violated this obligation, for it was called upon to deduce the legal consequences of the illegal presence of South Africa in Namibia, and these consequences differ in nature and in number according to whether there was a violation of the relatively limited texts constituting the mandate instruments, or a violation of the obligations flowing from the constitutional Charter of the United Nations and the Universal Declaration of Human Rights.

Furthermore, the principles and purposes of the United Nations must be observed by all its organs: by the General Assembly and the Security Council and, no less, by the International Court of Justice, as also by each of the member States.

Now, we are told that these principles have been violated, these pur-

poses gravely neglected. And when the political organs have fulfilled their obligations, by denouncing and condemning these violations and this grave neglect, the International Court of Justice owed it to itself to discharge its own obligations by not closing its eyes to conduct infringing the principles and rights which it is its duty to defend.

Again, the Court could not remain an unmoved witness in face of the evolution of modern international law which is taking place in the United Nations through the implementation and the extension to the whole world of the principles of equality, liberty and peace in justice which are embodied in the Charter and in the Universal Declaration of Human Rights.

The Court is not a law-making body. It declares the law. But it is a law discernible from the progress of humanity, not an obsolete law, a vestige of the inequalities between men, the domination and colonialism which were rife in international relationships up to the beginning of this century but are now disappearing, thanks to the struggle being waged by the peoples and to the extension to the ends of the world of the universal community of mankind.

Thus, in addition to the violation of the stipulations of the Mandate, the Court did not omit consideration of the other two grounds for its termination. By referring, like resolution 2145 (XXI), to the Charter of the United Nations and the Universal Declaration of Human Rights, the Court has asserted the imperative character of the right of peoples to self-determination and also of the human rights whose violation by the South African authorities it has denounced. It appears to me, however, that its reasoning and conclusions, to which, as I have said, I subscribe, leave room for explanations which, expressed in the separate opinions, may serve to strengthen those conclusions.

4. With regard to the survival of the Mandate after the dissolution of the League and the taking-over by the United Nations of supervision of the Mandatory's administration, which the Court has justified by legal arguments drawn from consideration of the purposes and objects of the Mandate in the light of the texts and *travaux préparatoires* and from an analysis of the pertinent Charter articles, referring also herein to certain of its earlier decisions (the Advisory Opinions of 1950, 1955 and 1956, and the Judgment of 1962), I would like to add one general observation which seems to me to be essential; it relates to the very nature of the tutelary-mandate institution and its place in the evolution of humanity.

Historians [1] have outlined the upward march of mankind from the time when *homo sapiens* appeared on the face of the globe, first of all in the Near East in what was the land of Canaan, up to the age of the greatest thinkers and, more particularly, throughout the whole history

[1] See in particular H. G. Wells, *Outline of History*.

of social progress, from the slavery of Antiquity to man's inevitable, irreversible drive towards equality and freedom. This march is like time itself. It never stops. Nothing can stand in its way for long. The texts, whether they be laws, constitutions, declarations, covenants or charters, do but define it and mark its successive phases. They are a mere record of it. In other words, the progressive rights which men and peoples enjoy are the result much less of those texts than of the human progress to which they bear witness.

The institution of tutelage, succeeding colonialization and preceding and preparing the way for sovereign independence, has its place in this upward march, at one stage of which this concept of guardianship was born, in 1920; at the following stage, it was due to end. The provisions of Article 22 of the Covenant and the terms of the mandate agreements, whether they define the purposes of tutelage or specify the assistance to be given to backward peoples to enable them to catch up the vanguard of more developed peoples, give expression to this kinetic reality. Woodrow Wilson, and even the South African General Smuts, and the French Minister Simon, were imbued with this truth when they admitted that mandates must have an end, or are revocable. And so, to revert to the arguments set forth in the Advisory Opinion, I could have wished that the revocability of the Mandate, which has been so strongly contested, had been more fully justified by reference to the nature of tutelage and in consideration of the universal context in which it finds its place. Considering its nature and purposes, the duration of the tutelary Mandate could not be determined at will by the party charged or entrusted with it. When the General Assembly, representing the international community once the League had ceased to do so, decided the revocation of that Mandate, with effect *erga omnes* in view of the Mandate's objective institutional character, that revocation was also binding on the extremely small number of States which had opposed it or, by expressing doubts and reservations, withheld their approval. For how could South Africa's Mandate, with its organs and structures, having lapsed for the quasi-unanimity of States, survive in the eyes of some others? An institution is a creature of reason which either exists or does not: it cannot at one and the same time be and not be. That would be no less curious than if a State admitted by majority vote to the United Nations should be a Member for some but not for others.

5. Recognition of the right of peoples to self-determination is expressed by the Court in paragraph 52 of the Advisory Opinion. It is there stated, *inter alia*, that:

> "Furthermore, the subsequent development of international law, in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. . . . A further important stage in this development was the Declaration on the Granting of Inde-

pendence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'."

The Opinion is not lacking in persuasive force; it would have possessed still more if it had retraced the path whereby this right of peoples has made its entry into positive international law and had determined exactly what were the factors which have gone into its making. I refer in particular to the fight of the peoples for freedom and independence, which has been going on ever since there have been conquering and dominating peoples and subject but unsubjugated peoples. To confine ourselves to modern times, we may mention the historic declarations proclaimed at the end of the eighteenth century, the provisions of present-day charters and covenants from the Atlantic Charter and the United Nations Charter to the Pact of Bogotá and the Charter of the Organization of African Unity, the repeated declarations of Bandung and of the non-aligned countries meeting in Belgrade and Cairo, the declaration contained in resolution 1514 (XV) of the General Assembly of the United Nations and, finally the two solemn Declarations which marked the close of the work of the United Nations during the first 25 years of its existence: resolution 2625 (XXV), adopted unanimously on 24 October 1970, on the principles of international law concerning friendly relations and co-operation between States in accordance with the Charter of the United Nations, and resolution 2627 (XXV), adopted on the same day on the occasion of the 25th anniversary of the United Nations. Would these international or universal instruments have seen the light of day if it had not been for the heroic fight of peoples aspiring with all their hearts after freedom and independence? If there is any "general practice" which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1 *(b)*, of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle. This struggle continues for the purpose of asserting, yet once more, the right of self-determination, more particularly in southern Africa and, specifically, Namibia. Indeed one is bound to recognize that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity. And without those same peoples, mainly of Asia and Africa, who since the Second World War have streamed into the new international Organization, the first of a universalist character, would it have been possible to achieve that impressive number of declarations and resolutions whereby the great principles they had helped consecrate have been translated into law and applied to the reshaping of international relations?

As for the "general practice" of States to which one traditionally refers when seeking to ascertain the emergency of customary law, it

has, in the case of the right of peoples to self-determination, become so widespread as to be not merely "general" but universal, since it has been enshrined in the Charter of the United Nations (Art. 1, para. 2, and Art. 55) and confirmed by the texts that have just been mentioned: pacts, declarations and resolutions, which, taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination. There is not one State, it should be emphasized, which has not, at least once, appended its signature to one or other of these texts, or which has not supported it by its vote. The confirmed rightness of this practice is moreover evinced by the great number of States—no less than 55—which, since the consecration by the Charter of the right of self-determination, have benefited from it, after having ensured, by the struggles and the strivings of their peoples, its definitive embodiment in both the theory and the practice of the new law. If any doubts had remained on this matter in the mind of the States Members of the United Nations, they would not have resolved to proclaim the legitimacy of the struggle of peoples—and more specifically the Namibian people—to make good their right of self-determination. If this right is still not recognized as a juridical norm in the practice of a few rare States or the writings of certain even rarer theoreticians, the attitude of the former is explained by their concern for their traditional interests, and that of the latter by a kind of extreme respect for certain long-entrenched postulates of classic international law. Law is a living deed, not a brilliant honours-list of past writers whose work of course compels respect but who cannot, except for a few great minds, be thought to have had such a vision of the future that they could always see beyond their own times. Everything goes to show how difficult it is to free ourselves from the servitudes of a past through which we have ourselves lived and from traditions we have always respected. It is, then, a page of history which needs turning that must be seen in attachment to an outdated law which denies the resolutions of the United Nations the authority with which the Charter has invested them, which authority has been reinforced by the almost unanimous will of the peoples of the world. That will is incomparably more decisive than that of the five or six Powers which have asserted opposite conceptions while relying on a claim to representativity whose lack of legal basis they must confess. Facts, therefore, have got the better of their last-ditch resistance, and in the last two sentences of paragraph 52 of the Advisory Opinion one may see an allusion to this struggle: one perhaps over-discreet, but at all events the Opinion has written *finis* to the matter.

6. The violation of human rights has not come to an end in any part of the world; to realize that fact one need only consult the archives of the European Court of Human Rights, the Human Rights Commission of the United Nations or the International Commission of Jurists, or simply read the world press. Violations of personal freedom and human dignity, the racial, social or religious discrimination which constitutes

the most serious of violations of human rights since it annihilates the two-fold basis provided by equality and liberty, all still resist the currents of liberation in each of the five continents. That is certainly no reason why we should close our eyes to the conduct of the South African authorities. The facts mentioned before the Court in relation to the request for an advisory opinion cannot be ignored, seeing that consideration of them is important for the determination of the legal consequences of the illegal presence of South Africa in Namibia.

The Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights. In the case of certain of the Declaration's provisions, attracted by the conduct of South Africa, it would have been an improvement to have dealt in terms with their comminatory nature, which is implied in paragraphs 130 and 131 of the Opinion by the references to their violation.

In its written statement the French Government, alluding to the obligations which South Africa accepted under the Mandate and assumed on becoming a Member of the United Nations, and to the norms laid down in the Universal Declaration of Human Rights, stated that there was no doubt that the Government of South Africa had, in a very real sense, systematically infringed those rules and those obligations. Nevertheless, referring to the mention by resolution 2145 (XXI) of the Universal Declaration of Human Rights, it objected that it was plainly impossible for non-compliance with the norms it enshrined to be sanctioned with the revocation of the Mandate, inasmuch as that Declaration was not in the nature of a treaty binding upon States.

Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1 *(a)*, of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1 *(b)* of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1 *(b)*, of the Statute. One right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.

The equality demanded by the Namibians and by other peoples of every colour, the right to which is the outcome of prolonged struggles to make it a reality, is something of vital interest to us here, on the one hand because it is the foundation of other human rights which are no more than its corollaries and, on the other, because it naturally rules out racial discrimination and *apartheid*, which are the gravest of the facts with which South Africa, as also other States, stands charged. The attention

I am devoting to it in these observations can therefore by no means be regarded as exaggerated or out of proportion.

It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights."

From this first principle flow most rights and freedoms.

Of all human rights, the right to equality is far and away the most important. It is also the one which has been longest recognized as a natural right; it may even be said that the doctrine of natural law was born in ancient times with the concept of human equality as its first element. It has been part of natural law ever since Zeno of Sidon [1] and his earliest disciples. It is in countries outside Europe that the provenance of the concept itself, as also of its most ardent present-day defenders, must be sought. Like the Christianity which later espoused the same premises, the philosophy of Zeno reflected the revolt of the humble and the oppressed. "Stoic liberty," Hegel teaches us in his *Phenomenology of the Mind*, "arose in a time of fear and slavery." Equality was not to the liking of the Greeks up to and including the time of Plato and Aristotle, who both found words to justify inequality and slavery [2], whereas for the Stoics: "man is a slave neither by nature nor by conquest." When Zeno died, his work was completed, and the notion of equality definitively received and propagated throughout the world of that era by his disciples [3], the distant forerunners of the eighteenth-century philosophers. Two streams of thought had become established on the two opposite shores of the Mediterranean, a Graeco-Roman stream represented by Epictetus, Lucan, Cicero and Marcus Aurelius; and an Asian and African stream, comprising the monks of Sinai and Saint John Climac, Alexandria with Plotinus and Philo the Jew, Carthage to which Saint Augustine gave new lustre; the two streams flowed together in Spain with Seneca. The stoic philosophy,

---

[1] According to Diogenes Laertes, a statue was erected to him in that city, as also in Athens, where he had gone to teach and where he founded the school which first bore his name but was later called the Stoic school.

[2] For Aristotle, reason was a privilege of which certain people, for instance slaves, are deprived. His advice to his pupil Alexander, who was not yet called the Great, was "to treat Greeks as members of the family, the *Barbarians* as animals . . .".

Yet had not the *Barbarians* already probed space, predicted eclipses and given names to the signs of the Zodiac; divided time into months, into weeks; invented the alphabet; and were they not soon to give the world the first really humane philosophy: namely, that founded upon equality?

[3] G. Rodier, *Etudes de philosophie grecque*, 1969, p. 231.

The disciples of Zeno were, many of them, his fellow countrymen: Zeno, the second of that name, and Boëthus, both also of Sidon; Antipater, of Tyre; Apollonios, also of Tyre; Chrysippos, of Phoenician Cyprus; Herillos, of Carthage; Cato, of Utica; Perseus, friend of Zeno; Posidonios, of Hama in Syria, a Phoenician halting-place on the road to Babylon; Diogenes, of Babylon; Panetios, a pupil of Antipater of Tyre, who was born in Rhodes, a Phoenicio-Greek meeting-place as also was Cyprus, where Cicero and Pompey came to follow his teaching.

sowing for the first time in mankind's history the seeds of equality between men and between nations, influenced the greatest of the Roman jurisconsults who were of Phoenician origin, Papinius and Ulpian, and then the doctors of Christianity [1] through whom it was eventually transmitted to the Age of Reason [2]. The ground was thus prepared for the legislative and constitutional process which began with the first declarations or bills of rights in America and Europe, continued with the constitutions of the nineteenth century, and culminated in positive international law in the San Francisco, Bogotà and Addis Ababa charters, and in the Universal Declaration of Human Rights which has been confirmed by numerous resolutions of the United Nations, in particular the above-mentioned declarations adopted by the General Assembly in resolutions 1514 (XV), 2625 (XXV) and 2627 (XXV). The Court in its turn has now confirmed it.

7. The Charter has consecrated the principle of equality in even more categorical terms than it uses for the right of peoples to self-determination by reaffirming in its preamble the faith of the United Nations in the equal rights of nations large and small, and by declaring in Article 2, paragraph 1, that "The Organization is based on the principle of the sovereign equality of all its Members". The General Assembly has many times had occasion to affirm the right to equality and the fundamental rights which derive therefrom. This has been the case every time that the General Assembly has decided that it had competence notwithstanding the claim by States that such rights did not enjoy the protection of international law and therefore fell within their own national jurisdiction. Thus South Africa has regularly sought to rely on its domestic jurisdiction, denying the competence of the United Nations whenever since 1946, at session after session, it has been accused of practising *apartheid* in violation of the right to equality. The successive resolutions of the General Assembly rejecting this contention by South Africa have given it to be understood that the equality and fundamental rights violated by *apartheid* constitute obligations which are in fact placed under the protection of international law and as such fall within the competence of the United Nations.

Only recently, on 26 May 1971, the Special Committee on Apartheid decided to oppose any dialogue with South Africa unless based on prior recognition of the equality of the Black population.

---

[1] Bertrand Russell, in his *History of Western Philosophy*, pp. 275 f., writes: "By nature, the stoics held, all human beings are equal . . . Christianity took this part of the stoic teachings."

[2] For this flowering of the concept of equality in the ancient land of Phoenicia, its adoption by the Graeco-Roman world and Christianity, and its development through the vicissitudes of time, the following works may be consulted: Bertrand Russell, *op. cit.*; Emile Bréhier, *Histoire de la philosophie*, Vol. 2, pp. 228 and 234; Rodis-Lewis, *La morale stoïcienne*, pp. 11 and 74; G. Rodier, *Etudes de philosophie grecque*, pp. 219, 220 and 231; Fritz Schulz, *History of Roman Legal Science*, p. 67; Ernest Renan, *Histoire des origines du christianisme*.

For the rest, how is it possible not to recognize the binding force of principles and rights which the international community has agreed that it is legitimate to defend by force of arms? That is what the General Assembly and the Security Council have been affirming ever since 1966 in proclaiming the legitimacy of the Namibian people's struggle, and that of all other dependent peoples, to defend their rights. What is more, in its resolution 2396 (XXIII) of 2 December 1968, the General Assembly, making specific reference to human rights and the struggle for their implementation, reaffirmed—

> ". . . its recognition of the legitimacy of the struggle of the peoples of South Africa for all human rights."

This resolution, adopted unanimously but for the two votes of South Africa and Portugal, demonstrates that the international community as a whole deems it legitimate to defend human rights by force of arms; it thus considers them to be peremptory rights endowed with effective sanction, or in other words that they are part and parcel of positive international law. The opposition of two States, Portugal and South Africa, does not diminish the legal authority of that resolution, because they could not be expected to go to the heroic length of condemning themselves. The Security Council in its turn, in resolution 282 (1970) ordering an embargo on the shipment of arms to South Africa, recognized—

> ". . . the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and [in] the Universal Declaration of Human Rights".

This concordance of view between the General Assembly and the Security Council offers final confirmation of the binding nature of human rights.

It will also be noted that the General Assembly equated acts which result from the policy of *apartheid* and thus violate the fundamental laws of equality and liberty, and nearly all other human rights, to war crimes and crimes against humanity when, in the International Convention of 26 November 1968, it declared them liable to prosecution without statutory limitation. Thus, in the eyes of the international community, violations of human rights by the practice of *apartheid*, itself a violation of equality and of the rights which are its corollaries, are no less punishable than the crimes against humanity and war crimes upon which the Charter of the Nuremberg Tribunal visited sanctions. General Assembly resolution 2074 (XX) even condemned *apartheid* as constituting "a crime against humanity". For how can States—other than Portugal and South Africa, so often denounced by the United Nations—cast doubt on a tenet to

which they have all subscribed, namely that human rights are binding in character? How true is what the Catholic philosopher Jacques Maritain once wrote:

> ". . . underlying the stealthy, perpetual urge to transform societies is the fact that man possesses inalienable rights while the possibility of claiming actually to exercise now this one, now that, is yet denied him by those vestiges of inhumanity which remain embedded in the social structures of every era[1]".

The particular human rights whose violation by the practice of *apartheid* is punishable for the same reason and on the same terms as war crimes, and such crimes against humanity as genocide, will be indentified when, at the end of section 8, I come in the course of the argument to deal with the various acts which go to make up *apartheid.*

8. The Court could not refrain from ascertaining the real nature of the practice of *apartheid,* which is not merely contrary to the Mandatory's obligation to ensure the moral and material well-being and social progress of the population under Mandate, but also contravenes the principles of equality and liberty, and the other rights deriving therefrom for individuals and peoples alike. The condemnation of *apartheid,* if it were only taken into account as a violation of the Mandate, would not be radical, as it should be. For it is not only practised by the former mandatory State of South Africa, nor only in the former mandated territory of Namibia. It is more widespread. It is applied in countries which are not under tutelage. It should be delineated and punished as any other attempt upon human equality and individual or national liberty would be. It should be apprehended, in the General Assembly's words, as a crime against humanity, committed in this case against the Namibian people. The breach of the obligation to submit a report to the satisfaction of the Council of the League, or to transmit the petitions of the inhabitants, both of which are obligations bound up with the safeguards for the due performance of the principal obligations assumed by the trustee-Mandatory as such, is not laden with the same degree of gravity as the violation of the latter themselves. It is therefore inadmissible to choose the easy way out and justify the revocation of the Mandate by reference to the refusal to report to the General Assembly or transmit petitions, or even the refusal to collaborate with the committees set up by the United Nations, while at the same time overlooking the gravest violations by failing to make the effort to adduce the proofs thereof, on the hollow pretext that a State has not been given an opportunity of producing factual evidence, when both the written and the oral proceedings contain superabundant proof. This point was grasped by the General Assembly when, with the exception of

[1] *Autour de la Déclaration universelle des droits de l'homme,* Unesco, 1948, p. 16.

South Africa and Portugal, it unanimously took account of the breach not only of the Mandate, but also of the Charter and the Universal Declaration of Human Rights. As is plain from the texts of its many resolutions, what decided the United Nations to penalize South Africa's conduct was much less the non-compliance over reports and petitions than the flagrant violation of the most essential principles of humanity, principles protected by the sanction of international law: equality, of which *apartheid* is the negation; freedom, which finds expression in the right of peoples to self-determination; and the dignity of the human person, which has been profoundly injured by the measures applied to non-White human beings.

That point having been made clear, a reply must nevertheless be given to two objections raised in connection with the practice of *apartheid* and the necessity of denouncing it with a view to determining the legal consequences.

When, in the first place, it is maintained that the request for advisory opinion formulated by the Security Council is not concerned with *apartheid*, it is surely forgotten that the application of that doctrine has been the underlying cause of the United Nations' action ever since the earliest days, from the raising of the question by India in 1946 to resolution 2145 (XXI) of 1966, which revoked the Mandate, and those adopted since. Resolution 2145 (XXI), which was reaffirmed by the Security Council resolution, 276 (1970), to which resolution 284 (1970) requesting the opinion of the Court refers, contains the following paragraph:

> "*Reaffirming* its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of *apartheid* and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity."

In view of this, can it still be said that the request for the Court's opinion does not entitle it to deal with the subject of *apartheid*?

Nor is it any excuse for evading examination of the practice of *apartheid* in Namibia to plead the absence of material proof of the application of that policy to the detriment of the Namibian people; for such proof, quite apart from ministerial admissions on the part of South Africa, is to be found in abundance in the documentation of the proceedings. After reproducing some of these admissions, I will cite the official texts of the South African Government which demonstrate the facts of the matter and reveal the explanation, which is that the policy of *apartheid* has been applied not, as South Africa claims, in the interest of the population formerly under Mandate, but to the prejudice of that population and in the interest of the mandatory State and its own nationals.

In the matter of admissions, four successive Prime Ministers from 1948 to the present day, Dr. Malan, Mr. Strijdom, Dr. Verwoerd and Mr. Vor-

ster, have defined their concept of the *apartheid* policy, as applicable in both South Africa and Namibia, in declarations which offer proof conclusive. In a speech made in April 1948, Dr. Malan asked:

> "Will the European race in the future be able to maintain its rule, its purity and its civilization, or will it float along until it vanishes for ever, without honour, in the Black sea of South Africa's Non-European population? . . . As a result of foreign influences the demand for the removal of all colour bar and segregation measures is being pressed more and more continuously and vehemently; and all this means nothing less that that the White race will lose its ruling position . . ."

In April 1955 Mr. Strijdom, describing his policy in Parliament, stated:

> "I am being as blunt as I can. I am making no excuses. Either the White man dominates or the Black man takes over . . . The only way the Europeans can maintain supremacy is by domination . . ."

Dr. Verwoerd likewise stated to Parliament in 1958:

> "Dr. Malan said it, and Mr. Strijdom said it, and I have said it repeatedly and I want to say it again: The policy of *apartheid* moves consistently in the direction of more and more separate development with the ideal of total separation in all spheres."

Later Dr. Verwoerd went into greater detail in a speech on 25 January 1963:

> "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . Keeping it White can only mean one thing, namely White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development."

Finally, in May 1965, the present Prime Minister, Mr. Vorster, then Minister of Justice, declared:

> "In this Parliament, whose business it is to decide the destiny of the Republic of South Africa, Whites, and Whites only, will have the right to sit."

Such declarations would afford ample proof of what the practice of *apartheid* means and what the motives of those who devised it were. But the Ministers whose declarations are here reproduced have not appeared

before the Court to certify their full authenticity or to explain and comment upon them. I therefore turn to the official texts which have been promulgated and published, and which constitute at one and the same time material proof and an admission; their mere enumeration, even though not exhaustive, demonstrates the various forms in which the unlawfulness of *apartheid* is manifested and the corresponding human rights which have been violated.

The chief texts possessing this probative effect are the following:

1. The Bantu Trust and Land Act of 1936, concerning reserves for Africans which constitute permanent territorial segregation; it thus encroached upon personal liberty, freedom of movement, freedom of residence and the right to own property (Universal Declaration of Human Rights, Arts. 1, 13 and 17).

2. The Natives (Urban Areas) Proclamation of 1951, amended in 1954, under which Black persons may not, with a few exceptions, reside in urban areas; this Proclamation infringes the same rights as the Bantu Trust and Land Act.

3. The Native Reserve Regulations of 1924 and 1938, which forbade Africans in the reserves to leave them or return to them without special authorization; this also violates the human rights mentioned above.

4. The Native Administration Proclamation of 1922, which forbids Africans to circulate without a pass; this violates the right to freedom of movement (Art. 13).

5. The Native Building Workers Act of 1951, which encroaches upon the principles of equality and liberty (Art. 1).

6. The Prohibition of Political Interference Act of 1968, which, in violation of democratic freedoms, prohibits parties of racially mixed membership (Art. 21).

7. The South West Africa Affairs Amendment Act of 1949, which flouted the political rights of the Africans (Art. 21).

8. The Master and Servants Proclamation of 1920, which makes the breach of a contract of employment a punishable offence; this constitutes an infringement of the right to work and an affront to human dignity, and virtually reintroduces forced labour (Arts. 1 and 23).

9. The Prohibition of Mixed Marriages Ordinance of 1953, which regards marriages between Blacks and Whites as void; this is another affront to human dignity and violates the principles of equality as well as the rights of the family (Arts. 1 and 16).

10. The Terrorism Act of 1967, intended to enforce *apartheid* through severe repression, which violates the most sacred principles of criminal law, namely the rule *nullum crimen sine lege*, the rules relating to the definition of principal and accessory, the non-retroactivity of penal laws and of penalties, the presumption of innocence, and the rule of *res judicata*.

11. The Suppression of Communism Act of 1950, extended to Namibia, which has the same unlawful characteristics as the Terrorism Act.

It is, in sum, not without interest to recall that the Commission on Human Rights, in its resolution 3 (XXIV) of 1968, denounced the laws and practices of *apartheid* and *condemned*—

> "... the Government of South Africa for its perpetuation and intensification of the inhuman policy of *apartheid*, in complete and flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights".

In the light of the foregoing it is justifiable to consider that the General Assembly was not mistaken when, in resolution 395 (V) of 2 December 1950, it emphasized that any system of racial segregation, such as *apartheid*, is necessarily based on doctrines of racial discrimination. The Assembly was no less categorical in its Declaration on the Elimination of All Forms of Racial Discrimination, adopted by resolution 1904 (XVIII). This Declaration condemns racial discrimination and *apartheid* as violating human rights. It was adopted unanimously. Given this general agreement of States, some of which have the fullest possible means of investigation at their disposal, it is difficult to understand how the material existence of the illegalities they denounce can be doubted.

Furthermore, the condemnation of *apartheid* has passed the stage of declarations and entered the phase of binding conventions. The International Convention on the Elimination of All Forms of Racial Discrimination—naturally including *apartheid*—adopted by the General Assembly on 21 December 1965, came into force on 4 January 1969.

9. South Africa has not only contested the material existence of the facts but also the interpretation placed upon them by the General Assembly and the Security Council. Its point of view—rejected by all States, even those which question the validity of the measures taken against South Africa—is that its administration has been designed with the precise aim of realising the objectives of the Mandate, these being to promote the well-being and social progress of the inhabitants; that accordingly *apartheid*, or the separate development of these populations was, given their stage of social evolution, instituted in their own interest: that the measures which have been deemed contrary to the provisions of the Charter and to the Universal Declaration of Human Rights, in particular by resolution 2145 (XXI) revoking the Mandate, were justified by the socio-anthropological circumstances and are directed solely to the accomplishment of the mission entrusted to South Africa.

The Court, in paragraph 131 of the Advisory Opinion, has very justly

adduced the textual proof which exists of the unlawfulness of the practice of *apartheid.* Concrete proof could likewise be drawn from the facts already in the Court's possession. When it is possible to refer to such proofs, it is even better to present them in order to reinforce, if need be, the decisiveness of the Court's findings. In this connection I propose to deal with two questions which the Court has not touched upon but which afford opportunities for further clarification: in order, first, to meet the assertion that the Namibian people is not a people and, secondly, to refute the claim that *apartheid* corresponds to the Mandatory's obligation of promoting the well-being and social progress of the people under Mandate.

10. The argument to which South Africa clings most tenaciously is that of the disparity of the various ethnic groups in Namibia. In order to justify the policy of *apartheid* applied not only in the Republic of South Africa but also in Namibia, successive Pretoria governments have put forward the argument that the natives in the south-west of Africa have never formed a people, and that, because of the ethnic and sociological differences which divide them and set them against each other, only the policy of separate development based upon their tribal institutions could ensure their social well-being and progress. This assertion has been used to buttress denials by the South African Government that it pursued a policy of racial discrimination and has also permitted it to reject any accusation that it violated the provisions of the Mandate and the Charter or contravened the Universal Declaration of Human Rights. I therefore propose to show that the premise upon which South Africa bases this justification of its methods of administration in Namibia is a false one; that the Namibian people, ultimate heir of an ancient civilization which in its heyday rivalled anything in Europe, had, before the days of the colonial régime, taken part in the making of great empires, notwithstanding the multiplicity of the elements of which it, like so many other peoples, is composed.

How many of the peoples that have come into being, throughout history and in our times, have not in fact been made up of a variety of human elements? Multiplicity of ethnic entities has been no obstacle to the formation of peoples and States in Africa. Not to mention the ancient States of Ghana, Mali, Bornu, Axum, Kivu, Benin and that of the Bantus, or the Congo State of the Berlin Conference, it cannot be denied that a large number of the 30 or so States liberated since 1960 are multiracial. India, China and Pakistan offer similar examples in Asia. Many States of Europe also preserve what is sometimes no faded memory of a now complete process of union: for example, Switzerland, Czechoslovakia, Yugoslavia, or the United Kingdom from the Norse invasions down to the reigns of Henry VIII (incorporation of Wales in England) and Queen Anne (union with Scotland). Moreover, is not even the South Africa of today governed by a White minority formed by the union of immigrants of different national origins—Germans, English, Dutch and

several others? Whereas the people of Namibia, which always used to be the master of the country, is nowadays united by common aspirations, the legal foundation of nationhood, towards a life of independence and freedom, whatever may be the political régime which it will select after obtaining independence.

If we take a look at the historical facts, we shall see, in the first place, what legality used to be taken to mean in Africa and what it was which used to be called "African law" as opposed to "the public law of Europe"; an African law illustrated—if one can apply the term—in the monstrous blunder committed by the authors of the Act of Berlin, the results of which have not yet disappeared from the African political scene. It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as *terrae nullius*, to be shared out among the Powers for occupation and colonization, when even in the sixteenth century Vitoria had written that Europeans could not obtain sovereignty over the Indies by occupation, for they were not *terra nullius*.

By one of fate's ironies, the declaration of the 1885 Berlin Congress which held the dark continent to be *terrae nullius* related to regions which had seen the rise and development of flourishing States and empires. One should be mindful of what Africa was before there fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale; and colonialism, which exploited humanity and natural wealth to a relentless extreme. Before these terrible plagues overran their continent, the African peoples had founded States and even empires of a high level of civilization. Only Abyssinia, by its savage resistance, escaped the slave-trade and repelled colonialism, preserving its venerable institutions of State. States less ancient but structurally no less developed than the country of the Negus have nothing to show today but ruins enshrining faint impressions of the past. It is just and pertinent that they be recalled here one by one, beginning, in the first centuries of the Christian era, with the empire of Ghana, the power and wealth of which was unequalled in Western Europe after the fall of the Roman Empire. The empire of Mali, which covered territories more vast than Europe at a time when a considerable part of the latter was a feudal and often feuding patchwork; at the centre of this empire shone a university more ancient than any of Europe, the University of Timbuktu, of which it was said, in illustration of its splendour, that the profit there obtained from the sale of manuscripts exceeded that derived from any economic activity. The State of Bornu, the prosperity of which was still such in the nineteenth century, when visited by an English traveller shortly before its conquest, that the situation of the most humble citizen appeared to him happy and comfortable. The Great Lake civilizations, where traces can be found of roads, irrigation canals, dykes and aqueducts, of a remarkable level of technical skill. Passing on, without pausing to consider the civilizations of Axum, Kivu and Benin, we come to that of Southern Africa. On the

banks of the Zambezi, in the same areas as are now dominated by the Republic of South Africa, the Portuguese found, to quote Barboza, "richer trade than in any other part of the world". This is a flattering comparison, for it was made when the Italian republics were at their splendid apogee. In Zimbabwe, the present Rhodesia, gigantic ruins, which call to mind the bastions at Nuragus or Mycenae, bear witness to its ancient grandeur. Its empire extended, into what is now the Republic of South Africa, on both banks of the Limpopo, including the present Transvaal and the sites of Pretoria and Johannesburg. To sum up, let us recall what Raimondo Luraghi has written:

> "Thus, at the time of the arrival of the Portuguese, a chequered history had unrolled for centuries and millennia between the Sahara desert and South Africa—a history of civilized peoples, comparable to that of the great empires of Latin America or of Europe in the most brilliant days of Antiquity and the Middle Ages."

Furthermore, African civilization was not merely material. To give some idea of the high intellectual level of these discredited, unknown or ignored peoples I would quote the work written by Father Placide Tempels, a Belgian Franciscan, on the Bantu people, who still live in Namibia in large numbers. Father Tempels called his book *Philisophie bantoue*, because he had observed the ontological nature of their thinking, based upon awareness of self—on the "know thyself", may I add, of Thales, the Phoenician philosopher who was adopted by the Greeks and ranked among the Seven Sages of their land. "To that intense spiritual doctrine which quickens and nourishes souls within the Catholic church," writes Placide Tempels, "a striking analogy may be found in the ontological thinking of the Bantus." The latter are in fact one of those same great ethnic groups which inhabit the immense territories to which colonialism still desperately clings, that is to say from Mozambique and Angola to Zimbabwe, South Africa and Namibia. And it is these very populations which the South African Government claims are made up of tribes of diverse origins which are incapable of uniting, and which do not deserve the title of a people which the United Nations has attributed to them.

11. Having done justice to the contention that separate development or *apartheid* is a necessity on account of the diversity of ethnic composition precluding on the part of the inhabitants a potentiality for nationhood, I shall now turn to the argument that the measures of discrimination adopted by the South African authorities can be justified in terms of the stage of social evolution reached by the Namibians.

The second paragraph of Article 2 of the mandate agreement provides that:

> "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of inhabitants of the territory subject to the present Mandate."

Here then is an obligation which the Mandatory has to carry out "to the utmost" *[par tous les moyens en son pouvoir]*. To that end the first paragraph of the same Article confers upon him "full power of administration and legislation over the territory subject to the present Mandate".

This means that, rightly or wrongly, the Council of the League of Nations deliberately conferred a power of discretion on the Mandatory. It was however a power of discretion in the legal sense of the term, thus evidently not an arbitrary power but one necessarily subordinate to certain limitations which flow from the overriding principles and rules of law, more particularly the rights of peoples and individuals.

South Africa contends that bad faith would be the only ground upon which criticism could be levelled against its use of that power. This implies that South Africa could be pardoned for irresponsible inaction or neglect, whether serious or slight; for the misuse of law; or for a wilful misinterpretation of the provisions of Article 22 of the Covenant, the Mandate and the United Nations Charter which is alleged to justify racial discrimination and *apartheid*, *de facto* annexation of the Territory of Namibia, and legislative, administrative or judicial measures contrary to the tenets of both national and international law, the principles of the Charter and the Universal Declaration of Human Rights.

But in fact there is no escaping the dialectical necessity of comparing the responsibility of an authority administering a country placed under its guardianship with that of other authorities entrusted with the administration of their own countries or the interests of their nationals. The latter are expected in public law to provide good government and, in the area of personal rights, to model their conduct on that of the *bonus paterfamilias*; they are for that reason the more to be blamed for any abuse of law or misuse of power. In short, the international judge cannot be denied the right of determining in all circumstances whether proper use has been made of the discretionary power; whether, in the opinion of the international tribunal, it has been exercised with a view to the promotion of the well-being and social progress of the population, or whether the mandatory State has done its utmost to fulfil its obligations. This implies ascertaining whether racial discrimination, *apartheid* and related measures, blameworthy in themselves, can be justified on account of local or temporary circumstances, usually of a social nature, and the interests of the population in question. To pass an opinion in these various situations, a judge cannot rely on his personal judgment, which is bound to be subjective and vary according to the mentality of each judge, his legal, philosophical and ethical outlook, his views on natural law and his cultural and social background. An objective criterion or standard is clearly necessary. Such a criterion is afforded by the general conduct of States and international organizations as a whole. Should the judge further decide to derive criteria from municipal precedents, which abound in such examples as the notion of the *bonus paterfamilias* already mentioned, or from powerful moral trends in a given country,

they must still be acceptable to other countries in general or be already enshrined in the universal conscience of mankind. And in fact it can be said that the many resolutions, adopted over nearly a quarter of a century, which condemn racial discrimination and *apartheid* in South Africa and, as later extended, in Namibia, disclose an objective standard which the South African Government is required to apply. The same can be said with reference to the other human rights. To this the firm attitude of the international community has borne witness whenever it has taken a stand against their infringement. Indeed, the mere perusal of the texts I have mentioned is edifying in this regard.

12. I now come to the legal consequences of the presence of South Africa in Namibia. In order to determine what these are, that presence must first of all be legally classified. Is it a matter of mere peaceful intervention? Or of a military occupation degenerating into aggression? Or a colonial war? For the legal consequences differ in international law according to whether it falls within one or another of these classifications.

The representatives of a certain number of States who have had occasion to speak in the Security Council have stated that the occupation of Namibia by the Republic of South Africa is an aggression. The representatives who so argued were those of Algeria, Colombia, Hungary, Nepal, Nigeria, the Soviet Union, the United Arab Republic, and Zambia [1]. Similarly the other African States stated at Addis Ababa in 1966 that it was a military occupation, which is the mark of aggression according to all the definitions which have been given of that term. And the representative of the United States of America, in the written statement submitted to the Court, expressed the following view:

> "The territory is occupied by force against the will of the international authority entitled to administer it. Such occupation is as much belligerent occupation as the hostile occupation of the territory of another State."

An armed force which violates the frontiers of a country indisputably commits an aggression. What then is the position as to belligerent occupation of a whole territory, to which the representative of the United States refers?

The General Assembly has made matters clear: in resolution 2131 (XX) it said that "armed intervention is synonymous with aggression".

The representative of Pakistan was more emphatic in his oral statement of 15 February last. He rightly viewed the act of using force with the object of frustrating the right of self-determination as an act of aggression, which is all the more grave in that the right of self-deter-

[1] See S/PV. 1387-1395.

mination is a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances.

I hasten to recall that the Security Council has used terms no less forceful. It described the occupation of Namibia as illegal. In its resolution 269 (1969), following the General Assembly, it recognized "the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in the territory"; a legitimate struggle against what, if not against an aggression? This is a logical interpretation, no refutation of which is possible. It follows not only from the logic of things but also from the actual text of the Charter. For Article 51 only authorizes self-defence *[légitime défense]* or legitimate struggle in cases of response to armed attack *[agression armée]*. Thus once the Security Council proclaims the legitimacy of a defence or of a struggle against a foreign occupier, it is an armed attack *[agression armée]* which is in question, and the occupier's act cannot consequently be anything other than an aggression *[agression]*. It is in this context that one must understand the Council's expression, mentioned by the Court in paragraph 109 of the Opinion, "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations".

The aggression committed by South Africa with regard to Namibia is the more serious in that, *de facto* and notwithstanding the South African Government's denials, it has turned into a veritable annexation. This can be indisputably proved by facts which cannot be denied. I will quote the more important of these, the meaning and significance of which it is easy to discern:

(1) The South West Africa Affairs Amendment Act of 1949 deleted all references to the Mandate from the Constitution of the Territory.

(2) The South African Government contends that it occupies the Territory of South West Africa by conquest or by acquisitive prescription.

(3) In the 16 following pieces of legislation, the "Union", or the "State", or the "Republic" of South Africa is defined as including South West Africa:

(a) the Terrorism Act of 1967;
(b) the Border Control Act of 1967;
(c) the War Pensions Act of 1967;
(d) the Wool Act of 1967;
(e) the Armaments Development and Production Act of 1968;
(f) the Human Sciences Research Act of 1968;
(g) the Professional Engineers' Act of 1968;
(h) the Companies Amendment Act of 1969;
(i) the Land Bank Amendment Act of 1969;
(j) the National Monuments Act of 1969;
(k) the Births, Marriages and Deaths Registration Act of 1970;
(l) the Land Survey Act of 1970;

(m) the Land Surveyors' Registration Act of 1970;
(n) the Maintenance Act of 1970;
(o) the National Supplies Procurement Act of 1970;
(p) the Reciprocal Enforcement of Maintenance Orders Act of 1970.

(4) The South West Africa Affairs Amendment Act of 1949 effects annexation at constitutional level, by providing for representation of the Namibians in the Pretoria Parliament.

The annexation of Namibia by South Africa is definitely an act of aggression. A memorable example of that kind of aggression is recorded in the historic Moscow Declaration of 30 October 1943 in which the Soviet Union, the United States, the United Kingdom and China qualified the occupation and annexation of Austria by Hitlerite Germany as aggression and solemnly declared their refusal to recognize it. The fact that the annexation of a territory by the mere movement of troops or by the presence of foreign troops is ranked as an act of aggression by that Declaration means that the word aggression covers a wider range than the notion of armed attack *stricto sensu*. This is easily understandable, inasmuch as occupation and annexation achieve the ultimate aims of aggression, bringing about the destruction of the entity which was the latter's target. As a matter of definition, can the occupation of Austria with a view to its annexation be classified as aggression, and the occupation and subsequent annexation of Namibia not be so regarded? This was what the Court has sought to exclude, when in paragraph 109 of the Opinion it recalled that in operative paragraph 3 of resolution 269 (1969) the Security Council decided "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations". The General Assembly had stated earlier in resolution 2074 (XX) that "any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression". For while the law of former times, as in the 1885 Act of Berlin and the Treaties of Bardo and Algéciras and numerous other treaties, tolerated conquest and annexation, of which South Africa's conduct appears to be one of the last examples, modern law, that of the United Nations Charter, the Pact of Bogotá and the Charter of Addis Ababa, condemns them beyond reprieve. Annexation is nothing less than the negation of the new law of self-determination. Thus the United Nations has reiterated that acquisition of a territory may not be effected by the use or the threat of force. In its recent resolution 2628 (XXV), of 4 November 1970, the General Assembly "reaffirms that the acquisition of territories by force is inadmissible", and that consequently the occupied territories must be restored. None the less, South Africa has throughout, and even before the Court, sought to justify its continued occupation of Namibia by claiming to be there by right of conquest or by the effect of acquisitive prescription. The Court has dismissed this claim in paragraphs 85 and 86 of the Opinion. The

most categorical argument on the point would have been that conquest and acquisitive prescription have totally disappeared from the new law which has condemned war and proclaimed the inalienability of sovereignty.

13. The presence of South Africa in Namibia having thus been defined as illegal and warlike, and, in short, regarded as aggression, what are the legal consequences of this?

The recognition by the United Nations of the legitimacy of the Namibian people's struggle against the South African aggression is nothing less than a recognition of belligerency. For the recognizing States, namely the States Members of the United Nations, it transforms the hostilities between a State and another subject of law, which the Namibian people is, into an international war. Consequently, when there is aggression by a State against a people for the purpose of subjugating it by force, then whatever its manifestations, it cannot be denied that it has the character of a war, or at least of a state of belligerency[1], with all the legal effects attaching thereto, including in particular the status of neutrality imposed on third-party States.

If the provisions of the Charter concerning collective security could have been implemented according to the letter and in the spirit of the San Francisco Conference, there would have been no place for neutrality, at least among States Members of the United Nations. The Charter provided on the one hand for an international army (Arts. 43 to 47) and disarmament (Art. 11, para. 1; Art. 26, and Art. 47, para. 1). But military preparations have been neglected since 1948, and in place of disarmament, which is in the doldrums, there has from the beginning been an intensive process of nuclear and conventional armament spreading into the wars being carried on more or less all over the world. On the other hand, there were the provisions concerning collective security (Arts. 39 et seq.), the executive counterpart of which was to be the international army. The fate of the new institution intended to put an end to wars was no better than that described above. The Security Council's action has been paralysed by the veto, or by the fear of a veto as in the Namibia question. Consequently, neutrality persists so long as wars are tolerated, whether deliberately or through weakness. This applies particularly in the case of the States Members which, evading the obligations deriving from the United Nations resolutions, for some reason or another, are at least under an obligation not to hinder the activities of or the measures adopted by the Organization of which they are Members.

The obligations of States not participating in hostilities, which constitute the status of neutrality, are applicable in the case of mere belli-

[1] L. Cavaré wrote as follows concerning colonial protectorates: "If the protected country retains its personality, then there is a war in the international meaning of the term and the laws of war must be applied" (*Droit international public positif*, Vol. I, 3rd ed., p. 551). *A fortiori*, this is the case for Namibia even before it was recognized by the United Nations by resolution 2372 (XXII). See also above section 2.

gerency just as in the case of war. This would be relevant if it were considered that the relations between South Africa and Namibia are only a state of belligerency between communities, one of which is not yet a State. The classic example of this is the War of Secession in the United States. Therefore, whether the Namibians are regarded as being in a state of war or in a state of insurrection against South Africa, recognized by the international community, the obligations of third States are clear: those States are bound by the status of neutrality as it derives from the 1871 Washington Rules, and Conventions V and XIII adopted by the 1907 Hague Peace Conference—which have become binding rules of customary law—and from the relevant provisons of the laws and customs of war. This means: abstention and impartiality.

In order to define the concept of impartiality, a distinction must be made between the aggressor and the victim of aggression[1]. A noteworthy example is that of the policy adopted by the United States of America, which led to the promulgation of the Cash and Carry and Lend-Lease Acts. These Acts were exceptions to the general rules of neutrality, founded on a desire to assist the victims of aggression[2]. With regard to certain Western States which continue to supply South Africa with arms, ammunition and war material, their attitude contravenes the status of neutrality, from which they have previously benefited[3], for instead of the obligation of impartiality being interpreted by them in favour of the victim, it is violated for the benefit of the aggressor. They should abstain from such deliveries. Security Council resolution 282 (1970), pronouncing the arms embargo against South Africa alone, is in line with international practice.

14. The obligation of abstention entailed by the status of neutrality

---

[1] G. Schwarzenberger explains the distinction in these words in connection with the implementation of the Briand-Kellogg Pact:

> "Parties to the Kellogg Pact which remain at peace with the aggressor are entitled, by way of reprisal, to depart from the observance of strict neutrality between the Pact-breaker and his victim and to discriminate against the aggressor."

As examples in support of this rule he cites the Destroyer Deal between the United States and Great Britain, and the "Aid Britain" Act of 1941. He adds in a relevant comparison:

> "As with Members of the United Nations (Art. 2 (5) of the Charter), parties to treaties may even be under a legal duty to discriminate against an aggressor State." (*A Manual of International Law*, Vol. I, 4th ed., p. 185.)

[2] See E. Castrén, *The Present Law of War and Neutrality*, 1954, pp. 451 and 477, who mentions that:

> "The purpose may be to assist the victim of aggression . . . in which case American writers have used the expression 'supporting State' " (p. 451).

[3] R. Sherwood, in his book of memoirs entitled *Roosevelt and Hopkins*, writes on p. 221, of Churchill's overjoyed gratitude: ". . . and from this came the vast concept which Churchill later described as 'a new Magna Charta ... the most unselfish and unsordid financial act of any country in all history'. "

must be defined having regard to the development of modern armaments and the variety of means of assistance which may be supplied to the belligerents. The different prohibitions imposed by international law may moreover duplicate and reinforce or may supplement those laid down in the relevant Security Council resolutions, on account of violation of the Charter and of international law. States may thus be under various obligations by virtue of more than one source of obligation. Examples of such prohibitions are:

(1) The prohibition of all military assistance, not only *de facto*, but also in implementation of a treaty of alliance or of bilateral or multilateral defence. The obligations contained in those treaties cannot prevail over the obligation not to assist an aggressor State. A treaty which enabled assistance to be given to an aggressor would be immoral and contrary to international order, and could not therefore be tolerated by the international community. Further, treaties of alliance generally provide that they do not operate unless it is the other signatory which was attacked.

(2) The prohibition of the supply of nuclear or conventional arms and of all ammunition; of the supply of ships, aircraft or other military machines, and of armed or transport helicopters; of rockets, missiles and electronic equipment which can be put to military uses; of all arms capable of being used against guerillas, including napalm, chemical and bacteriological weapons, and gases of all sorts. As in the case of treaties of alliance or defence, agreements for the supply of any of the foregoing may not be implemented in favour of the aggressor, for any reason whatsoever, whether of joint defence or of economic necessity.

(3) The prohibition of the supply of spare parts and any equipment capable of being used for the production or maintenance of arms or ammunition or nuclear devices, and patents or licences relating thereto.

(4) The prohibition of the emigration or despatch of technicians for work in the armaments industry, or for the training of military personnel; on the transmission of military or technical information, including information relating to the peaceful uses of nuclear energy, on account of the possibility of its being adapted to military purposes.

(5) The prohibition of the supply of oil and petroleum products and of natural gas on account of their vital importance for war. If this prohibition is such as to harm South African industry, that can only be a more effective way of bringing South Africa to put an end to its aggression [1].

(6) The prohibition of the supply of all facilities for the transport of the above-mentioned arms; machinery, munitions and other products.

(7) The prohibition of all economic, industrial or financial assistance,

[1] On the subject of oil supplies see Professor Erik Castrén, *The Present Law of War and Neutrality*, 1954, p. 474.

in the form of gifts, loans, credit, advances or guarantees, or in any other form [1]. This prohibition is not confined to States. It naturally extends to institutions in which States have voting rights, such as the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation; as is well known, the International Bank for Reconstruction and Development has deliberately disregarded the resolutions of the General Assembly and the Security Council, by continuing to grant South Africa aid amounting to hundreds of millions of dollars, which is in fact aid to the illegal activity of the South African authorities in Namibia, contrary to the objects and purposes of the United Nations [2].

All the above prohibitions apply to States and to associations of States and to public and private international organizations.

Furthermore, governments must show due diligence in preventing any individual or collective act contrary to neutrality. This obligation relates to nationals and subjects, and to foreign residents. Showing due diligence means that adequate measures must be taken, including legislative measures providing for penalties. For a State which undertakes an obligation commits its own subjects and those who live under its law, and must employ every kind of means, legislative, administrative and judicial, by which it governs. It is not therefore sufficient to refuse diplomatic protection to those who transgress, as has been suggested by the Government of the United States.

It is by taking these measures, which are dictated by the status of neutrality, that States, and in particular those which are, politically and financially speaking, the Great Powers, will bring South Africa to abandon its present policy, in the interests of justice, peace and international co-operation.

15. It was to be desired that the Court should deduce all the legal consequences from the aggression observed by the Security Council. The request made of it was not confined to the effect of resolution 276 (1970), referred to in resolution 284 (1970) requesting the opinion. The legal consequences upon which it had to pronounce are all those resulting from the very presence of South Africa in Namibia, which is the first

[1] See in connection with prohibitions of a financial nature, Professor Paul Reuter, *op. cit.*, p. 321.

[2] The specialized agencies in which the voting is based on the democratic rule of one State, one vote, have all decided to refrain from any support to South Africa: for example, Unesco, ILO, FAO and WHO. The recalcitrant attitude of the IBRD and the IMF is to be explained by the multiple voting system on a capitalist basis which operates therein, by which the financial Great Powers have a number of votes calculated according to the size of their share in the capital of these two institutions. These Powers are primarily the States which the General Assembly has described as commercial partners of South Africa. In future, States ought to take it as a matter of course that they should bring their attitude in these institutions into line with decisions of the United Nations.

point mentioned in resolution 284 (1970), and which is conditioned by resolution 276 (1970). That presence was the justification for resolutions 282 (1970) and 283 (1970), which the Court could not leave out of account as not falling within the request for advisory opinion. For resolution 283 (1970) re-affirms, first resolution 276 (1970) and secondly resolution 282 (1970), in the following terms:

> "*Re-affirming* its resolution 282 (1970) on the arms embargo against the Government of South Africa and the significance of that resolution with regard to the territory and people of Namibia, . . ."

These two resolutions, 282 (1970) and 283 (1970), concerning the illegal presence of South Africa in Namibia were, what is more, adopted before the request for opinion; resolution 283 (1970) was adopted solely because of that illegal presence, which is the principal subject-matter of the request for opinion, and resolution 282 (1970) had in view *apartheid* beyond the frontiers of South Africa, as well as the policies of that Government in southern Africa, including Namibia. Resolution 282 (1970) reads as follows:

> "*Reiterating* its condemnation of the evil and abhorrent policies of *apartheid* and the measures being taken by the Government of South Africa to enforce and extend those policies beyond its borders,
>
> . . . . . .
>
> "*Gravely concerned* by the persistent refusal of the Government of South Africa to abandon its racist policies and to abide by the resolutions of the Security Council and of the General Assembly on this question and others relating to southern Africa . . ."

This latter paragraph of resolution 282 (1970), by making reference to "the resolutions of the Security Council", contemplated resolution 276 (1970) in particular.

16. Although the Court has made no mention of resolutions 282 (1970) and 283 (1970), it has nonetheless reached conclusions which do not differ in substance from those which follow from those two resolutions and from the status of neutrality.

I will begin with economic consequences, namely those enumerated in resolution 283 (1970) and the more complete set, resulting from the status of neutrality, which are mentioned in section 14, paragraph 7, of the present separate opinion. The Advisory Opinion has not failed to express the view, in the operative clause, that member States of the United Nations are under obligation "to refrain from any acts and in particular any dealings with the Government of South Africa . . . lending support or assistance to" South Africa. The prohibition of economic assistance provided for in resolution 283 (1970) and by the status of neutrality has thus been substantially adopted by the Opinion of the Court.

It is clear from a reading of the whole of the Opinion that the operative

clause is integrally connected with the reasoning, and is explained by the reasoning. But even in the light of the reasoning, there are missing details which it might have been useful to clear up. The question arose whether the legal consequences which the Court was called upon to deduce should be summed up in a few major rules, or whether they should be laid down in terms as detailed as possible. The Court has chosen the first solution, leaving it to the political organs to effect the application thereof. This does not seem to me to be quite what the Security Council wanted. Of course any analytical formulation carried to extremes would have failed to be exhaustive, and might sometimes have overlooked circumstances which were necessarily unforeseeable. Nonetheless, a more complete enumeration, but one which did not lose itself in detail, might have been more satisfying, and would have been more surely effective in stopping at the source those interpretations which are sometimes made to suit national tendencies or interests.

The possible clarifications to supplement the Opinion may, in consequence of what has been said above, be deduced from what is laid down by the status of neutrality, and by resolution 283 (1970). Although not mentioned in the Advisory Opinion, this resolution is covered by the rule which has there been laid down *erga omnes*, namely that the decisions of the Security Council are imperatively binding by virtue of Article 25 of the Charter. The following is a not exhaustive list of the prohibitions of an economic kind which result therefrom:

(1) States should debar themselves and should forbid their nationals, subjects and foreign residents, under penalties, from having any part in South African companies or undertakings registered or established in Namibian territory, or having in that territory branches, representatives or agencies, either by way of technical participation or on the financial level by the acquisition of stocks, shares or bonds.

(2) States should not authorize the shares and bonds of such companies to be quoted on the Stock Exchange, or any dealings therein to be effected. Otherwise, they would be facilitating the disposal of assets acquired by misappropriation or spoliation, taking into account the civil or commercial responsibilities attaching thereto.

(3) The exploitation of the petroleum, diamond, gold and other resources of the soil and sub-soil of Namibia, its territorial waters or its continental shelf, carried out by South Africa or its nationals, or with its authorization, is equivalent to the seizure of Namibian assets by, or with the co-operation of, the occupying authority, and the Republic of South Africa must therefore render an account to the future State of Namibia of the income and taxes which it has derived or collected from such sources. Any States which have obtained profit from these exploitations, either in the form of concessions or in the form of participation in the invested capital, may be held jointly responsible with South Africa towards Namibia. These States and their subjects must refrain from acquiring any of the production of these exploitations, in order not to incur civil respon-

sibility by being involved either as receivers or as purchasers, with notice, of assets not belonging to the vendor.

17. Turning to military matters, it should be observed that the passage in the operative clause of the Opinion forbidding any support or assistance to South Africa is drawn in very general terms. By mentioning "any acts" and "any dealings with the Government of South Africa", it clearly includes military support, and such support, being indisputably the most serious and the most heavy with consequences, must therefore be forbidden before any other form of support. Any supply of arms, munitions or war material, and any technical or scientific military assistance, are hereafter prohibited. This rule applies to all States, and none of them can evade it on any ground whatsoever, e.g., economic or strategic interests.

As in the case of economic consequences, the details of the military support which is prohibited remain to be determined. Like resolution 283 (1970), resolution 282 (1970) is a binding decision by virtue of Article 25, already referred to; the more so in that resolution 282 (1970) is related, as has been stated, to resolution 276 (1970) through resolution 283 (1970). In any event, the acts of military support or assistance from which States must refrain are those the prohibition of which is dictated by resolution 282 (1970) and by the status of neutrality mentioned in Section 14, paragraphs 1 to 6, of this separate opinion. Under each of the three documents in question—the Court's Opinion, resolution 282 (1970) and the status of neutrality—what matters is that no assistance shall be given to an aggressor: consequently, the measures to be applied must be the same, in order to meet the same need.

Certain governments, in order to some extent to evade the embargo on arms and material for land, sea and aerial warfare, have drawn a distinction between arms and war material destined for internal use, in other words for repression—to which they admit the prohibition would apply—and arms and material allocated to external defence, which they contend would be excluded from the embargo.

This distinction is condemned by the facts of the case. In the various wars waged by the colonial Powers and mandatory States, heavy armaments and military aircraft were widely used. According to Mr. McBride, the Secretary General of the International Commission of Jurists, "heavy weapons were often employed to maintain a colonial régime, and they could be very useful to a régime like that in South Africa [1]". And armoured cars were in fact deployed at Sharpeville on 21 March 1960, when the South African police opened fire and according to the United Nations report, killed a large number of peaceful and unarmed Black demonstra-

[1] *Ad Hoc* Sub-Committee of the Security Council, S/AC. 17/SR. 14, meeting of 24 June 1970.

tors while fighter aircraft flew overhead. The anniversary of that day was proclaimed by the General Assembly as the *International Day for the Elimination of Racial Discrimination.* Of course, as a diplomat observed, "it is not possible to transform submarines into amphibious vehicles in order to use them for land operations". However, no one can be unaware that in the course of colonial wars there have been bombardments by naval units or aircraft of ports, towns, villages or concentrations of people. That is why the supply of any arms capable of reinforcing South Africa's military potential must be forbidden, particularly since it is this material strength which enables it to maintain its presence in Namibia notwithstanding resolution 276 (1970).

18. Furthermore, the illegal presence of South Africa in Namibia opens up possibilities of wide application of Article 103 of the Charter. The obligations of Members of the United Nations under the Charter, contemplated by that Article, clearly include obligations resulting from the provisions of the Charter and from its purposes, and also those laid down by the binding decisions of the organs of the United Nations. Among such decisions are those of the Security Council, namely resolutions 282 (1970) and 283 (1970). Since Article 103 applies both to past and future commitments, the following, whatever their date [1], can no longer be relied on against member States in their relationship with South Africa: military alliances, naval agreements or agreements relating to joint naval manœuvres, agreements to supply arms, war material and munitions, agreements for co-operation in the nuclear field for whatever purpose, as well as all treaties involving any assistance whatsoever calculated to facilitate the maintenance of South Africa's presence in Namibia, as is stated in paragraphs 119 et seq. of the Court's Opinion.

19. In conclusion, it should be emphasized that since 1967 the United Nations has been convinced that any assistance given to South Africa, even without being earmarked for any particular application, would nevertheless further the designs of South Africa both in South African territory and in Namibia. For the South African Government has been administering Namibia as an integral part of its territory since even before it was annexed thereto, applying to it its racial policy and its policy of colonial exploitation. Any financial, economic or military assistance is likely to promote the general development of that policy and consequently to tighten South Africa's hold over the Territory of Namibia. Thus it is that the General Assembly has adopted resolution upon resolution in order to dissuade member States of the United Nations from giving any assistance whatsoever to South Africa, even such as is not expressly intended to consolidate its presence in Namibia, for so long as it continues its policy of racial discrimination and *apartheid* in the

[1] See hereon L. Cavaré, *op. cit.*, pp. 653 f.

geographical, political, economic and military ensemble of South and South West Africa. This was the purpose of resolutions 2307 (XXII), 2396 (XXIII), 2426 (XXIII) and 2506 (XXIV). In the same way, the two resolutions 282 (1970) and 283 (1970) of the Security Council concern South Africa no less than Namibia. It is in this sense that the Court's Opinion is to be understood; to do otherwise would be to run counter to reality.

(Signed) Fouad AMMOUN.

SEPARATE OPINION OF JUDGE PADILLA NERVO

I agree with the Advisory Opinion given by the Court in answer to the question put to it by the Security Council.

I accept each and every one of the provisions of the operative clause of the Opinion.

From the reasoning and conclusions of the Court it has been recognized that the General Assembly and the Security Council of the United Nations, in the exercise of their competence, their functions and their duty, have revoked the Mandate of South Africa in respect of Namibia, have declared that the *de facto* presence of the former Mandatory in that territory is illegal, has the character of a foreign occupation and is an "aggressive encroachment" on the authority of the United Nations and on the territory over which South Africa has no legal title.

South Africa therefore has the juridical obligation to withdraw its administration there, and to co-operate with the United Nations for the peaceful enforcement of its decisions. Other legal consequences of the continuance of South Africa's unlawful and *de facto* presence there are expressed in the Advisory Opinion rendered by this Court, and some of the consequences are stated in relevant resolutions of the Security Council.

For the purpose of this Advisory Opinion the Court was not obliged, and did not need, to pass upon the objections regarding the validity of the resolutions concerned; nevertheless the Court considered it appropriate to answer such objections, and did recognize the validity and binding character of the decisions taken in this matter by the General Assembly and the Security Council.

Availing myself of the right conferred by Article 57 of the Statute, I wish to append to the Opinion of the Court a separate statement of my individual views.

PRELIMINARY

Some of the points raised in the written statements are either of a preliminary nature—as is the question whether or not the Court should accede to the request for an advisory opinion,—or are related to the validity of the resolutions of the Security Council and the General

Assembly, as for instance those which terminated the Mandate for South West Africa and those which declared illegal the presence of South Africa in Namibia. In my view these points go beyond the scope of the question put to the Court by the Security Council, which is couched in the following terms:

> "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

Nevertheless, as these questions have been raised, I will express my opinion on them.

It has been suggested that the Court should use its discretion whether or not to accede to a request for an advisory opinion and should in this case refuse to give it. The Court "must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion" (*Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 151, at p. 157). In the *Certain Expenses* case, the Court referred to the decision taken by the Permanent Court concerning the *Status of Eastern Carelia* and found no "compelling reason" why it should not give the advisory opinion which the General Assembly requested. The *Eastern Carelia* case, where the Permanent Court of International Justice declined to give an advisory opinion, is not a precedent in the present case before this Court.

As to the argument that the request of the Security Council should be refused because it has a political background in which the Court itself has become involved, the Court unanimously decided, at the beginning of the oral hearings, to disregard this argument. The Court decided not to accede to the objections raised against the participation of three Members of the Court, which were based on the contention that the judges in question had taken political positions in the General Assembly in issues related to South West Africa, while representing their Governments in the United Nations. The Court has thereby expressed its opinion in the sense that the controverted political background of the question is not a reason to decline to give the advisory opinion requested.

There is no merit either in the other contention which has been advanced against the Court giving the advisory opinion which the Security Council requested "considering that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking". The *Eastern Carelia* case was relied upon in support of the contention that the question before the Court involved a dispute. This matter does not need to be considered again since the Court by its Order of 29 January decided to reject the application for the appointment of a judge *ad hoc*, because it held that in

the present advisory proceedings there is no dispute pending between South Africa and any other State.

In the *Certain Expenses* case, the Court referred to the argument that the question put to the Court was intertwined with political questions, and that for this reason the Court should refuse to give an opinion. The Court replied that most interpretations of the Charter would have political significance. The Court, however, could not attribute a political character to a request which invited it to undertake an essentially judicial task, namely the interpretation of a treaty provision.

The question put to the Court by the Security Council can be said to be intertwined with certain political problems, but the actual wording of such question, asking the Court what are the *legal* consequences for States of the continued presence of South Africa in Namibia, indicates that the position is in fact a legal one even if it may have a political aspect. In the nature of things it could not be otherwise. The line between political and legal questions is often vague. Examining the close interrelation between the political and legal factors in the development of international law, Dr. Rosenne makes the following comments:

> "That interrelation explains the keenness with which elections of members of the Court are conducted . . . But that interrelation goes further. It explains the conflict of ideologies prevalent today regarding the Court." (Rosenne, *The Law and Practice of the International Court*, Vol. I, p. 4.)

> "The Charter of the United Nations and the urgency of current international problems and aspirations have turned the course of the organized international society into new directions . . . The intellectual atmosphere in which the application today of international law is called has changed, and with it the character of the Court, as the organ for applying international law, is changing too." (*Ibid.*, pp. 5-6.)

The full impact upon the Court of those changes is found in the activities of the General Assembly and the Security Council. Whatever conclusions might be drawn from these activities, it is evident that their far-reaching significance lies in the fact that the struggle towards ending colonialism and racism in Africa, and everywhere, is the overwhelming will of the international community of our days.

A fair examination of the contentions and arguments disputing the competence and jurisdiction of the Court to give the opinion requested leads to the conclusion that they are not valid and ought to be rejected.

There are not, in this instance, compelling reasons to make the Court depart from its unavoidable duty to give the advice requested by the Security Council.

The proposal [1] which became the first operative paragraph of Security Council resolution 284 (1970) made it clear from the outset that the termination of the Mandate and the assumption by the General Assembly of direct responsibility for the Territory was not being called into question [2]. For this had been an "irrevocable step" and "consequently, the presence of South Africa in Namibia was now illegal and member States had pledged themselves to fulfil the responsibility which the United Nations had assumed" [3]. The question to be presented to the Court therefore related to the legal consequences for States of the presence of South Africa in Namibia after these irrevocable changes had been brought about.

In general, therefore, from the record of the discussions of the Security Council and its Sub-Committee immediately preceding the adoption of Security Council resolution 284 (1970), it would appear that the question presented to the Court concerns the legal consequences for States of the continued presence of South Africa in Namibia, not as a mandatory Power, but as a State which according to the provisions of Security Council resolution 276 (1970) was continuing to occupy Namibia illegally [4], and in defiance of the relevant United Nations resolutions and the United Nations Charter [5], notwithstanding that the Mandate for South West Africa has been terminated [6], the United Nations has assumed direct responsibility for the Territory until its independence [7], and the Security Council has called upon the Government of South Africa immediately to withdraw its administration from the Territory [8].

The Issues to Be Examined

It has been shown that in formulating the question now before the Court, the Security Council used the phrase "the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)", in order to denote the presence of South Africa after the Mandate had terminated and South Africa had ceased to have any right to be present as mandatory Power. It follows that the legal consequences for States of this continued presence are not those which resulted directly from the conduct of South Africa in its former capacity as mandatory

---

[1] That of Finland.
[2] S/AC.17/SR.12, p. 3; and S/AC.17/SR.17, p. 8.
[3] S/AC.17/SR.12, p. 3.
[4] Security Council resolution 276 (1970), para. 2.
[5] *Ibid.*, para. 4.
[6] *Ibid.*, second and third preambular paragraphs.
[7] *Ibid.*, second preambular paragraph.
[8] *Ibid.*, third preambular paragraph.

Power, but only the consequences of the continued South African presence after the cessation of the mandatory relationship.

MERITS

Scope of the Question Submitted

The question before the Court is a limited one, namely what are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)? In this resolution the Security Council reaffirmed General Assembly resolution 2145 (XXI) of 27 October 1966, by which the United Nations decided that the Mandate for South West Africa was terminated and assumed direct responsibility for the Territory until its independence, and also reaffirmed its resolution 264 (1969), which recognized this termination and which called upon the Government of South Africa immediately to withdraw from the Territory.

No other request having been made, the Court will have to assume the validity of the action taken by the Security Council and the General Assembly on the question of Namibia and that such action was in accordance with the Charter. The Court should not assume powers of judicial review of the action of principal organs of the United Nations without specific request to that effect.

The Covenant

The Covenant is in the nature of a constitutional legal instrument, which is the source of rights and obligations relating to the system of mandates and to the securities and safeguards for the performance of the sacred trust. The principle proclaimed in Article 22, and its provisions, were binding on the Members of the League who were willing to accept the tutelage and exercise it as mandatories on behalf of the League in the interest of the indigenous population.

The Council of the League defined the degree of authority, control, or administration to be exercised by the Mandatory for South West Africa, in the terms that the Principal Allied and Associated Powers had proposed that the Mandate should be formulated. The purpose of the Mandate for South West Africa—in the terms defined by the Council—is to give practical effect to the principle of the sacred trust of civilization. The Mandate is the method chosen by the Allied and Associated Powers to accomplish that end. The legal obligations stated in the Covenant were translated and spelled out in the specific case of each mandate "according to the stage of development of the people, the geographical situation of

the territory, its economic conditions and other similar circumstances". All mandates—regardless of their differences in character—have a common denominator; all were established for the same reason, and with the object and purpose of giving practical effect to the principle that the well-being and development of the peoples inhabiting the territories concerned form a sacred trust of civilization.

The sacred trust is not only a moral idea, it has also a legal character and significance; it is in fact a legal principle. This concept was incorporated into the Covenant after long and difficult negotiations between the parties over the settlement of the colonial issue. It has been observed in that respect that:

> "It was clearly understood by all concerned that what was involved was the adoption, with respect to the treatment of indigenous peoples in certain areas of Africa and Asia, of a principle entirely different from that in effect until then. The new principle was that, as a matter of international law, the well-being and social progress of such peoples would be the responsibility of the 'organized international community', insured by legal, rather than by solely moral, considerations."

Sir Arnold McNair, in his separate opinion annexed to the Opinion of the Court on the *International Status of South West Africa*, observed:

> "From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence" (*I.C.J. Reports 1950*, p. 153).

Concept of Mandates—Rights and Obligations of Mandatory

The Court has given the following account of this question:

> "Under Article 119 of the Treaty of Versailles of 28 June 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions. The said Powers, shortly before the signature of the Treaty of Peace, agreed to allocate them as Mandates to certain Allied States which had already occupied them. The terms of all the 'C' Mandates were drafted by a Committee of the Supreme Council of the Peace Conference and approved by the representatives of the Principal Allied and Associated Powers in the autumn of 1919, with one reservation which was subsequently withdrawn. All these actions were taken before the Covenant took effect and before the League of Nations was established and started functioning in January 1920.

The terms of each Mandate were subsequently defined and confirmed by the Council in conformity with Article 22 of the Covenant.

The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a régime of tutelage for each of such peoples to be exercised by an advanced nation as a 'Mandatory' 'on behalf of the League of Nations'; and the recognition of 'a sacred trust of civilisation' laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights.

These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 329.)

Sir Arnold McNair, in his separate opinion mentioned above, stated:

"The Mandates System seems to me to be an *a fortiori* case. The occasion was the end of a world war. The parties to the treaties of peace incorporating the Covenant of the League and establishing the system numbered thirty. The public interest extended far beyond Europe. Article 22 proclaimed 'the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant'. A large part of the civilized world concurred in opening a new chapter in the life of between fifteen and twenty millions of people, and this article was the *instrument* adopted to give effect to their desire. In my opinion, the new régime established in pursuance of this 'principle' has more than a purely contractual basis, and the territories subjected to it are impressed with a special legal status, designed to last until modified in the manner indicated by Article 22. The dissolution of the League has produced certain difficulties, but, . . . they are mechanical difficulties, and the policy and principles of the new institution have survived the impact of the events of 1939 to 1946, and have indeed been reincarnated by the Charter under the name of the 'International Trusteeship System',

with a new lease of life." (*I.C.J. Reports 1950*, pp. 154-155, italics added.)

A new order based on the proposition that "all men are by nature equally free and independent" has attained solemn recognition in the basic law of many nations and is today—in one form or another—customary declaration, norm and standard in the constitutional practice of States. It cannot be ignored that the status of the Territory of South West Africa is the most explosive international issue of the post-war world; and the question whether the *official policy of apartheid*, as practised in the Territory, is or is not compatible with the principles and legal provisions stated in the Covenant, in the Mandate and in the Charter of the United Nations, begs an answer by the Court.

Power of Revocation

It has been contended that there is no express power of revocation of a mandate provided for under the League Covenant, nor yet an implied power. In answer to this contention, some relevant quotations have been relied upon during the present proceedings. Wright, in his *Mandates Under the League of Nations*, 1930 (pp. 440-441), wrote the following:

> "Whether the League can appoint a new mandatory in case one of the present mandatories should cease to function has not been determined. Nor has it been decided whether the League can dismiss a mandatory though both powers may be implied from the Covenant assertion that the mandatories act 'on behalf of the League', and members of the Permanent Mandates Commission have assumed that they exist. Furthermore, it would seem that the mandate of a given nation would automatically come to an end in case the mandatory ceased to meet the qualifications stated in the Covenant and that the League would be the competent authority to recognize such a fact. . . . Since the areas subject to mandate are defined in Article 22 of the Covenant it would seem that the League, whose competence is defined by the Covenant, could not withdraw a territory from the status of mandated territory unless through recognition that the conditions there defined no longer exist in the territory."

Smuts, in *The League of Nations: A Practical Suggestion*, 1918, said:

"... in case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate, and entrusting it to some other State, if necessary".

The view existed then that the League could revoke a mandate in the event of a fundamental breach of its obligation by a mandatory. Annexation, overt or disguised, was certainly the most grave and fundamental breach of the essential principles of the mandates system which—as an international institution—was created by Article 22 of the Covenant.

Consequences of Dissolution of the League

An international régime, the mandates system, was created by Article 22 with a view to giving practical effect to the two principles *(a)* of *non-annexation*, and *(b)* that *the well-being* and development of the peoples inhabiting the mandated territories, not yet able to stand by themselves, form "a sacred trust of civilization". The creation of this new international institution did not involve any cession of territory or transfer of sovereignty, and the mandatory was to exercise an international function of administration on behalf of the League of Nations. The mandate was created in the interests of the inhabitants and of humanity in general, as an international institution with an international object—a sacred trust of civilization.

The international rules regulating the mandate constituted an international status for the territory. The functions were of an international character and their exercise, therefore, was subjected to the supervision of the Council of the League of Nations and to the obligation to submit annual reports.

Obligations: *(a)* administration as a "sacred trust"; *(b)* machinery for implementation, supervision and control as "securities for the performance of this trust". These obligations represent the very essence of the "sacred trust". Neither the fulfilment of these obligations, nor the *rights* of the population, could be brought to an end with the liquidation of the League, as *they did not depend on the existence of the League.*

The provisions of paragraph 2 of Article 80 of the Charter presuppose that the rights of States and peoples should not lapse automatically on the dissolution of the League.

The resolution of the League Assembly of 18 April 1946 had to recognize that the functions of the League terminated with its existence, at the same time the Assembly *recognized* that Chapters XI, XII and XIII of the Charter embodied the principles declared in Article 22 of the Covenant

of the League of Nations. In paragraph 4 of that resolution, the mandatory Powers recognized that some time would elapse from the termination of the League to the implementation of the trusteeship system, and assumed the obligation to continue nevertheless, in the meantime, to administer the territories under mandate for the well-being of the peoples concerned, until other arrangements had been agreed between them and the United Nations.

The Assembly understood that the mandates were to continue in existence until "other arrangements" were established, concerning the future status of the territory concerned. Maintaining the status quo meant: to administer the territory as a sacred trust and to give account and to report on the acts of administration.

There are decisive reasons for an affirmative answer to the question whether the supervisory functions of the League were to be exercised by the new international organization created by the Charter. The authors of the Covenant considered that the effective performance of the sacred trust of civilization required that the administration of the mandated territories should be subjected to international supervision. The necessity for supervision continues to exist. It cannot be admitted that the obligation to submit to supervision has disappeared, merely because the supervisory organ under the mandates system has ceased to exist, when the United Nations has another international organ performing similar supervisory functions.

Article 80, paragraph 1, of the Charter purports to safeguard the rights of the peoples of mandated territories until trusteeship agreements are concluded, but no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ.

The resolution of 18 April 1946 of the Assembly of the League presupposes that the supervisory functions exercised by the League would be taken over by the United Nations, and the General Assembly has the competence derived from the provisions of Article 10 of the Charter, and is legally qualified to exercise such supervisory functions.

On 31 January 1923 the Council of the League adopted certain rules by which the mandatory governments were to transmit petitions. This right which the inhabitants of South West Africa had thus acquired is maintained by Article 80, paragraph 1, of the Charter. The dispatch and examination of petitions form a part of the supervision, and petitions are to be transmitted by the South African Government to the General Assembly, which is legally qualified to deal with them.

At its final session, on 18 April 1946, the League of Nations adopted a resolution, already referred to, concerning the mandates system, of which the last two paragraphs read as follows:

> "[The Assembly:] 3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated

territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

EFFECT OF RESOLUTION 2145 (XXI) OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS AND OF THE SECURITY COUNCIL RESOLUTIONS

The Principle of Non-Discrimination

The United Nations and the General Assembly were entrusted with special tasks under the Charter of the United Nations and, among other tasks, to "encourage and promote respect for human rights and for fundamental freedoms for all, without distinction as to race . . ." (Art. 76 *(c)*; Art. 1 (3)). The General Assembly has competence in respect of the interpretation of the Charter, and power to enact recommendations regarding racial discrimination which have evolved as principles or standards of general international acceptance.

The principle of non-discrimination on account of race or colour has a great impact in the maintenance of international peace, and the Organization has the duty to ensure that all States—even those which are not members—shall act, in accordance with the principles of Article 2 of the Charter, in the pursuit of the purposes stated in Article 1—among them to promote and encourage respect for human rights and fundamental freedoms for all, without racial discrimination (Art. 1 (3)).

Significance of the Recommendations of the General Assembly

Nobody would dispute the powers of the General Assembly to discuss such matters as racial discrimination, in general, and especially when they occur in a mandated territory which has an international status and is an institution or régime which is the concern of the Assembly. The International Court is guided by its Statute and its Rules, but even the Court's functions and powers may be discussed by the General Assembly, which may make recommendations (to the United Nations Members) in respect to them, and propose or evolve additional subsidiary means which the Court should apply for the determination of rules of law.

The numerous and almost unanimous recommendations regarding *apartheid* and racial discrimination are made to the Members of the United Nations, but the Court cannot overlook or minimize their overriding importance and relevance. The idea of concern for peoples, for the recognition of the role of the common man, and especially for the peoples "not yet able to stand for themselves under the strenuous conditions of the modern world", was the one that moved the authors of the Covenant and is at the root of the Mandate.

For purposes of the interpretation of the Mandate according to both its spirit and its letter, the dissolution or liquidation of the League is not of permanent importance, since the Mandate survived. But for a just interpretation of its terms and spirit, it is important to keep in mind that such interpretation is being made today; that this Court is sitting in 1971 and not in 1920, and that the international community of today, the United Nations, has the right and the duty to see that the sacred trust is performed. For that reason and to that effect, many resolutions were adopted in the General Assembly and are relevant and of the greatest importance in the consideration of the South West Africa case.

It is therefore in the exercise of its rights and duties that the General Assembly, through its resolutions, has passed judgment on the application in the mandated territory of the official policy of racial discrimination, and recognized the rules and standards which the Mandatory by its policy of *apartheid* contravenes, in violation of its obligations under the Mandate, obligations which are not dormant at all, but alive and in action, as are equally well alive and not dormant the rights of the peoples of the Territory who are the beneficiaries of such obligations.

After the 1950 Opinion has been accepted and approved by the General Assembly, it was the "law recognized by the United Nations" (Judge Sir Hersch Lauterpacht, in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, p. 46).

The General Assembly has had, under the relevant international instruments, several distinct roles in regard to Namibia, and the action which it took in this instance finds its bases in all these roles taken either individually or together. The General Assembly acted: in its capacity as the supervisory authority for the Mandate for South West Africa; as the sole organ of the international community responsible for ensuring the fulfilment of the obligations and sacred trust assumed in respect of the people and Territory of Namibia; and as the organ primarily concerned with non-self-governing and trust territories.

To the extent that resolution 2145 (XXI) was adopted by the General Assembly as the supervisory authority and as a party in contractual relationship with South Africa arising from the Mandate, the resolution is constitutionally valid on its own, and therefore legally effective. Furthermore, when the General Assembly decided that the Mandate was terminated, and that South Africa had no other right to administer the Territory, it made a statement which, in addition to its dispositive character, was also of a declaratory nature. One hundred and fourteen members of the General Assembly, which voted for resolution 2145 (XXI), and the three member Governments which abstained on the resolution, were all agreed that South Africa had failed to fulfil its obligations in respect of the administration of the Territory and its obligations to ensure the moral and material well-being and security of the indigenous inhabitants, and that it had in fact disavowed the Mandate. Under these circumstances, it was clearly incumbent upon the General Assembly not to remain silent, and to declare what in fact and in law was manifest.

The fact that, broadly speaking, the General Assembly's activities are mainly of a recommendatory character does not mean that the General Assembly cannot act in a situation in which it is a party to a contractual relationship in its capacity as such a party; nor does it mean that, in regard to a territory which is an international responsibility, and in regard to which no State sovereignty intervenes between the General Assembly and the territory, the General Assembly should not be able to act as it did by resolution 2145 (XXI).

During the past 25 years, a vast variety of actions and initiatives of the United Nations, in the fulfilment of the purposes and principles of the Charter, have found expression in General Assembly resolutions, adopted in the general context of Chapter IV of the Charter. These resolutions have conferred on various subsidiary organs a vast range of operational functions.

The legality of these, and numerous other actions and initiatives of the General Assembly, did not depend upon the existence of a precise textual provision in Chapter IV of the Charter, providing for each case. For the General Assembly is the competent organ of the United Nations to act in the name of the latter in a wide range of matters, and in these instances it is the United Nations itself which is acting. This is especially so concerning economic, social and trusteeship matters, non-self-governing territories, administration and finance, and action required under the United Nations Charter not coming within the special competence of the Security Council.

In this instance, the Security Council not only gave its support but also endorsed the Assembly's decisions. By its resolution 264 (1969) the Security Council recognized the termination of the Mandate and the assumption of direct responsibility for the Territory by the General

Assembly; stated that the continued presence of South Africa in Namibia was illegal; and called upon the Government of South Africa to withdraw immediately its administration from the Territory. The Security Council further reiterated its endorsement of the General Assembly decisions by its resolutions 269 (1969), 276 (1970) and 283 (1970). To the extent that General Assembly resolution 2145 (XXI) may be considered a recommendation to the Security Council, it became fully effective upon its endorsement by the Council.

It cannot be denied that the combined action of both principal organs with respect to Namibia is effective beyond any constitutional or legal challenge.

This Court has previously stated in 1950 and reaffirmed in its 1962 Judgment: "to retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified" (*I.C.J. Reports 1950*, p. 133).

There was general agreement that the General Assembly had a duty to act on the basis of its own assessment of the situation clearly summed up in the preamble of the relevant resolution.

In two resolutions unanimously adopted by the Security Council in 1968, the Council took note of the termination of the Mandate by the General Assembly and took it into account. In four additional resolutions adopted in 1969 and 1970, the Security Council *recognized* that the General Assembly had terminated the Mandate, *ruled* that the continued presence of South Africa in Namibia was illegal, *called upon* South Africa to withdraw its administration from the Territory, strongly *condemned* South Africa for its refusal to do so and *declared* all actions taken by South Africa on behalf of or concerning Namibia to be illegal and invalid.

There is no doubt in my view, that General Assembly resolution 2145 (XXI) is valid, and that the Security Council resolution 276 (1970) is also valid. Furthermore, the combined effect of the resolutions of these two principal organs of the United Nations justifies the validity of the termination of South Africa's Mandate over Namibia and makes its continued presence in that Territory illegal.

Namibia has been and remains an international responsibility which, though formerly discharged through the agency of the South African Government, has at all times constituted an exercise of international rather than of sovereign authority. A further part of this premise is that the people and Territory of Namibia have, for the past 50 years, possessed a *sui generis* international status, not being under the sovereignty of any State, and having been placed under the overall authority and protection of the international community represented since 1946 by the United Nations.

Neither South Africa nor the United Nations has possessed rights in

Namibia for any purpose other than to secure the rights and interests of the people of the Territory. For the Mandate did not confer ownership or sovereignty or permanent rights, but consisted only of a conditional grant of powers for the achievement of a purpose—not for the benefit of the grantee but for the benefit of a third party, the people and Territory of Namibia—which powers were to be relinquished as soon as the purpose was achieved.

The United Nations General Assembly adopted, on 24 October 1970, resolution 2625 (XXV) embodying a Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Declaration states, *inter alia*, in the sixth paragraph of the section *The principle of equal rights and self-determination of peoples*:

> "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."

By this Declaration, the General Assembly also declared further that:

> "The principles of the Charter which are embodied in this Declaration constitute basic principles of international law,"

and consequently appealed to all States—

> "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of their strict observance." (Declaration, *ibid.*, General part, para. 3.)

Validity

The United Nations had valid reason to proceed to the revocation. In resolution 2145 (XXI) the General Assembly relied on various grounds for its decision, and some at least of those grounds are of such a nature that their validity can be established without it being necessary to go into factual issues.

In the operative part of resolution 2145 (XXI) the General Assembly, *inter alia*,

(i) reaffirmed the inalienable right of the people of South West Africa to self-determination, freedom and independence;

(ii) reaffirmed that South West Africa is a territory having international status which it shall maintain until it achieves independence;

(iii) declared that South Africa had failed to fulfil its obligations in respect of the Territory and had disavowed the Mandate;

(iv) decided that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is, therefore, *terminated*; that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

(v) resolved to discharge these responsibilities with respect to South West Africa;

(vi) established an *ad hoc* committee to recommend practical means by which South West Africa should be administered so as to enable the people of the Territory to exercise their right of self-determination and to achieve independence;

(vii) called upon the Government of South Africa forthwith to refrain and desist from any action which will, in any manner whatsoever, alter or tend to alter the present international status of South West Africa;

(viii) called the attention of the Security Council to this resolution, and

(ix) requested all States to extend their whole-hearted co-operation and assistance in implementing this resolution.

The Security Council, in aid of the decisions taken by the General Assembly, *upheld* the principles embodied in General Assembly resolution 2145 (XXI), and adopted resolutions 245, 246 (1968); 264, 269 (1969); 276, 283 and 284 (1970). In these resolutions, the Security Council recognized that the General Assembly had terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence, and called upon the Government of South Africa to withdraw its administration from the Territory immediately (resolution 264 of 1969, reaffirmed in later resolutions).

The request for advisory opinion was made in resolution 284 (1970). By this resolution, the Security Council reaffirmed the special responsibility of the United Nations with regard to the Territory and the people of Namibia, recalled resolution 276 and decided to submit the question to the International Court of Justice for an advisory opinion.

In resolution 276 (1970), the Security Council reaffirmed General Assembly resolution 2145 (XXI) by which the United Nations decided to terminate the Mandate of South West Africa and assumed direct responsibility for the Territory until its independence, and reaffirmed Security Council resolution 264 (1969) which recognized this termination and called upon the Government of South Africa immediately to withdraw

from this Territory. Neither the Security Council nor the General Assembly has requested the Court to advise on the legal validity or otherwise of the action taken by them or the resolutions passed by them.

The principles of the Charter, on the basis of which action has been taken by the General Assembly and the Security Council, have been elaborated in the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which was unanimously adopted by the General Assembly on 24 October 1970.

The first argument against the formal validity of Security Council resolutions in general is based by the South African Government on the composition of the Council and concerns the representation of China—the "Republic of China", as it is named in paragraph 1 of Article 23 of the Charter. It is the Government of Nationalist China which has occupied the permanent seat of China from the foundation of the United Nations down to today. South Africa itself has always considered the Nationalist Government as the legal Government of China. When it comes to the right of representation of two rival governments of a member State, it is obviously the competent organ of the United Nations, in this case the General Assembly, which should decide. Up to now, there has not been any change in the representation of China in the United Nations. This objection to the validity of Security Council resolutions should, therefore be rejected.

The South African Government alleges that the Security Council did not act in conformity with the procedure laid down by Article 27, paragraph 3, of the Charter, when it adopted the various resolutions dealing with the question now before the Court, and that in consequence all those resolutions are null and void. Resolution 284 (1970), containing the request for an advisory opinion which underlies the present proceedings, was adopted despite the abstention of three members, two of which were permanent members. Likewise resolution 276 (1970) was adopted in spite of the abstention of two permanent members and, at the previous vote on a phrase in the draft resolution, the words in question were retained despite the abstention of four members, three of which were permanent members. Nevertheless, those votes cannot be considered as irregular and thus null and void, for there is *a long-standing practice*, followed by the Security Council since 1950, which has interpreted the provisions of Article 27, paragraph 3, in such a way that the abstention of one or more permanent members does not have the same effect as a negative vote. It is also generally recognized that the absence of a permanent member from a meeting of the Security Council does not prevent the taking of decisions which are valid even if they relate to questions of substance. The new procedural practice with regard to votes in the Security Council was followed without any objection on the part of the General Assembly.

Article 32 of the Charter, which is relied upon by the South African Government, presupposes the existence of a dispute to which the State which is not a member of the Security Council is a party, as a ground for having the right to participate, without the right to vote, in discussions relating to that dispute. It is not the purpose of Security Council resolution 284 (1970) to settle a *dispute* between States; it is connected with a *situation*, namely the question of Namibia, and with the responsibilities which the United Nations assumed in 1966 (resolution 2145 (XXI)) in respect of that Territory and its inhabitants. Article 32 of the Charter was therefore not applicable. Although the definite aim of the Council, when it adopted resolution 276 (1970), was to obtain the withdrawal of the South African authorities from Namibia, the intention was, at the same time, to strengthen the maintenance of international peace and security and to reduce the existing tension. As the matter at issue was not a dispute between States but a *situation* which concerned the United Nations as such, the Security Council was under no obligation to invite South Africa to participate, without the right to vote, in the discussions which preceded the adoption of the resolution.

Article 24 of the Charter constitutes a legal basis for resolution 276 (1970) of the Security Council. That Article confers on the Council not only the specific powers set forth in Chapters VI, VII, VIII and XII, but also general powers, consistent with the aims and principles of the United Nations. With regard to the interpretation of Article 24 of the Charter, it is said in the treatise published in 1969 by Goodrich, Hambro and Simons, entitled *Charter of the United Nations*: "Article 24 (2) states that the 'specific powers granted to the Security Council' are laid down in Chapters VI, VII, VIII and XII of the Charter. This statement raises the question whether the Council has these powers only or whether it may exercise such other powers, consistent with the purposes and principles of the Charter, as are necessary for it to discharge its responsibilities. The latter, more liberal interpretation has been generally accepted." (P. 204.) The objections of the South African Government to the intrinsic validity of resolution 276 (1970) of the Security Council should be dismissed.

The first four paragraphs of the operative part of the resolution are addressed in the first place to South Africa. They all, in particular paragraph 2, contain important findings which bind that State legally. It is therefore put under an obligation, by virtue of Article 25 of the Charter, to modify its conduct in the Namibia question in conformity with the decisions of the Security Council. Given that the continued presence of the South African authorities in Namibia is illegal, all the measures taken by them in the name of that Territory, or concerning that Territory, after the cessation of the Mandate, are illegal and invalid. That finding is also

binding on all member States of the United Nations other than South Africa.

Legal Consequences for South Africa, for Other Member States of the United Nations and for Non-Member States

It must be pointed out that South Africa, in international law, has, so long as its illegal presence in Namibia lasts, certain obligations vis-à-vis that Territory and its population. Those obligations are for the most part the same as were incumbent upon South Africa before the cessation of the Mandate. It is thus under an obligation to promote in continuous fashion the well-being and development of the peoples of the Territory, in conformity with Article 22 of the League of Nations Covenant and with the Mandate for South West Africa. South Africa has likewise an obligation to act in conformity with the Declaration regarding non-self-governing territories forming Chapter XI of the United Nations Charter. No matter under what régime, human rights have to be respected in Namibia as elsewhere.

The South African Government, after its attempts to annex the mandated territory had been defeated by the vigorous resistance of the United Nations, and after it had definitely refused to subject the Territory to trusteeship, nonetheless stated on various occasions that it would maintain the status quo, and that it would continue to administer the Territory in the spirit of the current Mandate.

Included among the international rules which are binding on the administration of the international territory of Namibia are declarations and resolutions formally adopted by the principal organs of the United Nations which represent generally accepted interpretations and applications of the provisions of the United Nations Charter, and which either are of general application, or are stated to have specific reference to the situation of Namibia.

The legal consequence for South Africa of its continued and illegal presence in Namibia, is therefore that this constitutes an internationally wrongful act and a breach of international legal obligations, owing by South Africa not only to the United Nations but also to the people and Territory of Namibia.

All States are required, under the provisions of Article 25 of the United Nations Charter, to comply with the resolutions of the Security Council and to assist the United Nations under Article 2, paragraph 5, of the Charter in any action it takes in accordance with the Charter. States are obliged to support the United Nations in securing the *withdrawal* of the South African administration from Namibia and in ensuring the free and effective exercise by the people of Namibia of their right to self-determi-

nation and independence. Since the termination of South Africa's Mandate over Namibia, States are precluded from establishing or maintaining any relation with Namibia through the Government of South Africa or through the illegal South African administration in the Territory.

It should be the duty of every Member of the United Nations:

to recognize the authority of the United Nations to administer the Territory of Namibia;

to recognize the inalienable right of the people of Namibia to self-determination and independence;

to take joint and separate action in co-operation with the United Nations (Art. 56) for the achievement of the purposes set forth in Article 55 of the Charter;

to accept and carry out the decisions of the Security Council which it has taken or which it may take from time to time in accordance with the Charter (Art. 25), such as the steps mentioned in resolution 283 (1970).

All States have the obligation not to recognize the presence of South Africa in Namibia in contravention of resolution 276 (1970) of the Security Council and resolution 2145 (XXI) of the General Assembly.

Plebiscite

The position of the South African Government in respect to South West Africa has always been very clear and consistent, in the sense that it considers the Territory as an integral part of South Africa and that in fact the *annexation* has taken place and that it does not intend ever to give up the Territory.

On *4 November* 1946, during the First Session of the General Assembly of the United Nations held at Lake Success, Field Marshal Smuts, at the fourteenth meeting of the Fourth Committee, presented a statement concerning the mandated territory of South West Africa (UN doc. A/C.4/41). He recalled the fact that during the First World War, President Wilson and other Allied spokesmen had emphasized the right of self-determination of all peoples and had made *any form of annexation unacceptable* to the Peace Conference. South West Africa, he continued, was so essentially a part of the South African territory and people, that a particular form of mandate had to be devised to meet the needs of the South African situation. Owing to the physical contiguity of South West Africa to the Union and its ethnological kinship with the rest of South Africa, the argument ran, the Union of South Africa was legitimately concerned in securing the *annexation* of that Territory. President Wilson understood, said Field Marshal Smuts, that the future of that Territory lay in its incorporation.

"By now [1946], South West Africa was so thoroughly integrated with the Union that its *formal incorporation* was mainly required to remove doubts, and thereby to attract capital and encourage individual initiative, and to render unnecessary a separate fiscal system. Incorporation would thus admit the inhabitants to the full benefits enjoyed by the population of the Union.

. . . . . .

The *integration* of South West Africa with the Union might be a process lasting over many years, but it would be as inevitable as the union of Wales and Scotland with England, of Texas and Louisiana with the American Union, and of Eastern Siberia with the Russian Union. At present [1946], South West Africa was a geographic, ethnic, strategic and economic *part* of the Union of South Africa.

The integration of South West Africa with the Union would be mainly a formal recognition of a *unity that already existed.*" (*GA, OR*, Fourth Committee, 14th Meeting, 4 November 1946; italics added.)

At that time and subsequently, South Africa has claimed sovereignty over the mandated territory and has openly declared its breach and disregard of the principle of *non-annexation* proclaimed by the Versailles Peace Conference. The avowed *annexation* was then and is now improper and unacceptable.

It is an admission by South Africa that the essential principle contained in the Covenant and the basic purpose of the mandates system has been violated, and is not now admitted or recognized as having any value or being applicable to Namibia. This evidence, and the violation of other obligations of the Mandatory, are among the compelling reasons taken into account by the General Assembly for the declaration that the Mandate was terminated and a justification of resolution 2145 (XXI).

At the hearing of 15 March 1971, the representative for South Africa stated:

"Against the background of the submission which we had made in the previous proceedings to the effect that the Mandate, as a whole, had lapsed, together with all obligations thereunder, the honourable President asked the question 'Under what title does the Government of South Africa claim to carry on the administration of Namibia?' Our answer is as follows:

South Africa *conquered* the Territory by force of arms in 1915, and administered it under military rule until the end of the war.

. . . . . .

> In the years since 1915, South West Africa has inevitably been *integrated* even more closely with the Republic.
>
> . . . . . .
>
> In the light of this history, it is the view of the South African Government that, if it is accepted that the Mandate has lapsed, the South African Government would have the right to administer the Territory by reason of a combination of factors, being *(a)* its original *conquest*; *(b)* its long occupation; *(c)* the continuation of the sacred trust basis agreed upon in 1920; and, finally *(d)* because its administration is to the benefit of the inhabitants of the Territory and is desired by them. In these circumstances the South African Government cannot accept that any State or organization can have a better title to the Territory." (Italics added.)

The question of a plebiscite has no relevance whatsoever to the question posed by the Security Council for the advisory opinion of this Court. The question of a plebiscite is a political question which has to be dealt with by the United Nations either in the General Assembly or in the Security Council. The question raised by South Africa can be briefly dismissed as being irrelevant and not falling within the ambit of the question that this Court has been requested to answer. The issues of non-annexation, *apartheid* and independence are not even mentioned as possible terms of a plebiscite. The proposal that the Court should supervise a political act, which would have been the concern of the General Assembly or the Security Council, should of course be rejected. The Court rightly answered that it "cannot entertain this proposal". I especially concur with the Court's comment regarding such proposal when it stated that:

> "The Court having concluded that no further evidence was required, that the Mandate was validly terminated and that in consequence South Africa's presence in Namibia is illegal and its acts on behalf of or concerning Namibia are illegal and invalid, it follows that it cannot entertain this proposal."

Against the background of the acts and intentions of South Africa in respect to the Territory of Namibia, it is obvious that such a request can have no other purpose than to obtain recognition of a *conquest*, an *integration* and an *annexation* which have already taken place. The status of South West Africa was thus *de facto* unilaterally and illegally changed. Twenty-five years ago, a request for annexation—founded on the alleged results of a plebiscite which Field Marshal Smuts presented to the General Assembly—was rejected. The feeling and declarations of the majority of delegations were that the spirit of the Charter would not be constructively implemented by the only two alternatives proposed by the Union of South Africa; i.e., incorporation or a continuation of the

present situation without United Nations supervision. The proposal of the Union of South Africa—it was said—would be a backward step that might endanger the progressive tendencies of the Charter and the legitimate aspirations of half the population of the world in the non-self-governing territories.

PRINCIPLE OF NON-ANNEXATION

One of the main principles which informs and gives new spirit to an international instrument like the Covenant, was the *principle of non-annexation*, a noble idea to deter the military powers from taking advantage of the war situation, or claiming, by right of conquest, sovereignty and ownership over peoples and territories, formerly pawns in the colonial system or the reward of victory or of superior strength. These new ideas were intended to help in the organization of a new world order, in which backward people, in all continents, would have a chance to be free from the former traditional chains of slavery, forced labour, and from being the prey of greedy masters. Those noble ideas, principles and concepts, embodied in the Covenant, were not born to have a precarious or temporary existence, linked to the mortal fate of a particular forum or to an international organization which could not be immune to change. They were intended to survive and prevail to guide the political conduct of governments and the moral behaviour of men. They were meant to persist and endure no matter what new social structures of juridical forms might evolve and change through the passage of time in this ever-changing world. Nevertheless South Africa has in reality and to all effects *annexed* as its own the Territory of Namibia. During the present proceedings, the Government of South Africa, through its representative at the oral hearings, has bluntly declared that its title to the mandated territory is based on conquest and long *occupation*. This behaviour as well as the refusal to render annual reports and to transmit petitions are sufficient grounds for the revocation of the Mandate.

So is the racial discrimination practised as an official policy in Namibia with the enforcement there of the system of *apartheid*. Racial discrimination as a matter of official government policy is a violation of a norm or rule or standard of the international community. A norm of non-discrimination of universal application has been drawn up independently of the Mandate and governs Article 2.

This is a problem, therefore, of the proper recognition and evaluation of human rights and the impact of their observance on the peace of the world. The mandatories have the duty, not only to "promote to the utmost the well-being and development" of the peoples entrusted to their

care, but to do it by *means and methods* most likely to achieve that end, and which do not by their very nature—as does *apartheid*—run contrary to the intended goal. The Charter prescribes the roads which will lead to it; those of non-discrimination and respect for human rights and fundamental freedoms, among other ways and means which will help the peoples to overcome the hardships and strains of our time.

The dissolution of the League was not the funeral of the *principles and obligations contained in the Covenant and the Mandate*; they are alive and will continue to be alive. No time-limit was or could be established for the "sacred trust of civilization".

The counterpart of annexation was to place the territories under a régime administered internationally. That was the purpose of the trusteeship system. South Africa should have been willing to *negotiate* with the United Nations an agreement to that effect, as was contemplated by the Charter. Paragraph 1 of Article 80 is not to be interpreted as giving grounds for delay or postponement of such negotiations; paragraph 2 of the same Article has no other purpose or meaning. South Africa disregarded the obligation to negotiate and the repeated request of the General Assembly to present a draft trusteeship agreement in respect of South West Africa. As Judge De Visscher said in the case concerning the *International Status of South West Africa*:

> "I concede that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to conclude a Trusteeship Agreement, in the sense that the Union is free to accept or to refuse the particular terms of a draft agreement. On the other hand, I consider that these provisions impose on the Union of South Africa an obligation to take part in negotiations with a view to concluding an agreement." (*I.C.J. Reports 1950*, p. 186.)

The character of the Mandate and the power of administration given to the Mandatory by Article 2, paragraph 1, of the Mandate, has its foundation in the reasoning and considerations stated in paragraphs 3 and 6 of Article 22 of the Covenant. Paragraph 6 contains the following concepts:

> "There are territories, such as South West Africa . . . which, owing to the sparseness of their population . . . or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory . . . can be best administered under the laws of the Mandatory . . . *subject to the safeguards* above mentioned in the interests of the indigenous population." (Italics added.)

Of no place in the world nowadays can one properly talk about "their remoteness from the centres of civilization". Now all countries and peoples everywhere are near and neighbours to each other. Isolation does not really exist unless imposed by force. The sparseness of population is becoming everywhere a thing of the past; the birth rate and the number of people cannot be measured by the figures of 50 years ago. The earth has become more than ever a melting-pot, crowded to overflowing and is subject to the everlasting pressure and impact of dynamic cross-currents of interchanging of peoples, cultures, ideas and reciprocal influences of every conceivable kind. Much can be said also of the number, location and identity of the "centres of civilization" which the framers of Article 22 of the Covenant had in mind.

So the discretion in the power of administration and legislation claimed by the Mandatory was founded on reasons and circumstances which half a century later have become and appear obsolete. They were intended only to facilitate administration. (Art. 2 (1) of the Mandate and Art. 22 (6) of the Covenant.) The exercise of such power was subject to the obligations stated in the Covenant and in the Mandate. (Art. 2 (2) among others.) Obviously the power of administration and legislation could not be legitimately exercised by *methods like apartheid* which run contrary to the aims, principles and obligations stated in Article 22 of the Covenant, especially in paragraphs 1, 2 and 6. Nor could be exercised today in violation of the provisions of the United Nations Charter, particularly—among others—those regarding respect for human rights and fundamental freedoms, or the prohibition of discrimination on account of race or colour. The arbitrary assertion that *apartheid* is the only alternative to chaos, and that the peoples of South West Africa are incapable of constituting a political unity and being governed as a single State does not justify the official policy of discrimination based on race, colour or membership in a tribal group.

Paragraph 3 of Article 22 of the Covenant did not presuppose a static condition for the peoples of the territories. Their stage of development had to be transitory, and therefore the character of the Mandate, even of a given mandate, could not be conceived as a static and frozen one; it had to differ as the development of the people changed or passed from one stage to another. Are the people of South West Africa in the same stage of development as 50 years ago? Are the economic conditions of the Territory the same? Article 2, paragraph 2, of the Mandate states:

> "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

Even if the geographical situation is to be considered from the aspect of its

remoteness from centres of civilization, and remoteness being a relative term, can it be said that South West Africa is now as remote from centres of civilization as it was 50 years ago?

The relentless will of self-assertion in search of new horizons has created new conditions where freedom and social justice could flourish; sometimes a new order has been established through violent and dramatic struggles, sometimes by peaceful processes of collective parliamentary action in national and international forums. This struggle has created conditions, principles, rules and standards of international behaviour, which have found expression in the works of thinkers, writers and philosophers. "Equality before the law", or in the words of the Charter: "International co-operation in the promotion and respect of human rights and fundamental freedoms for all without distinction as to race . . ."

This fundamental resolve will inspire the vision and the conduct of peoples the world over, until the goal of self-determination and independence is reached, and such ideas and hopes are kept in the human mind, "until [in the words of Lincoln] in due time the weights should be lifted from the shoulders of all men, and all should have an equal chance".

(Signed) Luis PADILLA NERVO.

SEPARATE OPINION OF JUDGE PETRÉN

[Translation]

I agree with the majority of the Court in considering that the revocation by the United Nations of the Mandate conferred upon South Africa in respect of South West Africa, now Namibia, constitutes an established fact which it is the duty of States, and in the first place of South Africa, to recognize. However, the grounds upon which I have reached this conclusion, enabling me to vote in favour of sub-paragraph 1 of the operative clause of the Opinion, do not wholly coincide with those of the majority. Furthermore, to my regret, I can only concur in part of what is contained in sub-paragraphs 2 and 3 of the operative clause; since a separate vote could not be taken in this respect, I was obliged to vote against those two sub-paragraphs. For these reasons, I must attach to the Advisory Opinion a statement of the grounds on which I differ.

*

With regard, in the first place, to the propriety of the Court's giving the advisory opinion requested by the Security Council, I believe that there is one particular aspect of the question with which I should briefly deal.

Whereas resolution 2145 (XXI), whereby the General Assembly of the United Nations declared the termination of South Africa's Mandate for Namibia, was founded upon reasons of a legal nature and the Security Council endorsed it in declaring by resolution 276 (1970) that South Africa's presence in Namibia was illegal, it clearly emerges from the context in which the request for advisory opinion was decided that its purpose was above all to obtain from the Court a reply such that States would find themselves under obligation to bring to bear on South Africa pressure of an essentially economic character designed to secure its withdrawal from Namibia. The natural distribution of roles as between the principal judicial organ and the political organs of the United Nations was thereby reversed. Instead of asking the Court its opinion on a legal question in order to deduce the political consequences flowing from it, the Security Council did the opposite. Considering as I do that, in accordance with the Charter of the United Nations, any legal obligation upon member States to apply coercive pressure on a State at fault can be created solely by a Security Council resolution to that effect, I fear that the Court's task in the present proceedings should be confined to a renvoi to the decisions taken by the Security Council. In other words, the request for advisory opinion lies outside the normal framework of the

Court's advisory function, which consists in offering directives for action to the organ requesting an advisory opinion. The Court would therefore have had a valid reason for declining to accede to the request. Nevertheless, in view of the particular circumstances in which the question of Namibia has evolved and the confused situation which has resulted, I am of the opinion that the Court ought to respond to this request, however abnormal it may appear.

There is however reason to consider whether the decisions taken by the Court with regard to its composition in the present proceedings are not such as to hamper it in its reply. According to Article 68 of the Statute, the Court should, in the exercise of its advisory functions, be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable. The Secretary-General of the United Nations and other participants in the proceedings have contended that South Africa had violated its obligations as the mandatory Power and that the resolutions of the General Assembly and of the Security Council concerning the revocation of the Mandate were valid, whereas South Africa has expounded opposite contentions. If ever there was reason for applying to advisory proceedings the provisions governing contentious proceedings, it seems difficult not to recognize that such is the case in the present proceedings. However, the majority of the Court, by an Order of 29 January 1971, rejected South Africa's request for the appointment of a judge *ad hoc*, only five Judges having declared themselves in favour of granting that request.

In the Advisory Opinion, the Court now states as the grounds for the Order of 29 January that the Rules of Court would not have permitted it to exercise any discretionary power with regard to South Africa's application. But Article 68 of the Statute, the clear purpose of which is to protect the interests of States which may be affected by advisory proceedings, lays a duty upon the Court to consider in each individual case to what extent the provisions of the Statute concerning contentious procedure should be applied, including those which contemplate judges *ad hoc*. Thus when Article 83 of the Rules of Court provides that if an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute (which deals with the appointment of judges *ad hoc*) shall apply, it is not possible to interpret this provision of the Rules as forbidding the Court to permit a State to appoint a judge *ad hoc* in other cases in which this would be justified by the circumstances. On the contrary, Article 83 of the Rules must be regarded as a positive rule for the application of Article 68 of the Statute, to the effect that Article 31 of the Statute must always be regarded as applicable when an advisory opinion is requested upon a legal question actually pending between two or more States. In such a situation, the Rules recognize the right of a State taking part in advisory proceedings to appoint a judge *ad hoc* if the Court does not include upon the Bench a judge of that State's nationality. Certainly Article 68 of the Statute was not an absolute

bar to the Court's refusing South Africa the right to choose a judge *ad hoc*, but it would, in my view, have been more in harmony with the spirit of that provision to have admitted South Africa's application.

Taking account of what has just been said, it remains to be considered whether South Africa did not have a right, by virtue of Article 83 of the Rules of Court, to appoint a judge *ad hoc*, inasmuch as the Advisory Opinion was requested upon a legal question pending between South Africa and one or more other States. By rejecting at the outset of the oral proceedings South Africa's request for the appointment of a judge *ad hoc*, the Court implicitly decided in the negative the issue as to whether the advisory opinion was requested upon such a question. But on 29 January 1971 the scope of the Advisory Opinion was not yet known. Several participants in the written proceedings, and in particular the Secretary-General of the United Nations, had contended that it is not for the Court to pronounce upon the validity of the General Assembly and Security Council resolutions concerning the revocation of the Mandate. At the outset of the oral proceedings, at the time when the Court rejected South Africa's request for a judge *ad hoc*, it was not yet known whether the Court would or would not be examining the validity of those resolutions. If the Court had decided not to proceed to such an examination, it could perhaps have been said that the Court's opinion related solely to the effects of the situation created by South Africa's continued presence in Namibia and that the illegal nature of that situation could not be questioned by the Court after the resolutions of the General Assembly and the Security Council. However, the Court has considered it necessary in its Opinion to decide the question of the validity of the resolutions and, in so doing, it has also felt it its duty to pronounce upon the question whether South Africa had violated its obligations as mandatory Power.

The applicability of Article 83 of the Rules therefore depends on whether there exist between South Africa and other States pending questions relating to the legal situation in regard to the matters thus dealt with in the Opinion. On this point it became clear, not only in the course of discussions in the United Nations but also in exchanges of notes direct between governments, that there do exist between South Africa and other States pending questions concerning the right of South Africa to represent Namibia at the international level, for instance in regard to accession to international instruments. These pending legal questions are intimately connected with the question of the effect of the resolutions of the General Assembly and Security Council on the revocation of the Mandate. Consequently, I find that, in giving the present Advisory Opinion, the Court has decided questions for the examination of which South Africa had the right, by virtue of Article 83 of the Rules of Court, to claim the presence upon the Bench of a judge of its nationality. By depriving South Africa of this procedural safeguard, the Court in my view has failed to observe its Rules of Court.

There are of course divergent opinions as to the value of the institution of judges *ad hoc*, but so long as it remains in the Court's Statute it will represent a safeguard of a procedural kind which is offered to a State which is a party in a contentious case when there is no judge of its nationality among the regular Members of the Court. Advisory proceedings are also part of the Court's judicial function, and Article 68 of the Statute lays down the principle that they should as far as possible be assimilated to contentious proceedings.

The departure from the principle laid down in Article 68 of the Statute which the Court evinced in rejecting South Africa's request for a judge *ad hoc* is accentuated by another majority decision of the Court. I refer to its retention on the Bench of a Member who, as a delegate to the United Nations, played, according to official records communicated to the Court, a spectacular role in the preparation of one of the Security Council resolutions which endorsed and took as their point of departure General Assembly resolution 2145 (XXI) the validity of which has had to be assessed by the Court in the present Advisory Opinion. The old saying that not only must justice be done but that it must be seen to be done would to my mind have required a stricter application of Article 17, paragraph 2, of the Statute, prohibiting Members of the Court from participating in the decision of any case in which they have previously taken part in any capacity whatsoever. I do not think that it is the case that the previous activities of a judge as representative of his country at the United Nations cannot in any circumstances attract Article 17, paragraph 2, of the Statute. Thus I consider that if a person has formulated or defended the text of resolutions upon the validity of which the Court has to decide, he may not take part in the case as a judge, whether the matter be contentious or advisory.

The two decisions concerning the composition of the Court to which I have just referred deserve attention because of their importance in the safeguarding of the judicial character of advisory proceedings. The fact remains that the majority considered that the Court ought to give its Advisory Opinion in its present composition, so that the situation is analogous to that in a contentious case in which a preliminary objection has been dismissed and the judges who declared themselves in favour of upholding that objection must take part in the proceedings on the merits.

*

I shall now turn therefore to the central parts of the Advisory Opinion and will first discuss the scope of the opinion requested of the Court.

In this connection, it should be observed that Security Council resolution 276 (1970) took as point of departure resolution 2145 (XXI), by which the General Assembly decided, *inter alia*, that the Mandate entrusted to South Africa was terminated. Since Security Council

resolution 276 (1970) is based upon General Assembly resolution 2145 (XXI), and upon a series of subsequent resolutions of the General Assembly and Security Council, there can be no question of the Court being able to pronounce on the legal consequences of Security Council resolution 276 (1970) without first examining the validity of the resolutions upon which that resolution is itself based, the more so in that the validity of those resolutions has been challenged by South Africa and called in question by other States. So long as the validity of the resolutions upon which resolution 276 (1970) is based has not been established, it is clearly impossible for the Court to pronounce on the legal consequences of resolution 276 (1970), for there can be no such legal consequences if the basic resolutions are illegal, and to give a finding as though there were such would be incompatible with the role of a court. It seems to me that the majority should have expressed itself on this point more precisely and firmly, but I note that it likewise considered that the opinion must include an examination of the validity of the resolutions in question.

I am in agreement with the majority in considering that the mandate institution included the power of the League of Nations to revoke a mandate in case of a serious breach of the mandatory Power's obligations, although that possibility is not mentioned in the texts which set up the mandates system. The same is true of many everyday private law contracts which make no reference to the right of one party to repudiate the contract if the other party has committed a serious breach of his obligations. Since the procedure by which the power of revocation could be exercised had not been specified, it had to be determined, should the matter arise, by the organ of the League of Nations which was to be regarded as competent in this respect.

Again in agreement with the majority, I find also that the Mandate for South West Africa survived the dissolution of the League of Nations, and that the role of the latter organization with regard to the safeguarding of the interests of the population of the mandated territory and the supervision of the mandatory Power's administration was transferred to the United Nations. This is also the case in respect of the power to revoke the Mandate on account of a material breach of its obligations by the mandatory Power, although no provision was ever adopted regulating the modalities of the exercise of this power inherent in the mandate institution. It follows therefore that it has always been left to the organ or organs of the world organization which, should the case arise, were to be regarded as competent in the matter, to determine the procedure for this purpose.

While, in the time of the League of Nations, the conduct of the mandatory Power did not lead the world organization to contemplate revocation of the Mandate, the United Nations was gradually brought into such a position, as South Africa came to base its administration of Namibia on a concept of race relations which is not that of the present

day. The course which led to resolution 2145 (XXI), by which in 1966 the General Assembly declared the Mandate to be terminated, was marked out by judicial decisions taken by the Court, in the form of Advisory Opinions in 1950, 1955 and 1956, and in the form of Judgments in 1962 and 1966. These successive decisions cast an occasionally flickering light not only on the facts justifying the conclusion that there existed a power of revocation of the Mandate vested in the United Nations, but also upon the forms in which that power should or should not be exercised.

It is in the nature of things that the revocation of the Mandate on account of material breach by the mandatory Power of the obligations incumbent upon it requires that the existence of such breach be found in a decision having binding force. As I have just observed, the texts underlying the mandates system do not clearly indicate what organ has the duty to take such a decision. Those texts must therefore be supplemented by way of interpretation. The question was first raised whether it was not for the Court to take the decision. However the 1966 Judgment decided that the Court could not determine, by means of a judgment having force of *res judicata*, the question whether the mandatory Power had or had not violated the obligations of a general nature laid upon it by the Mandate. In these circumstances, the organ of the United Nations which must be regarded as competent to take a decision in the matter cannot be any other than the General Assembly, to which the functions of supervision of the administration of the Mandate formerly vested in the Council of the League of Nations were transferred. This is why I consider that it must be held that the General Assembly had the power to revoke the Mandate on account of material breach of its obligations by the mandatory Power. Although it may have appeared preferable that, before taking its decision, the General Assembly should ask the Court for an advisory opinion on the question whether South Africa had violated its obligations, no provision in the applicable texts obliged it to do so.

This situation recalls that which would exist in the event of the application of the provisions of Article 6 of the United Nations Charter, concerning the expulsion of a member State which has persistently violated the principles contained in the Charter. A decision in this respect is to be taken by the General Assembly upon the recommendation of the Security Council. There is nothing to compel either the Security Council or the General Assembly to ask for an opinion of the Court before taking a decision on the question whether the member State concerned has violated the principles of the Charter. In other words, a political organ is entitled to take a decision upon grounds which are admittedly of a legal nature, but the validity of which cannot be examined by the Court once the political organ has taken its decision within its proper sphere of competence.

I therefore consider that in the present case the Court should have confined itself to the finding that resolution 2145 (XXI) is valid without

examining the correctness of the assessment of the facts upon which that resolution is based. To embark upon such an enquiry, as the Court has done in the present Opinion, amounts to implying that the Court could possibly have reached conclusions different from those of the General Assembly and could therefore have declared the resolution invalid. But, in the light of the foregoing, I consider that to be out of the question.

The effect of resolution 2145 (XXI) was thus to withdraw from South Africa the right to administer Namibia as mandatory Power. The international status of that Territory however remained intact, and the resolution according to which the Mandate was declared terminated cannot be interpreted in any other sense. It follows that that resolution has created for South Africa the obligation to make way for such new administration as the United Nations might organize with a view to achieving the ultimate objective of the Mandate, namely self-determination for the population of the Territory. In view of the complexity of this exercise, it would be eminently desirable that the South African authorities and the United Nations organs should co-operate in carrying it out, but it is not for the Court to prescribe the modalities of such co-operation. It goes without saying that, so long as South Africa remains in Namibia, it will be bound to continue to fulfil the obligations which the Mandate has laid upon it. The specification of what those obligations are is not the object of the request for an opinion which has been addressed to the Court.

Since South Africa has refused to comply with resolution 2145 (XXI), and since the General Assembly has no means of execution to ensure observance of its resolution, the Assembly had to have recourse to the Security Council, just as the Council may be seised, according to Article 94, paragraph 2, of the United Nations Charter, of a situation in which any party to a case which has been decided by a judgment of the Court fails to perform the obligation incumbent upon it under the judgment. It was by a whole series of resolutions, which are listed in the present Advisory Opinion, that the Security Council espoused resolution 2145 (XXI) and called upon South Africa to withdraw from Namibia. The resolution to which the present request for advisory opinion refers is resolution 276 (1970), by which the Security Council declared, *inter alia*, that the continued presence of the South African authorities in Namibia was illegal. It is on the legal consequences *for States* of the continued presence of South Africa in Namibia notwithstanding that resolution that the Court has been requested to give its opinion.

As a first consequence, sub-paragraph 1 of the operative clause of the Advisory Opinion mentions the obligation of South Africa to withdraw its administration from Namibia immediately. However, it is clear from what has been said above that it is resolution 2145 (XXI) which created the obligation for South Africa to withdraw from Namibia. That obligation therefore cannot be described as a consequence of the continued presence of South Africa in Namibia notwithstanding resolution 276 (1970). At the stage corresponding to resolution 276 (1970), the relevant legal con-

sequences for South Africa are solely those to which it is exposed because of its refusal to comply with resolution 2145 (XXI). Although I can support what is said in sub-paragraph 1 of the operative clause of the Opinion, I consider that as a matter of logic it should not be there at all.

*

On the other hand, the operative clause of the Advisory Opinion should deal with the legal effects which the continued presence of South Africa in Namibia has upon its relations with other States and, in particular, with the other Members of the United Nations. Having regard to what has been said above, these States must consider the termination of the Mandate as an established fact and they are under an obligation not to recognize any right of South Africa to continue to administer the Mandate. The question is therefore what conduct this obligation of non-recognition imposes as such on States. The reply must be sought in customary law as reflected in the settled practice of States, but that is easier in respect of the non-recognition of a State or of the government of a State than it is in respect of the non-recognition of the administration of a territory by the recognized government of a recognized State, especially if the economy of the said territory is more or less integrated in that of the said State. The very term *non-recognition* implies not positive action but abstention from acts signifying recognition. Non-recognition therefore excludes, above all else, diplomatic relations and those formal declarations and acts of courtesy through which recognition is normally expressed. Nevertheless, although the notion of non-recognition excludes official and ostentatious top-level contacts, customary usage does not seem to be the same at the administrative level, since necessities of a practical or humanitarian nature may justify certain contacts or certain forms of co-operation.

A similar approach seems to prevail in regard to international agreements. While non-recognition seems not to permit the formal conclusion of treaties between governments, agreements between administrations, for instance on postal or railway matters, are considered to be possible. In the same way, the legal effect to be attributed to the decisions of the judicial and administrative authorities of a non-recognized State or government depends on human considerations and practical needs. It would not be difficult to cite at least one current example showing the diversity and lack of rigidity with which the notion of non-recognition is applied by States which do not recognize some other State. The reasons may, of course, differ from those for which the administration of Namibia by South Africa must not be recognized, but what is important for the present Advisory Opinion is the fact that, in the international law of today, non-recognition has obligatory negative effects in only a very limited sector of governmental acts of a somewhat symbolic nature.

Outside this limited sphere, there cannot exist any obligations incumbent on States to react against the continued presence of South Africa in Namibia

unless such obligations rest on some legal basis other than the simple duty not to recognize South Africa's right to continue to administer the Territory. Such a basis can be sought only in those resolutions of the Security Council which were referred to in the course of the proceedings. Personally, I approve the reasons for which the majority of the Court rejected the objections advanced by South Africa against the formal validity of some of those resolutions. As for their content, resolution 276 (1970) which is explicitly referred to in the request for an opinion addressed to the Court, declares in the first place, in paragraph 2, that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid. Then, in paragraph 5, the Security Council calls upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2. The wording of paragraph 2 gives the impression that the non-validity of all acts taken by South Africa concerning Namibia is considered to be an automatic effect of the illegality of its continued presence in that Territory. The sense of paragraph 5 therefore seems to be that States must not recognize such acts as valid. However, having regard to the foregoing, the duty incumbent on States not to recognize South Africa's right to continue to administer Namibia does not entail the obligation to deny all legal character to the acts or decisions taken by the South African authorities concerning Namibia or its inhabitants. In this regard, the notion of non-recognition leaves to States, as I have said, a wide measure of discretion.

Thus resolution 276 (1970) seems to go beyond the area of the obligatory effects of mere non-recognition. This is even more evident in the case of resolution 283 (1970), which was adopted by the Security Council at the same time as the request for an opinion addressed to the Court. Since non-recognition does not involve as a necessary effect anything more than the abstention from governmental acts of a certain type, it is obvious that a request to States to limit or stop the commercial or industrial relations of their nationals with a certain country or territory belongs to a different sphere and that the measures in question are active measures of pressure against a State or a government. Now, in paragraph 7 of the operative part of resolution 283 (1970), the Security Council calls upon all States to discourage their nationals from investing or obtaining concessions in Namibia. And still further from the area of the notion of non-recognition is paragraph 11 in which the Security Council launches an appeal to all States to dissuade them from encouraging tourism in Namibia. On this latter point the wording of the resolution gives the impression that what is involved here is rather a mere recommendation but, for a whole series of other measures mentioned in the same operative section and going

beyond the obligatory effects of non-recognition, the question arises whether the resolution merely pronounces recommendations or is binding on States. The same question arises obviously as has already been stated in respect of resolution 276 (1970) so far as concerns the non-recognition of the validity of acts and decisions taken by the South African authorities in Namibia.

The question is now therefore no longer one of the obligations inherent in the duty of States not to recognize South Africa's right to continue to administer Namibia but one of the creation of obligations for States requiring them to apply other measures of pressure against South Africa because of its refusal to withdraw from Namibia. In this connection, the Court is found to be divided on the meaning to be attributed to Articles 24 and 25 of the Charter of the United Nations in relation to the provisions of Chapter VII. Personally, I share the opinion of those who think that Articles 24 and 25 cannot have the effect of evading the conditions which Chapter VII lays down for the Security Council to be able to order, with binding effect for States, the kind of measures involved here, more particularly the partial interruption of economic relations. According to Article 41 in Chapter VII the Security Council may impose upon States the obligation to apply such measures only within the framework of action in the event of threats to the peace, breaches of the peace and acts of aggression. There can be no doubt that, in this particular case, the Security Council did not adopt the resolutions in question in the context of any such action, clearly defined as it must be because of its nature. If only for this reason, I consider that it is quite out of the question that in this case the Court is confronted with Security Council decisions invested with binding force for States. They cannot be anything other than recommendations which, as such, obviously have great moral force but which cannot be regarded as embodying legal obligations.

The foregoing observations make clear the reasons why I am not able to concur in the whole of sub-paragraphs 2 and 3 of the operative part of the Advisory Opinion.

In sub-paragraph 2, emphasis is placed on the obligation incumbent upon States Members of the United Nations to recognize the illegality of South Africa's presence in Namibia, but there is the additional statement that member States are under obligation to recognize the invalidity of acts taken by South Africa on behalf of or concerning Namibia and to refrain from any acts and in particular any dealings with the Government of South Africa lending support or assistance in regard to the presence and administration of South Africa in Namibia. This goes beyond the obligations which flow from the duty not to recognize South Africa's right to continue to administer Namibia. Even if it is not possible to indicate precisely the acts from which the concept of non-recognition requires States to refrain, it cannot be denied that, since the South African administration of Namibia is a *de facto* administration, many acts taken by it

can be recognized as valid by the authorities of other States even beyond what is admitted in paragraph 125 of the Opinion. As for the prohibition of acts which would constitute lending support or assistance to the presence and administration of South Africa in Namibia, this vague and general formula gives no very clear idea of the specific acts it is intended to cover. It is capable of being construed as imposing obligations that are more extensive than those which flow from the non-recognition of South Africa's right to continue to administer Namibia. This is an additional reason why I could not vote in favour of this sub-paragraph of the operative clause.

As for sub-paragraph 3 of the operative clause, I cannot subscribe to it except in so far as it signifies that States which are not Members of the United Nations are also duty bound not to recognize the administration of Namibia by South Africa. But, when this paragraph proclaims that those States are under an obligation to give assistance in the action which has been taken by the United Nations with regard to Namibia, the impression is created that what is intended is an active contribution to measures of pressure and I do not think those States are under any obligation in that respect.

I consider therefore that, in so far as they relate to measures of pressure against South Africa going beyond what is required by the non-recognition of its right to continue to administer Namibia, the resolutions of the Security Council constitute only recommendations which do not create any obligations for States. Nevertheless I consider that these resolutions may afford States, whether Members of the United Nations or not, legitimate grounds for taking up a position in their legal relationships with South Africa which otherwise would have been in conflict with rights possessed by that country. At the legal level, the resolutions in question have created, not obligations, but rights to take action against South Africa because of its continued presence in Namibia. In this respect, the recommendations of the Security Council might guide the action of States, subject to the restriction that it would be wrong to run counter to the moral or material well-being of the population of Namibia, which is still a valid objective of the Mandate. This consideration would necessitate the making of a choice amongst the acts of administration taken by South Africa with regard to Namibia, and that choice cannot be undertaken by the Court for lack of sufficient information on such a complex matter.

(Signed) S. PETRÉN.

SEPARATE OPINION OF JUDGE ONYEAMA

I agree with the conclusion of the Court that the presence of South Africa in Namibia is illegal, but feel constrained to express my inability to concur in the Court's approach on certain aspects of the problem with which the Court has had to deal in its consideration of the legal question on which its advisory opinion is requested by the Security Council. These aspects are, the matter of the exclusion of a Member of the Court from participating in these proceedings, the choice of a judge *ad hoc*, the Court's competence to consider the formal and intrinsic validity of resolutions and decisions of the General Assembly and the Security Council, and the effect of Security Council resolution 276 (1970).

* * *

On the objection raised by South Africa to the participation of certain Members of the Court in the present proceedings, I do not agree that it is a sufficient answer to the objection raised and which was rejected in Order No. 3 of 26 January 1971, that the Member of the Court whose participation as a judge in the case was challenged, was a representative of his Government in his activities in the United Nations on which the challenge was grounded.

In my view, the words "or in any other capacity" in Article 17 (2) of the Statute are wide enough to include within their sweep activities in the United Nations by members of national delegations who subsequently become Members of the Court.

Each case must be considered on its own circumstances and no general rule can be laid down. In the present case, the Member concerned had, as a member of a national delegation to the United Nations, taken an active part in drafting a resolution which touched upon resolution 2145 (XXI) of the General Assembly, a resolution which, to my mind, is critical in the present proceedings.

The importance of the resolution with which the Member was concerned, that is, Security Council resolution 246 (1968), and its relevance to the present proceedings, appear from the fact that it formed part of the documents transmitted to the Court as likely to throw light on the question put to the Court, and the Court itself thought it necessary to refer to it as part of the Security Council's response to the call of the General Assembly for its co-operation in ensuring the withdrawal of South Africa from the Territory.

I thought the circumstances were such that the Member concerned should not have participated in the decision of the present case, and therefore dissented from Order No. 3.

* * *

It will be recalled that at the outset of these proceedings, the Republic of South Africa applied to be allowed to choose a judge *ad hoc* under Article 83 of the Rules of Court. This Article provides that:

> "If the advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article."

I agree with the majority of the Court, and for the reasons given by it, that the present Opinion is not requested upon a legal question *actually* pending between South Africa and any other State or States, but in view of the wide discretion vested in the Court by Article 68 of the Statute of the Court, the inapplicability of Article 83 of the Rules would not, in my view, conclude the matter. I am of the opinion that Article 83 of the Rules sets out one situation in which Article 31 of the Statute *shall* apply, but it does not exhaust the cases in which a judge *ad hoc* may be chosen in advisory proceedings, nor does it limit the Court's discretion under Article 68 of the Statute to be guided by the provisions of Article 31 of the Statute "to the extent to which [the Court] recognizes them to be applicable".

The objection to the exercise of the Court's discretion in favour of the choice of a judge *ad hoc* on the grounds that Article 31 of the Statute refers to "parties", and there are, strictly, no "parties" in advisory proceedings, does not seem to me to be a valid one, in view of the provisions of Article 83 of the Rules of Court which expressly applies Article 31 of the Statute to advisory opinions, and thus recognizes that though there are no parties in advisory proceedings, judges *ad hoc* may be chosen in those proceedings in the circumstances therein defined. The Court's discretion would be without substance if it could not be exercised in favour of permitting the choice of a judge *ad hoc* in circumstances falling outside Article 83 of the Rules, but in which the Court felt that the justice of the case required it to be so exercised.

This is the first occasion, since the creation of this Court, that a claim to a right to appoint a judge *ad hoc* in advisory proceedings has been made. The present request for an advisory opinion starts off by implying that South Africa's continued presence in Namibia notwithstanding Security Council resolution 276 (1970) gives rise to certain legal con-

sequences for States, since that presence is assumed to be contrary to international law. The records of the debate in the *Ad Hoc* Committee of the Security Council as well as in the Security Council itself leading up to the request, and some of the submissions addressed to the Court in the written statements and during the oral proceedings, leave no doubt that South Africa was being accused of violating some, at least, of its international obligations; and at the root of the request was the desire to enforce the consequences of the termination of South Africa's mandate over South West Africa, and remove its administration from the Territory.

These facts clearly show that special interests of vital concern to South Africa were directly affected by the request for an advisory opinion and this is, in my view, a circumstance which the Court should have taken into account in deciding whether, in the exercise of its discretion under Article 68 of the Statute, South Africa should have been permitted to choose a judge *ad hoc*.

I am of the opinion that the circumstance of South Africa's special interest in the present request should have prevailed with the Court, and, so that justice may not only be done but manifestly be seen to be done, the discretion of the Court should have been exercised in favour of the application by South Africa to choose a judge *ad hoc*.

I have not overlooked the fact that in the Advisory Opinion on an abstract legal question on the *International Status of South West Africa* in 1950, South Africa did not press her tentative enquiries about her right to choose a judge *ad hoc* to the point of a formal claim, nor that in that Advisory Opinion South Africa did not choose a judge *ad hoc*. The circumstances of those proceedings and the present, and the legal questions on which the advice of the Court was requested in the two proceedings, are entirely different, and it does not appear to me that any conclusions adverse to the application in the present case can rightly be drawn from the failure of South Africa to press its claim to a judge *ad hoc* in 1950, or the fact that no judge *ad hoc* was, in fact, chosen. Nothing that happened in this respect in 1950 can be a bar to an application to choose a judge *ad hoc* in later advisory proceedings, and such an application must be considered in the light of the nature of the legal questions put to the Court and the circumstances existing when the application is made.

The practice of the Permanent Court of International Justice in the matter of a choice of a judge *ad hoc* in advisory opinions as appears in the *Danzig Legislative Decree* Order of 31 October 1935 [1] does not seem to me to furnish a guide in the present case in view of the wholly different nature of the question posed in that case, and the differences between the governing Statutes and Rules of the two Courts. The Permanent Court

[1] *P.C.I.J., Series A/B, No. 65*, Annex 1, pp. 69-71.

had, in 1935, nothing in its Statute in force equivalent to Article 68 of the Statute of the Court which, to my mind, is the controlling provision having a bearing on the point of the Court's discretion in the matter under consideration.

In view of the binding decision of the Court, by a majority vote, to refuse the application for a judge *ad hoc* in the present proceedings, it becomes inutile to consider the question of the composition of the Court in this connection.

* * *

Underlying the resolutions of the Security Council pertaining to Namibia and concerning the legal question upon which the Court's advisory opinion is requested, is General Assembly resolution 2145 (XXI) of 27 October 1966, by which the General Assembly decided that "the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is . . . terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations".

In the debate in the Security Council following on the report of the *Ad Hoc* Sub-Committee which had been set up by Security Council resolution 276 (1970), the representative of Nepal, in speaking on the draft resolution that the Security Council request this Court to give an advisory opinion on the question which finally came before it, said:

> "In voting in favour of the draft resolution, it will be our understanding that the International Court limit the scope of its advisory opinion strictly to the question put to it, and not review or examine the legality or validity of the resolutions adopted by both the General Assembly and the Security Council."

The representative of Syria said:

> "The International Court of Justice, as we see from the draft resolution, is not asked to rule on the status of Namibia as such; rather it is requested to elicit the scope of legal means at the disposal of States, which may erect a wall of legal opposition to the occupation of Namibia by the Government of South Africa."

In stating the attitude of the delegation of Zambia to the draft resolution, the representative of Zambia said, *inter alia*:

> "We have had to take into account the following considerations:
>
> . . . . . .

(c) That the legal drafting of the question to be put to the Court is specific enough to elicit a clear opinion from the Court which would be politically acceptable;

(d) That there is some concern on our part that the Court may raise in its opinion doubts about General Assembly resolution 2145 (XXI) and about General Assembly resolution 2248 (S-V)."

A move to delete the words "notwithstanding Security Council resolution 276 (1970)" in the draft resolution failed, and the resolution to request an advisory opinion from the Court was eventually passed.

In explaining the vote of the French delegation on the different resolutions, the French representative said, *inter alia*:

> ". . . we were much interested in the initiative taken by the representative of Finland to request an advisory opinion on the question from the International Court of Justice. Of course, the—in our view—imperfect language of the request to the International Court may be a matter of regret. Without prejudging the opinion of the Court, it might be appropriate to leave it to the Judges at The Hague to question the legal foundations of the revocation of the Mandate."

The representative of the United Kingdom explained the attitude of his delegation thus:

> "In the *ad hoc* Sub-Committee the United Kingdom representative made it clear that my Government was quite willing to consider a request for an advisory opinion from the International Court of Justice. He did, however, add that our support for this depended upon the submission to the International Court of the issue of the status of South West Africa as a whole. The question before us does not appear to do this."

In some of the written statements submitted to the Court in the present proceedings and during the oral hearing, views were expressed which tended to deny that the Court could properly examine and pronounce upon the validity of resolutions of the General Assembly and the Security Council which bear upon the question put to the Court and whose examination would be relevant to the proper elucidation of the problem.

The Secretary-General in his written statement said:

> "12. It has been shown that in formulating the question now before the Court, the Security Council used the phrase 'the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)' in order to denote the presence of South Africa after the Mandate had terminated and South Africa had ceased to have any right to be present as mandatory Power."

It would be tedious to reproduce here all the written and oral submissions made to the Court and tending in the direction of confining the Court to an uncritical acceptance of the correctness in law of resolutions and decisions of the General Assembly and the Security Council directly relevant to the question upon which the Court's opinion is requested, and it suffices to say that a number of representatives urged this view upon the Court. The Court had therefore to decide whether it was competent or not to examine resolutions and decisions of the General Assembly and the Security Council relevant to the question before it, with a view to determining their accordance with the Charter of the United Nations, and, therefore, their validity.

In dealing with this matter the Court said:

> "89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from these resolutions."

I do not think that this approach to the question of the Court's competence to examine and pass upon decisions and resolutions of the General Assembly and the Security Council which touch upon issues before it leads to a sufficiently definitive answer.

The Court was established as the principal judicial organ of the United Nations, and, as such, adjudicates upon disputes between States when such disputes are properly brought within its jurisdiction. It is authorized by the Charter and the Statute of the Court to render advisory opinions on legal questions to the General Assembly, the Security Council and other organs of the United Nations and specialized agencies.

In exercising its functions the Court is wholly independent of the other organs of the United Nations and is in no way obliged or concerned to render a judgment or opinion which would be "politically acceptable". Its function is, in the words of Article 38 of the Statute, "to decide in accordance with international law".

The Court's powers are clearly defined by the Statute, and do not include powers to review decisions of other organs of the United Nations; but when, as in the present proceedings, such decisions bear upon a case properly before the Court, and a correct judgment or opinion could not be rendered without determining the validity of such decisions, the Court

could not possibly avoid such a determination without abdicating its role of a judicial organ.

The question put to the Court does not, in terms, ask the Court to give an opinion on whether General Assembly resolution 2145 (XXI) is valid, but the "legal consequences" which the Court is requested to define, are postulated upon its validity. Were the Court to accept this postulate without examination, it would run the risk of rendering an opinion based on a false premise. The question itself has not expressly excluded examination of the validity of this and other related resolutions; and, as this Court had in the past modified and interpreted questions put to it, it cannot be assumed that the Security Council intended to fetter the Court in its considerations of the question on which it had itself requested an advisory opinion; it would require the clearest inhibiting words to establish that such a limitation of the scope of the Court's consideration was intended.

I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts. I am therefore of the view that, whether an objection had been raised or not, the Court had a duty to examine General Assembly resolution 2145 (XXI) with a view to ascertaining its legal value; it had an equal duty to examine all relevant resolutions of the Security Council for the same purpose.

I can find nothing in the wording of the present request which excludes consideration of the validity of all pertinent resolutions. The words "notwithstanding Security Council resolution 276 (1970)" appear to me to indicate that the Security Council has assumed that resolution 276 (1970) validly created a situation in which South Africa's continued presence in Namibia gives rise to legal consequences for States; but, in my view, those words do not oblige the Court to make the same assumptions or to accept their correctness without examination.

The matter is, in my view, concluded by the principle stated by the Court in the *Certain Expenses of the United Nations* case (*I.C.J. Reports 1962*, p. 151 at p. 157) as follows:

> "... the Court must have full liberty to consider *all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion*" (italics added).

Where the question put to the Court is in such terms that the Court could not properly perform its judicial function of a thorough consideration of all relevant data, or where for any other reason the Court is not permitted the full liberty it is entitled to in considering a question posed to it, the Court's discretion to render or withhold an opinion would protect the Court from the danger of rendering an opinion based on,

conceivably, false assumptions or incomplete data.

I conclude that in the present request, the Court had a duty to examine all General Assembly and Security Council resolutions which are relevant to the question posed to it, whether objections had been taken to them or not, in order to determine their validity and effect, and so that the Court can arrive at a satisfactory opinion.

* * *

This Court, in the Advisory Opinions rendered in 1950, 1955 and 1956 on South West Africa and in the Judgment on 21 December 1962 in the first phase of the cases between Ethiopia and Liberia and South Africa, established that the Mandate over South West Africa survived the dissolution of the League of Nations, and that supervisory functions over the administration of the Mandate devolved upon the United Nations. It also established the continuance of the obligation which rested on South Africa to submit reports on its administration of the mandated territory to the General Assembly.

The question whether the League of Nations could unilaterally terminate or revoke the mandate against the will of the mandatory Power did not arise as a practical problem during the subsistence of the League, but members of the Permanent Mandates Commission and a number of international jurists who examined the matter as a theoretical question, did not doubt that if a mandatory was guilty of gross and repeated violations of the mandate, the League could revoke the mandate.

It was said that revocation went to the essence of control, and the view was expressed that the power of the League to appoint a new mandatory in case one of the existing mandatories should cease to function, and to dismiss a mandatory, may be implied from the Covenant assertion that the mandatories act "on behalf of the League". (See Quincy Wright, *Mandates Under the League of Nations*, 1930, pp. 440-441.)

The Institute of International Law at its Cambridge session in 1931 debated the question of mandates and passed a resolution containing the following clauses among others:

> "The functions of the mandatory State end by renunciation or revocation of the mandate: by the customary modes of ending international engagements; also by the abrogation of the mandate, and by the recognition of the independence of the community which has been under mandate.
>
> The renunciation takes effect only from the date fixed by the Council of the League of Nations in order to avoid any interruption of the assistance to be given to the community under mandate.

> The revocation of the mandatory State and the abrogation of the mandate are determined by the Council of the League of Nations . . ."

In the face of the strong current of opinion among international jurists, and from the common sense of the matter, it seems to me that there can be no doubt that the League of Nations, acting through the Council, had, as a necessary part of its supervisory powers, the power unilaterally to revoke or terminate a mandate which was being administered on its behalf, when the State entrusted with the mandate was guilty of a serious breach of its obligations under the mandate.

A contrary view would involve the suggestion that a mandate, particularly a class "C" Mandate such as the one with which the present question is concerned, could never be revoked, and that, contrary to their professed concern for the principles of non-annexation, the welfare of the peoples of the mandated territory and the sacred trust of civilization, the Principal Allied and Associated Powers and other Members of the League of Nations, behind a façade of fair promises, had in reality permitted the perpetual annexation of the mandated territories and the subjection of their peoples to the arbitrary rule of the mandatory Power without hope of deliverance or future self-determination. The "sacred trust of civilisation" would, on this view, have no meaning at all. The actual historical development of the mandate régime in the days of the League and subsequent to 1946 does not support this view, and it ought therefore to be rejected.

This Court in its Advisory Opinion on the *International Status of South West Africa*, and for the reasons stated in that Opinion, arrived at the conclusion:

> ". . . that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it". (*I.C.J. Reports 1950*, p. 128 at p. 137.)

The devolution of the supervisory powers of the League Council on the General Assembly of the United Nations vested the General Assembly with the rights, duties and obligations appurtenant to those powers, including the power unilaterally to terminate or revoke the Mandate on the grounds of gross violations by the mandatory Power.

This is a power which the General Assembly possesses by reason of its control of the Mandate and is, in my view, a power *sui generis*, not limited by Article 10 of the Charter.

It follows that when the Assembly passed the resolution 2145 (XXI) the competent organ of the United Nations terminated the Mandate in a binding way, and that South Africa, thereafter, had no right to administer

the Territory of South West Africa. The decision of the General Assembly was brought to the attention of the Security Council but, in my view, it was then already an effective and binding decision.

It seems to me that the legal consequences for States flowed from South Africa's failure to carry out resolution 2145 (XXI) and vacate the Territory, and its continued presence in the Territory against the will of the United Nations, and not from resolution 276 (1970) which was not the means of putting an end to South Africa's administration of the Mandate. The provisions of resolution 276 (1970) capable of giving rise to legal obligations are operative paragraphs 2 and 5 and are as follows:

> "*The Security Council*
>
> . . . . . .
>
> 2. *Declares* that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid;
>
> . . . . . .
>
> 5. *Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution."

The declaration of the illegality of the continued presence of South Africa in Namibia did not itself make such presence illegal; it was, in my opinion, a statement of the Security Council's assessment of the legal quality of the situation created by South Africa's failure to comply with the General Assembly resolution—a statement not binding any Member of the United Nations which held a different view. It was, in effect, a judicial determination, and it is doubtful if any power exists in the Charter for the Security Council to make such a determination except in certain well-defined cases not relevant here. As paragraph 2 does not, in my view, create any binding legal obligations, it follows that paragraph 5 is similarly ineffective for founding legal obligations or creating legal consequences.

The matter, however, does not end there for resolution 276 (1970) "reaffirmed" General Assembly resolution 2145 (XXI) of 27 October 1966, "by which the United Nations decided that the Mandate of South-West Africa was terminated and assumed direct responsibility for the territory until its independence", and reaffirmed:

> "... Security Council resolution 264 (1969) which recognized the termination of the Mandate and called upon the Government of South Africa immediately to withdraw its administration from the Territory". (See second and third preambular paragraphs of resolution 276 (1970).)

In this way the resolution incorporated General Assembly resolution 2145 (XXI).

The question before the Court can therefore be understood to request an advisory opinion on the legal consequences to States of South Africa's continued presence in Namibia after the Mandate over South West Africa had been duly terminated by the United Nations. In my view the words "notwithstanding Security Council resolution 276 (1970)" do not affect the scope of the question.

The legal consequences for States in the case under consideration are those which flow automatically, under international law, from the unlawful continuation of South Africa's presence in Namibia, and do not, in my view, extend to enforcement measures which may or may not be adopted by States individually, or the United Nations collectively, to remove South Africa from the Territory or to assert the authority of the United Nations over the Territory, in the absence of treaty provisions or a customary rule of international law requiring such measures to be adopted. These consequences are:

(1) South Africa is under a legal obligation to end its unlawful occupation by withdrawing from Namibia its presence and its administration, but while it remains in the Territory it must act in conformity with its obligations under the Mandate and the Charter.

(2) There is imposed on all other States an obligation of non-recognition; that is to say, all States are obliged not to recognize that South Africa has any legal right to remain in Namibia or to maintain its administration in that Territory. They are obliged to do nothing to aid the continuance of the unlawful presence of South Africa or its administration in the Territory of Namibia.

(3) If the Security Council decides to take action in the matter of Namibia in discharge of its duties under its responsibility for the maintenance of international peace and security, all Members of the United Nations are obliged to accept and carry out any decisions which may be made in accordance with the Charter; but although the decision of the Security Council to take such action may be a consequence of the continued presence of South Africa in Namibia, the obligation to accept and carry out the decision is an obligation States incur as a consequence of membership of the United Nations, and not, directly, as a legal consequence for them of South Africa's continued presence in Namibia. It is for this reason that I consider that the Court cannot particularize legal conse-

quences for States and that it must be left to the Security Council to decide on what enforcement action it should take under the Charter.

* * *

I regret that I differ from the Court as to the scope of the doctrine of non-recognition which, as I understand it, it was intended to reflect in sub-paragraphs 2 and 3 of paragraph 133 of the Advisory Opinion. To my regret I have been unable to vote affirmatively on sub-paragraphs 2 and 3. In my view, the effect of the doctrine in the context of the case in hand is correctly set out in paragraph 119 of the Advisory Opinion, but sub-paragraphs 2 and 3 of paragraph 133 of the Advisory Opinion appear to me to attribute to the doctrine too wide a scope; and while I agree that there is on States an obligation of non-recognition of the legality of the presence of South Africa and of its administration in Namibia, I do not agree that this obligation necessarily extends to refusing to recognize the validity of South Africa's acts on behalf of or concerning Namibia in view of the fact that the administration of South Africa over Namibia (illegal though it is) still constitutes the *de facto* government of the Territory.

States which are not members of the United Nations incur no obligations to assist the Organization except as provided by Article 2, paragraph 6, of the Charter, and this Article places upon the Organization the onus of ensuring that such States act in accordance with the principles set out in Chapter I of the Charter.

(Signed) Charles D. ONYEAMA.

SEPARATE OPINION OF JUDGE DILLARD

In this opinion I shall make certain general observations in support of operative clause 1 of the Opinion based on my reading of the facts and my understanding of the jurisprudence of the Court. I shall also make some observations concerning the thrust of operative clause 2 as will appear near the end of this opinion. At the beginning I shall allude briefly to a number of preliminary matters and my reason for disagreeing with the majority of the Court on the issue of the appointment of a judge *ad hoc*.

At the outset it may be well to stress that, in my view, the Opinion of the Court (hereafter referred to as the Opinion) does *not* purport to do the following:

(1) By invoking Articles 24 and 25 of the Charter it does not purport to carry the implication that, in its view, the United Nations is endowed with broad powers of a legislative or quasi-legislative character. The Opinion is addressed to a very specific and unique situation concerning a territory with an *international status*, the administration of which engaged the supervisory authority of the United Nations.

(2) It does not purport to validate the "revocation" of the Mandate on an analysis of the motives inspiring or the purposes and effects attending the application of policies of *apartheid* in the Territory. Despite the voluminous record accumulated over a period of 21 years this issue has never been judicially determined and was not the object of adjudication in these proceedings as it might have been had the proceedings been assimilated to a contentious case in accordance with South Africa's proposal. It would not have been compatible with its judicial function to have determined the issue of breach on these grounds in the absence of a full exposure of all relevant facts. The references in the Opinion (paras. 129-131) to the "laws and decrees applied by South Africa in Namibia, which are a matter of public record" was in response to South Africa's request to supply further factual evidence. The revocation was rested on other grounds as the Opinion discloses (para. 104).

(3) By confining its scope to intergovernmental relations, operative clause 2 does not concern itself with private dealings or the activities directly performed by specialized agencies.

* * *

Read literally, Security Council resolution 284 does not appear to ask the Court to call into question the validity of resolution 276 or General Assembly resolution 2145 but only to indicate the "legal consequences" flowing from them. The Court has not felt justified in attaching this limited scope to its enquiry. My own assessment of the reasons follows:

A court can hardly be expected to pronounce upon legal consequences unless the resolutions from which the legal consequences flow were themselves free of legal conclusions affecting the consequences. To say this, in no sense implies that the Court is questioning the application of the San Francisco formula with respect to the interpretation of the Charter. Furthermore, the greatest deference must be given to resolutions adopted by the organs of the United Nations. There is, of course, nothing in the Charter which compels these organs to ask for an advisory opinion or which gives this Court (as in many domestic arenas) a power of review to be triggered by those who may feel their interests unlawfully invaded.

But when these organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function precludes it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolutions requesting an opinion were legally neutral as in the three previous requests for advisory opinions bearing on the Mandate.

The conclusion reached above can be fortified by a number of other considerations which, in the interests of brevity, I will merely mention without discussion. First, it is compatible with the Court's own jurisprudence as revealed, especially in the *Certain Expenses* case (*I.C.J. Reports 1962*, pp. 156, 157, 216, 217); second, the debates preceding the adoption of Security Council resolution 284 disclose that the view that the Court should not call into question the validity of the relevant resolutions was held by only five States, while ten either expressed a contrary view or voiced constitutional doubts or refrained from expressing any view on the matter; third, the representative of the Secretary-General in the course of argument retreated from a dogmatic stance in the matter (C.R. 71/18, p. 21); fourth, as a sheer practical matter, had the Court refrained from such an enquiry and had a strongly reasoned dissent cast grave doubt on the validity of the resolutions, then the probative value of the Advisory Opinion would have been weakened and, finally, it may not be presumptuous to suggest that as a political matter it is not in the long-range interest of the United Nations to appear

to be reluctant to have its resolutions stand the test of legal validity when it calls upon a court to determine issues to which this validity is related [1].

* * *

By its Order of 29 January 1971 the Court denied the application of the South African Government for the appointment of a judge *ad hoc*. Since Judge Onyeama and I disagree with the decision of the Court I feel it is incumbent upon me to state my reasons for doing so. In our joint dissent we declared:

> "While we do not think that under Article 83 of the Rules of Court the Republic of South Africa has established the right to designate a judge *ad hoc*, we are satisfied that the discretionary power vested in the Court under Article 68 of its Statute permits it to approve such designation and that it would have been appropriate to have exercised this discretionary power in view of the special interest of the Republic of South Africa in the question before the Court."

If the Court decides that there is a "legal question actually pending between two or more States" within the meaning of Article 83 of its Rules, read in conjunction with Article 82, then it has no choice but to apply Article 31 of the Statute of the Court which gives the applicant State a *right* to appoint a judge *ad hoc*. It assimilates the advisory proceedings into one comparable to a contentious case. The determination that there is a legal question actually pending between two or more States has a distinct bearing on whether there is a "dispute" within the meaning of Article 32 of the Charter of the United Nations. Coming at the very threshold of our enquiry I was unwilling to prejudge this issue. At the same time it seemed clear that the interests of South Africa were vitally affected.

Article 68 of the Statute empowers the Court in the exercise of its advisory functions to be guided by the provisions of the Statute which apply in contentious cases "to the extent to which it recognizes them to be applicable".

The latitude provided by this Article is not circumscribed by the way questions are put to the Court. On the contrary the Court has itself declared that it depends on the circumstances of each case and that the Court possesses a large amount of discretion in the matter (*I.C.J. Reports 1950*, p. 72 and *I.C.J. Reports 1951*, p. 19).

The Court thus has the power to appoint a judge *ad hoc* even if Article 83 of its Rules is not invoked. It seemed to me the exercise of the power

---

[1] These reasons are, of course, completely subordinate to the principal one touching the integrity of the judicial function.

while not essential to the legitimacy of the composition of the Court would have been appropriate [1].

Since the interests of South Africa were so critically involved the appointment of a judge *ad hoc* would have assured the Court that those interests would have been viewed through the perspective of one thoroughly familiar with them. Furthermore should the Opinion of the Court have been unfavourable to the interests of South Africa, the presence on the Court of a judge *ad hoc*, even in a dissenting capacity, would have added rather than detracted from the probative value of the Opinion.

Whatever may be thought in general about the institution of a judge *ad hoc*, as to which opinions vary, it seemed to me that one of its justifications, namely that it is important not only that justice be done but that it appears to have been done, would have justified the use of the Court's discretionary power without attracting the theoretical and practical difficulties invited by assimilating the proceeding to a larger extent into one comparable to a contentious case.

* * *

South Africa has challenged the formal validity of Security Council resolutions on a number of grounds mentioned in the Opinion. It is only necessary to support the Opinion with a few additional arguments.

At the outset, South Africa contended that the words "including the concurring votes of the permanent members" in Article 27 (3) preclude the taking of valid decisions if one or more of the permanent members voluntarily abstain from voting. Resolution 276 (1970) was adopted despite the abstentions of France and the United Kingdom (S/PV. 1529 (1970), para. 184); and resolution 284 (1970) was adopted despite the abstentions of Poland, the United Kingdom and USSR (S/PV. 1550 (1970), para. 160).

The contention is rested on an analysis of legislative history and on the theory that the language of Article 27 (3) is so clear and unambiguous that no interpretative process, whether by subsequent conduct or otherwise, is permissible.

The contention reveals the weakness of an indiscriminate application of the textual approach when coupled with the plain and ordinary meaning canon of interpretation. Had the critical clause read: "*all five* permanent members, *who must be present and voting* ...", the contention might have been justified. In the absence of such a precise prescription the subsequent conduct of the parties is clearly a legitimate method of

[1] A careful consideration of the Order of 31 October 1935 in the *Danzig Legislative Decrees* case, *P.C.I.J., Series A/B, No. 65*, Annex 1, pp. 69-71, has not convinced me that it was controlling in light of the wholly different question at issue in that case and the different character of the Statute and Rules which were then operative.

giving meaning to the Article in accordance with the expectations of the parties, including, in particular, the permanent members.

That their interpretation does not coincide with that of South Africa is abundantly revealed by the undeviating practice of the Security Council. The records and authorities marshalled by the representatives of the Secretary-General and the United States in the present proceedings (C.R. 71/1, pp. 36-41 and C.R. 71/19, pp. 8-11), are conclusive on this point [1].

* * *

More fundamental and difficult than the previous issue is that concerning the existence *vel non* of a "dispute" within the meaning of Article 27 and Article 32. It is contended that under the former the principle of compulsory abstention should have applied and under the latter that South Africa should have been invited to participate in the discussions relating to the alleged dispute. I confine myself to the latter.

No single, absolute meaning can be attached to the word or concept of a "dispute". It must be considered in context and with reference to the purpose intended to be served by Article 32. That purpose, as indicated by Security Council discussions, was to place the parties on the same footing or a more nearly equal footing whether they were members of the Council or even of the United Nations (see Goodrich, Hambro and Simons, *Charter of the United Nations*, 3rd ed., at p. 254). If the dispute is considered to be between South Africa and the 114 member States voting for General Assembly resolution 2145 (XXI) it is difficult to see how this particular purpose could be accommodated in a practicably feasible manner.

The contention of South Africa leans heavily on the 1962 Judgment which, for purposes of establishing jurisdiction, did hold that there was a "dispute" between South Africa and the applicant States. It must be recalled, however, that this holding was in the context of Article 7 of the Mandate which referred to "any dispute whatever" and to all the "provi-

[1] The brief statement above is not intended to convey the impression that a finding of "ambiguity" is a precondition for recourse to subsequent conduct as a legitimate mode of enquiry into meaning. It has been observed that the word "ambiguous" is itself not free from ambiguity. Much depends on the nature of the subject-matter to be interpreted, i.e., constitutional document, multilateral treaty, bilateral treaty, type of contract, etc. Much depends also on the character of the applicable norms, i.e., whether a vaguely worded standard or a precise rule and much depends on the expectations aroused in light of the entire context and the social interests involved. "A word," Justice Holmes has reminded us, "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner* (1918) 245 U.S. at p. 425.

sions" of the Mandate. The language employed was said to be "broad, clear and precise; it gives rise to no ambiguity and it permits of no exception" (*I.C.J. Reports 1962*, p. 343). Even so, the point was vigorously opposed in the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice (*ibid.*, pp. 547-548).

Article 32 does not contemplate a "dispute" which is predominantly between the United Nations as an organized body and one of its component Members but rather one in which the Security Council is acting as a neutral forum for airing a controversy between two or more of its members. The Article 32 image is rather that of a parent providing the means for settling a controversy between two or more members of the family than that of a parent embroiled in a controversy with one of them. This seems to have been the notion of the dissenters in 1962. Granted that quotations out of context are dangerous, their description appears relevant to the present proceedings:

> "It is common knowledge that the present case finds its whole *fons et origo* in, and springs directly from, the activities of the United Nations Assembly relative to the mandated Territory and the Mandatory. No one who studies the record of the proceedings in the Assembly, and of the various Assembly Committees and Sub-Committees which have been concerned with the matter, and especially the Assembly resolutions on South West Africa which directly led up to the institution of the present proceedings before the Court, can doubt for a moment that the *real dispute over South West Africa is between the Respondent State and the United Nations Assembly* ..." *(loc. cit.)* (Emphasis added.)

Of course it is not doubted that *in a sense* there is a dispute between South Africa and the other States. This is revealed in the attitude of numerous States with respect to South Africa's accession to the ITU Convention (C.R. (H.C.) 71/1, pp. 20-28). South Africa's interests are definitely affected and it is no doubt possible to so frame a definition of a dispute as to have the present controversy fall under it. But, as previously suggested, regard must be had to context and purpose. Thus Judge Sir Gerald Fitzmaurice's carefully framed definition in the *Northern Cameroons* case in a context of "mootness" is quite different from that associated with Article 32. (See *I.C.J. Reports 1963*, p. 110.)

It is for the Council to make the preliminary determination that there is a "dispute" rather than a "situation". The argument that the terms of Article 32 are mandatory seems insufficient to cover the problems involved in this preliminary determination. At no time did the Security Council or any member State proceed on the assumption that the Namibian question was anything but a "situation". Furthermore, South Africa with full knowledge of the nature of the proposed discussions at

no time sought to be included in the discussions. While this fact does not precisely answer the "mandatory" point, it clearly indicates that South Africa did not deem itself substantially prejudiced by virtue of a failure to be invited.

Finally, it may be recalled that most requests for an advisory opinion are stimulated by some kind of controversy in which States are involved.

The conclusion follows that on this ground the Court's jurisdiction is not impaired.

* * *

Article 65 of the Court's Statute confers on it ample discretion to refuse to render an advisory opinion. There is no logical inconsistency, therefore, in holding that while there was no dispute within the intended meaning and application of Article 32 there may yet be such elements of controversy and complicated factual issues as to warrant the Court in refusing on the ground of propriety from responding to the request for an opinion. The jurisprudence of the Court, especially as revealed in the *Administrative Tribunal* case (*I.C.J. Reports 1956*, p. 86) and the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 155) suggests that this discretionary power will not be exercised unless there are "compelling reasons" for doing so. The reasons in this instance are not sufficiently compelling.

South Africa leans heavily on the *Eastern Carelia* case (1923, *P.C.I.J., Series B, No. 5*). It appears unnecessary to burden this statement with an analysis, so much discussed by commentators, as to whether the *Peace Treaties* case has weakened the persuasive authority of the *Eastern Carelia* case and the doctrinal relationship of each to the *Mosul* case [1]. It may be suggested that the simplest point of distinction between the *Eastern Carelia* case and the present case lies in the fact that to render the opinion in the former would have constituted a disguised form of compulsory jurisdiction over a non-member of the League of Nations quite apart from the practical difficulties to be encountered in attempting to deal with controverted facts in the absence of one of the parties. In the present case, while South Africa registered objections, she was yet a vigorous advocate and offered the Court optimum co-operation.

[1] For an analysis of the *Status of Eastern Carelia* case reference is directed to the comprehensive statements of Mr. Cohen (USA) and the then Mr. Fitzmaurice (UK) in arguments in the *Peace Treaties* case (*I.C.J. Pleadings*, pp. 272-276, 303-312).

* * *

Turning to matters of substance, I shall attempt to put my support of operative clause 1 into a broad perspective.

It is appreciated that attempts to recapture the legal meaning and significance of expectations aroused by events and statements made in the past invite peculiar difficulties of interpretation and construction. The difficulties are compounded when obligations originally assumed are disrupted by the happening of unexpected events—in this instance the Second World War, the dissolution of the League and the birth of the United Nations.

While sweeping generalizations are no substitute for close analytical reasoning, I yet venture to say that whenever a long-term engagement, of whatever nature, is so interrupted, emphasis in attempting a reasonable interpretation and construction of its meaning and the obligations it imposes shifts from a textual analysis to one which stresses the object and purpose of the engagement in light of the total context in which the engagement was located [1]. This generalization can be amply supported by recourse to "the general principles of law recognized by civilized nations" as revealed in the application of doctrines of impossibility and frustration to long-term engagements.

The exact legal characterization of the mandate instrument defies easy analysis as the jurisprudence of this Court abundantly discloses. At the minimum, it bore a double aspect. On the one hand it "had the character of a treaty or convention" (*I.C.J. Reports 1962*, p. 330), and, as such, it could attract the potentiality of termination for material breach as the Opinion asserts and counsel for various States argued.

On the other hand it also had a status aspect, that is, it was "a special type of instrument composite in nature and instituting a novel international régime" (*ibid.*, p. 331).

Clearly it is not cast in the image of a personal service type of enga-

---

[1] My reading of the record inclines me to agree with the following statement by Judge Lauterpacht in the *Petitioners* case, when in dealing with the 1950 Opinion, he declared:

> "On the face of it, the Opinion, inasmuch as it held that the United Nations must be substituted for the League of Nations as the supervisory organ, signified a change as compared with the letter of the Covenant. Actually, the Opinion did no more than give effect to the main purpose of the legal instruments before it. That is the true function of interpretation." (*I.C.J. Reports 1956*, p. 56.)

This is to be read in light of the nature of the instruments involved and the total context. See *ibid.*, pp. 44, 48.

gement in which the continued existence of one of the parties may be essential to continued performance [1].

Even if viewed through the restricted prism of a long-term engagement in the national arena, such as a lease or trust (to which allusions were made in the proceedings), the conclusion would not necessarily follow that the happening of an unexpected event such as a war or a change in institutional management would entail a collapse of the basic duties embraced in the engagement. The issue would be whether the engagement was terminated or could continue without imposing an undue burden on the parties in light not merely of the terms of the engagement but, more importantly, of its object and purpose. Viewed in large perspective the 1950 Advisory Opinion decided that no undue burden would be imposed on South Africa by submitting to the supervisory authority of the United Nations General Assembly.

This conclusion is reinforced by analogies (always to be indulged with caution) drawn from generally recognized principles of law in national domains governing "assignments" as opposed to principles analogous to a novation which South Africa, in effect, considers to be operative. Whenever there is a liquidation of an enterprise and an *attempted* transfer of its rights and obligations to an assignee the cardinal issue does *not* centre on the *consent* of the obligor (as in a novation) but in a determination of the impact of the transfer on the obligations of the obligor. The 1950 Advisory Opinion, to repeat, held, in effect, that this transfer would impose no undue burden on South Africa. Cases are legion which support the view that this is the proper focus of enquiry [2]. At the jurisprudential level this preserves the social interests in the integrity and durability of long-term engagements while still protecting the interests of the obligor.

Indeed had the Mandate lapsed, as South Africa contended in 1950 and continued to maintain, it is difficult to believe that a legal alternative would have been the power to annex. As the Court stated in a much-quoted passage in the 1950 Opinion, at page 133 and repeated with approval in the 1962 Judgment at page 333:

"The authority which the Union Government exercises over the

[1] See, in particular, Judge Jessup's analysis in his dissenting opinion in 1966 (*I.C.J. Reports 1966*, p. 353 *et seq.*). Although it did so only incidentally South Africa projected the image of a personal service contract and its non-assignability in its written statement, Vol. II, p. 155.

[2] The leading cases in England are: *The British Waggon Co., etc.* v. *Lea and Co.*, 5 Q.B.D. 149 (1880) and *Tollhurst* v *Associated Portland Cement Co.* (1903) A.C. (H.L.) 414. In each case the obligor claimed that the transfer terminated the contract. In each case the contention was denied because no undue burden was imposed. Similar results have been reached in the United States. See *Meyer* v. *Washington Times Co.* 76 F (2d) 988 (1935). The point is that "consent" is not the central issue.

> Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified."

Yet in the present proceedings South Africa contended that: "... it is the view of the South African Government that no legal provision prevents its annexing South West Africa" (C.R. 71/21, p. 59).

The Court in 1950 not only said that submitting to the United Nations General Assembly imposed no greater burden on South Africa, it also offered South Africa a milder alternative than the one she proposed and one which was highly qualified in her favour.

I refer to the conclusion (despite six dissents including the logically persuasive opinion of Judge De Visscher) that "the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System". Furthermore, the Court stated that it could not deduce from the various general considerations any legal obligation for mandatory States to negotiate such agreements. (*I.C.J. Reports 1950*, p. 140.)

It had previously indicated that:

> "The degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." (*Ibid.*, p. 138.)

The dilemma this posed was perhaps insufficiently aired in the present proceedings.

The dilemma is focussed on the *negotiating process* consequent upon the dissolution of the League of Nations. Although South Africa was under no duty to submit to the trusteeship system or to negotiate a specific trusteeship agreement, yet, as a Member of the United Nations, she was surely under a duty to negotiate in good faith and even, reasonably, with the United Nations concerning a viable alternative either within the trusteeship system or outside it. The source of this duty derived from her combined obligations under the Covenant, the Mandate and the United Nations Charter in light of the object and purpose of the Mandate and the requirements of Article 2 (2) of the Charter [1].

[1] Judge Klaestad in his separate opinion in the *Voting Procedure* case (*I.C.J. Reports 1955*, p. 88) stated that as a Member of the United Nations South Africa "is in duty bound to consider in good faith" a recommendation by the General Assembly, but concluded that however serious it may be it does not involve a "true legal obligation". I cannot agree with this conclusion. The use of discretion and freedom to bargain which the system may confer does not imply the right to exercise an attitude of uninhibited freedom of action which would be tantamount to operating

It is apparent that no negotiating process can be successful if the parties are at odds as to the fundamental basis on which the process rests. The records reveal that the basis chosen by the General Assembly and its various Committees was that it had been sufficiently endowed with supervisory authority. It was fortified in this conclusion by the broad doctrinal jurisprudence of this Court not only by virtue of the 1950 Opinion but by the implications flowing from those in 1955 and 1956 and the Judgment in 1962 [1]. In short, its negotiating posture was not only based on a good faith assessment of its supervisory authority but a reasonable one as well.

While the attitude of South Africa appeared to agree with the legitimacy of this assumption in the period 1946-1947, its attitude changed thereafter.

Basing itself on the premise that advisory opinions of this Court are not binding (which is true) and that the Judgment of 1962 was only on a preliminary issue (which is also true), it appeared to take as a beginning premise for negotiating that the General Assembly had no power of supervision whatever. Quite obviously negotiations based on those conflicting premises qualify, at best, as an empty time-consuming pageant and at worst as a mere dialogue of the deaf.

---

outside the system. (See *I.C.J. Reports 1955*, p. 120.) Surely the implication of the *North Sea Continental Shelf* cases was that the three Governments were under a *legal* duty to negotiate in good faith along the lines indicated in the Judgment. (*I.C.J. Reports 1969*, p. 47.)

[1] It is worth recalling that the 1962 Judgment represents the latest authoritative doctrinal statement of the dual point that the obligation to submit to international supervision survived the dissolution of the League and that "... to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate". (*I.C.J. Reports 1962*, pp. 333, 334.)

I associate myself entirely with the interpretation placed on the 1966 Judgment by Judge Jessup when he said, in his carefully reasoned dissenting opinion fortified by a comprehensive analysis of historical data, that:

> "In the course of three Advisory Opinions rendered in 1950, 1955 and 1956, and in its Judgment of 21 December 1962, the Court never deviated from its conclusion that the Mandate survived the dissolution of the League of Nations and that South West Africa is still a territory subject to the Mandate." (*I.C.J. Reports 1966*, p. 327.)

And later, in discussing the implication of the Judgment in 1966:

> "Further, the Court has *not* decided ... that the Mandatory's former obligations to report, to account and to submit to supervision had lapsed upon the dissolution of the League of Nations." (*Ibid.*, p. 331.)

Nor can I see that to identify international supervision with supervision by the *United Nations* involves a logical *non sequitur* in light of the expectations reasonably aroused upon the dissolution of the League and the available alternatives. Logical problems, including empiric assumptions latent in the choice of premises are beyond the reach of this opinion.

In my submission, South Africa, in light of her obligations under the Covenant, Mandate and Charter (as analysed in the Opinion) was not legally entitled to assume that negotiating posture any more than, to repeat, she was legally entitled to claim that "... it is the view of the South African Government that no legal provision prevents its annexing South West Africa" (C.R. 71/21, p. 59).

To assert that the advisory opinions of this Court are not technically binding is one thing. To assert that they have no bearing on the legal status of the Mandate and the General Assembly's supervisory power is quite another thing.

An analysis of the many abortive efforts to induce South Africa to negotiate under the aegis of the United Nations, even including alternatives to submitting to the trusteeship system, are indicated briefly in the Opinion and need no rehearsal in this statement. Suffice it to suggest that, without impugning the good faith of South Africa, its reiterated insistence on negotiating from a position that denied the reasonable basis on which the General Assembly's negotiating posture rested added weight to the General Assembly's determination that South Africa had, in fact, disavowed the Mandate and especially so since supervision and reporting were admittedly essential features of the entire system.

Indeed the insistent and reiterated efforts of the United Nations to negotiate with South Africa represented something more than the expression of General Assembly political action. It represented a sense of continuity in the international community's concept of South Africa's obligations and the responsibilities incumbent on the United Nations. No doubt considerations of this kind led Lord Caradon (United Kingdom), in an address of special significance and in carefully measured terms, to declare:

> "For over fifteen years we have waited for the South African Government to comply with its clear obligations. It has failed to do so. It has denied this obligation as it has denied the existence of all other obligations incumbent upon it by virtue of the Mandate. It has opposed the essential requirement of international responsibility.
>
> What are we to do in the face of this refusal? *Repeated attempts by the General Assembly to persuade South Africa to adopt a policy of co-operation have been unsuccessful.* And not only has the South African Government refused to submit to United Nations supervision but it continues to deny, despite the repeated pronouncements of the International Court, that the Mandate is still in force.
>
> What conclusions should we draw from this history of South African intransigence? By word and by action the South African Government *has clearly demonstrated its undeviating determination to deny and repudiate* essential obligations, incumbent upon it under the

> Mandate. By repudiating those obligations, so clearly affirmed by the International Court, *it has in effect, forfeited its title to administer the Mandate* [1]."

The fact that this specific negotiating issue was not analysed in depth is not, however, sufficient in my opinion to weaken the conclusion reached in operative clause 1 since the facts are not basically controverted [2].

The reasons supporting the conclusion reached in operative clause 1 can, in my opinion, be fortified by data of an historical, legal and logical character in addition to that supplied in the Opinion. The records tracing the history of the mandates system are comprehensive and have been the subject of elaborate analysis in the three previous Advisory Opinions and the two Judgments rendered throughout the long history of the controversy over South Africa's administration of the Mandate. Much depends on the way these records and events are viewed. My own reading leads me to believe that the legal power to "revoke" the Mandate for a material breach was inherent in the system; that the unanimity rule in the League Council was not absolute; that no significance can be attached to the rejection of the so-called Chinese proposal and that a restrictive interpretation of Article 80 of the United Nations Charter is not justified. These matters are covered in the Opinion and it would be tedious to elaborate upon them [3].

* * *

[1] United Nations General Assembly, 1448th Plenary Meeting, 19 October 1966, Agenda Item 65, pp. 4, 5. It should be added that the statements above only support the notion of breach. Lord Caradon questioned the wisdom and certain legal aspects of the then proposed termination of the Mandate. It will be recalled that General Assembly resolution 2145 (XXI) was carried by a vote of 114 to 2 with 3 abstentions. Botswana and Lesotho were absent. Portugal and South Africa dissented and the United Kingdom, France and Malawi abstained.

[2] There is something almost prophetic in the pronouncement made by Judge Lauterpacht 11 years before General Assembly resolution 2145 (XXI) was adopted. In a much-quoted passage in his separate opinion in the *Voting Procedure* case, he suggested, in dealing with the discretionary power exercised under the trusteeship system and assimilated territories:

> "Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction." (*I.C.J. Reports 1955*, p. 120.)

[3] Evidence that the supervisory role of the Mandates Commission was intended to be an "effective and genuine, not a purely theoretical or formal, supervision" is

The conclusion that the General Assembly in resolution 2145 (XXI) validly terminated the Mandate may be supported by two separate approaches and since they are grounded on different processes of reasoning I shall briefly indicate the scope of each.

The first approach asserts that, conceding that the powers exercised by the General Assembly are *grosso modo* of a recommendatory character only, it is yet clear that in certain *limited* areas it has decision-making power. As stated in the *Certain Expenses* case:

> "Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies, and the making of recommendations; they are not merely hortatory." (*I.C.J. Reports 1962*, p. 163.)

The termination of the Mandate reposes in one of those limited areas. It is an area that is *sui generis*. And the exercise of the power involved no invasion of national sovereignty since it was focussed on a territory and a régime with an international status. The power was conferred on the General Assembly *aliunde* the Charter through the unique situation posed by the Mandate coupled with authority granted under Article 80 of the Charter, which constituted a bridge between the League of Nations and the United Nations in so far as mandates were concerned.

Precedents exist for the exercise of such power as the decisions taken under Annex XI of the Peace Treaty with Italy and General Assembly action with respect to the Palestine Mandate attest, and other examples could be cited.

---

revealed in the League of Nations publication, *The Mandates System; Origin, Principles, Application* quoted *in extenso* in *I.C.J. Pleadings, Admissibility of Hearings of Petitioners*, pp. 28-35.

Clearly no-one contemplated in 1920 that a mandatory would commit a material breach and it would have been unusual to have specifically provided for "revocation" in light of that non-contemplated contingency. Indeed, this is true of most long-term engagements. There is, however, support for the proposition that the right of revocation was considered to be *inherent*, in the view of the Mandates Commission and leading jurists (*I.C.J. Pleadings, International Status of South-West Africa, 1950*, p. 230). To the authorities in support of this proposition, marshalled by the representative of the United States, which included the views of the authoritative Institute of International Law and its rapporteur Professor Rolin (United States written statement, Part II, Section V), may be added the high authority of Bonfils-Fauchille, *Traité de droit international public*, I (1925), which, after a thorough examination, states at p. 887:

> ". . . un mandat international est susceptible d'être révoqué lorsque le mandataire se rend coupable d'un manquement grave à ses obligations, et c'est le Conseil qui . . . prendra à cet égard une décision".

Nor is this conclusion necessarily incompatible with the implications of the *Voting Procedure* case (*I.C.J. Reports 1955*, p. 67). That Opinion was concerned with voting procedures to be employed in the assumed normal course of supervision. The Court stated that "the General Assembly, in adopting a method of reaching decisions in respect of the annual reports and petitions concerning South-West Africa should base itself exclusively on the Charter" (*ibid.*, p. 76). The Court was not concerned in 1955 with the ultimate issue of material breach which lies outside the normal course of performance and which, by definition, is a denial of the permitted exercise of discretionary power by the mandatory State.

In voting that South Africa had in fact disavowed the Mandate the General Assembly was, to repeat, exercising power inherited from the Council and it did so strictly within its own Charter-authorized rules of procedure. And, as indicated above, it was not limited to its recommendatory power under Article 10 since it was concerned with a matter of material breach lying outside the normal scope of performance.

Under this approach the special powers granted under the Mandate are stressed rather than the general powers under the Charter, including especially the powers of the Security Council under Articles 24 and 25.

* * *

The alternative approach accents the obligations undertaken under the Charter. While asserting that General Assembly resolution 2145 (XXI) was "binding" in the sense in which it registered the collective will of all who voted for the resolution in terminating the Mandate, it yet insists that the powers of the General Assembly vis-à-vis non-consenting States fall in the category of recommendations. Acting under its supervisory authority and in accordance with its voting procedures it could end the Mandate but it could not generate an obligation on South Africa to withdraw or engage the responsibility of member States to co-operate in effecting a withdrawal.

It is for this reason that it called upon the Security Council. While Security Council resolution 276 (1970), as with its antecedent resolutions 264 (1969) and 269 (1969), endorsed General Assembly resolution 2145 (XXI), it did not "validate" it since it was already valid. It served to convert a recommendation into a binding decision operative as against non-consenting States.

The reasoning of the Court is mainly based on the theory sketched above. I favoured the former approach but under either approach the Mandate was validly terminated so as to justify the conclusion reached in

operative clause 1. In light of the object, purpose and history of the mandates system and the unique problems it posed, the conclusion is, in my opinion, well founded.

* * *

Turning to operative clause 2, I shall confine myself to a few comments mainly of a cautionary nature.

Operative clause 2 of the Opinion is based on the pronouncements of the General Assembly and the Security Council, reinforced by the provisions of Article 25 of the Charter. In part, it is also a reflection of general principles of international law arising from the obligations of States to refuse official recognition to a government *illegally* in control of a territory.

General Assembly resolution 2145 (XXI), coupled with subsequent Security Council resolutions, culminating in Security Council resolution 276 (1970), together with the Opinion of this Court, have settled the issue of "legality".

The "legal consequences" flowing from that determination must not be confused with specific enforcement measures under Article 41 of the Charter. Not only did the Security Council fail to invoke the provisions of Chapter VII of the Charter, it studiously avoided doing so.

It is well known that the exact nature and scope of the obligations incurred by Members of the United Nations under Article 25 of the Charter have never been determined by the Security Council (*Repertory of United Nations Practice*, 1955, pp. 37-51; 1958, pp. 257-265; 1964, pp. 295-304).

Paragraph 113 of the Opinion announces that, in the view of the Court, Article 25 is not confined to "decisions in regard to enforcement action" but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Paragraph 114 sounds the cautionary note that the question of the exercise of power under Article 25 must be determined in any particular instance by the "terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council".

It is to be observed that Security Council resolution 276 (1970) is not action oriented. It speaks principally of a negative duty of restraint, not a positive duty of action. Thus operative paragraph 5 calls upon all States "to *refrain* from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2" (emphasis added). This

paragraph declares that "the continued presence of the South African authorities in Namibia is illegal".

The Opinion of the Court in operative clause 2, as suggested earlier, appears to be grounded at least in large part on principles of non-recognition under international law, and is thus in harmony with Security Council resolution 276. But a strong *caveat* is needed to avoid any misunderstanding.

I refer to the fact that the references in operative clause 2 to "*any* acts" and "*any* dealings" are to be read subject to the critically significant qualifying phrase "*implying recognition of the legality*" of South Africa's presence in Namibia (emphasis added). This announces, to repeat, the doctrine of non-recognition.

It is important to understand that this doctrine is not so rigid as to preclude *all* intergovernmental dealings under all circumstances. Even as applied to non-recognized governments and States, in which the administrative control of the government over the territory is conceded, the doctrine permits of flexibility in application at such governmental levels as do not imply recognition of legitimacy.

Under particular circumstances a limited measure of intercourse is essential as customary international law, derived from the practice of States, abundantly reveals. (Hackworth, *Digest of International Law*, Vol. I, pp. 327-364 (1940); Whiteman, *Digest of International Law*, Vol. 2, pp. 524-604 (1963); Oppenheim, *International Law*, pp. 146-148 (8th ed., 1955).) As Lauterpacht has stated:

> "... in normal circumstances there is nothing in the attitude of non-recognition which *necessarily* constitutes an obstacle in the way of a measure of intercourse *so long as the State against which it is directed does not insist on full and formal recognition of the results of the illegal act*" (*Recognition in International Law* (1947), p. 432 (emphasis added)).

If this limitation applies in the context of non-recognized governments and States, it surely applies even more to a complex situation in which a government such as South Africa is required to withdraw from a territory over which it has long exercised administrative control. Considerations of a practical and humanitarian nature are clearly involved in light of the economic interdependence of the two areas and their interlocking administrative structures.

Examples can be easily suggested to support this view. Thus if a famine or a cholera epidemic were to break out in Namibia prior to the effective exercise of control by the United Nations a measure of intergovernmental co-operation between South Africa and other States might well be

required. Likewise if an official plane were grounded (as happened in Albania when it was not recognized by the United States) direct dealings would be needed between the government officials of both States. No implication of recognition flows from such dealing (Whiteman, *Digest of International Law*, p. 530 (1963)). It is needless to add examples which cover a wide spectrum of relations. A similar note of caution needs to be sounded with respect to the first part of operative clause 2.

It will be observed that the statement that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and "the invalidity of its *acts* on behalf of or concerning Namibia" is a less comprehensive formulation than the specific language of Security Council resolution 276 (1970) which speaks of *all* acts.

This is consistent with the reasoning of the Court in paragraphs 122 and 125.

But in my opinion the matter does not stop there. The legal consequences flowing from a determination of the illegal occupation of Namibia do not necessarily entail the automatic application of a doctrine of nullity.

As Lauterpacht has indicated the maxim *ex injuria jus non oritur* is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith [1]. Were it otherwise the general interest in the security of transactions would be too greatly invaded and the cause of minimizing needless hardship and friction would be hindered rather than helped.

This was in fact conceded by the representative of the Secretary-General when, in answer to a question put by a judge, he declared that the Secretary-General "had not considered that he was enunciating a doctrine of 'absolute nullity' " (C.R. 71/18, p. 20).

A detailed specification of the particular acts which may or may not be compatible with South Africa's illegal presence in Namibia cannot be determined in advance since they depend on numerous factors including not only the interests of contracting parties who acted in good faith but the immediate and future welfare of the inhabitants of Namibia.

* * *

I shall conclude on another note. It is true, of course, that prior to the termination of the Mandate by the General Assembly there had never been a judicial determination that this was legally permissible. Further-

[1] Lauterpacht, *Recognition in International Law* (1947), p. 420.

more, it is accurate to say the General Assembly in the exercise of its supervisory powers did not calmly and rationally analyse the extent of those powers under the grant of authority accorded by the San Francisco formula (a point made by Professor Katz in his characteristically thoughtful book on the *Relevance of International Adjudication* (1968), pp. 69-123). The point is troublesome but it is not conclusive.

Law and what is legally permitted may be determined by what a court decides, but they are not only what a court decides. Law "goes on" every day without adjudication of any kind. In answer to a question put by a judge in the oral proceedings (C.R. 71/19, p. 23), Counsel for the United States, in a written reply received in the Registry on 18 March 1971, declared:

> "The fact that in the international as opposed to a municipal legal system the other party cannot be assured of bringing a case involving material breach before an international tribunal except where both parties have accepted the compulsory jurisdiction of an international tribunal is a problem relating to the efficacy of international law and institutions generally and not especially to the problem of the material breach doctrine."

It is part of the weakness of the international legal order that compulsory jurisdiction to decide legal issues is not part of the system. To say this is not to say that decisions taken by States in conformity with their good faith understanding of what international law either requires or permits are outside a legal frame of reference even if another State objects and despite the absence of adjudication.

General Assembly resolution 2145 (XXI) was a political decision with far reaching practical implications. But it was not an arbitrary exercise of political power outside a legal frame of reference. Its endowment of supervisory power over the Mandate had been confirmed by the jurisprudence of this Court and the scope of that power, as indicated in the Opinion, included the power ultimately to terminate for material breach.

The legal issues involved in this proceeding were not simple or easily resolved. Indeed they were resolved only after hearings and deliberations extending over a period of many months. It should be added that the great learning and consummate skill brought to bear on the issues by the representatives of South Africa were in the highest tradition of the legal profession.

It may be hoped and expected that South Africa, as a great nation, will respect the judicial pronouncement of this Court and the almost unanimously held view in the United Nations that its administration of

Namibia must come to an end. It may be hoped, also, that in the delicate and difficult era that lies ahead, especially in the period of transition, a spirit of mutual good will may, in time, displace one based on mutual misunderstanding.

(Signed) Hardy C. DILLARD.

SEPARATE OPINION OF JUDGE DE CASTRO

[Translation]

While I fully concur in the operative part of the Advisory Opinion and in the reasoning upon which it is based, I venture to exercise the faculty conferred by Article 57 of the Statute in order to set forth in greater detail the legal reasons which decided my vote.

I. Preliminary Issue: the Competence of the Court

A. Does the Request for an Opinion Relate to a Legal Question?

Article 65 of the Statute states that "the Court may give an advisory opinion on any legal question . . .". Consequently, the Court may not give an opinion on a non-legal question, and should decline to give one on a purely political question.

On the other hand, the Court cannot arbitrarily refuse to give an opinion; it can only do so if "the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*I.C.J. Reports 1950*, p. 72). It should be borne in mind that when the Court is requested to give an opinion "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*ibid.*, p. 71).

Refusal to give an opinion is admissible only if the question addressed to the Court is essentially political or non-legal, for it would seem that the determining factor is the positive one of "legal-ness", and not the negative one of political motivation. It would be difficult for requests emanating from the General Assembly or the Security Council, in view of the nature of those organs of the United Nations, not to relate to political questions: that is "in the nature of things" (*I.C.J. Reports 1962*, p. 155).

The present request for an advisory opinion (Security Council resolution 284 of 29 July 1970) lays before the Court the question of the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970). The Court is thus faced with a question of a purely legal nature and does not have to take into account the possible underlying political motivations (*I.C.J. Reports 1947-1948*, p. 61). It is true that the question put relates

to a particular issue, but it must not be forgotten that the General Assembly and the Security Council can request an opinion "on any legal question", including therefore matters which concern the interests of particular States or certain concrete situations. (This was so in the case not only of the three Opinions relating to South West Africa, but also of the Opinions relating to *Interpretation of Peace Treaties, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization,* and even that relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.*)

The fact that the subject-matter of the question is the legal consequences for States does not deprive the request of its legal nature or make it any less the business of the United Nations. It relates to the conduct which may be expected of States in law, or which the Security Council may if need be require.

B. Does the Question Relate to a Dispute Between States?

(a) *The Jurisdiction of the Court*

1. The *competence of the Court* has been denied because of the alleged existence of a dispute between States, and it has been asserted that a preliminary question exists.

In this connection it may be as well to recall a few elementary notions.

The Court is here confronted with two problems—a *preliminary* one as to its competence and another, *in limine*, concerning the procedure to be followed—which have a point in common: the existence or non-existence of a dispute or legal question pending between States. Neither arises *if there is no* dispute or pending question.

2. In its Advisory Opinion on the *Status of Eastern Carelia* (*P.C.I.J., Series B, No. 5*, p. 29) the Permanent Court of International Justice declared itself incompetent, as the question put to it concerned a dispute between States, this being properly a matter for contentious proceedings.

This decision can be explained by the circumstances of the case, which are well known.

The Court was faced with an insuperable difficulty. To give its opinion it needed to know the truth about the facts contested, which was not possible in the absence of one of the parties.

Another difficulty, of a general nature, lay in the rules of procedure in force at the time. On the date of the Advisory Opinion (23 July 1923) the Rules of Court did not offer States adequate safeguards in the event of a request for an advisory opinion on an existing dispute between two or more States. It was not until a paragraph had been added in 1927 to what was then Article 71 of the Rules that the appointment of judges

ad hoc was permitted when an advisory opinion had been sought on a question relating to an existing dispute between two or more States. And only in 1929, when the Statute was amended, was the further step taken of adopting Article 68, still in force, whereby the Court may in advisory proceedings be guided by the provisions of the Statute which apply in contentious cases.

These rules opened the way to the giving of advisory opinions on quasi-contentious matters. After the Opinion on the *Status of Eastern Carelia*, the Permanent Court did indeed give several on legal questions pending between States [1].

The abandonment of the precedent comprised in the Opinion on the *Status of Eastern Carelia* has been confirmed by the International Court of Justice, for two reasons:

In the first place, the constitutional or organic position of the Court has changed. Technically speaking, the Permanent Court was not a part of the League of Nations. But the International Court of Justice is both a creation of the Charter and an organ of the United Nations (Art. 92 of the Charter; Art. 1 of the Statute) [2]. The Court has the duty to co-operate with the General Assembly and the Security Council, as organs of the same Organization:

> "It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take." (*I.C.J. Reports 1950*, p. 71.)

As in *Interpretation of Peace Treaties*, the Court can now say: "In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten [an organ of the United Nations] (*ibid.*, p. 72.) Hence it is also because the Court's decision, being of a purely advisory nature, has a very different force from that of a judgment disposing of a contentious case that the 1923 precedent has been disregarded (*ibid.*, p. 71).

Above all, the doctrine of the Advisory Opinion on the *Status of Eastern Carelia* can be considered as outworn in view of the terms of Articles 82 and 83 of the Rules of Court. The Court has to consider whether the request for advisory opinion relates to a legal question actually pending between two or more States (Art. 82), and this it has to do, not in case it should declare its lack of jurisdiction, but in order to take that

---

[1] See Hudson, *The Permanent Court of International Justice (1920-1942)*, p. 496.

[2] Cf. the excellent treatment of these questions in the oral statement made on behalf of the British Government on 2 March 1950 (*I.C.J. Pleadings, Interpretation of Peace Treaties*, pp. 305 f.). See also the statement on behalf of the United States, in which attention is drawn to the new phrase inserted in the Statute of the International Court: "and all matters specially provided for in the Charter of the United Nations" (*ibid.*, p. 276).

factor into account in the procedure to be followed and with respect to the applicability of the rules concerning judges *ad hoc* (Art. 83). There could thus be no clearer indication that the Court is competent to deal with a request for advisory opinion relating to a question actually pending between States ("You could hardly have put it more strongly than that"—statement on behalf of the British Government, *I.C.J. Pleadings, Interpretation of Peace Treaties*, p. 308).

It is easy to comprehend the concern felt by zealous defenders of untouchable State sovereignty at the abandonment of the doctrine enunciated in the Advisory Opinion on the *Status of Eastern Carelia*. But, as Judge Azevedo recognized in a separate opinion, the present Rules in force admit of no other solution, which is why he asked for the abrogation of Articles 82 and 83 (*I.C.J. Reports 1950*, pp. 86 f.).

3. The Court *may* give an opinion (Statute, Art. 65), therefore it *may* decline to give one. But, as an organ of the United Nations (Charter, Art. 92), it has a *duty* to collaborate with the other organs of the United Nations. In what circumstances is the Court incompetent to give an opinion? It would seem that it is in the case of a question not meriting the description of "legal question".

The Security Council has requested an opinion because it "would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking" (resolution 284 (1970)). The Court, as a judicial organ of the United Nations, should therefore not refuse its collaboration.

4. The position of the Court, as the principal *judicial* organ of the United Nations, may have led to misunderstanding and given rise to the belief that all its functions are of a purely judicative or contentious nature. But in advisory proceedings, even when they relate to questions pending between States, there are no 'parties—there are States or organizations which provide the Court with information, by means of written or oral communications (Statute, Art. 66). Moreover, advisory opinions are not endowed with binding force, either for the requesting organ or organization, or for the States and organizations which provide information.

An organ may have functions of different kinds, both advisory and contentious; such, for example, is the case of a Council of State, a court of arbitration or a tribunal.

But in all circumstances the Court retains the elevated dignity deriving from its constitutional status and independence, and its authority may never be compared to that of a legal consultant or advisor; it must remain faithful to its judicial character.

Its advisory opinions do not carry less authority than its judgments. There is, to be sure, a difference, stemming from the *vis re judicata* of the judgments, but this is limited to the parties to the dispute (*vis relativa*: Statute, Art. 59).

On the other hand, the reasons on which judgments are based (Statute, Art. 56) are considered to constitute *dicta prudentium*, and their force as a

source of law (Statute, Art. 38) derives *not* from any hierarchic power *(tantum valet auctoritas quantum valet ratio)* but from the validity of the reasoning *(non ratione imperio, sed rationis imperio)*.

The essential differences between judgments and advisory opinions lies in the binding force of the former (Charter, Art. 94) and it is on that account that the Court's jurisdiction was established on a voluntary basis (Statute, Art. 36) and the effect of judgments limited to the parties and the particular case (Statute, Art. 59). However, like the reasons on which a judgment is based, the reasoning and operative part of an advisory opinion are, at least potentially, clothed with a general authority, even vis-à-vis States which have not participated in the proceedings, and may therefore contribute to the formation of new rules of international law (Statute, Art. 38, para. 1 *(d)*).

For these reasons, the voluntary nature of the Court's jurisdiction does not operate where advisory opinions are concerned.

5. A request having been made for an advisory opinion, does it relate to a dispute or legal question pending between States?

It is important to settle this point, in order to be in a position to settle others.

(a) If there is no question pending, all doubt as to the Court's competence on the basis of the *Status of Eastern Carelia* case is removed.

(b) The existence or non-existence of a question pending between States has to be considered first and foremost in order that, in the affirmative, it may be possible to determine the rules of contentious procedure applicable, and more particularly those providing for the application of Article 31 of the Statute.

For there is a very close relation between the Court's task of determining the nature of the question put by the request for advisory opinion, and the task of deciding whether any request for the appointment of a judge *ad hoc* shall be granted.

It is evident that no decision as to the applicability of Article 31 of the Statute can be taken before it has been ascertained whether the request for an opinion relates to a legal question pending between States. That is what the letter of Article 82 of the Rules requires, and also common sense: it would be most incongruous for the position of any judge to be subject to a built-in risk of invalidation.

6. For there to exist a dispute or legal question between States with the effect of causing the Court either to declare itself incompetent (Statute, Art. 65; *Status of Eastern Carelia* doctrine) or to apply by analogy the provisions which apply to contentious proceedings (Rules, Arts. 82 and 83; Statute, Art. 68), the question or dispute must be of a potentially contentious nature and inherently amenable to the Court's jurisdiction, so that it could have Chapter II of the Statute applied to it and be decided by a judgment.

(b) *Procedure to Be Followed*

The Court "shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States" (Rules, Art. 82) in order to determine the procedure to be followed (Rules, Art. 83; Statute, Art. 68).

For the request to relate to a legal question pending between States, or to a pending dispute, there must be identity of subject-matter between the question and the request for opinion; there must be States in the position of parties, and the question must be actually pending.

1. South Africa has defined the subject-matter of the question pending in several ways. It has been said that it is that to which the Judgments of 1962 and 1966 were directed (question of *apartheid*, and the existence of norms and standards whereby that policy would stand condemned). It has also been said that in order to reply to the request for advisory opinion the Court must pronounce on the validity and interpretation of these resolutions concerning which there is a divergence of views between South Africa and other States. Finally it has been pointed out that there exists a dispute as to South Africa's accession to the International Convention on Telecommunications adopted at Montreux in 1965.

A certain effort of the imagination is necessary to see any resemblance between these questions and that which is the subject of the request for advisory opinion, which relates only to the legal consequences for States of Security Council resolution 276 (1970).

2. A further legal obstacle to the contentions of South Africa lies in the difficulty of particularizing the other States and the fact that they are not in the position of parties.

Between South Africa and whom is a question pending? The answer runs, according to the occasion: Liberia and Ethiopia, the Organization of African Unity, the States which voted in favour of certain resolutions, or the United Nations.

How can it be argued that there is here a question of a quasi-contentious nature, to which Article 83 of the Rules could apply? How can it be argued that these States or Organizations are in the position of opposing parties with regard to South Africa? In its observations South Africa endeavoured to do so by relying on the doctrine of the 1962 Judgment in the *South West Africa* cases (discussions and negotiations in the United Nations), but it should be observed that the standing of Ethiopia and Liberia as parties was based upon the special provision of Article 7 of the Mandate, and that this jurisdictional clause operated in favour of Members of the League of Nations. Above all, the doctrine of the 1966 Judgment in the *South West Africa* cases should be taken into account. To be a party to a dispute, each State must have a legal right or interest in the subject-matter of the claim "which is a different thing from a political interest" (*I.C.J. Reports 1966*, p. 22). In the separate opinion of Judge Morelli it is explained that: ". . . standing . . . means the possession by one person rather than another of the substantive right relied on in the proceedings" (*ibid.*, p. 65).

As will be apparent, there is no other State in the legal position of a party, as between which State and South Africa there might be a legal question pending within the meaning of Article 82 of the Rules of Court.

Again, it is inconceivable that there could be a question or dispute between those States which have voted for a resolution and a State which denies validity thereof. In public and in private law, a resolution adopted by the majority of the members of an organization is regarded as a resolution of the organization, and if a member seeks to dispute its validity, it is the organization that he must approach, and he cannot approach the other members for that purpose. In the present case, if there were a pending question, it would be between South Africa and the United Nations—in other words, there would be no question between States.

Thus a difference of views between States at the United Nations, a division of opinion, or opposition between a majority and a minority, does not constitute a dispute or legal question pending between States, within the meaning of Articles 82 and 83 of the Rules of Court. The organs of the United Nations request advisory opinions when there is a diversity of views, and the main function of advisory opinions is to clarify the questions argued over and to dispel the doubts raised by the opposition of a minority [1].

A difference of views between a State and the United Nations is not a dispute or legal question *between States*, the only kind contemplated by the applicable legal texts (Statute, Art. 34; Rules, Arts. 82 and 83).

3. The qualification "pending" applied to a question makes it requisite that the already existing question should be *the same* as the question which is the subject of the request for an opinion—a necessary identity which means that, if the question had been decided by a judgment, an objection of *res judicata* could be raised against any new application by way of request.

Are the questions between Ethiopia and Liberia, on the one hand, and South Africa, on the other, identical with that raised by the request for an advisory opinion? To establish such identity, there would have to be an identity of claim, the same basis of application, and the same parties acting in the same capacity (cf. Art. 1351 of the French Civil Code), i.e., in the classic formula: *eadem persona, eadem res, eadem causa petendi.*

In the contentious cases concerning *South West Africa*, the parties opposing South Africa were two States, former Members of the League of Nations, acting in pursuance of Article 7 of the Mandate on account of the infringement of obligations under that instrument which the introduction of *apartheid* into South West Africa represented.

The request for an advisory opinion has been made by the Security

[1] Such was the case in *Certain Expenses of the United Nations (I.C.J. Reports 1962)*; the Court gave its Opinion on a question concerning which there was bitter controversy within the Organization.

Council in its capacity as an organ of the international community, and it has asked the Court what are the legal consequences for States of South Africa's conduct (its continued presence in Namibia) contrary to one of its resolutions: resolution 276 (1970).

This lack of identity is also apparent with respect to the preliminary questions raised by South Africa regarding the request for advisory opinion.

4. While there is no identity between the question which was the subject of the 1962 and 1966 Judgments and that concerned in the present request, there can be no denying that the latter is of the same nature as the question answered by the 1950 Advisory Opinion and partly coincides with it in subject-matter.

Invited to give an opinion on the legal status of South West Africa, the Court found it necessary to make pronouncements on the legal title of South Africa and that of the United Nations in respect of the Territory, and also on the legal consequences for States of the existence of those titles, because a legal status—like the *iura in re* with which it is sometimes confused—is effective *inter omnes* and *erga omnes*.

To request an advisory opinion on the consequences for States of the presence of South Africa in Namibia (South West Africa) is another way of asking what the legal status of South West Africa is here and now, i.e., in the situation prevailing since the adoption of resolution 276 (1970). It is from that Territory's legal status, and from it alone, that the legal consequences for States flow.

The implication of this coincidence of underlying subject-matter is that the competence of the Court has at present the same basis as in the 1950 proceedings.

C. The Factual Issues

South Africa's proposition that the Court should examine factual issues requires some reflection as to the Court's competence in this connection and on the pertinance of the suggestion.

(a) *The Competence of the Court to enter into factual issues*

(i) In view of the terms of the request for advisory opinion is South Africa's proposition a matter *ultra vires*? The request for advisory opinion takes as point of departure a particular fact—resolution 276 (1970) of the Security Council—and seeks the Court's opinion on the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding that resolution. The South African proposition seeks the admission by the Court of evidence regarding *a different fact*, or *a different question*, namely whether or not South Africa has failed to fulfil its obligations to promote the moral and material well-being of South West Africa.

It would therefore seem that the South African proposition, if accepted, would *alter the very subject-matter* of the request for advisory opinion; it would amount to asking the Court to give its opinion on a subject quite *different* from that on which the Security Council seeks guidance; in other words, there would be a danger of recognizing something in the nature of a counter-claim or a request for a "counter-opinion".

It may be doubted that the Court would be entitled to allow any such proposition, when it comes not from an organ or agency authorized by the Charter to request an opinion, but from one of the States permitted to furnish information. In such a case, would the Court be acting in conformity with the letter and spirit of Article 96 of the Charter and Article 65 of the Statute? Could the Court disregard those provisions by giving effect to Article 68 of the Statute? With all respect, I would find that difficult to accept.

(ii) Taking into account the arguments of South Africa, has the Court jurisdiction to proceed to examine factual issues?

It is well known, and South Africa reminds us of it, that, in the words of the Permanent Court, "under ordinary circumstances it is . . . expedient that the facts upon which the opinion of the Court is desired should not be in controversy" (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28). Furthermore, advisory opinions have as their subject-matter legal questions (Art. 96 of the Charter, Art. 65 of the Statute) and not questions concerning facts *of primary importance*—such as those which South Africa wishes to have established.

(b) *Pertinence of the proposition that the Court should enter into factual issues*

(i) The argument of South Africa on the need to go into factual issues, and thus, it would maintain, the duty of the Court to declare its own lack of jurisdiction if it considers that an examination of the facts is indispensable, runs as follows: Security Council resolution 276 (1970) and General Assembly resolution 2145 (XXI) are based on the postulate that South Africa has not ensured the moral and material well-being of the natives of South West Africa. South Africa denies and offers to disprove this, the implication being that, if it be established that South Africa has ensured such well-being, the two resolutions would lack any basis, and would for that reason be invalid and void.

This reasoning would be valid if the sole basis for the resolutions were the conduct of South Africa with regard to the well-being of the natives; but such is not the case. There are other bases, equally important or more important than the question of well-being, which may be said to underlie the declaration of termination of the Mandate.

General Assembly resolution 2145 (XXI) stressed that South Africa had refused to continue fulfilling its obligations under the Mandate or to recognize that the United Nations had powers of supervision over South West Africa, and also referred to the fact that South Africa had carried on a policy of *apartheid* despite the condemnation thereof. These are well-known and uncontroverted facts. Security Council resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI), and its factual basis is the same.

It is a matter of established general teaching that for an act or grant to be declared void, or for it to be declared terminated, only one cause is necessary and that single cause sufficient *(ex una causa, nullitas)*; there is no need to establish all or even a multiplicity of the causes adduced.

It follows that, if the Court decides to consider the contentions of South Africa as to the invalidity of the resolutions, it will give due weight to the existence of uncontroverted facts which may serve as a basis for those resolutions.

(ii) The observations already made regarding the non-existence of a question pending between States and the subject-matter of the request for advisory opinion also argue the exclusion of factual issues: for it is the existence of a pending question which could justify the opening of a quasi-contentious procedure, including the production of evidence. But even in such a context it is hard to see how the absence of an opposing party and a *juge instructeur* could be made good, if the procedure for taking evidence is to feature the necessary safeguards.

D. The Question of a Plebiscite

The Court should not concern itself with considerations as to the object, the practical possibilities, and the outcome of such a plebiscite; these are political aspects of the matter which fall outside the competence of the Court.

But it could have drawn immediate attention to the procedural impossibility, in advisory proceedings, of its participating in a plebiscite in which South Africa was also to take part.

It is furthermore apparent that such a plebiscite or its outcome would lack all legal relevance to the Court's reply to the request for an advisory opinion. For the purpose of answering the question put by that request it makes no difference whether the population would vote in favour of administration by South Africa or by the United Nations [1], nor would it possess any significance in the treatment of the problems raised by South Africa in its written and oral statements.

[1] The plebiscite envisaged is not one which would posit the independence of Namibia or a change of administration; it would only be held for the purpose of obtaining information.

II. ANTECEDENTS: QUESTIONS CONCERNING THE VALIDITY OF RESOLUTIONS

A. Competence of the Court

Does the Court have the power to pronounce as to the invalidity or nullity of resolutions of the General Assembly and Security Council?

It is difficult to answer yes or no to this question. The interplay of two principles, which one might have thought contradictory, must be taken into account.

1. The principle of division of powers—the Charter set up three organs, each having sovereign powers in the sphere of its own competence: the General Assembly, the Security Council, and the International Court of Justice. The first two have powers analogous to those of legislative chambers, and the third has judicial powers.

Each of these has the power to interpret the provisions of the Charter *verbis et factis.* Such interpretation must be respected by the other organs providing it does not encroach upon their own jurisdiction. Any other solution would be inconsistent with the independence or sovereignty of each organ. On this view of the matter, the Court does not have the powers of a constitutional court to pass judgment on the validity or the resolutions of the General Assembly and Security Council [1].

Naturally, it could do so if the General Assembly or Security Council were to ask, expressly or impliedly *(Certain Expenses of the United Nations)*, for an opinion on the interpretation of the Charter, and on the consistency of the resolutions with the Charter.

As a result of this mutual respect, neither the General Assembly nor the Council can declare a judgment of the Court to be invalid, even if it be contrary to the wishes of the majority in those organs.

2. The principle of "legal-ness"—the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law [2].

Furthermore, the Court must act as a judicial organ, so that no limitations can be placed upon it as regards the logical processes to be followed in answering the question put to it (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, p. 217).

---

[1] It has been said that everything "makes it necessary to put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined and hence to regard to a large extent the non-conformity of the act with a legal rule as a mere irregularity", and also that "each organ of the United Nations is the judge of its own competence" (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, pp. 223, 224).

[2] "Examples might be a resolution which had not obtained the required majority, or a resolution initiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization)": separate opinion of Judge Morelli, *I.C.J. Reports 1962*, p. 223.

3. Before ordinary municipal courts, the result of the interplay of these two principles is that such courts refrain from passing judgment on the validity of laws, with the sole exception of cases in which it is clear and indisputable that the alleged law does not in fact rank as a law, in which there is only an apparent law. In any other case, in general, either the courts refrain from considering the question of the validity of laws, or they consider that they must indicate the reasons for their validity; there is always a presumption in favour of the validity of laws.

The Court may derive inspiration from this example. Should it decline to give an opinion on the validity of the resolutions? The Court is not, in the structure of the United Nations, a super-organ, and it is not entitled to give any sort of "counter-opinion".

4. The Opinion relating to *Certain Expenses of the United Nations* may have given the impression that the Court has the power to pass judgment, in all cases and without any limitation, upon the validity of the resolutions of the General Assembly and Security Council. But the Court was on that occasion asked to give its opinion on the question whether the expenditures authorized by a series of General Assembly resolutions were "'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations" (*I.C.J. Reports 1962*, p. 152), that is, to say whether those expenditures had been validly authorized. It was possible to observe in that case with perfect correctness that there cannot be placed "any limitations on the Court as regards the logical processes to be followed in answering the question", even when it related to the validity of the said resolutions. This statement was qualified as follows:

> "This freedom [i.e., the Court's freedom] can however be understood only as subordinated both to the rules of law and logic by which the Court is bound and also to the objective which the Court must pursue, which is the solution of the question submitted to it" (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, pp. 217-218).

The Court stated, in the Opinion referred to, that "each organ [of the United Nations] must, in the first place at least, determine its own jurisdiction" (*ibid.*, p. 168).

In its resolution 284 of 29 July 1970, the Security Council does not call in question, either implicitly or explicitly, the validity of resolution 276 (1970), and no rule of logic makes it necessary to consider such validity in order to answer the question put to the Court.

It was because of other considerations that the Court dealt with the validity of Security Council resolution 276 (1970) and General Assembly resolution 2145 (XXI). The Court has the duty to co-operate in the efficient functioning of the other organs of the United Nations. The opinion has been sought because it would be useful for the Security Council "in its further consideration of the question of Namibia and in

furtherance of the objectives the Council is seeking". For such consideration, and for such objectives to be attained, it will be as well to dissipate the doubts which have accumulated in the course of many years on a whole series of legal questions, which are preliminary to the question which is the subject-matter of the Opinion. These doubts emerged in the course of the discussions of the Security Council and the Assembly, and their importance is clear from the attention paid to the question of the validity of the resolutions, not only by the representative of South Africa but also by the representative of the Secretary-General, the representatives of the States which furnished information, in the form of written or oral statements, and the representative of the Organization of African Unity.

In any event, the place for considerations of the validity of the resolutions is in the reasoning of the Opinion and not in its operative clause (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, pp. 216-217; dissenting opinion of Judge Bustamante, *ibid.*, p. 288; this was also the solution adopted by the Court in its Opinion on *Certain Expenses of the United Nations*, *ibid.*, pp. 155-181).

B. Interpretative Method

In its written contentions and its oral statement, South Africa has expounded at length its theory as to the interpretation of legal texts, and rightly so, because the method chosen by it is the basis of the solutions it puts forward. It defends the technique of literal interpretation of texts, restrictive interpretation of powers conferred on international organizations, and it vigorously condemns teleological methods.

Without indulging here in an academic study of interpretation, it would nevertheless appear useful to make certain observations on the question, since it will thus be possible to avoid repetitions.

1. It would seem that a distinction should first of all be made between the various types of legal texts. For our purposes, it will be useful to take into account the particular characteristics of: *(a)* treaties dominated by bargaining, each party seeking its own advantage, to obtain the maximum and give the minimum; *(b)* agreements by which an organization grants certain powers or privileges to a State, which the latter accepts; *(c)* treaties by which an international organization is set up, and the resolutions of such an organization.

2. The prudent rule of considering prima facie the letter of conventions and treaties has been distorted into the literalistic interpretation which condemns any element not to be found in the text *(quod non est in codice non est in mundo)*.

As early a writer as Grotius pointed out that this was a vain tendency, as is also the so-called principle of contemporaneity. He showed that in addition to what is said, there is the force of the development of the convention (*potentia moraliter considerata: De jure belli as pacis*, II, 16, 25).

While it is true that the common intention of the parties must be taken into account, it is also true that in all systems of law it has been necessary to provide for the possibility of lacunæ; there are rules for filling out the parties' expressions of their will, and for this purpose the case law of municipal courts takes into account what the parties may reasonably have intended; it is in this way that endeavours have been made to fill the gaps in texts.

For this purpose the subject and purpose of the convention is to be taken into account. The rule *in claris non fit interpretatio* has been well commented on by Anzilotti, who pointed out that it is not possible to say that an article is clear so long as one is unaware of its subject; one only knows the will of the parties when one knows what the aim intended was (dissenting opinion, *P.C.I.J., Series A/B, No. 50*, p. 383; an idea accepted by the American Law Institute, *Restatement* 1965, para. 147, p. 455). Much earlier, Vattel had drawn attention to the importance of the reason for an act: "when once the purpose which has led the speaker to act is clearly known his words must be interpreted and applied in the light of that purpose only" (*The Law of Nations*, Book 2, Chap. 17, para. 287, Fenwick's translation). Finally, it has been possible to assert that it is thanks to the aim indicated by the expressions of will that the convention as a whole acquires an objective unity of meaning *(objektive Sinneinheit)* (Dahm, *Völkerrecht*, Vol. III, p. 50).

It is of interest for the question now under study to observe that in all internal systems of legislation, in order to reach this result, the nature of contracts and agreements is taken into account. "Contracts bind not only to what is expressly stated therein, but in addition to all consequences attached to the obligation according to its nature by equity, custom, or law" (French Civil Code, Article 1135; for the Common Law see *Windfield on Contracts*, p. 38). It should also be remarked that technical terms like "mandate" or "trust", should be interpreted in accordance with their technical meaning (Lauterpacht, *The Development of International Law by the International Court*, p. 60). The necessary conclusion is that even a clause which is reasonably clear cannot be interpreted literally if by so doing one reaches a result which is contrary to the purpose of the treaty (*P.C.I.J., Series A/B, No. 64*, p. 19; *contra*, see dissenting opinion of three judges, *ibid.*, p. 26). If, in the case just referred to, the Court had proceeded in accordance with the majority view, it would have lent its sanction to the *fraus legis* proposed by the Albanian Government. *Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit* (*Digest*, 1, 3, 29). All treaties must be interpreted so as to exclude fraud and so as to make their operation consistent with good faith (Oppenheim-Lauterpacht, Vol. I, Sec. 544, para. 13).

Finally, it may be observed that a modern author, and one made much of in the arguments of South Africa, states and emphasizes the need to use the teleological method (Dahm, *Völkerrecht*, Vol. III, pp. 43 ff.).

3. Multilateral treaties, conventions establishing an international organization and above all the Charter, are subject to particular rules of interpretation.

The Charter would appear not to fall within the framework of the Convention on the Law of Treaties. To interpret it, one should not apply by analogy the rules of municipal law on contracts, but rather rules for the interpretation of laws and statutes (*Restatement*, *loc. cit.*, para. 146, p. 1965; Dahm, *loc. cit.*, Vol. III, p. 55).

It should not be forgotten that the General Assembly and Security Council have the responsibility of promoting the purposes laid down in the Charter. They cannot remain bound by the possible intentions of the draftsmen, not only because it is difficult to know what those intentions were (while the intentions of those who speak are known, the intentions of those who give their vote in silence are not), but also because interpretation necessarily undergoes a process of development, and, as in municipal law, must adapt itself to the circumstance of the time and to the requirements, so far as they are foreseeable, of the future. The text breaks away from its authors and lives a life of its own (dissenting opinions of Judge Alvarez, *I.C.J. Reports 1950*, p. 18, and *I.C.J. Reports 1951*, p. 53; Dahm, *loc. cit.*, Vol. III, p. 55).

In the United Nations, "each organ must, in the first place, at least, determine its own jurisdiction" (*I.C.J. Reports 1962*, p. 168). When an organ adopts a resolution, "there must arise at the least a strong *prima facie* presumption" of validity and propriety (separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, p. 204). It has even been considered that the resolutions of the Assembly and the Council, the practice of those organs, *facta concludentia*, could be considered as constituting an official interpretation *(interprétation authentique)* (cf. Dahm, *loc. cit.*, p. 50), involving in any case a duty to carry them out so far as questions which relate to "peace-keeping, dispute-settling and, indeed, most of the political activities of the Organization" are concerned (separate opinion of Judge Sir Gerald Fitzmaurice, *I.C.J. Reports 1962*, p. 213).

Concerning the United Nations Organization, the Court has said:

> "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged" (*I.C.J. Reports 1949*, p. 179);
>
> ". . . the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" (*I.C.J. Reports 1949*, p. 180).

On the interpretation of the Charter it has been said that:

> "It may with confidence be asserted that its particular provisions

should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter, something to compel a narrower and restricted interpretation" (separate opinion of Judge Sir Percy Spender, *I.C.J. Reports 1962*, p. 185).

The teaching of the Court is, in fact, that for the interpretation of the Charter account must be taken of its fundamental purposes, and it must be recognized that it has the powers which are necessary to achieve them "by necessary implication" (*I.C.J. Reports 1949*, p. 182; separate opinion of Judge Sir Gerald Fitzmaurice, *I.C.J. Reports 1962*, pp. 208-215); "when the Organization takes action which . . . [is] appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization" (*I.C.J. Reports 1962*, p. 168). One may therefore regard as an authoritative criterion the following conclusion: "The meaning of the text will be illuminated by the stated purposes to achieve which the terms of the Charter were drafted" (separate opinion of Judge Sir Percy Spender, *ibid.*, p. 187).

III. The Validity of the Resolutions

A. General Observation

In view of the nature of the Charter and the powers of the principal organs of the United Nations, the presumption in favour of the validity of the resolutions of those organs must be taken to be based upon their power to interpret the Charter, and to do so *ex factis*, that is to say by the very fact that they have adopted a resolution.

To challenge the validity of a resolution, it is not sufficient merely to allege that it is possible to find a better interpretation; a resolution can only be criticized if it is demonstrably absolutely impossible to find any reason whatsoever, even a debatable one, upon which an interpretation favourable to the validity of the resolution may be based.

B. The Abstention of the Permanent Members

It has been said that:

> "It is already well known that an unwritten amendment to the Charter has taken place in the practice of the Security Council, namely, to the effect that the abstention of a permanent member present at a meeting is not assimilated to the exercise of the right to veto" (dissenting opinion of Judge Bustamante, *I.C.J. Reports 1962*, p. 291; see also *I.C.J. Reports 1962*, pp. 172, 175 and 176, and with certain reservations, separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, p. 210).

In fact this interpretation of abstentions is not merely based upon an undisputed practice [1], it also necessarily follows from the nature of silence, and from the purpose of the right of veto [2].

Silence must be interpreted according to the situation and the circumstances, it may indicate a negation, but it may also mean an acceptance. In the voting of the Security Council, according to the customary interpretation, the abstention of a member may mean that that member has some doubt as to the validity of the resolution, but does not wish to prevent it being adopted. It is not a matter of mere silence, but of an abstention which, it is known, will be taken as an intention not to prevent the adoption of the resolution.

Furthermore, the condition of the "affirmative vote", required by Article 27 of the Charter, may just as well apply to the content of the resolution as to the adoption of the resolution. At the last moment, subject to the possibility of an express reservation by one member, an affirmative vote takes place on the validity of the resolution. The permanent members are not obliged to vote in any particular way, and they may express their position by abstaining.

Nor can it be overlooked that the right of veto is a privilege, and that therefore it can be renounced and can be modified *in meius*; and in any case that it should not be interpreted extensively *(privilegia restringenda sunt)*.

The 1965 amendment of the Charter confirms this interpretation. The practice of the Council regarding abstentions was known to the draftsmen, and if the text was not altered on this point, it would appear that it was because it was not intended to change the previous practice.

C. The Resolutions of the Security Council

(a) *Article 24 of the Charter*

The restrictive interpretation proposed by South Africa cannot be accepted.

The Council has "primary responsibility for the maintenance of . . . peace". It seems undeniable that the illegal occupation of a territory with

[1] Stavropoulos, "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations", *The American Journal of International Law*, Vol. 61, No. 3, July 1967, pp. 737-752.

[2] In the time of the League of Nations, Art. 19, para. 5, of the Rules of Procedure of the Assembly provided that representatives who abstained from voting were to be considered as not present. Rolin explains this by saying that it is undesirable that the indifference or doubts felt by certain Members on a question on which it is certain that the other Members will be unanimous should be able to prevent it being voted; if one Member does not consider itself justified in using its right of opposition when unanimity is required, it may abstain without rendering the vote invalid. This is an interpretation, according to Riches, by which those who abstain are regarded as having given tacit approval to the action of the Assembly: *The Unanimity Rule and the League of Nations*, Baltimore, 1933, p. 43.

regard to which the United Nations has accepted "a sacred trust" is an act contrary to the maintenance of peace.

The Court has said that it must be acknowledged that the Charter, by entrusting certain functions to an organ, with the attendant duties and responsibilities, has conferred upon that organ the competence required duly to discharge them (*I.C.J. Reports 1949*, pp. 179 and 182; *I.C.J. Reports 1954*, p. 57).

Paragraph 2 of Article 24 does not make a restrictive interpretation inevitable [1]. The reference to the "specific powers granted to the Security Council" by Chapters VI, VII, VIII and XII does not mean that it has only those powers. Not merely may it have those provided for in other provisions of the Charter, but in addition it must have those which are necessary to it for the fulfilment of its duties. The words "the specific powers granted . . ." simply mean that in the Chapters referred to, these powers are regulated in a particular way for the fulfilment of the duties and responsibilities in question.

For the purpose of examining the jurisdiction of the Security Council with regard to mandates, the mention of Chapter XII in Article 24 of the Charter is of great importance.

The principal purpose of Article 80, as we shall have to demonstrate, is to avoid any alteration of the rights of peoples subject to mandate, directly or indirectly, in any manner whatsoever. When the League of Nations came to an end, the United Nations took over the responsibility of the League towards those peoples. The mention of Chapter XII in Article 24 leads to the view that the Council has the specific powers necessary for the fulfilment of its duties toward the peoples under mandate.

It is very possible that those who drafted Article 24 were not thinking of Article 80, but it is also probable that those who drafted Article 80, or the majority of them, would have accepted this interpretation, in view of their interest in the conservation of the rights of the peoples subject to mandate.

However that may be, the wording of Article 24 does not permit of Article 80 of Chapter XII being excluded without special reason; the purpose of Article 24, which is to maintain international peace and security, through respect for the purposes and principles of the United Nations, calls for Article 80 to be taken into account. The object of Article 80 with regard to the conservation of the rights of the peoples subject to mandate can only be achieved if the Security Council possesses the necessary competence.

This being so, if there is no convincing reason why Article 24 should be given an interpretation which is restrictive and contrary to its clear

---

[1] The principal responsibility entrusted to the Council requires that it be regarded as having a residual competence: Castañeda, *Legal Effects of United Nations Resolutions*, 1969, p. 72.

terms, Article 24 must be interpreted as meaning that the Organization has entrusted to the Council powers which are sufficient for the United Nations to perform its duties, in accordance with Article 80.

(b) *The Non-Abstention of the Members Parties to a Dispute (Art. 27, para. 3, of the Charter)*

The argument based on this observation by South Africa loses its force once it is clear that it is impossible to describe its refusal to fulfil its obligations as Mandatory as a "dispute", as has just been observed.

(c) *South Africa Was not Invited to Participate in the Discussions of the Security Council (Art. 32 of the Charter)*

This argument falls away if there is no dispute. South Africa had an interest in the discussions; but not merely was it not a party to a dispute, but also it did not take the trouble to see that it was invited, which is an indication that it did not, at that time, consider that it was a party to a dispute in the legal sense.

D. General Assembly Resolution 2145 (XXI)

Doubt has been cast on the validity of this Assembly resolution, on the ground that the competence of the Assembly is confined to making recommendations (Art. 10 and Art. 11, para. 2, of the Charter). The Court has already endeavoured to resolve this doubt. "While it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies, the making of recommendations; they are not merely hortatory" (*I.C.J. Reports 1962*, p. 163). "The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action" (*ibid.*, p. 164).

It should not be forgotten that Article 18 refers without distinction to recommendations and to decisions of the Assembly. Among the recommendations on "important questions", there are some which "have dispositive . . . effect" (*ibid.*, p. 163).

Among these "important questions", mention is made of "questions relating to the operation of the trusteeship system", that is to say, questions relating to Chapter XII of the Charter ("international trusteeship system"). One of the rules in question is Article 80, which settled what the position of mandates would be up to the time when the mandated territories would be placed under the trusteeship system [1].

[1] At the 37th meeting of the Coordination Committee it was said that "Discussion of the new phrase from Committee II/1 'questions relating to the operations of the trusteeship system' brought an understanding that the questions embraced trust agreements, decisions on reports, and everything else relating to the system"(UNCIO docs., Vol. XVII, p. 324, quoted in *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South West Africa*, p. 49).

If it is recognized that the United Nations accepted the transfer from the League of Nations of the "sacred trust" of guarding against any modification of the rights of any people under mandate, and if it is recognized that this is one of the purposes of the Charter, it must also be admitted that the Assembly has the powers necessary for the fulfilment of its duties (see separate opinion of Sir Percy Spender, *ibid.*, pp. 186-187).

The terms of the resolution, which declares that South Africa "has failed to fulfil its obligations in respect of the administration of the mandated territory", and that it "has, in fact, disavowed the Mandate", and that the Mandate is "terminated", clearly show the nature and the purpose of the resolution.

The resolution does not of itself lay any special obligation on States other than South Africa. It confines itself to noting and declaring the forfeiture of the Mandate [1]. Since the resolution was passed, the Mandate, the only title justifying possession of the Territory of South West Africa, has lost any appearance of continued existence. This is a new situation and one which must be respected by all, in view of the competence of the United Nations in this regard.

Resolution 2145 (XXI) is certainly not judicial in nature, it does not encroach, and does not involve any encroachment, on the competence of the Court. The United Nations believed that the time had come to fulfil its duties towards the people of Namibia by solemnly withdrawing any semblance of legality from South Africa's occupation of the Territory.

The resolution "calls the attention of the Security Council to the present resolution". This shows that the Assembly is confining itself to its declaratory function, in accordance with Articles 80 and 18 of the Charter, and that it is requesting the co-operation of the Security Council so that the latter may determine the kind of action appropriate to the situation.

The Security Council has reaffirmed the special responsibility of the United Nations with regard to the people of Namibia (resolution 264 (1969)), called upon South Africa to withdraw its administration from the Territory of Namibia (resolution 269 (1969)) and reaffirmed resolution 2145 (XXI). In other words it has adopted the resolutions of the Assembly, affirmed them afresh, and taken a step towards coercive measures.

[1] Resolution 2145 (XXI) is the manifestation of the exercise of a power coupled with a duty *(officium)* of the Assembly, with a view to the fulfilment of the "sacred trust" entrusted to it by the Organization. Through this, the Assembly has the faculty and the duty to declare terminated the administration which had been entrusted by the international community to the Mandatory, to be exercised on its behalf, when the Mandatory has shown itself unworthy of that confidence. By resolution 2145 (XXI), the General Assembly modified the legal situation of the mandated territory, and with that resolution the legal title of the former Mandatory to possession of the Territory of South West Africa or Namibia disappeared: this is a change in the status of the Territory which must be respected by all.

Examples might be given of earlier resolutions which change a legal situation, and also give rise to legal consequences (obligations, rights) on the basis of other provisions of the Charter or other resolutions (for example of the Council); see Castañeda, *loc. cit.*, p. 121.

IV. Transmission of Powers of the League of Nations to the United Nations

A. Article 80 of the Charter

1. South Africa is the only mandatory State ever to have raised this question. According to its contention, the Mandate for South West Africa came to an end with the dissolution of the League of Nations or, at any event, the obligation to make annual reports concerning the Territory came to an end. In its 1950 Advisory Opinion the Court affirmed that the Territory was still under mandate and that South Africa still had the obligations flowing from the Mandate, the supervisory functions being exercised by the United Nations.

Judges McNair and Read expressed a contrary view. They considered that the League of Nations' supervision of the Mandatory had come to an end, because, the organs designated to receive the reports no longer existing, it had become impossible to perform this obligation (*I.C.J. Reports 1950*, pp. 159 and 169; dissenting opinion of Judge van Wyk, *I.C.J. Reports 1962*, p. 648) [1].

This narrow interpretation has been clearly discarded by the Court. In *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections*, the Court had to decide whether it had jurisdiction on the basis of a treaty containing a clause conferring jurisdiction on the Permanent Court. It was argued that the dissolution of the Permanent Court made it impossible to apply that provision (dissenting opinion of Judge Morelli, *I.C.J. Reports 1964*, pp. 95 f.). But the Court found on the contrary that the Permanent Court "was merely a means for achieving that object", namely "judicial settlement"; while it was true that the former Court no longer existed, the obligation remained "substantively in existence, though not functionally capable of being implemented", and if another tribunal were "supplied by the automatic operation of some other instrument by which both parties are bound", the clause again came into force (*ibid.*, pp. 38 f.). The important thing was the purpose and not the instrument. Consent to the transfer of powers resulted from membership of the United Nations (*ibid.*, p. 35).

The authority of the 1950 Opinion has been firmly established. It was confirmed not only by the 1955 and 1956 Opinions, but also by the 1962 Judgment in the *South West Africa* cases (*I.C.J. Reports 1962*, pp. 333 f.). Moreover the Court has clearly rejected the arguments of Judges McNair and Read (*Barcelona Traction* case).

The joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice in the *South West Africa* cases reverted to the prob-

[1] Judges McNair and Read did not consider that South Africa had been relieved of its obligations as the Mandatory, but that their performance could be demanded only by former Members of the League and by application to the International Court of Justice.

lem of the transmission of powers, rejecting the 1950 Opinion as "definitely wrong" (*I.C.J. Reports 1962*, p. 532, note 2). As this criticism relates to the interpretation of Article 80 and to its background, careful study of these matters would seem to be called for (*ibid.*, p. 516, note 1), particularly as the Court stated in 1966 that it did not wish to prejudice the question (*I.C.J. Reports 1966*, p. 19).

Article 80 cannot be properly interpreted without considering its purposes and the historical context of the time when it was drafted. The framers of the Charter were determined not only to maintain the progress made in the protection of indigenous peoples by the League of Nations under the mandates system, but also to intensify it through the trusteeship system.

The Charter, including Article 80, was signed on 26 June 1945. The League of Nations still existed. Before its dissolution, the trusteeship system and Article 80 *could not* be implemented. As the States and experts involved in the creation of the United Nations and the liquidation of the League of Nations were practically the same, it was possible to frame the Charter with the forthcoming liquidation of the League of Nations in mind.

Article 80 could not be applied at once. It had no function until the League of Nations was liquidated. The mandates were still exercised on behalf of the League of Nations, and until its liquidation they could not be converted into trusteeships or come under the supervision of the United Nations. The operation of Article 80 was subject to a suspensive condition. It was with a view to the time when it would come into operation that the provision which has been called a "conservatory" clause was included. This clause stipulates that the provisions of Chapter XII (particularly Arts. 75 and 77) would not alter the existing mandates régime. But in addition provision was made for a transitional régime, for the period which must elapse between the liquidation of the League of Nations and the conclusion of trusteeship agreements. This transitional régime related only to the territories administered under the mandates system, namely "territories now held under mandate", because there was no possibility of placing the other territories listed in Article 77 under the transitional régime by the mere application of the provisions of the Charter.

For the territories still held under mandate, it was provided that none of the new provisions of the Charter would "in or of itself . . . alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties". These territories therefore remained, until the conclusion of trusteeship agreements, "held under mandate" (Art. 80; Art. 77).

2. The interpretation proposed seems closely in accordance with the Advisory Opinion of 1950. But one may not overlook the fact that that Opinion has been criticized by certain authorities. It has been main-

tained that Article 80 is no more than a "saving clause" designed to prevent the provisions of Chapter XII from "being *interpreted* so as to operate beyond their intendment" and that its "sole purpose" is to prevent them from "being construed so as to alter existing rights prior to a certain event" (joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, *I.C.J. Reports 1962*, p. 516, note).

These assertions are based on a phrase in the Article ("nothing . . . shall be construed . . . to alter . . ."), but they fail to give any explanation as to the purpose of the Article or the rights it is meant to conserve. Now it is impossible to admit without any explanation that the sole function of Article 80 can have been that of an interpretation clause in the technical sense.

Certain explanations have therefore been put forward. Article 80 has been said to relate to the rights conferred by mandates, but only for the period intervening between the entry into force of the Charter and the liquidation of the League of Nations. It has also been regarded as concerning the rights derived from trusteeship agreements.

But these efforts have been of no avail. They do not take account of the fact that the rule embodied in Article 80 is applicable only "until such [trusteeship] agreements have been concluded". Thus it is applicable *after the liquidation* of the League of Nations *and until* the conclusion of such agreements, and it is *not* applicable *after the conclusion of the agreements*.

The interpretation put forward by the 1950 Advisory Opinion would therefore appear to be the only one in conformity with the purpose and the letter of Article 80. It is true that the wording of that clause is not very clear, but a reading of the *travaux préparatoires* gives the impression that it is the result of the draftsmen's concern to take several purposes into account and to harmonize them in the Article.

Nor should the desiderata of the international trusteeship system be forgotten. Its establishment depended on the trusteeship agreements, and it was desired to maintain the status quo until they had been concluded. The Charter declares, in Article 76, that the basic objectives of the trusteeship system are in accordance with the purposes of the United Nations laid down in Article 1. The question was whether that declaration affected the rights of the mandatory Powers. To remove doubt on that score, it was decided to provide that nothing in Chapter XII should be construed to alter the rights whatsoever of any State (the reservation at the end of Art. 76 *(d)* was inserted with the same end in view). To keep the mandates system as such intact, it was also thought necessary to provide that nothing in the Chapter concerning the end of mandates could be construed to alter the rights of peoples. Finally, to avoid any form of words capable of suggesting a prolonged survival of mandates, they were not referred to, except by way of a reminder that they should be replaced by trusteeship agreements. Using the term "interpret" in the somewhat non-technical sense in which "*interpréter*" is employed in the French

text (the English text has "construe"), paragraph 2 of Article 80 states that paragraph 1 should not be "interpreted" as giving grounds for delay or postponement of the negotiation and conclusion of trusteeship agreements.

There are also other reasons for considering that the interpretation given by the 1950 Advisory Opinion was correct.

Interpreted as a mere "saving clause", Article 80 is really reduced to nothing, to total pointlessness. If the view is taken that the liquidation of the League of Nations put an end to the mandates or to the obligations of the mandatories, the Article is deprived of all practical meaning. In this sense Judge MacNair was right in saying "that it is difficult to see the relevance of this Article" (*I.C.J. Reports 1950*, p. 160). But can a method of interpretation be a good one if it leads to the absurd conclusion that an Article of the Charter is totally pointless?

3. The history of Article 80 has been thoroughly studied, as is apparent in the Court's publications in the *South West Africa* cases. To examine it afresh would be unnecessarily to burden this opinion; but it may be of use to reproduce a few texts with which the Court was already acquainted in 1950.

On 14 May 1945 at San Francisco, in Committee II/4, the delegate of South Africa said that "the terms of existing mandates could not be altered without the consent of the mandatory Power". It was his concern to protect the rights of States in the period preceding the conclusion of trusteeship agreements, whereas the delegate of Egypt expressed concern for the preservation of the rights of peoples administered under mandate. This led to the proposition of the United States delegate, to the effect that: "all rights, whatever they may be, remain exactly the same as they exist—that they are neither increased nor diminished . . ." (UNCIO docs., Vol. X, pp. 439 and 486, quoted in *I.C.J. Pleadings, International Status of South West Africa*, p. 98). In the same sense, Mr. Stassen said that the purpose was "to preserve the rights during that in-between period from the time this Charter is adopted and the time that the new agreements are negotiated and completed" (8 June 1945: running numbers 24, 25. UN Archives, Vol. 70, quoted in *I.C.J. Pleadings, ibid.*, p. 217).

In Commission II of the San Francisco Conference, Mr. Fraser (Prime Minister of New Zealand), the president of the Trusteeship Committee, said with regard to the report of that Committee: "The Mandate does not belong to my country or any other country. It is held in trust for the world." He also stated that:

> "The work immediately ahead is how those mandates that were previously supervised by the Mandate Commission of the League of Nations can now be supervised by the Trusteehip Council."

Mr. Fraser was the last speaker on the report, and when he had finished,

Field Marshal Smuts, presiding, declared it adopted in full (UNCIO docs., 1144 (21 June 1945) and 1208 (27 June 1945), quoted in *I.C.J. Pleadings, ibid.*, p. 108).

Field Marshal Smuts, the Prime Minister of the Union of South Africa, replied to a question put to him on the meaning of paragraph 2 of Article 80 by saying:

> "That was to prevent a situation where the mandatory says: 'I do not want to make an agreement at all'. He takes this position, that the League of Nations having disappeared we are now free, that we can do what we like" (Union of South Africa, Debates of the House of Assembly, 13 March 1946, quoted in the statement by Mr. Ingles (Philippines), *I.C.J. Pleadings, ibid.*, p. 242).

4. Article 80 is also the basis of reference or support for the League of Nations resolution of 18 April 1946 [1]. The dying League of Nations could be easy in its mind because the principles of the Charter were the same as those of Article 22 of the Covenant, the principle of the well-being and development of peoples not yet able to stand by themselves being preserved. Having by their signature of the Charter endorsed Article 80, the mandatories manifested their intention to continue to administer the territories in accordance with Article 22 of the Covenant and the mandate instruments.

The conclusion that South Africa remained subject to the international obligations contained in Article 22 of the Covenant and that the supervisory functions with regard to their performance were to be carried out by the United Nations is thus based on the acceptance by the mandatory of Article 80 (because it signed the Charter), the resolution of 18 April 1946 (which declared the functions of the League of Nations to be at an end and stated its agreement with the provisions of the Charter) and the statements whereby the mandatories announced their intention of continuing to administer the mandated territories in accordance with the obligations set out in the various mandates.

5. These conclusions have been severely criticized and doubt has been cast on the authority of the 1950 Opinion on the basis of what has been called the "new facts"—facts which it is claimed were unknown to the Court in 1950. But the study of the background, looked at with an open mind, would seem to lead to a contrary result [2]. The basic concern of most of the framers of the Charter and of the liquidators of the League of

---

[1] On the subject of the understanding that the United Nations was to continue the work of the League, see the preamble to the League Assembly's resolution of 19 April 1946 and the observations of the Rapporteur and Chairman of the First Committee (cited in *I.C.J. Pleadings, International Status of South West Africa*, pp. 209 f.).

[2] See the excellent account of the matter given by Judge Jessup in a dissenting opinion: *I.C.J. Reports 1966*, pp. 339-351.

Nations was to preserve the rights of peoples and the safeguards for those rights, and only secondarily the rights of States (the open-door question).

From the information provided by South Africa itself at the hearing of 15 March 1971 concerning the background to the drafting of Article 80, it appears that, in the text proposed by the Technical Committee, it was provided that nothing should in and of itself alter the rights of any States or any peoples "or the terms of any mandate". An Egyptian proposal also referred to "the terms of any mandate". The United States spoke of "a conservatory or safeguarding clause", whereby all rights would remain the same and be "neither increased nor diminished". The Syrian proposal also referred to "the terms of any mandate". The Consultative Group proposed that what should be specified as not being altered were the rights whatsoever . . . "or the terms of existing international instruments". The United States asked that it should be placed on record that among "rights whatsoever" were included any rights provided by Article 22, paragraph 4, of the Covenant. The Coordination Committee indicated that the intention of Committee II/4 was "to freeze the present position".

In these discussions the Soviet Union said it feared that the preservation of the former mandate régime unchanged might be used as a pretext to delay the conclusion of trusteeship agreements and indefinitely perpetuate the mandates.

Once the Charter had been signed [1], the League of Nations concerned itself with ensuring the continuation of its work with a view to the protection of the peoples under mandate. Dr. Liang proposed in the First Committee, which was discussing the transmission of the League of Nations' functions, a draft recommending that the mandatory Powers should submit annual reports to the United Nations until the Trusteeship Council had been constituted. This draft was not accepted, as it was outside the Committee's terms of reference. Later, when the time came to discuss the mandates, Dr. Liang submitted another draft in which no reference was made to annual reports, and which was to provide the basis for the resolution of 18 April 1946. The withdrawal of Dr. Liang's first draft, and the wording of the new draft, have been regarded as providing a reason for rejecting the view of the 1950 Advisory Opinion that the League's functions passed to the United Nations (separate opinion of Judge van Wyk, citing the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, *I.C.J. Reports 1966*, p. 112). But if the Liang draft was abandoned, it was not because it provided for the transmission of functions; it was because it was unrealistic in the sense that reports could not simply be sent to the General Assembly. Some

[1] It is noteworthy that during the ten meetings held by Committee II/4 Argentina, Ethiopia and Guatemala expressed reservations in respect of Article 80, but South Africa did not.

specialized machinery was necessary and that, in the view of the Soviet Union, could be a pretext for delaying the institution of the Trusteeship system.

There was also concern in the United Nations with regard to the need for some organized machinery to supervise the administration of the mandatories, hence the idea of a temporary trusteeship committee as proposed by the United States. If this met with no success it was because of the opposition of the Soviet Union, which regarded all these proposals as a way of prolonging the mandates system and staving off the trusteeship system.

There is no reference to non-transmission of functions to the United Nations, or to the extinction of the mandatories' obligations.

On the contrary, States affirmed their readiness to discharge their obligations as mandatories in accordance with the spirit of the mandates. The general interest appeared to be to seek to ensure the transfer to the United Nations of the functions and responsibilities of the mandates system (South African written statement, Chap. VIII, para. 13).

For its part, Belgium stated (11 April 1946) that it was "fully alive to all the obligations devolving on Members of the United Nations under Article 80 of the Charter".

South Africa stated that it was prepared to apply the principles laid down in the Charter (23 December 1945), that it was conscious of its obligations and responsibilities as a signatory of the Charter (17 January 1946), and that "according to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded" (22 January 1946). South Africa also recognized the transmission to the United Nations of the powers concerning the mandates, since it requested the General Assembly to agree to the annexation of South West Africa. Finally, in the letter of 23 July 1947, there was a reference to the continuation of the submission of reports.

The Assembly's resolution of 18 April 1946 is of great importance. It is based on Dr. Liang's draft. In proposing the new draft, Dr. Liang indicated that the functions of the League of Nations were not transferred automatically to the United Nations. The appropriate administrative organ was lacking. The League of Nations should take steps to secure "the continued application of the principles of the mandates system". He quoted Professor Bailey to the effect that "the League would wish to be assured as to the future of mandated territories". In supporting Dr. Liang's proposal, France stated that the dissolution of the League was not to be regarded as weakening the obligations of the mandatory States.

6. The resolution of 18 April 1946 recalled the basic principle of the mandates system, which was to ensure the well-being and the protection of the peoples under mandate (Art. 22 of the Covenant). It recognized the ending of the functions of the League of Nations while accepting its replacement by the United Nations (the Charter containing provisions

which could be implemented on the dissolution of the League of Nations), and noting that the principles of Article 22 had been embodied in Chapters XI, XII and XIII of the Charter. The concordance with Article 80 will be noted. The League of Nations was satisfied that the protection of the peoples under mandate would be ensured by the United Nations, as it had been under Article 22 of the Covenant.

To make doubly sure, the resolution solemnly placed on record the statements whereby the Members of the League administering territories under mandate expressed their intention of continuing to administer them in accordance with the obligations contained in the respective mandates.

Once the League of Nations had been dissolved, the concern of all States except South Africa was the rapid conclusion of trusteeship agreements. The lack of any body to which reports could be submitted is attributable to the fear of delaying the conclusion of trusteeship agreements. However there is no evidence that there was any doubt as to the transmission to the United Nations of the powers regarding mandates. On the contrary, the decision of the Organization was awaited (even by South Africa) before declaring that the mandates had come to an end.

7. To dispel misunderstanding, it would be as well to clarify the significance of Chapter XI of the Charter and of Article 73, which forms part of it.

To consider the declaration regarding non-self-governing territories as applying only to territories under neither mandate nor trusteeship is to obscure the sense of it. Both the wording and the history of Article 73 show that it is of general application.

In the course of the first stages of drafting the Charter, the provisions of Chapter XI were in the same chapter as the articles of what is now Chapter XII. If Section A became a separate chapter (now Chap. XI), it was because it was thought inappropriate to include a general declaration in the chapter governing the trusteeship system. But this has not diminished the general nature of Article 73.

When presenting the report of Committee II/4 to Commission II, Field Marshal Smuts explained the scope of Section A (which became Chap. XI) by saying that Section A applied the trustee principle to all dependent territories, whether they were mandated, territories taken from defeated countries, or existing colonies of Powers. That covered the whole field of non-self-governing territories. (UNCIO docs., Vol. VIII, p. 127.) Mr. van der Plas pointed out that the declaration in Article 73 applied to all non-self-governing territories, to those of colonial status on a voluntary basis and to those of a trust status, among the obligations assumed for them, on a contractual basis (Coordination Committee, summary record of 37th Meeting, quoted in *I.C.J. Pleadings, International Status of South West Africa*, p. 39).

The text of Article 73 shows that the declaration regarding non-self-governing territories applies to "territories whose peoples have not yet

attained a full measure of self-government", without mention of any exception. It does not appear that anyone interpreting the text is entitled to exclude non-self-governing territories such as mandated or trusteeship territories.

Of course the obligations imposed upon the States administering mandated or trusteeship territories are wider than those provided in the case of other non-self-governing territories, but the declaration in Article 73, being general and supplementary, is applicable to all non-self-governing territories.

Article 73 took over from Article 22 of the Covenant the principle of the "sacred trust" and of the temporary nature of the administration of the territories ("territories whose peoples have *not yet* attained a full measure of self-government"). This explains the reference made by the League of Nations resolution of 18 April 1946 to Chapter XI of the Charter.

During the first few years South Africa submitted reports to the United Nations. It stated at times that it was a matter of supplying information in accordance with Article 73. But the fact that South Africa vouchsafed certain interpretations *a posteriori* and referred expressly to Article 73 does not imply that it had thereby cast off its position and obligations as a mandatory; it was carrying out the duties generally laid upon mandatories.

8. An additional argument against the transmission of powers has been sought in resolution XIV of 12 February 1946 concerning the transfer of certain functions and activities. It contains no reference to the mandates, and the conclusion has been drawn from this omission that there was no transmission. This is an inexplicable argument, as the Sub-Committee of the Executive Committee which dealt with the possible transfer of League of Nations functions and activities expressly stated that the question of the mandates was outside its terms of reference. This is natural, for the question had already been settled by Article 80 of the Charter on the United Nations' part and by the resolution of 18 April 1946 on the League of Nations' part [1].

9. There is also powerful support for the 1950 Advisory Opinion in the principles of municipal law.

Lauterpacht recalls that the essence of the mandates system was the administration of the territory in the interests of the indigenous peoples; to hold that this could be secured without supervision would have been to reduce to a form of words the decision of the Court. He adds that seldom was there a more compelling occasion for applying—as the Court did in

[1] It should not be forgotten that the caesura between the League and the United Nations is political, not functional; see the observations of Bailey and Bourquin and the preamble of the League resolution of 18 April 1946, in *I.C.J. Pleadings, International Status of South West Africa*, p. 209 and note 1.

fact—the *cy-près* doctrine (*The Development of International Law by the International Court*, p. 279).

Under that doctrine, which applies specifically in the case of charitable trusts, a court must decide "as near as possible", by changing the trustee or the method of administration in the interests of the beneficiary when this is necessary in view of the circumstances (Bogert, *Handbook of the Law of Trusts*, 1952, p. 568; Keeton, *Law of Trusts*, 1939, pp. 148 f.; Hanbury, *Modern Equity*, 1946, p. 227; Keeton, *Social Change in the Law of Trusts*, 1958, p. 96).

In other systems of law there is no doubt that if the existing supervisory organ in a tutelage situation is abolished and another is established (if for example a *conseil de famille* is replaced by judicial supervision) the guardian becomes accountable to the new organ.

10. In reality the interpretation of Article 80 by the Court in 1950 has the virtue of preventing the mandate being used to create a title for annexation; it has the virtue of preventing *fraus legis*.

B. The Unanimity Rule in the Covenant of the League of Nations

1. An indirect but effective way of arguing against any transmission of powers to the United Nations in respect of the mandates is to point to its practical impossibility, because the unanimity rule operated in respect of decisions by the League Council, and because the mandatory was present at the meetings of the Council either as a member or on the invitation of the Council owing to its interests being specially affected (Covenant, Art. 5, para. 1, and Art. 4, para. 5). A right of veto was thus conferred on the mandatory, emptying the League's supervisory rights and duties of any substance and making it impossible for the League to transmit them; no power or practical function could have passed to the United Nations.

2. It is therefore necessary to study the unanimity rule and the possibility of its application to a Member of the League of Nations which was a mandatory.

At the time of the Opinion requested of the Court on the *International Status of South West Africa*, South Africa argued energetically and forcibly that the Mandate had lapsed, but did not mention the unanimity rule. It was only after the 1950 Opinion and the setting up of the Committee on South West Africa, in the discussions of the Committee and of the Assembly devoted to the implementation of the Opinion, that the Government of the Union of South Africa opposed the proposals of the Committee, claiming that they "would not, *inter alia*, safeguard the rule of unanimity which was provided for in the Covenant of the League of Nations [1]".

[1] Letter of 25 March 1954 from Permanent Representative of South Africa to

This argument impressed the Committee, whose members were divided in their views. The General Assembly found itself faced with two proposals. Under one of them, resolutions were to be taken "subject to the concurring vote of the Union of South Africa"; this proposal did not obtain the necessary majority. The other culminated in resolution 844 (IX) of 11 October 1954, by which the Court was asked to give an opinion on the voting procedure on questions relating to South West Africa, in particular on the question whether the application of Article 18, paragraph 2, of the Charter was in conformity with the 1950 Opinion, and in the affirmative, as to the voting procedure which the General Assembly should follow. (See the Dossier transmitted by the Secretary-General of the United Nations, *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, pp. 21 ff.) The Government of South Africa did not take part in the proceedings, but in the Additional Notes in the Dossier transmitted by the Secretary-General (*ibid.*, pp. 38-48) and in the written statement of the United States (*ibid.*, pp. 57-60), the question of unanimity was studied.

In the 1955 Opinion, the Court considered that despite the arguments on the unanimity rule advanced before the General Assembly and the United Nations Committees, it was unnecessary "to deal with the issues raised by these contentions or to examine the extent and scope of the operation of the rule of unanimity under the Covenant of the League of Nations", because the question of the degree of supervision did not include or relate to the system of voting (*I.C.J. Reports 1955*, p. 74). The Opinion states that:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations." (*I.C.J. Reports 1955*, p. 75.)

Consequently, the Court rejected the contention of South Africa that there was incompatibility between the voting procedure contemplated by the General Assembly and the unanimity rule.

The 1950 Opinion had recognized that the General Assembly had the right to exercise the supervisory functions. The 1955 Opinion recognized that it had the power to take decisions regarding the Mandate by a two-thirds majority of Members present and voting. Judge Lauterpacht would have wished the Court to examine the problem of the unanimity rule in

---

Chairman of Committee on South West Africa, Annex I to Report to the Committee on South West Africa, *GA, OR*, Ninth Session, Supplement No. 14, A/2666.

all its aspects (*I.C.J. Reports 1955*, p. 98). The Court did not do so and the question of the application to mandates of the unanimity rule, provided for in the Covenant, remains open.

The Court has nonetheless held, in two successive Judgments that, according to the Covenant and within the framework of the League of Nations, the unanimity rule was applicable to mandates, without having subjected the question to special study.

The 1962 Judgment endeavours to show that the system of judicial protection of the sacred trust contained in each mandate was an essential feature of the mandates system; it stressed the *raison d'être* and the necessity of this evident security, because without it the supervision by the League, and the steps to be taken by the Council, could not be effective, "in either case the approval meant the unanimous agreement of all the representatives including that of the mandatory" (*I.C.J. Reports 1962*, p. 336).

Later the Court based an argument on the unanimity rule, but in order to contradict the necessity argument. The functioning of the mandates system was otherwise, given the unanimity rule (*I.C.J. Reports 1966*, pp. 44-47); "the Council had no means of imposing its views on the mandatory", "in relation to the 'conduct' provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories". "As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the mandate itself, the risk of this was evidently taken with open eyes" (*ibid.*, p. 46).

The authority of the 1962 and 1966 Judgments seems rather weak. They are in clear contradiction with each other and the references to the unanimity rule are *obiter dicta*, intended to reinforce the argument, but which are not the outcome of a special and thorough study of the question [1].

Nonetheless one cannot ignore them. The 1966 Judgment amounts to saying that the unanimity rule laid down in the Covenant is not merely a rule of voting procedure, but it also touches the very essence of the mandates. As a result one must question whether mandates are not thus disguised cessions. Do mandatories have no legal obligations, but only moral obligations? Could the Council of the League of Nations do nothing to check the annexation of a mandated territory?

It therefore seems that the counsel of Sir Hersch Lauterpacht should be followed, and that the question of the unanimity rule should be examined in all its aspects.

---

[1] There were not taken into consideration the arguments and facts based on practice indicated in *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, pp. 38-48 and 57-60; *I.C.J. Reports 1955*, pp. 98-106, and by legal writers, J. F. Williams, "The League of Nations and Unanimity", *American Journal of International Law*, Vol. 19, 1925, p. 475; C. A. Riches, *The Unanimity Rule and the League of Nations*, Baltimore, 1933.

3. If the unanimity rule gives rise to difficulties for anyone who seeks to understand the mandates system, this results in the first place from an error of perspective. Should the question be seen from the point of view of Article 22? It is that Article which we are attempting to interpret. According to its provisions, the purpose of the mandate is the sacred trust towards the natives; the mandatory is the instrument by which the League of Nations effects its civilising task, the admitted consequence being the exclusion of any possibility of open or disguised annexation on the part of the mandatory.

To appreciate the significance of Article 22, its origin must be recalled. Mandates were founded on the Treaty of Versailles. Germany ceded its African colonies on condition that they became mandated territories. The Allied Powers and the League of Nations accepted the territories subject to the duty to ensure that the mandatories to which the territories were entrusted duly accomplished their sacred trust of civilization.

Germany, as a party to the Treaty of Versailles, had a legal interest in the observance by the League of Nations of Article 22. Germany had no right to supervise the administration of the territories [1], but it could complain if the mandates system were transformed into another régime, if a mandated territory became a colony or were annexed.

Article 22 plays a very special part in the Covenant. It created a situation or institution which was independent of the will of the Members of the League. The provisions of the Covenant could be altered by majority vote (Art. 26); the Mandate for South West Africa could be modified with the consent of the Council (Art. 7 of the Mandate). But Article 22 could not be abrogated or modified. The regime was set up for the benefit of the peoples of the territories, and these territories were assigned subject to the obligation to respect Article 22.

This special status of Article 22 is apparent if one considers the structure of the Covenant. This Article is an independent normative entity, foreign even to the remainder of the provisions of the Covenant. Those who drafted it had in fact contemplated that agreements for mandates could be inserted into the Peace Treaty (Hymans Report, quoted in the separate opinion of Judge Jessup, *I.C.J. Reports 1962*, p. 391).

4. The relation between a mandatory and the Council is not the same as that between a Member of the League and the Council. According to the mandate instrument for South West Africa, the Mandatory exercises administration on behalf of the League of Nations (Preamble to the Mandate); it may apply its own legislation to the Territory (Art. 2); it undertakes a series of obligations (Arts. 2-5); it is to make to the Council an annual report to the satisfaction of the Council with full

[1] It is for this reason that Germany's protest against Belgium with regard to Ruanda-Urundi was rejected.

information with regard to the Territory and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5 (Art. 6).

The mandatory therefore comes down from the "platform" of sovereignty. The administration of a mandated territory is not something which falls, either essentially or fortuitously, within the national competence proper to States. The relationship between the Mandator (League of Nations) and Mandatory (South Africa) or, if preferred, between the guardian *(tuteur)* and the authority called upon to supervise its management, is not a relation of equality *inter aequales*, but one of subordination in the field of mandates. A mandatory does not have to administer nor present reports to the satisfaction of the Council as a Member, with the conditions and prerogatives involved in that relationship; it does so as a mandatory which has to give an account of its mandate.

The mandatory cannot play two different and inconsistent parts. It cannot enjoy the advantages connected with the administration of the territory in the robe of a mandatory, and then, after having doffed that, put on the robe of Member of the League of Nations, make use of its right of veto, and evade its obligations as mandatory.

5. Article 5, paragraph 1, of the Covenant lays down the unanimity rule as general "except where otherwise expressly provided in this Covenant". A decisive provision, which appears to exclude the possibility of any implied derogation, or derogation by analogy, if there is no provision expressly contrary to the rule.

But interpretation does not deserve to be so called if it sticks in the bark of the words, superstitiously sacrificing the other rules of law, in the present case, by neglecting Article 22 of the Covenant and the principles inspiring it.

(a) To ascertain the significance of Articles 4 and 5 of the Covenant, it is necessary first of all to study their particular purpose.

At the time of the drafting of the Covenant, the unanimity rule was fundamental as an expression and a safeguard of the sovereignty and independence of States. On the birth of the League of Nations, the need was felt to reassure governments. It was said that "no nation, whether small or great, need fear oppression from the organs of the League" (Lord Cecil, quoted by Riches, *loc. cit.*, p. 22); and it was also said that any scheme would be avoided "under which our own country [the United Kingdom] should be rendered liable to have a recommendation passed against it by a majority vote in a matter vitally affecting the national interests". (Interim Report of the Phillimore Committee, 1918, Riches, *loc. cit.*, p. 3.)

Since such was the purpose, and the sole purpose, of the rule, it was logical for the First Committee of the Second Assembly to

accept the report of the London Committee, which after having explained that the unanimity rule served to safeguard the sovereignty of States, deduced therefrom that unanimity could not be necessary except in cases in which the sovereignty of States was in jeopardy (Riches, *loc. cit.*, p. 98). The Second Assembly "again explained the adoption of the unanimity rule in the first place as a means of protecting 'the rights of State sovereignty', and they further stated that it only needed to be maintained where it served that end (Riches, *loc. cit.*, p. 117).

This unanimity rule protected not only the Members of the League, but all States. In the practice of the Council, it was customary to consider that the right to sit as a member, implying the right to vote, must be applicable also by analogy to countries which were not members of the League.

In addition to this, the reason is well known why there was a divergence between the absolute form of the rule and the limited nature of its object and purpose.

Two of the draftsmen of the Covenant, Lord Cecil of Chelwood and Mr. Scialoja, suggested in 1930, when amendment to Article 13 of the Covenant was under consideration, that it was only by inadvertence that a provision on qualified unanimity had been inserted in some of the articles concerning disputes and omitted from others [1].

(b) The Permanent Court has stated that:

> "It follows from the foregoing that, according to the Covenant itself, in certain cases and more particularly in the case of the settlement of a dispute, the rule of unanimity is applicable, subject to the limitation that the votes cast by representatives of the interested Parties do not affect the required unanimity.
>
> . . . . . .
>
> The well-known rule that no-one can be judge in his own suit holds good.
>
> From a practical standpoint, to require that the representatives of the Parties should accept the Council's decision would be tantamount to giving them the right of veto enabling them to prevent any decision being reached . . ." (*P.C.I.J., Series B, No. 12*, pp. 31-32).

[1] Lord Cecil: "had always held that it must have been by some accident that the rule in the Covenant providing that unanimity should not comprise the parties to the dispute had only been enacted in certain cases. Obviously if it were the right rule it should be applied to all cases of dispute."

Mr. Scialoja: "There was no doubt that . . . it had been simply by an oversight that it had not been said that the votes of the interested parties should not figure in calculating unanimity." (Dossier transmitted by the Secretary-General of the United Nations, *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, p. 41.)

Consequently, it has been possible to observe that:

> "The requirement of unanimity, however expressly stated, is implicitly qualified by the latter principle [the principle that a party may not be judge in its own suit]; and . . . nothing short of its express exclusion is sufficient to justify a State in insisting that it should, by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed." (Separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 104.)

(c) In a study of the unanimity rule, it has been said that "law is the expression of the will of a living organism", and that "the permanency of the organism requires that its constitution should be subject to readjustment to the conditions of its life" (Williams, *loc. cit.*, pp. 475, 485). This is what the League of Nations did.

As early as 1921 it was recommended in a resolution that "pending the ratification of the amendment [of Article 16], the votes of the parties be excluded in determining whether unanimity had in fact been achieved" (Riches, *loc. cit.*, p. 141).

In the same way, and also to avoid the absurd result whereby unanimity rule might prevent the application of Article 26 of the Covenant, it was considered that for the proposal of amendments to the Covenant, unanimity was not necessary and the majority required for amendments was sufficient (Riches, *loc. cit.*, pp. 109, 115).

For disputes might also be cited in which the Council considered its resolutions to be binding despite the contrary vote of one of the parties (see separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 101; Riches, *loc. cit.*, p. 145) [1]. Finally one might quote all the resolutions on questions in which the League had to carry out administrative functions (Riches, *loc. cit.*, pp. 161, 166).

(d) After a thorough examination of the practice of the League, it has been possible to conclude that "it shows a decided disposition on the part of the Members not to allow the unanimity rule to make the League impotent, and this in spite of the explicit provisions of the legal instrument which forms its fundamental law" (Riches, *loc. cit.*, p. 117).

(e) The apparent contradiction between Article 22 and Articles 4 and 5 of the Covenant is to be overcome by taking into account the relative value of those provisions.

Articles 4 and 5 are rules of an abstract and general nature; their purpose lies outside the relationship of the mandatory with

---

[1] Naturally, for political reason, the Council could regard as not binding resolutions opposed by one of the parties—cases of Lithuania and Japan (Riches, *loc. cit.*, pp. 148-152).

the mandator on behalf of which it exercises its administration. Thus, the non-application of the unanimity rule to the Council's functions regarding the mandate does not contradict the object and purpose of Articles 4 and 5, namely respect for the exclusive jurisdiction of States. Article 22 on the other hand, gave birth to an institution the nature of which is incompatible with the possibility of the exercise of a veto by the mandatory.

It is so contrary to the concepts of mandate and of tutelage, and to good faith, to set up and regulate supervision of the mandatory while rendering "that supervision nominal and ineffective", while leaving it to the good will of the mandatory to fulfil his obligations, that this "cannot be conclusively inferred from the mere fact that the basic instrument provides for the rule of unanimity" (see separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 99).

Furthermore, the principle *nemo-judex in re sua* prohibits an administrator, guardian *(tuteur)* or mandatory from being the person who decides or judges whether or not he has fulfilled his obligations as such—"there is no valid reason for distinguishing, in connection with the applicability of the principle that no-one is judge in his own cause, between the judicial and the supervisory organs" (separate opinion of Judge Lauterpacht, *ibid.*, p. 100).

The question raised by the unanimity rule is the same as that which arises in practice in municipal law, where it is answered by an appeal to the concept of *fraus legis*. The mark of this concept is the fact that the protection of an abstract general rule is sought in order to avoid the application of another rule intended to settle a concrete point. In cases where the purpose of the abstract rule is not to settle the concrete point, the rule which directly contemplates that point is to be applied.

South Africa's claim for the application of the unanimity rule can therefore be classified as *agere in fraudem legis*. An interpretation of Articles 22, 4 and 5 of the Covenant which would justify the refusal of the mandatory to fulfil the obligations which it has accepted by the mandate instrument and by the signature of the Covenant, could be classified as *interpretatio in fraudem legis*.

To the same effect it should be added that the idea of the application the unanimity rule to mandates was not generally accepted by writers the time of the League. Wright rejected it decisively on the basis of e Opinion given in the so-called *Mosul* case, and of Articles 15 and 16 the Covenant (*Mandates Under the League of Nations*, pp. 132 and 2). At the 1931 session of the Institut de Droit International held at ambridge, which discussed international mandates, Borel raised the estion of the unanimity rule in connection with the revocation of andates. Seferiades then argued that although the Council's decisions ere taken unanimously, the mandatory's vote was disregarded. Rolin

stated that unanimity was not necessary but that discussion of the question was untimely. The discussion was not pursued, but the vote in favour of revocation implied rejection of the application of the unanimity rule to mandates (*Annuaire de l'Institut de droit international*, Vol. II, p. 58). The many writers who assert that the League was entitled to revoke the mandates appear by implication to share the same view. Quite recently Dugard has maintained that the unanimity rule was not applicable to mandates ("The Revocation of the Mandate for South West Africa", *A.J.I.L.*, 1968, pp. 89 ff.).

V. Possibility of Forfeiture by the Mandatory— the Nature of the Mandate

It is necessary to recall the characteristics of the mandate régime, for only in the light of its nature will it be possible to say what powers were possessed by the League of Nations and are now possessed by the United Nations in its place.

The mandates are not a simple concession granted by the Principal Allied and Associated Powers to the mandatory States. The mandate is a very complex institution.

It was based on the cession by Germany of its colonies in Africa (Arts. 118 and 119 of the Treaty of Peace). This cession was not pure and simple, but *sub modo*. The territories concerned did not pass under the sovereignty of the mandatory States. In the Treaty, the mandatory States were designated as the "governments exercising authority over those territories" (Art. 127); the territories were transferred "to the Mandatory Power in its capacity as such"; the territories were to be "administered by a Mandatory under Article 22 of Part I (League of Nations) of the present Treaty" (Art. 257); reference was also made to any Power "administering former German territory as a mandatory under Article 22, Part I (League of Nations)" (Art. 312). It was this Article 22 which laid down the principles of the new institution.

The League of Nations assumed the responsibility for a "sacred trust of civilization"[1], "in the interests of the indigenous population", until such time as the peoples in question should be "able to stand by themselves". It was in this way that the Covenant pointed to the temporary nature of mandates; they were to come to an end when the indigenous populations were capable of governing themselves. General Smuts tried to get this reference to the chronologically finite nature of mandates

[1] Mr. Fraser (New Zealand), the then chairman of Committee II/4, concluded his report to the Second Committee with the following words: "The mandate does not belong to my country or any other country. It is held in trust for the world." (21 June 1945, UNCIO doc. 1144, Vol. VIII, p. 154; cited in *I.C.J. Pleadings, International Status of South West Africa*, p. 222.

deleted, and for this purpose proposed the removal of the word "yet" in the phrase "not yet able to stand by themselves"; but this amendment was rejected.

The League of Nations entrusted "the tutelage of such peoples . . . to advanced nations" the method being that "this tutelage should be exercised by them as Mandatories on behalf of the League"[1]. Powers of administration were entrusted to the mandatories by the League "subject to the safeguards above mentioned in the interests of the indigenous population". More particularly, there was constituted a Permanent Commission to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates. In the Mandate for South West Africa, in addition to the reference to Article 22 of the Covenant, it was provided that the Mandatory should make to the Council of the League of Nations annual reports to the satisfaction of the Council, containing full information with regard to the Territory, and indicating the measures taken to carry out certain specified obligations (Art. 6).

Supervision by the organ of the international community is a distinctive feature of the mandate (Wright, *Mandates under the League of Nations*, 1930, p. 64) and is in conformity with its very nature (*I.C.J. Reports 1950*, pp. 133 and 136). "Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate" (*I.C.J. Reports 1962*, p. 334) [2]. The "sacred trust" in respect of the indigenous peoples was a grave responsibility for the League of Nations and now for the United Nations, and one which can only be discharged through the modality of supervision and the possibilities which it provides [3].

The task which the mandatory States have to perform "on behalf" of the League is qualified as a "mandatory" function and consists in the exercise of "tutelage". It is characterized, as the same terms imply in municipal law, by absence of self-interest. This was solemnly proclaimed by the Allied Powers (16 June 1919) in reply to a protest by the German

---

[1] The New Zealand Government said in 1926: "Western Samoa is not an integral part of the British Empire, but a child of which we have assumed the guardianship" (Minutes of the Tenth Session of the Permanent Mandates Commission, 1926, p. 24: cited in *I.C.J. Pleadings, International Status of South-West Africa*, p. 203).

[2] "The international supervision provided for in paragraphs 7 and 9 of Article 22 of the Covenant is the cornerstone of the whole mandates system"; "It clearly emerges . . . from . . . the decisions of the Council that what is intended is an effective and genuine, not a purely theoretical or formal, supervision." (*The Mandates System. Origin—Principles—Application*, p. 33; cited in *I.C.J. Pleadings, Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, p. 28.)

[3] "With regard to the responsibility of the League for securing the observance of the terms of the mandates, the Council interprets its duties in this connection in the widest manner." (*Op. cit.*, p. 34, quoting a report presented by the Council to the Assembly on 6 December 1920, League Assembly Doc. 20/48/161; cited in *I.C.J. Pleadings, ibid.*, p. 29.)

Government at the Peace Conference: "The Mandatory Powers which, in so far as they may be appointed Trustees by the League of Nations, will derive no benefit from such Trusteeship . . ." This conception is reflected in Article 257 of the Treaty of Peace, the effect of which is that the value of the German possessions thus transferred was not taken into account in calculating the reparations to be paid by Germany (van Rees, *Les mandats internationaux*, 1927, pp. 18 f.). The same argument of absence of interest was used by the Principal Allied and Associated Powers when Italy claimed territorial compensation on the basis of promises made by France and Great Britain:

> "The territories entrusted to them under mandate do not represent any increase in their colonial possessions; the territories in question can only belong, under the mandates system, to the peoples inhabiting them" (Stoyanovski, *La théorie générale des mandats internationaux*, 1925, p. 18).

Consequently the rights of the mandatory "are, so to speak, mere tools given to enable it to fulfil its obligations" (*I.C.J. Reports 1962*, p. 329).

This conception has important practical consequences. The mandatory has no power to cede or lease any part of the mandated territory (Sjöberg report, quoted by Wright, *op. cit.*, p. 122). The Permanent Mandates Commission protested against the statement by South Africa in the 1926 boundary agreement between South Africa and Portugal that South Africa "possesses sovereignty" in the mandated area (Wright, *op. cit.*, pp. 121, 201 f., 446)[1]. The Commission insisted that "as a direct corollary to the lack of sovereignty . . . the mandatory make no direct profit from the territory" (*ibid.*, p. 214), and that "even in C territories economic discriminations are scrutinized to see that they are not against the interests of the inhabitants of the area" (*ibid.*, p. 215).

Van Rees finds that the mandated territories have a distinct individuality; the mandatory Powers are managers under an obligation of strict respect for the integrity of the territories; unoccupied or ownerless land is part of the property of the territory (*Les mandats internationaux*, p. 22). The Permanent Mandates Commission also stated in 1925 that contributions or gifts made by the mandated territories to the mandatory Power were only admissible if they concerned institutions or works which could be said to benefit the mandated territory materially or morally

[1] On that occasion the representative of South Africa, Mr. Smit, said "the Government of the Union of South Africa exercised and possessed that sovereignty [over the Territory of South-West Africa] on behalf of a third party undefined. That was his position: there could be no question of annexation." (Minutes of the Eleventh Session of the Permanent Mandates Commission, 1927, p. 92; cited in *I.C.J. Pleadings, International Status of South-West Africa*, p. 197.)

(Bentwich, *The Mandates System*, pp. 106 f.). In 1927 the Commission stated that the railways and harbours built by the Germans in South West Africa could not be regarded as having passed to the *dominium* of South Africa; it urged that they should be declared to belong to the territory administered by the Union; in 1929 South Africa gave explanations in accordance with the request made to it (*ibid.*, p. 96).

The instrument embodying the Mandate for German South West Africa, dated 17 December 1920, took the form of a declaration made by the Council of the League of Nations. Its nature has been discussed by jurists, who have been unable to classify it as belonging to any one of the known legal categories. It was brought into being, like the other mandates, as follows. Germany ceded German South West Africa to the Principal Allied and Associated Powers, to be administered by the mandatory in accordance with Article 22 of the Covenant. The Principal Powers agreed that a mandate should be conferred on His Britannic Majesty to be exercised on his behalf by the Union of South Africa, in accordance with Article 22 of the Covenant. His Britannic Majesty, acting for South Africa, undertook to accept the Mandate and exercise it on behalf of the League of Nations. The Council of the League of Nations, having regard to Article 22, paragraph 8, took a decision on the points referred to in that provision, and confirmed the Mandate.

This was a complicated process, in which the contributions of the different participants varied in significance. South Africa's was the most passive: His Britannic Majesty made the undertaking to accept the Mandate on its behalf. In this way was born an international institution the essence of which is in Article 22 of the Covenant—as is moreover apparent from the continuous references to this Article in the Versailles Treaty and in the mandate instrument. It was really also to the basic principles of Article 22 that the resolution of 18 April 1946 constituting the final will and testament of the League of Nations referred back; it is those principles which give meaning to the mandates system.

The sacred trust in respect of the indigenous people of the mandated territories is a direct responsibility of the organized international community. The League of Nations and, since 18 April 1946, the United Nations, is in duty bound to guarantee those peoples that this trust will not be betrayed by the conduct of the mandatories acting, as they do, on its behalf. It is those principles which give rise to well-defined obligations for the United Nations and the mandatories.

VI. Possibility of Withdrawal of the Mandate

A. Revocability of Mandates

Taking into account what has gone before, the key prior question for the response to be given to the request for opinion is whether the General

Assembly took a decision *ultra vires* when it declared that the Mandate entrusted to South Africa was terminated. Even if it is admitted that the United Nations succeeded to the supervisory powers of the League of Nations, it is clear that if the League of Nations could not withdraw the mandate from South Africa, the United Nations could not have received powers which the League did not have. It is necessary therefore to consider whether the League of Nations had the power to put an end to mandates.

The struggle between the colonialists and progressives did not end with the signature of the Covenant. It is understandable that colonialists consider and aver that the mandates system is a veiled form of annexation, that sovereignty over the mandated territories belongs to the mandatories, and that the grant of a mandate is definitive and irrevocable. In order to defend the colonial interest, its partisans have to overcome the obstacle of the expression of the purposes of the mandates system to be found in Article 22 of the Covenant. In order to achieve this, they put forward the following arguments: Article 22 does not mention any right of revocation; but if it had been intended to confer such a right on the League of Nations, it would have been expressly provided for in the Covenant. The mandatory States, or the majority of them, frankly revealed, in the course of the discussions preceding the drawing-up of Article 22, their desire to obtain annexation pure and simple. Mandates were granted to States by the Principal Allied and Associated Powers, and not by the League of Nations; and since the Principal Powers had acquired those territories by conquest, they alone, and not the League, could have retained the power to revoke a mandate.

These arguments seem somewhat weak. The rule *inclusio unius exclusio alterius* may not be applied when the purpose of a norm shows that an interpretation in harmony with the *ratio iuris* is necessary if effect is to be given to it. There is no ground for taking into account the desires and hopes of certain parties to the Covenant, any more than any mental reservation, if they were disregarded by the other parties at the time of signature, even if South Africa now relies on them. The Principal Powers did not acquire the territories by way of conquest (there was no *debellatio*), and if Germany ceded those territories in the Treaty of Versailles, it was so that they might be placed under mandate, in accordance with Article 22 of the Covenant.

In view of the weakness of the arguments just discussed, it is the contrary position, favouring the right of the League of Nations to put an end to a mandate, which must prevail. But those who hold this view are themselves divided as to the basis of the right.

It is clear that the original idea of the mandates system involved the possibility of revocation. For General Smuts, who put it into words, the allocation of a mandate was a mark of great trust and an honour, and a mandate should not be a source of profit or private advantage for the nationals of the mandatory (*The League of Nations: A Practical Sugges-*

tion, 1918, pp. 21 f.); he goes on to say that the League should reserve to itself "complete power to ultimate control and supervision, as well as the right of appeal to it from the territory or people affected against any gross breach of the mandate by the mandatory State" (*ibid.*, p. 23). But it was European territories which General Smuts was thinking of as possible mandates, and it was he who later was to call for annexation for the African territories. It was Wilson who was to have the mandates system extended to the African territories, while retaining the principles formulated by General Smuts.

The silence of Article 22 on the question of revocation can be explained by the circumstances under which it was drawn up. Unlike the other Articles of the Covenant, it was not drawn up by experts acquainted with the finer points of legal interpretation: it is well known that it was worked out by politicians, without being revised by experts. International society of the *belle époque* did not like to mention disagreeable matters and preferred to leave them to be understood. It would have been in bad taste to refer to the possibility that one of the Principal Powers might betray the sacred trust conferred upon it. This remote risk was, however, covered, thanks to the terms used.

That such was the situation at that time seems to be confirmed by what is known of the preliminary discussions preceding the drafting of the Covenant, and what is known of the opinion of the members of the Permanent Mandates Commission.

In the preliminary meetings prior to the drafting of the Covenant, certain governments showed concern as to the conditions which were to be applicable to mandates; there might be no interest in having a mandate if it were revocable at any moment. These doubts were put at rest by the statement that such a revocation was practically impossible. The legal possibility of revocation was not denied, but an attempt was made to calm their fears by explaining that such a possibility was not to be foreseen, taking into account which Powers it had been agreed to grant mandates to, and which Powers made up the Council of the League of Nations.

The members of the Permanent Mandates Commission had to discuss the question of revocability. They were under a duty to favour the economic development of the mandated territories. But some of them had expressed fears that the possibility of revocation might scare off investors. What could be done to assuage these fears? From the reports of the discussions one gets the impression that it was desired not to give a definite negative answer, but that no effort was spared to strengthen the assurance that a revocation was inconceivable in practice. Only van Rees considers that he has found legal support for his view in that of Rolin; but it may be said in reply that the latter author considers revocation to be possible in the case of serious abuse of a mandate [1]. The opinion of those

[1] After having said that a mandate is an irrevocable alienation, he goes on: "It would not be subject to revocation as against the latter [the mandatory] except for a

best acquainted with the mandated territories, and of the colonial administrators, seems somewhat unfavourable to irrevocability. Van Rees, who is so much concerned to reassure investors, mentions among the questions which the article leaves unanswered: are mandates revocable, and if so what is the authority competent to take such a decision? He gives no reply to the question (*Les mandats internationaux*, 1927, p. 14). Sir Frederick Lugard, who before the Commission had stressed the inconceivability of the hypothesis of revocation, admits the possibility of revocation without any doubt whatsoever in his fundamental book. He does so when he is dealing with the legal situation of persons under mandate: "the person 'protected under mandate' shares with the owner of an estate 'un titre précaire' subject to the contingencies of revocation, rendition, or resignation of the mandate" (*The Dual Mandate in British Tropical Africa*, 2nd ed., 1923, p. 56; 5th ed., 1965, p. 56) [1].

Those writers who uphold revocability support their view with various arguments adducing: the basically temporary nature of the Mandates; the need for them to come to an end in the case of a people ripe for independence; the sovereignty of the League of Nations; sanctions following from a breach of duty; general principles governing mandates, trusts and tutelage; manifestation of powers of supervision and control; impossibility of co-operation, and the need to protect the peoples. This abundance of grounds does not prove the weakness of the argument, but is the consequence of the variety of aspects of the mandate as an institution, and the possibility of envisaging various causes for termination.

It is not, legally speaking, entirely correct to say that the powers of the League of Nations corresponded to the exercise of *exceptio non adimpleti*. That is one of the characteristics of bilateral contracts, but it is also the manifestation of a general principle. In the case of contracts, if one party defaults it is open to the other, who is honouring his own basic contractual obligations, not only to declare the contract terminated but to claim damages and the restitution of the thing received under the contract (an example lies in the grant of military bases: if the treaty is terminated for breach on the part of the grantee State, that State must make restitution). But there are other relationships which feature an especially stringent

---

breach of the conditions of the grant so serious as to show the basic unfitness of the mandatory to administer the territory in accordance with the Covenant" ("Le système des mandats coloniaux", *Revue de droit international et de législation comparée*, 1920, pp. 352 f.)

[1] Rappard, having observed before the Permanent Mandates Commission that the revocability of mandates was in conformity with general principles, added: "To state that, however unworthy in theory a mandatory Power might be, its misdeed could never in any conceivable circumstances lead to revocation, would be to weaken, before public opinion, that sentiment which gives its special value to the institution of which we are the recognized defenders" (Minutes of Sixth Session, 1925, p. 157; cited in *I.C.J. Pleadings, International Status of South-West Africa*, p. 230, note 3).

power to put an end to the contractual bond and claim restitution. In the case of mandates, tutelage and trusts, a particular power to put an end to the situation is vested in one party or in an authority. The party granting powers to administer in his name or on his behalf may withdraw them (and must withdraw them if conferred for the discharge of his own duties to a third party) in the event that their recipient fails to discharge the obligations assumed, expresses unwillingness to discharge them or denies their existence. The particular legal nature of international mandates is such that these considerations must be taken into account.

It does seem that in the drafting of Article 22 an effort was made to lay stress on the fundamental purposes of the mandate. The terms employed—mandate, trust, tutelage—evidence each in their own way the common character of the committal of a trust *(fides facta)* protective functions exercised for the international organization and on its behalf by the mandatory. The latter is bound by the mandate, like the organization, with power of *officium*. It is for this reason, it would seem, that the term "tutelage" was chosen. One of the expressions to be found in paragraph 1 of Article 22 is practically the same as the standard definition of tutelage (*qui propter aetatem suam sponte se defendere nequit*; *Digest*, 26, 1, 1, pr.). This accords also with the nature of a trust, which mandates are also regarded as having. A guardian under the Common-Law system is in the position of a trustee ("the relation of guardian and ward is strictly that of trustee and *cestui que trust*"). As these legal concepts essentially contemplate the protection of persons (in this case, peoples) who cannot govern themselves, the necessary consequence is the exercise of supervision over the person entrusted with guardianship, "supervision of the guardian", and in case of serious breaches of his duties *(fides fracta)* the loss or forfeiture of guardianship.

It will thus be observed that in view of the wording of Article 22 and the terms used therein there was no need to mention revocation of the mandates. The essential nature of this concept implies, clearly and evidently, the possibility of putting an end to the mandate, and even the duty laid upon the organization to do so in the case of serious breaches of obligations on the part of the mandatory. A mandate which could not be revoked in such a case would not be a mandate, but a cession of territory or a disguised annexation.

It is difficult to believe that, on the one hand, the working of the mandates system was organized to include a Permanent Commission to control the mandatory's administration and that, on the other hand, the mandatory was left free to do what he thought fit, even if it were to run counter to the very nature of the mandate, that one should put him in possession of the territory without any obligation on his part (*sub hac conditione: si volam, nulla fit obligatio*; *Digest*, 44, 7, 8). It would really be too much if the mandatory were permitted to do what he wished, to commit, on behalf of the organization, acts contrary to the purposes of

Article 22. Any interpretation which denied the possibility of putting an end to the mandate in the case of flagrant violation by a mandatory of its obligations would reduce Article 22 to a *flatus vocis*, or rather to a "damnable mockery", by giving some colour of legality to the annexation of mandated territories.

These considerations explain why the *communis opinio* is favourable to the power of revocation. At the Cambridge session of the Institut de droit international (July 1931), a resolution was adopted on "International Mandates". Article VII reads: "The functions of the mandatory State come to an end on the resignation or removal *(révocation)* of the mandatory . . ." The removal of the mandatory State and the abrogation of the mandate are to be decided on by the Council of the League of Nations; such abrogation may also result from admission of the entity under mandate as a Member of the League of Nations. The word *révocation* was included by a vote of 27 to 15 (*Annuaire de l'Institut*, 1931, Vol. II, p. 60: for the text of the resolution see *ibid.*, pp. 233 f.). The objections raised against this expression fall into different categories. Wehberg thought that the League could unilaterally withdraw a mandate, even in the absence of serious fault by the mandatory, since the League had sovereignty over the territory. Verdross stressed that termination of the mandate should be based on the principles of law which permit of forfeiture for non-observation of obligations. Gidel quoted the *exceptio non adimpleti contractus*. But the Rapporteur, Rolin, defended the term *révocation* by saying that it was of the essence of control to involve adequate sanctions: "by agreeing to administer a territory under the control of the League of Nations, the mandatory State had implicitly accepted the sanction of revocation of its trust" (for the discussion see *ibid.*, pp. 54-59).

It has been pointed out that the function of the *Institut* is only *de lege ferenda*, and that consequently one cannot seek support from this quarter for interpretation of Article 22 of the Covenant. This argument seems to overlook that, on the final vote on this occasion, several members abstained and explained their abstention by saying that the resolution related to the interpretation of the Covenant (thus James Brown Scott, Huber, Fischer Williams, and probably Diéna: *ibid.*, pp. 66 f.). [1]

More recently, since the dissolution of the League of Nations, independent writers have argued for the temporary nature of mandates and the possibility of their revocation (Crawford, "South West Africa: Mandate Termination in Historical Perspective", *The Columbia Journal of International Law*, Vol. VI, No. 1, 1967, pp. 95, 100, 107, 109, 119; Dugard, "The Revocation of the Mandate for South West Africa", *American Journal of International Law*, *in toto* and particularly pp. 85 ff.).

It has been argued that the silence of the Charter on the possibility

[1] There were 18 abstentions, 38 votes for and none against the resolution.

of revoking trusteeships is conclusive in the sense that it establishes the irrevocability thereof. This therefore, the argument continues, is an additional argument in favour of the irrevocability of mandates, in view of the analogy between the two concepts. But the lack of any provision for revocation of trusteeships does not mean that such is excluded; on the contrary, the purpose of the institution would appear to require the possibility of revocation. An express declaration would have been necessary to bring about irrevocability. The Charter does not seem to have intended to leave the administration of territories under trusteeship to the unfettered will of the administrators, in such a way that the Organization would be deprived of any authority to impose sanctions for violation of their obligations. South Africa does not appear to have differed from this view when it brushed aside all requests by the United Nations concerning the signature of a trusteeship agreement.

In a study of the question of trusteeships, it has been mentioned that by virtue of Article 85, paragraph 1, of the Charter, and in accordance with the procedure laid down by Article 18, paragraph 2, thereof, a trusteeship may be terminated for substantial violation thereof (Marston, "Termination of Trusteeship", *International and Comparative Law Quarterly*, XVIII, 1969, p. 18).

B. The Facts Which Led to the Withdrawal of the Mandate

With reference to the considerable amount of information presented in the written and oral statements of South Africa, an offer has been made by the South African Government to produce evidence to refute the accusations made against it of breaches of its duties as Mandatory. But there is nonetheless one fact as to which South Africa does not seek to adduce evidence, a fact which it concedes, the existence of which it proclaims. This is its refusal to fulfil its obligations as Mandatory towards the organization on behalf of which it has to carry on its administration, and upon which depends its legal title to occupy and administer Namibia (South West Africa).

This contravention of the Mandate is the most serious of all from the formal legal point of view. In its submissions, South Africa denies the continued existence of the Mandate, which it considers to have lapsed, or, in the alternative, it claims that the essential obligations of the Mandate have disappeared. In this way, South Africa is preventing the United Nations from fulfilling its "sacred trust" towards the people of Namibia.

South Africa has failed in its duties as Mandatory and it has solemnly and repeatedly declared its decision not to fulfil them; it has denied their existence. The Court, for its part, has declared, in its Opinions of 1950, 1955 and 1956, and in the 1962 Judgment, that South Africa is subject to the international obligations resulting from its Mandate for South West Africa, and that the functions of the League of Nations are now exercised by the United Nations. South Africa cannot allege that it is unaware of

the existence of its duties, nor can litigious cavils bring to nought the authority of the Court.

In fact, we are dealing with a case of violation of obligations, and it can be said, as was said by Rolin in his early study of mandates, with reference to the conditions for revocation, that this breach indicates the "basic unfitness of the mandatory to administer the territory in accordance with the Covenant" ("Le Système des mandats coloniaux", *Revue de droit international et de législation comparée*, 1920, p. 353).

Furthermore, in applying the laws of *apartheid* in South West Africa (Namibia), South Africa is in breach of its duties as the mandatory Power; it is not permissible to administer an entrusted territory in a manner contrary to the purposes and principles of the Charter (Art. 1, para. 3; Art. 76 *(c)*).

VII. Reply to the Request for Advisory Opinion

A. Legal Consequences

It would seem that, before anything else, the scope of the question should be clearly defined. For this purpose the terms thereof must be considered. It has been asked what are "the legal consequences": therefore everything relating to economic, social, practical and political consequences should be left aside. For this reason, it would seem that the Court should not concern itself with what States are to do within the framework of the United Nations organs in order to put an end to the abnormal situation in Namibia and thus enable the United Nations to discharge its duties towards the people of Namibia in accordance with the "sacred trust" confided to it. The mention of consequences "for States" implies that the Court will not have to examine the consequences of resolution 276 (1970) for international organizations, not even for the United Nations, so far as responsibility to the Namibian people is concerned. Finally, the fact that resolution 276 (1970) is specifically cited prompts the supposition that the Court does not have to consider the legal consequences of the other resolutions of the Security Council.

The Court's reply should, it seems, be drawn up in general terms for the guidance of the United Nations, and should not go into details which might give rise to confusion.

B. Consequences for South Africa

The immediate and fundamental consequence is the loss of the legal title which might, up to the present, have justified the possession of the Territory of South West Africa by South Africa. Of course it may be considered that, ever since it declared that it was not bound by the obligations deriving from the Mandate, it has forfeited its position as Manda-

tory. But until resolution 2145 (XXI), no solemn declaration of the cessation of the Mandate had been made, and it was conceivable to hold that the Mandatory still had a title.

The declaration to the effect that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by South Africa was "terminated" (resolution 2145 (XXI)) involved the consequence that, from that time on, the occupation of the Territory of Namibia was devoid of any legal justification. The same resolution provides for South West Africa to come under the direct responsibility of the United Nations, so that the presence of South Africa is somewhat in the nature of usurpation and an occupation *mala fide*. These consequences have acquired executory force by virtue of Security Council resolution 276 (1970).

The immediate consequence for South Africa is that it is under obligation to withdraw its administration from the Territory of Namibia and take all necessary steps to put the United Nations administration into possession.

The Government of South Africa, as a possessor in bad faith, is responsible to the people of Namibia for the restitution of property, assets and the fruits thereof.

It should not be forgotten that, as the Permanent Mandates Commission had declared, the assets transferred by Germany (railways, tramways, ports, etc.) and public assets of all kinds (mines, *bona vacantia*, non-private waterways, etc.) have remained the exclusive property of the Namibian people and, since these are assets in the public domain, there can be no bar of limitation to their restitution.

This being the case, the South African Government is under an obligation to indemnify the people of Namibia for damage suffered. An account should be struck in respect of the administration of the Mandatory, in which investments made for the benefit of the Namibian people by South Africa should be taken into consideration.

C. The Consequences for Member States of the United Nations

The Security Council, by giving its support to resolution 2145 (XXI) in its resolution 276 (1970), lays upon the Members of the Organization the obligation to accept and apply what is laid down in those resolutions, and to co-operate to ensure the fullest possible implementation thereof.

In the present case, the acts of the occupying authorities cannot be considered as those of a legitimate government, but must be likened to those of a *de facto* and usurping government.

A distinction must be made between the private and the public sector. It would seem that the acts of the *de facto* authorities relating to the acts and rights of private persons should be regarded as valid (validity of entries in the civil registers and in the Land Registry, validity of marriages, validity of judgments of the civil courts, etc.). On the other hand, other States should not regard as valid any acts and transactions of the autho-

rities in Namibia relating to public property, concessions, etc. States will thus not be able to exercise protection of their nationals with regard to any acquisitions of this kind.

In the field of international relations, the duty of co-operation of States implies that they must refrain from all diplomatic, consular and other relations with South Africa which might indicate that they recognize the authority of the South African Government over the Territory of Namibia—and more particularly they must not have consuls, agents, etc., in Namibia, except for such as are of a nature appropriate to territories which are under *de facto* occupation (in the sense of resolution 283 (1970)).

States should regard as ineffective clauses in any treaty which recognize the authority of South Africa in the Territory of South West Africa. New treaties with South Africa may not contain such clauses.

In treaties for avoidance of double taxation, no account may be taken of taxes paid in Namibia. Extradition treaties may not have effect with regard to Namibians, because they cannot be handed over to illegal authorities, etc.

D. Consequences for States not Members of the United Nations

These States have no obligations under the Charter. Nonetheless they should respect a declaration of the forfeiture of the legal title to possess the Territory, pronounced by a legitimate authority, against a State which received the territory in order to administer it in the name of the international organization. Such declaration should, it appears, be respected in the same way as that of an owner of property who withdraws the mandate given by him to administer his property.

(Signed) F. DE CASTRO.

DISSENTING OPINION OF JUDGE SIR GERALD FITZMAURICE

[A summary of main conclusions is given in paragraph 10 of this Opinion; and a synoptical table of contents appears at the end, after the Annex.]

PART I

INTRODUCTORY CONSIDERATIONS

1. The real issues in the case

1. Although I respect the humanitarian sentiments and the avowed concern for the welfare of the peoples of SW. Africa which so clearly underlie the Opinion of the Court in this case, I cannot as a jurist accept the reasoning on which it is based. Moreover, the Opinion seems to me insufficiently directed to those aspects of the matter which really require to be established in order to warrant the conclusion that South Africa's mandate in respect of SW. Africa stands validly revoked. Much of the substance of the Opinion (i.e., that part of it which does not deal with formal, preliminary or incidental matters) is taken up with demonstrating that League of Nations mandates, as an international institution, survived the dissolution of the League—whereas what is really in issue in this case is not the survival of the Mandate for SW. Africa but its purported revocation. Whether or not South Africa still disputes the survival of the Mandate, it certainly disputes its survival in the form of an obligation *owed to the United Nations* (this is the basic issue in the case); and denies that the organs of the United Nations have any competence or power to revoke it.

2. As regards the Court's conclusion that the Mandate has been validly revoked, this can be seen to rest almost exclusively on two assumptions—or rather, in the final analysis, on one only. I speak of assumptions advisedly,—and indeed, concerning the second and more far-reaching of the two (which in one form or another really underlies and entirely motivates the whole Opinion of the Court), there is an open admission that nothing more is needed—the matter being "self-

evident". These two assumptions are *first* that there was, or there must have been, an inherent right, vested in the United Nations, unilaterally to revoke the Mandate in the event of fundamental breaches of it (unilaterally determined to exist),—and *secondly*, that there have in fact been such breaches. Since it is clear that the supposed inherent right of revocation, even if it exists, could never be invoked *except* on a basis of fundamental breaches (several passages in the Opinion specifically recognize that only a material breach could justify revocation), it follows that the whole Opinion, or at least its central conclusion, depends on the existence of such breaches. How then does the Opinion deal with this essential matter?—essential because, if there is insufficient justification *in law* for the assumption, the whole Opinion must fall to the ground, as also (though not only for that reason) must the General Assembly's Resolution 2145 of 1966 purporting to revoke, or declare the termination of the Mandate, which was predicated on a similar assumption [1].

3. The charges of breaches of the Mandate are of two main kinds. The first relates to the failure to carry out, *in relation to the United Nations* an obligation which, in the relevant provision of the Mandate itself (Article 6), is described as an obligation to make an annual report "to the Council of the League of Nations". At the critical date however, at which the legal situation has to be assessed, namely in October 1966 when the Assembly's resolution 2145 purporting to revoke the Mandate, or declare its termination, was adopted, the view that the failure to report to the Assembly of the United Nations constituted a breach of it—let alone a fundamental one—rested basically (not on a judgment [2] but) on an Advisory Opinion given by this Court in 1950 which, being advisory only,

---

[1] Since it is important that the true character and purport of this Resolution—(not reproduced in the Opinion of the Court)—should be understood, especially as regards its tone and real motivation, I set it out *verbatim* and *in extenso* in the Annex hereto (section 3, paragraph *15*). There is hardly a clause in it which is not open to challenge on grounds of law or fact;—but considerations of space forbid a detailed analysis of it on the present occasion.

[2] *(a)* So far as the reporting obligation is concerned, which is a distinct issue from that of the survival of the Mandate *in se*, the 1955, 1956 and 1962 pronouncements of the Court merely referred to the 1950 Opinion and added no new reasoning. In its 1962 Judgment in the preliminary (jurisdictional) phase of the then *SW. Africa* cases (Ethiopia and Liberia *v.* South Africa) in which the issue was not Article 6 but Article 7 of the Mandate, the Court, as an *obiter dictum*, simply recited with approval the Court's 1950 Opinion about the reporting obligation and did not further deal with the matter, which therefore still rests essentially on the 1950 Opinion. Neither in the main conclusion, nor in the operative part of the 1962 Judgment, both of which appear on p. 347 of the Court's 1962 Volume of Reports, is there any mention of or pronouncement on it. The 1955 and 1956 Opinions given in the *Voting Procedure* and *Right of Petitions* cases were equally consequential upon and based on, the original 1950 Opinion.

(b) It is not without significance perhaps, that the failure to render reports to the Assembly—so heavily relied on in the Opinion of the Court—is not *specifically*

and rendered to the United Nations, not South Africa, *was not binding on the latter* and, as regards this particular matter, was highly controversial in character, attracted important dissents, and was the subject of much subsequent serious professional criticism. This could not be considered an adequate basis in law for the exercise of a power of unilateral revocation, even if such a power existed. There cannot be a fundamental breach of something that has never—*in a manner binding upon the entity supposed to be subject to it*—been established as being an obligation at all,—which has indeed always been, as it still is, the subject of genuine legal contestation. That South Africa denied the existence of the obligation is of course quite a different matter, and in no way a sufficient ground for predicating a breach of it.

4. The second category of charges relates to conduct, said to be detrimental to "the material and moral well-being and the social progress" of the inhabitants of the mandated territory, and thus contrary to Article 2 of the Mandate. *These charges had never, at the critical date of the adoption of Assembly resolution 2145, been the subject of any judicial determination at all,*—and in the present proceedings the Court has specifically refused to investigate them, having rejected the South African application to be allowed to present further [3] factual evidence and connected argument on the matter. The justification for this rejection is said to be that practices of "apartheid", or separate development, are self-evidently detrimental to the welfare of the inhabitants of the mandated territory, and that since these practices are evidenced by laws and decrees of the Mandatory which are matters of public record there is no need for any proof of them. This is an easy line to take, and clearly saves much trouble. But is it becoming to a court of law?—for the ellipsis in the reasoning is manifest. Certainly the authenticity of the laws and decrees themselves does not need to be established, and can be regarded as a matter of which, to use the common law phrase, "judicial notice" would be taken without specific proof. But the *deductions* to be drawn from such laws and decrees, as to the effect they would produce in the particular local circumstances, must obviously be at least *open* to argument,—and there are few, if any, mature systems of private law, the courts of which, whatever conclusions they might ultimately come to, would refuse to hear it. Yet it was on the very

mentioned (though presumably intended to be implicitly covered) in Assembly resolution 2145, amongst the reasons for purporting to terminate the Mandate. Much more prominence is given to the attainment of independence by the mandated territory, which could not by any process of reasoning be a valid *legal* ground of *unilateral* revocation.

[3] Much evidence both written and oral was of course laid before the Court in the 1965-1966 proceedings. But only four judges out of those who then composed the Court now remain,—and in any case the Court, as such, has not made any collective study of that evidence at all in the course of the present proceedings.

question of the alleged self-evidently detrimental effect of its policies of apartheid *in SW. Africa*, that the Mandatory wanted to adduce further factual evidence. Thus the Court, while availing itself of principles of contractual law when it is a question of seeking to establish a right of unilateral revocation for fundamental breaches, fails to apply those corresponding safeguards which private law itself institutes, directed to ensuring that there have indeed *been* such breaches. It is not by postulations that this can be done.

5. In consequence, since the whole Opinion of the Court turns, in the final analysis, on the view that fundamental breaches of the Mandate have occurred, it must (regrettably) be concluded that, in the circumstances above described, this finding has been reached on a basis that must endanger its authority on account of failure to conduct any adequate investigation into the ultimate foundation on which it professes to rest.

* * *

6. What, in truth, the present proceedings are or should properly speaking, and primarily, be concerned with, is not any of this, but issues of competence and powers,—for unless the necessary competence and power to revoke South Africa's mandate duly resided in the organs of the United Nations,—unless the Mandatory, upon the dissolution of the League of Nations, became accountable to such an organ,—no infringements of the Mandate, however serious, could operate in law to validate an act of revocation by the United Nations, or impart to it any legal effect. Here the fallacy, based on yet another unsubstantiated assumption underlying the whole Opinion of the Court, namely that the survival of the Mandate *necessarily* entailed the supervisory role of the United Nations, becomes prominent.

7. As to unilateral revocability itself, the Opinion proceeds according to a conception of the position of the various League of Nations mandatories, in relation to their mandates, which would have been considered unrecognizable in the time of the League, and unacceptable if recognized. My reading of the situation is based—in orthodox fashion—on what appears to have been the intentions of those concerned at the time. The Court's view, the outcome of a different, and to me alien philosophy, is based on what has become the intentions of new and different entities and organs fifty years later. This is not a legally valid criterion, and those thinking of having recourse to the international judicial process at the present time must pay close attention to the elaborate explanation of its attitude on this kind of matter which the Court itself gives in its Opinion.

8. Under both heads,—the competence of the United Nations to supervise, and the liability of the Mandate to (unilateral) revocation,—the findings of the Court involve formidable legal difficulties which the

Opinion turns rather than meets, and sometimes hardly seems to notice at all. Inferences based on the desirability or, as the case may be, the undesirability, of certain results or consequences, do not, as my colleague Judge Gros points out, form a satisfactory foundation for legal conclusions,—no more than would such an over-simplification of the issue as that involved in the assertion that South Africa administered its mandate on behalf of the United Nations which, therefore, had the right to revoke it,—a view which quietly begs virtually every question in the case. Here again, statements to the effect that certain results cannot be accepted because this would be tantamount to admitting that given rights were in their nature imperfect and unenforceable, do not carry conviction as a matter of international law since, at the present stage of its development, this is precisely what that system itself in large measure is, and will, pending changes not at present foreseeable, continue to be. It is not by ignoring this situation that the law will be advanced.

* * *

9. Given the Court's refusal to allow the appointment of a South African judge *ad hoc* in the present case, in spite of its clearly very contentious character (as to this, see section 4 of the Annex hereto), it is especially necessary that the difficulties I refer to should be stated, and fully gone into. This must be my excuse for the length of an Opinion which the nature of the case makes it impossible to reduce, except at the risk of important omissions.

2. Arrangement and statement of main conclusions

10. The substance of my view is contained in the four sections A-D of Part II hereof (paragraphs 11-124). A postscriptum on certain related political aspects of the whole matter is added (paragraph 125). As regards the various preliminary issues that have arisen, these—or such of them as I have felt it necessary to consider—are, together with one or two other matters that can more conveniently be treated of there, dealt with in the Annex that follows paragraph 125. On the substantive issues in the case my principal conclusions, stated without their supporting reasoning, are as follows:

(i) Although the various mandates comprising the League of Nations mandates system survived the dissolution of that entity in 1946, neither then nor subsequently did the United Nations, *which was not the League's successor in law*, become invested with the supervisory function previously exercised by the Council of the League, as the corollary or counterpart of the mandatories' obligation to render reports to it. It was only if a mandated territory was placed under the United Nations trusteeship

system (but there was no obligation to do this) that the supervisory relationship arose. No mandates at all (and not merely South Africa's) were ever, *as* such, administered on behalf of the United Nations [4].

(ii) The reporting obligation also survived the dissolution of the League, but became dormant until such time as arrangements for reactivating it, comparable to those which existed under the League, and acceptable to the Mandatory, could be made [5]. It was not automatically transformed into, nor ever became, an obligation owed to the United Nations, such as to invest the latter with a supervisory function. The Mandatory's consent to what would, in effect, have been a *novation* of the obligation was never given.

(iii) Even if the United Nations did become invested with a supervisory function in respect of mandates not converted into trusteeships, this function, as it was originally conceived on a League basis, did not include any power of unilateral revocation. Consequently no such power could have passed to the United Nations.

(iv) Even if such a power was possessed by the Council of the League, the Assembly of the United Nations was not competent to exercise it, because of the constitutional limitations to which its action as a United Nations organ was inherently subject having regard both to the basic structure and specific language of the Charter.

(v) Except as expressly provided in certain articles of the Charter not material in the present context, the Assembly's powers are limited to discussion and making recommendations. It cannot bind the Mandatory any more than the Council of the League could do.

(vi) Having regard to conclusions (i)-(iii) above, which relate to the United Nations as a whole, the Security Council did not, on a *mandates* basis, have any other or greater powers than the Assembly. Its action could not therefore, *on* that basis, replace or validate defective Assembly

---

[4] With the exception of SW. Africa, all the various mandated territories—apart of course from those that had become, or became, sovereign independent States—were placed under United Nations trusteeship. This did not by any means take place all at once,—but eventually SW. Africa was the only one to retain mandated status. However, as the Court found in its Advisory Opinion of 1950 concerning the *International Status of South West Africa* (*I.C.J. Reports 1950*, at p. 144), the mandatories were not under any legal obligation to place mandated territories under the trusteeship system.

[5] It appears that none of the mandatories rendered reports to the United Nations in the interval (which could be as much as about two years) before the mandated territory was converted into a trust territory or, in some cases, became independent.

action. The Security Council equally had no power to revoke the Mandate.

(vii) The Security Council cannot, in the guise of peace-keeping, validly bring about a result the true character of which consists of the exercise of a purported supervisory function relative to mandates.

(viii) Even where the Security Council is acting genuinely for the preservation or restoration of peace and security, it has no competence as part of that process to effect definitive and permanent changes in territorial rights, whether of sovereignty or administration,—and a mandate involves, necessarily, a territorial right of administration, without which it could not be operated.

(ix) The "Legal consequences for States" of the foregoing conclusions are that the Mandate was not validly revoked by United Nations action in 1966 or thereafter, and still subsists;—that the Mandatory is still subject to all the obligations of the Mandate, whatever these may be and has no right to annex the mandated territory or otherwise unilaterally alter its status;—but that nor has the United Nations,—and that its member States are bound to recognize and respect this position unless and until it is changed by lawful means.

* * *

In Part II of this opinion, which comes next, the reasoning in support of these conclusions is distributed in the following way: as to conclusions (i) and (ii), in Section A, paragraphs 11-64; as to conclusion (iii), in, Section B, paragraphs 65-89; as to conclusions (iv)-(viii), in Section C, paragraphs 90-116; and as to conclusion (ix), in Section D, paragraphs 117-124. The postscriptum (paragraph 125) follows. The Annex is separately paragraphed and footnoted.

PART II

SUBSTANCE

SECTION A

THE UNITED NATIONS NEVER BECAME INVESTED WITH ANY SUPERVISORY FUNCTION IN RESPECT OF MANDATES AS SUCH

1. Absence of any legal successorship as between the United Nations and the League of Nations

11. There being no general rule of international law which would involve a process of automatic successorship on the part of such an entity as the United Nations to the functions and activities of a former entity such as the League of Nations, there are only three ways in which the United Nations could, upon the dissolution of the League, have become invested with the latter's powers in respect of mandates as such: namely, *(a)* if specific arrangement to that effect had been made,—*(b)* if such a succession must be implied in some way,—or *(c)* if the mandatory concerned—in this case South Africa—could be shown to have consented to what would in effect have been a *novation* of the reporting obligation, in the sense of agreeing to accept the supervision of, and to be accountable to, a new and different entity, the United Nations, or some particular organ of it.

12. It is my view that the United Nations did not in any of these three ways become clothed with the mantle of the League in respect of mandates;—but as regards the first of them, it is necessary to make it clear at the outset that the matter went far beyond the field of mandates. There was in fact a deliberate, *general*, politically and psychologically motivated, rejection of any legal or political continuity at all between the United Nations and the League (see paragraphs 35 and 36 below). Since mandates were regarded as one of the League's political activities, this raises a presumption that there was not any takeover by the United Nations of the League mandates system *as such*,—a view fully borne out by the creation of the parallel United Nations trusteeship system, and the fact that the mandatories were invited to convert their mandates into trusteeships, though without obligation to do so. These matters will however more conveniently be considered later, in their historical context;—and the same applies to the question of whether South Africa, as Mandatory, ever consented to the transfer to the United Nations of obligations which,

at the date of the entry into force of the Charter, were owed to the League *which was then still in existence*, and remained so for some time after.

13. Meanwhile I turn to the second of the three possibilities mentioned in the preceding paragraph,—namely that there was an *implied* succession by the United Nations to League functions in respect of mandates, and correspondingly an *implied* transfer to the United Nations of the obligations owed by the Mandatory to the League. It is easy to assume that because the United Nations had certain resemblances to the League and might have been regarded as its "natural" successor, therefore it was the legal successor;—but this was not the case. It is no less easy to assume, as the Opinion of the Court clearly does—virtually without arguing the point—that if, and because, the various mandates survived the dissolution of the League, *therefore* the United Nations must necessarily and *ipso facto* have become entitled to exercise a supervisory role in respect of them, although they were a League, not a United Nations institution, and are mentioned in the Charter only as territories that can, but do not have to be, placed under United Nations trusteeship. The fallacy in this kind of reasoning—or rather, presupposition, is evident. Even the argument that only the United Nations *could* play such a part is, as will be seen, erroneous.

2. No automatic or implied succession

(i) Origin and nature of the supervisory function

14. The Council of the League of Nations (of which three of the principal mandatories were permanent members) was never itself in terms invested *eo nomine* with what has become known as the supervisory function relative to the conduct of the various mandates [6]. The very term "supervisory" is moreover misleading in the light of the League voting rule of unanimity including the vote of the member State affected,—that is to say, when mandates were in question, the mandatory. The so-called supervisory function was in reality predicated upon and derived from the obligation of the mandatories [6a] to furnish an annual report to the Coun-

---

[6], [6a], [6b] The plural, or the indefinite article, and small letter "m" is used in the present opinion whenever the context does not require the sense to be confined to the Mandate for SW. Africa or South Africa as Mandatory. Failure to do this must result in a distortion of perspective;—for, subject to the differences between "A", "B" and "C" mandates, as adumbrated in paragraphs 4, 5 and 6 of Article 22 of the League Covenant, and as resulting from the texts of the various categories of mandates, the position in most of the connections with which this case is concerned was the same for all the mandates and mandatories—not peculiar to SW. Africa. In particular, none of the mandates conferred any specific supervisory function on the League Council, and none went further in this respect than to include the reporting obligation in substantially the same terms.

cil, through the then Permanent Mandate Commission,—as a sort of inference, corollary or counterpart of that obligation. It was in that way and no other that what has been called the accountability of the mandatories arose. This point, which is of primary importance when it comes to determining what was the real nature of the supervisory function as exercisable by the League Council, and whether it included the power to revoke a mandatory's [6b] mandate, is developed in full in Section B below. Its relevance here is that it was this reporting obligation, and such "accountability" as an obligation of that order may imply [7], that gave rise to the *specific* function of supervision, not vice versa;—and what is incontestably clear is that the whole question of who, or what entity, was entitled to supervise, was bound up with and depended on the prior question of who, or what entity, mandatories were obliged to report to and, to that extent, become accountable to (but accountability did not in any event—see footnote 7—imply *control*).

(ii) Distinction between the reporting obligation in se and the question of what entity can claim performance of it

15. It follows that in order to determine what entity, if any, became invested with the supervisory function after the disappearance of the League and its Council, it is necessary to ascertain what entity, if any, the mandatories then became obliged to report to, if they continued to be subject *as* mandatories to the reporting obligation at all—(see footnote 5, paragraph 10 above). More specifically, in the context of the present case, in order to answer the question whether the *United Nations*, in particular, became invested with any supervisory function, it will be necessary to determine whether, in respect of any mandated territory not placed under the United Nations trusteeship system, the mandatory concerned became obliged to report to some organ of the United Nations (and notably to its General Assembly, found by the Court in its 1950 Opinion to be the most appropriate such organ for the purpose). The underlying issue is whether the United Nations could claim not merely *a* right to be reported to, but an *exclusive* right, in the sense that the obligation arose in relation to it and it alone, and no other entity. In different terms: *first*,

[7] As will be seen later, reporting in the context of mandates had none of the implications that are involved when, for instance, it is said that "X" reports to "Y" (a superior), which implies that "X" takes his *orders* from "Y". This was not the position as between the League Council and the mandatories, any more than it is as between the competent organs of the United Nations and member States administering trust territories (see below, paragraphs 77 and 104, and also footnote 66, paragraphs *(b)* and *(c)*).

given, as is generally accepted [8], that the various mandates survived the dissolution of the League, then did the reporting obligation, the situation of accountability considered in the abstract so to speak, equally survive that dissolution as part of the concept of mandates;—and *secondly*, if so, did it survive in the form of, or become converted into, an obligation to report, to be accountable not just to *some* organ, but to that particular organ which was and is the Assembly of the United Nations?

(iii) The reporting obligation, if it survived, was capable of implementation otherwise than by reporting to a United Nations organ

16. It is of course evident that if a reporting obligation survived the dissolution of the League, the furnishing of reports to an organ of the United Nations, in particular the General Assembly, was not the only possible way in which that obligation could be discharged; nor was a United Nations organ, specifically as such, in any way indispensable as a recipient, and commentator on or critic of such reports. There were at the time, and there are now, several international bodies in existence, much more comparable in character to the League Council, or at least to the former Permanent Mandates Commission, than the United Nations Assembly, to which any mandatory preferring that course could have arranged to report, and with which it could have carried on the sort of dialogue that was carried on with the League organs;—*and here it is of primary importance to bear in mind that the absence of any compulsory powers vested in such a body would have had no bearing on the situation, since neither the League Council nor the Assembly of the United Nations had any such powers in this matter* [9]. Alternatively, if no appropriate body could be found willing to act, it would have been open to any mandatory, perhaps acting in conjunction with others, to set one up,

[8] So far as this aspect of the subject is concerned, the South African contention that the Mandate is at an end is both conditioned and indirect. It is maintained on the one hand that the reporting obligation lapsed in its entirety on the dissolution of the League because it then became impossible to perform it according to its actual terms,—but also that it was not an essential part of the Mandate which could continue without it. At the same time it is maintained that if the obligation is non-severable—if it *is* an essential part of the Mandate—then its lapse entails the lapse of the Mandate as a whole. These are alternative positions and there is no contradiction between them as the Opinion of the Court seeks to claim.

[9] This point, which goes to the root of much of the case, is more fully developed in Section B below. According to League procedure the Council's decisions were not binding on the mandatory concerned unless the latter concurred in them, at least tacitly; while the resolutions of the United Nations Assembly—except in certain specific cases not material in this context—only have the status of recommendations and have no binding effect except, at most (and even that is open to argument) for those who have affirmatively voted in favour of them.

to which the necessary reporting undertakings would be given,—the ensuing reports, and comments thereon, being made public [10].

(iv) There was no survival of the reporting obligation in the form of an automatic obligation to report to a United Nations organ—Basic differences between the League Council and the United Nations Assembly as a supervisory body

17. For present purposes it is unnecessary to express any final view as to whether the reporting obligation did or did not, in the abstract, or as a concept, survive the dissolution of the League, because in any event I do not consider that it survived in the form of an automatic self-operating obligation to report to and accept the supervision, specifically, of the United Nations, and in particular of its General Assembly. *The unconscious assumption* (or has it been deliberate?) which has dogged the SW. Africa question for so many years, *that it was all the same thing for a mandatory whether it reported to the League Council or to the United Nations Assembly*, so why should it not do so, *is of course quite illusory, because the character of the supervisory organ affects the character and weight of the obligation.* Taking this view does not necessarily mean accepting the South African contention that the reporting obligation was so intimately bound up with the character of the entity to be reported to that, upon the extinction of that entity, it must lapse entirely [11]. But I do accept the view that in no circumstances could an obligation to report to and accept supervision at the hands of one organ—the League Council—become converted automatically and *ipso facto*, and without the consent of the mandatory (indeed against its will), into an obligation relative to another organ, very differently composed, huge in numbers compared with the League Council, functioning differently, by different methods and procedures, on the basis of a different voting rule, and

---

[10] In fact, none of the mandatories did this,—*nor did any of them report to the United Nations*,—but, apart from South Africa, they did eventually convert their mandates into trusteeships.

[11] See further as to this in Section D below, paragraphs 119-120. The matter turns on:

(i) whether, as the Court found in 1950 (*I.C.J. Reports 1950*, pp. 136-137), the reporting obligation, in so far as it implied supervision, was so important a part of a mandate that if the latter survived, the former must too,—or whether, as Judge Read thought (*ibid.*, p. 165), the absence of reporting, etc., might "weaken the mandate" but not otherwise affect it;

(ii) the effect, if the situation is a contractual or quasi-contractual one, of the extinction of one of the parties,—in this case of the League of Nations; and

(iii) if the situation is not of that kind, the legal status of a provision that can no longer be carried out according to its actual terms but can perhaps be implemented in some equivalent way.

against the background of a totally different climate of opinion, philosophy and aim, unsympathetic by nature to the mandatory [12]. Indeed the very fact that the supervision of a *mandate* would have become exercisable by an organ which disapproved in principle of mandates that remained mandates, and held it from the start almost as an article of faith (this will be reverted to later, for it is a cardinal point) that all mandated territories should be placed under its own trusteeship system,—and whose primary aim moreover, in all its dealings whether with trust territories, mandated territories, or non-self-governing territories under Article 73 of the Charter, was to call into existence as speedily as possible a series of new

[12] The following table makes this clear:

I. International Organization:—	League of Nations.	United Nations.
II. Report receiving or supervisory body:—	League Council.	General Assembly.
III. Numbers of same:—	Small (varied through 9-11-13) and included the then permanent members of which three were mandatories.	Potentially unlimited. 50/60 even in 1946—now 130-140 and still growing.
IV. Voting rule:—	Unanimity, including vote of Mandatory.	Two-thirds majority; sometimes possibly a bare majority.
V. Advisory sub-organ:—	Permanent Mandates Commission.	Trusteeship Council; Committee of the Assembly; or "subsidiary organ" set up under Art. 22 of the Charter.
VI. Composition of sub-organ:—	Experts acting in their personal capacity, not as representatives of governments.	Representatives of governments.
VII. Attitude and approach of supervisory body:—	Sympathetic to the mandatories—not over-political.	Unsympathetic to mandatories,—highly political.
VIII. Aim:—	Good administration of the mandated territory.	Earliest possible bringing about of the independence of the territory.

sovereign independent States;—all this alone would have been sufficient to create, and perpetuate, a permanent state of tension between the United Nations Assembly as a supervisory organ and any mandatory held accountable to it. None of this existed under the régime of the League.

18. Exactly the same considerations apply to any Committee or sub-Committee of the Assembly which might be set up to deal with mandates, and which, however it might be dressed up to look like the former League Council or Permanent Mandates Commission (see the proposal made in Assembly resolution 449 (V) of 13 December 1950) would remain fully under the Assembly's control, and reflect its tendencies and aims. Indeed this has been only too self-evidently the case as regards those Committees that have been (at later stages) set up with reference to the SW. Africa question.

(v) Conclusion as to implied succession

19. For these reasons it seems to me to be juridically impossible to postulate such a metamorphosis as taking place automatically or unless by consent. *To do so would not merely be to change the indentity of the organ entitled to supervise the implementation of the obligation but, by reason of this change, to change also the nature of the obligation itself.* Given the different character and methods of that organ, it would be to create a new and more onerous obligation (it is of course, *inter alia*, precisely because of the possibility of this, that novations require consent). I must therefore hold that no such transformation ever took place of itself so that, if consent was lacking, the United Nations never became invested with any supervisory function at all. This view will now be developed, first by way of answer to various counter-arguments that have been or may be advanced,—secondly on the basis of certain positive and concrete considerations which have never been given their true weight, but are to my mind decisive.

3. Counter-contentions as to implied succession

(a) *The Advisory Opinion of the Court of 11 July 1950*

20. In the 1950 advisory proceedings there was a striking, though quite differently orientated parallelism between the South African arguments on this matter and the views expressed by the Court, due to a mutual but divergently directed confusion or telescoping of the two separate questions already noticed, of the survival of the reporting obligation as such,

and the form of its survival, if survival there was. Contending that this obligation had never been contemplated except as an obligation relative to the Council of the League, and could not therefore, upon the dissolution of the latter and the establishment of the United Nations, become automatically transformed into an obligation owed to that Organization, South Africa argued that *because* this was so, therefore *all* obligations of accountability had disappeared. This deduction may have been natural, but clearly lacked logical rigour and necessity,—for the *obligation* as such could survive, even though becoming dormant for the time being.

21. The same process of ellipsis, though with quite another outcome, characterized the reasoning of the Court in 1950. Holding that the reporting obligation was an essential part of the mandates system, and must survive if the system itself survived, the Court went on to hold that *therefore* it survived as an obligation to report specifically to the Assembly of the United Nations. This last leg of the argument not only lacked all logical rigour and necessity but involved an obvious fallacy,—which was the reason for the dissenting views expressed by Judges Sir Arnold McNair (as he then was) and Read—dissenting views with which I agree. It obviously could not follow, as the Court in effect found, that *because* the United Nations happened to be there, so to speak, and, in the shape of the trusteeship system, had set up something rather similar to the mandates system, *therefore* not merely trusteeships but mandates also were subject to United Nations supervision. This again was a *non sequitur* [13]. It was tantamount to saying that although (as the Court found later in the same Opinion—*I.C.J. Reports 1950*, pp. 138-140) mandatories were not obliged to place their mandated territories under trusteeship, yet for all practical purposes they had to accept United Nations supervision just the same whether or not they had placed the territories under trusteeship. This does not make sense. The result was that in effect the Court cancelled out its own finding that trusteeship was not obligatory—and made it a case of "Heads I win: tails you lose"! It is not too much to say that the

[13] The following passage from the Court's Opinion (*I.C.J. Reports 1950*, p. 136) exhibits very graphically the telescoping of the (valid) premiss that accountability in principle had not necessarily disappeared with the League, with the (invalid) deduction that mandatories were thereby necessarily obliged to hold themselves accountable *to the United Nations*:

> "It cannot be admitted that the obligation to submit to supervision had disappeared merely because the supervisory organ has ceased to exist, when the United Nations has *another* [precisely!] international organ *performing similar, though not identical supervisory functions*"—(my italics).

The *non sequitur* is clearly apparent. The Court did not seem to see that the transition to a new and different party could not occur of itself or simply be *presumed* to have taken place;—and the present Opinion of the Court compounds the fallacy.

absence of any legal obligation to place mandated territories under trusteeship implied *a fortiori*, as a necessary deduction, the absence of any legal obligation to accept United Nations supervision in respect of mandates, or the one would be defeated by the other.

22. Clearly the existence of the United Nations, and its superficial resemblances to the League, had absolutely nothing to do in logic with the survival of the reporting obligation, except in so far as it provided a convenient (but not obligatory) method of discharging that obligation if it did survive. This was Judge Read's view in 1950. Having found that there had been no consent on the part of the Mandatory to the exercise of United Nations supervision, in the absence of which the only possible basis for such an obligation would be "succession by the United Nations", he continued (*I.C.J. Reports 1950*, p. 172):

> "Such a succession could not be based upon the provisions of the Charter, because . . . no provisions of the Charter could legally affect an institution founded upon the Covenant or impair or extinguish [the] Legal rights and interests of those Members of the League which are not members of the United Nations[14]. It could not be based on implications or inferences drawn from the nature of the League and the United Nations *or from any similarity in the functions of the organizations*. Such a succession could not be implied, either in fact or in law, in the absence of consent, express or implied by the League, the United Nations and the Mandatory Power. There was no such consent"—(my italics).

(b) *Did the Charter imply accountability obligations for mandatories?*

(i) In general

23. The Charter makes no specific mention of mandated territories at all, except in the two Articles (77, and 80, paragraph 2) where it refers to them, along with other types of territories, as candidates for being placed under trusteeship but without creating any obligation in that regard. It says nothing at all either about supervision or accountability. The contention that the Charter is to be read as if in fact it did so, is therefore founded entirely on a process of implication,—a process sought to be

[14] It was and is conveniently forgotten—though not by Judge Read—that at the time when the Charter came into force (October 1945), and until April 1946, the League was still in being.

founded on two particular provisions, Articles 10, and 80, paragraph 1. These must now be considered.

(ii) Article 10 of the Charter

24. For Article 10 to suffice in itself, it would be necessary to find in it not only a competence conferred on the Assembly to exercise a supervisory role in respect of mandates, but also an obligation for mandatories to accept that supervision and be accountable to the Assembly. Since the Article makes no mention of mandates as such, the argument would have to be that the faculty given to the Assembly by that provision "to discuss [and 'make recommendations . . . as to'] any questions or any matters within the scope of the present Charter", not only invested the Assembly with a supervisory function in respect of mandates, but also obliged mandatories to *accept* the Assembly in that role and regard themselves as accountable to it. Quite apart from the fact that a faculty merely to "discuss . . . and . . . make [non-binding] recommendations" could not possibly extend to or include so drastic a power as a right unilaterally to revoke a mandate, it is evident that a *faculty* conferred on "A" cannot, in and of itself—even in relation to the same subject-matter—automatically and *ipso facto* create an *obligation* for "B" [15]. The *non sequitur*—the absence of any *nexus* is apparent, and the gap cannot be bridged in the way the Court seeks to do (see footnote 16 below). Furthermore, since one of the basic questions at issue is, precisely, whether mandates *as such*—as opposed to trusteeships and mandated territories *placed under trusteeship* —*are* "within the scope of the Charter", the whole argument founded on Article 10 of the Charter is essentially circular and question-begging.

25. Article 10 was, and is, a provision which, without in terms mentioning mandates, or indeed anything specific at all, ranges over the vast field implied by the words "any questions or any matters within the scope

[15] For instance the setting up of an authority empowered to conduct and collect information in view of a census, does not of itself oblige the population to co-operate. Census laws, in addition to the obligation imposed on the census authority, impose a separate obligation on all members of the population to co-operate, with penalties for any default. Otherwise the latter obligation would not exist,—and the former would in consequence be vain.

[16] As in 1950, the Court, while finding in Article 10 the competence of the Assembly to supervise, professes to find the obligation of the mandatory to be accountable to the Assembly *(a)* in Article 80 of the Charter, *(b)* in an alleged recognition of accountability to the United Nations, supposed to have been given by all the mandatories when they voted in favour of the final League of Nations resolution on mandates of 18 April 1946. As will be seen (paragraphs 26-32 and 54-55 below) such an obligation cannot be derived from either source.

of the present Charter". This could cover almost anything [17]. Yet could it reasonably be contended that in relation to anything the Assembly might choose to discuss under this provision, and which could fairly be regarded as included in it, authorities and bodies in all member States of the United Nations thereby, and without anything more, would become obliged at the request of the Assembly to submit reports to it, and accept its supervision concerning their activities? The question has only to be put, for its absurdity to be manifest. Nothing short of express words in Article 10 could produce such an effect. Upon what juridical basis therefore, can an obligation to report and accept supervision in respect of mandates be predicated upon this provision? It was precisely this absence of logical necessity, or even connexion, that motivated Lord McNair's dissent in 1950. After saying that he could not find any legal ground upon which the former League Council could be regarded as being replaced by the United Nations for the purpose of being reported to and exercising supervision, which "would amount to imposing a new obligation [18] upon the [mandatory] and would be a piece of judicial legislation", he continued (*I.C.J. Reports 1950*, p. 162):

> "In saying this, I do not overlook the competence of the . . . Assembly . . . under Article 10 of the Charter, to discuss the Mandate . . . and to make recommendations concerning it, but that competence depends not on any theory of implied succession but upon the provisions of the Charter."

In other words, even if the provisions of the Charter might be sufficient to found the competence of the Assembly—(even so, only to discuss and recommend)—they must also be shown to establish the obligation of the mandatory, since no theory of implied succession could be prayed in aid [19];—and in so far as it is sought to rely on the terms of Article 10 for

---

[17] It suffices to look at the Preamble to the Charter, and Article 1 and the provisions of Chapters IX and X, in order to see how great the range is, even omitting things like peace-keeping and sundry miscellanea.

[18] "New" because, since the League clearly had not *assigned* its supervisory rights to the United Nations (see further as to this, paragraph 42 below), only a *novation* could have produced the effect that the Court found in favour of in 1950. But a novation would have required the mandatory's consent, which Lord McNair did not think had been given. Speaking of the various contemporary statements made on behalf of South Africa, he said (*I.C.J. Reports 1950*, p. 161) that he did not find in them "adequate evidence" that the mandatory had "either assented to an implied succession by the United Nations . . ., or . . . entered into a new obligation towards [it] to revive the pre-war system of supervision".

[19] Lord McNair had already held (*I.C.J. Reports 1950*, p. 159) that it was a "pure inference" [i.e., in the context a mere supposition] "that there [had] been an automatic succession by the United Nations to the rights and functions of the

this purpose, it is clear that they will not bear the weight that would thereby be put upon them.

(iii) Article 80 of the Charter

26. This is another provision (its terms are set out below [20]) to which it has been sought to give an exaggerated and misplaced effect, and which equally cannot bear the weight thus put upon it. (It is true that the second paragraph manifests an expectation that mandated territories would be placed under the trusteeship system,—but expressions of expectation do not create obligations, as the Court found in 1950, specifically in relation to this provision—*I.C.J. Reports 1950*, p. 140).) As for the first paragraph, the changes which it rules out are clearly those, and only those, that might result from Chapter XII (the trusteeship chapter) of the Charter ("nothing in this Chapter [i.e., XII] shall be construed . . . to alter . . . etc.),—and, as Lord McNair pertinently observed in 1950, "the cause of the lapse of the supervision of the League and of Article 6 of the Mandate [21] is not anything contained in Chapter XII of the Charter, but is the dissolution of the League, so that it is difficult to see the relevance of this Article". It is of course possible to hold on other grounds that the principle of accountability, as expressed in the form of the *reporting* obligation, though becoming dormant, did not lapse with the dissolution of the League (paragraphs 17 and 20 above). What cannot legitimately be held is that if it did so lapse—or would otherwise have done so—it was preserved or revived by reason of Article 80,—for that provision's sole field of preservation was from extinction due to the effects of Chapter XII, not from extinction resulting from the operation of causes lying wholly outside that Chapter.

Council of the League in this respect; . . . as the Charter contained no provision for [such] a succession . . . [which] could have been expressly preserved and vested in the United Nations . . . but this was not done".

[20] Article 80 of the Charter reads as follows:

"1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing *in this Chapter* shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties—(my italics).

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

[21] Article 6 of the Mandate for SW. Africa embodies the reporting obligation.

27. Still less can it be legitimate to hold that the reporting obligation was not only preserved as a concept, but became, by some sort of silent alchemy, actually *converted* by Article 80 into an obligation to report to an (unspecified) organ of the United Nations. The impossibility of attributing this last effect to Article 80 becomes manifest if it be recalled that at the date (24 October 1945) when the Charter, including Article 80, came into force, *the League of Nations was still in existence* (and continued so to be until 18 April 1946)[22], so that the reporting obligation was still owed to the Council of the League. If therefore Article 80 could have operated at all to save this obligation from causes of lapse lying outside Chapter XII of the Charter, it is in *that* form that it must have preserved it—i.e., as an obligation in relation to the League Council;—and there is no known principle of legal construction that could, simply on the basis of a provision such as Article 80, cause an obligation preserved in that form, to become automatically and *ipso facto* converted six months later into an obligation *relative to a different entity of which no mention had been made*. If, to cite Article 80, Chapter XII was not to be "construed" as altering, "the terms of existing international instruments", then what was not to be altered were those provisions of the mandates and of Article 22 of the League Covenant (then still in force) for reporting to the League Council (then still in being). How then is it possible to read Article 80, not as preserving *that* obligation but (as if at the wave of the magician's wand) creating a new and different obligation to report to a new and very different kind of organ—the United Nations Assembly?—a change which could not have been a matter of indifference to the mandatories.

28. It comes to this therefore, that there is absolutely nothing in Article 80 to enable it to be read as if it said "The League is still in being, but if and when it becomes extinct, all mandatories who are Members of the United Nations will thereupon owe to the latter Organization their obligations in respect of mandated territories". *That* of course (see *per* Lord McNair in footnote 19 above) is precisely what (or something like it) the Charter ought to have stated, in order to bring about the results which—(once it had become clear that SW. Africa was not going to be placed under the United Nations trusteeship system)—it was then attempted to deduce from such provisions as Articles 10 and 80. But the Charter said no such thing, and these Articles, neither singly nor together, will bear the weight of such a deduction.

29. The truth about Article 80 can in fact be stated in one sentence: either the mandates, with their reporting obligations, would in any event

[22] Although it was known *de facto* that the League would be dissolved, there was nothing in the Charter to compel those Members of the United Nations who were also Members of the League to take this step, still less to take it by any particular date.

have survived the dissolution of the League on a basis of general legal principle or, as some contend, of treaty law, and there would have been no need of Article 80 for that particular purpose [23];—or else, if survival had to depend on the insertion of an express provision in the Charter, Article 80 was not effectual for the purpose—guarding as it did only against possible causes of lapse arising out of Chapter XII itself, which was not the cause of the dissolution of the League. In consequence, quite a different type of provision would have been required in order to produce the results now claimed for Article 80.

30. It is argued that the foregoing interpretation deprives Article 80 of all meaning, since (so it is contended) there is nothing in Chapter XII of the Charter that *could* alter or impair existing rights, etc. Even if this were the case, it would not be a valid juridical reason for reading into this provision what *on any view* is not there, namely a self-operating United Nations successorship to League functions,—the automatic conversion of an obligation of accountability to the League Council (still extant when Article 80 came into force) into an obligation towards the Assembly of the United Nations. But in any event this argument is not correct. Article 80 remains fully meaningful,—and its intended meaning and effect, so far as mandates were concerned, was to guard against the possibility that the setting-up of the trusteeship system might be regarded as an excuse for not continuing to observe mandates obligations, *whatever these were*, and continued to be. *But it did not define what these were, or say whether they continued to be.* Furthermore it was only "in and of itself" (words all too frequently overlooked) that the creation of the trusteeship system was not to affect mandates. But if these lapsed from some other (valid) cause, Article 80 did not, and was never intended to operate to prevent it. In short, Article 80 did not *cause* them to survive,—but if they did (otherwise) survive, then the setting-up of the trusteeship system could not be invoked as rendering them obsolete.

---

[23] This was the view taken by Ambassador Joseph Nisot, the former Belgian delegate and jurisconsult whose knowledge of the United Nations dates from the San Francisco Conference. Writing in the *South African Law Journal*, Vol. 68, Part III (August 1951), pp. 278-279, he said:

> "The only purpose of the Article is to prevent Chapter XII of the Charter from being construed as in any manner affecting or altering the rights whatsoever of States and peoples, as they stand pending the conclusion of trusteeship agreements. Such rights draw their judicial life from the instruments which created them; they remain valid in so far as the latter are themselves still valid. If they are maintained, it is by virtue of those instruments, not by virtue of Article 80, which confines itself to providing that the rights of States and peoples—whatever they may be and to whatever extent may subsist—are left untouched by Chapter XII."

For a similar view by a former judge of the Permanent Court (also a delegate at

31. The argument founded upon the reference to Article 80 contained in Article 76 *(d)* of the Charter is equally misplaced and turns in the same circle. Without doubt the effect of this reference was that *in so far as* any preferential economic or other rights were preserved by reason of Article 80, they formed exceptions to the régime of equal treatment provided for by Article 76 *(d)*. But this left it completely open what preferential rights were thus preserved. They were of course only those preserved from extinction because of the operation of Chapter XII of the Charter, not those that might be extinguished from other causes. The point is exactly the same as before.

32. If neither Article 10 nor 80, taken singly, created an obligation to report to the United Nations Assembly, it is evident that, taken together, they cannot do so either. If anything, the reverse is the effect,—two blanks only create a bigger blank.

(c) *The Organized World (or "International") Community Argument*

33. This argument, not previously prominent, the essence of which is to postulate an *inherent* continuity between the League of Nations and the United Nations, as being only different expressions of the same overriding idea, emerged in the course of the *South West Africa* cases (Ethiopia and Liberia *v.* South Africa, 1960-1966). It is obviously directed to supplying a possibly plausible foundation for something that has no basis in concrete international law. It has no such basis because the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to find actual expression. In the days of the League there was not *(a)* the organized world community, *(b)* the League. There was simply the League, apart from which no *organized* world community would have existed. The notion therefore of such a community as a sort of permanent separate residual source or repository of powers and functions, which are re-absorbed on the extinction of one international organization, and then automatically and without special arrangement, given out to, or taken over by a new one, is quite illusory [24].

San Francisco) see Manley Hudson in *American Journal of International Law*, Vol. 45 (1951), at p. 14.

[24] Nor does international law know anything comparable to such principles of private law as those for instance which, in the event of a failure of all heirs to given property, cause it to pass as *bona vacantia* to the State, the fisc, the Crown, etc.; so that although there is no "inheritance" as such, there is a successorship in law. Moreover, what is in question in the present case is not property but the exercise

34. It is evident therefore that, in the instant case, this theory is put forward with a view to circumventing, *ex post facto*, what would otherwise be—what *is*—an insuperable juridical obstacle,—namely the lack of any true successorship in law between the League of Nations and the United Nations. In the absence of such successorship, the "organized world [or 'international'] community" argument can be seen for what it is—an expedient;—for it is quite certain that none of the States that, as mandatories, assumed obligations to report to the League Council could for one moment have supposed that they were *thereby* assuming an open-ended obligation to report for all time to whatever organ should be deemed, at any given moment, to represent a notional and hypothetical organized world community, and regardless of how such a community might be constituted or might function.

4. Political rejection in the United Nations of any continuity with the League of Nations

(a) *In general and in principle*

(i) Attitude towards the League

35. In the foregoing sub-sections various theories of implied succession as between the United Nations and the League in the field of mandates have been considered and shown to be fallacious. The real truth is however, that they all fly in the face of some of the most important facts concerning the founding of the United Nations;—for the idea of taking over from the League, of re-starting where it left off, was considered and rejected—expectedly so. The United States had never been a member of the League for reasons that were still remembered [25]. The Soviet Union had been expelled in 1939. The "Axis" Powers, on the other hand, under their then fascist régimes, *had* been members, and so on. The League had a bad name politically. It had failed in the period 1931-1939 to prevent at least three very serious outbreaks of hostilities, and it had of course been powerless to prevent World War II. It was regarded in many quarters as something which—so far from being an "organised world com-

of a function, and there is no principle of international law which would make it possible to say that, if an international organization becomes extinct, its functions automatically pass to another without special arrangements to that effect. The position was correctly stated by Judge Read in 1950, in the passage quoted in paragraph 22 above.

[25] It will be recalled that although President Wilson was one of the principal architects of the League Covenant,—and although the Covenant, instead of being a separate instrument had been made formally part of the Treaty of Versailles in the belief that the United States must ratify the latter, and thereby automatically become a member of the League,—this expectation was defeated by the action of the United States Senate in declining to ratify the Treaty, despite the fact that the United States was one of the "Principal Allied and Associated Powers" in whose name it was made. A separate Peace Treaty with Germany was concluded by the United States in 1921.

munity"—was a paramountly European institution dominated by "colonialist" influences. The United Nations, so it was felt, must represent an entirely fresh initiative. Although it could hardly fail in certain ways to *resemble* the League, there must be no formal link, no juridical continuity. The League had failed and the United Nations must not start under the shadow of a failure.

36. *This* is why absolutely *no mention of the League is to be found in any part of the Charter.* (Even in connection with mandates, formerly generally known as "League of Nations mandates", the Charter makes no mention of the League. In Article 77, paragraph 1, and Article 80, paragraph 2—the only provisions in which mandates as such are mentioned—they are referred to as "territories now held under mandate" and "mandated ... territories".) *This again* is why the Charter was brought into force without any prior action to wind up the League, and regardless of the fact that it was still, and continued to be, in existence. It is not too much to say therefore that, in colloquial terms, the founders of the United Nations bent over backwards to avoid the supposed taint of any League connexion.

(ii) Assembly Resolution XIV of 12 February 1946

37. The same attitude of regarding the League as a quasi-untouchable was kept up when, after the Charter had come into force and the United Nations was definitely established, action was taken to put an end to the League and take over its physical and financial assets,—and to reach a final decision regarding its political and technical activities [26]. This was done by the now well-known General Assembly Resolution XIV of 12 February 1946, the whole text of which will repay study and will, with one (non-pertinent) omission, be found set out verbatim on pages 625-626 of the 1962 volume of the Court's Reports. The parts relevant to mandates (though not mentioning them by name) were as follows:

---

[26] A start had of course been made in the Preparatory Commission of the United Nations set up after the San Francisco Conference. To cite the joint dissenting Opinion written by Sir Percy Spender and myself in the 1962 phase of the *South West Africa* cases (*I.C.J. Reports 1962*, p. 532), the Summary Records of the Commission, in particular UNPC Committee 7, pp. 2-3 and 10-11, indicated that "the whole approach of the United Nations to the question of the activities of the League of Nations was one of great caution and indeed of reluctance ... there was a definite rejection of any idea of ... a general take-over or absorption of League functions and activities".

"3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations and adopts the following decisions set forth in A, B and C below."

Decisions A ("Functions pertaining to a secretariat") and B ("Functions and powers of a technical and non-political character") are irrelevant in the present connexion; but decision C, under which the question of mandates was regarded as coming, read as follows:

"C. *Functions and Powers under Treaties, International Conventions, Agreements and other Instruments Having a Political Character* [27].

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character [27a]."

Commenting on this in 1950 (*I.C.J. Reports 1950*, p. 172), Judge Read, whose views I share, said, speaking of the Mandate for SW. Africa, that it involved "functions and powers of a political character" and that in substance decision C provided that the General Assembly would examine a request "that the United Nations should assume League functions as regards report, accountability and supervision over the South-West African Mandate". He then continued:

"No such request has been forthcoming, and the General Assembly has not had occasion to act under decision C. *The very existence of this express provision, however, makes it impossible to justify succession based upon implication*"—(my italics).

38. Nor was the Assembly's Resolution XIV of 12 February 1946 in any way the outcome of a hasty or insufficiently considered decision. It had been carefully worked out in the Preparatory Commission, and its committees and sub-committees, and it represented the culmination of a settled policy. The story is summarized on pages 536-538 of the 1962 joint dissenting Opinion already referred to (footnote 26 above) and a fuller version is given at pages 619-624 of the same volume of the Court's Reports. In the discussion in the Preparatory Commission of the drafts prepared by its Executive Committee, of what eventually became Reso-

[27], [27a] It was of course under the head of "Other instruments having a political character" that mandates were deemed to come.

lution XIV, the use of the word "transfer" [of League functions and activities], which nowhere appears in that resolution, was specifically objected to, and dropped, on the ground that it would seem to apply a "legal continuity *that would not in fact exist*"—my italics—(see UN docts. PC/LN/2, pp. 2-3, and PC/LN/10, pp. 10-11).

(b) *In particular as regards mandates*

(i) Settled policy of preference for and reliance upon the trusteeship system

39. As regards mandates, no fewer than three proposals were made in the Preparatory Commission for the setting up of what would have been an interim régime for *mandates* under the United Nations. In the first place the Executive Committee recommended the creation of a "Temporary Trusteeship Committee" to deal with various interim matters until the trusteeship system was fully working, and amongst them "any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System"—(references will be found in the footnotes to pp. 536 and 537 of the *I.C.J. Reports 1962*). Had this proposal been proceeded with, it would have resulted in the creation of some sort of interim régime in respect of mandates, pending their being placed, *or if they were not placed*, under trusteeship. But in the Preparatory Commission itself, the idea of a temporary trusteeship committee met with various objections, mainly from the Soviet Union, and was not proceeded with. Instead, the Commission made quite a different kind of recommendation to the General Assembly, looking to the conversion of the mandates into trusteeships. This recommendation eventually emerged as Assembly Resolution XI of 9 February 1946, which will be considered in a moment.

40. Even more effective would have been the two United States proposals made in the Executive Committee on 14 October and 4 December 1945 respectively, which, had they been adopted, would have done precisely and expressly what it is now claimed was (by implication) done, even though these proposals were not proceeded with. Subject to differences of wording they were to the same effect, and their character can be seen from the following passage recommending that one of the functions of a temporary trusteeship committee should be (UN doct. PC/EX/92/Add. 1):

> ". . . to undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, the functions

previously performed by the Mandates Commission in connection with receiving and examining reports submitted by Mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function".

But after tabling these proposals the United States delegation did not further proceed with them. Instead, the Preparatory Commission recommended, and the Assembly adopted, Resolution XI mentioned at the end of the preceding numbered paragraph above. The full text of the relevant parts of this Resolution will be found on page 624 of *I.C.J. Reports 1962*. It was addressed to "States administering territories now held under mandate"; but all it did was to welcome the declarations made by "certain" of them as to placing mandated territories under trusteeship, and to "invite" all of them to negotiate trusteeship agreements for that purpose under Article 79 of the Charter;—not a word about the interim position,—not a word about the situation regarding any mandated territories in respect of which this invitation was not, and continued not to be, accepted. This piece of history confirms the existence of a settled policy of avoidance of mandates as such.

(ii) The final League of Nations Resolution of 18 April 1946

41. Precisely the same attitude characterized the behaviour of those Members of the United Nations who were also Members of the League when, in their latter capacity, they attended the final Geneva meeting for the winding up of the League. Here again was an opportunity of doing something definite about mandates,—for (with the exception of Japan, necessarily absent) all the mandatories were present, and would be bound by any decisions taken,—since, according to the League voting rule, these had to be taken by unanimity. The terms of the resulting Resolution of 18 April 1946 will be considered in greater detail later, in connexion with the question whether they implied for the mandatories any *undertaking* of accountability *to the United Nations* in respect of their mandates as such. Suffice it for present purposes to say that after *recognizing* that, on the dissolution of the League, the latter's "functions with respect to Mandated Territories will come to an end", the Resolution merely *noted* that "Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League",—and then went on to take note of the "expressed intentions" of the mandatories to continue to administer their mandates "in accordance with the obligations contained" in them, "until other arrangements have been agreed between the United Nations and the

respective [mandatories]";—again an allusion to, and a looking towards, the trusteeship system which, under the Charter, required the negotiation of trusteeship *agreements*. The interim position, and the position concerning any mandates in respect of which no trusteeship agreements were negotiated, was thus left to the operation of an ambiguous general formula, the precise effect of which (to be considered later) has been in dispute ever since.

42. The view that it was once more the trusteeship system that those concerned had in mind is borne out by the fact that the Board of Liquidation set up by the League Assembly to dispose of the League's assets—in handing over the archives of the League's mandates section to the United Nations—said in a report, the relevant part of which was entitled "*Non-Transferable* Activities, Funds and Services"—(my italics), that these archives "should afford valuable guidance to those concerned with the administration of the *trusteeship* [not the mandates] *system*"—my italics). It then also declared that "the mandates system inaugurated by the League has thus been brought to a close" (L. of N. doc. C.5.M.5., p. 20). In short, as Lord McNair said in 1950 (*I.C.J. Reports 1950*, p. 161), in a very pertinent verdict on the April 1946 resolution, it

> ". . . recognized that the functions of the League had come to an end; *but it did not purport to transfer them . . . to the United Nations*" (my italics) [28].

After adding that he did not see how this resolution could "be construed as having created a legal obligation . . . to make annual reports to the United Nations and to transfer to that Organization . . . the supervision of [the mandates]" he concluded that: "*At the most, it could impose an obligation to perform those obligations . . . which did not involve the activity of the League*"—(my italics).

43. There were however two further circumstances which suggest conclusively that no interim *mandates* régime was contemplated at Geneva—

(a) *The "Chinese" draft*—In the first place (and what must resolve all doubts) is the fact that quite a different type of resolution had previously been proposed but not proceeded with. This was what has become known in the annals of the SW. Africa complex of cases as the "Chinese" or "Liang" draft, from its source of origination, and it was in complete contrast to what was eventually adopted. It ran as follows:

---

[28] In other words there was (it cannot too often be repeated) no assignment, so that the acceptance of a *new* party to the Mandate (the United Nations) by way of novation needed the Mandatory's consent.

"The Assembly,

Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into trusteeship territories;

Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of inter-regnum in the supervision* of the mandatory régime in these territories;—(my italics),

Recommends that the mandatory powers as well as those administering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trusteeship Council shall have been constituted."

Although this proposal would have required amendment on account of certain technical errors and defects, it needs but a glance to see that, had the *substance* of it been adopted, it would have done precisely what has since so continually and tediously been claimed as having been done by the Resolution actually adopted on 18 April 1946. It would have imposed upon the mandatories an obligation at least to seek United Nations supervision and submit to it, if forthcoming, during what the proposal termed the "period of inter-regnum" in respect of mandates. Whether the United Nations would have accepted the suggested function—and naturally no resolution of the League could have compelled it to do so—is beside the point. The inescapable fact remains that, for whatever reason (and that reason does not appear upon the record) the proposal was not adopted; and matters cannot therefore, in law, be exactly the same as if it had been. If any further proof were needed it could be found in the fact that Dr. Liang himself, in speaking on the Resolution of 18 April 1946, as actually adopted, recalled his earlier (non-adopted) draft, and, after stating that the trusteeship articles of the United Nations Charter were "based largely upon the principles of the mandates system", added "*but the functions of the League in that respect were not transferred automatically to the United Nations*"—(my italics). Therefore, he said, the Assembly of the League should "take steps to secure the continued application of [those] principles". But in fact the Assembly of the League, like the Assembly of the United Nations, decided to rely for that purpose on the (non-obligatory) conversion of mandates into trusteeships, or else on Article 73 *(e)* of the Charter to which I now come.

(b) *The reference to Chapter XI of the Charter in the Resolution of 18 April 1946*—This is the second significant circumstance showing how minds were working at Geneva in April 1946. The Resolution of 18 April (paragraph 3—see *ante* paragraph 41) referred not only to Chapters XII

and XIII of the Charter (trusteeships) but also to Chapter XI (non-self-governing territories). The reasons for this were given in the joint dissenting Opinion of 1962, at pages 541-545 of the 1962 volume of Reports, where attention was drawn to the virtual reproduction in the principal provision of Chapter XI (Article 73) of the language of Article 22, paragraph 1, of the League Covenant (both texts were set out for comparison in footnote 1 on p. 541 of that Opinion). The significance of the reference to Chapter XI in the Geneva Resolution—a reference that would otherwise have had no object—is as showing (i) that the delegates, including the various mandatories, regarded mandated territories as being in any event in the non-self-governing class, and (ii) that they regarded reporting under paragraph *(e)* of Article 73 as an alternative to the placing of mandated territories under trusteeship, *at least in the sense* of being something that would fill in the gap before the latter occurred, *or if it did not occur at all.* Furthermore, it had this advantage, that although it involved a less stringent form of reporting than specifically mandates or trusteeship reporting, and one moreover that did not involve actual accountability as such (see paragraph 59 below), it was *obligatory* for member States of the United Nations administering non-self-governing territories,—whereas the Charter created no obligation to place mandated or other territories under the trusteeship system. If therefore it be contended that there could not have been an intention to leave the "gap" totally unfilled, the answer is that this is how it was intended to be filled;—and there is evidence that several delegates and/or governments understood the matter in that sense (see *I.C.J. Reports 1962*, pp. 543-544). But equally clear it is that the gap was *not* intended to be filled on the basis that mandatories would, *as* mandatories, become accountable to the United Nations,—for if that had been the intention, the obvious course would have been followed of setting up an interim régime specifically for mandates as such, and inviting the United Nations to supervise it. There was therefore an implicit rejection of that course,—and if it is sought to explain matters (or explain them away) on the ground that the United Nations, being intent on the conversion of all mandates into trusteeships, would probably not have accepted the invitation, then surely this is an explanation that speaks for itself and can only confirm the view here put forward.

* * *

44. In relation to all these various attempts to bridge the gap between mandates and trusteeships, or alternatively to place continuing mandates on a more regular footing, the claim made in the Opinion of the Court is that their non-adoption did not necessarily imply a rejection of the underlying idea contained in them. I myself had always thought that the absolutely classic case of implied rejection was when a proposal had been considered and not proceeded with—it being, as a matter of

law, quite irrelevant why [29]. When an idea has been put forward, in much the same terms, on several different successive occasions, but not taken up, only the strongest possible contra-indications (if any there could be) would suffice to rebut the presumption—if not of rejection—at least of deliberate non-acceptation. If something is suggested but not provided for, the situation cannot be the same as if it had been. If there is a series of proposals substantially in the same sense, none of which is adopted, the quite different resolutions that eventually were adopted cannot be interpreted as having the same effect as those that were not. Even a non-jurist can hardly fail to admit the logic of these propositions.

(c) *Reasons for and significance of the United Nations attitude on mandates*

45. These persistent avoidances of any assumption of functions regarding mandates—even on an interim or temporary basis—are clear evidence of a settled policy of disinterest in anything to do with them that did not take the form of their conversion into trusteeships. This is borne out by an additional factor, namely that in spite of the considerations set out in paragraph 43 *(b)* above, the United Nations Assembly was, from the start, unwilling to allow that Article 73 of the Charter could be regarded as relating to mandated territories and, when it did receive reports about SW. Africa transmitted on that basis (see paragraphs 59 and 60 below), insisted on dealing with them through the Trusteeship Council. Individual episodes, occurring in isolation, might not have meant very much, but the cumulative effect of them, taken as a whole, is overwhelming, and can lead to only one conclusion; namely that the United Nations did not intend to take over any political function from the League except by special arrangements that were never made,—and that, as part of this policy, it did not want to become involved with mandates as such. This attitude was in fact understandable. In the first place, since the Charter made no express provision for the supervision of mandated territories by the United Nations, except if they were converted into trusteeships, which must be a voluntary act and could not be compelled, there was no legal basis upon which the Organization could claim to be *entitled* to supervise mandates not so converted. No separate machinery for doing so was instituted by the Charter, so that this would have had to be created *ad hoc*—with doubtful legality. To supervise *mandates* through the Trustee-

[29] At international conferences proposals are often not proceeded with because their originators realize that they would not be agreed to,—and this of course speaks for itself. Alternatively, they are often not proceeded with because, even though desirable in themselves, they would involve difficulties, or entail certain corresponding disadvantages;—but in that event a *choice* is made, and as a matter of law it cannot afterwards be claimed that "in reality" the proposal *was* accepted, or that at least it was not "truly" rejected. Such pleas are of a purely subjective character,—and psychology is not law.

ship Council would have been tantamount to treating them as trust territories although they had not been placed under trusteeship, and did not have to be. In consequence, all efforts had to be concentrated on endeavouring to bring the various mandates into the trusteeship system.

46. Secondly, there cannot be any shadow of doubt that (apart from the general unwillingness to take over League functions) the reason for the reluctance to assume any role relative to mandates was the fear that to do so would or might tend to perpetuate the mandates system by acting as an inducement to mandatories to maintain the *status quo* and refrain from submitting to the trusteeship system (see *I.C.J. Reports 1962*, pp. 540-541). In this connexion a point to note—though only an incidental one—is that the latter system was in certain respects more onerous for the mandatories than the mandates system—in particular as regards the character and composition of the body that would be advising the supervisory authority. In the case of mandates, this was the Permanent Mandates Commission, which was made up of independent experts of great experience in such matters, acting in their personal capacity, not as representatives of their governments, and not acting under official instructions. In the case of the trusteeship system it was to be the Trusteeship Council, a political body consisting of representatives of governments acting under instructions [30]. Be that as it may, it was evidently thought desirable to refrain from giving mandatories any excuse for not transferring their mandated territories to the trusteeship system, such as they might well have considered themselves to have had, if an alternative in the shape of an *ad hoc* continuation of the mandates system had been afforded them. There was in addition the psychological factor of avoiding any suggestion, even indirect, that, possibly, not all mandated territories would be transferred to trusteeship, such as might have been conveyed by making provision for that eventuality.

(d) *Conclusion as to the legal effects of this attitude*

47. Such then were the reasons for the United Nations attitude about mandates. But to establish the *reasons* for something is not to cancel out the *result*, as the Opinion of the Court often seems to be trying to maintain. Reliance on the proposition that, to find a satisfactory explanation of *why* a proposal was not adopted, is equivalent to demonstrating that it was not really *rejected*;—and so it must be treated as if it had "really" been *adopted*, cannot enhance respect for law as a discipline.

[30] This of course was mitigated by the fact that half the members of the Trusteeship Council had to consist of representatives of administering Powers.

48. What in actual fact did occur in the United Nations, in the period 1945/1946, was that the Assembly, in full awareness of the situation, made an *election*—or choice. The election, the choice, was this: it was, so far as the United Nations was concerned, to be "trusteeship" (though not obligatory trusteeship). The taking over of mandates on any other basis was, in effect, rejected. That being so, it was not thereafter *legally* possible to turn round and say, as regards any mandated territory not placed under trusteeship, that although the United Nations had not been given the right to supervise the administration of the territory as a trust territory, it nevertheless had the right to supervise it as a mandated territory. This would simply be an indirect way of in effect making trusteeship compulsory, which it was not, and was never intended to be. It would be like allowing the man who draws the short straw to take the long one also! There is an unbridgeable inconsistency between the two positions. Despite various warnings, there was an expectation—or hope—that, in the end, trusteeship for all mandates would come about; but the risk that it might not do so had to be accepted. In the event this expectation or hope was realized except in the case of SW. Africa. The failure in this one case may have been very annoying or even exasperating,—but it could not afford juridical ground for deeming the United Nations *ex post facto* to be possessed of supervisory functions in respect of mandated territories which were not provided for in the Charter (outside the trusteeship system), and which the Organization deliberately, and of set purpose, refused to assume. In short, so far as SW. Africa was concerned, the United Nations backed the wrong horse,—but backing the wrong horse has never hitherto been regarded as a reason for running the race over again!

49. The basic mistake in 1945/1946 was of course the failure either to make the conversion of mandates into trusteeships obligatory for Members of the United Nations, or else expressly to set up an interim régime for non-converted mandates. But by the time *political* awareness of this mistake was fully registered, it was already legally too late;—neither of these things having been done (because in effect the United Nations had preferred to trust to luck) it is hardly possible now to treat the situation virtually as if one of them had been. There is surely a limit to which the law can admit a process of "having it both ways". The cause of law is not served by failing to recognize that limit.

* * *

50. If the foregoing considerations are valid, it results that there is one and only one way in which the United Nations could have become invested with any supervisory function in respect of mandates, and that is by the consent of the mandatory concerned. Whether this was ever given by South Africa will now be considered.

5. The issue of consent to accountability and United Nations supervision

(a) *General principles*

(i) Absence of any true basis of consensus

51. The question of consent can strictly speaking be disposed of in one sentence,—for, once it is clear that at the time, the United Nations was not accepting, was not wanting to assume any function in respect of mandates as such, was in fact aiming at the total disappearance of the mandates system,—it follows that there was nothing for the mandatories to consent to in respect of mandates, unless they were willing to start negotiations for the conclusion of trusteeship agreements, which they were not obliged to do. As Judge Read said (in *I.C.J. Reports 1950*, p. 171) speaking of events at an even later date (November 1946-May 1948), it was doubtful "whether the General Assembly was willing, *at any stage* [my italics], to agree to any arrangement that did not involve a trusteeship agreement . . .". In these circumstances there was no basis of consensus for any arrangement involving United Nations supervision of mandates as *mandates*. It would have been necessary for the mandatory's "consent" to have taken the form of a positive petition or plea, which would unquestionably have received the answer that if the mandatory wanted, or was prepared to accept, United Nations supervision, all it had to do was to negotiate a trusteeship agreement.

(ii) A Novation was involved

52. Several references have been made to this principle, which I believe has not, as such, been invoked in the previous proceedings before the Court except (implicitly) by Lord McNair and Judge Read in 1950. As has been seen in paragraphs 41 and 42 above, the League declared its functions with respect to mandates to be "at an end" and that the system "inaugurated by the League" had been "brought to a close". There was no assignment in favour of the United Nations of mandates as such,—nor could there have been without the consent of the mandatories, for what would have been involved was a new and different party and therefore, in effect, something in the nature of novation of the obligation. It is well established in law that a novation which involves the acceptance of a new and different party, needs consent in order to be good as such;—and, moreover, consent unequivocably and unambiguously expressed, or at least evidenced by unequivocal acts or conduct. It is in the light of this requirement that the question of consent must be viewed.

(iii) "Statements of Intention" and their legal effect

53. Given what has been said in the preceding paragraph concerning what would be needed in the present context in order to afford adequate evidence of consent, there is no need here to consider in detail the many so-called statements of intention made on behalf of South Africa and other mandatories in 1945 and 1946, indicative of their general attitude as to the future of their mandates, from which implications have been sought to be drawn in the sense of an acceptance or recognition of a United Nations function in respect of mandates as such—i.e., mandates not converted into trusteeships,—for hardly any of them is free from ambiguity. I therefore agree with Lord McNair's verdict in 1950 (*I.C.J. Reports 1950*, p. 161) that there were "also many statements to the effect that the Union Government will continue to administer the Territory 'in the spirit of the Mandate'. These statements are in the aggregate contradictory and inconsistent;" and, he continued, he did not "find in them adequate evidence that the Union Government has either assented to an implied succession by the United Nations . . . or has entered into a new obligation . . .". I would however go further, and say that the various statements made, not only on behalf of South Africa but on behalf of the other mandatories (see next paragraph), taken broadly in the mass (many of them are given at various places from pp. 616-639 of the 1962 volume of the Court's Reports) show the following common characteristics: *(a)* they are statements of general attitude, insufficient, and not purporting, to convey any definite undertaking; *(b)* if there was any undertaking, it was to continue to *administer* the mandated territories concerned in accordance with the mandates,—and the administration of a mandate is of course a separate thing from reporting *about* that process [31]; and *(c)* they none of them implied any recognition of the existence of a United Nations function relative to mandates, or any undertakings towards that Organization. I shall now consider the three episodes or complexes of episodes that have chiefly been relied on as indicative of South African recognition of accountability to the United Nations but which, in my view, do not justify that conclusion.

[31] There was an inherent ambiguity in all those phrases whereby the mandatories said that they would continue to observe the mandates according to their terms, or to observe all the obligations of the mandates; because so far as the reporting obligation was concerned, this was, under the mandates, an obligation to report to the League Council, still in being up to 18 April 1946. Up to that date therefore, any mandatory was entitled to interpret its declaration in that sense, and after that date to interpret it as being no longer possible of execution on the basis of the mandate itself. What is quite certain is that, at the time, no one, whether mandatory or not, read these declarations as involving an undertaking then and there to report to the Assembly of the United Nations.

(b) *Particular Episodes*

(i) The final League of Nations Resolution of 18 April 1946

54. Features *(a)*, *(b)* and *(c)*, as set out in the preceding paragraph, strongly characterized the Geneva proceedings ending in the final League of Nations Resolution of 18 April 1946[32], on paragraphs 3 and 4 of which such heavy reliance was placed both in the 1950 and 1962 proceedings before the Court, and again now. Its effect has already been considered (paragraphs 41-43 above) in the related but separate context of the attitude of the States concerned on the question "mandates or trusteeships?" The question now is what if any undertakings for mandatories were implied by its paragraph 4 which is the operative one in the present connexion. This classic of ambiguity (text in footnote 32) consists essentially of a *recital* describing a situation. Since it merely "takes note" of something—namely the "expressed intentions of the [mandatories]", it does not of itself impose any obligations, so that the question is what these "expressed intentions" themselves were, and whether they amounted to binding undertakings, and if so to what effect. The statement made on behalf on South Africa is quoted in the next succeeding paragraph, and a summary of the key phrases used by the other mandatories will be found in footnote 2 on page 528 of the 1962 volume of the Court's Reports. Their vague and indeterminate character is immediately apparent [33]. As summed up and described in paragraph 4 of the League resolution of 18 April 1946, the intentions expressed had nothing to do with the acceptance of United Nations supervision. They were, simply, "to administer [the territories] for the well-being and development of the peoples concerned". The further words "in accordance with the obligations contained in the respective mandates" at once involve the ambiguities to which attention has been drawn in paragraph 53 and footnote 31 above. These words *need* mean, and were almost certainly intended by

[32] The full text of this resolution is given in footnote 1 on pp. 538-539 of the 1962 volume of the Court's Reports. It can be seen at a glance that only paragraphs 3 and 4 are relevant in the present context. The terms of paragraph 3 have in effect been cited in paragraph 41 above. Paragraph 4 was as follows:

> "4. Takes note of the expressed intentions of the members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates until other arrangements have been agreed between the United Nations and the respective mandatory powers."

[33] On the question whether, in consequence of this, the mandatories were regarded as having entered into any definite agreement about the mandates, a detail worth noting is that whereas the various arrangements made between the League and the United Nations for the transfer of funds, buildings, archives, library, etc., were all registered under Article 102 of the Charter, nothing was registered in respect of mandates.

the mandatories to specify, no more than the obligations relative to administering "for the well-being and development . . .", etc.,—for, as has already been noticed, reporting and supervision is *about* administration, not administration itself.

55. It is not upon flimsy and dubious foundations of this kind that binding undertakings (especially when dependent on unilateral declarations) can be predicated, more particularly where, as has beeen seen, a novation of an undertaking is involved, needing, in law, unambiguous consent. It is therefore instructive to see what, on this occasion, the "expressed intentions" of South Africa were, as stated by its delegate at Geneva on 9 April 1946 (*League of Nations Official Journal*, Special Supplement, No. 194, pp. 32-33). These were that, pending consideration of the South African desire, on the basis of the expressed wishes of the population, to incorporate SW. Africa in the territory of the Union (as it then was), the latter would in the meantime—

> ". . . continue to administer the territory scrupulously *in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.*
>
> The disappearance of [the] organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with . . . full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory"—(my italics).

For those who enjoy parlour games, an interesting hour could be spent in trying to decide exactly what this statement, equally a classic of ambiguity, amounted to as regards any South African acceptance of *United Nations* supervision,—for that, of course, is the point. The italicized passage clearly excludes the idea,—presaging as it does the continuation of a situation that had already lasted six years, in which no reports had been rendered, because there was no active *League* authority to which they could be rendered. The remainder of the statement, and in particular the phrase "as in no way diminishing its obligations under the mandate", involves precisely those ambiguities and uncertainties to which attention has already been drawn (footnote 31). To me it seems the very prototype of the non-committal, so far as concerns any recognition of accountability

to the United Nations, and I am unable to find in it any indication whatever of such recognition. I realize that on this matter, as on most others my view and the reasoning of the Court are operating on different wavelengths. Seeing in the South African statement a recognition of the existence of a continuing obligation towards the peoples of the mandated territory—the reasoning of the Court then makes the great leap;—*because* there was that degree of recognition there was also, and *therefore* a recognition of accountability to the United Nations. The lack of all rigour in this reasoning is evident. It involves exactly the same ellipses and telescopings of two distinct questions that characterized the reasoning of the Court in 1950, as already discussed in paragraphs 20-22 above. Nobody can have taken this declaration in that sense at the time, because everybody knew that United Nations supervision was to be exercised solely through the trusteeship system, and that there was no obligation to bring mandated territories within that system. This, to me, is one of the most decisive points in the whole case.

(ii) Question of the incorporation of SW. Africa as part of South Africa itself

56. The approach made by South Africa to the United Nations in November 1946 for the incorporation in its own territory of SW. Africa on the basis of the expressed wishes of the inhabitants who had been consulted, constitutes the only episode which can plausibly be represented as a recognition—not indeed of accountability to the United Nations on a specifically mandates basis (nor, as will be seen, was it taken by the Assembly in that sense)—but of the existence, on a political basis, of a United Nations interest in matters having a "colonial" aspect. It was also a convenient way of obtaining a large measure of general international recognition for such an incorporation [34]. This last aspect of the matter—that what was being sought through the United Nations was "international" recognition—had already been mentioned in another part of the statement cited in the preceding paragraph above, made on behalf of South Africa at Geneva earlier in the year, in which it was announced that at the next session of the United Nations Assembly there would be formulated "the case for according South West Africa a status under which it would be *internationally recognized* as an integral part of the Union [of South Africa]"—my italics.

57. This was not the first mention of the matter. The possibility of

[34] This would of course be far from being the first historical example of seeking a *political* recognition of the incorporation of territory without there being any obligation to do so.

incorporation had been foreshadowed in the most explicit terms as far back as 11 May 1945 in the long and detailed statement then made by the representative of South Africa in Committee II/4 of the San Francisco Conference, which there is every reason to believe [35] ended with a remark to the effect that the matter was being mentioned—

> ". . . so that South Africa *may not afterwards be held to have acquiesced in the continuance of the Mandate* or the inclusion of the territory in any form of trusteeship under the new International Organisation"—(my italics).

From this, it was already clear that any definite approach to the United Nation son incorporation, if and when made, would be a political one, on a voluntary basis, not in recognition of accountability.

58. When however the matter was raised in the Fourth Committee of the United Nations Assembly in November 1946 by Field-Marshal Smuts in person, it became clear that the probable reaction of the Committee would be a demand that the territory should be placed under trusteeship. Accordingly Field-Marshal Smuts later made a further statement in the course of which he said that:

> "It would not be possible for the Union Government *as a former mandatory* to submit a trusteeship agreement in conflict with the clearly expressed wishes of the inhabitants. The Assembly should recognize that the implementation of the wishes of the population was the course prescribed by the Charter and dictated by the interests of the inhabitants themselves. If, however, the Assembly did not agree that the clear wishes of the inhabitants should be implemented, the Union Government could take no other course than to abide by the declaration it had made to the last Assembly of the League of Nations to the effect that it would continue to administer the territory as heretofore as an integral part of the Union, and to do so *in the spirit of the principles* laid down in the mandate"—(my italics).

Two things may be noted about this statement: *First* the speaker referred to South Africa as a "former" mandatory. Whether or not it was correct to speak of South Africa as not still being a mandatory is not the point. The point is that such a remark is quite inconsistent with any recognition

---

[35] The full text of this statement, which was only given summarily in the San Francisco records, appears in paragraph 4, Chapter VIII, of the South African written pleading in the present case. The text and provenance of the final observation, the inherently probable authenticity of which has never been challenged, appears in footnote 1 on page 9 of that pleading. The matter is also referred to in paragraph (5) on page 533 of the joint dissenting Opinion of 1962.

of accountability in respect of the mandate. *Secondly*, when at the end of this passage, the speaker stated his Government's intention to continue to administer the territory "in the spirit" of the "principles" laid down in the Mandate—(and it would be difficult to find a phrase less recognizatory of obligation)—he did not mention, and was clearly not intending to include reporting of the kind indicated in the Mandate. Instead, he went on to state an intention to report on the non-self-governing territory basis of Article 73 *(e)* of the Charter (the effect of which will be considered in the next succeeding subsection); and what he said was that his Government would "in accordance with" (not, be it noted, Article 6 of the Mandate, but) "Article 73, paragraph *(e)*, of the Charter" transmit reports to the Secretary-General "for information purposes",—this last phrase being the language of Article 73 *(e)* itself. He then concluded by saying that there was—

> ". . . nothing in the relevant clauses of the Charter, nor was it in the minds of those who drafted these clauses [36], to support the contention that the Union Government could be compelled to enter into a trusteeship agreement even against its own view or those of the people concerned".

And what was the reaction of the Assembly in its ensuing resolution 65 (I)?—was it to demand the submission of reports and the acceptance of supervision under Article 6 of the Mandate? Not at all,—it was to recommend that SW. Africa be placed under *the trusteeship system.* Clearly, no more than the Mandatory was the Assembly contemplating the exercise of any functions in respect of the territory on a mandates basis.

(iii) The Mandatory's offer to furnish Article 73 (e) *type information*

59. In the case of SW. Africa the Mandatory had no intention either of negotiating a trusteeship agreement or of submitting to United Nations supervision of the territory on a mandates basis;—and here again, it is not the ethics of this attitude that constitutes the relevant point, but the evidence it affords of lack of *consent* to any accountability to the United Nations. Nothing could make this—or the absence of all common ground —clearer than the next episode, starting with the statement made on behalf of South Africa in the Fourth Committee of the Assembly, on 27 September 1947, relative to the South African proposal, originally made in November 1946 (see previous paragraph), to transmit information of the same type as was required by Article 73 *(e)* of the Charter in respect of so-called "non-self-governing territories". Such information,

[36] Amongst whom of course was the Field-Marshal himself.

given about colonies, protectorates, etc., *does not imply accountability*, and is not in the formal and technical sense "reporting". The Report of the Fourth Committee on this occasion (dated 27 October 1947) describes the statement of the South African representative as follows:

> "It was the assumption of his Government, he said, that the report [i.e., the information to be transmitted] would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that as the League of Nations had ceased to exist, the right to submit petitions could no longer be exercised, since that right presupposes a jurisdiction which would only exist where there is a right of control and supervision, *and in the view of the Union of South Africa no such jurisdiction was vested in the United Nations with regard to South West Africa*"—(my italics).

What was said of petitions was *a fortiori* applicable in respect of reports of the kind contemplated by Article 6 of the Mandate. The italicized words constituted a *general* denial of United Nations jurisdiction.

60. There were further offers to furnish information on the same basis in the period 1947/1948, and one or two reports were actually transmitted. But all along the line statements were made on behalf of South Africa indicating clearly that this was done voluntarily and without admission of obligation. Thus at a Plenary Meeting of the Assembly on 1 November 1947 the representative of South Africa said that:

> ". . . the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered *on the basis that the United Nations has no supervisory jurisdiction in respect of this territory* they will serve to keep the United Nations informed in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 *(e)* of the Charter"—(my italics).

And in a letter of 31 May 1948 to the Secretary-General an explicit restatement was given of the whole South African position as follows (UN doct., T/175, 3 June 1948, pp. 51-52):

> ". . . the transmission to the United Nations for information on South West Africa, in the form of an annual report or any other form, *is on a voluntary basis and is for purposes of information only. They* [the Government] *have on several occasions made it clear that they recognise no obligation to transmit this information to the United*

Nations, but in view of *the wide-spread interest* in the administration of the Territory, and *in accordance with normal democratic practice*, they are willing and anxious *to make available to the world*[37] such facts and figures as are readily at their disposal . . . The Union Government desire to recall that in offering to submit a report on South West Africa for the information of the United Nations, they did so on the basis of the provisions of Article 73 *(e)* of the Charter. This Article calls for 'statistical and other information of a technical nature' and makes no reference to information on questions of policy. In these circumstances the Union Government do not consider that information on matters of policy, particularly future policy, should be included in a report (or in any supplement to the report) which is intended to be a factual and statistical account of the administration of the Territory over the period of a calendar year. Nevertheless, the Union Government are anxious to be as helpful and as co-operative as possible and have, therefore, on this occasion replied in full to the questions dealing with various aspects of policy. The Union Government do not, however, regard this as creating a precedent. Furthermore, the rendering of replies on policy should not be construed as a commitment as to future policy *or as implying any measure of accountability to the United Nations on the part of the Union Government.* In this connexion the Union Government have noted that their declared intention to administer the Territory in the spirit of the mandate *has been construed in some quarters as implying a measure of international accountability.* This construction the Union Government cannot accept *and they would again recall that the League of Nations at its final session in April 1946, explicitly refrained from transferring its functions in respect of mandates to the United Nations*" [38]—(my italics).

And then again in the Fourth Committee of the Assembly in November 1948 (Official Record of the 76th Meeting, p. 288), it was stated that:

". . . the Union could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended: *still less could the Trusteeship Council assume for itself the power claimed in its resolution, i.e.*, 'to determine whether the Union of South Africa is adequately discharging its responsibilities *under the*

[37] The use of such expressions as "wide-spread interest" and "make available to the world" confirms the view taken in paragraph 56 above as to the basis of the South African approach to the United Nations on the subject of incorporation.

[38] See on this matter paragraph 42 above, and Lord McNair's pronouncement in the same sense two years later, as there quoted.

> *terms of the mandate . . .*' Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African delegation considered that in so doing the Council had exceeded its powers"— (my italics).

Since however the Assembly persisted in dealing with the reports through the Trusteeship Council, they were subsequently discontinued. It is of course evident that the "parties", so to speak, were completely at loggerheads. But no less clear is it *(a)* that the Assembly would agree to nothing, except on a trusteeship basis, and *(b)* that South Africa would agree to nothing that involved recognition of an obligation of accountability to the United Nations. In consequence there was no agreement, no consent.

(c) *Conclusions as to consent*

61. Whatever may be thought of the South African attitude from a wider standpoint than that of law, there can surely be no doubt as to what, *in* law, the character of that attitude was. In the face of the statements above set-out, it is impossible to contend that there was any recognition, or acceptance, of accountability to the United Nations as a *duty* arising for the Mandatory upon the dissolution of the League. There was in fact an express rejection of it. Consequently, in a situation in which, for the reasons given in paragraphs 51 and 52 above, nothing short of positive expressions of recognition or acceptance would have sufficed, there were in fact repeated positive denials and rejections. This being so, all attempts to *imply* it must fail in principle on *a priori* grounds; for implications are valid only in situations of relative indeterminacy where, if there are no very positive indications "for", there are also no very positive ones "against". Where however, as here, there are positive indications "against", mere *implications* "for" cannot prevail. Recognition of accountability could be attributable to South Africa only on the basis of conduct not otherwise explicable. In fact, it was both otherwise explicable, and repeatedly explained.

* * *

62. An important point of international legal order is here involved. If, whenever in situations of this kind a State voluntarily, and for reasons of policy, brings some matter before an international body, it is

thereby to be held to have tacitly admitted an *obligation* to do so (as it has quite erroneously been sought to maintain in connexion with the United Kingdom's reference of the Palestine question to the United Nations in 1948), then there must be an end of all freedom of political action, within the law, and of all confidence between international organizations and their member States.

63. Exactly the same is applicable to attempts to read binding undertakings into the language of what are really only statements of policy, as the declarations made at one time or another by the various mandatories essentially were. Clearly in the formative period of the United Nations and the dissolution of the League, the question of mandates was a matter of general interest. They were bound to be discussed,—the mandatories were bound to make known in a general way what their views and attitudes were. Clearly some conclusion had to be reached about their future. *But equally clearly, if not more so, is the fact that the conclusion reached as to their future was that they ought to be placed under the trusteeship system, and that the United Nations should not have anything to do with them as mandates. In other words United Nations supervision was to be exercised through the trusteeship not the mandates system.* At the same time no legal obligation was created under the Charter for mandatories to convert their mandates into trusteeships. Therefore it is not now legally possible (SW. Africa not having been placed under trusteeship and there having been no legal obligation so to place it) to contend that the United Nations is entitled *none the less* to exercise supervision on a mandates basis. Such a contention constitutes a prime example of a process to which I will not give a name, but which should not form part of any self-respecting legal technique.

6. General conclusion on Section A

64. Since for all these reasons the United Nations as an Organization (including therefore both the General Assembly and the Security Council) never became invested with the powers and functions of the Council of the former League in respect of mandates, in any of the possible ways indicated in paragraph 11 above, I must hold that it was incompetent to revoke South Africa's mandate, irrespective of whether the League Council itself would have had that power. It is nevertheless material to enquire whether the latter did have it,—for if not, then *cadit quaestio* even if the United Nations had inherited. To this part of the subject I now accordingly turn.

SECTION B

EVEN IF THE UNITED NATIONS BECAME INVESTED WITH THE POWERS OF THE FORMER COUNCIL OF THE LEAGUE OF NATIONS, THESE DID NOT INCLUDE ANY POWER OF UNILATERAL REVOCATION OF A MANDATE

1. Lack of competence of the United Nations to exercise any other or greater supervisory powers in respect of mandates than were possessed by the League of Nations

65. On the assumption—or postulate as it really has to be—that, contrary to the conclusion reached in the preceding section (Section A), the United Nations did inherit—or did otherwise become invested with—a supervisory function in respect of those mandates which remained mandates and were not converted into United Nations trusteeships;—it then becomes necessary to enquire what was the nature and scope (or content) of that function, as it was exercised, or exercisable, by the Council of the League of Nations. Such an enquiry is rendered necessary because of an elementary yet fundamental principle of law. In so far as (if at all) the United Nations could legitimately exercise any supervisory powers, these were perforce *derived* powers—powers inherited or taken over from the League Council [39]. They could not therefore exceed those of the Council,—for *derived* powers cannot be other or greater than those they derive from. There could not have been transferred or passed on from the League what the League itself did not have,—for *nemo dare potest quod ipse non habet*, or (the corollary) *nemo accipere potest id quod ipse donator nunquam habuit*. This incontestable legal principle was recognized and applied by the Court in 1950, and was the basis of its finding (*I.C.J. Reports 1950*, at p. 138) that:

> "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."

This finding was specifically affirmed in the later *Voting Procedure* and *Oral Petitions* cases (1955 and 1956), both of which indeed turned on whether the way in which the Assembly was proposing or wanting to interpret and conduct its supervisory role in certain respects, would be

[39] It goes without saying that even if, contrary to the conclusion reached in the previous section, South Africa consented or can be deemed to have consented, to any exercise of supervisory powers by the United Nations, it can never in any circumstances have consented, or be deemed to have consented, to the exercise of *more* extensive powers than those of the League.

consistent with the principle thus enunciated. Furthermore, in the second of these cases the Court gave renewed expression to the principle. Referring to its original (1950) Opinion, it said (*I.C.J. Reports 1956*, at p. 27):

> "In that Opinion the Court . . . made it clear that the obligations of the Mandatory were those which obtained under the Mandates System. Those obligations could not be extended beyond those to which the Mandatory had been subject by virtue of the provisions of Article 22 of the Covenant and of the Mandate for South West Africa under the Mandates System. The Court stated therefore that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System [and that] the degree of supervision should conform as far as possible to the procedure followed by the Council of the League . . ."

66. The correctness of this view has never been challenged, and seems on principle unchallengeable. It follows inevitably therefore that if the League possessed no power of unilateral revocation of a mandate [40] the United Nations could not have become subrogated to any such power. It equally follows on the procedural side—(and here there is an important connexion)—that if, under the mandates system as conducted by the League, the position was that the supervisory body, the League Council, could not bind a mandatory without its consent, then neither could the organs of the United Nations do so, whether it was the General Assembly or the Security Council that was purporting so to act. In short, let the Assembly—or for that matter the Security Council—be deemed to have all the powers it might be thought that either organ has, or should have,—these still could not, in law, be exercised in the field of *mandates* [41] to any other or greater effect than the League Council could have done. (Both organs are of course also subject to *Charter* limitations on their powers which will be considered in main Section C below.)

---

[40] The "indefinite" article—"a" not "the" mandate is here employed of set purpose,—for whatever the position was as regards the League's powers of revoking a mandate, it was the same for all mandates, not merely that for SW. Africa. The view that the latter could unilaterally be revoked entails that the various Australian, Belgian, French, Japanese, New Zealand and United Kingdom mandates equally could be.

[41] What the Security Council might be able to do not on a mandates but on a peace-keeping basis is considered separately in paragraphs 110-116 below.

2. The League had no power of unilateral revocation, express or implied

(a) *Presumption against the existence of such a power*

67. The case for deeming League of Nations mandates to have been subject to a power of unilateral revocation by the Council of the League does not rest on any provision of the mandates themselves, or of the League Covenant. (These indeed, as will be seen presently, imply the exact opposite.) The claim is one which, as noted earlier, is and can only be advanced on the assumption of fundamental breaches of the mandate concerned, such as, if the case were one of a private law contract for instance, could justify the other party in treating it as terminated [42]. The claim therefore rests entirely on the contention that, in the case of institutions such as the League mandates were, there must exist an inherent power of revocability in the event of fundamental breach, even if no such power is expressed;—that indeed there is no need to express it. This is in fact the Court's thesis.

* * *

68. In support of this view, comparisons are drawn with the position in regard to private law contracts and ordinary international treaties and agreements, as to which it may be said that fundamental breaches by one party will release the other from its own obligations [43], and thus, in effect, put an end to the treaty or contract. The analogy is however misleading on this particular question, where the contractual situation is different from the institutional,—so that what may be true in the one case

---

[42] Note the intentional use of the phrase "in treating it as terminated" and not "in putting an end to it". There is an important conceptual difference. Strictly speaking, all that one party alleging fundamental breaches by the other can do, is to declare that it no longer considers itself bound to continue performing *its own* part of the contract, which it will regard as terminated. But whether the contract *has*, in the objective sense, come to an end, is another matter and does not necessarily follow (certainly not from the unilateral declaration of that party)—or there would be an all too easy way out of inconvenient contracts.

[43] The question at once arises who or what would, in the case of mandates, be the other party, and what would be its obligations from which it could claim release because of the mandatory's breaches? In the case of a mandate what obligations are there other than the mandatory's? How and by whom is the existence of fundamental breaches to be established with the effect that would attach to a judgment (not opinion) of a competent court of law (not a lay political organ)?

cannot simply be translated and applied to the other without inadmissible distortions (see footnotes 42 and 43).

69. There is no doubt a genuine difficulty here, inasmuch as a régime like that of the mandates system seems to have a foot both in the institutional and the contractual field. But it is necessary to adhere to at least a minimum of consistency. If, on the basis of contractual principles, fundamental breaches justify unilateral revocation, then equally is it the case that contractual principles require that a new party to a contract cannot be imposed on an existing one without the latter's consent (novation). Since in the present case one of the alleged fundamental breaches [44] is precisely the evident non-acceptance of this new party, and of any duty of accountability to it (such an acceptance being *ex hypothesi*, on contractual principles, *not* obligatory), a total inconsistency is revealed as lying at the root of the whole Opinion of the Court in one of its most essential aspects.

70. If, in order to escape this dilemma—and it is not the only one [45]—a shift is made into the international institutional field, what is at once apparent is that the entities involved are not private persons or corporate entities, but sovereign States. Where a sovereign State is concerned, and where also it is not merely a question of pronouncing on the legal position, but of ousting that State from an administrative role which it is physically in the exercise of, it is not possible to rely on any theory of implied or inherent powers. It would be necessary that these should have been given concrete expression in whatever are the governing instruments. If it is really desired or intended, in the case of a sovereign State accepting a mission in the nature of a mandate, to make the assignment revocable upon the unilateral pronouncement of another entity, irrespective of the will of the State concerned [46], it would be essential to make express provision for the exercise of such a power.

71. Nor would that be all,—for provision would also need to be made as to how it was to be exercised,—since clearly, *upon* its exercise a host of legal and practical questions would at once arise, requiring speedy solution, and possibly demonstrating the existence of potential problems more serious than those supposed to be solved by the revocation. To

[44] Alleged breaches that have not in any event been properly established—see paragraphs 2-5 at the start of the present Opinion.

[45] For instance, according to ordinary contractual principles, and subject to qualifications not here relevant, the death or extinction of one of the parties to a contract normally puts an end to it and releases the other party from any further obligations except such as have already accrued due but remain undischarged. Applied to mandates this would have meant their termination upon the extinction of the League of Nations, and the discharge from all further obligations of the mandatories, who would have remained in a situation of physical occupation from which they could not in practice have been dislodged.

[46] If it be objected that no State would willingly or knowingly accept such conditions, I can only agree,—but this in fact reinforces and points up the whole of my argument. The obvious absurdity of the whole idea at once emerges.

leave such matters in the air—to depend on the chance operation of unexpressed principles or rules—is an irresponsible course, and not the way things are done. If the possibility of changes of mandatory had really been contemplated, the normal method would have been to provide for a review after an initial period of years, or at stated intervals,—and even this would not imply any general or unconstrained power of revocation, but rather an ordered process of periodical re-examination in which the mandatory itself would certainly participate.

* * *

72. In consequence, within a jurisprudential system involving sovereign independent States and the major international organizations whose membership they make up, there must be a natural presumption *against* the existence of any such drastic thing as a power of unilaterally displacing a State from a position or status which it holds [47]. No implication based on supposed inherency of right—but only concrete expression in some form—could suffice to overcome this presumption,—for what is in question here is not a simple finding that international obligations are considered to have been infringed, but something going much further and involving action—or purported action—of an executive character on the objective plane. *It is as if the King of Ruritania were declared not only to be in breach of Ruritania's international obligations but also, on that account, be no longer King of Ruritania.* The analogy is not claimed to be exact, but it will serve to make the point,—namely that infringements of a mandate might cause the mandatory concerned to be in breach of its international obligations but could not cause it thereby to cease to be the mandatory or become liable to be deposed as such, at the fiat of some other authority, *unless* the governing instruments so provided or clearly implied. In the present case they not only do not do so but, as will be seen, indicate the contrary.

(b) *Positive indications negativing the notion of revocability*:—
(1) based on the terms of the relevant instruments and certain applicable principles of interpretation

(i) Essentially non-peremptory character of the mandates system

73. This point will be more fully dealt with in connexion with the basic voting rule of the League which, with certain exceptions not applicable

[47] It is not that sovereign States are above the law, but that the law itself takes account of the fact that they are not private citizens or private law entities.

in the case of mandates, was that of unanimity including the vote of the interested party, and therefore of the mandatory concerned. It is mentioned here by way of introduction as being an essential piece of background knowledge,—for since it was the case that mandatories could not in the last resort become bound by the decisions of the League Council unless they agreed with them, or at least tacitly acquiesced in, or did not oppose them [48], the system was necessarily non-peremptory in character;—and in relation to such a system there is obviously an element of total unreality in speaking of a power of unilateral revocation,—for any decision to revoke would itself, in order to be valid, have required the concurrence of the mandatory [49]. It could not therefore have been unilateral. Any other view involves an inherent logical contradiction.

(ii) Limited scope of the so-called supervisory function as exercised by the League Council

74. As was mentioned early in this Opinion (paragraph 14 above), no supervisory role in respect of mandates was, *in terms*, conferred upon the League Council, or any other organ of the League, either by the relevant mandate itself or by Article 22 of the League Covenant, which established the mandates system as a régime, and indicated its character in considerable detail—but not in this particular respect. The supervisory role or function was left to emerge entirely—or virtually so—as a kind of deduction from, or corollary of the obligation of the mandatory concerned to furnish annual reports to the Council. It is therefore to the character of *that* obligation to which regard must be had in order to establish what kind and scope of supervision could legitimately be inferred as flowing from it.

Applicable principle of interpretation

Where a right or power has not been the subject of a specific grant, but exists only as the corollary or counterpart of a corres-

[48] In fact, strictly speaking, there could not, without the concurrence of the mandatory, *be* a decision as such: there could only be something in the nature of a (non-binding) recommendation. But the mandatory could refrain from exercising its vote.

[49] The principle *nemo iudex esse potest in sua propria causa* clearly cannot apply so as to defeat the voting rules laid down in the constitutions of international organizations;—or else, to take an obvious example, the five permanent Members of the United Nations Security Council would be unable to exercise their "veto" in regard to any matter involving their own interests;—whereas one of the objects of giving them the veto was, precisely (apart from the specific exception contained in Article 27, paragraph 3, of the Charter, as also the analogous one in the League Covenant—see paragraph 80 below), to enable them to protect those interests.

ponding obligation, this right or power is necessarily defined by the nature of the obligation in question, and limited in its scope to what is required to give due effect to such correlation.

75. All the various mandates (with one exception not here pertinent [50], and subject to minor differences of language) dealt with the reporting obligation in the same way. Citing that for SW. Africa, it was provided (Article 6) that the Mandatory was to render to the Council of the League "an annual report to the satisfaction of the Council [51] containing full information with regard to the territory and indicating the measures taken to carry out the obligations assumed . . .". This was a reflection and expansion of paragraph 7 of Article 22 of the Covenant, which provided for an annual report to the Council "in reference to the territory committed to [the Mandatory's] charge". The only other relevant clause was paragraph 9 of Article 22, which provided for the setting up of what became the Permanent Mandates Commission, "to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates". Later, by special arrangement, written petitions from the inhabitants of the mandated territories, forwarded through the mandatories, could also be received and examined.

* * *

76. It is clear therefore that the sole real *specific* function of the Council was (via the Permanent Mandates Commission) to "receive and examine" these reports and petitions. The Council could require that the reports should be to its satisfaction, namely "contain full information" about the mandated territory, and "indicate the measures taken" by the mandatory, etc. It would also be a natural corollary that the Council could comment on these reports, indicate to the mandatory what measures it thought wrong or inadequate, suggest other measures, etc.,—but in no case with any binding effect unless the mandatory agreed. The Council could exhort, seek to persuade and even importune; but it could not

[50] That of Iraq, which was differently handled—see joint dissenting Opinion, *I.C.J. Reports 1962*, p. 498, n. 1.

[51] The phrase "to the satisfaction of the Council" cannot have related to the measures reported on, for the mandatory only had to render one annual report, and could not know, at the reporting stage, what view the Council would take as to those measures. Nor did the mandatory subsequently revise its *report*, though it might revise its measures. The object of the report was, precisely, to inform the Council about these;—and, considered *as* a piece of reporting, the report was necessarily satisfactory if it contained full and accurate information as to what was being done, so that the Council, having thus been put in possession of all the facts, would, on the basis of the report, be able to indicate to the mandatory whether it approved of the measures concerned or what other or additional measures it advocated.

require or compel,—and it is not possible, from an obligation which, on its language, is no more than an obligation to render reports of a specified kind, to derive a further and quite different obligation to act in accordance with the wishes of the authority reported to. This would need to be separately provided for, and it is quite certain that none of the various mandatories ever understood the reporting obligation in any such sense as that, and equally certain that they never would have undertaken it if they had.

77. In other words, the supervisory function, as it was contemplated for League purposes, was really a very limited one—a view the principle of which was endorsed by Sir Hersch Lauterpacht in the *Voting Procedure* case when, speaking of United Nations trusteeships (but of course the same thing applies *a fortiori* to the case of mandates) he said this (*I.C.J. Reports 1955*, p. 116):

> "... *there is no legal obligation, on the part of the Administering Authority, to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure.* The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, *but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council*"—(my italics).

* * *

78. Such then was the real and quite limited nature of the supervisory function to which the General Assembly became subrogated, if it became subrogated to any function at all in respect of mandates. It was, as the term implies, strictly a right of "supervision"; it was not a right of *control*—it did not comprise any executive power;—and therefore clearly could not have comprised a power of so essentially executive a character as that of revocation. Between a function of supervision (but not of control) and a power to *revoke* a mandate and, so to speak, evict the mandatory—and to do this unilaterally without the latter's consent—there exists a gulf so wide as to be unbridgeable. It would involve a power different not only (and greatly) in degree, but in kind. This is a consideration which, in the absence of express provision for revocation, makes it impossible to imply such a power,—and indeed excludes the whole notion of it, as being something that could not have fallen within the League Council's very limited supervisory role, and accordingly cannot fall within that of the United Nations Assembly—assuming the latter to have any supervisory role.

(iii) The League Council's voting rule

79. The views just expressed are more than confirmed by the League Council's voting rule, as embodied in paragraph 5 of Article 4 of the Covenant in combination with paragraph 1 of Article 5 (texts in footnote 52). The effect, in the case of all matters involving mandates, was to enable the mandatories, if not already members of the Council (as several invariably were), to attend if they wished, and to exercise a vote which might operate as a veto. No exception was provided for the possibility of a revocation, and no such exception can be implied from the fact that mandatories did not always attend the Council when invited to do so, or might abstain on the vote, or that certain devices might be employed on occasion to avoid direct confrontations between them and the other members of the Council. The fact that there may be no recorded case of the actual use of this veto does not alter the legal position,—it merely shows how well the system worked *in the hands of reasonable people*. None of this however can alter the fact that mandatories always had the right to attend and exercise their votes. The existence of this voting situation was confirmed by the Court not only in its Judgment of 1966 *but also in that of 1962* (*I.C.J. Reports 1966*, pp. 44-45; and *I.C.J. Reports 1962*, pp. 336-337) [53]. It is obvious that a situation in which the League Council could not impose its views on the mandatories without their consent, is with difficulty reconcilable with one in which it

[52] *Article 4, paragraph 5*: "Any Member of the League not represented on the Council shall be invited to send a *Representative to sit as a member* [italics mine] at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League."

Article 5, paragraph 1: "*Except where otherwise expressly provided* in this Covenant . . . decisions at any meeting of the . . . Council shall require the agreement of all the Members of the League *represented at the meeting*"—(italics mine).

[53] e.g. (pp. 336-337):

> ". . . approval meant the unanimous agreement of all the representatives [at the Council meeting] including that of the Mandatory who, under Article 4, paragraph 5, of the Covenant, was entitled to send a representative to such a meeting to take part in the discussion and to vote".

And again (p. 337):

> "Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory."

It may seem surprising at first sight that the Court, in its 1962 composition, was so ready to admit, and even to stress, the existence of this situation. The explanation is that it was basing itself in the absence of effective "administrative supervision" in the League system as one ground for postulating the existence of "judicial supervision" in the form of a right, on the part of any Member of the League dissatisfied with the conduct of a mandate, to have recourse to the former Permanant Court and, since then, to the International Court of Justice as set up under the United Nations Charter. It follows that although the present (1971) Opinion of the Court is wholly in line with the type of *conclusion* reached by the Court in 1962, it is wholly at variance with the 1962 *reasoning* just described; for that reasoning must, in logic, lead to the result indicated above at the end of paragraph 79.

could unilaterally revoke their mandates without their consent;—and therefore, *a fortiori*, with the idea that the United Nations possessed such a power.

Applicable Principle of Interpretation

> Where a provision [such as the League Council's voting rule] is so worded that it can only have one effect, any intended exceptions, in order to be operative, must be stated in terms.

80. This principle of interpretation is, as it happens, well illustrated, and the view expressed in the preceding paragraph is given the character of a virtual certainty, by the fact that (though not in the sphere of mandates) the League Covenant did specifically provide for certain exceptions to the basic League unanimity rule,—namely, in particular under paragraphs 4, 6, 7 and 10 of Article 15, and paragraph 4 of Article 16, dealing with matters of peace-keeping [54]. This serves to show that those who framed the Covenant fully realized that there were some situations in which to admit the vote of the interested party would be self-defeating —and these they provided for. They do not seem to have thought so in the case of mandates, nor was such a suggestion ever made in the course

---

[54] It has been contended that the power given to the League Council by paragraph 4 of Article 16 of the Covenant to expel a Covenant-breaking member State (though in my opinion relating only to the *peace-keeping* undertakings of the Covenant—see paragraph 1 of this same Article 16) afforded a way by which a mandate could be revoked. Since, according to the express terms of paragraph 4 of Article 16, the concurring vote of the expelled State was not requisite for an expulsion order, a mandatory in breach of its obligations could first be expelled, and then, because it had ceased to be a Member of the League, a decision to revoke its mandate could be taken without it.

This ingenious contention however (about which there may be factual doubts not worth troubling about here) misses the real point;—for if it would not have been possible to get rid of a mandatory without going to these elaborate lengths, what better demonstration could there be that revocability, whether on a basis of inherency or otherwise, simply did not exist within the four corners of the Covenant or the mandates, in respect of any mandatory in the normal situation of still being a Member of the League? That a mandatory might lose its rights if it ceased to be a Member could in practice act as a deterrent, but has no bearing on the juridical issue of what its rights and liabilities were *as* a Member.

Exactly the same principle applies in regard to another contention based on the circumstance that, under Article 26, the Covenant could be *amended* (though only by a vote that had to include the unanimous vote of all the members of the League Council). True, the Covenant could thus be amended;—but in fact it was *not* amended: therefore it is the *un*amended Covenant that governs. It is difficult to know how to deal with this type of argument which, juridically, cannot be taken seriously, except as a clutching at straws.

of the League's dealings with mandates. It can only be concluded that terminations or changes of administration were never contemplated, except on a basis of agreement.

(iv) Contemporaneous consideration and rejection of the idea of revocability

81. Nor was it in any way a question of a mere oversight. Earlier proposals for a mandates system, in particular as put forward by President Wilson on behalf of the United States, did contain provision for the replacement of mandatories, or for the substitution of another mandatory,—and these things (contrary to what is implied in the Opinion of the Court) could of course only be done by revoking (or they would amount to a revocation of) the original mandate. Even the possibility of breaches was not overlooked, for the Wilson proposals also provided, as is correctly stated in the Opinion of the Court, for a "right to appeal to the League for the redress or correction of any breach of the mandate". There can however be no point in following the Opinion of the Court into a debate as to the precise period and the precise context in which the idea of revocability was discussed,—because what is beyond doubt is that, whether on the basis of President Wilson's proposal, or of some other proposal, it *was* discussed. The proof of this is something of which the Court's Opinion makes no mention, namely that objections were entertained to the notion of revocability by all the eventual holders of "C" mandates, and by the representatives of governments destined to hold most of the "A" and "B" mandates—in particular by M. Simon on behalf of France and Mr. Balfour (as he then was) on behalf of Great Britain, both of whom pointed out the difficulties, economic and other, that would arise if mandatories did not have complete security of tenure [55]. The idea was accordingly not proceeded with, and the final text of the mandates, and of Article 22 of the Covenant, contained no mention of it. This makes it quite impossible in law to infer that there nevertheless remained some sort of unexpressed intention that a right of revocation should exist, for this would lead to the curious legal proposition that it makes no difference whether a thing is expressed or not. Yet the classic instance of the creation of an irrebuttable presumption

[55] At the meetings of the Council of Ten on 24-28 January 1919, and subsequently. See *Foreign Relations of the United States: The Paris Peace Conference*, Vol. III, pp. 747-768. It was Mr. Balfour who pointed out (pp. 763-764) that although plenty of consideration had been given to the League aspect of the matter, very little had been given to the position of the mandatories, and that the system could only work if the latter had security of tenure. M. Simon pointed out (p. 761) that mandatories would have little inducement to develop the mandated territories if their future was uncertain.

in favour of a given intention is, precisely, where a different course has been proposed but not followed. The motives involved are juridically quite irrelevant, but were in this case clear [56].

Applicable Principle of Interpretation

Where a particular proposal has been considered but rejected, for whatever reason, it is not possible to interpret the instrument or juridical situation to which the proposal related as if the latter had in fact been adopted.

82. The episode described in the preceding paragraph directly illustrates and confirms the view expressed in paragraphs 70-72 above. When Statesmen such as President Wilson thought of making mandates revocable (which could only be in a context of possible breaches) they were not content to rely on any inherent principle of revocability but made a definite proposal which, had it been adopted, would have figured as an article in the eventual governing instrument, or instruments. Since however the idea met with specific objections, it was not proceeded with and does not so figure. Therefore to treat the situation as being exactly the same as if it nevertheless did, is inadmissible and contrary to the stability and objectivity of the international legal order. Again, the process of having it both ways is evident.

(v) The "integral portion" clause

83. Article 22 of the League Covenant drew a clear distinction between the "C" mandated territories and the other ("A" and "B") territories, inasmuch as in its paragraph 6 it described the former as being territories that could "be best administered under the laws of the Mandatory as integral portions of its territory",—and a clause to that effect figured

[56] For sheer audacity, it would be hard to equal the attempts made in the course of the present proceedings to represent M. Simon's statement to the effect that every mandate would be revocable and there could be no guarantee of its continuance (which of course *would* have been the case on the basis of the *earlier* idea which M. Simon was *contesting*), as affording evidence of an intention that mandates should be revocable; and that this was only not proceeded with because of a desire to be "tactful" towards the mandatories,—although it is perfectly clear on the face of the record that M. Simon (and Mr. Balfour) were *objecting* to the idea of revocability,—not on grounds of its want of tact, but for economic and other reasons of a highly concrete character,—i.e., France and Great Britain, no less than the "C" mandatories, were not prepared to accept mandates on such a basis.

in the "C" mandates accordingly (text in footnote 57). This distinction was not, however, fully maintained; for a similar clause eventually appeared in the "B" mandates as well,—though without warrant for this in the Covenant. But this does not invalidate the point to be made because, as has been seen in the previous sub-section (paragraph 81), the notion of revocability was as inacceptable to the "B" as to the "C" mandatories. The point involved is that the "integral portion" clause came very close in its wording to the language of incorporation—indeed it only just missed it. It did not amount to that of course, for annexation or cession in sovereignty of the mandated territory was something which it was one of the aims of the mandates system to avoid. But this clause did create a situation that was utterly irreconcilable with unilateral *revocability*,—with the idea that at some future date the existing administrative and legal integrations, and applicable laws of the mandatory concerned, could be displaced by the handing over of the territory to another mandatory, to be then administered as an integral portion of *its* territory and subjected to another set of laws;—and of course this process could in theory be repeated indefinitely, if the revocability in principle of mandates once came to be admitted.

84. In consequence, although the mandates did not contain any provision affirmatively ruling out revocability, the "integral portion" clause in the "B" and "C" mandates had in practice much the same effect. Significantly, no such clause figured in any of the "A" mandates which were, from the start (paragraph 4 of Article 22 of the Covenant), regarded as relating to territories whose "existence as independent nations can be provisionally recognized". Naturally the insertion of the "integral portion" clause in the "B" and "C" mandates did not in any way preclude the eventual attainment of self-government or independence by the territories concerned, as indeed happened with most of them some forty years later,—*with the consent of the mandatory concerned*; but that is another matter. What it did preclude was any interim change of régime *without* the consent of the mandatory.

---

[57] In the Mandate for SW. Africa that provision read as follows:

> "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate 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."

The phrase "subject to the present Mandate" of course qualifies and describes the word "territory".

(c) *Positive contra-indications:—(2) based on the circumstances prevailing when the mandates system was established*

85. As is well known, the mandates system represented a compromise between, on the one hand, President Wilson's desire to place all ex-enemy territory outside Europe or Asia Minor (and even some *in* Europe) under direct League of Nations administration,—and, on the other hand, the desire of some of the Allied nations (more particularly as regards the eventual "C" mandates) to obtain a cession to themselves of these territories, which their forces had overrun and occupied during the war [58]. The factor of "geographical contiguity to the territory of the Mandatory", specifically mentioned in paragraph 6 of Article 22 of the Covenant, was of course especially (indeed uniquely) applicable to the case of SW. Africa, and had unquestionably been introduced with that case in mind. The compromise just referred to was accepted only with difficulty by some of the mandatories and, in the case of the "C" mandates only after assurances that the mandates would give them ownership in all but name [59]. Whether this attitude was unethical according to present-day standards (it certainly was not so then) is juridically beside the point. It clearly indicates what the *intentions* of the parties were, and upon what basis the "C" mandates were accepted. This does not of course mean that the mandatories obtained sovereignty. But it does mean that they could never, in the case of these territories contiguous to or very near their own [60], have been willing to accept a system according to which, at the will of the Council of the League, they might at some future date find themselves displaced in favour of another entity—possibly a hostile or unfriendly one—(as is indeed precisely the intention now). No sovereign State at that time—or indeed at any other time—would have accepted the administration of a territory on such terms. To the mandatories, their right of veto in the Council was an essential condition of their acceptance of this compromise,—and that they viewed it as extending to any question involving a possible change in the identity of the mandatory is beyond all possible doubt. Here once more is a consideration that completely negatives the idea of unilateral revocability.

---

[58] Such occupation, being a war-time one, was not in the nature of annexation, and its ultimate outcome had in any case to await the eventual peace settlement.

[59] See Mr. Lloyd George's statement to the Prime Minister of Australia, and the question put by Mr. Hughes of Canada, as given by Slonim in *Canadian Yearbook of International Law*, Vol. VI, p. 135, citing Scott, "Australia During the War" in *The Official History of Australia in the War of 1914-18*, XI, p. 784.

[60] On the geographical question, see the very forthright remarks made about SW. Africa by Mr. Lloyd George to President Wilson as recorded in the former's *The Truth About the Peace Treaties*, Vol. I, pp. 114 *et seq* and 190-191.

3. General conclusion

86. Taking these various factors together, as they have been stated in the preceding paragraphs, the conclusion must be that no presumptions or unexpressed implications of revocability are applicable in the present case, and that in any event they would be overwhelmingly negatived by the strongest possible contra-indications.

87. *Test of this conclusion*—a good test of this conclusion is to enquire what happened as regards those former mandated territories that were eventually placed under the United Nations trusteeship system. Here was an opportunity for the Assembly to introduce an express power of unilateral revocation into the various trusteeship agreements entered into under Article 79 of the Charter. This however was not done, for one very simple reason, namely that not a single administering authority, in respect of any single trusteeship, would have been prepared to agree to the inclusion of such a power—any more than, as a mandatory, it had been prepared to agree to it in the time of the League. The point involved is of exactly the same order (though in a different but related context [61]) as that to which attention was drawn in paragraphs 93-95 of the 1966 Judgment of the Court [61], where is was stated (*I.C.J. Reports 1966*, p. 49) that there was *one* test that could be applied in order to ascertain what had really been intended, namely,

> ". . . by enquiring what the States who were members of the League when the mandates system was instituted did when, as Members of the United Nations, they joined in setting up the trusteeship system that was to replace the mandates system. In effect . . . they did exactly the same as had been done before . . .".

And so it was over revocation. No more than before was any provision for it made. Is it really to ascribe this to a belief that it was not necessary because all international mandates and trusts were inherently subject to unilateral revocation, irrespective of the consent of the administering authority?—or would it be more reasonable to suppose that it was because no such thing was intended? If no such thing was intended in the case of the *trust* territories (all of them formerly mandated territories), this was

[61] The 1966 Judgment of the Court found that the compulsory adjudication articles of the mandates only applied to disputes concerning clauses about the economic and other *individual* interests of members of the League, and not to clauses concerning the conduct of the mandates themselves, which was a matter vested collectively in the League as an entity. This view was confirmed by the fact that, in the trusteeship agreements relating to former mandated territories, a compulsory adjudication article figured only in those trusteeships which included clauses of the former kind, but not in those which were confined to the latter type of clause.

because no such thing had been intended, or had ever been instituted, in the case of the mandated territories themselves, *as mandates*. The former mandatories were simply perpetuating in this respect the same system as before *(and the Assembly tacitly agreed to this under the various trusteeship agreements)*. This previous system of course applied, and continues to apply, to the mandated territory of SW. Africa.

* * *

88. Since the conclusion reached is that League of Nations mandates would not have been subject to unilateral revocation by the Council of the League or—what comes to the same thing—that the concurrence of the mandatory concerned would have been required for any change of mandatory, or for the termination of the mandate on a basis of self-government or independence;—and since the United Nations cannot have any greater powers in the matter than had the League, it follows that the Assembly can have had no competence to revoke South Africa's mandate, even if it had become subrogated to the League Council's supervisory role—for that role did not comprise any power of unilateral revocation.

* * *

89. There are however other reasons, resulting from the United Nations Charter itself, why the organs of the United Nations had no competence to revoke the Mandate, whether or not they would otherwise have had it; and these will now be considered in the next main section (Section C).

SECTION C

LIMITATIONS ON THE COMPETENCE AND POWERS OF THE ORGANS OF THE UNITED NATIONS UNDER THE CHARTER

90. In the two preceding main sections it has been held, *first* (Section A) that the United Nations as an Organization never became invested with any supervisory function in respect of mandates not voluntarily converted into trusteeships, and never became subrogated to the sphere of competence of the former League of Nations in respect of mandates; and *secondly* (Section B) that since in any event that competence did not include any power of unilateral revocation of a mandate, or of terminating it without the consent of the mandatory concerned, the United Nations would equally have had no competence to exercise such a power even if it had,

in principle, become subrogated to the role of the League in respect of mandates. But in addition to the limitations thus arising, both from general rules of law and from the provisions of the relevant governing instruments, there is also the question of the limitations imposed upon the competence and sphere of authority of the organs of the United Nations by the constitution of the latter, as embodied in its Charter. Since these organs (in the present context the General Assembly and the Security Council) are the creations of the Charter, they are necessarily subject to such limitations, and can prima facie, take valid action only upon that basis.

1. Competence and Powers of the General Assembly under the Charter

91. So far as the Assembly is concerned, there arises at the outset an important preliminary question, namely whether it was competent to act as (in effect) a court of law to pronounce, as judge in its own cause, on charges in respect of which it was itself the complainant. In my opinion it was not; and this suffices in itself to render Resolution 2145, by which the Assembly purported to revoke the Mandate for SW. Africa, invalid and inoperative. However, in order not to break the thread of the present argument, I deal with the matter in the first section of the Annex to this Opinion.

(i) The Assembly lacks any general competence to take action of an executive character

92. In contrast with the former League of Nations, in which both main bodies, except in certain specified cases, acted by unanimity, the basic structure adopted in the drafting of the United Nations Charter consisted in the establishment of a careful balance between a small organ—the Security Council, acting within a comparatively limited field, but able, in that field, to take binding decisions for certain purposes;—and a larger organ, the General Assembly, with a wide field of competence, but in general, only empowered to discuss and recommend;—this distinction being fundamental. The powers of the Security Council will be considered at a later stage. As to the Assembly, the list appended below in footnote 62 indicates the general character of what it was empowered to do. From

[62] The list shows that the Assembly is either limited to making recommendations, or that where it can do more, it is as a result of a specific power conferred by the express terms of some provision of the Charter. In other words the Assembly has no inherent or residual power to do more than recommend.

(a) The recommendatory functions are described as follows:—

[The General Assembly]
Article 10: "may discuss . . . and . . . make recommendations";
Article 11, paragraph 1: "may consider . . . and . . . make recommendations";

what this list reveals (seen against the whole conceptual background of the Charter), there arises an irrebuttable presumption that except in the few cases (see section *(d)* of the list) in which executive or operative powers are specifically conferred on the Assembly, it does not, so far as the Charter is concerned, have them. In consequence, anything else it does outside those specific powers, whatever it may be and however the relevant resolution is worded, *can* only operate as a recommendation. It should hardly be necessary to point out the fallacy of an argument which would attribute to the Assembly a residual power to take executive action at large, because it has a *specific* power so to do under certain particular articles (4, 5, 6 and 17). On the contrary, the correct inference is the reverse one—that where no such power has been specifically given, it does not exist.

93. It follows ineluctably from the above, that the Assembly has no *implied* powers except such as are mentioned in *(e)* of footnote 62. *All* its powers, whether they be executive or only recommendatory, are precisely formulated in the Charter and there is no residuum. Naturally any organ must be deemed to have the powers necessary to enable it to perform the specific functions it is invested with. This is what the Court had in mind when, in the *Injuries to United Nations Servants* (Count Bernadotte) case (*I.C.J. Reports 1949*, p. 182), it said that the United Nations:

Article 11, paragraph 2: "may discuss . . . and . . . make recommendations";
Article 11, paragraph 3: "may call . . . attention . . . to";
Article 12, paragraph 1: "shall not make any recommendation . . . unless [so requested]";
Article 13: "shall initiate studies and make recommendations";
Article 14: "may recommend measures";
Article 15: "shall receive and consider [reports]";
Article 16: "shall perform such functions . . . as are assigned to it [by Chapters XII and XIII of the Charter]";
Article 105, paragraph 3: "may make recommendations".

(b) The peace-keeping functions conferred upon the Assembly by Article 35 are, by its third paragraph, specifically stated to be "subject to the provisions of Articles 11 and 12" (as to which, see above).

(c) As regards Chapters XII and XIII of the Charter (trusteeships), the only provisions which refer to the Assembly are:

Article 85, which (without any indication of what the functions in question are) provides that the non-strategic area functions of the United Nations "with regard to *trusteeship agreements*" (italics added) "including the approval of the terms of" such agreements, "shall be exercised by the . . . Assembly".

Article 87, under which the Assembly may "consider reports" ("submitted by the administering authority"); "accept petitions and examine them" ("in consultation with [that] authority"); "provide for periodic visits" to trust

". . . must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".

This is acceptable if it is read as being related and confined to existing and specified duties; but it would be quite another matter, by a process of implication, to seek to bring about an *extension* of functions, such as would result for the Assembly if it were deemed (outside of Articles 4, 5, 6 and 17) to have a non-specified power, not only to discuss and recommend, but to take executive action, and to bind.

94. In the same way, whereas the practice of an organization, or of a particular organ of it, can modify the manner of exercise of one of its functions (as for instance in the case of the veto in the Security Council which is not deemed to be involved by a mere abstention), such practice cannot, in principle, modify or add to the function itself. Without in any absolute sense denying that, through a sufficiently steady and long-continued course of conduct, a new tacit *agreement* may arise having a modificatory effect, the presumption is against it,—especially in the case of an organization whose constituent instrument provides for its own amendment, and prescribes with some particularity what the means of effecting this are to be. There is a close analogy here with the principle enunciated by the Court in the *North Sea Continental Shelf* case (*I.C.J. Reports 1969*, p. 25) that when a convention has in terms provided for a

---

territories ("at times agreed upon with the [same] authority"); and "take these and other actions *in conformity with the terms of the trusteeship agreements*" (italics added).

None of this invests the Assembly with any binding or executive powers except in so far as might specifically be conferred upon it by the express terms of the trusteeship agreements. These did not in fact any of them do so (see footnote 64 below).

(d) In the result, the only provisions of the Charter which confer executive or quasi-executive powers on the Assembly are:

Articles 4, 5 and 6, which enable the Assembly to admit a new Member, or suspend or expel an existing one,—in each case only upon the recommendation of the Security Council; and *Article 17*, under paragraph 1 of which the Assembly is to "consider and approve" the budget of the Organization, with the corollary (paragraph 2) that the expenses of the Organization are to be borne by the Members "as apportioned by the Assembly". Under paragraph 3, the Assembly is to "consider and approve" financial arrangements with the specialized agencies, but is only to "examine" their budgets "with a view to making recommendations" to them.

(e) The Assembly naturally has those purely domestic, internal, and procedural executive powers without which such a body could not function, e.g., to elect its own officers; fix the dates and times of its meetings; determine its agenda; appoint standing committees and *ad hoc* ones; establish staff regulations; decide to hold a diplomatic conference under United Nations auspices, etc., etc.

particular method whereby some process is to be carried out (in that case it was the method of becoming bound by the convention), it was "not lightly to be presumed that", although this method had not been followed, the same result had "nevertheless somehow [been achieved] in another way"—a principle which, had it been applied by the Court in the present case [63], would have led to a totally different outcome, as can be seen from Sections A and B above.

95. Translating this into the particular field of mandates, it is clear that, just as the Assembly would have no power to make a grant of sovereign independence to a non-self-governing territory under Articles 73 and 74 of the Charter, nor to terminate a trusteeship without the consent of the administering authority (see relevant clauses of the various trusteeship agreements made under Article 79 of the Charter [64]),—so equally, given the actual language of the Charter, does the Assembly have no power to evict a mandatory. Any resolution of the Assembly purporting to do that could therefore only have the status of, and operate as, a non-binding recommendation. The power given to the Assembly by Articles 5 and 6 of the Charter to suspend or expel a member State (upon the recommendation of the Security Council) would of course enable it to suspend or expel a mandatory *from its membership of the United Nations*; but this cannot be extended on a sort of analogical basis to the quite different act of purporting to revoke the mandatory's mandate.

* * *

96. From all of this, only one conclusion is possible, namely that so far as the terms of the Charter itself are concerned, *the Assembly has no power to terminate any kind of administration over any kind of territory.*

* * *

97. It may however be contended that the matter does not end there, for it may be possible for powers other or greater than its normal ones to be conferred upon an international organ *aliunde* or *ab extra*, for some particular purpose—e.g., under a treaty,—and if so, why should it not

[63] This affords an excellent illustration (and many more could be given) of the fact that, owing to the constant changes in the composition of the Court, due to the system of triennial elections created by its Statute, the Court does not always adhere to its own jurisprudence.

[64] The various trusteeship agreements deal differently with the question of the termination, or possible termination of the trust, but the effect is that in no case does the Assembly possess any unilateral power in the matter. If therefore no trusteeship can be terminated without the consent, given in one form or another, of the administering powers, why should it be so unthinkable that a mandate should not be terminable without the consent of the mandatory?

exercise them? This contention must now be considered.

(ii) The Assembly can only exercise powers conferred upon it or derived aliunde *or* ab extra *provided it keeps within the limits of its constitutional role under the structure of the Charter*

98. The question here is whether it is legally possible for a body such as the Assembly, in the purported exercise of what may conveniently be called "extra-mural" powers, to act in a manner in which, in the *intra*-mural exercise of its normal functions, it would be precluded by its constitution from doing. To put the matter in its most graphic form, suppose for instance a group of member States of the United Nations—in a particular region perhaps—entered into a treaty under which they conferred on the Assembly, in relation to themselves and for that region, exactly those peace-keeping powers which, under the Charter, the Security Council is empowered to take as regards the member States of the United Nations collectively. Could it then validly be argued that although it would be *ultra vires* for the Assembly so to act under the *Charter*, if Charter action were involved, nevertheless it could in this particular case do so because it had acquired, *aliunde*, the necessary power vis-à-vis the particular States members of the regional group concerned, by reason of the treaty concluded between them investing the Assembly with such power? It is in fact approximately upon the basis of a theory such as this one, that those who (to their credit) feel some difficulty in attributing executive powers to the Assembly, outside those specified in Articles 4, 5, 6 and 17 of the Charter, rely in contending that, although under the Charter the Assembly could not do more than discuss and recommend in the field of mandates, yet it could go further than this if it had derived from the League of Nations the power to do so.

99. It should be realized that the question asked in the preceding paragraph is not merely an academic one: it is closely related to situations that have actually arisen in the history of the United Nations. There have been times when the majority of the member States have been dissatisfied with the functioning of the Security Council, whose action had become paralyzed owing to the attitude of one or more of the Permanent Members. In these circumstances recourse was had to the Assembly, which adopted resolutions containing recommendations that were not, indeed, binding but which could be, and were by most of the States concerned, regarded as authorizing them to adopt courses they might not otherwise have felt justified in following. If such situations were to arise again and continue persistently, it could be but a step from that to attempts to invest the Assembly with a measure of executive power by the process already described, or something analogous to it.

* * *

100. It so happens that the principle of the question under discussion arose in the *Voting Procedure* case, and was dealt with both by the Court and by three individual judges in a sense adverse to the contention now being considered. It was Sir Hersch Lauterpacht who gave the most direct general negative; and though he was speaking with reference to the question of the voting rule, the principle involved was exactly the same (*I.C.J. Reports 1955*, at p. 109):

> ". . . the . . . Assembly cannot act in that way. It cannot override a seemingly mandatory provision of the Charter *by the device of accepting a task conferred by a treaty. It might otherwise be possible to alter, through extraneous treaties, the character of the Organization in an important aspect of its activity*"—(my italics).

The passage italicised is precisely applicable to the situation that would arise if the Assembly were deemed able to accept, *ab extra*, functions of an executive character going beyond its basic Charter role of consideration, discussion and recommendation. Even if it may not be outside the scope of the Charter for the Assembly to deal in *some* form with mandated territories not placed under trusteeship—e.g., as being, at the least, non-self-governing territories within the meaning of Article 73—it can only deal with them by way of discussion and recommendation, not executive action.

101. In the *Voting Procedure* case, the Court itself was of the same way of thinking as Sir Hersch. Having regard to the view expressed in its earlier (1950) Opinion to the effect that the degree of supervision in the Assembly should not exceed that of the League Council, and should as far as possible follow the latter's procedure (see paragraph 65 above), it became evident that if the Assembly applied its usual majority, or two-thirds majority, voting rule in the course of its supervision of the mandate, it would *not* be conforming to the procedure of the League Council, which was based on a unanimity rule, including even the vote of the mandatory. Moreover, it was clear that the latter rule (being more favourable to the mandatory by making decisions adverse to its views harder to arrive at) involved in consequence a lesser degree of supervision than the Assembly's voting rule would do. This being so, the question arose whether the Assembly, in order to remain within the limits of the powers derived by it from or through the instrument of mandate, as those powers had been exercised by the League Council, could proceed according to a voting rule which was not that provided for by the

Charter—in short could depart from the Charter in this respect [65]. The Court answered this question by a decided negative in the following terms (*I.C.J. Reports 1955*, at p. 75):

> "The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for another without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League . . . would amount to a disregard of one of the characteristics of the . . . Assembly."

This view was independently concurred in by Judges Basdevant, Klaestad and Lauterpacht. Judge Basdevant said (at p. 82):

> "The majority rule laid down by Article 18 of the Charter and the unanimity rule prescribed by the Covenant of the League of Nations are something other than rules of procedure: they determine an essential characteristic of the organs in question and of their parent international institutions." (For Judge Klaestad's view see paragraph 104 below and paragraph *(a)* of footnote 66.)

102. The criteria thus enunciated by the Court and by Judge Basdevant were, be it noted, formulated precisely in the context of the mandates system. It is therefore legitimate to apply them to the present case; and if this is done in terms of the last two sentences of the foregoing quotation from the 1955 Opinion of the Court, the result is that there "cannot . . . without constitutional amendment" "be substituted" for a system which only allows the Assembly to discuss and recommend, "another" system which would allow it, in addition, to take executive and peremptory action,—and that, to deem the Assembly to be invested with such a power "would amount to a disregard of one of [its] characteristics" within the system of the Charter.

* * *

[65] The *form* in which the question arose in the *Voting Procedure* case was a little different, inasmuch as the issue was not whether the Assembly could act in a way not provided for by the Charter, but whether it *could* do so if this would involve a more stringent supervisory régime than that of the League's system. But the underlying point was the same—i.e., could the Assembly, in the exercise of *ab extra* functions, act by means of a *different* voting rule from that provided by the Charter—*could* it in any event, consistently with the Charter, apply the League unanimity rule?

103. It must be concluded that even if the League Council's supervisory powers had in principle passed to the Assembly, and had included the right to revoke an existing mandate, such a right could not, constitutionally, be exercised by the Assembly, since this would be inconsistent with the basic philosophy of its role within the general structure of the United Nations.

(iii) Elements confirming the above conclusions

104. *Dilemma of Judges Klaestad and Lauterpacht in the Voting Procedure case*—The problem in the *Voting Procedure* case was that, as has already been mentioned, the fact that decisions could be more easily arrived at under the Assembly's voting rule than under the League's rule of unanimity including the vote of the mandatory, involved for the latter a "greater degree of supervision" than the League's. Yet, as the Court found (see *ante*, paragraph 101), the Assembly could not, conformably with the Charter, depart from its own voting rule. The Court solved this problem by holding that although, in the exercise of its supervisory function, the Assembly must not depart from the substance of the mandate, the procedure by which it carried out that function must be the procedure provided for by the Charter; and that the Court's previous (1950) pronouncement, indicating that the degree of supervision must not be greater than the League's, was intended to apply only to matters of substance, not procedure. Given that the Assembly's voting rule *did* however, in principle, involve a greater degree of supervision than the League rule, by making it possible for decisions to be arrived at without the concurrence of the mandatory, this pronouncement of the Court in the *Voting Procedure* case involved a distinct element of inconsistency. That solution accordingly did not satisfy Judges Klaestad and Lauterpacht who arrived at a different and more logical one, avoiding contradictions and, at the same time, operating to confirm in a very striking manner the views expressed above as to the limits imposed by the Charter on the powers of the Assembly. They pointed out that the decisions reached by that organ in the course of supervising the mandate, not being in the nature of domestic, internal or procedural decisions (see head *(e)* in note 62 above) *could only operate as recommendations,* and could not therefore in any case be binding on the mandatory unless it had at least voted in favour of them [66]. Hence the Assembly's two-thirds rule, though theoretically more burdensome for the mandatory than the League's rule of unanimity including the mandatory's vote, would not in practice be so,

[66] *(a)* Distinguishing between the "domestic" or "internal", and the non-domestic categories of Assembly decisions, Judge Klaestad (*I.C.J. Reports 1955*, at p. 88) stated that in his opinion "recommendations . . . concerning reports and petitions relating to . . . South West Africa belong . . . to the last mentioned category". He continued:

since in neither case could the mandatory be bound without its own concurrence. In this way the balance between the weight of the League Council's supervision and that of the Assembly would be maintained or restored.

"They are not legally binding on the Union . . . in its capacity as Mandatory Power. Only if the Union Government *by a concurrent vote has given its consent to the recommendation* can that Government become legally bound to comply with it. In that respect the legal situation is the same as it was under the supervision of the League. *Only a concurrent vote can create a binding legal obligation for the Union of South Africa*"—(my italics).

(b) Judge Lauterpacht illustrated his view by reference to the trusteeship position, which he regarded as relevant to that of mandates. The passage in question is so striking as to be worth quoting *in extenso*,—and it is of course applicable *a fortiori* to the case of mandates (*loc. cit.*, at p. 116):

"This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administration of trust territories. The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. *Thus there is no legal obligation, on the part of the Administering Authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure.* The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, *but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council.* This is so as a matter both of existing law and of sound principles of government. *The Administering Authority, not the General Assembly, bears the direct responsibility for the welfare of the population of the Trust Territory.* There is no sufficient guarantee of the timeliness and practicability of a particular recommendation made by a body acting occasionally amidst a pressure of business, at times deprived of expert advice and information, and not always able to foresee the consequences of a particular measure in relation to the totality of legislation and administration of the trust territory. Recommendations in the sphere of trusteeship have been made by the General Assembly frequently and as a matter of course. *To suggest that any such particular recommendation is binding in the sense that there is a legal obligation to put it into effect is to run counter not only to the paramount rule that the General Assembly has no legal power to legislate or bind its Members by way of recommendations,* but, for reasons stated, also to cogent considerations of good government and administration"—(my italics).

"In fact States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council as approved by the General Assembly. That right has never been seriously challenged. There are numerous examples of express refusal on the part of the Administering Authority to comply with a recommendation." [Follow-

105. This conclusion could not be other than correct;—for if the Assembly's decisions bound the mandatory without the latter's consent, whereas the League's did not, there would be imposed a degree of supervision not only far heavier, *but differing totally in kind* from that of the League. To put the matter in another way, if the substitution of the Assembly for the League Council could not be allowed to operate so as to increase the Mandatory's obligations, it correspondingly could not be allowed to operate to increase the supervisory organ's powers, still less to give it a power that the former supervisory organ never had, or could never have exercised except in a certain way and by a certain kind of vote. It follows that such a power could not be exercised by the Assembly either, especially since the latter equally cannot bind the mandatory and cannot go beyond recommendations without exceeding its constitutional Charter powers. In consequence, Resolution 2145, even if it were otherwise valid, could not have any higher status or effect than, or operate except as, a *recommendation* that South Africa's administration should terminate, and not as an actual termination of it. I have to point out in conclusion that the whole of this most important aspect of the matter, resulting from the Court's own jurisprudence as it was enunciated in the 1955 *Voting Procedure* case, is now completely ignored, and not even mentioned, in the present Opinion of the Court;—for the sufficient reason no doubt that there is no satisfactory answer that can be given to it.

106. *The answer given by the Court in 1950 to the question lettered* (c) *put to it in the then advisory proceedings*—This question asked where the competence to modify the international status of SW. Africa lay, upon the assumption that it did not lie with South Africa acting unilaterally. The Court replied (*I.C.J. Reports 1950*, at p. 144):

> "... that the Union of South Africa acting alone has not the competence to modify the international status of the territory of South West Africa, and that the competence to determine and

---

ing upon this (*loc. cit.*, pp. 116-117) Judge Lauterpacht cited, with references, a long list of specific instances.]

(c) With regard to mandates equally, in a passage of quite particular significance in the circumstances of the present case, Sir Hersch Lauterpacht said (*loc. cit.*, at p. 121):

> "This absence of a purely legal machinery and the reliance upon the moral authority of the findings and the reports of the Mandates Commission are in fact the essential feature of the supervision of the Mandates system. Public opinion—and the resulting attitude of the Mandatory Powers—were influenced not so much by the formal resolutions of the Council and Assembly [of the League] as by the reports of the Mandates Commission which was the true organ of supervision ... *yet no legal sanction was attached to non-compliance with or disregard of the recommendations, the hopes and the regrets of the Commission*"—(my italics).

modify the international status of the Territory *rests with the Union of South Africa acting with the consent of the United Nations*"—(my italics).

It is clear that even if the Mandate itself persisted under another authority the *change* of authority (particularly if the new one was the United Nations as such) would unquestionably involve a modification of the international status of the territory, not only by substituting a new administration for the existing one, but by substituting one which could not itself be subjected to any supervision at all, except its own, and which would have to render reports to itself (and so—*quis custodiet ipsos custodes?*) [67]. It therefore follows from what the Court said about modifying the status of the territory, that the competence to effect any substitution of this kind (or any other change of mandatory) would rest "with the Union of South Africa acting with the consent of the United Nations", —which view invests *South Africa* with the initiative, and negatives the existence of any independent right of termination resident in the United Nations acting alone. Even allowing for the fact that the issue at that time was whether the *mandatory* had any unilateral power of modification it is impossible to reconcile the phraseology employed with the idea that the Court in 1950 could have thought the United Nations, or any organ of it, acting *alone*, had such a power. As my colleague Judge Gros points out, both aspects of the matter had been raised in the course of the proceedings.

(iv) Conclusion as to the powers of the Assembly

107. The foregoing considerations lead to the conclusion that even if the Assembly inherited a supervisory role from the League Council, it could exercise it only within the limits of its competence under the Charter namely by way of discussion and recommendation. Such a situation has no room for, and is entirely incompatible with any power to revoke a mandate. In consequence, Assembly Resolution 2145 could have effect only as a recommendation.

---

[67] Even if the Assembly had "inherited" the supervisory function from the League, this function manifestly cannot include administration,—for the essence of supervision is its exercise by a *separate* body, not being the *administering* authority. The idea of mandates administered direct by the League itself without a mandatory as intermediary, which formed part of President Wilson's original proposals at Versailles, was not adopted, and formed no part of the *League* mandates system which it is claimed that the United Nations inherited.

2. Competence and powers of the Security Council relative to mandates

(i) Consequential character of the Security Council's resolutions in the present case

108. It is strictly superfluous to consider what (if any) were the Security Council's powers in relation to mandates, because it is quite clear that the Council never took any independent action to terminate South Africa's mandate. All its resolutions were consequential, proceeding on the basis of a supposed termination already effected or declared by the Assembly. Without the Assembly's act, the acts of the Security Council, which were largely in the nature of a sort of attempted enforcement of what the Assembly had declared, would have lacked all *raison d'être*;—while on the other hand, if the Assembly's resolution 2145 lacked *in se* validity and legal effect, no amount of "confirmation" by the Security Council could validate it or lend it such effect, or independently bring about the revocation of a mandate.

(ii) On a mandates basis, the powers of the Security Council are no greater than the Assembly's

109. The words "relative to mandates" have been inserted of set purpose in the title to this subsection,—because it is necessary to distinguish clearly between what the Security Council can do on a *mandates* basis and what it might be able to do on the only other possible basis on which it could act, namely a peace-keeping basis. On a mandates basis the Security Council has no greater powers than the Assembly,—for (see the 1950 Opinion of the Court at p. 137) [68] it was the United Nations as a whole which inherited—or did not inherit—the role of the League of Nations in respect of mandates, together with (if it did) such powers as were comprised in that role. Consequently, as regards any power of revocation, the Security Council stands on exactly the same footing as the Assembly in respect of such questions as whether the United Nations has any supervisory function at all and, if so, whether it includes any power of revocation;—subject however to this one qualification, namely that in 1950 the Court very definitely *(loc. cit.)* indicated the Assembly as the *appropriate* organ to exercise the supervisory function it found the United Nations to be invested with. It must therefore be questioned whether the Security Council has any specific role whatever in respect of mandates as such, similar to that which it has in respect of strategic

[68] Speaking of the final League winding-up resolution of 18 April 1946 (see paragraphs 41 and 42 above) the Court said "This resolution pre-supposes that the supervisory functions exercised by the League would be taken over by *the United Nations*"—(my italics).

trusteeships. If this is so, it would be solely for peace-keeping purposes that the Security Council would be competent to take action in respect of a mandate.

(iii) Wider powers in the field of mandates exercisable only on a peace-keeping basis

110. As regards the alternative basis of Security Council intervention, clearly that organ cannot be precluded from exercising its *normal* peace-keeping functions merely because the threat to the peace, if there is one, has arisen in a mandates context,—*provided* the intervention has a genuinely peace-keeping aim and is not a disguised exercise in mandates supervision. What the Security Council cannot properly do is, in the guise of peace-keeping, to exercise functions in respect of mandates, where those functions do not properly belong to it either as a self-contained organ or as part of the United Nations as a whole. It cannot, in the guise of peace-keeping revoke a mandate any more than it can, in the guise of peace-keeping order transfers or cessions of territory.

111. However, in my opinion, the various Security Council resolutions involved did not, on their language, purport to be in the exercise of the peace-keeping function. There is in fact something like a careful avoidance of phraseology that would be too unambiguous in this respect. That being so, their effect was as indicated in paragraphs 108-109 above. They were not binding on the Mandatory or on other member States of the United Nations. Like those of the Assembly they could only have a recommendatory effect in the present context.

(iv) Proper scope of the Security Council's peace-keeping powers under the Charter

112. This matter, so far as the actual terms of the Charter are concerned is governed by paragraphs 1 and 2 of Article 24 which read as follows:

> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations. *The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII*"— (my italics).

I am unable to agree with the extremely wide interpretation which the Opinion of the Court places on this provision. No doubt it does not limit the *occasions* on which the Security Council can act in the preservation of peace and security, provided the threat said to be involved is not a mere figment or pretext. What it does do is to limit the type of action the Council can take in the discharge of its peace-keeping responsibilities, —for the second paragraph of Article 24 states in terms that the *specific* powers granted to the Security Council for these purposes are laid down in the indicated Chapters (VI, VII, VIII and XII). According to normal canons of interpretation this means that so far as *peace-keeping* is concerned, they are not to be found anywhere else, and are exercisable only as those Chapters allow. It is therefore to them that recourse must be had in order to ascertain what the *specific* peace-keeping powers of the Security Council are, *including the power to bind.* If this is done, it will be found that only when the Council is acting under Chapter VII, or possibly in certain cases under Chapter VIII, will its resolutions be binding on member States. In other cases their effect would be recommendatory or hortatory only. (Peace-keeping action under Chapter XII—strategic trusteeships—does not really seem to me to be a separate case, since it is difficult to see how it could fail to take the form of action under Chapters VI or VII as the case might be.)

113. These limitations apply equally to the effect of Article 25 of the Charter, by reason of the proviso "in accordance with the present Charter". If, under the relevant chapter or article of the Charter, the decision is *not* binding, Article 25 cannot make it so. If the effect of that Article were automatically to make *all* decisions of the Security Council binding, then the words "in accordance with the present Charter" would be quite superfluous. They would add nothing to the preceding and only other phrase in the Article, namely "The Members of the United Nations agree to accept and carry out the decisions of the Security Council", which they are clearly intended to qualify. They effectively do so only if the decisions referred to are those which *are* duly binding "in accordance with the present Charter". Otherwise the language used in such parts of the Charter as Chapter VI for instance, indicative of recommendatory functions only, would be in direct contradiction with Article 25—or Article 25 with them.

114. Since, in consequence, the question whether any given resolution of the Security Council is binding or merely recommendatory in effect, must be a matter for objective determination in each individual case, it follows that the Council cannot, merely by *invoking* Article 25 (as it does for instance in its Resolution 269 of 12 August 1969) impart

obligatory character to a resolution which would not otherwise possess it according to the terms of the chapter or article of the Charter on the basis of which the Council is, or must be deemed to be, acting.

(v) The Security Council is not competent, even for genuine peace-keeping purposes, to effect definitive changes in territorial sovereignty or administrative rights

115. There is more. *Even when acting under Chapter VII of the Charter itself*, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a principle of international law that is as well-established as any there can be,—and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are. The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or piece of territory *in order to restore peace and security*, but it could not thereby, or as part of that operation, abrogate or alter territorial rights;—and the right to administer a mandated territory is a territorial right without which the territory could not be governed or the mandate be operated. It was to keep the peace, not to change the world order, that the Security Council was set up.

* * *

116. These limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended,—and the present case is a very good illustration of this: for not only was the Security Council not acting under Chapter VII of the Charter (which it obviously could not do—though it remains to be seen by what means and upon what grounds the necessary threat to, or breach of the peace, or act of aggression will be determined to exist);—not only was there no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes,—but the whole operation, which will not necessarily end there, had as its object the abrogation of the Mandatory's rights of territorial administration, in order to secure (not eventually but very soon) the transformation of the mandated terri-

tory into, and its emergence as, the sovereign independent State of "Namibia". This is what is declared in terms, not only in Resolution 2145 itself, but also in the subsequent Assembly Resolution 2248 (S-V) of 1967, specifying June 1968 as the intended date of transfer [69],—and this is par excellence the type of purpose, in promoting which, the Security Council (and *a fortiori* the Assembly) exceeds its competence, and so acts *ultra vires*.

SECTION D

THE LEGAL CONSEQUENCES FOR STATES

1. In general

117. On the basis of the foregoing conclusions, the answer to the question put to the Court in the present proceedings, as to what are the legal consequences for States of the continued presence of South Africa in the mandated territory of SW. Africa, despite Security Council resolution 276 of 1970 is, strictly, that there are no specific legal consequences for States, for there has been no change in the legal position. Since neither the Security Council nor the Assembly has any competence to revoke South Africa's Mandate, the various resolutions of these organs purporting to do so, or to declare it to be at an end, or to confirm its termination, are one and all devoid of legal effect. The result is that the Mandate still subsists, and that South Africa is still the Mandatory. However, from this last conclusion there do follow certain legal consequences both for South Africa and for other States.

2. Consequences for South Africa

118. *For South Africa* there is an obligation

(1) to recognize that the Mandate survived the dissolution of the League, —that it has an international character,—and that in consequence SW. Africa cannot unilaterally be incorporated in the territory of the Republic;
(2) to perform and execute in full all the obligations of the Mandate, whatever these may be.

119. With regard to this last requirement, I have given my reasons for thinking that, the United Nations not being the successor in law to the League of Nations, the Mandatory is not, and never became subject

[69] See further in the Annex, paragraph *15* in section 3.

to any duty to report to it, or accept its supervision, particularly as regards the Assembly. But as was pointed out earlier in this Opinion (paragraphs 17 and 20), it does not follow that the reporting obligation has lapsed entirely; and it is the fact that it could be carried out by the alternative means indicated in paragraph 16. This being so, the question arises whether the Mandatory has a legal duty to take some such steps as were there indicated. The matter is not free from doubt. The Court in 1950 considered the reporting obligation to be an essential part of the Mandate. Judge Read on the other hand thought that although its absence might "weaken" the Mandate, the latter would not otherwise be affected. Again if the Mandate is viewed as a treaty or contract, the normal effect of the extinction of one of the parties would be to bring the treaty or contract to an end entirely.

120. However, the better view seems to be that the reporting obligation survived, though becoming dormant upon the dissolution of the League, and certainly not transformed into an obligation relative to the United Nations. Nevertheless, if not an absolutely essential element, it is a sufficiently important part of the Mandate to place the Mandatory under an obligation to revive and carry it out, if it is at all possible to do so, by some other means [70]. But the Mandatory would have the right to insist *(a)* on the new supervisory body being acceptable to it in character and composition—(such acceptance not to be unreasonably withheld),—*(b)* on the nature *and implications* (as to degree of supervision) of the reporting obligation being as they are indicated to be in paragraphs 76-78 above,—and *(c)* that, just as with the League Council, the Mandatory would be under no legal obligation to carry out the recommendations of the supervisory body, no more than States administering trust territories are obliged to accept the views of the United Nations Assembly as supervisory organ—(see *supra*, paragraphs 77 and 104 and footnote 66)

121. A further, or rather alternative, course that could be considered incumbent on South Africa, though as a consequence of the Charter not the Mandate, would be to resume the rendering of reports under Article 73 *(e)* of the Charter (see as to this the joint dissenting Opinion of 1962, *I.C.J. Reports 1962*, pp. 541-548 and paragraph 43 *(b)* above), seeing that on any view SW. Africa is a non-self-governing territory. This resumption must however be on the understanding that the reports are not dealt with by the Trusteeship Council unless South Africa so agrees.

---

[70] *Ex hypothesi* however, it would not be to the United Nations that the Mandatory would be responsible for doing this, or there would merely be the same situation in another form.

3. For other States

122. *For other States* the "legal consequences" of the fact that South Africa's Mandate has not been validly revoked, and still subsists in law are:

(1) to recognize that the United Nations is not, any more than the Mandatory, competent unilaterally to change the status of the mandated territory;
(2) to respect and abide by the Mandatory's continued right to administer the territory, unless and until any change is brought about by lawful means.

* * *

123. On the foregoing basis it becomes unecessary for me to consider what the legal consequences for States would be if the view taken in the Opinion of the Court were correct; although, since the measures indicated by the Court seem to be based mostly on resolutions of the Security Council that—for the reasons given in paragraphs 112-114 above—I would regard as having only a recommendatory effect, I would be obliged to question the claim of these measures to be in the proper nature of "legal consequences", even if I otherwise agreed with that Opinion. (I also share the views of my colleagues Judges Gros, Petrén, Onyeama and Dillard as to the standing of certain of these measures.)

124. There is however another aspect of the matter to which I attach importance and which I think needs stressing. It was for this reason, that, on 9 March 1971, during the oral proceedings (see Record, C.R. 71/19, p. 23), I put a question to Counsel for the United States of America, then addressing the Court. I do not think I can do better than cite this question and the written answer to it, as received in the Registry of the Court some ten days later (18 March 1971):

> *Question:* In the opinion of the United States Government is there any rule of customary international law which, in general, obliges States to apply sanctions against a State which has acted, or is acting, illegally—such as cutting off diplomatic, consular and commercial relations with the tortfeasor State? If not, in what manner would States become compelled so to act—not merely by way of moral duty or in the exercise of a faculty, but as a matter of positive legal obligations?
>
> *Reply:* It is the opinion of the United States that there is no rule of customary international law imposing on a State a duty to apply sanctions against the State which has acted, or is acting, illegally. However, under the Charter of the United Nations, the Security Council has the power to decide that member States should apply

sanctions against the State which acts in certain illegal ways. Thus, should the Security Council determine that an illegal act by a State constitutes "a threat to the peace, breach of the peace, or act of aggression", it would have a duty under Article 39 to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". Whenever the Security Council makes such a determination and decides that diplomatic, consular and commercial relations shall be cut off in accordance with Article 41 of the Charter, all Members of the United Nations have the duty to apply such measures.

If the latter part of this reply is intended to indicate that it is broadly speaking only in consequence of decisions taken under Chapter VII of the Charter, after a prior determination of the existence of a "threat to the peace, breach of the peace or act of aggression", that a legal duty for member States would arise to take specific measures, I can only agree.

POSTSCRIPTUM

OTHER CONSEQUENCES

125. In the latter part of his separate declaration, the President of the Court has made certain observations which, though closely related to the legal issues involved in this case, have a different character. Taking my cue from him, I should like to do the same. In the period 1945/1946, South Africa could have confronted the United Nations with a *fait accompli* by incorporating SW. Africa in its own territory, as a component province on a par with Cape province, Natal, the Transvaal and the Orange Free State. Had this been done, there would have been no way in which it could have been prevented, or subsequently undone, short of war. Wisely however, though at the same time exercising considerable restraint from its own point of view, South Africa refrained from doing this. If however "incorporation" is something which the United Nations believes it could never accept, there should equally be a reciprocal and corresponding realization of the fact that the conversion of SW. Africa into the sovereign independent State of Namibia (unless it were on a very different basis from anything now apparently contemplated) could only be brought about by means the consequences of which would be incalculable, and which do not need to be specified. Clearly therefore, in a situation in which no useful purpose can be served by launching the irresistible force against the immovable object, statesmanship should seek a *modus vivendi*—while there is yet time.

(Signed) G. G. FITZMAURICE.

ANNEX

PRELIMINARY AND INCIDENTAL MATTERS [1]

1. Incompetence of the United Nations Assembly to act as a court of law

1. When, by its Resolution 2145 of 1966, the Assembly purported to declare the termination of South Africa's mandate, on the basis of alleged fundamental breaches of it, and to declare this not merely as a matter of opinion but as an *executive* act having the intended operational effect of bringing the Mandate to an end—or registering its termination—and of rendering any further administration of the mandated territory by South Africa illegal,—it was making pronouncements of an essentially juridical character which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make.

2. There is nothing unusual in the view here expressed. On the contrary it represents the normal state of affairs, which is that the organ competent to perform an act, in the executive sense, is not the organ competent to decide whether the conditions justifying its performance are present. In all other fields a separation of functions is the rule. Thus the legislature is alone competent to enact a law,—the executive or administration alone competent to apply or enforce it,—the judiciary alone competent to interpret it and decide whether its application or enforcement is justified in the particular case. In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will, in principle, be competent to make the necessary determinations. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.

[1] Relegation to this Annex does not in any way involve that the matters dealt with in it are regarded as of secondary importance;—quite the reverse—they involve issues as salient in their way as any in the case. But to have dealt with them at the earlier stage to which they really belong would have held up or interrupted the development of the main argument which I wished to put first.

3. It must be added that besides being *ultra vires* under this head, the Assembly's action was arbitrary and high-handed, inasmuch as it acted as judge in its own cause relative to charges in respect of which it was itself the complainant, and without affording to the "defendant" any of the facilities or safeguards that are a normal part of the judicial process.

4. It has been contended that the competence of the Assembly to make determinations of a legal character is shown by the fact that Article 6 of the Charter confers upon it the right (upon the recommendation of the Security Council) to expel a member State "which has persistently violated the principles contained in ... the Charter". This however merely means that the framers of the Charter did confer this particular specific power on the Assembly, in express terms, without indicating whether or not it was one that should only be exercised after a prior determination of the alleged violations by a competent juridical organ. To argue from the power thus specifically conferred by Article 6, that the Assembly must therefore be deemed to possess a *general* power under the Charter to make legal determinations, is clearly fallacious.

5. The contention that Resolution 2145 did not actually terminate South Africa's mandate, but merely registered its termination by South Africa itself, through its breaches of it, i.e., that the Resolution was merely declaratory not executive, is clearly nothing but an expedient directed to avoiding the difficulty;—for even as only declaratory, the resolution amounted to a finding that there had been breaches of the Mandate,—otherwise there would have been no basis even for a declaratory resolution. It is moreover a strange and novel juridical doctrine that, by infringing an obligation, the latter can be brought to an end,—but doubtless a welcome one to those who are looking for an easy way out of an inconvenient undertaking.

6. No less of an expedient is the plea that South Africa had itself "disavowed the Mandate" ever since 1946. South Africa's attitude has always been that, as a matter of *law*, either the Mandate was so bound up with the League of Nations that it could not survive the latter's dissolution, or else, that if it did, it did not survive in the form claimed in the United Nations. Whether this view was correct or not it was in no sense equivalent to a "disavowal" of the Mandate. To deny the existence of an obligation is *ex hypothesi* not the same as to repudiate it [2]. Nor can any such deduction legitimately be drawn from the failure to render reports to, and accept the supervision of the Assembly, based as this was on the

[2] For this reason the justification for the revocation of the Mandate which the Court finds in Article 60, paragraph 3 *(a)*, of the 1969 Vienna Convention on the Law of Treaties is quite misplaced.

contention (considered correct by an important body of professional opinion) that no legal obligation to that effect existed. If this were not so, no party to a dispute could argue its case without being told that, by doing so, it had "disavowed" its obligations.

* * *

7. It has also been argued that the Assembly had "vainly" tried to obtain the necessary findings from the Court via the contentious proceedings brought by Ethiopia and Liberia in the period 1960-1966. But this would be tantamount *(a)* to saying that because the Assembly did not get the judgment it wanted in 1966, it was therefore justified in taking the law into its own hands, which, however, would in no way serve to validate Resolution 2145;—*(b)* to admitting that the 1966 Judgment was right in seeing the then Applicants in the light of agents of the United Nations and not, as they represented themselves to be, litigants in contentious proceedings sustaining an interest of their own;—and *(c)* recognizing that, as was strongly hinted in paragraphs 46-48 (especially the latter) of the 1966 Judgment, the correct course would have been for the Assembly as an organ to have asked the Court for an advisory opinion on the question of breaches of the Mandate, in relation to which the objection as to legal interest would not have been relevant. It was still open to the Court to do this, for instance in 1967. It cannot therefore do other than give a wrong impression if it is said that the Assembly in 1966 had no other course open to it but to adopt Resolution 2145 without having previously sought legal advice on this basis.

* * *

8. These various purported justifications for the Assembly making legal determinations, though not itself a competent legal organ, and without any reference to such an organ, or even to an *ad hoc* body of jurists (such as was the settled practice of the League Council in all important cases), are clearly illusory. In the result, the conclusion must be that the Assembly's act was *ultra vires* and hence that Resolution 2145 was invalid, even if it had not been otherwise ineffective in law to terminate South Africa's mandate.

2. The Court's right to examine the assumptions underlying any Request for an Advisory Opinion

9. Although the Court has to some extent gone into the question of the validity and effect of Assembly Resolution 2145, it has not adequately

examined the question of its right to do so having regard to the way in which the Request for an Advisory Opinion in the present case was worded. The matter is however so important for the whole status and judicial function of the Court that it becomes necessary to consider it.

10. The Court could not properly have based itself on the literal wording of the Request, in order to regard its task in the present proceedings as being confined solely to indicating what, on the assumptions contained in the Request, and without any prior examination of their validity, are the legal consequences for States of South Africa's continued presence in SW. Africa,—those assumptions being that the Mandate for that territory had been lawfully terminated and hence that this presence was illegal [3]. The Court cannot do so for the simple but sufficient reason that the question whether the Mandate is or is not legally at an end goes to the root of the whole situation that has led to the Request being made. If the Mandate is still, as a matter of law, in existence, then the question put to the Court simply does not arise and no answer could be given. Alternatively the question would be a purely hypothetical one, an answer to which would, in those circumstances, serve no purpose, so that the situation would, on a different level, resemble that which, in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15), caused the Court to hold (at p. 38) that it could not "adjudicate upon the merits of the claim" because *inter alia*, the circumstances were such as would "render any adjudication devoid of purpose". It has constantly been emphasized in past advisory cases—(and this was also confirmed in the contentious case just mentioned, in which occasion arose to consider the advisory practice)—that in advisory, no less than in contentious proceedings, the Court must still act as a court of law (and not, for instance, as a mere body of legal advisers),—that "the Court's authority to give advisory opinions must be exercised as a judicial function ' (*ibid.*, at p. 30),—and that, to use the wording of one of the most quoted dicta of the Permanent Court in the *Eastern Carelia* case, *P.C.I.J., Series B, No. 5* (1923) at page 29, the Court "being a Court of Justice, [it] cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court".

11. So much is this the case that the original tendency in the past was to question whether the mere giving of *advice*, even in solemn form such as by means of an advisory opinion of the Court, was compatible with the judicial function at all [4]. The Court has not of course taken this view but,

[3] The fact that certain representatives of member States in the Security Council said that they understood the Request in this sense, and even that they only agreed to it on that basis, cannot of course in any way bind the Court. Neither representatives of States, nor such organs as the Security Council itself, possess any competence to restrict the Court as to what it shall take account of in delivering a legal opinion.

[4] See the discussion in Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, pp. 510-511.

to cite a very high authority and former judge of the Permanent Court [5]:

> "... the Court ... has conceived of its advisory jurisdiction as a judicial function, and in its exercise of this jurisdiction it has kept within the limits which characterize judicial action. It has acted *not as an 'academy of jurists' but as a responsible 'magistrature'* "—(my italics).

The words italicized in the passage just quoted contain the key to the question. If an organ such as the General Assembly or Security Council of the United Nations likes to refer some question to a body of legal experts, whether a standing one or set up *ad hoc* for the purpose, which that body is instructed to answer on the basis of certain specified assumptions that are to be taken as read, it will be acting perfectly properly if it proceeds accordingly, because it is not a court of law and is not discharging or attempting to discharge any *judicial* function: it is indeed bound by its instructions, which the organ concerned is entitled to give it. But the Court, which is itself one of the six original main organs of the United Nations, and not inferior in status to the others, is not bound to take instruction from any of them, in particular as to how it is to view and interpret its tasks as a court of law, which it is and must always remain, whatever the nature and context of the task concerned;—and whereas a body of experts may well, as a sort of technical exercise, give answers on the basis of certain underlying assumptions irrespective of their validity or otherwise, a court cannot act in this way: it is bound to look carefully at what it is being asked to do, and to consider whether the doing of it would be compatible with its status and function as a court.

12. This faculty constitutes in truth the foundation of the admitted right of the Court, deriving from the language of Article 65, paragraph 1, of its Statute, and consecrated in its jurisprudence, to refuse entirely to comply with a request for an advisory opinion if it thinks that, for sufficient reasons, it would be improper or inadvisable for it to do so;—and if the Court can thus refuse entirely, *a fortiori* can it, and must it, insist on undertaking a preliminary examination of the assumptions on which any request is based, particularly where, as in the present case, those assumptions are of such a character that, unless they are well-founded, the question asked has no meaning or could admit of only one reply. Otherwise put, for a court to give answers that *can only* have significance and relevance if a certain legal situation is presumed to exist, but without enquiring whether it does (in law) exist, amounts to no more than indulging in an interesting parlour game, which is not what courts of law are for. In the present case, if the Court had lent itself to such a course, it would not have been engaging in a judicial activity,—it would have to

[5] Hudson, *op. cit.*, p. 511.

abnegate its true function as a court-of-law and would indeed have acted as if, in the words used by Judge Hudson, it were "an academy of jurists".

3. Should the Court have complied with the Request in this case

13. There can be no doubt that the question put to the Court was a legal one, such as it had the power to answer if it considered it proper to do so,—more especially if (as it must be) the question is regarded as relating not only to the legal *consequences* of the General Assembly Resolution 2145 but also to the validity of that Resolution itself, and its effect upon the Mandate for South West Africa.

14. On the other hand, had the Court considered that the form of the question addressed to it precluded it from following any but the first course (i.e., dealing with the "consequences" alone), and excluded, or was intended to exclude, any consideration by it of the validity and effect of the act from which those consequences are supposed to flow—i.e., Assembly Resolution 2145—then this would have been a ground for declining to comply with the Request since, for the reasons given in the preceding section of this Annex, it is unacceptable for any organ making such a request to seek to limit the factors which the Court, as a court of law, considers it necessary to take into account in complying with it, or to prescribe the basis upon which the question contained in it must be answered. A further element is that the Court, not being formally obliged to comply with the Request at all (even though it might otherwise be right for it to do so), is necessarily the master, and the only master, of the basis upon which it will do so, if in fact it decides to comply.

15. Subject to what has just been said, I agree with the conclusion of the Court that it should comply with the Request, though not with some of the reasoning on which that conclusion is based [6]. I take this view even though I have no doubt that the present proceedings represent an attempt to use the Court for a purely political end, namely as a step towards the setting up of the territory of South West Africa as a new sovereign independent State, to be called "Namibia", irrespective of what the consequences of this might be at the present juncture. This aim is made perfectly clear by operative paragraphs 1, 2 and 6 of Resolution 2145

[6] In particular as regards the question of the existence in this case of a "dispute" or "legal question pending" between States—as to which see section 4 below. But the "pendency" of a dispute or legal question is not *per se* a ground on which the Court must refuse to give an advisory opinion to the requesting organ. Where the Court was to blame, was in not applying the contentious procedure to the present advisory proceedings, as it had the power to do—(again see section 4 below).

itself, which is reproduced here *in extenso*:

"*The General Assembly*,

Reaffirming the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations, General Assembly resolution 1514 (XV) of 14 December 1960 and earlier Assembly resolutions concerning the Mandated Territory of South West Africa,

Recalling the advisory opinion of the International Court of Justice of 11 July 1950, accepted by the General Assembly in its resolution 449 A (V) of 13 December 1950, and the advisory opinions of 7 June 1955 and 1 June 1956 as well as the judgement of 21 December 1962, which have established the fact that South Africa continues to have obligations under the Mandate which was entrusted to it on 17 December 1920 and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa,

Gravely concerned at the situation in the Mandated Territory, which has seriously deteriorated following the judgement of the International Court of Justice of 18 July 1966,

Having studied the reports of the various committees which had been established to exercise the supervisory functions of the United Nations over the administration of the Mandated Territory of South West Africa,

Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of apartheid and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity,

Emphasizing that the problem of South West Africa is an issue falling within the terms of General Assembly resolution 1514 (XV),

Considering that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

Mindful of the obligations of the United Nations towards the people of South West Africa,

Noting with deep concern the explosive situation which exists in the southern region of Africa,

Affirming its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory,

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;

2. *Reaffirms further* that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;

3. *Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;

4. *Decides* that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations;

5. *Resolves* that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;

6. *Establishes* an *Ad Hoc* Committee for South West Africa—composed of fourteen Member States to be designated by the President of the General Assembly—to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967;

7. *Calls upon* the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatsoever alter or tend to alter the present international status of South West Africa;

8. *Calls the attention* of the Security Council to the present resolution;

9. *Requests* all States to extend their whole-hearted co-operation and to render assistance in the implementation of the present resolution;

10. *Requests* the Secretary-General to provide all the assistance

necessary to implement the present resolution and to enable the *Ad Hoc* Committee for South West Africa to perform its duties.

1454th plenary meeting,
27 October 1966."

If there could be any doubt it would be resolved by the two following more recent and conclusive pieces of evidence:

(a) General Assembly Resolution 2248 (S-V) of 19 May 1967, after re-affirming Resolution 2145 and appointing a "Council for South West Africa" which later became known as the "Council for Namibia", ended as follows:

> "*Decides* that South West Africa shall become independent on a date to be fixed in accordance with the wishes of the people and that the Council shall do all in its power to enable independence to be attained by June 1968."

(b) On 29 January 1971, when the whole matter was already *sub judice* before the Court and the oral proceedings had actually started [7], the United Nations "Council for Namibia" issued a statement commenting on the South African proposal for holding a plebiscite in SW. Africa under the joint supervision of the Court and the Government of the Republic, and finishing as follows:

> "Furthermore, the issue at stake is the independence of Namibia, and not whether the Government of South Africa or the United Nations should administer the Territory. The United Nations decisions in this matter are aimed at achieving the independence of Namibia, and not its administration by the United Nations, except for a brief transitional period."

16. Despite the revealing character of these statements, and despite its obvious political background and motivation, the question put to the Court is, in itself, essentially a legal one. Moreover, in fact, most advisory proceedings have a political background. It could hardly be otherwise, as the Court pointed out in the *Certain Expenses* case with reference to interpretations of the Charter (*I.C.J. Reports 1962*, p. 155, *in fine*). But as the Court equally pointed out in that case (echoing a similar dictum

[7] A sitting *in camera* was held on 27 January 1971 to hear the South African request for the appointment of a judge *ad hoc*. The public hearings started on February 8.

made on a previous occasion [8]), such a background does not of itself impart a political character to the *question* the Court is asked to answer, and this is the important consideration. It would seem therefore that the political background of a question would only justify a refusal to answer where this background loomed so large as to impart a political character to the question also. In spite of doubts as to whether something of the kind has not occurred in the present case [9], the legal character of the questions themselves remains.

4. *The question of the appointment of a South African judge* ad hoc

(a) *The relevant provisions of the Court's Statute and Rules*

17. The Court's rejection of the South African request to be allowed to appoint a judge *ad hoc* in the present case was embodied in the Order of the Court of 29 January 1971 to which my colleagues Judges Gros, Petrén and I appended a joint dissenting declaration reserving our right to give reasons for this at a later stage. In my opinion this rejection was wrong in law, and also unjustified as a matter of equity and fair dealing,—for it was obvious, and could not indeed be denied by the Court, that South Africa had a direct, distinctive and concrete special interest to protect in this case, quite different in kind from the general and common interest that other States had as Members of the United Nations. In short, South Africa had, and was alone in having, precisely the same type of interest in the whole matter that a litigant defendant has,—and should therefore have been granted the same right that any litigant before the Court possesses, namely that, if there is not already a judge of its own nationality amongst the regular judges of the Court, it can, under Article 31 of the Statute of the Court, appoint a judge *ad hoc* to sit for the purposes of the case [10].

18. The Court's refusal to allow this was thrown into particular relief

---

[8] See for instance the first *Admissions of New Members* case (*I.C.J. Reports 1947/1948*, at p. 61).

[9] The present case might well be regarded as being at the least a borderline one, for the political nature of the background is unusually prominent. Yet the two main questions involved, namely whether the Mandate has been validly terminated or not and, if it has, what are the legal consequences for States, are in themselves questions of law. The doubt arises from the way in which the request is framed, suggesting that the Court is to answer the second question only, and postulating the first as already settled. It is above all this which imparts a political twist to the whole Request.

[10] There would naturally have been no objection to the appointment also of one judge *ad hoc* to represent the common interest of what was in effect "the other side", —and see further notes 14 and 15 below.

by the almost simultaneous rejection, in the three Orders of the Court dated 26 January 1971, of the South African challenge concerning the propriety of three regular judges of the Court sitting in the case,—a matter on which, as to the third of these Orders, I wish to associate myself with the views expressed in the early part of his dissenting opinion in the present case by my colleague Judge Gros. In the light of the explanations as to this, given in the Opinion of the Court, it has now to be concluded that, outside the literal terms of Article 17, paragraph 2, of the Statute, no previous connexion with the subject-matter of a case, however close, can prevent a judge from sitting, unless he himself elects as a matter of conscience not to do so.

* * *

19. On the question of a judge *ad hoc*, the immediately relevant provision is Article 83 of the Court's Rules, which reads as follows:

> "If the advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article."

If this provision was the only relevant one, it would be a reasonable inference from it that a judge *ad hoc* could not be allowed unless the case had the character specified. In the present one it was obvious that a legal question was involved,—or the Court would have lacked all power to comply with the Request for an advisory opinion (see Article 96, paragraph 1, of the United Nations Charter and Article 65, paragraph 1, of the Court's Statute). But could it be said to be a question "actually pending between two or more States"? I shall give my reasons later on for thinking that it was of this kind. But for the purposes of my principal ground for holding that the South African request should have been allowed, it is not strictly necessary for me to determine whether the legal questions concerned were "pending"; and if pending, "actually pending"; and if actually pending, then actually pending "between two or more States", and if so which ones, etc., etc.;—for in my view the matter is not exclusively governed by the provisions of Article 83 of the Rules, which I consider do not exhaust the Court's power to allow the appointment of a judge *ad hoc*.

* * *

20. The contrary view is based on a misreading of the true intention and effect of Rule 83 when considered in relation to Article 68 of the Statute which reads as follows:

> "In the exercise of its advisory functions, the Court shall . . . [11] be guided by the provisions of the present statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

This provision of course covers Article 31 of the Statute, and hence confers on the Court a general power to apply that Article by allowing the appointment of a judge *ad hoc* if requested. Furthermore, the provisions of the Rules are subordinated to those of the Statute. The Court has no power to make Rules that conflict with its Statute: hence any rule that did so conflict would be *pro tanto* invalid, and the Statute would prevail.

21. However, I can see no conflict between Rule 83 and Article 68 of the Statute. They deal with different aspects of the matter. The *latter* (Article 68), despite its quasi-mandatory form, confers what is in effect a power or discretion on the Court to assimilate requests for advisory opinions to contentious cases, either in whole or in part. Rule 83 on the other hand contains what amounts to a direction by the Court to itself as to how it is to exercise this discretion in certain specified circumstances. If those circumstances are found to obtain, then the Rule obliges the Court to allow the appointment of a judge *ad hoc*. But this in no way means, nor was ever intended to mean, that by making Rule 83 the Court parted with the residual discretion it has under Article 68 of the Statute, and that in *no other* circumstances than those specified in Rule 83 could the Court allow such an appointment. The object of the Rule was *not* to specify the only class of case in which the Court could so act, but to indicate the *one* class in which it *must* do so, and to ensure that, at least in the type of case contemplated in the Rule, the Court's discretion should be exercised in a positive way, in the sense of applying Article 31 of the Statute. This was entirely without prejudice to the possibility that there might be other cases than those indicated in the Rule, as to which the Court might feel that, though not *obliged* to apply Article 31, it ought nevertheless for one reason or another to do so. This view is borne out by the language of Article 82, paragraph 1, of the Rules, which relates to the application in advisory proceedings of *any* of the contentious procedure provisions, not merely those of Article 31. After recapitulating the general language of Article 68, it goes on to say that "for this purpose" (i.e., in order to determine the sphere of application—if any—of the contentious procedure), the Court is "above all" to consider "whether the request . . . relates to a legal question actually pending between two or

---

[11] The omitted word is "further", which is quite otiose in the context since there is no other paragraph, or article of the Statute dealing with the matter to which this one could be "further".

more States". This wording clearly makes the test of legal pendency a primary, but equally clearly not a conclusive factor.

* * *

22. It has been contended that although the foregoing description of the relationship between the various provisions concerned might otherwise be correct, it must nevertheless break down on the actual wording of Article 31 itself, particularly its second and third paragraphs which, it has been claimed, not only clearly contemplate the case of "parties" to an actual litigation but are virtually incapable of functioning in any other circumstances, so that at the very least the requirements of Rule 83 constitute a minimum and *sine qua non*, in the absence of which no application of Article 31 is possible. I have difficulty in following the logic of this view which, if it were correct, would go far in practice to clawing back almost everything supposed to have been conferred by Rule 83, and rendering that provision a piece of useless verbiage,—for even where the case is indubitably one of a legal question actually pending between two or more States, it would be rare in advisory proceedings to find a situation such that Article 31 could be applied to it integrally as that provision stands, and without gloss or adaptation. It is in fact manifest that the provisions of the Statute and Rules concerning contentious cases were quite naturally and inevitably drafted with litigations and parties to litigations in mind. Hence these provisions are bound to be—as they are—full of passages and expressions that are not literally applicable to cases where there is no actual litigation and no parties technically in the posture of litigants,—in short to the vast majority of the cases in which there are advisory proceedings. Consequently the power given to the Court by Article 68 of the Statute to be guided by the contentious procedure would be largely nullified in practice unless it were deemed to include a power to adapt and tailor this procedure to the advisory situation. The very words "shall be guided by" indicate that such a process is contemplated.

23. In the present case in particular, no difficulty could have arisen, for the sufficient reason that, apart from South Africa, no other State presenting written or oral statements asked to be allowed to appoint a judge *ad hoc*, although they in fact had the opportunity of doing so [12], —and moreover representatives of four such States actually attended

[12] The Court does not normally invite the appointment of a judge *ad hoc*. The matter is entirely facultative, and there have been cases where, even in a litigation, and although neither or none of the parties had a judge of its nationality on the Court, no designation of a judge *ad hoc* has been made.

the separate and preliminary oral hearing held *(in camera* [13]*)* on this matter, but none of them intervened either to oppose the application or to make a similar one. Had any two or more such applications been received, in addition to South Africa's, the Court would have had to consider, under Article 3, paragraph 2, of its Rules, whether the States concerned, or any group of them, not already comprising between them a judge of the nationality of one of them amongst the regular judges of the Court, were "in the same interest" [14], in which event only one *ad hoc* judge *per* such group could have been allowed [15].

24. Reference is made in the Opinion of the Court to the Permanent Court's Order of 31 October 1935 in the *Danzig Legislative Decrees* case (Annex 1 to *Series A/B, No. 65,* at pp. 69-71). That case however has no relevance to the present one; for in 1935 no provision corresponding to what is now Article 68 of the Statute figured in the Statute as it then stood. The latter, in fact, contained no provisions at all about the advisory jurisdiction, which rested entirely on Article 14 of the Covenant of the League and the Court's own Rules. It was therefore inevitable that the Court should feel it had no discretion as to the appointment of a judge *ad hoc* unless the matter fell strictly within the terms of those Rules. Hence the *Legislative Decrees* case constitutes no precedent, either for the view that the Court lacks a discretion *now*, or for a refusal to exercise that discretion (which the Permanent Court, not then having one, could not in any event have exercised). The situation being in consequence quite different, it becomes evident that if, under Article 68, of the Statute—which takes precedence of the Rules, there is (as is unquestionably the case) a discretion to "be guided by the provisions of the . . . Statute which apply in contentious cases" (including therefore Article 31) there must be a discretion to allow the appointment of a judge *ad hoc*—one of the most important parts of the contentious process. No (manifestly non-existent) doctrine of the Court's inability to regulate its own composition could operate to prevent this.

* * *

[13] See Article 46 of the Statute. The hearing takes place before the full Court and in the main Court-room as if for a public sitting, but press and public are excluded. The decision to sit in private despite South Africa's strong representations to the contrary, was in my view mistaken and unwise (as was indeed subsequently impliedly admitted by the decision to publish the verbatim record of the sitting).

[14] Which, in advisory proceedings could be read as meaning the adoption of broadly the same view on the main legal questions involved. Any State asking to appoint a judge *ad hoc*, which had signified its intention to take part in the oral proceedings, but had not previously presented any written statement, could have been requested to furnish a brief indication of its principal views or contentions.

[15] In the present proceedings all the States which intervened, either at the written or the oral stage of the proceedings (apart from South Africa), could be said to be in the same (legal) interest, except France,—but there was already a French judge among the regular judges of the Court.

25. In the light of these various considerations, it is clear that the Court in no way lacked the power to grant the South African request, but was simply unwilling to do so. In this I think the Court was not justified, particularly in view of the fact that the request was unopposed which, to my mind, indicated a tacit recognition by the other intervening States of the contentious features of the case. The present proceedings, though advisory in form, had all the characteristics of a contentious case as to the substance of the issues involved [16], no less than had the actual litigation between South Africa and certain other States which terminated five years ago, and of which these advisory proceedings have been but a continuation in a different form. Even if, therefore, the Court did not consider the matter to come under Article 83 of its Rules, in such a way as to *oblige* it to allow a judge *ad hoc* to be appointed, it should have exercised its residual discretionary powers to the same effect.

(b) *The existence of a dispute or legal question pending between States*

26. The above expression of view has proceeded upon the assumption that, in order to determine whether the Court *could* grant the South African request, and should do so, it was unnecessary to decide whether the case fell within the strict terms of Rule 83. In fact, however, I consider that it does, and that any other conclusion is unrealistic and can only be reached by a closing of the eyes to the true position. It really involves something that gets very near to equating the words "a legal question actually pending between two or more States" in Rule 83, with circumstances in which two or more States are in a condition of actual or immediately impending litigation. But, as I have already pointed out, such an interpretation would virtually nullify the intended effect of Rule 83 by restricting its scope to situations that seldom take that precise form in advisory proceedings.

27. The nub of the whole difficulty lies in the word "pending"; but if this is taken on its normal dictionary acceptation [17] of "remaining undecided" or "not yet decided", and "not terminated" or "remaining unsettled",—or in short "still outstanding",—then it is evident that there is a whole series of legal questions in issue (or in dispute) between South Africa on the one hand and a number of other States, and that these questions are, in this sense, outstanding and unresolved, inasmuch as the view held on one side as to their correct solution differs *in toto*

---

[16] In consequence of which the Court found itself obliged in practice, and in a manner virtually unprecedented in previous advisory proceedings, to conduct the oral hearing as if a litigation were in progress.

[17] As given in up-to-date publications such as *Chambers Twentieth Century Dictionary* and the *New Penguin English Dictionary*.

from that taken on the other. Would it be possible for instance to find a more concrete and fundamental issue of this kind than one which turns on whether the Mandate for SW. Africa has been legally terminated or is still in existence; whether South Africa is *functus officio* in SW. Africa or is still entitled to administer that territory, and whether South Africa's continued presence there is an illegal usurpation or is in the legitimate exercise of a constitutional authority? It would surely be difficult to think of a more sharply controversial situation than one in which, depending on the answers to be given to these questions, South Africa is on the one side being called upon to quit the territory, while she herself asserts her right to remain there,—in which it is maintained on the one side that the whole matter has been settled by the General Assembly resolution 2145 of 1966, and on the other that this resolution was *ultra vires* and devoid of legal effect,—and therefore settled nothing. The case in fact falls exactly within the definition of a dispute which, following my former colleague Judge Morelli, I gave in my separate opinion in the *Northern Cameroons* case (*I.C.J. Reports 1963*, at p. 109), when I said that the essential requirement was that:

> "... the one party [or parties] should be making, or should have made, a complaint, claim or protest about an act, omission or course of conduct, present or past of the other party, which the latter refutes, rejects or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded".

If this does not describe the situation as it has long existed, and now exists, between the United Nations or many of its member States, and South Africa, I do not know what does.

* * *

28. Nevertheless it may be suggested that these issues, concrete and unresolved as they are, and hence, in the natural and ordinary sense, "pending" and "actually pending", are not, within the primarily intended meaning of the words, pending "between two or more States", because they lie too much at large between South Africa and either the United Nations as an entity, or a group of its Members rather than as individual States. In other circumstances there might be a good deal to be said in favour of this view. But the Assembly resolution purporting to terminate the Mandate has led to a situation in which, as it was one of its objects, this resolution is being made the basis of *individual* action taken outside the United Nations by a number of States in their relations with South

Africa over SW. Africa, as described in some detail by Counsel for South Africa at the preliminary oral hearing held on 27 January 1971 [18].

29. One example must (but will) suffice—namely the situation which has arisen over the application to South West Africa of the 1965 Montreux International Telecommunication Convention. When becoming a party to this Convention, South Africa gave notice in proper form applying it to SW. Africa also. Thereupon a number of States [19] addressed official communications to the Secretariat of the International Telecommunication Union, which were all to the same effect, namely that *precisely by reason of Assembly resolution 2145* purporting to terminate the Mandate, South Africa no longer had the right to administer or speak for SW. Africa, and that, in consequence, the application of the Convention to that territory was invalid and of no effect. The Administrative Council of the Union then, in May 1967, circularized the member States with a request for their views on the matter, which was put to them in the form whether South Africa's right to represent SW. Africa "should be withdrawn". To this South Africa, on 23 May 1967, sent a full and reasoned reply affirming its continuing right to represent SW. Africa. Nevertheless at the next session of the Union a majority voted in favour of the "withdrawal". There now in consequence exists a clear-cut and concrete dispute, not only between South Africa and a majority of the members of the Union as such, but also individually between South Africa and those specific members who initiated and raised the issue in the first place. The subject-matter of this dispute is whether or not the 1965 Convention is or is not applicable to SW. Africa;—and this dispute, or legal question (to use the language of Rule 83), not only is actually pending between South Africa and those States, and continues so to be, *but also constituted one of the alleged possible "legal consequences" of the purported termination of the Mandate which the Court might have to consider in the present proceedings.*

* * *

30. For these reasons, were it necessary to hold (as in my view it is not) that the Court had no residual power outside Rule 83 to allow the appointment of a South African judge *ad hoc*, I should take the view

[18] Typescript of verbatim record, C.R. (H.C.) 71/1 (Rev.), pp. 19-28.

[19] These were, in the order named in the record (see preceding note), the Federal Republic of Cameroon, Yugoslavia, Tanzania, United Arab Republic, Soviet Union, Ukrainian S.S.R., Byelorussian S.S.R. and Poland.

that the conditions specified in the Rule were fully satisfied and that it was applicable so as to oblige the Court to grant the request, as justice and equity in any event called for, in the exercise of its undoubted discretionary power. In fact, if ever there was a case for allowing the appointment of a judge *ad hoc* in advisory proceedings, that case was this one.

* * *

31. On the basis of the foregoing views two somewhat serious consequences would ensue. The first is that, in refusing to allow the appointment of a judge *ad hoc*, the Court in effect decided that the proceedings did not involve any dispute, and thus prejudged the substance of a number of issues raised by South Africa which turned on the existence or otherwise of a dispute,—although no argument had yet been heard on these issues, nor was until after the Order embodying the Court's decision on the matter had been issued. This created a situation in which, in most national legal systems, the case would, on appeal, have been sent back for a re-trial. Similarly the Court virtually precluded itself from going into any question of fact; for disputed issues of fact are difficult to deal with except on the basis of a contentious procedure involving recognition of the existence of a dispute. This again was in advance of having heard the South African argument on the question of the admission of further factual evidence,—although the Court was, from the start, under written notice of the South African view that such further evidence was relevant and important. These views are not affected by the fact that, as the Opinion of the Court correctly observes, a decision on the question of a judge *ad hoc*, being a matter of the composition of the Court, had to be taken in advance of everything else,—although this situation may well point to a somewhat serious flaw in the present Rules. It cannot however affect the fact that, having rejected the request for the appointment of a judge *ad hoc*—and *on the very ground* that there was no dispute or legal question pending (for if the Court had thought there was, Rule 83 would have obliged it to grant the request)—the Court was thenceforward precluded in practice, in connexion with anything arising later in the case, from coming to a different conclusion as to the existence of a dispute or legal question pending. Had the Court, without prejudging these matters, simply exercised its discretion in the sense of allowing the appointment (as in my view it should in any case have done), no difficulty would have arisen. But it should at least, and *at that stage*, have heard full argument on the question, in the course of ordinary public hearings.

32. Secondly, the failure to allow the appointment of a judge *ad hoc*, coupled with the views expressed by my colleague Judge Gros, which I share, concerning the third of the three Orders of the Court referred

to in paragraph 18 of this Annex, arouses in me a number of misgivings, as to which it will suffice here to say that I associate myself entirely with what is stated at the end of paragraph 17 of Judge Gros' Opinion.

(Initialled) G.F.

SYNOPTICAL TABLE

MAIN SECTIONS

DETAILS

DISSENTING OPINION OF JUDGE GROS

[Translation]

To my regret, I am unable to concur in the Advisory Opinion, whether in regard to the substance or in regard to certain problems of a preliminary character, and I propose to explain my disagreement below.

1. By way of preliminary decision, the Court made four Orders on questions concerning its composition, and as I voted against two of them I should give my reasons for doing so. The first concerned is Order No. 3 of 26 January 1971, which, having regard to Article 48 of the Statute, rejected by 10 votes to 4 an objection raised against a Member of the Court, but gave no reasons. The second Order on which I have to comment is that of 29 January 1971, which, having regard to Articles 31 and 68 of the Statute and Article 83 of the Rules of Court, rejected by 10 votes to 5 a request by the Government of South Africa for the appointment of a judge *ad hoc*; it likewise gave no reasons, and it was accompanied by two joint declarations, one made by three and the other by two Members of the Court.

2. The Court has said: "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*I.C.J. Reports 1963*, p. 29). Even if one of the Governments represented in the proceedings had not raised the problem decided by Order No. 3 of 26 January 1971, the Court would have been obliged to examine it in the application of its Statute. The observance of the provisions of its own Statute is a strict obligation, as the Court's 1963 decision emphasizes.

3. At the meeting of the Security Council on 4 March 1968, the representative of Pakistan, speaking on behalf of the co-sponsors of draft resolution S/8429 on Namibia, which was to become Security Council resolution 246 (1968), stated:

> "The seven co-sponsors acknowledge with gratitude the constructive co-operation extended to them by Mr. . . . and Mr. . . . and the great contribution which they made to the formulation of the draft resolution" (S/PV. 1395, p. 32).

The first person mentioned has since become a Member of the Court; now, resolution 246 (1968) of 14 March 1968, in its preamble, takes into account the General Assembly resolution, 2145 (XXI), "by which the General Assembly of the United Nations terminated the Mandate of South Africa over South West Africa and assumed direct responsibility for the territory until its independence" (14 March 1968, S/PV. 1397, pp. 6-10). The records likewise contain summaries of several speeches,

some of them lengthy, which that same person made on the substantive problem now decided by the Court (see S/PV. 1387, pp. 61-66; S/PV. 1395, pp. 41 and 43-45; S/PV. 1397, pp. 16-20).

4. Such are the facts. Hitherto it has been the practice of the Court to determine in each case of this kind whether Article 17 of the Statute was applicable and to ascertain whether there had been any active participation on the part of a Member, before his election, in a question laid before the Court (cf. Stauffenberg, *Statut et Règlement de la Cour permanente de Justice internationale*, 1934, p. 76, citing a decision of the Permanent Court, taken at its twentieth session in which the material point was that a Member had not played an "active part" in the treatment of the question by the Council of the League). It was in application of that principle that one Member of the Court decided not to sit in the case concerning the *Anglo-Iranian Oil Company* because he had represented his country in the Security Council when it had been considering a matter arising out of the claim of the United Kingdom against Iran, and that the Court expressed its agreement with that decision (*I.C.J. Yearbook 1963-1964*, p. 100).

No reader of the records I have cited in paragraph 3 can be left in any doubt as to the character and substance of the positions adopted by the then representative, now a judge, on the question of the revocation of the Mandate by the effect of resolution 2145 (XXI). Yet that resolution is the fundamental problem of the present proceedings, inasmuch as they are concerned with the determination of its legal consequences. It must therefore be noted that Order No. 3 of 26 January 1971 marked a change in practice, and that the Court has discarded the criterion of active participation.

It was indeed, in the present case, no participation in the drafting of a general convention that had to be considered, but the expression of opinion on the international status of the Mandate after and in function of the declaration of revocation by resolution 2145 (XXI), which is the underlying legal point of the proceedings. Thus we see that the representative in the Security Council pronounced upon the substance of the case after the critical date of October 1966. There is therefore no comparison with certain precedents cited in the Advisory Opinion (para. 9), which are instances of judges having contributed to the drafting of international treaties applicable in cases which arose much later and in which they had taken no part.

The Court's decision contradicts the principle, to which Article 17 of the Statute lends formal expression, that a Member must not participate in the decision of any case in which he has previously taken part in some other capacity. This Article, moreover, is an application of a generally accepted principle of judicial organization deriving from an obvious concern for justice. The new interpretation which has been placed upon it cannot, therefore, be justified.

5. I have now to explain why I consider that Article 68 of the Statute

and Articles 82 and 83 of the Rules ought to have been given a different application from the one chosen by the Court in adopting the Order of 29 January 1971.

The Order of 29 January 1971 rejecting the request for a judge *ad hoc* was made after a closed hearing, held on 27 January, at which the observations of the South African Government were heard. Judge Sir Gerald Fitzmaurice, Judge Petrén and I reserved the right to make known the reasons for our dissent, which, inasmuch as they concerned the substance from certain aspects, could not be disclosed at the moment when the Order which discounted them was issued. The Court gave definitive shape to its interpretation of the relevant articles of the Statute and Rules by refusing the appointment of a judge *ad hoc*—a question which it thus made irreversible—without, however, disclosing any reasons for the Order embodying the decision. In that this was an interpretation of rules which are binding on the Court, it is necessary to examine the reasons for it.

The refusal of a judge *ad hoc* is justified only if the legal conditions for the exercise of the faculty to request such an appointment have not been satisfied. The Court has not, in effect, any freedom of choice in the matter for Article 83 of the Rules expressly provides that if "a legal question actually pending between two or more States" is involved in proceedings on a request for advisory opinion, the Court is to apply Article 31 of the Statute, which concerns the appointment of a judge *ad hoc* on the application of a State not represented on the Bench. Furthermore, the Court ought to have pronounced upon this legal problem "*avant tout*" ["above all"] (Rules, Art. 82), but this it failed to do, not treating the question as a preliminary one to be thrashed out in full cognizance of all the factors concerned, including those related to questions of substance. Needless to say, the idea of a preliminary question is nothing new in advisory procedure, and it would have been natural, in view of the particular circumstances of the case, to adopt on this point an approach analogous to that of contentious procedure, as is recommended by Article 68 of the Statute. This is a point with which the Court had to deal, for example, in connection with its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956)*; Poland's objection to the Court's jurisdiction in *International Status of South West Africa* (*Pleadings*, p. 153, in para. 2) was of a preliminary nature, as was also that raised in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* by the Government of Czechoslovakia, which specifically relied on Article 68 of the Statute and Article 82 of the Rules in requesting the Court to apply preliminary objection procedure (*Pleadings*, p. 204). (Note also the Permanent Court's Order of 20 July 1931 on the appointment of judges *ad hoc* in *Customs Régime between Germany and Austria*, ruling by way of preliminary decision on the applicability of Article 71 of its Rules (Art. 82 in those of the present Court) and Article 31 of the

Statute: *P.C.I.J., Series A/B, No. 41*, p. 89; see also the Advisory Opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935, P.C.I.J. Series A/B, No. 65*, p. 69, and the explanation of it given by my colleague Judge Sir Gerald Fitzmaurice in his dissenting opinion, Annex, para. 24.) A thorough preliminary examination would not have resulted in any delay, as the deliberation would only have required a few meetings and the interval separating the Order from the oral argument on that point, which was two days, would scarcely have been lengthened. To deal with the problem by a rejection not giving reasons, and without adequate examination, is to confuse the preliminary with the prima facie. A preliminary question is the subject of exhaustive treatment and final decision; a prima facie examination can never, by definition, be thoroughgoing, and can never lead but to a provisional decision. Articles 82 and 83 entail irrevocable decisions, as has been seen in the present proceedings.

6. The fact that the Court did not *avant tout* consider whether the request related to a pending legal question constitutes a refusal to apply a categorical provision of the Rules touching a problem with regard to the Court's composition. It is no reply to argue (para. 36 of the Opinion) that, in any case, the decision to refuse a judge *ad hoc* left the question of the Court's competence on the points of substance open; what Article 82 prohibits, in requiring an examination *avant tout* of the point of law, is to fix the composition of the Court otherwise than as provided by Article 83, and it is only subsequent to that point's being decided for sound reasons after a thorough legal examination that any refusal of a judge *ad hoc* may ensue—and not the reverse.

7. The manner in which the problem was decided therefore constitutes, in my judgment, a violation of the general system laid down in the Statute and Rules, whatever view one may hold of the idea of a legal question actually pending. Moreover, I consider that the present proceedings are in fact related to a legal question actually pending (see paras. 37-45 below), and this ought to have occasioned a deliberation as to the appointment of a judge *ad hoc* or, possibly, judges *ad hoc* in the plural.

The Advisory Opinion affirms the existence of a legal obligation on the part of States which have never ceased to affirm that that obligation did not exist. The existence or non-existence of legal obligations *for States* is the question put to the Court; it was even the subject of lively controversy during the discussions in the General Assembly and the Security Council, according to the documentation in the present proceedings (cf. paras. 20 et seq. below). Judging by the declarations made on behalf of States, there was a conflict of views and much hesitation as to the law applicable.

8. The Court finds in its Opinion that the question is not a dispute between States, nor even one between the Organization and a State. That is a purely formal view of the facts of the case which does not, to my mind, correspond to realities. While it is true that an advisory opinion is given to the organ entitled to request it, and not to States (*Interpretation of*

Peace Treaties, First Phase, I.C.J. Reports 1950, p. 71), the present request has been so framed as to seek an opinion on "the legal consequences for States", a formulation which the Court in its reply has not sought to modify despite its ambiguity in relation to the rule stressed by the Court in *Interpretation of Peace Treaties*. The course taken by the oral proceedings before the Court, as also the text of the Court's present Opinion, have placed South Africa in the position of respondent in a manner difficult to distinguish from contentious proceedings. (See paras. 133, 118 and 129, which are framed like judicial pronouncements in the form of decisions.)

9. The Court observed in its Judgment of 21 December 1962:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence" (*I.C.J. Reports 1962*, p. 328).

One need only substitute "legal question actually pending" for "dispute" to establish that the Court had an obligation to treat the matter in depth and take it beyond the mere assertion that, while questions did lie in dispute between States, this represented, as in the case of the 1950, 1955 and 1956 Opinions, a divergence of views on points of law, as in nearly all advisory proceedings (para. 34).

10. Rather than generalizations, it is necessary to apply to the present proceedings the test adopted by the Court in 1950, when it stated that the application of the provisions of the Statute which apply in contentious cases "depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter" (*I.C.J. Reports 1950*, p. 72).

What then are the particular circumstances of the case which might have led the Court to exercise that "large amount of discretion"? The request for an advisory opinion relates to a substantive problem over which South Africa and other States are opposed; the existence of slight divergences of view on some points among those other States is immaterial, the basic legal question for all of them without exception being that of the revocation of the Mandate with which, as a binding decision, certain States confront South Africa, but which gives rise to doubts and hesitations on the part of others; the purpose of the Advisory Opinion is to apprise the international community of the present legal position of the Territory of Namibia (South West Africa), and thus to determine the purport of a certain international status. It is another way of putting afresh the question laid before the Court in 1950: "What is the international status of the territory?" That, with the addition of "since General Assembly resolution 2145 (XXI)", could in fact have been the request.

However, any reply purporting to apprise *States* of the extent of their obligations subsequent to resolution 2145 (XXI) must connote not only the disposal of the conflict of views between the holder of the revoked

Mandate and the States which instigated and eventually pronounced the revocation, but also the imposition on all States of a certain line of conduct.

11. It is not enough to describe the problem as a "situation" for the difficulties to cease. As the Court said in respect of disputes, "a mere assertion is not sufficient". From the viewpoint of law the description "situation" used by the Security Council has no effect so far as the Court is concerned. Without denying that the Namibia affair is and remains for the Security Council a situation, the Court, in order to determine its own competence, had to enquire whether, quite apart from what the Security Council may have thought, the request of 29 July 1970 did or did not relate to a legal question actually pending between States, within the meaning of the Rules of Court (as the Court did in its Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, pp. 72-74). Any other view would confer on the political organs of the United Nations the right to interpret, subject to no appeal, the Rules of Court.

12. The Court was faced with a legal question with pronounced political features, which is often the case, but which is not enough to overrule the argument that the issue is, at bottom, a legal one. The subject of the dispute is the conflict of views between, on the one hand, those States which, through the procedures available to the United Nations, have sought and procured the revocation of South Africa's Mandate for the Territory of South West Africa and, on the other hand, South Africa, which attacks that revocation and such effects as it might have. The way in which the request was framed adds to this basic question that of the effects for all States, that is to say even for States which have not taken any active part in the development of the action proceeded with in the United Nations; but this relates to consequences, as the request itself says, and not to the essential legal question. All this emerges strikingly from the written and oral proceedings, in which the Government of South Africa behaved like a respondent, replying to veritable claims and submissions presented by other Governments (with the exception of the French Government, whose written statement is more in the nature of an intervention by an *amicus curiae*).

13. There is, said the Court in 1962, a "conflict of legal views and interests—between the respondent on the one hand, and the other Members of the United Nations . . . on the other hand" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345); and this observation was not modified in the Judgment of 1966, which dismissed the Applications not on the ground that there was no dispute, but solely in regard to the question whether the Applicants had a legal interest in the carrying-out of the "conduct" clauses of the Mandate. It is therefore impossible to deduce therefrom any refusal on the part of the Court to pronounce in any circumstances on whether there had been breaches of the Mandate (on the contrary, one might note the allusion in paras. 11 and 12 of the 1966 Judgment to Article 5 of the

Mandate for South West Africa and to the right of every League member to take action to secure its observance, which connotes recognition of a legal interest in the proving of certain breaches of the Mandate). The Advisory Opinion, as is apparent from its contents, meets the concern, expressed during the discussions in the Security Council preceding its request, for proof that the Mandate was lawfully revoked; and this, by the Opinion's own admission, comprises a legal question rooted in the very origins of the Mandate, one which at all events, as we shall see below (para. 25), made its appearance before the Court as long ago as 1950.

The Court might perhaps have been encouraged to admit the existence of a genuine dispute between States if it had taken note of the fact that the General Assembly itself, in its resolution 1565 (XV) of 18 December 1960, made a pronouncement on "the dispute which has arisen between *Ethiopia, Liberia and other member States, on the one hand, and the Union of South Africa on the other*" (my emphasis). Need one do more than recall this fact and raise the question as to whether, in the words of the Court's Advisory Opinion of 30 March 1950 on the *Interpretation of Peace Treaties*, "the legal position of the parties . . . cannot be in any way compromised by the answers that the Court may give to the question put to it" (*I.C.J. Reports 1950*, p. 72)? Judge Koretsky had a similar point in mind when, in what was in many respects a comparable case, he observed that the Court, in its Advisory Opinion, would be giving "some kind of judgment as if it had before it a concrete case" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, dissenting opinion, *I.C.J. Reports 1962*, p. 254).

14. The fact that a political organ of the United Nations places a situation on its agenda cannot have the legal effect of the disappearance of a dispute between two or more States interested in the maintenance or modification of the situation. These are two different and parallel planes; one is the manifestation of the United Nations' political interest in facilitating settlement of a situation of general concern for the community of States, the other is the determination of the existence as between certain States of opposed legal interests which give them a special position in the appraisal of the situation of general concern. Naturally, the fact that there is a divergence of views on the law does not rob the Security Council or the General Assembly of the rights they derive from the Charter to consider the situation as it presents itself. But in the same way it is impossible to admit that the mere calling-in of a general situation by the political organs of the United Nations could bring about the disappearance of the element of a dispute between States if there exists such an element underlying the general situation, when such a case is in fact provided for in the Rules of Court. This is why, in each case, the question arises of whether one is or is not confronted with what is really a dispute. Articles 82 and 83 of the Rules of Court would otherwise have no meaning, whereas their purpose is to reassure States that, if an advisory opinion be requested in relation to a legal question over which they are divided,

they will enjoy the right to present their views in the same way and with the same safeguards as in contentious procedure, more particularly where the composition of the Court is concerned.

15. To conclude in regard to this point, to say, as the Opinion does, that there is no dispute, and that the question of the application of Articles 82 and 83 of the Rules does not arise, is to suppose that the Court was, on the very first day of the proceedings, able to resolve the substantive question, namely the existence of a power in the United Nations, as an international organization, to revoke the Mandate. But on the day the Order of 29 January 1971 was made, before any discussion or deliberation of the substantive issues, the least that can be said is that this was still a point which remained to be proved. This is a question which was so important for all the subsequent examination of the case that the Court ought to have resolved it "*avant tout*", but this it failed to do. The argument that it was the Order of 29 January 1971 which established that there was no legal question pending between South Africa and other States, but merely an opinion to be given to a political organ on the consequences and repercussions of its decisions, is equivalent to an assertion that, before any oral proceedings on the substance of the case, the Court could have judicially decided the substantive problem to which the request for an advisory opinion related. To refuse the judge *ad hoc* applied for by South Africa before settling this basic question was to prejudge it irremediably. The questions whether a dispute existed, what it consisted of and who the parties might be were all disposed of *in limine litis* by the mere effect of the dismissal of the application for a judge *ad hoc*, for it was thereafter impossible to go back and modify that refusal, even if the examination of the substantive issues had eventually led the Court to conclude that there was in fact a legal question pending between States. The fact that the Court has confirmed the decision to refuse a judge *ad hoc* in its consideration of the substance does not exonerate it from the charge of having failed to consider the point of law "*avant tout*".

16. I would add that, even if the Court, after thorough preliminary examination of the point of law, had decided that Article 83 did not oblige it to accept the application for the appointment of a judge *ad hoc*, Article 68 of the Statute left it the power to do so, and on this point I would refer to the declaration of my colleagues Judges Onyeama and Dillard appended to the Order of 29 January 1971. When it is a matter of deciding whether a legal title has lawfully been withdrawn from a State and determining the legal consequences of that revocation, it is in the compelling interest of the Court that it should apply that clause of its Statute which provides for the closer approximation of advisory to contentious procedure. I am unable to accept the contention in paragraph 39 of the Opinion, to the effect that the circumstances contemplated in Article 83 of the Rules are the only ones in which the Court may agree to the appointment of a judge *ad hoc* in advisory proceedings (cf. the reasoning of Judge Sir Gerald Fitzmaurice in paragraph 25 of the Annex

to his dissenting opinion, and that of Judge Onyeama in his separate opinion).

17. The two decisions of the Court concerning its composition affect the constantly followed rule that the Court, when it gives an advisory opinion, is exercising a judicial function (*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 153: "The Court as a judicial body is . . . bound in the exercise of its advisory function to remain faithful to the requirements of its judicial character"; a formula reiterated in *Northern Cameroons, I.C.J. Reports 1963*, p. 30). For it is certain that while advisory judgments and advisory opinions are for the Court two different forms of decision, they are always the expression of its confirmed view as a tribunal on rules of international law. There are no two ways of declaring the law. For the reasons I have set down in the foregoing paragraphs, Order No. 3 of 26 January 1971 and the Order of 29 January 1971 do not appear to me to satisfy the requirements of that good administration of justice which it is the purpose of the Statute and Rules to secure.

* * *

18. Another deviation from the line of the Court's case-law is to be observed in the way in which the Court has hesitated to examine the lawfulness of the legal step which gave rise to the question upon which the Court is asked to pronounce, i.e., General Assembly resolution 2145 (XXI). In paragraphs 88 and 89 of the Opinion the Court declares that the question of the validity or the conformity with the Charter of resolution 2145 (XXI), or of the Security Council resolutions, did not form the subject of the request for advisory opinion. It used not to be the Court's habit to take for granted the premises of a legal situation the consequences of which it has been asked to state; in the case concerning *Certain Expenses of the United Nations* it declared that:

> "The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditure were 'decided on in conformity with the Charter', if the Court found such consideration appropriate. It is not assumed that the General Assembly would seek to hamper or fetter the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*I.C.J. Reports 1962*, p. 157.)

The situation in the two cases is parallel; in *Certain Expenses of the United Nations*, as in the present case, there was some question as to the desirability of stating that the Court should examine the whole of the legal situation and in particular the validity of the acts of the General

Assembly. But, unlike what has occurred in the present case, and although the General Assembly eschewed placing the Court's terms of reference on the broadest basis when it rejected the amendment of France submitted for that purpose, the Court nevertheless, on that occasion, found that it had competence and was bound to conduct that thorough examination in order to acquit itself fully of its judicative task. How indeed can a court deduce any obligation from a given situation without first having tested the lawfulness of the origins of that situation? Between the Court's decision in 1962 and the present Opinion a change of attitude is manifest.

19. In the present case, in which the Court has based its Opinion on an interpretation of Articles 24 and 25 of the Charter as to the powers of the Security Council, and on an interpretation of the legal nature of the powers of the General Assembly, it would have seemed particularly appropriate to have exercised unambiguously the Court's power to interpret the Charter, which the General Assembly itself, in resolution 171 (II) of 14 November 1947, formally recognized that it possesses. That resolution recommends the reference to the Court of points of law "relating to the interpretation of the Charter".

20. I must therefore briefly indicate the reasons why I disagree with the Court with regard to the legal nature of resolution 2145 (XXI) and its effects.

It is the content of resolution 2145 (XXI) which determines the scope of that decision; it contains various declarations:

(a) as to the right of the peoples of South West Africa to freedom and independence, based on the Charter, General Assembly resolution 1514 (XV), and its previous resolutions concerning the Territory (first and seventh paragraphs of the preamble, para. 1 of resolution 2145 (XXI));

(b) recalling the obligations under the Mandate and the supervisory powers of the United Nations as the successor to the League of Nations (second paragraph of preamble, para. 2 of the resolution);

(c) as to the administration of the Territory in a manner regarded as contrary to the Mandate, the Charter, and the Universal Declaration of Human Rights (fifth paragraph of preamble, para. 3 of resolution);

(d) as to condemnation of *apartheid* and racial discrimination as constituting a crime against humanity (sixth paragraph of preamble);

(e) as to the right to take over the administration of the mandated territory (eleventh paragraph of preamble; paras. 4, 5, 6 and 7 of resolution).

21. It is also important to recall that underneath the quasi-unanimity which is often urged in favour of resolution 2145 (XXI) having certain legal effects there lie serious differences of view.

(a) The Soviet Union and nine other States (Albania, Byelorussia, Cuba, Czechoslovakia, Hungary, Poland, Romania, Ukraine, Yugoslavia) expressed reservations (see Secretary-General's second written statement, paras. 30 to 39) with regard to the setting-up of a United Nations organism for the administration of the Territory of Namibia, which is one of the essential objects of resolution 2145 (XXI) (cf. last paragraph of preamble and paras. 4 and 5 of the resolution).

(b) Australia and Japan drew attention to the complexity of the legal problems involved and reminded the General Assembly that it "must keep strictly within the framework of the Charter and of international law" (*ibid.*, Australia: para. 49; Japan: para. 57).

(c) Canada said that "the General Assembly was not called upon to make a juridical judgment as to whether in one respect or another the government in charge of the Mandate had been delinquent in carrying out the Mandate entrusted to it . . ." (*ibid.*, para. 50), whereas, as we have seen in paragraph 20 above, the fifth and sixth paragraphs of the preamble and paragraph 3 of the resolution make formal declarations on that subject.

(d) The representative of Belgium explained "that his delegation's support of the text [resolution 2145 (XXI)] for which he had voted did not, in any way, imply that the delegation approved it without doubts or reservations. His delegation would have preferred the point of law of the General Assembly's competence to be clarified as fully as possible" (*ibid.*, para. 40).

In the same way, Brazil declared that the decision for the Mandate to be revoked and the United Nations to take over direct responsibility for the Territory "would be based on doubtful juridical grounds" and "expressed a series of reservations". For example: "it was not . . . legitimate for the General Assembly to decide to revoke the Mandate" (*ibid.*, para. 60).

(e) Italy and the Netherlands formally reserved their position with regard to paragraph 4, concerning an essential point of resolution 2145 (XXI): the assumption by the United Nations of direct responsibility for Namibia (*ibid.*, paras. 45 et seq.). New Zealand reserved its position with regard to the methods of implementation.

(f) Israel considered "that the political aspect of the question of South West Africa outweighed the possible legal problems, and that even the most scrupulous concern for legal niceties might at this juncture cede its place to the political wisdom of the majority of the General Assembly" (*ibid.*, para. 51).

(g) It will be recalled that two States voted against resolution 2145 (XXI) and that three abstained, while all indicating definite reservations.

22. Thus there were 24 States which, in one way or another, expressed opposition, reservations or doubt. The fact that 19 of these States voted for resolution 2145 (XXI) does not in any way diminish the effect of the observations and reservations they made upon the text, for in voting for it the States in question did not withdraw them; thus their votes signified acceptance of a political solution of which some features remained, for each of them, the subject of the opinions expressed. Resolution 2145 (XXI), therefore, was not voted with quasi-unanimity of intention; it was voted by a large majority, clearly under the strong impression that law was not being made.

It was argued before the Court on behalf of the Secretary-General that the concept of reservations was not applicable to the voting of decisions in organs of the United Nations (hearing of 8 March 1971). As the Opinion makes no pronouncement on that point, suffice it to recall that the practice is a constant one, necessitated through the need to provide States wishing to dissociate themselves from a course of action with a means of making their attitude manifest (on the usefulness and meaning of such reservations, see the opinion of Judge Koretsky in *Certain Expenses of the United Nations*, *I.C.J. Reports 1962*, p. 279). The consequence of the rejection of this practice and its effects would be to treat the political organs of the United Nations as organs of decision similar to those of a State or of a super-State, which, as the Court once declared in an oft-quoted phrase, is what the United Nations is not. For if a minority of States which are not in agreement with a proposed decision are to be bound, however they vote, and whatever their reservations may be, the General Assembly would be a federal parliament. As for the Security Council, to affirm the non-existence of the rights of making reservations and of abstention would, for the permanent members, be a simple encouragement to use the veto. The everyday operation of the United Nations would be deprived of all the flexibility made possible by statements of reservation and by abstention; as Judge Koretsky put it:

> "Abstention from the vote on the resolutions on these or those measures proposed by the Organization should rather be considered as an expression of unwillingness to participate in these measures (and eventually in their financing as well) and as unwillingness to hamper the implementation of those measures by those who voted 'in favour' of them." (*I.C.J. Reports 1962*, p. 279.)

23. Resolution 2145 (XXI) is a recommendation of the General Assembly concerning a mandated territory. With certain exceptions, recommendations have no binding force on member States of the Organization. It is therefore either in the law of mandates or in the Charter that justification for an exception must be discovered.

24. First, let us re-examine the question of revocation under the man-

dates system as it was originally established. The international status of the mandated territory was defined by the Court's Opinion of 1950, and "it is in accordance with sound principles of interpretation that the Court should safeguard the operation of its Opinion of 11 July 1950 not merely with regard to its individual clauses but in relation to its major purpose" (separate opinion of Judge Sir Hersch Lauterpacht annexed to Opinion of 1 June 1956, *I.C.J. Reports 1956*, p. 45). It is in this spirit that enquiry must be made whether the power of revocation of the Mandate was, either in the 1950 Opinion which is the broadest account of the principles governing the matter, or in the proceedings and arguments preceding that Opinion, regarded as being an element of the international status defined by the Court.

25. It will be recalled that the question put by point *(c)* of the request for opinion contained in the General Assembly resolution of 6 December 1949 ran as follows:

> "Has the Union of South Africa the competence to modify the international status of the territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the territory?"

This question was put in a sufficiently general way for it to have been possible, either in the Opinion of the Court, or in the separate and dissenting opinions, to raise the question of unilateral modification of the status of the Territory by the United Nations; competence "to determine and modify the status" is the widest kind of competence, since it enables the existing obligations both to be defined, and their limits stated, and also to be "modified". It is therefore important to observe that the only statement by the Court on point *(c)*, to be found in identical terms in the reasoning and in the reply itself, was:

> "that competence to determine and modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations".

While it is true that the Court's conclusion replied, at the time, to a claim by the Mandatory to modify the status of the Territory unilaterally, the formula used in the Opinion is absolute, and does not contain any suggestion of exceptions, as for example the case of unilateral revocation of the Mandate, or of any partial, less substantial, modification of the status by the United Nations. It must be recognized that neither the Court nor any judge who took part in the 1950 proceedings was ready to admit the existence of a power of revocation appertaining to the United Nations in case of violation of the Mandatory's obligations.

This was not, however, because the problem was not raised before the Court at the time. The written statement of the United States Government touched on the question (*I.C.J. Pleadings, International Status of*

South West Africa, pp. 137-139) and the Secretary-General, in his oral statement, attributed sufficient importance to it to make it one of his conclusions:

> "Fourth, the possibility of revocation in the event of a serious breach of obligation by a mandatory was not completely precluded. It was suggested that in the event of an exceptional circumstance of this kind it would be for the Council or for the Permanent Court or for both to decide" (*ibid.*, p. 234).

Then the statement went on to discuss the notion of "*a solution agreed between the United Nations and the mandatory Power*" (*ibid.*, p. 236, italics in the original), which was to be confirmed by the Court in its reply to question *(c)*. On this point, the statement ended as follows:

> "Could not the International Court of Justice be put into a position to play a constructive role?" [for the interpretation and application of the Mandate] (*ibid.*, p. 237).

Without seeking to base a decisive argument on these facts, they do nevertheless make it impossible to advance the contrary argument that the reason why the question of unilateral revocation of the Mandate was not mentioned in the Court's reply to question *(c)* was because the problem had not been mentioned during the proceedings. As is apparent, it had been raised by the United States and by the Secretary-General.

26. As early as 14 December 1946, the General Assembly had adopted resolution 65 (I), inviting the Union of South Africa to propose a trusteeship agreement for the consideration of the General Assembly. And from that time on, invitations to negotiate followed each other; resolution 141 (II) of 1 November 1947, resolution of 26 November 1948, and so on up to the request for advisory opinion of 6 December 1949. After the Opinion of 11 July 1950, the General Assembly continued its efforts towards negotiation with the Union of South Africa (resolution 449 A (V) of 13 December 1950; resolution 570 A (VI) of 19 January 1952, in which the Assembly: "Appeals solemnly to the Government of South Africa to reconsider its position, and urges it to resume negotiations . . . for the purpose of concluding an agreement providing for the full implementation of the advisory opinion"; resolution 651 (VII) of 20 December 1952, which maintained the instructions to negotiate given to the *Ad Hoc* Committee of Five by resolution 570 A (VI) of 19 January 1952, resolution 749 A (VIII) of 28 November 1953, etc.). Up to the time of the Eleventh Session, in 1957, the General Assembly does not seem to have conceived of any other means of solution of the problem of South West Africa than that of negotiation, and it was only in resolution 1060 (XI) of 26 February 1957 that the Committee on South West Africa was instructed to examine the legal means at the disposal of the organs of the United Nations, the Members of the United Nations, or the former

Members of the League of Nations; this was the source of the initiative of the two member States of the United Nations, who were also former Members of the League of Nations, which resulted in the Court's Judgments of 1962 and 1966. The question put to the Committee on South West Africa was:

> "What legal action is open to *the organs of the United Nations*, or to the Members of the United Nations, or to the former Members of the League of Nations . . . to ensure that the Union of South Africa fulfils the obligation assumed by it under the Mandate . . ." (emphasis supplied).

The general line followed by the United Nations was thus to obtain a South African commitment to negotiate a trusteeship agreement, with certain attempts to arrange an interim international status, as the Opinion recalls in paragraph 84.

27. It will be sufficient to observe that between 1950 and 1960, the date of the Applications filed by Ethiopia and Liberia, when it was a question of carrying on the work done by the Court in its Opinion of 11 July 1950, no-one claimed that there existed a power of revocation of the mandate by the organs of the United Nations, or even a power to modify the provisions of the mandate by such unilateral means. The facts afford the proof: it was known in 1960 that contentious proceedings before the Court would be lengthy and would involve some risk, whereas, according to the Court's present Opinion, a power of unilateral revocation of the Mandate by the General Assembly has always existed, ever since the refusal by South Africa to submit to supervision and present reports on its administration of the Territory. The least that can be said is that the General Assembly was certainly not aware in 1960 that it had such power, when it contented itself with commending Ethiopia and Liberia upon their initiative (resolution 1565 (XV) of 18 December 1960), and that the States which opposed the claims of South Africa were no better informed since, as became apparent in October 1966, it would have been infinitely more simple and rapid to "modify" the mandate by unilateral action in 1960, even after having consulted the Court on the means to be used, by a request for advisory opinion similar to that to which the Court has now replied *ex post facto*. But this was never contemplated at any time before the revocation declared in October 1966, so flimsy did the idea of a unilateral power to revoke the Mandate appear.

28. In 1955, at the time of the Opinion on *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* (Advisory Opinion of 7 June 1955, *I.C.J. Reports 1955*, pp. 67 ff.), Judge Lauterpacht gave exhaustive study to all the problems raised by the implementation of the Opinion of 11 July 1950, including that of the legal position of a mandatory which systematically refused to take account of the recommendations addressed to it (cf. his separate opinion at pp. 118, 120-121 and 122). It is important to note that, even

when he supposes that the Mandatory had over-stepped "the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and abuse of that right" (p. 120), Judge Lauterpacht does not pronounce on the possible legal sanctions, and makes no mention of the idea of revocation for violation of the obligation of the Mandatory to act in good faith. The purpose of his argument is the affirmation of the legal nature of that obligation, the idea of sanction only being relied on as a confirmation thereof.

29. The conclusion to be drawn from the conduct of the United Nations and of the States most directly concerned by solution of the problem of South West Africa is that the power of revocation is not a feature of the mandates system as it was originally established. It is not consistent with any reasonable interpretation of the powers of the General Assembly in the field of mandates to discover today that it has had for 25 years what the Council of the League of Nations had never claimed, and thus has not merely means to revoke the Mandate, but also, merely by drawing attention to such power, the possibility of obliging the Mandatory to render account to it, which is an argument that was never employed.

30. The system described in the Opinion of 11 July 1950, which did not go so far as to affirm the existence of a legal obligation to negotiate a trusteeship agreement, did not entail, even implicitly, the concept of unilateral revocation, the accent being laid exclusively on the idea of negotiation between the United Nations and the Mandatory. As the Judgment of 21 December 1962 in the *South West Africa* cases subsequently explained, "the Council could not impose its own view on the mandatory . . . and the mandatory could continue to turn a deaf ear to the Council's admonitions" (*I.C.J. Reports 1962*, p. 337); the 1950 Advisory Opinion on the *International Status of South West Africa* had said that "the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the mandates system . . ." (*I.C.J. Reports 1950*, p. 138).

The existence in the mandates system of a power of revocation has not been proved.

31. The second justification presented to support the revocation of the Mandate refers to a special power of the United Nations to take a decision to revoke it, even if such power did not exist with regard to mandates originally, by a sort of transposition of a general rule relating to violation of treaties. It is sought to justify resolution 2145 (XXI), with regard to its effects, by an appeal to the general theory of the violation of treaty obligations, and by affirmation of the existence of a right for the United Nations, as a party to a treaty, namely the Mandate, to put an end to that treaty by way of sanction for the refusal of the other party, the Mandatory, to fulfil its obligations.

In the first place, the idea that the mandates system is a treaty or

results from a treaty is not historically correct, as was recalled by Judge Basdevant:

> "The Court has felt able to rely on what it recognizes as the treaty character of the Mandate established by the decision of the Council of the League of Nations of 17 December 1920. I do not subscribe to this interpretation. I adhere to the character of the instrument made by the Council of the League of Nations on 17 December 1920 ... I have not found anything to indicate that *at that time* the particular character of the Council's instrument was disputed" (*I.C.J. Reports 1962*, p. 462; emphasis supplied).

It must be added that, even if one concedes that the Mandate is a treaty, there is no rule in the law of treaties enabling one party at its discretion to put an end to a treaty in a case in which it alleges that the other party has committed a violation of the treaty. An examination of the rival contentions is necessary, and the one cannot prevail over the other until there has been a decision of a third party, a conciliator, an arbitrator or a tribunal.

32. The mandates system having been established on the international level, it became binding subject to the conditions on which it was established, that is to say without the inclusion therein of any power of revocation. To modify any international status of an objective kind, there must be applied thereto the rules which are proper to it. The argument for the unilateral power of revocation of the mandate by the General Assembly has no basis but the idea of necessity, however it may be clothed. And, as Judge Koretsky recalled in 1962, the end does not justify the means (*I.C.J. Reports 1962*, p. 268). To say that a power is necessary, that it logically results from a certain situation, is to admit the non-existance of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law.

33. In these circumstances, for me the problem of the legal consequences of resolution 2145 (XXI), and of the related resolutions of the Security Council, arises in a way very different from that adopted by the Court. As Judge Lauterpacht said in 1955, and as Judge Koretsky said in 1962, I consider that the recommendations of the General Assembly, "although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, ... do not create a legal obligation to comply with them" (*I.C.J. Reports 1955*, p. 115). In the present case, in the absence of a power of revocation in the mandates system, neither the General Assembly nor even the Security Council can cause such a power to come to birth *ex nihilo*. Thus we have here recommendations which are eminently worthy of respect, but which do not bind member States legally to any action, collective or individual. This classic view was laid before the Court by the representative of the USSR in the case concerning *Certain Expenses of the United Nations*

(written statement, *I.C.J. Pleadings*, p. 273; oral statement, *ibid.*, pp. 411 f.). In 1962 and in 1970, France also argued that the United Nations could not, by way of recommendation, legislate so as to bind member States (*I.C.J. Pleadings, Certain Expenses of the United Nations*, pp. 133 f.; written statement of France in the present case, *Pleadings*, Vol. I, pp. 365-368, with the reminder of frequently expressed reservations, *ibid.*, p. 368, note; see also the declaration of the United States Government on the attitude of certain States following the Opinion on *Certain Expenses of the United Nations*, in particular on the problem of the double standard obtaining among member States: UN doc. A/AC.121/SR.15.Corr.1).

Resolution 2145 (XXI) is a recommendation with considerable political impact, but the member States of the United Nations, even including those which voted for its adoption, are under no legal obligation to act in conformity with its provisions, and remain free to determine their own course of action.

34. There is still to be considered the argument that the Security Council has, if need be, "confirmed" resolution 2145 (XXI) (cf. the statements made in this sense on behalf of the United States Government by Mr. Stevenson, hearing of 9 March 1971). But how can an irregular act be rendered legitimate by an organ which has declared only to have "taken note" of it or "taken it into account"? To regularize an act connotes the power of doing oneself what the first organ could not properly do. And the Security Council has no more power to revoke the Mandate than the General Assembly, if no such power of revocation was embodied in the mandates system. Hence the problem remains.

As for the contention that the Security Council was entitled under Articles 24 and 25 of the Charter to intervene directly in the revocation of the Mandate and take decisions binding on States because the situation was being dealt with under the head of the maintenance of international peace and security, that is another attempt to modify the principles of the Charter as regards the powers vested by States in the organs they instituted. To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government. The Court has well defined the conditions of the Charter:

> "That is not the same thing as saying that [the United Nations] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a 'super-State', whatever that expression may mean." (*I.C.J. Reports 1949*, p. 179.)

35. There is not a single example of a matter laid before the Security Council in which some member State could not have claimed that the continuance of a given situation represented an immediate or remote

threat to the maintenance of peace. But the Charter was drawn up with too much precaution for the disturbance of its balance to be permitted. Here again the words used before the Court in 1962 by the Soviet representative are apposite:

> "The opposing of the effectiveness of the United Nations Organization to the observance of the principles of the United Nations Charter is legally groundless and dangerous. It is clear to everyone that the observance of the principles of the United Nations Charter is the necessary condition of the effectiveness of the United Nations. The experience of the United Nations clearly shows that only on the basis of the strict observance of the principles of the United Nations Charter can the Organization become an effective instrument for the maintenance of international peace and security and the development of friendly relations among States." (*I.C.J. Pleadings, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, pp. 411 f.; see also the French Government's written statement in the same case, *ibid.*, p. 134, and cf. the parliamentary statement of H.M. Government on the legal nature of obligations arising out of Security Council recommendations: *Hansard*, Vol. 812, No. 96, 3 March 1971, pp. 1763 ff.)

The same point was stressed by the delegates of several States in Security Council discussions of the matter with which the Court is now concerned. They pointed out that the only way of laying States under obligation would be for the Council to take a decision based on Chapter VII of the Charter after proceeding to effect the requisite determinations, a method which the Council chose not to adopt.

The degree of solidarity accepted in an international organization is fixed by its constitution. It cannot be subsequently modified through an interpretation based on purposes and principles which are always very broadly defined, such as international co-operation or the maintenance of peace. Otherwise an association of States created with a view to international co-operation would be indistinguishable from a federation. It would be precisely the "super-State" which the United Nations is not.

36. There are therefore no other consequences for States than the obligation of considering in good faith the implementation of the recommendations made by the General Assembly and the Security Council concerning the situation in Namibia (cf. oral statement on behalf of the United States, hearing of 9 March 1971, section IV *in fine*).

* * *

37. Nevertheless, considering the importance of the humanitarian interests at stake and of the question of principle raised before the Court for over 20 years, one cannot, I feel, merely record these legal

findings and leave the matter there. It would be regrettable not to indicate means of pursuing what the Court established in 1950. It was in my view open to the Court to adopt towards the question put by the Security Council a different approach, one which would not only have been more in conformity with its traditions but also have offered the United Nations some prospects of a solution, instead of an impasse. However, as that approach was not adopted, I cannot do more than outline it.

What is essential in the case of a request for advisory opinion, as in that of a contentious application, is its actual subject, not the reasoning advanced in the course of the proceedings. A court seised of a matter must judge that matter and not another (cf. *Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173; *Fisheries, I.C.J. Reports 1951*, p. 126 concerning "*des éléments qui . . . pourraient fournir les motifs de l'arrêt et non en constituer l'objet* [1]"; similarly, in the *Minquiers and Ecrehos* Judgment, *I.C.J. Reports 1953*, p. 52, the Court distinguished between the reasons advanced and the requests made). The request made to the Court was that it should define the present legal status of Namibia, and the opposing contentions of States were no more than explanations proposed to the Court, some holding that the revocation of the Mandate was final, others that it was dubious or illegal. But this is veritably a request that the Court declare what has become of the Mandate and what are the legal consequences of various actions, whether on the part of the Mandatory or on the part of the United Nations. The Court was at liberty to reply to that request with reference to other reasons than those advanced before it, and by another system of argument, on one condition, that it did not reply to another request than that formulated and that it thus avoided transforming the case "into another dispute which is different in *character*" (*P.C.I.J., Series A/B, No. 78*, p. 173; my emphasis).

38. The 1950 Advisory Opinion defines South West Africa as "a territory under the international Mandate assumed by the Union of South Africa on December 17th 1920" (*I.C.J. Reports 1950*, p. 143). Thus there exists an international mandatory régime which remains in force for so long as it has not been ended by a procedure legally opposable to all States concerned. The principle of the protection of peoples not yet fully capable of governing themselves, constituting "a sacred trust of civilization" concretized in the mandate status of 1920, still holds good. The Court had in 1950 shown the legal path to follow in order to modify and, if so desired, terminate that status. It was that path which ought to have been followed.

39. The Advisory Opinion of 11 July 1950 did not, to be sure, impose upon South Africa, as a legal obligation, the conclusion of a trusteeship

[1] The English text of the Judgment does not render so clearly as the French, which is the authoritative text, the distinction between reasons (motifs) and subject-matter (objet).

agreement. The Court refrained from taking to its logical extreme the position of principle which it adopted in saying "To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified" (*I.C.J. Reports 1950*, p. 133) and declined to say that the Mandatory's obligations included that of converting the Mandate into a trusteeship agreement. But that is not the end of the matter, as is shown by the suggestion of Judge De Visscher made in subsequent writings supplementing the views of his 1950 Opinion on the purport of the obligation to negotiate (*I.C.J. Reports 1950*, pp. 186 ff.) and also the treatment of the problem by Judge Lauterpacht in 1955 (para. 28 above).

40. In my view the Court should in its present Opinion have taken up and acted upon the observations made on this point by the two judges mentioned. In its Judgment of 20 February 1969 (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 48) it recalled the import of any obligation to negotiate, already defined in the Advisory Opinion on *Railway Traffic between Lithuania and Poland*: it is an obligation "not to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements" (*P.C.I.J., Series A/B, No. 42*, 1931, p. 116). In 1969 the Court found that the negotiations conducted prior to the *North Sea Continental Shelf* cases had not satisfied that condition.

41. Let us briefly recall the position hereon of the South African Government, which is to the effect that it was impossible for it to negotiate with the United Nations following the Advisory Opinion of 11 July 1950, This contention is very clearly argued in the South African Counter-Memorial and the oral statement of 11 October 1962 (*I.C.J. Pleadings, South West Africa*, Vol. II, pp. 86-95, and Vol. VII, pp. 241-250). According to that Government the *Ad Hoc* Committee set up in 1950 and the Committee on South West Africa in 1953 had been charged to seek ways and means of implementing the Advisory Opinion; similarly, the Good Offices Committee set up in 1957 was to seek an agreement whereby the Territory as a whole would continue to have an international status consistent with the purposes of the United Nations. South Africa's argument is based on these strict terms of reference and indentifies them as the cause of the absence of any negotiations with a view to the implementation of the 1950 Opinion. Thus in 1959 South Africa offered "to enter into discussions with an appropriate United Nations *ad hoc* body that might be appointed after prior consultation with the South African Government and which would have a full opportunity to approach its task constructively, providing for fullest discussion of all possibilities", and this statement was repeated in identical terms in 1960 (*ibid.*, Vol. I, p. 83, Mémorial of Ethiopia; and Vol. II, p. 91, Counter-Memorial).

42. Even before the 1950 Opinion the General Assembly, by successive resolutions in 1946, 1947 and 1948, had for its part thrice called upon South Africa to negotiate a trusteeship agreement. After the Court had

found that South Africa was under no legal obligation to bring the Territory within the trusteeship system, the Assembly took many further initiatives to which paragraph 84 of the present Opinion alludes (see also para. 26 above).

43. The conflict of standpoints can be roughly summarized as follows: The aim of the United Nations was to arrive at the negotiation of a trusteeship agreement, whereas South Africa did not want to convert the Mandate into a trusteeship. It is necessary to determine which party has been misusing its legal position in this controversy on the extent of the obligation to negotiate. The difference in the appreciation of the legal problem as between 1950 and today bears solely on that point. In 1950 the Court was unable, in its Opinion, to envisage the hypothesis that difficulties might arise over the implementation of the obligation to observe a certain line of conduct which it found incumbent on South Africa in declaring that an agreement for the modification of the Mandate should be concluded; hence its silence on that point. But the general rules concerning the obligation to negotiate suffice. If negotiations had been begun in good faith and if, at a given juncture, it had been found impossible to reach agreement on certain precise, objectively debatable points, then it might be argued that the Opinion of 1950, finding as it had that there was no obligation to place the Territory under trusteeship prevented taking the matter further, inasmuch as the Mandatory's refusal to accept a draft trusteeship agreement could in that case reasonably be deemed justified: "No party can impose its terms on the other party" (*I.C.J. Reports 1950*, p. 139). But the facts are otherwise: negotiations for the conclusion of a trusteeship agreement never began, and for that South Africa was responsible. The rule of law infringed herein is the obligation to negotiate in good faith. To assert that the United Nations ought to have accepted the negotiation of anything other than a trusteeship agreement on bases proposed by South Africa, that, coming from the Government of South Africa, is to interpret the 1950 Advisory Opinion contrary to its meaning and to misuse the position of being the party qualified to modify the Mandate. In seeking to impose on the United Nations its own conception of the object of the negotiations for the modification and transformation of the Mandate, South Africa has failed to comply with the obligation established by the 1950 Opinion to observe a certain line of conduct.

The United Nations, on the other hand, was by no means misusing its legal position when it refused to negotiate with any other end in view than the conclusion of a trusteeship agreement, for such indeed was the goal acknowledged by the 1950 Opinion and already envisaged by the League of Nations resolution of 18 April 1946. "It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System" (*I.C.J. Reports 1950*, p. 134). It would have been

legitimate for the United Nations to have taken note of the deadlock and demanded South Africa's compliance with its obligation to negotiate.

44. This view is reinforced by South Africa's consistent interpretation of its own powers, whether it be its pretention to the incorporation of the Territory—something essentially incompatible with the mandate régime—or its contentions with regard to its legal titles apart from the Mandate. The legal position of Mandatory formally recognized by the Court in 1950 gave South Africa the right to negotiate the conditions for the transformation of the Mandate into a trusteeship; since 1950 that position has been used to obstruct the very principle of such transformation.

45. An analysis on these lines, if carried out by the Court and based on a judicial finding that there had been a breach of the obligation to transform the Mandate by negotiation as the 1950 Opinion prescribed, would have had legal consequences in respect of the continued presence of South Africa in the mandated territory. I consider that, in that context, the legal consequences concerned would have been founded upon solid legal reasons.

(Signed) André GROS.