INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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

VOLUME II
Oral Statements and Correspondence

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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

VOLUME II
Exposés oraux et correspondance

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VOLUME II
Exposés oraux et correspondance

The present volume reproduces the oral statements and the Correspondence relating to the case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

This case, entered on the Court's General List on 5 August 1970 under number 53, was the subject of an Advisory Opinion delivered on 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), I.C.J. Reports 1971*, p. 16).

The page references originally appearing in the statements have been altered to correspond with the pagination of the present edition.

The Hague, 1972.

Le présent volume reproduit les exposés oraux et la correspondance relatifs à l'affaire des *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*.

Cette affaire, inscrite au rôle général de la Cour sous le n° 53 le 5 août 1970, a fait l'objet d'un avis consultatif rendu le 21 juin 1971 (*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, C.I.J. Recueil 1971*, p. 16).

Les renvois d'un exposé à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition.

La Haye, 1972.

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presiding

EXPOSÉS ORAUX

AUDIENCES PUBLIQUES

tenues au palais de la Paix, La Haye,
le 27 janvier, du 8 février au 17 mars,
et le 21 juin 1971, sous la présidence
de sir Muhammad Zafrulla Khan, président

MINUTES OF THE SITTINGS HELD FROM 27 JANUARY TO 21 JUNE 1971

YEAR 1971

SITTING IN CAMERA [1] (27 I 71, 10.05 a.m.)

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.

Also present:

For India:
Mr. J. N. Dhamija, Ambassador to the Netherlands.

For the Netherlands:
Mr. W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs.

For Nigeria:
Mr. Metteden, Secretary of Embassy.

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.
Mr. F. D. Tothill, Member of the Department of Foreign Affairs.
Mr. C. H. S. von Bach, Member of the Department of Foreign Affairs.

For the United States of America:
Mr. A. E. Breisky, Secretary of the Embassy.

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[1] Verbatim Record made available to the public by decision of the Court. See **Correspondence**, No. 90, p. 672, *infra*.

ORAL STATEMENT BY MR. VIALL

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

The PRESIDENT: The Court has met this morning to hear the Representative of South Africa on the question of the appointment of the judge *ad hoc* in these proceedings

Mr. VIALL: Mr. President, Members of the Court, permit me at the outset to introduce to you the members of the South African delegation. I have the honour to present to you Mr. de Villiers, first on my right, and Mr. Grosskopf, second on my right, both of them senior counsel of the Supreme Court of South Africa, who are appearing here as counsel for the Republic of South Africa. Also appearing as counsel are Mr. van Heerden, third on my right, Mr. Botha, fourth on my right, and Professor Wiechers next to him, all of whom are members of the South African Bar. In addition, there are Mr. Tothill next to Professor Wiechers and Mr. von Bach behind me, of the Department of Foreign Affairs.

May I say, Mr. President, on behalf of my colleagues and myself that we are sensible of the honour of appearing before this Court, some of us for the first time.

On 13 November 1970, Mr. President, my Government applied to the Court by letter for the appointment of a South African judge *ad hoc* in the present proceedings, which we contend concern a legal question actually pending between two or more States. On behalf of my Government I renew that application today. With the Court's permission, Mr. de Villiers, who is fully authorized to speak on behalf of my Government, will present our argument in this matter.

ORAL STATEMENT BY MR. DE VILLIERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: Mr. President, honourable Members of the Court, some of my colleagues and I have had the opportunity of appearing before this very honourable Court on previous occasions. To us it is a very special experience to be here again today; to other members of the team it is a novel experience; to all of us it is a great privilege and an honour to appear before you.

It is a matter for regret that this first session of the Court should take place in circumstances of disagreement about the question whether it should be an open or a closed session. We have, on behalf of our Government, registered protest at the fact that this is a closed session. I do not propose to say any more about that subject now except this, Mr. President, that with the greatest respect, our protest stands. In our submission it is well founded. On the other hand, procedure is for the Court to determine, not for us. When we appear before this Court, when we take part in these proceedings, as we intend to do, then it is for us to co-operate with the Court in the procedure upon which it may decide. We intend to do so with the greatest respect. And I need hardly say the personal relations which we value very highly need not be affected by matters of disagreement.

We come, Mr. President, from a country which values its legal and judicial traditions and heritage very highly and which prides itself in the maintenance of high standards in that field, or at any rate in a constant attempt at the maintenance of high standards. We see the task of legal practitioners in our country as being two-fold: as being to state our client's case forcefully, independently, and fearlessly, to the best of our ability, and at the same time to be of assistance to the court if we can.

My colleagues and I will try our very best to be faithful to both aspects of that task in appearing before this Court.

The question on which you have kindly invited us to address you, Mr. President, concerns our application to the effect that South Africa is entitled to the appointment of a judge *ad hoc* in these proceedings, notwithstanding the fact that they are, in form at least, advisory proceedings and not contentious ones. We have set out in writing certain contentions in this regard in a letter [1] addressed to the Court and the letter refers to portions of our written statement which are relevant to this subject. I do not intend to traverse in any detail anything which has been already submitted to the Court in writing. If I do refer to it, it will be as a basis for perspective and for taking the matter further in the additional presentation which we wish to make to the Court orally today.

As a basis for the application, we refer the Court to Rule 83 which provides:

> "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."

Article 31, as the Court knows, refers to the facility afforded to a State to

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[1] See **Correspondence**, No. 26, p. 641, *infra*.

appoint a judge *ad hoc* in certain circumstances and, with respect, it could hardly be contested that if these were contentious proceedings, then those circumstances would apply in this particular case.

The crucial question concerns the applicability, I submit, of Rule 83.

Now in order to determine whether the present opinion is requested upon a legal question actually pending between two or more States, it will, in our submission, be convenient to refer very briefly and by way of summary to the historical background of the present matter.

After the dissolution of the League, South Africa expressed a desire to incorporate the Territory of South West Africa in accordance with the expressed wishes of its inhabitants which had been obtained. We deal with that subject in our written statement at **I**, pages 615-617. Now this desire of the South African Government at the time was opposed by the General Assembly, to whom the intentions of the South African Government had been conveyed. It was opposed in resolution 65 (I) of 14 December 1946, on certain grounds:

> ". . . that the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory".

That is found in our written statement, **I**, at page 617. The General Assembly recommended in its resolution that South Africa should enter into a trusteeship agreement relative to South West Africa. The South African Government declined. The reasoning behind these decisions and attitudes is set out in the written statement.

In the years from 1947 to 1949 conflicting opinions were expressed in the proceedings and debates of the United Nations on various questions which arose from this situation. Those conflicting opinions are summarized in our written statement, **I**, pages 624-630. And they were very briefly:

Firstly, whether the Mandate was still in existence; secondly, whether South Africa was under a duty to conclude a trusteeship agreement; thirdly, whether, if no trusteeship agreement was concluded, there was an obligation under the Mandate on South Africa's part to report and account to the United Nations.

As we point out in **I**, at the pages which I have cited, there was really at the time—that is in the years 1947 to 1949—very little support within the United Nations for a positive answer to this last question, for an answer to the effect that South Africa would be, outside of trusteeship, under an obligation to report and account to the United Nations under the Mandate.

The Advisory Opinion of 1950 was the next stage. In regard to these points which I have mentioned, the Court concluded in the first place, unanimously, that the Mandate still existed; secondly, that there was no obligation on South Africa's part to conclude a trusteeship agreement. That conclusion was arrived at by a majority of 8 to 6. And thirdly, that South Africa was under an obligation to report and account to the General Assembly of the United Nations. The majority in that case was 12 to 2.

After that the subject of South Africa was still regularly considered and debated and disputed in various organs of the United Nations. The majority attitude in the United Nations was to urge the conclusion of a trusteeship agreement. Further, within the United Nations a number of States contended that South Africa was contravening the Mandate particularly by the application of its policy of apartheid or separate development in the Territory, and further that it was contravening the Mandate by not reporting and accounting

to the General Assembly, the contention being that on the basis of the Court's Advisory Opinion it was obliged to do so.

South Africa disputed these contentions. It disputed firstly the correctness of the 1950 Opinion on the question of the continued existence of the Mandate, although it said that in practice this would make little or no difference to its position, as it considered itself as continuing to administer the Territory in the spirit of that Mandate. Secondly, and more importantly, it disputed the Court's finding by the majority of 12 to 2 to the effect that supervisory powers in respect of the Mandate had been transferred to the General Assembly, and in accordance with that attitude it did not systematically report and account to the United Nations organs although it gave information from time to time as to the facts and its policies and its practices in the Territory. Thirdly, it denied that it was in any way violating the Mandate by its policies and practices in South West Africa; and fourthly, it refused to conclude a trusteeship agreement for reasons which it stated to the General Assembly.

This controversy within the United Nations led eventually to the previous contentious cases on *South West Africa*. The Applicants, as the Court will recall, were Ethiopia and Liberia but it was, in our submission, perfectly clearly established—and indeed they did not seek to deny—that they were acting on behalf of the Organization of African Unity. A steering committee of that organization had been established: "To determine the procedures and tactics incidental to the conduct of the juridical proceedings in this matter." We quote that from the *Pleadings* of the 1966 cases, Volume II, page 448; it was a resolution of the Conference of Independent African States in 1960.

Now generally I can refer the Court—I do not want to go into the details now —to our treatment of this subject, the fact that Ethiopia and Liberia were really acting on behalf of the Organization of African Unity, to Volume II, of the *Pleadings* in those cases, pages 446-449; and I may also refer the Court to an article by Anthony A. D'Amato in the *Law in Transition Quarterly* of 1967 at pages 16-17. The article is entitled "Legal and Political Strategies of the South West Africa Litigation". In a footnote applying to the author it was stated that he was a member of the New York Bar and that he was retained by Ethiopia and Liberia to write portions of the Applicants' brief. It says further that the author expresses appreciation to, amongst others, Keith Highet, Esquire, for his kind assistance. The Court will recall that Mr. Highet was a member of the legal team for Ethiopia and Liberia which appeared in this Court, so what he says may well be regarded as authentically stating the position, and at the pages to which I have referred the Court he leaves the Court in no doubt on this point, that the two countries were acting on behalf of the Organization of African Unity.

Now in their Memorials in that case the Applicants asked the Court for a ruling on a series of matters and they included three to which I would like to refer. First, whether the Mandate was still in existence; secondly, whether the General Assembly of the United Nations had succeeded to the supervisory functions of the League Council; and thirdly, whether South Africa had, by its policy of apartheid, violated Article 2 of the Mandate which required the mandatory to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory.

The question then arose, in that case for the purpose of the preliminary objections raised by South Africa, whether in the meaning of the compromissory clause of the Mandate there had previously been any dispute between the mandatory and another Member of the League of Nations which could not be settled by negotiation, that being broadly the wording of the compromissory

clause in that particular case. The question arose for several reasons, but one of them was the fact that the differences of opinion which had previously manifested themselves—those upon which Ethiopia and Liberia relied for purposes of jurisdiction—had arisen purely within the proceedings of the United Nations; they had not manifested themselves on what might be termed a direct inter-State relationship outside the United Nations. The Applicants Ethiopia and Liberia contended that this nevertheless meant that there was a dispute, or that a dispute had, prior to the institution of proceedings, manifested itself between them and South Africa. We deal in our written statement, I, at pages 443-445, with their reasoning in that respect. Basically they contended that the mere adoption of conflicting attitudes in the political organs of the United Nations constituted such a dispute and this contention was accepted by the majority of the Court—there was a divergence of opinion about it—in its Judgment of 1962, to which we refer in I at pages 444-445 of our statement. We quote the 1962 Judgment at pages 344-345. We also quote the opinion of Judge Jessup at page 436.

May I make it clear South Africa contended to the contrary and it still, with respect, disputes the correctness of the finding of the majority of the Court as far as that particular point is concerned. There were also dissenting minority opinions on this matter, particularly the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice and the opinion of Judge van Wijk. The dissents were very broadly based on the proposition that inasmuch as there was no specific individual ground of dispute between South Africa and the applicant States outside the General Assembly of the United Nations there was no dispute within the meaning of the particular compromissory clause.

Of course, Mr. President, with submission, the question with which we are dealing at the moment, concerns Rule 83 of this Court dealing with the concept of a legal question actually pending between two or more States. The question here is not necessarily the same as it was for purposes of the application of the compromissory clause with its different wording, and I am referring to this difference of opinion which manifested itself at that time. The point I do want to make is this: that one could now view the matter on one of two alternative bases. One would be the correctness of the 1962 majority Judgment on this proposition. If it is applied to what we are dealing with at the moment then the present question, in our submission, is *a fortiori* one actually pending between two or more States. On the other hand if one applies the minority view I will endeavour to demonstrate to the Court that, in fact, the matter has by now gone very very much further, and that in many important instances the differences of opinion, the conflicting attitudes adopted, have extended to the direct inter-State level on matters which are very much part and parcel of the question which has been submitted to the Court for the purposes of these proceedings. I shall come to that at a later stage.

Now to revert to the *South West Africa* cases. Ultimately, none of the issues which I have briefly mentioned were eventually decided formally by the Court in its Judgment in 1966, when the Court came to the conclusion that the Applicants had no right or legal interest in the subject-matter of the dispute and decided to rest its decision on that proposition alone.

So after that Judgment in 1966 one could state the position about the conflicting attitudes. They are briefly as follows: that if the Court's 1962 Judgment were accepted as correct then South Africa was engaged in a dispute with all States Members of the United Nations who had, in the course of the activities of the Organization, mentioned views conflicting with those of South Africa concerning South West Africa. And I mention, as the Court knows, that even

while the case was pending from 1960 to 1966 the United Nations activities and debates continued unabatedly in respect to South West Africa. And then, secondly, summarizing the position after the Jugdment in 1966, differences of view between South Africa and the two Applicants who represented the members of the OAU, had been defined in formal pleadings before this Court and those differences were still unresolved.

Now this conflict of views on both levels has continued ever since and it has developed, as I shall endeavour to demonstrate. Let us first look at the position within the United Nations; there was in 1966 a debate on the question whether the General Assembly could and should revoke the Mandate. This culminated, as the Court knows, in resolution 2145 (XXI), which was adopted, *inter alia*, against the opposition of South Africa. We deal with that in our written statement, I, pages 445-446, and we find, Mr. President, in the statement which is now being submitted to this Court by the Pakistan Government, the rather telling description of these events, these events which led up to the adoption of this resolution. The statement at I, page 357, indicates Pakistan's disagreement with the 1966 Judgment of the Court and it proceeds:

> "The Afro-Asian countries in 1966, therefore, took the matter to the General Assembly of the United Nations which on 26 October 1966 resolved to terminate the South African right to administer the territory."

In 1969 the matter was taken a step further in the United Nations by the representatives of a group of more than 40 States, mostly Afro-Asian States, in a letter to the President of the Security Council dated 14 March 1969. Those representatives stated that it was incumbent upon the Security Council to take measures and action to enable the people of South West Africa "to exercise their right to self-determination and independence" in the light of the adoption of resolution 2145 (XXI) and South Africa's continued presence in South West Africa. We refer to that in our written statement, I, page 446. This action, Mr. President, led eventually to Security Council resolutions 264 of 1969, 269 of 1969 and 276 of 1970, all of which called upon South Africa to withdraw from South West Africa. Now what is important is on the one hand the fact that this group of Afro-Asian States took the matter to the Security Council, and on the other hand, that the validity of these resolutions has been disputed by South Africa both prior to these proceedings and in these proceedings. As regards the disputation prior to these proceedings we refer to our written statement, I, page 447, and we refer to Annexure C [1], that is a letter which was written in 1969 on behalf of the South African Government to the Secretary-General on the subject of the Security Council resolutions.

So, to summarize the position, within the United Nations, it is clear that after 1966 the differences of opinion continued, basically along the same lines as before, particularly on the question whether the United Nations had succeeded to the supervisory functions of the League, and whether South Africa had violated the Mandate. Those were some of the basic original issues as I might call them, but the further issues came to be raised, which are relevant now in these proceedings, in our submission, as from 1966 onwards.

In 1966 the issue came to be stated very clearly whether the General Assembly was competent to terminate South Africa's rights of administration over South West Africa. And of course some of the previous issues, whether the United Nations had succeeded to the supervisory functions of the League, and whether

[1] Not reproduced.

South Africa had violated the Mandate—they also became germane to the question whether there had been a valid termination of title by the General Assembly. And then, as from 1969, yet further issues came into the picture within the United Nations. Those concerned the validity of the Security Council resolutions requiring South Africa to depart from South West Africa.

Going outside the United Nations now, I refer first to the confrontation which has been concretized in this Court in the pleadings between South Africa, on the one hand, and Ethiopia and Liberia on the other hand. Nothing has happened since 1966 to resolve those issues and it is significant, Mr. President, that in the present proceedings, the Organization of African Unity is again taking an active part. It now appears to be represented by Nigeria. At I, page 889 of the written statements submitted by States to the Court, one finds that the statement is headed "Written Statement of the Government of Nigeria" and paragraph 1 commences by stating "The Organization of African Unity wishes to begin by setting out" certain things. Broadly, as I will indicate later, the attitude taken by the Organization of African Unity, or by Nigeria on its behalf, still follows the same line as that of Liberia and Ethiopia in the *South West Africa* cases.

Now taking it a step further, outside of the United Nations, on what might be termed the direct inter-State level, subsequent to resolution 2145 a number of States took either individual or collective action outside of the United Nations against South Africa in her administration of South West Africa, and they left no doubt that they based that upon legal views concerning South Africa's right, or lack of right, to administer the Territory.

We find, in the first place, that certain States have withdrawn consular or similar diplomatic representation from South West Africa on this very basis. I can furnish the Court information in this regard, particularly with reference to replies which have been furnished by the States themselves to enquiries by the Secretary-General of the United Nations, enquiries which were aimed at obtaining information to aid the sub-committee which had been established under Security Council resolution 276 of 1970. In the circular to which I wish to refer the Court, the official reference to which is PO 230 SOAS/5, dated 16 March 1970, the Secretary-General sought certain information from various States Members of the Organization. The information was to include: "Any diplomatic, consular, trade or other official representation that they may have in the Territory or that may imply recognition of South African authority over the Territory." Now I give the Court certain extracts from replies from some of the States. Finland replied as follows:

> "Finland is represented in South Africa by a Chargé d'Affaires. His duties as representative of Finland do not extend to the Territory of Namibia and since the termination of the mandate he has been under instructions not to visit the Territory. Finland has no career consular representation in Namibia. An honorary consulate is maintained in Walvis Bay." (UN Security Council doc. S/9863 of 7 July 1970, p. 8.)

Norway's reply:

> "Before the termination of South Africa's mandate over Namibia in 1966, the official district of the Norwegian Consul General at Cape Town included Namibia. The district has now been limited to the Republic of South Africa.
>
> An honorary Norwegian vice-consulate is maintained at Windhoek." (*Ibid.*, p. 24.)

Sweden replied as follows:

> "Sweden has no official representation in or extending to Namibia. A Swedish honorary consulate existed in Windhoek till 18 November 1966, but was withdrawn, following the General Assembly's decision on the status of Namibia (South West Africa) in its resolution 2145 (XXI) of 27 October 1966." (*Ibid.*, p. 32.)

The United States of America replied as follows:

> "On 20 May, the Government of the United States announced the following steps relative to future activities of United States nationals and companies in Namibia. Specifically:
>
> *(a)* The United States will officially discourage investment by United States nationals in Namibia;
>
> *(b)* United States nationals who, nevertheless, invest in Namibia on the basis of rights acquired through the Government of South Africa since adoption of United Nations General Assembly resolution 2145 (XXI), 27 October 1966, shall not receive the assistance of the Government of the United States in protection of such investments against claim of a future lawful government of Namibia; and
>
> *(c)* Export-Import Bank credit guarantees and other facilities shall not be made available for trade with Namibia."

And then I'll quote from a further portion of the reply of the United States:

> "The United States considers that since 27 October 1966, South Africa has lacked the capacity to enter into international agreements with effect for Namibia and that, since that time, the United Nations has had direct responsibility for the territory." (*Ibid.*, pp. 46-47.)

I refer to these, Mr. President, admittedly from a document written in the United Nations context to which replies were furnished in that context. But the replies really give evidence of attitudes and actions which were taken outside of the United Nations context, in direct inter-State relations with South Africa, and in conflict with the attitude which South Africa has constantly expressed and maintained concerning its position relative to South West Africa.

I refer next to the attitude adopted by States with reference to the possibility of accession to a particular convention on behalf of South West Africa by the South African Government. This concerned the International Telecommunication Convention which was adopted at the Plenipotentiary Conference in the International Telecommunication Union—I will refer to it, with respect, Mr. President, as the ITU—in Montreux in 1965. The South African—and the Court will note that this was before resolution 2145 of 1966—delegation was excluded from the proceedings of the conference, South Africa contends illegally, but that is not relevant to the present argument. The fact is that for that reason South Africa was unable to sign the Convention and that therefore in order to become a party to the Convention had to avail itself of Article 19 of the Convention which provided for accession. It provided for accession by countries eligible to be members of the ITU, which countries were listed in Annex I to the Convention, and South Africa was listed as follows: "South Africa (Republic of) and Territory of South-West Africa." As I have said, this was 1965. The reference is to the official documents of that Convention, the Montreux Convention of 1965, which are obtainable from the General Secretariat of the International Telecommunication Union, Geneva, at page 92. I do not know whether this document is available in the library—could somebody tell me—if it is not, we will see to it that it is made available to the Registrar.

Now after the South African Government had studied the Convention, it decided that it would accede to it on behalf of the Republic of South Africa, and on behalf of South West Africa, and South Africa's accession was duly published in ITU Notification No. 989 of 10 December 1966 in the following words:

"*Republic of South Africa and Territory of South-West Africa*

The Government of the Republic of South Africa has acceded to the International Telecommunication Convention, Montreux, 1965, on behalf of the Republic of South Africa and the Territory of South-West Africa.

The instrument of accession was deposited with the General Secretariat on 11 November 1966."

It goes on to state that "a duly certified copy" would be sent to members.

Now this was, as I pointed out, in December 1966, which was after General Assembly resolution 2145. Reaction was not long in forthcoming. The first reaction came from the Ministry of Foreign Affairs of the Federal Republic of Cameroon. It was dated 26 January 1967 and it was sent to the General Secretariat of the ITU, declaring in a note:

". . . that the Government of the Federal Republic of Cameroon, in conformity with resolution 2145, adopted by the General Assembly of the United Nations on 28 October 1966 by virtue of which the mandate of the Republic of South Africa over South-West Africa is terminated, considers any decision taken by the Republic of South Africa in the name of the Territory of South-West Africa null and void and must therefore make the most express reservations concerning the commitment of South-West Africa by South Africa with respect to the said Convention".

The reference is to ITU Administrative Council, 22nd Session, Geneva, Doc. No. 364-E, of 30 March 1967.

Next came a communication from the Yugoslav Government dated 13 February 1967. It read as follows—I am not going to read many of these, I will indicate later that others were of a similar tenor Mr. President—

"The Yugoslav Government considers that the communication of the Government of the Republic of South Africa regarding its accession to the International Telecommunication Convention on behalf of the Territory of South-West Africa has no legal basis and is legally null and void."

It goes on to state:

"The communication of the Government of the Republic of South Africa is also in complete contradiction with the resolution of the General Assembly of the United Nations No. 2145 of 28 October 1966, which stated that South Africa had no right to administer the Territory of South-West Africa, which comes under the direct reponsibility of the United Nations. The act of the Government of the Republic of South Africa, at the same time, directly disregards the clause in the General Assembly resolution calling 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."

The reference is to ITU Notification No. 992, Geneva, 10 March 1967, page 3.

It is significant, Mr. President, to note that apparently the Yugoslav Government considered South Africa's accession on behalf of South West Africa as being null and void independently of resolution 2145, because it first states it to

be null and void and then says it is *also* in conflict with that resolution. I refer to that in passing.

Then we find that subsequently South Africa's accession on behalf of South West Africa was challenged by a number of other governments too.

On 28 March 1967, Tanzania sent a communication indicating that in its view, as a result of resolution 2145 South Africa was no longer responsible for the implementation of the purposes and functions of the International Telecommunication Union in the Territory of South West Africa, adding that South Africa was not competent to sign or ratify international instruments on behalf of South West Africa or to participate in international organizations, conferences or conventions as a representative of that Territory. This was ITU Administrative Council, 22nd Session, Geneva, Addendum 1 to Document No. 3643-E, 3 May 1967.

The United Arab Republic sent a telegram on 30 March 1967, and in this it stated:

> "Reference to your letter No. 3060/60/TT of 25 November 1966, regarding accession of Republic of South Africa and Territory of South-West Africa to the Montreux Convention, 1965. UAR Administration considering Resolution No. 45 of the Plenipotentiary Conference, Montreux, 1965, hereby reserves the right of its Government not to accept the statement submitted by the Government of South Africa on behalf of the Government of the Territory of South-West Africa being issued by an authority which has no legal capacity towards the aforesaid territory. Consequently such statement is unlawful."

It proceeds to draw attention to the decision of the United Nations General Assembly resolution 2145. Then the reference is the same as the previous one, Mr. President.

Then the Minister of Foreign Affairs of the Soviet Union sent a letter dated 22 April, and this is the last one which I will quote:

> "With reference to your letter . . . I enclose the copies of the documents from the Government of the Republic of South Africa concerning the accession of the Republic of South Africa and the Territory of South-West Africa to the International Telecommunication Covention adopted at Montreux on 12 November 1965, which I am returning because the accession of the Republic of South Africa thereto on behalf of the Territory of South-West Africa is illegal and cannot have any juridical force. It is a well-known fact that the General Assembly of the United Nations divested the racialistic régime of the Republic of South Africa of any right whatsoever with respect to the Territory of South-West Africa (resolution 2145, dated 27 October 1966)."

The reference is to ITU Notification No. 994, Geneva, 10 May 1967, pages 2 to 3.

Then there were communications to the same effect by the Ministry of Foreign Affairs of the Ukrainian SSR on 27 April 1967, the Ministry of Foreign Affairs of the Byelorussian SSR on 29 April 1967 and the Polish Administration on 4 May 1967. The reference is to ITU Notification 994, Geneva, 10 May 1967, pages 1 to 2.

Now for South Africa's reaction. Eventually the Administrative Council of the ITU circularized member States on 18 May 1967, with a question whether South Africa's right to represent South West Africa should be withdrawn—the question of what Members' attitudes would be in regard to such proposed action.

South Africa too received this circular and it replied fully to it on 23 May 1967. It is a fairly long letter and I do not want to take the Court's time with reading it. If the other representatives would not object, Mr. President, I would suggest that we follow the procedure which we followed before, that is that I hand to the Court a certified copy of the document and that we regard it as if it were read into the record and that we will hand copies simultaneously to representatives of other States. I will refer just to the gist of it, which disputes the validity of General Assembly resolution 2145 on grounds which have been stated in the past repeatedly by South Africa and are stated again in the proceedings now before the Court, basically, that the General Assembly lacked any power to take a resolution in a matter of this kind having anything more than recommendatory force. Secondly, that the purported cancellation apparently rested on the basis that the United Nations had succeeded to the supervisory powers of the Council of the League but that it had never been established that even the Council of the League had had a power of unilateral cancellation of a mandate and in any event that the General Assembly had not succeeded to the powers of the Council, and furthermore, that there was no substance in the grounds advanced to the effect that South Africa had failed to fulfil its obligations to the inhabitants of the Territory. There is further reasoning in support of these propositions. Will you please hand these documents to the Registrar? Will that be in order Mr. President?

THE PRESIDENT *indicated assent*[1].

Mr. de VILLIERS. So the issue in this respect was firmly joined.

The proposal to withdraw South Africa's right to represent South West Africa was nevertheless adopted by a majority within the ITU with a number of abstentions. And now this practical position has arisen that there is complete

[1] South African reply dated 23 May 1967, to circular telegram 15/18 May 1967, dispatched to Members of International Telecommunication Union by the President of the Administrative Council:

"Your Circular Telegram No. 15/18 re deposit of instrument of accession by the Republic of South Africa on behalf of the Territory of South West Africa refers.

It is noted that the proposal of the Administrative Council to withdraw South Africa's right to represent South West Africa in the International Telecommunications Union is based on resolution No. 2145 (XXI) adopted by the United Nations General Assembly on 27th October 1966. This resolution has no legal foundation. The more important reasons for its invalidity are given below.

(a) The Resolution violates the basic principle embodied in Article 10 and associated provisions of the Charter, viz. that, with limited and irrelevant exceptions, the powers of the General Assembly are confined to *discussion* and making of *recommendations*. In purporting to terminate, unilaterally, South Africa's rights of administration of South West Africa, the majority in the General Assembly therefore acted in conflict with one of the basic principles upon which Members joined the Organisation.

(b) The purported termination apparently rested upon the basis that the United Nations had succeeded to the supervisory powers of the League of Nations. However,

(i) it was never established that the League of Nations itself had a power of unilateral cancellation of a Mandate. On the contrary, the findings of the International Court of Justice in its 1966 Judgment in the South West Africa cases indicate plainly that the League had no such power.

(ii) In any event, after the proceedings in the *South West Africa* cases, the question whether the United Nations did succeed to the supervisory powers of the League is, putting it at its lowest, more controversial than ever.

legal uncertainty, or shall I say certainly legal differences of opinion, on the question whether South West Africa is, or is not, a party to the particular convention. The Court will appreciate this goes well outside debating postures and attitudes taken within an organization. It concerns the question whether a particular State, and here a particular territory, must now be regarded as a party to an international convention. And it concerns South Africa's right, or lack of right, to represent that territory in entering into international conventions. But more, as I have said, it concerns the practical outcome in this case: is South West Africa a party or is it not, when there was published what was on the face of it, a perfectly valid document of accession, and this other action was taken subsequently.

It is an aspect of what comes before this Court as part of the question submitted to it, and an aspect which has outside of any organizations manifested itself on a direct practical inter-State basis between South Africa and these various other States and affecting directly South West Africa itself.

I referred earlier to the reply given by the United States of America to a circular letter of the Secretary-General. I may refer to certain other evidence too, which is not confidential, which demonstrates to what extent various issues of a relevant nature have manifested themselves directly in an inter-State way between the United States Government and South Africa relative to South West Africa.

We prefer not to refer to the contents of exchanges, oral or in writing, which have taken place between the United States Government and South Africa since the date of resolution 2145. We would rather not divulge contents of such communications unilaterally, but I am in a position to refer, Mr. President, to public statements which have been made by and on behalf of the United States Government which to a large extent reveal some of these representations and attitudes which have been taken by the United States Government directly in its relations with the South African Government.

(c) There was no substance in the suggested grounds that South Africa had failed to fulfil its obligations in respect of administration of the Territory and ensuring the well-being of the inhabitants. This point was dealt with at length by South Africa's Representatives at the 21st Session of the General Assembly in their statements on 26 September, 5, 12 and 26 October 1966, and was carried further in the recently published *South West Africa Survey, 1967.*

(d) It was exactly because of uncertainty about legal or factual justification for any drastic action on the part of the General Assembly of the United Nations that legal proceedings were recommended by the United Nations Special Committee in 1957-1959. One report mentioned:

> '. . . the advantage that the Court in reaching its opinion, would proceed by impartial methods and on the basis of evidence produced to and weighed by the Court'.

(e) As was pointed out by a Judge of the International Court of Justice in the *Certain Expenses of the United Nations* Advisory Opinion case:

> '[The Charter] cannot be altered at the will of the majority of the member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority.'

In the light of, *inter alia,* the foregoing, the Republic of South Africa strongly opposes the proposal of the Administrative Council to withdraw South Africa's right to represent South West Africa in the International Telecommunications Union."

I can refer first of all to a letter dated 26 January 1968 on behalf of the United States Government to the Secretary-General of the United Nations in which it intimated that it had sought to make clear to the Government of South Africa through the United Nations and bilaterally its position, *inter alia*, with respect to questions of the international status of South West Africa. I refer to United Nations General Assembly Twenty-second Session, document A/7045/Add. 3, dated 29 January 1968, Report of the Secretary-General, page 3: just the general indication that it had made its position clear not only through the United Nations but also bilaterally.

Then on 20 May 1968 the United States representative at the 1658th meeting of the General Assembly once more revealed that his Government had made representations to the South African Government on several occasions in connection with questions emanating from resolution 2145 and other questions flowing from South Africa's administration of the Territory.

After the representative referred to specific legislation or contemplated legislation by the South African Government, he added:

> ". . . having recounted these efforts I must candidly agree that thus far the efforts of my Government, combined with those of other Governments and the United Nations itself, have been unavailing against the obdurate attitude of South Africa. Nevertheless, we must persevere . . . My own Government still intends to do its utmost by all appropriate and peaceful means to help carry through to fruition the aims which are so broadly shared and which are embodied in resolution 2145."

Now this quotation admittedly goes no further than to show that there have been representations on the subject of resolution 2145 and its consequences and that it has met with complete resistance on the part of the South African Government. The reference is to United Nations General Assembly document A/PV.1658 dated 20 May 1968, pages 36-37. But then we have these additional items to add. In a brief summary of United States policy in respect to South West Africa, published by the United States Department of State in its series "Background Notes", March 1969, it is stated at page 5:

> "The United States has closely followed developments in the territory and made vigorous protests against South African violation of the rights and well-being of the inhabitants."

In other words, a direct attitude alleging violation of the rights of the inhabitants. And then at the 1527th meeting of the Security Council, on 28 January 1970, the United States representative stated:

> "For our part, we shall continue to point out to South Africa that we consider its presence in Namibia illegal. We do not recognize and we do not intend to recognize South Africa's claim that it has the right to act on behalf of the people of that territory."

Now the United States revealed in the earlier quotation I read, and I can confirm on behalf of the South African Government, that these representations, these attitudes on the part of the United States, have consistently been resisted on the direct inter-State level by the Government of South Africa, as it is doing in the present proceedings before this Court.

These, Mr. President, may be said to be examples—I could give more but I do not want to burden the record or take the Court's time unnecessarily—of the manner in which disputes concerning legal issues regarding South West Africa, legal issues which in our submission are absolutely part and parcel of

the question submitted to this Court, where those disputes have manifested themselves on the direct inter-State level outside of the United Nations.

So I may summarize the general position as follows. Firstly, that there is within the United Nations a disagreement between South Africa and others whether the presence of South Africa in South West Africa is unlawful. This overall question is composed of a number of subsidiary questions which have been in issue for a number of years, particularly issues pertaining to United Nations rights of supervision and whether South Africa has violated the mandate. But, in addition, new issues have emerged more recently—I have mentioned them—as from 1966 onwards concerning the powers of the organs of the United Nations—the General Assembly and the Security Council and the validity or otherwise of the resolutions which they have taken. That is in the United Nations.

Then, secondly, a number of the vital issues which are disputed in the United Nations were embodied in formal pleadings before the Court in contentious proceedings between States. Ultimately a decision on those issues was not necessary and they are still pending between the States which were the real parties to the proceedings: South Africa and the members of the Organization for African Unity.

And thirdly the purported termination of South Africa's right to administer South West Africa and the alleged or suggested consequences thereof have led to controversies on the direct practical inter-State level between South Africa and various other States, examples of which I have mentioned, concerning the lawfulness of South Africa's administration of South West Africa and concerning particularly her right to represent South West Africa internationally.

The written statements before the Court illustrate the extent to which these differences of opinion, these conflicts of view and of attitude, still exist, and the extent to which they have existed for a long time. We find in these statements that South Africa maintains that her presence in South West Africa is lawful and that she is entitled to administer the Territory and to represent it internationally. We find on the other hand that this is disputed by others.

I do not intend to analyse all or even any of the statements which have been filed, but I want to make very brief reference to a few examples.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

I was, at the adjournment, referring to examples of attitudes taken by other States in the written statements now submitted to the Court in opposition to South Africa's basic attitude about the matter which I have broadly described.

I wanted to refer, as I intimated earlier, to the attitude stated by Nigeria, representing the Organization of African Unity. Nigeria's statement is found at I, pages 891-897. And one finds briefly that Nigeria contends that South Africa's right to administer South West Africa has been validly terminated on the basis of violation by South Africa of its obligations. It contends further that South Africa's administration is therefore unlawful and should cease and that other States should conduct themselves in conformity with that view.

We find, Mr. President, that Poland (I, p. 354), Pakistan (I, p. 357) and India (I, pp. 838 842) raise contentions much to the same effect.

Now, Mr. President, in the light of the facts of the situation which I have dealt with, the question arises of the application of Rule 83 to these facts. Can there be said to be a situation where the advisory opinion in the present case is requested upon a legal question actually pending between two or more States within the meaning of that Rule? My submission is that if ever there were a

case where this Rule is positively applicable, then this must be such a case. Whatever borderline or questionable cases might arise in other instances, this would not be one of them. This would be par excellence the type of situation contemplated by the Rule—with the result that this is hardly an occasion on which it is necessary to go into what might be debatable aspects in an academic legal sense of the Rule. Nevertheless, I will refer to the elements of that relevant wording in their application to this case.

First of all, is there a *legal* question? Now, Mr. President, numerous of the component questions in issue between South Africa and other States which I have identified, are without any doubt, legal questions. There are a number of questions which might be termed questions of pure law, such as those pertaining to the powers of the United Nations organs and the validity or otherwise of their resolutions. They are questions of interpretation of the Charter and application to particular instances.

In the same category of questions of pure law would fall the question whether the Council of the League had a power of unilateral termination of mandates. Then there is the question whether the supervisory functions of the League passed to the United Nations. That question too, is overall, in our submission, legal. It comprises one element of fact, namely the question whether South Africa consented to a transfer of supervisory powers. But that question is answerable entirely from a record of undisputed documentary sources. So that for all practical purposes, and particularly for present purposes, the whole of the question whether the supervisory powers passed can rightly be regarded as legal.

So in so far as the question of the legality or otherwise of South Africa's continued presence in South West Africa depends on the questions which I have just referred to, that is also a legal question. And the same would apply to the legal consequences for States of South Africa's legal or illegal presence in South West Africa. And to this extent, it would therefore be without question that the questions existing between South Africa and other States being also questions raised in these proceedings are legal. They are legal for the purposes of Rule 83 concerning an *ad hoc* judge, as well as for the purposes of Article 96 of the Charter concerning advisory opinions.

Now one does find this aspect of the matter, to which reference has been made by South Africa in its written statement, namely that when one looks at the whole of the question as posed for the Court by the request of the Security Council, it has to it a strong political background and it has comprised within it a large and important factual aspect: the aspect relating to the allegations, denied by South Africa, that South Africa has violated its obligations to the inhabitants of the Territory by its policies and practices. Those aspects are there, the political background and the factual field of potential dispute. They apply, these aspects, both to the question, as raised for the Court, and to the issues which have manifested themselves between South Africa and other States outside the Court and within and outside the United Nations.

So, at some appropriate stage, the Court will no doubt give attention, with respect, to South Africa's contention that for either or both of these reasons, either by reason of the political background, or by reason of the factual aspect, the question as a whole should not preponderantly be viewed as legal for purposes of Article 96 (1) of the Charter. Those are contentions which we raise. The result of upholding that contention would be that the Court would decline to give an advisory opinion. So if the Court were to come to that conclusion at its present session then, *cadit quaestio*, the whole of the rest of the proceedings would collapse.

We rather assume, perhaps correctly, perhaps wrongly, that the Court would not wish to go fully into that question at this stage, before the Court has finally decided on its composition for the proceedings. If we are wrong in the assumption, if the Court would like to hear full argument from us about that matter at this stage, we shall be pleased if the Court would indicate that to us. But we rather assume that the Court would not, at this stage, determine whether they are elements which take the matter as a whole out of the category of being legal. What is important at this stage is merely to indicate that if the matter as a whole is taken out of the category of being legal for the purposes of the appointment of an *ad hoc* judge, then it would by the same token be taken out of the category of being legal for purposes of giving an advisory opinion at all.

So if for purposes of giving an advisory opinion one assumes at this stage that the questions are not taken out of the category of being legal, then one makes the same assumption for the purposes of the appointment of an *ad hoc* judge. That is our contention as at this stage.

The next element to consider is whether we are dealing with a question between two or more States. Now, I think the answer to that is self-evident. If the question or the controversies had still been confined merely to the proceedings within the United Nations, then one might have said, well, is this to be seen as a question between two or more States, or as a question between South Africa and the Organization, the United Nations. But as I have indicated to the Court even if it were viewed in that light, then if one applies the 1962 Judgment, one would still come to the conclusion that it was a dispute between South Africa and two or more States.

But in fact we have pointed out that the matter has gone far beyond that, that there have been direct inter-State disputes which were not resolved by the 1966 Judgment, and there were these further disputes and questions which have arisen on the direct practical inter-State level which I have identified.

So there can be no question about the existence of a legal question between two or more States.

That brings us to the element of whether the question is actually pending. In the context, we submit there can be no doubt as to what was meant by the phrase "actually pending". It simply means a dispute which has not been resolved —which is unresolved—which actually exists and which has not been resolved. That is in this kind of context and looking at it merely as a matter of language, in our submission, the natural construction one would give to it. Looking at dictionary definitions of "pending", it has a broad meaning. It has the meaning of "unresolved" in the sense of awaiting decision or settlement. Particularly the word "pending" is taken in its ordinary connotation, standing by itself, it is not referring to something which is pending for decision before a tribunal or court of some kind. I say when it stands by itself; when it is the intention to speak of a dispute or question pending before a tribunal, one says so. Then one does not use the elliptical phrase, one does not use the phrase "actually pending", because if it were intended to refer to "pending before a tribunal", then it would be an elliptical phrase merely to say "actually pending". If one says "actually pending" by itself, the normal natural meaning would be the broad one of awaiting decision or settlement, awaiting finality by way of some or other of the processes which could bring finality, and those processes, of course, include settlement or agreement between the parties themselves.

That is a conclusion at which one prima facie arrives merely by looking at the language in its context. The conclusion is further fortified by looking at the background and the history and the general context. The meaning which I have just assigned to the phrase "actually pending" would bring the present Rule

into entire conformity with what the position was under the Permanent Court Rules where different language was used first of all in regard to matters which may be submitted to the Court for advisory opinions and where corresponding language was consequently used in regard to the appointment of an *ad hoc* judge in such cases. There the language used was something of the nature of a circumlocution—it was "any dispute or question"—therefore one had different language. But the same kind of language was used when it came to the Rules pertaining to the appointment of an *ad hoc* judge in advisory proceedings. The matter is referred to by Rosenne in his second edition, Volume II, pages 659-660, where he too expresses the view that the change in language is probably not one ofs ubstance and he even states that the present provisions of Rule 83 may be somewhat broader than the corresponding provisions of the Rules of 1936—that is at page 730.

I may say that we have not been able to find any commentator who suggests that the Rule is to be given a narrower interpretation than the corresponding Rule of the Permanent Court, and particularly we found no suggestion that this Rule is to be interpreted as referring to a dispute which is pending before some tribunal.

Such a contention in favour of narrowing the meaning to that effect would be inconsistent with what has often been stated to be the purpose of the provision for an *ad hoc* judge in advisory proceedings. The purpose has frequently been stated to be that in cases of existing disputes, actual practical disputes or legal questions which have not been decided between States, if the Court were to be asked to give an advisory opinion in those cases, that opinion may well be looked upon in a practical sense as being a kind of decision of that dispute. Therefore it is only fair to the parties concerned—where the advisory opinion is sought without their consent—that there should at least be the same kind of safeguards as in contentious proceedings—the appointment of an *ad hoc* judge being one of the balancing factors and one of the safeguards. One finds that theme dealt with, for instance, by Lauchame in "Le juge *ad hoc*", *Revue générale de droit international public*, Volume LXX, 1966, page 265 at 305. I can refer also to the separate opinion of Judge Winiarski in the *Peace Treaties* case, *I.C.J. Reports 1950*, at page 92.

I may further point out, Mr. President, that the submission of disputes to third party determination is highly exceptional in international law and practice. It occurs really in only a very small minority of cases. It therefore seems from a practical point of view almost inconceivable that there should be specific provision in Rules 82 and 83 for the highly exceptional contingency that an advisory opinion may be asked upon a question between States which is actually pending before some other tribunal. One would say, as I have pointed out, that if that had been the intention then the Rule would explicitly have said "pending before tribunal X or Y" or have given some description of the type of tribunal which the Rule might have had in mind. And furthermore, one would then have expected that the provision of the Rule would not have been that if this dispute was actually pending before some other tribunal it would now be permissible for a party to appoint an *ad hoc* judge in an advisory proceeding before this Court; one would rather have expected the provision to be that this Court should then desist, either permanently or temporarily, from giving an advisory opinion while that dispute was actually pending before some other tribunal.

We submit there can really be no question about what was meant by this phrase "actually pending" in the context of this particular Rule, by reason of

the meaning of language and by reason of context, of historical background and of probable intention.

Now, finally, it may be necessary for me to say something at this stage about the scope of the question which is being submitted for the Court's advisory opinion. I have, in what I have said so far, taken it for granted that the question which is being posed in the Security Council's request is to be dealt with in its full scope, as indicated by the wording of the resolution and as we have contended for in our written statement. In particular I have assumed that the legality or otherwise of General Assembly resolution 2145 is a fundamental part of the question posed for the Court. We submit that there is really no other possible view compatible with the exercise by this Court of a judicial function in this matter. But there are participants who contend otherwise in the written statements to the Court, notably the Secretary-General has contended otherwise and India has done the same. They have contended for a narrower construction or application to be given to the question posed. We submit, as I said, that those contentions are without substance, but again we assume that the Court would not, at the present stage, wish to enter fully into that matter before the Court has finally decided upon its composition. Therefore we do not intend at this stage to offer full argument on the matter of the scope of the question posed for the Court.

But again I say with respect, Mr. President, we ask that if the Court should wish to hear us fully on that question at this stage we would be obliged if the Court would indicate that to us, and we would do our best to comply. What I do want to point out at this stage is that even if the question should, in our submission quite artificially, be regarded as assuming the validity of General Assembly resolution 2145 and if it should therefore for that reason be regarded as referring only to the legal consequences of South Africa's presence in South West Africa on the assumption of a valid termination of South Africa's title, then our application in respect of the appointment of an *ad hoc* judge would still, in our submission, be well-founded, because it would be evident that several of the practical differences that I have mentioned, particularly those that have manifested themselves in the direct inter-State relationships, operate exactly in the field of legal consequences. They operate in the field of whether there should be consular representatives in South West Africa, whether South Africa has the right to represent South West Africa in regard to international treaties and conventions; it goes so far as to operate in a practical sense in regard to this situation of South West Africa vis-à-vis the Montreux Telecommunication Convention—is South West Africa a party or is it not? Therefore even on what we submit would be a completely artificial limitation of the question, these matters which have manifested themselves between South Africa and other States fall well within even that more limited conception.

Mr. President, there is one further matter to which I wish to draw attention and which we submit to be relevant. I have dealt with our application for the appointment of an *ad hoc* judge on the basis of the wording of the relevant Rule. In substance it really amounts to this, that my Government's contention is that these proceedings, although advisory in form, are quasi-contentious in substance. Our submission is that the analysis which we have given today of the issues which are involved in the question submitted to the Court, as properly construed, and of the differences which have manifested themselves between South Africa and other States bears out the contention that these proceedings are, in substance, quasi-contentious. That is the substantive basis which, in our submission, justifies the appointment, and requires the appointment, of an *ad hoc* judge.

Looking at the matter in this way we submit one should not lose sight of the practical value and contribution which a judge *ad hoc* could make in proceedings of this kind when they are viewed as quasi-contentious. In the present case too, if the Court should over-rule the preliminary objections which have been raised on behalf of the South African Government and should really enter into the merits of the matter, it will certainly be necessary in the interests of justice, in our respectful submission, to adapt the procedures of the advisory proceedings as nearly as possible to those of contentious proceedings in order to do justice to the issues and to the parties and to the interested participants concerned. It may, as we have pointed out in correspondence [1] to the Court, be necessary to have a definition of issues, particularly in the factual field, to assign time to parties for the submission of evidence in the factual field, to determine questions such as whether it is necessary to have oral testimony, and if so, on what issues and to what extent; whether it is necessary to make other forms of factual enquiry which we have already foreshadowed in the correspondence with the Court—the possibility of inspections *in loco* and so forth.

We have mentioned these various matters and this morning there was delivered to the Court—unfortunately we could not do it earlier for practical reasons—a letter of today's date [2] to which I should like to draw the Court's attention in this context. It has probably not been circulated to Members of the Court because of the late hour of its delivery. It should not take long to read . . . it has been distributed to the Court.

THE PRESIDENT *indicated that the letter had been circulated to Members of the Court.*

Mr. de VILLIERS. Then I need not read it; I need merely comment to the effect that Article 49 of the Rules of Court, applicable of course to contentious proceedings, requires parties to state, as soon as it may be practicable to the Court, what they have in mind by way of presentation in regard to factual issues, testimony in various forms.

We are not in a position, of course, at this early stage, to go into detail of what we would have in mind if and when it comes to the stage of considering the factual issue. But we have mentioned the various possibilities in broad outline and for that reason we considered it advisable, also with a view to enabling the Court to consider its further procedure at this early stage effectively, to announce at this stage that, if and when it comes to the consideration of the factual issues in this case, this is a proposal which will be made by the South African Government. It considers this as a most fundamental way and a most practical way of testing these issues which have been alive for such a long time and which amount in essence to allegations of oppression, repression and denial of self-determination to the peoples of South West Africa. The proposal is that there is to be co-operation as between the South African Government and this Court with a view to the holding of a plebiscite to test the views and the wishes of the inhabitants on the question whether the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations. We suggest that an appropriate method by which the Court could accede to the request, which will be dealt with in more detail later, would be the appointment of a committee of independant experts. And then matters such as the membership and the terms of reference of the committee and the details concerning the plebiscites would

[1] See **Correspondence**, No. 65, p. 659, *infra*.
[2] *Ibid.*, No. 73, p. 665, *infra*.

have to be worked out in a practical way by agreement between the Court and the South African Government.

That, I wish to point out in the present context, is par excellence the field in which a judge versed in the background, the circumstances, the laws and the customs, and so forth, of South Africa and of South West Africa, would be in a position to make a major contribution and be of great assistance to the Court. As we say in the letter, the proposal and the details, with the implications thereof, would require to be considered at a later stage but we bring it to the Court's notice at this stage for the reasons I have mentioned.

To summarize our contention, therefore, we submit that looking at the matter in a practical and substantive way, we justify our application in respect of the appointment of an *ad hoc* judge on the basis that these proceedings, although advisory in form, are quasi-contentious in substance, and that is a practical way of saying that the case falls within the category of those envisaged by Rule of Court No. 83, where it speaks of an advisory opinion being requested upon a legal question actually pending between two or more States.

No other representative signified a desire to speak

The Court rose at 12.30 p.m.

FIRST PUBLIC SITTING (8 II 71, 3 p.m.)

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,

Representatives of Governments and Organizations also present during the sittings:

For the Secretary-General of the United Nations:

Mr. C. A. Stravropoulos, Under Secretary-General, The Legal Council of the United Nations.

Mr. E. Schwelb, Senior Consultant to the Office of Legal Affairs; formerly Deputy Director, Division of Human Rights, United Nations Secretariat.

Mr. D. B. H. Vickers, Senior Legal Officer, United Nations Office of Legal Affairs.

For Finland:

Mr. E. J. S. Castrén, Professor of International Law at the University of Helsinki.

For India:

Mr. M. C. Chagla, Member of Parliament, former Minister for Foreign Affairs.

Mr. J. N. Dhamija, Ambassador to the Netherlands.

Mr. S. P. Jagota, Director, Legal and Treaties Division in the Ministry of External Affairs.

Mr. Jagmohan Mahajan, Secretary of Embassy.

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.

Mr. Metteden, Secretary of Embassy.

For the Organization of African Unity:

Mr. T. O. Elias, Attorney-General and Commissioner for Justice of Nigeria.

Mr. B. A. Shitta-Bey, Junior Counsel.

For Pakistan:

Mr. Syed Sharif Uddin Pirzada, S.Pk., Attorney-General of Pakistan.

Mr. Zahid Said, Deputy Legal Adviser, Ministry of Foreign Affairs.

Mr. N. D. Ahmad, T.Q.A., Secretary of Embassy.

Mr. S. T. Joshua, Secretary of Embassy.

For the Republic of Viet-Nam:

Mr. Le Tai Trien, Attorney-General, Supreme Court of Viet-Nam.

Mr. Nguyen Van Tho, Secretary-General, Ministry of Justice.

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.
Mr. F. D. Tothill, Member of the Department of Foreign Affairs.
Mr. C. H. S. von Bach, Member of the Department of Foreign Affairs.

For the United States of America:
Mr. J. R. Stevenson, Legal Adviser, Department of State.
Mr. L. B. Sohn, Counsellor on International Law, Department of State.
Mr. R. E. Dalton, Office of the Legal Adviser, Department of State.
Mr. A. E. Breisky, Secretary of Embassy.

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court is meeting today to hear oral statements, under Article 66, paragraph 2, of the Statute of the Court, in connection with a Request for an advisory opinion submitted to it by the Security Council of the United Nations. The Request of the Security Council was made pursuant to a resolution of 29 July 1970; I shall ask the Registrar to read the question on which the opinion of the Court is asked.

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

The PRESIDENT: Notice of the request for advisory opinion was given to all States entitled to appear before the Court, and the Court has received from the Secretary-General of the United Nations a dossier of documents likely to throw light upon the question. Furthermore, pursuant to Article 66, paragraph 2, of the Statute of the Court, all States entitled to appear before the Court were notified that they were considered as likely to be able to furnish information on the question, and that the Court was prepared to receive written statements from them within a time-limit fixed for that purpose.

The following States, indicated in English alphabetical order, exercised the right thus made available to them by transmitting to the Court written statements or letters: Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States of America and Yugoslavia.

A written statement was also presented to the Court on behalf of the Secretary General of the United Nations, and the representative of the Secretary-General expressed a desire to make an oral statement.

The following States also expressed a desire to make oral statements in the course of the present proceedings namely: Finland, India, the Netherlands, Nigeria, Pakistan, the Republic of Viet-Nam, South Africa and the United States of America.

In addition, the Court decided that the Organization of African Unity was likely to be able to furnish information on the question, and was authorized to make an oral statement before the Court.

After consultations between the President of the Court and the representatives of those States which have expressed a wish to make oral statements, the Court has decided to call upon such representatives in the following order.

The representative of the Secretary-General of the United Nations will address the Court first; thereafter I shall call upon the representative of Finland, and then on the representative of the Organization of African Unity. From then on, the Court will hear the oral statements of the remaining States in the alphabetical order of their English names, that is to say India, the Netherlands, Nigeria, Pakistan, the Republic of Viet-Nam, South Africa and finally the United States of America.

In this connection, I would mention that the representative of South Africa had requested the Court's permission to make a brief statement at the very beginning of these sittings, in order to enlarge upon a matter raised in a letter addressed to the Court dated 27 January 1971[1]. Copies of this letter have been made available to the other representatives attending this sitting, and to the public.

The Court, having considered this request, decided that it found no justification for this particular matter to be taken out of its context, and that the representative of South Africa would be free to make any observations he might wish to make on the subject in the course of his general oral statement to the Court, in the order of speakers which I have just indicated. The representative of South Africa has now addressed a further letter [2] to the Court, dated 6 February, on the same subject. Copies of this letter also have been made available to the other representatives in these proceedings, and to the public. Representatives of other States and organizations will thus be free to comment on this letter, either before or after hearing the statement of the representative of South Africa, as they may wish.

Before calling on the representative of the Secretary-General, there is one further matter to which I should refer.

The Court has decided to examine first of all the observations which the Government of the Republic of South Africa has made in its written statement and in its letter [3] of 14 January 1971 concerning the supposed disability of the Court to give the advisory opinion requested by the Security Council, because of political pressure to which the Court, according to the Government of the Republic of South Africa had been or might be subjected.

After having deliberated upon the matter, the Court has unanimously decided that it was not proper for it 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.

Before I call upon the representative of the Secretary-General of the United Nations, Mr. C. A. Stravropoulos, I will call upon Judge Gros who wishes to put certain questions to him and which Mr. Stravropoulos is at liberty to answer at his convenience.

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[1] See **Correspondence**, No. 79, p. 668, *infra*.
[2] *Ibid.*, No. 92, p. 673, *infra*.
[3] *Ibid.*, No. 65, p. 659, *infra*.

QUESTIONS DE M. GROS

M. GROS: Je pose ces questions après lecture des deux exposés écrits du Secrétariat général afin de vous permettre, Monsieur le représentant du Secrétariat général, d'y répondre soit dans votre exposé oral soit après la fin de cet exposé, selon vos convenances.

Première question — Le Secrétariat général propose, dans ses deux exposés écrits déposés le 7 décembre et le 24 décembre 1970 à la Cour, une interprétation de la Charte en ce qui concerne les pouvoirs de l'Assemblée générale et du Conseil de sécurité.

Cette interprétation est-elle sienne ou représente-t-elle, selon le Secrétatiat général, l'interprétation de l'Assemblée générale sur ses propres pourvoirs et du Conseil de sécurité sur les siens? Dans ce dernier cas, le Secrétariat général peut-il indiquer quand et comment cette interprétation a été adoptée par ces organes des Nations Unies?

Dans le premier cas, quel est le fondement juridique de la compétence du Secrétariat général pour interpréter la Charte? (Voir sur ce point le document annexé à une lettre du 26 juillet 1968 du Secrétaire général, reproduisant l'opinion du conseiller juridique des Nations Unies sur la responsabilité du Secrétariat général d'accomplir son devoir à la lumière de sa compréhension des dispositions pertinentes de la Charte (A/7146).)

Deuxième question — Dans l'exercice de cette capacité d'interpréter les dispositions pertinentes de la Charte, comment le Secrétariat général concilie-il l'interprétation qu'il paraît soutenir avec ce qu'a dit la Cour dans son avis sur la *Réparation des dommages subis au service des Nations Unies* (*C.I.J. Recueil 1949*, p. 179): « Encore moins cela équivaut-il à dire que l'Organisation soit un « super-Etat », quel que soit le sens de cette expression »?

Troisième question — Si cet exposé des vues de la Cour n'est plus considéré comme exact par le Secrétariat général, quelle est la motivation juridique de l'opinion qu'il se fait aujourd'hui de l'étendue des pouvoirs de l'Assemblée générale et du Conseil de sécurité?

Quel est alors, dans cette nouvelle perspective, l'effet des réserves faites par de nombreux Etats sur la résolution 2145 de l'Assemblée générale; par exemple des réserves faites par le Royaume-Uni, la France, l'URSS (sur un point précis de la résolution), du Canada, réserves signalées dans l'exposé écrit du Secrétariat général du 24 décembre 1970, aux paragraphes 120, 233, 30 et 50 notamment. Quel est, pour tous les Etats qui ont formellement réservé leur position, l'effet de cette résolution et a-t-elle, malgré ces réserves, un effet obligatoire à leur égard, et à quel titre?

Quatrième question — Le Secrétariat général considère-t-il qu'un Etat qui a fait une réserve formelle à la résolution 1514, citée comme le fondement de la résolution 2145, et qui a renouvelé sa réserve au cours du débat sur la résolution 2145, est lié malgré cette double réserve? Quelle est l'opinion du Secrétariat général sur l'avis de la Cour sur les *Conditions de l'admission d'un Etat comme Membre des Nations Unies (article 4 de la Charte)*, en date du 28 mai 1948 (*C.I.J. Recueil 1948*, p. 64):

> « le caractère politique d'un organe ne peut le soustraire à l'observation des dispositions conventionnelles qui le régissent, lorsque celles-ci constituent des limites à son pouvoir ou des critères à son jugement »?

Cinquième question — Dans le paragraphe 116 de son *premier exposé écrit* le Secrétariat général, en quelques lignes, considère que « toute relation juridique, de quelque sorte que ce soit intéressant la Namibie, qui a été établie par le Gouvernement de l'Afrique du Sud ou l'administration sud-africaine illégale en Namibie depuis la terminaison du Mandat », est nulle et de nul effet.

Quel serait le fondement juridique de cette opinion en ce qui concerne un Etat qui, à l'Assemblée générale et au Conseil de sécurité, a émis formellement des doutes sur la portée juridique de la résolution 2145 en ce qui concerne la fin du Mandat?

En examinant par exemple les observations faites par le délégué des Etats-Unis (S-PV./1465 du 20 mars 1969, p. 8-10 et S-PV./1496 du 11 août 1969, p. 12-13), les réserves du délégué de la France (S-PV./1387 du 25 janvier 1968, p. 116 et S-PV./1464 du 20 mars 1969, p. 51-52) quel peut être l'effet pour ces deux Etats de la théorie de nullité absolue exposée dans le paragraphe 116 de l'exposé écrit du Secrétariat général? Sur quelle règle de droit international se fonde la théorie de la nullité absolue?

Sixième question — De manière générale, le Secrétariat général est-il en désaccord avec le premier paragraphe de la page 157 de l'avis de la Cour en date du 20 juillet 1962, *Certaines dépenses des Nations Unies (article 17, paragraphe 2, de la Charte)* et en particulier avec le passage suivant:

> « la Cour doit avoir la pleine liberté d'examiner tous les éléments pertinents dont elle dispose pour se faire une opinion sur une question qui lui est posée en vue d'un avis consultatif »?

ORAL STATEMENT BY MR. STAVROPOULOS

REPRESENTATIVE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

Mr. STAVROPOULOS: Mr. President, Honourable Members of the Court, it is a great privilege and pleasure for me to appear before the highest international tribunal, on behalf of the Secretary-General of the United Nations. This is the seventh occasion when the Secretary-General has been represented before the principal judicial organ of the United Nations in connection with advisory opinions requested by the World Organization.

In the past, all requests from United Nations organs for advisory opinions have emanated from the General Assembly. For the first time the International Court of Justice has before it a request from the Security Council. This request is for an advisory opinion on the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). In resolution 284 (1970), making this request, the Security Council has expressed the view that the advisory opinion would be useful for the Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking.

The source of the request, of course, in no way alters the views of the Secretary-General regarding his responsibilities to this Court to offer such information and argumentation as he believes may be helpful in elucidating the request and the issues before the Court. In pursuance of these responsibilities, the Secretary-General has already made available to the Court a dossier containing the relevant documentation. I regret this documentation proved to be so voluminous—voluminous because of the intricacies, the history, and the great degree of international concern in the question of Namibia. The Secretary-General has also submitted two documents to the Court, one entitled "Written statement" and the other "Review of the proceedings of the General Assembly and of the Security Council relating to the termination of the Mandate for Namibia and subsequent action". For purposes of brevity, I shall henceforth refer to this latter document as the "Review of the proceedings".

In addition to these documents, the Court had also received some very valuable written statements from a considerable number of governments, which reflect the wide interest in this case and which will undoubtedly be of great assistance to the Court in its consideration of the question before it.

The facts put forward and the views expressed in the two documents submitted by the Secretary-General represent his position in regard to the subject before the Court, a position formulated in the light of the Secretary-General's responsibilities to which I have alluded earlier. As this would be both superfluous and time-consuming, it is not my intention today to reiterate the information and the argumentation advanced in our written documents. Thus, for example, I shall not expand further upon the information therein on the scope of the question put to the Court. (See paragraphs 1 to 15 of the Secretary-General's written statement and paragraphs 327 to 353 of the "Review of the Proceedings".) Nor shall I elaborate, beyond a brief reference at the end of this statement, the views of the Secretary-General in those documents on what he considers to be the legal consequences for States of the continued presence of South Africa in Namibia. In this latter connection, however, I should like to invite

particular attention to Part III, paragraphs 106 to 109, and Part IV of the Secretary-General's written statement where his views on the legal consequences for South Africa and for other States are set out.

At this stage of the proceedings the Secretary-General sees his responsibilities as requiring him to offer such information and comments as he deems may be useful to the Court on various points which have been made by the governments in the written statements which they have presented to the Court. Many of these points are either of a preliminary nature—such as the issue whether the Court should accede to the request for an advisory opinion—or relate to the question of the validity under the United Nations Charter of actions and decisions of the Security Council and the General Assembly, such as the decision that the Mandate for South West Africa was terminated. Viewed strictly, these points may go beyond the scope of the question put to the Court. However, they have been raised. Since, in its Advisory Opinion concerning *Certain Expenses of the United Nations*, the Court remarked that it "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. 151, at p. 157), the Court may wish to consider the relevance of the points just mentioned to the issues before it.

Furthermore, the Secretary-General feels that it is his special duty to comment upon certain of the points raised mainly in one statement which, if accepted, would have profound, in fact possibly disastrous effects, upon the structure, functioning and constitutional practices of the United Nations as these have evolved over the last 25 years.

It is in the light of the considerations just enumerated that I am today presenting the present oral statement on behalf of the Secretary-General. Broadly speaking, this statement will deal, in the order indicated, with the following topics:

First, the question whether the Court should render the advisory opinion requested by the Security Council.

Second, some basic considerations applicable to the question of Namibia.

Third, objections which have been advanced to the formal validity of the relevant Security Council resolutions relating to Namibia.

Fourth, the scope of the powers of the Security Council, particularly under Article 24 of the United Nations Charter.

Fifth, questions raised concerning the legal basis of General Assembly resolution 2145 (XXI) of 27 October 1966, deciding, *inter alia*, that the Mandate for South West Africa was terminated.

Sixth, the question whether South Africa has a right to remain in Namibia independently of the Mandate.

Seventh, the question of material breaches by South Africa of its obligations regarding Namibia.

Eighth, the legal consequences of the continued presence in Namibia of South Africa.

The statement concludes with a summary of the basic principles which the Secretary-General considers to be involved in this case.

I. The Question Whether the Court Should Render the Advisory Opinion Requested by the Security Council

I turn now to the first topic I have just indicated, namely the question whether the Court should render the advisory opinion requested by the Security

Council. One of the Governments which has submitted a statement suggests 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. In this connection the principal contentions advanced are threefold:

first, that the question posed by the Security Council is intertwined with political issues and has a political background in which the Court itself has become embroiled to an extent rendering it impossible for the Court to exercise its judicial function properly;

second, that the legal question on which the Court is requested to advise, relates to an existing dispute between South Africa and other States; and

third, that the question can only be answered by deciding disputed factual issues.

(a) *The Allegedly Political Character and Background of the Question*

As regard the first reason—the allegedly political character and background of the question—it must be said that in this regard the question now before the Court does not basically differ from other questions which have been before this Court, and before its predecessor, in contentious as well as advisory proceedings. The Statute of the Court provides that in the body of the Court as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured. The composition of the Court is intended to guarantee that even in questions which have a strong political aspect, the political elements will not be unduly predominant.

The Court has already decided not to accede to the objections raised by the Government of South Africa in its written statement against the participation of three Members of the Court. The objections were based on the contention that political positions taken by these judges in the course of earlier, non-judicial activities might make their participation in the proceedings undesirable. It can hardly be expected to find judges selected from among prominent international lawyers and diplomats who have not in one form or another expressed an opinion on questions such as self-determination of peoples, colonialism and racial discrimination. The Court, having rejected the challenge against the participation of three judges, it would hardly be logical to assume that the Court as a whole would have difficulty in rendering an advisory opinion which is unaffected by individual political views. I submit, therefore, that the contended political background of the question should not be a reason for this Court to decline giving the advisory opinion which the Security Council has requested.

(b) *Characterization of the Issue before the Court*

The second argument which has been put forward is that the present case relates to an existing dispute between States comparable to the one involved in the *Eastern Carelia* case (Collection of Advisory Opinions of the Permanent Court of International Justice, *Series B, No. 5*), where the Permanent Court of International Justice declined in 1923 to give an advisory opinion. In that case the question put to the Court related to the issue whether certain provisions of the Peace Treaty of Dorpat between Finland and Russia of 1920, and a Declaration of the Russian delegation annexed to it regarding the autonomy of Eastern Carelia, constituted engagements of an international character which placed Russia under an obligation to Finland as to the carrying out of the provisions contained therein. The Permanent Court declined to give an advisory opinion because it bore on an actual dispute between Finland and Russia. Russia

had on several occasions clearly declared that it accepted no intervention by the League of Nations in the dispute with Finland. The refusals which Russia had opposed to the steps suggested by the Council of the League of Nations had been renewed upon the receipt by it of the notification of the request for an advisory opinion. The Court therefore found it impossible to give its opinion on a dispute of this character.

To turn to the present case before the Court, it is the view of the Secretary-General that the *Eastern Carelia* case is not a precedent. I hope to prove, in a different context later in this statement, that the present case does not relate to an existing dispute between South Africa and other States. Moreover, Article 83 of the Rules of Court is evidence that an advisory opinion can be requested and given upon a legal question actually pending between two or more States. Furthermore, since 1923, when the Permanent Court of International Justice was requested to give the advisory opinion in the *Eastern Carelia* case, the law and practice concerning the giving of advisory opinions on legal questions pending between two or more States have undergone a certain modification and development. Although, as I have already indicated, the present case is not a disguised dispute between two or more States, it might nevertheless be of some use if I were to present a short survey of this modification and development.

While its eventual establishment was envisaged in Article 14 of the Covenant of the League of Nations, the Permanent Court of International Justice was not organically linked with the League. The present Court, however, is the principal judicial organ of the United Nations. As such, it has on several occasions taken a stand different from that of the Permanent Court in the *Eastern Carelia* case.

In the matter of the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the argument was invoked, against the power of the Court to answer the questions put to it by the General Assembly, that the Court could not give the advisory opinion without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States, could take place without their consent. The Court did not accept this argument. It said that, while the consent of States, parties to a dispute, was the basis of the Court's jurisdiction in contentious cases, the situation was different in regard to advisory proceedings, even where the request for an advisory opinion related to a legal question actually pending between States. The Court emphasized that its reply was only of an advisory character. It followed that no State could prevent the giving of an advisory opinion which the United Nations considered to be desirable in order to obtain enlightenment as to the course of the action it should take. The Court's opinion, the Court said, was given not to the States but to the organ which was entitled to request it; the reply of the Court, itself an "organ of the United Nations", represented its participation in the activities of the Organization, and, in principle, should not be refused. The Court noted that it was not merely an "organ of the United Nations" but essentially "the principal judicial organ" of the Organization (*I.C.J. Reports 1950*, p. 65 at pp. 71, 72).

In the case concerning *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against Unesco* (*I.C.J. Reports 1956*, p. 77, at pp. 86, 87) the Court, considering whether it should comply with the request for an opinion, said that the question put to the Court was a legal one. It arose within the scope of the activities of Unesco. In submitting the request for an opinion, the Executive Board of Unesco was seeking a clarification of the legal aspect of a matter with which it was dealing. The Court stated that only compelling reasons could cause it to adopt in that matter

a negative attitude which would imperil the working of the régime established by the Statute of the ILO Administrative Tribunal for the judicial protection of officials. It concluded that there were no such compelling reasons, and that it ought to comply with the request for an opinion.

In the case concerning *Certain Expenses of the United Nations*, this Court referred to the decision taken by the Permanent Court concerning the *Status of Eastern Carelia* and to the *Peace Treaties* and the *ILO Administrative Tribunal* cases. In the *Certain Expenses* case the Court again found no "compelling reason" why it should not give the advisory opinion which the General Assembly requested by its resolution 1731 of the sixteenth session. 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 it was true that most interpretations of the Charter would have political significance, great or small. In the nature of things it could not be otherwise. 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. It referred to the fact that the General Assembly in its resolution 1731 of the sixteenth session had expressed its recognition of "its need for authoritative legal guidance". In its search for such guidance it had put to the Court a legal question. The Court proceeded therefore to give its Opinion on *Certain Expenses of the United Nations* (*I.C.J. Reports 1962*, p. 151 at pp. 155, 156).

Similarly in the present case, the Security Council submitted the request for the advisory opinion to the Court:

> ". . . 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".

I respectfully submit, therefore, that the present request is to a very large extent comparable to the requests which were addressed to this Court in the case of the three other Advisory Opinions to which I have just referred.

(c) *Whether Deciding the Case Involves Disputed Factual Issues*

The third argument against rendering the advisory opinion is based on the claim that the question put to the Court can be answered only by deciding disputed factual issues. In the Secretary-General's opinion this argument is not convincing, as these factual issues have already been determined by the bodies competent to do so. In this respect, resolution 2145 (XXI) of the General Assembly declared, *inter alia*, that South Africa had 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 had in fact disavowed the Mandate. As a consequence, the General Assembly stated that the Mandate for South West Africa was terminated. Subsequently, those findings and the consequences drawn from them were expressly confirmed and agreed to by the Security Council. Thus the question whether South Africa did or did not promote to the utmost the material and moral well-being and the social progress of the inhabitants, was decided by the organs within the technical and political appreciation of which it came.

The facts have been established by a near-unanimous decision of the General

Assembly, by 114 votes in favour, two against with three abstentions. Apart from South Africa and Portugal, there was unanimity in regard to operative paragraphs 2, 3 and 7 of the resolution, paricularly on the finding in paragraph 3 that South Africa had failed to fulfil its obligations in respect of the administration of the mandated territory, and that by word and by action the South African Government had demonstrated its undeviating determination to deny and to repudiate essential obligations incumbent upon it, and that it had forfeited its title to administer the Mandate (see "Review of Proceedings", paras. 77, 78 and 24). No fact finding is therefore involved in what the Court has been asked by the Security Council to do, namely to advise on the legal consequences of the continued presence of South Africa in Namibia notwithstanding the decisions taken by the Security Council.

For all the foregoing reasons I respectfully submit that it will be in accordance with authoritative precedent if the Court, as the principal judicial organ of the United Nations, decides to render the advisory opinion which had been requested by the Security Council, the principal organ of the United Nations bearing primary responsibility for the maintenance of international peace and security.

II. Some Basic Considerations Applicable to the Question of Namibia

I come now, Mr. President, to the second topic to be considered in this oral statement, namely some basic considerations which the Secretary-General considers are applicable to the question of Namibia. In this context, I should like first of all to address myself to some of the underlying issues and legal conceptions concerning which differences have arisen between South Africa and the United Nations. With great learning and extraordinary industry, the Government of South Africa has presented to the Court an extremely thorough analysis and legal exegesis which, if I may be permitted to say so, constitutes a professional achievement of a very high level indeed, on which the Government's legal advisers deserve to be congratulated. The high professional level of the South African presentation calls however for a preliminary examination of what kind of a legal system it is on which the South African statement is based—whether the legal world in which the South African arguments operate is really the world of 1971, or for that matter of 1966 or 1945 or even of 1920.

Through more than 25 years the Government of South Africa has continued to assert that, as a consequence of the dissolution of the League of Nations, the South African Mandate for South West Africa, now Namibia, has lapsed and that, as a result, South Africa is freed from any international supervision, and even from any limitations on the way in which it administers or administered the Territory. The South African view appears to be that Namibia is today the sole and exclusive responsibility of South Africa which, in all but name, is the sovereign of the territory.

The United Nations, on the other hand, has maintained that 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. It is apposite to recall that, in his separate opinion

in the *South West Africa* cases, *First Phase*, Judge Bustamante stated, *inter alia*, that:

> ". . . all the members of the organization are jointly and severally responsible for the fulfilment of the sacred trust". (*I.C.J. Reports 1962*, p. 319, at p. 355).

Proceeding from the above premise it is the position of the United Nations that the international territory of Namibia has been a responsibility of the Organization, virtually since the latter's inception, and its previous administration by South Africa on behalf of the international community was at all times since the entry into force of the Charter subject to the compliance by South Africa not only with its obligations under the Mandate but also with its duty to respect the obligations and responsibilities of the United Nations towards the people and territory of Namibia.

These continuing international obligations, for the fulfilment of which the international community has had the overriding and, since 1966, the direct responsibility, are derived, *inter alia*, from the League of Nations mandates system, from the Charter of the United Nations and from customary norms and general principles of international law. In addition, these responsibilities are also derived from those international declarations and resolutions which, although they may not be legally binding on States in the exercise of their independent sovereign powers, nevertheless constitute binding directives in the performance of an international function on behalf of the international community. The obligation to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory" permits no doubt that it was part of the obligation of the mandatory to promote social progress by applying, in favour of the inhabitants, the rules as they have been internationally developed in the last 25 years.

Included among the international rules which are binding on the administration of the international territory of Namibia are declarations and resolutions formally adopted by 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.

Since the origin and scope of these various obligations were further elaborated in the written statement submitted on behalf of the Secretary-General (Sec. II, paras. 16 to 67), it is not necessary for me to examine them in detail at this stage.

One of the common characteristics of the obligations derived from the relevant treaty and constitutional texts, as well as from the interpretative and declaratory instruments adopted by United Nations organs is that, in both cases, they are in most instances directly related to contemporary prevailing norms. The application of these contemporary prevailing norms is part and parcel of the promotion of the material and moral well-being and the social progress of the inhabitants, an obligation of the Mandatory laid down in positive law.

For example, the reference in Article 22 of the Covenant of the League of Nations to "the strenuous conditions of the modern world" clearly could not be interpreted half a century later as still meaning the world of 1920. It was pointed out, *inter alia*, in the dissenting opinion of Judge Jessup, in the *South West Africa* cases, *Second Phase*, that the modern world of 1966—

> ". . . is a multi-racial world. It is a world in which States of varied ethnic composition and of different stages of economic and political development

> are now associated in the United Nations on the basis of 'sovereign equality' (Article 2 (1) of the Charter). Obviously 'the modern world' is not a static concept and could not have been so considered by the framers of the Covenant of the League." (*I.C.J. Reports 1966*, p. 6 at p. 440.)

Indeed, any assertion that South Africa's obligations in 1966 should be interpreted in the light of the standards and expectations of 1920 is patently absurd. I would recall the classic statement of Max Huber, Arbitrator in the *Island of Palmas* case that:

> "The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."

To apply at a particular point in time an institution, legal rule or practice which was formerly acceptable may in fact, at that point of time, prove to be *contra bonos mores*. Likewise to apply concepts of moral well-being current 50 years ago could not be considered as promoting moral well-being today.

South Africa's claim to have promoted the material and moral well-being and the social progress of the inhabitants of the Territory is based solely upon a unilateral determination by South Africa as to what constitutes well-being and social progress, and is apparently not affected by a denial to the majority of the inhabitants of basic human rights and fundamental freedoms, including equality before the law, and economic, social, cultural, civil and political rights. In the view of the South African Government severe restrictions on the freedom of movement of the inhabitants of the Territory, on their freedom of residence and right to own land, on their right to work and freedom of employment, on their right to family life, on their right to education and, last but not least, on their right to participate in government are apparently not incompatible with its obligation to promote the well-being and social progress of the inhabitants and to respect and observe human rights and fundamental freedoms for all without distinction as to race.

Whereas South Africa alleges that the United Nations has sought to interfere unlawfully in the exercise by South Africa of her rights, it is our position that South Africa, which has forfeited all rights to be in Namibia, has forcibly prevented both the United Nations and the people of Namibia from exercising their lawful rights. These latter rights arise not only from contract, but also from the international status possessed by the people of Namibia in their relationship to the international community.

It may be added that 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 remains pledged to the achievement of this purpose, namely the exercise by the people of Namibia of their right to self-determination and full membership in the international community in accordance with the terms of the mandates system and the United Nations Charter, and the internationally accepted interpretation of these legal rights at the present time.

III. Objections Which Have Been Advanced to the Formal Validity of the Relevant Security Council Resolutions relating to Namibia

With your permission, Mr. President, I would now like to take up the third topic to which I referred at the outset of this statement, namely objections by governments to the formal validity of the relevant Security Council resolution. I believe it would be convenient for the Court if I were to deal with this topic under four separate subheadings, as follows:

First, the question of the composition of the Security Council;

second, the effect of voluntary abstentions by permanent members of the Council;

third, the question of the applicability of Article 32 of the Charter relating to invitations to parties to disputes to participate in Security Council discussions of those disputes; and

fourth, the question of the applicability of the proviso in Article 27, paragraph 3, of the Charter concerning compulsory abstentions of parties to a dispute in taking decisions under Chapter VI of the Charter.

(a) *The Question of the Composition of the Security Council*

The question of the composition of the Security Council has been raised by the Government of South Africa with reference to the representation of a permanent member—namely China—at the time when the various decisions of the Security Council on the question of Namibia were taken. The Government states expressly that it raises this question for the Court's consideration without making any submission in this regard. It also states that South Africa has throughout recognized the government of Generalissimo Chiang Kai-Shek as the legitimate government of China.

Well, leaving aside the question whether South Africa has the standing to raise this issue in view of the fact that the government of China recognized by South Africa occupied the Chinese seat at the relevant times, it is submitted that the objection against the validity of the Security Council resolutions on this ground is not well taken.

Rules 13 to 17 of the provisional rules of procedure of the Security Council pertain to representation and credentials. They provide, *inter alia*, that the credentials of a representative on the Security Council shall be issued either by the Head of the State or of the government concerned or by its Minister for Foreign Affairs and shall be communicated to the Secretary-General who, having examined such, shall submit a report to the Security Council for approval.

Rules 16 and 17 specifically stipulate that, pending the approval of his credentials, a representative shall be seated provisionally, with the same rights as other representatives, and that any representative on the Security Council to whose credentials objection has been made within the Security Council shall continue to sit, with the same rights as other representatives, until the Security Council has decided the matter. Accordingly, the Security Council itself has the right to consider any question relating to the representation or the credentials of one of its members. Therefore, as long as the Security Council does not decide that a person whom it has recognized as the representative of a member of the Council has lost that capacity, that person is, within the meaning of the Charter, the representative of the member State. As of the present date no such decision has been taken by the Security Council as regards the representative of China.

In the unlikely event that the Court were to grant any credence to this issue

which has been raised in the South African statement, particularly in so far as it has been advanced to challenge past decisions and actions, the possible effects would range far beyond the limits of the present case. For instance, amendments to the Charter of the United Nations require, *inter alia*, ratification, in accordance with their respective constitutional processes, by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council. The amendments to Articles 23, 27 and 61 of the Charter, enlarging the membership of the Security Council and of the Economic and Social Council, were ratified on behalf of China in 1965 by the same government of China which was represented on the Security Council when the resolutions on Namibia were adopted by the Council in 1968, 1969 and 1970. Under the theory underlying the South African reference to the representation of China on the Security Council, it could be claimed that the amendments to the Charter have not entered into force and that on this ground two principal organs, namely the Security Council and the Economic and Social Council, have since 1 January 1966 not been legally constituted. In other words: to entertain the allegation that a resolution of the Security Council adopted with the concurrence of the Government of the Republic of China is invalid would, logically, also lead to uncertainty as to what is the valid text of the Charter and the constitutional composition of two principal organs.

(b) *The Effect of Voluntary Abstentions of Permanent Members of the Security Council*

I come now to the second matter which has been raised in the present context, namely the effect of voluntary abstentions of permanent members of the Security Council in the vote on non-procedural decisions in the Council. South Africa has claimed—on the basis of the wording of Article 27, paragraph 3, of the Charter which refers to "the concurring votes of the permanent members"—that non-procedural decisions of the Security Council, where voluntary abstentions by permanent members have occurred, are invalid.

The constant practice of the Security Council of not treating the voluntary abstention of a permanent member of the Security Council as a vote against a substantive draft resolution before the Council is, it is submitted, customary law, and was the valid customary law of the United Nations long before the Security Council resolutions of 1968, 1969 and 1970 on the subject of Namibia were adopted. South Africa has itself contributed to the establishment of this rule of customary international law by votes in the General Assembly—for example, in the cases of the admission of new members in 1949 and 1961 upon recommendations of the Security Council adopted with voluntary abstentions of permanent members.

Even if the development relating to voluntary abstentions is looked upon as an interpretation of the Charter by subsequent practice, the result cannot be different and the practice must be recognized as being authoritative for the Organization itself, its organs, its member States and, in the light of Article 2, paragraph 6, of the Charter, even for non-member States.

In their separate opinions agreeing with the result of the Advisory Opinion in the case concerning *Certain Expenses of the United Nations*, Judges Sir Percy Spender and Sir Gerald Fitzmaurice expressed reservations with regard to the view that the practice of an organ of the United Nations can for purposes of interpretation be held to be equivalent in its effect to subsequent conduct of the parties. The most emphatic statement of this reservation concerning the relevance of subsequent practice by United Nations organs is found in the separate opinion of Sir Percy Spender. But even Sir Percy Spender makes, in

his separate opinion, an important exception from his generally negative view of the relevance of subsequent practice by United Nations organs. The exception is, in his words "a practice which is of a peaceful, uniform and undisputed character accepted in fact by all current Members" (*I.C.J. Reports 1962*, p. 151 at p. 195). If there is any practice which comes within this exception, as formulated by Sir Percy, it is the uniform and undisputed practice of not treating the abstention of a permanent member as a vote against a non-procedural resolution.

Whether we consider it to be a rule of customary law, or a binding interpretation of the Charter, the rule was well established by 1965, when the amendment to Article 27 entered into force, and in 1966 when Portugal and South Africa, both of whom had never previously questioned the rule, for the first time advanced doubts regarding it.

Moreover, with the exception of the reservations on the value of subsequent practice of United Nations organs mentioned a moment ago, the present Court and its predecessor have repeatedly stressed the importance which subsequent practice of the organs of international organizations has on the interpretation of the constituent instrument of the organization concerned.

Let me refer, in this context, to the Advisory Opinion of 12 August 1922 on the question whether the competence of the International Labour Organisation extended to international regulation of the conditions of labour of persons employed in agriculture (Collection of Advisory Opinions, *Series B, No. 2*). In this Opinion, the Permanent Court of International Justice said with regard to the meaning of the relevant provisions of Part XIII of the Peace Treaty of Versailles—namely the Constitution of the International Labour Organisation—that it had no doubt agricultural labour was included in the competence of the Organisation. The Court went on to say:

> "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty. The Treaty was signed in June, 1919, and it was not until October, 1921, that any of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organisation. During the intervening period the subject of agriculture had repeatedly been discussed and had been dealt with in one form and another. All this might suffice to turn the scale in favour of the inclusion of agriculture, if there were any ambiguity."

It should be noted that the Peace Treaty of Versailles was signed on 28 June 1919 and entered into force on 10 January 1920. Pursuant to Article 424 of the Tretay, the first International Labour Conference took place in October 1919. The Court considered that the practice of the organs of the International Labour Organisation during the comparatively short period between 1919 and 1921 was sufficient to support the proposition that agriculture was within the competence of the Organisation. If this was the authoritative conclusion drawn from the facts which had occurred in a time shorter than two years, the constant practice of the Security Council and of the General Assembly in the interpretation of Article 27, paragraph 3, of the Charter since the establishment of the United Nations over a quarter of a century ago must certainly be much more conclusive.

It would be superfluous for me here to elaborate upon the instances in which this present Court has attributed great relevance to the practice of organs of an international organization. I shall therefore limit myself to mentioning the names of two cases where this issue has been the subject of judicial pronounce-

ment, namely the Advisory Opinion of 3 March 1950 on *Competence of the General Assembly for the Admission of a State to the United Nations* (*I.C.J. Reports 1950*, p. 4 at p. 9), and the Advisory Opinion concerning the *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization* (*I.C.J. Reports 1960*, p. 150 at p. 167).

In considering this question one has also to keep in mind that under the principles on which the whole structure of the United Nations is based, each principal organ decides upon its own jurisdiction and has the authority to regulate its own procedure. While the question of the effect or otherwise of voluntary abstentions of permanent members is not a question of the rules of procedure which the Security Council is expressly authorized to adopt under Article 30, the voting arrangements are basically internal affairs of the Security Council. When the presiding officer has announced that a certain resolution has been adopted, and no objection to or appeal from his ruling is made, then the decision that the resolution has been validly adopted is, as it were, *res judicata*.

As I am speaking on behalf of the Secretary-General, it is incumbent upon me to draw the Court's attention to the extraordinary consequences which a reversal of the established customary law, on the effect of voluntary abstentions of permanant members in the vote on non-procedural matters, would have for the Organization and for the international community as a whole. In the Annex to the document entitled "Review of the Proceedings", a long list of resolutions of the Security Council is given in the vote on the whole, or part of which, one or more permanent members abstained, and no fewer than 21 States are listed whose admission to the Organization was effected by the General Assembly upon recommendations of the Security Council made with voluntary abstentions by permanent members.

Many of the resolutions just referred to are of considerable continuing and contemporary importance. To give examples, I would point out that the decisions of the Security Council on the peace-keeping arrangements on the Cyprus question were adopted with the abstention of a permanent member. Likewise, the basic resolutions concerning the situation in Southern Rhodesia; the sanctions applied by the Security Council in regard to that Territory, and the measures to safeguard non-nuclear-weapon States, parties to the Treaty on the Non-Proliferation of Nuclear Weapons, are also embodied in resolutions of the Security Council on which one or more permanent members voluntarily abstained.

In conclusion of this point, I need hardly say that a reversal of the established customary law might well, in effect, cripple the possibilities for effective action in the Security Council in the future.

(c) *The Question of the Applicability of Article 32 of the Charter*

The next issue which has been raised in the present connection is the question of the applicability of Article 32 of the Charter. It has been claimed that the Security Council violated the provisions of this Article by not inviting South Africa to participate, without vote, in the proceedings which led to the adoption of Security Council resolutions 264, 269, 276 and 283 of 1969 and 1970 respectively.

There is no disagreement on the mandatory character of Article 32: that is, the Security Council has the obligation to invite a State which is a party to a dispute to participate. Not only is this clearly indicated by the wording of the Article itself, ". . . shall be invited", but also this principle has been consistently upheld in the practice of the Security Council and in constitutional discussions in the Council concerning the interpretation of Article 32.

It must be noted, however, that the obligation of the Security Council to extend an invitation is inseparable from the consideration that the matter under discussion is a dispute. The Security Council has an obligation to issue an invitation to a State Member of the United Nations or to a non-member only in cases where it considers that the matter before it is a dispute. Prior to such determination, or in circumstances where the point has not been raised at all, the Council is under no obligation to initiate a proposal for participation.

In fact, the Council does not usually take the initiative to propose participation to States Members. The practice shows that the Council decides upon invitations when it has received a request to that effect, directly from the State concerned, or when participation is proposed by a member of the Security Council. Even those States which have themselves brought a matter for the consideration of the Council have generally requested to be allowed to participate in the discussion of the Council. Except for rare instances, the invitations to participate in the debate on the substance of the matter have been granted, upon request, under Article 31 of the Charter or under Rule 37 of the provisional rules of procedure of the Council.

In the case of Namibia, the Security Council not only did not make the determination that the matter under discussion was a dispute but, on the contrary, adopted the provisional agenda entitled: "Situation in Namibia." Furthermore, the question of Namibia has always been referred to as a "situation" by member States who brought it before the Security Council. The characterization of the question brought to the attention of the Security Council—the consideration of which led to the adoption by the Council of the resolutions rejected by South Africa—appear in the communications addressed to the Security Council and in the requests for meetings. In no such communications and requests, nor during the debates, has the question of Namibia been referred to as a "dispute". It has always been referred to as a "situation".

The Charter and the well-established relevant jurisprudence clearly distinguish between "disputes" on the one hand, and "situations" on the other. "Disputes" are referred to in Article 33, in the first phrase of Article 34, in the first phrase of Article 35, in the first phrase of Article 36, and in Articles 37 and 38.

"Situations" are referred to in the second phrase of Article 34, in the second phrase of Article 35, and in the second phrase of Article 36. The practice of the Security Council in regard to the question of Namibia, to which I have already referred, indicates a consistent course of action of dealing with the matter as a "situation". Article 32 of the Charter was therefore not applicable.

South Africa could have made use of the provision of Article 31 of the Charter and Rule 37 of the provisional rules of procedure of the Security Council, and requested, in line with the general and consistent practice of the Security Council and of member States, to be invited to participate without vote in the discussion of the question which was before the Council. There is no doubt that in that case the Security Council, if it had considered that the interests of South Africa were specially affected, would have agreed to South Africa's participation. However, South Africa did not avail herself of the facilities which Article 31 and Rule 37 offer. Perhaps even more significantly, South Africa never demanded, at any relevant time, that it be invited under Article 32 of the Charter to participate in the relevant discussions.

It is of course a matter of record that the Court, in its Judgment of 21 December 1962 in the *South West Africa* cases, *First Phase*, rejected the third preliminary objection presented by South Africa. This objection was to the effect that the conflict or disagreement alleged by the Governments of Ethiopia

and Liberia to exist between them and the Government of the Republic of South Africa was, by reason of its nature and content, not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa. The Court held "that the present dispute is a dispute as envisaged in Article 7 of the Mandate and that the third preliminary objection must be dismissed" (*I.C.J. Reports 1962*, p. 319 at p. 344). From the fact that the Court held that there was a dispute before it between Ethiopia and Liberia on the one hand and South Africa on the other, it by no means follows that what was before the Security Council in 1968, 1969 and 1970 was also a dispute between the applicant States of the *South West Africa* cases and South Africa, or between other States and South Africa. Nor would it follow that because there may be existing bases for disputes between South Africa and other States in respect of Namibia, that what was before the Security Council in the years just mentioned was one such dispute.

In 1968, 1969 and 1970 the Security Council was seized of a subject-matter of an entirely different nature. It was called upon to act, and did act, on the basis of the circumstances which had been created by the General Assembly's declaration of the termination of the Mandate, by the concurrence of the Security Council in this termination, and by the further fact that South Africa had not complied with the various Security Council decisions. This was a question fundamentally different from that which had been before the Court in the contentious *South West Africa* cases. Article 32 of the Charter was therefore not applicable and, until the present case, South Africa has not itself argued that it was so applicable.

(d) *The Applicability of the Proviso to Article 27, Paragraph 3, of the Charter*

I come now to the second point raised in connection with the present section of this oral statement. This relates to the question of the applicability of the proviso in Article 27, paragraph 3, of the Charter concerning compulsory abstentions of parties to a dispute in taking decisions under Chapter VI of the Charter. It has been claimed that certain governments members of the Security Council in 1969 and 1970 ought to have abstained from voting on the resolutions concerning Namibia which were adopted in these years, because they were parties to a dispute before the Security Council. I hope that I have just shown that what the Security Council was seized of in 1968, 1969 and 1970 was not a "dispute" within the meaning of Article 27, paragraph 3, and other relevant articles of the Charter, but was a "situation". It consequently follows that the proviso of Article 27, paragraph 3, did not apply in these instances.

The PRESIDENT: Mr. Stavropoulos, perhaps this may be a convenient time for the Court to adjourn for 20 minutes, after which you will resume your submission to the Court. May I draw your attention to the fact that part of the earlier submission that you have made to the Court this afternoon was concerned with matters on which the Court has already handed down its decision. Three matters have already been decided, two of which have been adverted to in that part. Perhaps with regard to one of them it might have been thought that part of your statement referred to matters that were not specifically dealt with in the decision of the Court, but with regard to the rest, I would draw your attention to the fact that the Court having disposed of those matters, that part of the submission was not entirely necessary.

The Court adjourned from 4.15 p.m. to 4.40 p.m.

IV. The Scope of the Powers of the Security Council, particularly under Article 24 of the United Nations Charter

I would like to take up now, Mr. President, the fourth principal topic forming part of this oral statement, regarding the scope of the powers of the Security Council, particularly under Article 24 of the United Nations Charter.

It appears to be the South African contention that the legality of any action taken by the United Nations is dependent on whether there exists in the text of the United Nations Charter a specific and express phrase or article providing specific and express authority for such action. Thus, under the restrictive and textual approach adopted in the South African written statement, it is apparently suggested that in the absence of a specific and express provision in the United Nations Charter envisaging each of the different actions which have been taken by the United Nations in respect of Namibia, such actions must be presumed to have been illegal and without effect.

Not only is this approach to the interpretation and application of the United Nations Charter, as set out in the South African written statement, legally unfounded, but it is also incompatible with the manner in which member States have in fact interpreted and applied the United Nations Charter during the past 25 years.

The United Nations Charter is the basic constitutional instrument of the United Nations, and like other constitutions, it does not set out specific and detailed provisions dealing with each of the many contingencies which arise.

In the second place, the United Nations Charter, like other similar instruments, is subject to continuing interpretation, which has been provided for the most part by the joint and collective action of member States acting through the principal organs of the United Nations. Thus, while the United Nations is naturally bound at all times by the Charter, certain modalities for implementing the provisions of the latter which are consistent therewith may legally be resorted to even though they may not be set out textually in the Charter itself. This Court in its Advisory Opinion concerning *Certain Expenses of the United Nations*, has said that—

> ". . . when the Organization takes action which warrants the assertion that it was 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. 150 at p. 168).

Apart from the considerations just mentioned, I believe that it can be convincingly demonstrated that the powers of the Security Council, particularly under Article 24 of the Charter, provide a sound legal basis for the actions it has taken regarding Namibia. In passing I should note that the Security Council rarely identifies expressly the chapter or articles of the Charter under which it is proceeding. The basis of its action, however, derives from the powers given in Chapters VI and VII, in Article 24 and in the Charter as a whole.

Paragraphs 1 and 2 of Article 24 of the Charter read as follows:

> "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.
>
> 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."

Very early in the history of the United Nations, the Security Council had to address itself to the interpretation of these provisions. In particular, it had to answer the question whether the listing in paragraph 2 of Article 24 of Chapters VI, VII, VIII and XII of the Charter amounted to a restriction on the Security Council's responsibility for the maintenance of international peace and security. In other words, is the right of action conferred upon the Council by the Charter restricted to circumstances and modalities set forth in Chapters VI, VII, VIII and XII? As I shall show presently, the answer, based on the *text, the object and purpose of the Charter and on its legislative history has*—apart from occasional and isolated dissents—consistently been that the powers of the Security Council are not limited.

In January 1947, the Security Council considered whether it had authority under the Charter to assume certain responsibilities relating to the Free Territory of Trieste. The establishment of this Territory was provided in the draft of the Peace Treaty with Italy. The responsibilities, which the Council of Foreign Ministers had requested the Security Council to assume, related particularly to ensuring the independence and integrity of the Territory of Trieste. Certain members of the Security Council, namely Australia and Syria, doubted that the Council had the constitutional authority to undertake these responsibilities, as they did not fall within the scope of the powers set forth in Chapters VI, VII, VIII and XII of the Charter, that is, the chapters listed in the second paragraph of Article 24.

The representative of Australia contended that it was only in the particular circumstances referred to in the chapters just mentioned that the Security Council acquired and could acquire jurisdiction. Before the Council may act there must, the representative stated, be a dispute or a situation which might lead to international friction or give rise to a dispute or a threat to the peace, or a breach of the peace. The representative of Syria questioned the legality of the assumption by the Council of the responsibilities deriving from the Peace Treaty with Italy. He failed to find a provision in the Charter giving such authority, with the possible exception of Chapter XII concerning strategic areas which are put under the trusteeship system.

In answer to these objections, attention was drawn by other representatives either to implicit powers or to the spirit of the Charter. In this connection, explicit reference was made to Article 24. It is appropriate to quote at this juncture extracts from the statements which were made on the question by the representatives of the five permanent members of the Security Council in rebuttal of the objections made against the Council's authority.

The representative of the United Kingdom deprecated—

> "... any kind of precedent which in future would debar the Council from accepting any responsibilities which were not specifically laid upon it in the Charter, because I think very difficult questions may often arise, in which it really will be necessary to turn to the Council for assistance" (*Security Council Official Records* (1947), 89th meeting, p. 9).

The representative of China contended:

> "... that the Charter confers sufficiently broad powers on the Security Council for undertaking such a responsibility, and that it is only through the Security Council undertaking this responsibility that this solution could be made workable" (*ibid.*, p. 17).

The representative of France, having recourse to the phraseology of Article 24, said:

> "In my opinion, the text of the Charter confers upon the Security Council a very general mission: that of maintaining peace. Moreover, we are not faced by an instance where the provisions of the Charter should be interpreted in a restricted sense because they clash with another principle, such as, for example, the sovereignty of a State. Indeed, world opinion would certainly not understand it, if the Security Council were to give the impression of evading a responsibility so closely related to the maintenance of international peace and security, as it is precisely the main task and responsibility of the Security Council." (*Ibid.*, p. 16.)

The representative of the USSR invoked Article 24 explicitly. He said:

> "As regards the powers and rights of the Security Council, I consider it to be obvious that the right and power of the Security Council to assume responsibility for the fulfilment of the tasks specified in the document submitted by the Council of Foreign Ministers are provided for by several of the terms of the United Nations Charter, in particular by Article 24 of the Charter." (*Ibid.*, p. 9.)

The representative of the United States expressed the following views:

> "The Council of the United Nations is charged, as its highest responsibility by the Charter, with the duty of watching over and maintaining international peace and security. Any spot on the surface of the earth where, for whatever reason, conflicts may break out and where men may be at each other's throats, is a spot of legitimate concern to the Security Council.
>
> . . . . . .
>
> The Security Council should not in my view, be afraid of leaping to take such a responsibility. It is in the fulfilment of such a responsibility that the United Nations justifies its existence." (*Ibid.*, p. 11.)

At the 91st meeting of the Security Council, a statement by the Secretary-General relating to the authority of the Security Council to accept the responsibilities in question was presented to the Council. Regarding the text and legislative history of Article 24, the Secretary-General observed:

> "The words, 'primary responsibility for the maintenance of international peace and security', coupled with the phrase, 'acts on their behalf' constitute a grant of power sufficiently wide to enable the Security Council to approve the documents in question and to assume the responsibilities arising therefrom.
>
> Furthermore, the records of the San Francisco Conference demonstrate 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. In particular, the Secretary-General wishes to invite attention to the discussion at the fourteenth meeting of Committee III/1 at San Francisco, wherein it was clearly recognized by all the representatives that the Security Council was not restricted to the specific powers set forth in Chapters VI, VII, VIII and XII. (I have in mind, document 597, Committee III/1/30.) It will be noted that this discussion concerned a proposed amendment to limit the obligation of Members to accept decisions of the Council solely to those decisions made under the specific powers. In the discussion, all

the delegations which spoke, including both proponents and opponents of this amendment, recognized that the authority of the Council was not restricted to such specific powers. It was recognized in this discussion that the responsibility to maintain peace and security carried with it a power to discharge this responsibility. This power, it was noted, was not unlimited, but subject to the purposes and principles of the United Nations.

It is apparent that this discussion reflects a basic conception of the Charter, namely, that 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." (*Security Council Official Records* (1947), 91st meeting, pp. 44-45.)

In concluding the discussion, the representative of France stated, *inter alia*:

"I pointed out that Article 24 of the Charter, which is drafted in very general terms, did not, in the case now before us, come up against any principle which might justify a narrow or limited interpretation of its terms.

The case is not one where the principle of the sovereignty of States, the rule according to which there must be no interference in a country's domestic affairs, is at stake . . .

. . . . . .

If the question has been brought before us under Chapter VI and, particularly, Chapter VII, we should be invested with extremely wide powers extending even to, these are the very words of Article 42, demonstrations and the use of force.

It would be rather extraordinary, if in a case really liable to endanger, if not peace itself, at least the maintenance of peace, the Security Council, which, in that event, would have such extensive powers of intervention, should not even be able to take administrative measures, far less serious than the use of force, in order to ensure the maintenance of peace.

As I said the other day, we are dealing with a case where the Security Council must take a full view of its responsibilities. It is responsible for the maintenance of peace. It is my opinion that we should not shrink from the task, however delicate, which the drafters of the peace treaty have asked us to assume." (*Ibid.*, pp. 58-59.)

The Security Council adopted by ten votes to none, with one abstention, a resolution recording its approval of the annexes of the draft Peace Treaty with Italy relating to the creation and government of the Free Territory of Trieste and its acceptance of the responsibilities devolving upon it under the same. Thus 10 out of 11 members of the Security Council, including all 5 of its permanent members, rejected the restrictive interpretation of Article 24 which had originally been put forward by 2 members.

It may be appropriate to inject here a comment which refers to the intervention of the representative of France at the 91st meeting of the Security Council just referred to. He said that the case of Trieste was not one where the principle of the sovereignty of States, the rule according to which there must be no interference in a country's domestic affairs, was at stake. The same can, with equal justification, be said of the question of Namibia where there does not exist and never has existed any State sovereignty which would stand between the organs of the international community—in particular at present

the Security Council and the General Assembly of the United Nations—and the territory and people of Namibia.

The incident to which I now intend to refer also throws some light on the interpretation of Article 24 of the Charter, a circumstance which justifies the reference to it, although as to substance it is not in any way connected with the type of question now before the Court. In August 1951, the Security Council was dealing with a question concerning the passage of ships through the Suez Canal. In contesting the authority of the Council to adopt a resolution on this subject, the representative of Egypt, speaking at the 553rd meeting of the Security Council, said, *inter alia*:

> "Although we do not want to pretend that the functions and powers of the Security Council are limited to those specific powers mentioned in paragraph 2 of Article 24 of the Charter, yet we affirm that those powers and duties are limited and should be strictly regulated and governed by the fundamental principles and purposes laid down in Chapter I of the Charter. Paragraph 2 of Article 24, on the 'functions and powers' of the Security Council reminds us that 'In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. Those Purposes and Principles of the United Nations are laid down in Chapter I of the Charter; Article 1, paragraph 1, demands that the adjustment or settlement of international disputes should be 'in conformity with the principles of justice and international law' . . ." (*Security Council Official Records* (1951), 553rd meeting, pp. 22-25.)

Thus, a government which was opposed to the adoption of a draft resolution felt it appropriate to admit that the functions and powers of the Security Council are not limited to those specific powers mentioned in paragraph 2 of Article 24, that is the circumstances coming under Chapters VI, VII, VIII and XII of the Charter.

While other instances might also be cited, I believe the legal opinions and proceedings just summarized are sufficient to illustrate the powers of the Security Council in the discharge of its primary responsibility for the maintenance of international peace and security. It also permits conclusions to be drawn regarding the position in which the Security Council found itself in connection with the question of Namibia. Repeated and serious representations were made to the Security Council both by the General Assembly and by a large number of member States. Regarding the details of these representations, I would invite the attention of the Court to the detailed survey contained in the "Review of the Proceedings". In particular, the General Assembly, in a number of resolutions, requested the Security Council to take effective steps to enable the United Nations to fulfil the responsibilities which it had assumed with respect to Namibia.

From the documents which were before the Council at its meetings in 1968, 1969 and 1970, it appeared that the General Assembly had decided that the South African Mandate for Namibia was terminated and that South Africa had been called upon to remove its administration from Namibia. It is clear that in the circumstances the Security Council was under the obligation to act and to act promptly and effectively as the Charter provides in Article 24.

The action which the Security Council took finds full constitutional justification in Chapters VI and VII and also in Chapter V, namely in Article 24 as interpreted in the light of its text, of its object and purpose, its context in the Charter as a whole, corroborated by its legislative history.

I submit therefore that there can be no doubt that in adopting the relevant

resolutions, the Security Council acted within its jurisdiction and with the effect that South Africa and the other Members of the United Nations are under the legal obligation to accept and carry out the decisions contained in these resolutions in accordance with Article 25 of the Charter.

In this connection, the Government of France in its written statement has observed that the relevant Security Council resolutions are recommendations rather than legally binding decisions under Article 25 of the Charter. The Government of France has drawn attention to the fact that the language used by the Security Council in its resolutions concerning Namibia differs from the clear language which the Council has used in its decisions concerning Southern Rhodesia, particularly that in regard to Southern Rhodesia the language of Chapter VII of the Charter has been used, which is not the case in the decisions relating to Namibia. In reply to this argument it can be pointed out that legally and factually the cases of Southern Rhodesia and of Namibia are fundamentally different. Southern Rhodesia is in law a dependency of the United Kingdom and therefore under the sovereignty of the United Kingdom. To take action in regard to a territory which is under the sovereignty of a State Member of the United Nations without the consent of that State, the determination of the existence of a threat to the peace, breach of the peace or act of aggression was necessary. Namibia, however, is not and has never been under the sovereignty of South Africa. As a consequence United Nations organs have powers in regard to Namibia which they do not have in regard to independent States or non-self-governing territories which are under the sovereignty of an independent State.

The French Government points out that with one exception, namely operative paragraph 3 of Security Council resolution 269 (1969), the Security Council has in regard to Namibia used the verb "to decide" only in relation to its own procedure and not on substantive matters. However, while the Security Council in the resolutions on Namibia did not use the term "decides", it used a series of equivalent terms. That the terms are equivalent is made clear by the fact that in operative paragraph 3 of resolution 276 (1970) the Council declared that the defiant attitude of South Africa towards the Council *decisions* undermines the authority of the United Nations, and in the fourth preambular paragraph of resolution 283 (1970) it noted with great concern the continued flagrant refusal of South Africa to comply with the *decisions* of the Security Council demanding the immediate withdrawal of South Africa from the Territory. This aspect of the matter was further elaborated in paragraphs 91 to 97 of the Secretary-General's written statement.

V. Questions concerning the Legal Basis of General Assembly Resolution 2145 (XXI) of 27 October 1966

The fifth main topic, Mr. President, on which I wish to present the views of the Secretary-General to the Court, is concerned with questions raised by governments regarding the legal basis of General Assembly resolution 2145 (XXI) of 27 October 1966. As it will be recalled, this was the resolution by which the General Assembly decided, *inter alia*, that the Mandate for South West Africa was terminated and the Territory was declared to be under the direct responsibility of the United Nations. The validity and effect of the resolution has been challenged in two of the written statements presented to the Court.

While the grounds advanced for such challenge, and the replies thereto, are not easily susceptible of clear-cut classification, I intend to deal with them, in

general terms, under the following headings: first, the bases for General Assembly action; second, the competence of the General Assembly; third, confirmation of General Assembly action by the Security Council; and fourth, the basic principle of law applicable to this case. Finally, I shall treat separately certain observations made by the Government of France in its written statement to the Court.

(a) *Bases for General Assembly Action*

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. To enumerate only some of these roles, the General Assembly acted:

in its capacity as the supervisory authority for the Mandate for South West Africa;

as a party in the contractual relationship arising from the Mandate;

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;

as the organ primarily concerned with Non-Self-Governing and Trust Territories;

as the organ authorized, by Article 13 of the Charter, to make recommendations for the purpose of assisting in the realization of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion;

as the organ of the United Nations which is authorized, by Article 10 of the Charter, to make recommendations to the Members of the United Nations, or to the Security Council, or to both, on any questions or any matters within the scope of the Charter; and as the organ which may make recommendations, under Article 11 of the Charter, with regard to any question relating to the maintenance of international peace and security to the State or States concerned, or to the Security Council, or to both.

(b) *Competence of the General Assembly*

To turn now to the question of the competence of the General Assembly, I would first observe that, to the extent that resolution 2145 (XXI) was adopted by the General Assembly as the supervisory authority and as a party in the 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, who voted for resolution 2145 (XXI), and the three member Governments that 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 General Assembly is also the principal organ of the United Nations which has responsibilities towards the people and Territory of Namibia. As stated in paragraph 41 of the Secretary-General's written statement, in the absence of any intervening sovereign jurisdiction between the General Assembly

and the people and Territory of Namibia, no governmental authority exists other than the General Assembly, and the Security Council, having the competence to interpret and apply to Namibia the international obligations which are owing to the latter under the Charter of the United Nations and the former mandates system.

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).

In this connection, it may be observed that 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. To cite but a few examples, the resolutions have included those appointing a United Nations Mediator (General Assembly resolution 186 (S-2) of 14 May 1948), and United Nations Plebiscite Commissioners (in Togoland under United Kingdom administration, see General Assembly resolution 944 (X), of 15 December 1955; in Cameroons under United Kingdom administration, see General Assembly resolution 1350 (XIII), of 13 March 1959, *et seq.*; in Western Samoa, see General Assembly resolution 1569 (XV), of 18 December 1960); those establishing United Nations Commissions (in Libya, see General Assembly resolution 289 (IV) of 21 November 1949; in Eritrea, see General Assembly resolution 289 (IV), of 21 November 1949 and 390 (V) of 2 December 1950) and Tribunals (in Libya, see General Assembly resolution 388 (V) of 15 December 1950; in Eritrea, see General Assembly resolution 530 (VI) of 29 January 1952, Article XI); for Libya and Eritrea and a Commission and Commissioners for Ruanda Urundi (General Assembly resolutions 1579 (XV), of 20 December 1960 and 1605 (XV) of 21 April 1961); and those setting up executive organs such as the United Nations Relief and Works Agency (General Assembly resolution 302 (IV) of 8 December 1949); the United Nations Korean Reconstruction Agency (General Assembly resolution 410 (V) of 1 December 1950); the United Nations High Commissioner for Refugees (General Assembly resolution 428 (V) of 14 December 1950); the United Nations Emergency International Force (General Assembly resolution 1000 (ES-I) of 5 November 1956, see also General Assembly resolutions 998 (ES-I), 1001 (ES-I), 1121 (XI), 1122 (XI) and 1126 (XI)); and the United Nations operation for the clearance of the Suez Canal (General Assembly resolution 1121 (XI) of 24 November 1956). In addition, the General Assembly authorized the transfer of the administration of the territory of West New Guinea/West Irian to the United Nations Temporary Executive Authority, to be established by and under the jurisdiction of the Secretary-General, and with full authority to administer the Territory (General Assembly resolution 1752 (XVII) of 21 September 1962).

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.

If, with reference to some of the above exemples, it should be pointed out that these initiatives were taken with the consent of the States in whose sovereign jurisdiction the intended action was to be taken, I would reply by emphasizing that there can be no absence of such consent in the case of Namibia. For in the first place, Namibia has never been within the sovereign jurisdiction of South Africa, and moreover, the United Nations did not decide upon any unilateral action in Namibia until South Africa's former right to be present in the Territory had been legally forfeited, and the Mandate had been terminated.

This is not the first instance where the General Assembly has taken action to declare the termination of a mandate. I refer, in this connection, to the Palestine Mandate.

In spite of all the fundamental legal and political differences between the Mandate for Palestine—including the fact that it was referred to the General Assembly by the Mandatory—and the Mandate for South West Africa, the proceedings of the General Assembly at its first special session, its second regular session and its second special session, in 1947 and 1948, constitute an authoritative precedent for the proposition that jurisdiction to declare a mandate terminated vests in the General Assembly. However controversial the Palestine question and the resolution eventually adopted (General Assembly resolution 181 A (II)), there was unanimity among the Members of the General Assembly that it was within the Assembly's powers not only to decide that the Mandate for Palestine should be terminated but also to recommend a solution which was not acceptable to the Mandatory Power. (Proceedings of the first special session, the second regular session, second special session, report of UNSCOP, A/364; General Assembly resolution 181 A (II).)

It is of interest to note that the Union of South Africa was among those Members of the United Nations which voted, on 29 November 1947, for the plan of partition of Palestine with economic union (document A/PV. 128), and that at the second special session of the General Assembly the representative of South Africa recalled that his delegation had supported the majority report of the United Nations Commission on Palestine and had voted in the Assembly for the plan. The representative of South Africa added that his Government adhered to the attitude that partition with economic union remained the only practical solution. He expressed his regret that it had proved impossible to implement that plan peacefully. (Statement in the 126th meeting of the First Committee at the second special session, 26 April 1948. *Official Records of the Second Special Session of the General Assembly*, Vol. II, p. 92.)

(c) *Confirmation of General Assembly Action by the Security Council*

I turn now to the question of confirmation of General Assembly action by the Security Council. In this context, I should like to recall that, under Article 11, paragraph 2, of the Charter, the General Assembly may refer questions on which action is necessary to the Security Council. The Assembly did so in the case of the termination of the Palestine Mandate to which I have just referred. In adopting the plan of partition with economic union, in resolution 181 A (II) of 29 November 1947, the General Assembly was aware of the fact that it could not by itself implement the plan contained in the recommendation which it was adopting. It therefore addressed itself to the Security Council, and asked for the Council's assistance. It requested that the Security Council take the necessary measures, as provided for in the plan for its implementation. The General

Assembly further asked the Security Council to consider whether the situation in Palestine constituted a threat to the peace, and to determine as a threat to the peace, breach of the peace or act of aggression any attempt to alter by force the settlement envisaged by the General Assembly's resolution. For present purposes it is not relevant that, owing to disagreement between permanent members of the Security Council, the Council did not in fact accede to the requests addressed to it by the General Assembly in regard to Palestine.

When the General Assembly, in 1966, adopted the resolution declaring that the Mandate for Namibia was terminated, it proceeded in a way similar to that which the Assembly had adopted in 1947, in regard to the termination of the Mandate for Palestine. By resolutions 2325 (XXII) of 1967; 2372 (XXII) of 1968; 2403 (XXIII) of 1968 and 2498 (XXIV) of 1969, the Assembly also called for the support of the Security Council as its "secular arm". In this instance, the Security Council not only gave its support but also endorsed the Assembly's decisions. For example, 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 may be recalled that of the two States, South Africa and Portugal, casting negative votes on resolution 2145 (XXI), the latter advanced as one of its arguments that the resolution went beyond the competence of the General Assembly, that under the Charter, the Security Council is the decision-making organ. Whatever legal questions one may have had concerning the right of the General Assembly to act alone, or the right of the Security Council to act alone—and I must emphasize that in the view of the Secretary-General there can be no doubts on this point—it cannot be denied that the combined action of both principal organs with respect to Namibia is effective beyond any constitutional or legal challenge.

(d) *Basic Principle of Law Applicable to the Case*

I now come to what I consider to be the most fundamental point underlying the legal basis for General Assembly resolution 2145 (XXI), namely that, as 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 cannot be justified.

In the earlier advisory proceedings, in the contentious proceedings and again in the current proceedings, a considerable amount of argument has been devoted to the legal character of the relationship between South Africa and Namibia and between South Africa and the international community, the latter represented by the League of Nations and subsequently by the United Nations. The question has been argued whether the relationship was contractual or *in rem*, or both, and which principles of interpretation are to be applied in order to arrive at a correct legal evaluation of the situation as it existed before 1945, between 1946, and 1966 and after 1966. It is submitted that the attempts at legal classification which have been made over decades, with so much ingenuity, are perhaps not as important for the correct answering of the question which is now before the Court as would appear at first sight.

Whether the relationship between South Africa and the international community is contractual, or the result of the establishment of an objective situation, or both, or whether it is a relationship *sui generis* which has no parallel in other fields of international law or in other geographical locations and historical situations, it is nevertheless governed by certain fundamental principles which apply in every legal system, including international law. One of those principles is the proposition that in any bilateral relationship or, for that matter, in any multilateral relationship, a party which disowns its own obligations flowing from the relationship, or a party which does not fulfil the obligations incumbent upon it and arising from the relationship, cannot be recognized as retaining the rights which it claims to derive from the relationship. This is a principle which is not restricted to the law of treaties. It would be applicable even if, contrary to the findings of the Court in its 1962 Judgment —which is *res judicata* vis-à-vis South Africa—one would assert that the Mandate was not, in July 1966, a treaty or a convention in force.

In connection with this proposition, that is the right of the wronged party to abrogate unilaterally the relationship, Lord McNair has said: ". . . the more elementary a proposition is, the more difficult it often is to cite judicial authority for it" (*Law of Treaties*, 1961, p. 554). However, there are also other authoritative pronouncements supporting this proposition. Thus, Judge Anzilotti said in his dissenting opinion in the case concerning *Diversion of Water from the River Meuse* (*Series A/B, No. 70, 1937*, p. 4 at p. 50): "I am convinced that the principle underlying this submission *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized, that it must be recognized in international relations also. In any case it is one of those 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute." More recently, Sir Humphrey Waldock, as Special Rapporteur on the Law of Treaties of the International Law Commission, expressed the idea in the following terms: "Nor is it easy to see how the rule could be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect . . ." (*1963 Yearbook of the International Law Commission*, Vol. II, p. 73, 2nd report on the Law of Treaties, document A/CN. 4/156 and Add. 1-3).

The principle applies, of course, not only in the relationships between States, but also when one of the participants is not a State but an international organization, in whatever capacity it may be involved.

To illustrate the generality of the principle *non adimplenti non est adimplendum*, reference can be made to the separate opinion of Judge *ad hoc* van Wyk who in 1966 implied (*I.C.J. Reports 1966*, p. 6 at p. 117, footnote No. 1, and at p. 138, footnote No. 1), without deciding the question, that a State Member of the United Nations might be entitled to refuse to comply with the reporting provisions of Chapter XI of the Charter, when United Nations organs disregard the provisions of the Charter in a way which amounts to their breach or repudiation by the United Nations. Judge *ad hoc* van Wyk was prepared to entertain the argument that the breach or repudiation of a provision by a United Nations organ entitles a member State affected thereby to repudiate even provisions of the Charter of the United Nations.

It is hardly necessary to corroborate Judge Anzilotti's statement that *non adimplenti non est adimplendum* is a general principle of law of the members of the international community. It suffices to mention that the French Code Civil, in Article 1184, makes the violation of the contract by one of the parties an implied condition subsequent, that is, a *condition résolutoire* of every synallag-

matic contract. The wronged party has the right either to enforce the execution of the contract or to demand its resolution and to claim damages.

In the common law, when one party to a contract totally or substantially fails to perform what he has promised, or renounces his liabilities under it, the other party may claim to be released from his obligations. In a field of the law of common law countries which is most comparable to the legal relationship created by the mandates under Article 22 of the Covenant of the League of Nations, it is well established that a trustee can be removed for breach of trust, and a guardian for neglect of duties or violation of his obligations.

It has been claimed that the parties instrumental in the establishment of the South African Mandate for South West Africa did not contemplate the contingency that the League of Nations might at some stage cease to exist. The assumption that the dissolution of the League of Nations was not considered a possibility in 1919 or 1920 may or may not be correct. Certainly not correct, however, is the conclusion drawn from this assumed fact that, when an event which was not foreseen by the parties occurs, one party might retain all the assets which it has acquired by the transaction, while at the same time it would be free from the obligations which represented its consideration for the rights deriving from the transaction.

No canon of interpretation which leads to so absurd and inequitable a conclusion can be correct. It is not necessary to have recourse to what has been called the "necessity argument" to avoid arriving at so inequitable a result. If, as has been claimed over the decades, the Mandate lapsed with the dissolution of the League of Nations, and if reporting to the Council of the League of Nations had become impossible and reporting to the United Nations was declared not acceptable to South Africa, then a logical and equitable solution would have been to find that the Mandate had terminated and that South Africa had lost its right to administer and to remain in the Territory.

Instead of finding as early as 1950 that, as a consequence of its own claim that the Mandate had lapsed, South Africa had lost any right to administer South West Africa, this Court in that year found a solution involving a less radical change in the *status quo*. This solution had the effect of saving South Africa's right to be in the Territory, subject to the obligations that it would continue to report on its conduct of the Mandate to an international authority to the latter's satisfaction.

The Advisory Opinion of 1950 has been criticized as being "judicial legislation". If the Advisory Opinion amounted to "judicial legislation", then it was judicial legislation in favour of South Africa, the only legal alternative to the Court's findings having been to declare what the General Assembly declared 16 years later, namely that the Mandate was terminated and that South Africa had lost any right to remain in South West Africa and to administer the Territory.

One point that has been emphasized in the South African written statement is the assertion that "certain new facts" have been discovered which, had they been known to the Court in 1950, would have led the Court to different conclusions from those actually pronounced in the Advisory Opinion of that year. In its 1962 Judgment, the Court rejected this contention by South Africa, and stated that the unanimous ruling of the Court in 1950 continued to reflect the Court's opinion. The Court added that nothing had since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950 (*I.C.J. Reports 1962*, p. 319 at p. 334).

In his dissenting opinion in 1966, Judge Jessup dealt in considerable detail

with these alleged "new facts" and concluded that it was apparent that there was nothing in this argument concerning "new facts" to induce the Court to alter decisions about the international status of South West Africa which it had reached after full argument and full deliberation (*I.C.J. Reports 1966*, p. 4 at pp. 339-351). I need only add that had these "new facts" been such as to lead the Court, as South Africa contends, to the conclusion that the Mandate did not survive the demise of the League the result, for the reasons I have just given, would have been the loss of any right on the part of South Africa to remain in the Territory.

(e) *Observations of France Regarding General Assembly Resolution 2145 (XXI)*

Finally, in this portion of the present statement, I would like to refer to some of the written observations submitted by the Government of France, regarding General Assembly resolution 2145 (XXI). The Government has observed that, in order to terminate South Africa's Mandate, the resolution based itself upon contravention by South Africa of the principles of the Mandate, the principles of the Charter, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Government agrees that the South African Government has systematically contravened the norms of the Universal Declaration of Human Rights, the principles of the Charter and the obligations imposed by the Mandate. The French Government doubts, however, whether the sanction to be visited on this proven breach can in fact be that selected by the General Assembly, namely the withdrawal of the Mandate.

This observation appears, however, to be based on a misconception of the nature of the United Nations action in this case. The decision that the Mandate was terminated and that South Africa should withdraw from the Territory was not taken for the purpose of imposing a punitive sanction *against* South Africa, but to safeguard and protect the rights of the people of Namibia—most importantly their right to independence at the earliest possible opportunity. The decision was not therefore a sanction but an exercise of rights on the bases which I have just elaborated.

Leaving aside this, in my opinion, erroneous view of the nature of the General Assembly decision, I should like to refer to the comment of the Government of France that the Universal Declaration of Human Rights does not of itself bind States and is not of the nature of treaty law. It is not necessary in this context to express an opinion on the consequences of the fact that the Universal Declaration of Human Rights is not technically speaking a treaty, or on the view that it is not of itself binding on States in general. Even if this should be so—and as representative of the Secretary-General I do not have to express an opinion on this question in the present context—it does not follow that the Universal Declaration of Human Rights, and also similar declarations, are legally irrelevant in regard to the evaluation, not of the action of a sovereign State in its own territory, but in regard to the administration of a territory by a mandatory that had undertaken to act on behalf of the international community in promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. It would seem that a mandatory which, according to a decision supported by the votes of 114 States Members of the United Nations, has failed to observe the provisions of the Universal Declaration in its administration of the Mandate, cannot be considered to have promoted to the utmost the material and moral well-being of the inhabitants.

With respect to the obligations under the Mandate, the Government of France has stated that the Covenant of the League of Nations did not confer on

the Council of the League the power to terminate a mandate for misconduct of the mandatory. I have earlier referred to "the general principle of law recognized by civilized nations", that he who does not comply with his obligations is not entitled to enforce the rights arising from the same transaction. This principle would, in the view of the Secretary-General, have applied to a situation arising during the life-time of the League involving material and persistent violations of the obligations of a mandatory power, as it applies equally now.

The French Government further denies that the General Assembly had the right to terminate the Mandate because of South Africa's breaches of the principles of the Charter. In this regard, the Government refers to Article 6 of the Charter which provides a sanction—namely expulsion from the Organization—for persistent violation of the principles of the Charter. But, as I have already stated, the decision of the General Assembly was never intended to be a punitive measure against South Africa, such as that mentioned in Article 6 of the Charter. The fact that the Charter provides for specific sanctions is in no way relevant to the General Assembly's decision. It may be noted, however, that the written statement of France expressly confirms the Government's agreement with the General Assembly's conclusion that South Africa has committed serious internationally wrongful acts. From this it legally follows that South Africa is responsible for these acts and one of its resulting obligations is to desist from continuing the wrongful act and, in the specific case, to remove its administration from Namibia.

VI. The Question Whether South Africa Has a Right to Remain in Namibia Independently of the Mandate

The question whether South Africa has a right to remain in Namibia independently of the Mandate is, Mr. President, the sixth topic on which the Secretary-General wishes me to express his views to the Court. It has been claimed by South Africa, in the various proceedings before this Court and in the General Assembly, as well as by Judge *ad hoc* van Wyk in his separate opinion in the second phase of the *South West Africa* cases, that the Mandate is not the basis for South Africa being in Namibia. In this respect, two principal contentions have been advanced: first, that South Africa is in South West Africa as a consequence of the conquest of the Territory during the First World War, and second, that South Africa by acquisitive prescription has acquired sovereignty over South West Africa. I shall deal separately with these two contentions.

(a) *Claim to Acquisition by Conquest*

The claim to acquisition by conquest has been answered in the dissenting opinion of Judge Jessup in 1966 (*I.C.J. Reports 1966*, p. 6 at pp. 418 and 419). I do not think that it is necessary to add to what Judge Jessup said, beyond summarizing his remarks. No *debellatio* of Germany by South Africa took place in World War I; South Africa did not conquer the whole of the territory of Germany; in the Peace Treaty of Versailles, Germany did not cede South West Africa to South Africa. Moreover, as mentioned in the Secretary-General's written statement (see para. 20), by assuming the responsibilities of the Mandatory, South Africa thereby accepted the premises on which the Mandate was founded and was thus precluded from claiming any territorial or sovereign rights, in respect of South West Africa, inconsistent with the Mandate or arising from events anteceding its creation.

(b) *Claim to Acquisition by Acquisitive Prescription*

I turn now to the second contention, the claim of South Africa to have acquired sovereignty over Namibia by acquisitive prescription, that is through continuous and undisturbed exercise of sovereignty over a long period of time. This claim is completely unfounded. The concept of acquisition of sovereignty by prescription is a concept of Roman law which has occasionally been received into international law. The Roman law of acquisition of the right of ownership by prescription—*usucapio*—requires long possession with *animus domini*, that is possession with the conviction that one possesses as the owner. In order to lead to the acquisition of ownership, the possession *animo domini* must have been legally acquired. There must be a *iusta causa possessionis*, a *iustus titulus* and bona fides. The requirement of good faith, in this context, not only means that the person concerned must have acted in good faith in general. It also means in this particular situation, as a condition for the *usucapio*, that the possessor must have bona fide believed throughout the possession that the thing was his. None of those requirements are complied with in the case of South Africa's relationship to Namibia. A possessor who holds a thing which was entrusted to him can under no circumstances claim acquisition of ownership by *usucapio*. South Africa was not in possession of Namibia as its owner, but as a Mandatory. She could not believe, and did not believe, that she was holding Namibia as its sovereign.

It is also obvious that, in the years since 1946, South Africa could not have acquired sovereignty over Namibia by acquisitive prescription. It is true that South Africa repeatedly made the claim that the Mandate had lapsed with the dissolution of the League of Nations. Apart from the fact that South Africa also occasionally recognized the continued existence of the Mandate, and promised that it would continue to administer the Territory in the spirit of the Mandate, it must be said that the unilateral declaration that the Mandate had lapsed could not have given to South Africa a *iustus titulus* to govern Namibia *animo domini*. Nor could it be said that, between 1946 and 1966, South Africa had the specifically qualified bona fides which is the condition for the acquisition of property by acquisitive prescription.

South Africa's claim that the Mandate has lapsed was never accepted by any international authority or by any other State. On the contrary, the record shows that South Africa's claim was consistently opposed in proceedings of political organs and before the International Court of Justice. These facts alone disprove any attempt at claiming bona fides within the specific meaning of the rules of *usucapio*. In the light of the Advisory Opinion of 1950, when the Court held that the Mandate had not lapsed and that South Africa's obligations under the Mandate continued, it would be manifestly absurd to claim that South Africa was in good faith, namely that she was bona fide believing that she was the sovereign of Namibia. In the light of what happened over so many years, both within and outside the United Nations and before the Court, it is impossible to claim that South Africa was in continuous and undisturbed exercise of sovereignty over Namibia.

VII. The Question of Material Breaches by South Africa of its Obligations regarding Namibia

With your permission, Mr. President, I would now like to turn briefly to the seventh topic forming part of this oral statement, namely the question of material breaches by South Africa of its obligations regarding Namibia.

As pointed out earlier in this statement, South Africa's claim to have promoted the material and moral well-being, and the social progress of the inhabitants of the Territory, is based solely upon a unilateral determination by South Africa as to what constitutes well-being and social progress, and, by way of example, is apparently not affected by a denial to the majority of the inhabitants of basic human rights and fundamental freedoms, such as equality before the law and economic, social, cultural, civil and political rights.

Such a claim by South Africa, however, could not provide any basis for judging compliance with the international obligations which are owing, unless it were itself based on a valid interpretation of those obligations within the meaning of the international relationship under which Namibia has been administered. Such a valid interpretation has been expressed in successive General Assembly resolutions, in conformity with the terms of the Mandate, the United Nations Charter and generally established principles of international law. It is therefore with reference to these criteria—which require, *inter alia*, nothing less than equal rights for all the inhabitants of Namibia, as well as full respect for the status and integrity of the Territory—that the legality of the acts of the South African administration must be evaluated.

This question has been investigated and considered repeatedly in various organs of the United Nations, particularly by the General Assembly and a series of its subsidiary bodies, and by the Security Council in the course of its consideration of the question of Namibia in 1968, 1969 and 1970. The findings of the two principal organs on this question are recorded in their resolutions and in the proceedings which led up to them. They have been examined by the Secretary-General, *inter alia*, in his written statement and in the document entitled "Review of the Proceedings".

In the General Assembly and in the Security Council there has been agreement on the basic questions of fact and also on most of the questions of law relevant to the administration of Namibia by South Africa and in regard to the consequences to be drawn from the findings. Thus, at the Twenty-first Session of the General Assembly, there was agreement among the 114 delegations which voted for General Assembly resolution 2145 (XXI) and the three delegations which abstained on that resolution on the reaffirmation of the Territory's international status; the fact that South Africa had failed to fulfil its obligations and had disavowed the Mandate; that the Mandate was terminated and that South Africa had no other right to administer the Territory.

In six resolutions adopted in 1968, 1969 and 1970, the Security Council also recognized, *inter alia*, that the Mandate had been terminated. The Council ruled that the continued presence of South Africa in Namibia was illegal, called upon South Africa to withdraw its administration from the Territory and strongly condemned South Africa for its refusal to do so. I do not believe that the Secretary-General has to add anything to this unanimity and, in certain respects, quasi-unanimity of the international community as expressed in the proceedings and the decisions of the General Assembly and of the Security Council, except perhaps to mention that essential facts concerning South Africa's violations of her international obligations in respect of Namibia are set out in published and undisputed texts of South African legislation and regulations which have had the effect, *inter alia*, of denying basic rights to a majority of the inhabitants of the Territory.

VIII. The Legal Consequences of the Continued Presence in Namibia of South Africa

Before presenting the concluding observations of the Secretary-General, Mr. President, I wish to refer in the briefest terms to what is, in fact, the actual question before the Court, namely the legal consequences of the continued presence of South Africa in Namibia. In this connection, I would recall the remarks made at the outset of this oral statement, when I invited the attention of the Court to Part III, paragraphs 106 to 109, and to Part IV of the Secretary-General's written statement, which deal with this question. The legal consequences involved have to be considered in relation first to South Africa and secondly to other States.

(a) *Legal Consequences for South Africa*

In paragraphs 106 to 109 of his written statement, the Secretary-General has pointed out that South Africa's continued presence in Namibia constitutes an internationally wrongful act. In spite of the termination of the Mandate and of the repeated calls upon its Government to remove its administration from the Territory, South Africa has continued its presence in Namibia. For this internationally wrongful act it bears international responsibility and one of the primary consequences which flows from this fact is South Africa's obligation to discontinue committing that internationally wrongful act and to remove its administration from the Territory. South Africa has violated and continues to violate its obligations under the Charter, provisions of international law, the obligations arising from its specific undertaking as a former Mandatory Power and its commitment to accept and to carry out, in accordance with the Charter, the decisions of the Security Council. The obligation of South Africa to remove its administration from the Territory is, however, not the only legal consequence of South Africa's continued presence in Namibia. South Africa has incurred, and as long as it remains in the Territory will continue to incur, international responsibility both under the United Nations Charter and also under the general rules of international law concerning State responsibility.

(b) *Legal Consequences for Other States*

While for South Africa the legal consequences of its continued presence flow from the fact that it is continuing to commit an internationally wrongful act for which it is responsible, the legal consequences for States other than South Africa consist in their obligation not to recognize this internationally wrongful act. They also consist in their obligation to co-operate with the United Nations in the action it has taken, and continues to take, in endeavouring to safeguard the rights, including the right of self-determination, of the people of Namibia as the inhabitants of a territory having international status. Among the legal consequences for States, other than South Africa, is their obligation not to recognize in any way South Africa as the territorial authority for the Territory and not to maintain, in so far as Namibia is concerned, diplomatic, consular or other relations with South Africa.

In conclusion on this point, the further and more extensive duties of States which flow from the illegal situation created by the South African presence, and the resulting measures decided upon by the Security Council, are examined in greater detail in paragraphs 110 to 148 of the Secretary-General's written statement. I shall not therefore dwell upon them in this statement.

Mr. President, I have now reached the stage of the concluding remarks which the Secretary-General wishes me to place before this highest of all international tribunals, the principal judicial organ of the United Nations. I shall not endeavour to summarize each and every point which I have made in the course of this statement, but will only indicate what appears to the Secretary-General to be the correct position on some of the main issues which have been raised. These remarks are not intended in any way to be formal submissions and are tendered only for the assistance and information of the Court.

First, the Secretary-General believes that there is no merit in the contentions which have been advanced against the Court rendering an advisory opinion in this case, and he is confident that the Court, in the exercise of its discretion, will proceed so to do.

Second, the Secretary-General is convinced that it is evident that the Territory presently called Namibia has never been under the sovereignty of South Africa and that in its relationship to South Africa it has always been *res aliena*. This is established, *inter alia*, by the international instruments which have been referred to in these present proceedings, as well as in the previous advisory and contentious proceedings before this Court.

Third, the Secretary-General is certain that the jurisprudence of this Court has already established beyond any shadow of doubt that the Mandate for South West Africa did not lapse upon the dissolution of the League of Nations, and continued to be binding on South Africa with the obligations thereby entailed towards the international community, which is embodied today in the United Nations. This derives from the Advisory Opinion of this Court of 1950, from two subsequent Advisory Opinions, and from the Judgment of the Court in 1962 in the first phase of the *South West Africa* cases.

Fourth, the Secretary-General takes it to be axiomatic that if the Mandate had lapsed, as contended by South Africa, then the authority of the Mandatory had likewise lapsed, with the consequent termination of the latter's right to remain in the Territory. As this Court has said, to retain the rights derived from the Mandate and to deny the obligations thereunder cannot be justified.

Fifth, the Secretary-General believes that the record establishes conclusively that South Africa has failed to discharge the sacred trust of civilization placed upon it by the Mandate to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory. South Africa's material breaches in this respect are of a character sufficient to permit the declaration, by the competent authority, of the termination of the Mandate. It cannot be accepted in any legal system that legal rules and standards of material and moral well-being and social progress acceptable at a particular moment in time are legally acceptable for all time. The standards of 1970 are not, contrary to the contentions of South Africa, the standards of 1920. The failure of South Africa, in discharge of its sacred trust, to observe the internationally declared norms and standards of the present constitute a material breach of its responsibilities towards Namibia.

Sixth, the Secretary-General is confident that under the Charter of the United Nations, the General Assembly and the Security Council are endowed with the powers, and were in possession of all the necessary legal and factual justification, to proceed as they did in regard to the termination of the Mandate for South West Africa. This view is shared by an overwhelming majority of the world community which comprises the United Nations, as evidenced by the virtual unanimity of vote on General Assembly resolution 2145 (XXI)

Seventh, the Secretary-General believes that South Africa's continued presence in Namibia since the declaration of the termination of the Mandate

constitutes an internationally wrongful act incurring responsibilities both for South Africa and for other States under international law. The first and most basic of these consequences, so far as South Africa is concerned, is South Africa's obligation to discontinue that internationally wrongful act which consists in its continued presence in Namibia. This obligation does not, of course, exhaust the legal consequences for either South Africa or other States. For a definition of all the legal consequences the Security Council, the principal organ of the United Nations with primary responsibility for the maintenance of international peace and security, has had recourse to this Court, the principal judicial organ of the world community. The Secretary-General is confident that the United Nations will receive from this Court the definitive guidance which it is seeking.

Mr. President, honourable Members of the Court, the question before the Court concerns the fundamental rights and freedoms of more than half a million people, the indigenous inhabitants of an international territory to whom promises were made in the name of mankind. This international pledge, restated and enlarged by the United Nations Charter and subsequent undertakings pursuant thereto, has been designed to secure for the inhabitants of Namibia not merely a state of physical well-being, but also moral well-being and freedom and equality in the exercise of their economic, social, cultural, civil and political rights, as well as their right to self-determination and membership of the international community. It has been shown, however, that the continued and illegal presence of South Africa in Namibia, in breach of the trust which the community of nations agreed to share, has deprived the great majority of the people of Namibia both of their rights and also of the international protection which is virtually their only recourse. In our submission, the law cannot be indifferent to a matter so basic to international order and morality, and it is our hope that, by determining the legal consequences of this breach of trust, the Court may help substantially to renew the faith of the world's peoples in international obligations, and in the will of the international community to see that they are honoured.

Mr. President, if I may be permitted, I want to make an addition. I have carefully noted the important questions which have been put by the honourable Judge Gros and, with the permission of the Court, will be presenting our replies as soon as these have been prepared.

I have also noted the points raised in the letter to the Registrar of the Court of 6 February 1971 [1] from the Agent of the South African Government which we shall also examine carefully.

In connection with my own presence here I should add that urgent circumstances require that I should, with the Court's permission, return to United Nations Headquarters on approximately 11 February 1971. With the leave of the Court, therefore, I would not propose to prolong further my own presence here beyond Thursday, although needless to say I shall remain at the disposal of the Court as and when any further appearance on my part should be desired.

In the meantime I would respectfully request the Court to permit our replies to the questions put by Judge Gros and any observations we might have on other points which have been raised to be presented to the Court after my departure by a representative who will be remaining.

The Court rose at 6 p.m.

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[1] **See Correspondence,** No. 92, p. 673, *infra.*

SECOND PUBLIC SITTING (9 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

QUESTIONS BY JUDGE SIR GERALD FITZMAURICE

The PRESIDENT: Before I call on the distinguished representative of Finland to address the Court, Sir Gerald Fitzmaurice has some questions to put to the representative of the Secretary-General.

Sir Gerald FITZMAURICE: Arising out of the statement made on the Secretary-General's behalf yesterday:

First Question

What actual limits does the Secretary-General place on the powers of the General Assembly and the Security Council of the United Nations, respectively?

Second Question

Is it his view that provisions of the Charter apparently, or ostensibly (whether directly or by necessary implication), involving limitations on those powers, can, if the occasion arises, legitimately be disregarded? If so, what would, in his view, be the, so to speak, applicable "principles of disregard", or confines within which such disregard could be considered acceptable?

Third Question

In particular what limits, if any, does the Secretary-General set on the type of case or subject-matter with reference to which the Security Council can emit a resolution binding on all Members of the United Nations in terms of Article 25 of the Charter?

Fourth Question

Assembly resolution 2145 appears to be based upon, and to embody, what is in effect a *judgment of law*, namely that fundamental breaches of the Mandate for South West Africa have occurred, legally justifying its revocation or termination. Is it the Secretary-General's view that the Assembly has the power to make legal determinations of this kind—that is of a kind that would normally fall within the province of a court of law, such as this Court? If so, where, in his view, would the line of distinction come between the judicial functions of the Assembly, if it had such functions, and those of this Court which is equally a main organ of the United Nations, and its principal judicial organ?

EXPOSÉ ORAL DE M. CASTRÉN

REPRÉSENTANT DU GOUVERNEMENT FINLANDAIS

M. CASTRÉN: Monsieur le Président, Messieurs les juges, le Gouvernement finlandais, que j'ai l'honneur de représenter, a, comme vous le savez, pris l'initiative de proposer au Conseil de sécurité des Nations Unies de vous soumettre, pour avis consultatif, la question qui fait l'objet du présent examen de la Cour. Ayant le grand honneur de prendre parole devant la Cour aujourd'hui, je vous apporte les hommages respectueux de celui qui m'a mandé. Je voudrais tout d'abord souligner que mon gouvernement intervient d'une façon aussi objective qu'il est possible. Il n'a pas d'intérêt particulier dans l'affaire et agit uniquement dans l'intérêt du droit et de la justice.

I. Remarques préliminaires

1. Je me permets de commencer par quelques remarques préliminaires. Il me plaît de constater que le Secrétaire général des Nations Unies et les autres gouvernements, à l'exception de l'Afrique du Sud qui se trouve dans une situation spéciale dans cette affaire, ont avancé dans leurs exposés écrits des idées et opinions similaires à celles de mon gouvernement dans plusieurs points d'importance pour l'appréciation de la question soumise à la Cour. Ainsi le Gouvernement français aussi admet que l'Afrique du Sud a manqué d'une manière systématique à ses devoirs découlant du Mandat sur le Territoire du Sud-Ouest africain et de la Charte des Nations Unies pour les Etats Membres et qu'il a agi contrairement aux normes établies dans la Déclaration universelle des droits de l'homme, quoique le Gouvernement français n'estime pas que les Nations Unies possédaient le droit de révoquer le Mandat. Je reviendrai plus tard sur cette dernière question.

2. Comme il était à prévoir, l'Afrique du Sud n'a pas changé son attitude intransigeante, ni en ce qui concerne le droit de révocation ni quant aux autres questions se rattachant à l'administration du Territoire de la Namibie, s'opposant continuellement à toutes les tentatives des Nations Unies d'intervenir dans les affaires de la Namibie. Elle allègue que toutes les résolutions de l'Assemblée générale et du Conseil de sécurité relatives à la révocation du Mandat et au transfert de l'administration de la Namibie aux Nations Unies sont illégales et nulles. L'Afrique du Sud est allée même plus loin en essayant de faire valoir que les avis consultatifs que la Cour a émis en 1950, 1955 et 1956 dans les affaires relatives au *Statut international du Sud-Ouest africain*, à la recevabilité de demandes d'audience présentées au Comité du Sud-Ouest africain et à l'admissibilité de l'audition de pétitionnaires par ledit comité, reposent sur des données incomplètes et devraient maintenant être reconsidérés. L'Afrique du Sud estime encore que la Cour n'est pas compétente ou devrait s'abstenir pour certaines autres raisons d'émettre l'avis consultatif demandé, en alléguant aussi que la Cour, dans sa composition actuelle, et particulièrement certains de ses membres actuels, seraient mêlés à la question soumise à eux d'une façon qui pourrait influer sur leur attitude.

3. Ma tâche principale est donc de traiter toutes ces objections et les divers arguments avancés par l'Afrique du Sud à leur appui. Je m'efforcerai de les

réfuter l'un après l'autre, le mieux possible, en évitant d'aborder les détails de moindre importance.

4. En ce qui concerne la proposition du Gouvernement sud-africain relative à l'organisation d'un plébiscite en Namibie sous le contrôle conjoint de la Cour internationale de Justice et ledit gouvernement, mon gouvernement estime qu'une telle fonction est hors de la compétence de la Cour. En plus, comme le Conseil des Nations Unies pour la Namibie l'a déjà déclaré, le Gouvernement sud-africain, n'ayant plus aucun droit d'administrer le Territoire, n'est pas compétent pour faire une telle proposition, encore moins pour organiser un plébiscite en Namibie.

II. Interprétation et modification des traités

5. Comme l'Afrique du Sud l'a fait dans son exposé écrit, je commence par quelques observations concernant les principes et les règles sur l'interprétation et la modification des traités, car le point de vue que l'on adopte à cet égard peut influer sur la prise de position vis-à-vis de plusieurs questions juridiques dans cette affaire. Je suis d'accord avec le Gouvernement sud-africain que les articles 31 et 32 de la convention de Vienne sur le droit des traités forment une base solide pour l'interprétation des traités internationaux.

Or, il me semble que ledit gouvernement attribue une trop grande importance à l'interprétation littérale, à savoir du texte réel et du sens ordinaire des termes du traité. On ne saurait sous-estimer les autres moyens principaux d'interprétation mentionnés dans l'article 31 de la convention de Vienne, comme l'objet et le but du traité et la pratique ultérieurement suivie dans l'application du traité par les parties, qui reflètent souvent leur vraie intention. En ce qui concerne particulièrement la valeur de la pratique pour l'interprétation, je ne peux pas accepter ce que le Gouvernement sud-africain dit à cet égard au paragraphe 23 du chapitre II de son exposé écrit où il allègue que l'on ne peut faire appel à la pratique que lorsqu'il existe une ambiguïté ou une incertitude dans le traité même. Cette condition est prescrite seulement pour le cas des moyens complémentaires d'interprétation, comme il ressort de l'article 32 de la convention de Vienne.

6. Quant au comportement ultérieur des parties au traité comme moyen de modifier les traités, il est assez généralement reconnu par les auteurs contemporains qu'un traité peut être revisé ou modifié par ce moyen. La Commission du droit international avait proposé dans son projet d'articles sur le droit des traités, qui constituait la base des débats de la conférence de Vienne, une disposition, l'article 38, tendant à confirmer expressément ledit principe. Le fait que la conférence, après une discussion assez longue, supprima cet article ne signifie pas, comme le Gouvernement sud-africain voudrait le faire valoir aux paragraphes 26-32 de son exposé écrit, que le principe lui-même de l'effet de la pratique ultérieure sur le contenu du traité aurait été rejeté à Vienne. Les raisons principales de la suppression de la disposition en cause étaient les suivantes: d'abord, plusieurs délégations, parmi elles la mienne, représentées à ladite conférence étaient d'avis qu'il était incontestable que la pratique ultérieure pouvait modifier un traité et que cette disposition était par conséquent superflue. Certaines autres délégations pensaient que le projet d'article n'était pas assez précisé et qu'il était difficile de trouver une meilleure formule. Elles préféraient laisser les détails indécis.

7. Pour ce qui est de la Charte des Nations Unies, je ne peux, non plus, souscrire aux opinions exprimées dans l'exposé du Gouvernement sud-africain

dans les paragraphes 33-40. Cet instrument aussi doit être interprété et peut être modifié par la pratique ultérieure des Etats Membres, ce qui s'est produit en réalité comme nous le verrons plus tard.

III. Question de savoir si la Cour devait accéder ou non à la demande d'avis consultatif

8. Dans le chapitre IV de son exposé écrit, le Gouvernement sud-africain propose que la Cour, dans l'exercice de son pouvoir discrétionnaire, refuse pour plusieurs raisons indiquées plus tard, d'accéder à la demande d'avis consultatif présente. Je ne suis pas du même avis et je tâcherai de montrer que la Cour manquerait à ses devoirs si elle donnait suite à la demande du Gouvernement sud-africain.

9. S'il est vrai que la Cour n'est pas obligée, selon son Statut, de rendre un avis consultatif, même dans les cas où elle est juridiquement fondée de le faire, elle a souligné à plusieurs reprises que, en tant qu'organe des Nations Unies, elle ne devrait pas en principe refuser une demande dûment présentée par un autre organe et qu'il faudrait donc des raisons décisives pour agir autrement. Contrairement à ce que le Gouvernement sud-africain allègue, il n'y a aucune raison ni décisive ni de moindre importance pour laquelle la Cour devrait refuser de rendre l'avis demandé dans cette affaire.

10. J'admets que l'on peut dire que la question posée à la Cour est mêlée à certains problèmes politiques et présente donc aussi un aspect politique. De même, on ne saurait nier que la démarcation entre les questions politiques et juridiques est souvent imprécise. Or étant donné la formulation de la question par le Conseil de sécurité qui n'envisage que des conséquences *juridiques* pour les Etats de la présence continue de l'Afrique du Sud en Namibie, il est difficile de faire valoir qu'il ne s'agit pas dans ce cas d'espèce d'une question clairement juridique, bien qu'elle puisse comporter aussi un aspect politique. La Cour ne s'est point engagée en raison de cet aspect de façon qu'il lui soit devenu impossible d'exercer convenablement sa fonction judiciaire, contrairement à l'assertion du paragraphe 2 *a)* de l'exposé écrit du Gouvernement sud-africain.

11. Ledit gouvernement parle longuement dans les paragraphes 7 à 14 de son exposé écrit de l'accueil réservé à l'arrêt de la Cour rendu en 1966 dans les affaires du *Sud-Ouest africain*. Il est compréhensible que cet arrêt rendu par sept voix contre sept, la voix du Président étant prépondérante — et par lequel la Cour avait en réalité modifié son point de vue antérieur en ce qui concerne la compétence pour statuer sur le fond du différend, adopté dans l'arrêt de 1962 — ait été l'objet de critiques. Mais dire que cela puisse influer sur l'attitude des membres de la Cour anciens et nouveaux qui devront se prononcer en l'affaire présente qui concerne une question nouvelle, signifie mettre à tort leur impartialité en cause. Il est difficile de dire si l'arrêt de 1966 a influé, et dans quelle mesure, sur les dernières élections des membres de la Cour mais autre chose est de faire valoir que les personnes élues à la Cour dans sa composition entière sont mêlées à la question qui leur est soumise, comme le Gouvernement sud-africain essaie de le montrer dans les paragraphes 15 à 29 de son exposé écrit.

Dans l'exposé du Gouvernement sud-africain on parle à plusieurs endroits, par exemple au paragraphe 30, d'une pression politique qui se serait exercée sur la Cour. Il s'agit de certaines déclarations faites par un certain nombre de délégués dans divers organes des Nations Unies. Mais on ne saurait les prendre par trop au sérieux et il va sans dire que les membres de la Cour n'attachent aucune importance à ces critiques et suggestions quant à leur activité future.

12. Au paragraphe 33 de l'exposé écrit du Gouvernement sud-africain il est dit

> « que la jurisprudence de la Cour paraît confirmer l'idée que celle-ci ne doit pas accéder à une demande si la question posée a directement trait au point essentiel d'un différend entre Etats ».

A l'appui de cette assertion ledit gouvernement cite l'avis de la Cour permanente de Justice internationale rendu le 23 juillet 1923 dans l'affaire de la *Carélie orientale* entre la Finlande et la Russie soviétique où la Cour permanente s'est refusée par une majorité assez faible à statuer sur la question dont elle était saisie, déclarant, entre autres, que:

> « il est bien établi en droit international qu'aucun Etat ne saurait être obligé de soumettre ses différends avec les autres Etats ... à n'importe quel procédé de solution pacifique sans son consentement ».

Le soi-disant précédent est toutefois peu pertinent déjà pour la raison que la Russie soviétique n'était pas encore en ce temps-là devenue membre de la Société des Nations. Du reste, cette décision de la Cour permanente a été beaucoup critiquée dans la doctrine et la Cour internationale de Justice n'a pas suivi cet exemple dans des cas pareils. L'affaire qui est soumise à la Cour ne peut pas être qualifiée de différend entre deux ou plusieurs Etats. Il s'agit de l'interprétation d'une résolution du Conseil de sécurité et c'est le Conseil lui-même qui a demandé l'avis en question afin que la situation juridique actuelle soit éclaircie avec compétence et autorité. Rien n'a empêché la Cour d'émettre en 1950, en 1955 et en 1956 les avis déjà cités sur différents problèmes *se rattachant au Mandat du Sud-Ouest africain et aux pouvoirs de surveillance* de l'Assemblée générale de l'administration dudit territoire, bien qu'il ait existé à ce sujet, aussi en ce temps-là, des divergences de vues parmi les Membres des Nations Unies et surtout entre l'Afrique du Sud et l'Organisation elle-même.

13. Je passe maintenant au troisième point de la contestation du Gouvernement sud-africain. Il essaie de faire valoir, au paragraphe 48 de son exposé écrit, que la Cour ne serait pas en mesure d'émettre l'avis demandé sans formuler aussi des conclusions sur des éléments de fait contestés et prêtant à controverse et

> « d'une telle ampleur que la question posée ne saurait, en dernière analyse, être considérée comme purement juridique, et qu'en tout cas il serait au moins inopportun d'émettre l'avis demandé ».

Il cite de nouveau — au paragraphe 44 — un énoncé de la Cour permanente de Justice internationale dans l'affaire de la *Carélie orientale* qui, à mon avis, est sans importance dans l'affaire maintenant en cause. En ce qui concerne l'opinion de Rosenne à laquelle on se réfère au paragraphe suivant (45), il est à observer que cet auteur n'a pas dit autre chose qu'il existe des doutes sur le point de savoir si, dans l'exercice de la compétence consultative, la Cour peut répondre à une question concernant *exclusivement* — je me permets de souligner ce mot — l'établissement de faits.

Dans le cas de l'affaire présente, il est demandé à la Cour, comme je l'ai déjà fait remarquer, de rendre un avis sur des questions juridiques. Bien entendu, la Cour ne peut pas se prononcer sur ces problèmes sans connaître au moins certains éléments de fait ayant trait à l'affaire du Sud-Ouest africain et de la Namibie. Or, plusieurs de ces faits sont notoires ou peuvent être vérifiés en consultant les documents officiels comme ceux des Nations Unies ou de la

Cour elle-même dans les affaires relatives au territoire en question soumises antérieurement à elle. Quant à la résolution 2145 (XXI) de l'Assemblée générale par laquelle le Mandat sur ledit territoire fut révoqué, il paraît possible de déterminer si, dans ce cas d'espèce, cet organe des Nations Unies avait des raisons valables de le faire, si la Cour estime qu'il est nécessaire ou opportun de traiter aussi cette question dans son avis. L'Assemblée générale a invoqué dans cette résolution plusieurs raisons à l'appui de sa décision et au moins certaines d'entre elles sont de telle nature que leur validité peut être établie sans qu'il soit nécessaire de pénétrer dans les questions de fait, comme je le démontrerai plus tard. Je reviendrai aussi encore sur la question de fait, qui est de savoir si l'Afrique du Sud a manqué à promouvoir le bien-être matériel et moral et la sécurité des habitants du Territoire de la Namibie, ce qu'elle a contesté continuellement, nonobstant l'opinion presque unanime de tous les autres Etats Membres ou non Membres des Nations Unies.

IV. Validité formelle des résolutions pertinentes du Conseil de sécurité

14. Dans le chapitre III de son exposé écrit le Gouvernement sud-africain se donne beaucoup de peine pour montrer que les résolutions du Conseil de sécurité en général et particulièrement les résolutions 264 (1969), 269 (1969), 276 (1970) et 284 (1970) relatives à la question du Sud-Ouest africain et de la Namibie manquent de validité formelle pour diverses raisons que je vais examiner maintenant en essayant de les réfuter l'une après l'autre.

15. Le premier argument contre la validité formelle des résolutions du Conseil de sécurité en général est tiré par ledit gouvernement de sa composition et concerne la représentation de la Chine, «République de Chine», comme elle est dénommée au paragraphe 1 de l'article 23 de la Charte. Nous savons que c'est le Gouvernement de la Chine nationale (présidé par le généralissime Tchang Kaï-Chek) qui a occupé le siège permanent de la Chine dès le début de la constitution des Nations Unies jusqu'ici. Mais après que le Gouvernement rival de la République populaire de Chine se fut emparé du pouvoir sur le continent de Chine, plusieurs Etats Membres des Nations Unies ont appuyé ses revendications de représenter ledit pays au Conseil de sécurité et dans les autres organes de l'Organisation. Certains de ces Etats ont parfois même contesté la légalité de toute action entreprise par le Conseil de sécurité tel qu'il est actuellement composé. Or, il y a lieu de noter que l'Afrique du Sud elle-même a toujours considéré que le Gouvernement de la Chine nationale est le gouvernement légitime de la Chine. En ce qui concerne la doctrine, elle admet généralement que la reconnaissance d'un Etat ainsi que d'un gouvernement est un acte de caractère essentiellement politique qui peut donc être laissé en suspens si l'Etat le désire. Quant à la question concernant le droit de représentation de deux gouvernements rivaux d'un Etat Membre, c'est évidemment l'organe compétent des Nations Unies, à savoir l'Assemblée générale, qui en décide par une majorité simple ou de deux tiers conformément aux dispositions respectives de l'article 18 de la Charte. C'est ainsi que l'on a procédé jusqu'ici. Il n'y a pas encore eu de changement à la représentation de la Chine à l'Organisation. J'estime donc que l'objection du Gouvernement sud-africain contre la validité de résolutions du Conseil de sécurité, pour les raisons indiquées, devrait être rejetée.

16. Le Gouvernement sud-africain allègue, en plus, que le Conseil de sécurité ne s'est pas conformé à la procédure prescrite par l'article 27, paragraphe 3, de la Charte quand il a adopté les diverses résolutions ayant trait à l'affaire

soumise présentement à la Cour, et il soutient que, par conséquent, toutes ces résolutions sont nulles et dépourvues d'effet juridique. Ladite disposition prévoit, comme nous le savons, que les décisions du Conseil de sécurité sur toutes autres questions que celles relatives à la procédure devraient être prises par un vote affirmatif de neuf — avant la modification de l'article en 1965, sept — de ses membres, dans lequel sont comprises les voix de tous les membres permanents. Il est aussi vrai que la résolution 284 (1970), qui contient la requête pour avis consultatif concernant la présente affaire, a été adoptée en dépit de l'abstention de trois membres dont deux étaient des membres permanents. De même, la résolution 276 (1970) a été adoptée malgré l'abstention de deux membres permanents et, au vote précédent, par division sur un membre de phrase du projet de résolution, les mots en question ont été maintenus en dépit de l'abstention de quatre membres dont trois étaient des membres permanents. Toutefois, on ne saurait considérer ces votes comme irréguliers et nuls, car une longue pratique qui a été suivie par le Conseil de sécurité dès 1950 a modifié les dispositions de l'article 27, paragraphe 3, de telle façon qu'une abstention d'un ou plusieurs membres permanents lors d'un vote n'a pas le même effet qu'un vote négatif. Ainsi on peut dire avec M. Bustamante dans son opinion dissidente en l'affaire *Certaines dépenses des Nations Unies* que:

> « Il est déjà bien connu qu'un amendement coutumier de la Charte est intervenu dans la pratique du Conseil de sécurité, en ce sens que l'abstention d'un membre permanent présent à la séance n'est pas assimilée à l'exercice du droit de veto. »

Mais je ne suis pas d'accord avec l'éminent ancien Président de la Cour quand il affaiblit sa déclaration en ajoutant que « cette sorte d'amendement peut juridiquement être reniée dans un cas d'espèce en invoquant le texte de la Charte ».

Il est aussi généralement reconnu que l'absence d'un membre permanent à la séance du Conseil de sécurité n'empêche pas de prendre des décisions valables même sur les questions de fond. Nous voyons donc que la pratique des parties au traité, même s'il s'agit d'un traité multilatéral d'une importance universelle, comme la Charte des Nations Unies, peut modifier le texte et le contenu du traité. Ce que certains délégués des Etats Membres ou hauts fonctionnaires de l'Organisation ont dit au cours des premières années de l'existence des Nations Unies de l'interprétation de la disposition en question n'a aucune valeur probante, car la nouvelle pratique est née plus tard. Pour cette raison je peux passer outre à toutes les citations qui figurent dans les paragraphes 17 à 19 et 24 de l'exposé écrit du Gouvernement sud-africain. La même remarque vaut aussi quant aux opinions semblables exprimées par quelques-uns des premiers commentateurs de la Charte, opinions citées aux paragraphes 20 à 23 dudit exposé. La doctrine moderne a pris en considération et approuvé l'évolution qui s'est produite à l'Organisation pendant vingt-cinq ans.

17. Le Gouvernement sud-africain admet lui-même, au paragraphe 27 de son exposé écrit, que la nouvelle pratique sur la procédure se rapportant aux votes au sein du Conseil de sécurité a été uniformément suivie par lui entre 1950 et 1965 et sans objection de la part de l'Assemblée générale. Mais il soutient que cette situation s'est ensuite modifiée en raison des événements postérieurs à l'année 1965 et plus particulièrement en raison de la pratique du Conseil de sécurité lui-même, ce qui n'est pas toutefois le cas. Ledit gouvernement invoque d'abord le fait que l'article 27 de la Charte a été amendé en 1965 conformément à la procédure prévue par la Charte sans qu'on ait modifié le membre de phrase du paragraphe 3 où il est stipulé que les décisions sur le fond doivent être

prises par un vote affirmatif dans lequel sont comprises les voix de tous les membres permanents. Or, il faut tenir compte de ce que la seule raison pour quoi on a procédé à cet amendement était le désir d'augmenter le nombre des membres non permanents en raison du grand accroissement du nombre des Membres de l'Organisation elle-même. On a à ce moment-là intentionnellement évité de faire d'autres modifications pour ne pas risquer la réussite du but principal. Et probablement on a aussi pensé qu'il n'était pas nécessaire d'amender les dispositions déjà modifiées par une longue pratique qui en effet a continué même après l'année 1965, contrairement à ce qu'allègue le Gouvernement sud-africain.

Le fait que deux Etats Membres, le Portugal et l'Afrique du Sud, qui n'ont pas été membres du Conseil de sécurité et qui ont montré peu de respect pour toutes les résolutions de l'Assemblée générale et du Conseil de sécurité les concernant particulièrement, ont exprimé au cours des dernières années des réserves ou des objections sur la validité de ces résolutions, ne saurait signifier l'abrogation de la nouvelle pratique, car les autres Etats, y compris tous les membres permanents et non permanents du Conseil de sécurité, se sont conformés à cette pratique.

18. Le Gouvernement sud-africain soutient encore que les résolutions 264 (1969), 269 (1969) et 276 (1970) du Conseil de sécurité sont nulles aussi pour le motif supplémentaire que certains membres du Conseil ne se sont pas abstenus au moment du vote, bien qu'ils aient été tenus de le faire en vertu de la clause figurant à la fin de l'article 27, paragraphe 3 où il est stipulé que, dans les décisions prises aux termes du chapitre VI, une partie à un différend doit s'abstenir de voter. Au paragraphe 41 de l'exposé de ce gouvernement il est dit que « si l'arrêt rendu par la Cour en 1962 en ce qui concerne l'existence d'un différend aux Nations Unies est bien fondé, il s'ensuit qu'il existe un différend sur la question du Sud-Ouest africain entre l'Afrique du Sud et plusieurs Etats Membres des Nations Unies y compris vraisemblablement tous ceux qui ont voté en faveur de la résolution 2145 (XXI) de l'Assemblée générale ». Or, à mon avis, on ne peut pas parler d'un différend dans le sens du chapitre VI de la Charte entre l'Afrique du Sud, d'un côté, et certains autres Membres des Nations Unies, de l'autre, en connexion avec les trois résolutions du Conseil de sécurité que je viens de citer. Il s'agit plutôt d'une situation créée par la révocation du Mandat et l'attitude intransigeante de l'Afrique du Sud qui ne s'est pas conformée à la résolution 2145 de l'Assemblée générale. Quant à l'arrêt émis par la Cour en 1962, la Cour a seulement constaté, en rejetant les exceptions préliminaires de l'Afrique du Sud, qu'il existe un différend entre elle et les deux Etats requérants, à savoir l'Ethiopie et le Libéria. Je peux donc conclure que les trois résolutions du Conseil de sécurité ont été adoptées dans un ordre régulier.

19. En ce qui concerne particulièrement la résolution 284 (1970) du Conseil de sécurité, sa validité formelle a été contestée par le Gouvernement sud-africain pour deux raisons: premièrement, parce qu'elle a été adoptée sans le vote affirmatif de tous les membres permanents dont trois se sont abstenus lors du vote et, deuxièmement, parce que l'Afrique du Sud n'a pas été conviée par le Conseil à participer aux discussions ayant précédé son adoption. J'ai déjà examiné la première objection en connexion avec la question concernant la validité formelle des résolutions du Conseil en général et montré qu'elle n'est pas fondée. En plus, il n'est pas certain que le paragraphe 3 de l'article 27 soit applicable à la décision par laquelle la résolution 284 a été adoptée. Nous voyons dans le paragraphe 49 de l'exposé écrit du Gouvernement sud-africain que les divergences d'opinions sont grandes entre les auteurs sur le point de

savoir si la décision du Conseil de sécurité sollicitant un avis doit être considérée comme une décision de procédure ou de fond. Dans le premier cas, le vote affirmatif de tous les membres permanents n'est pas nécessaire.

La deuxième objection aussi a été déjà traitée en quelque manière lorsque j'ai examiné la validité formelle des autres résolutions pertinentes du Conseil de sécurité. L'article 32 de la Charte, invoqué par le Gouvernement sud-africain, présuppose l'existence d'un *différend* où l'Etat qui n'est pas membre du Conseil de sécurité est partie, pour qu'il ait le droit de participer, sans droit de vote, aux discussions relatives à ce différend. La résolution 284 du Conseil de sécurité ne tend pas à régler un différend entre Etats, elle est liée à une situation, à savoir à la question de Namibie et aux responsabilités des Nations Unies assumées en 1966 envers ce territoire et son peuple. L'article 32 de la Charte n'était donc pas applicable.

20. J'en ai maintenant terminé avec toutes les objections du Gouvernement sud-africain concernant la validité formelle des résolutions du Conseil de sécurité en cause, objections qui se sont montrées dénuées de tout fondement.

V. Validité intrinsèque de la résolution 276 (1970) du Conseil de sécurité

21. Le Gouvernement sud-africain ne se contente pas de contester la validité formelle de la résolution 276 (1970) du Conseil de sécurité. Il soutient, dans le chapitre V de son exposé écrit, en plus, que cette résolution est aussi intrinsèquement invalide et n'a aucune portée juridique pour les raisons suivantes. D'abord, étant donné que ladite résolution se base sur la résolution 2145 (XXI) de l'Assemblée générale qui, à son avis, est en elle-même sans valeur juridique, la résolution 276 du Conseil est également invalide. Je reviendrai plus tard sur la question de la validité de la résolution 2145 de l'Assemblée générale. Comme deuxième raison, le Gouvernement sud-africain fait valoir que la résolution 276 du Conseil de sécurité n'a pas été adoptée conformément aux dispositions de la Charte et que celui-ci a par conséquent outrepassé ses pouvoirs. Le Gouvernement sud-africain estime que le Conseil de sécurité, en adoptant ladite résolution, n'a pas agi conformément au chapitre VII de la Charte, que le chapitre V ne fournit aucun fondement particulier à l'action du Conseil et que celui-ci ne s'est pas conformé aux exigences du chapitre VI. Regardons si c'est le cas.

22. Je suis d'accord avec le Gouvernement sud-africain que le Conseil de sécurité, lorsqu'il adopta la résolution 276, n'entendait pas agir dans le cadre du chapitre VII de la Charte. Les articles 39 et suivants ne sont donc pas applicables dans ce cas. On ne saurait dire que la situation créée par la question de la Namibie ait encore causé « une menace contre la paix, une rupture de la paix ou un acte d'agression » — agression de la part de l'Afrique du Sud — quoique dans les interventions de certains représentants et à l'Assemblée générale et au Conseil de sécurité, ainsi que dans les préambules de certaines résolutions de ces organes, comme dans la résolution du Conseil 269 de 1969 et surtout dans celle de l'Assemblée générale 2372 (XXII), on ait employé des expressions qui pourraient être interprétées ainsi. Or, force est d'admettre que la situation présente en ce qui concerne la Namibie est loin d'être satisfaisante et a donné lieu à beaucoup de tension entre les Nations Unies et l'Afrique du Sud. Sa prolongation peut être « susceptible de menacer le maintien de la paix et de la sécurité internationales » pour parler dans les termes des articles 33 et 34 de la Charte. Par conséquent, il est possible de chercher le fondement juridique de la résolution 276 du Conseil de sécurité dans les pouvoirs à lui conférés au paragraphe 1 de l'article 36 de la Charte. Il est vrai que certains auteurs soutiennent que, avant de recourir à cette clause, le Conseil de sécurité aurait dû constater,

par une décision préalable, si la prolongation du différend ou la situation en question semblait constituer une menace au maintien de la paix et de la sécurité internationales. Mais ce n'est pas une condition *sine qua non*, comme il est allégué aux paragraphes 32 et 42 de l'exposé écrit du Gouvernement sud-africain. Au contraire, la pratique généralement suivie par le Conseil de sécurité a été telle que l'on a pris directement, après le débat, une décision relative aux procédures ou méthodes d'ajustement appropriées si l'on désirait faire quelque chose pour le règlement pacifique de l'affaire. La gravité de la situation est alors sous-entendue. Quoique le but concret du Conseil, en adoptant la résolution 276, ait été d'obtenir le retrait des autorités sud-africaines de la Namibie, l'intention était de renforcer en même temps le maintien de la paix et de la sécurité internationales et de diminuer la tension actuelle. Vu qu'il s'agissait non pas d'un différend entre Etats mais d'une situation qui intéressait les Nations Unies comme telles, le Conseil de sécurité n'avait aucune obligation d'inviter l'Afrique du Sud à participer, sans droit de vote, aux débats qui ont précédé l'adoption de la résolution. Tous les autres Membres des Nations Unies auraient pu demander, avec le même droit, de prendre parole dans l'affaire devant le Conseil, ce qui aurait pu conduire à une situation bizarre. Je me permets de me référer à ce que j'ai déjà dit auparavant sur cette question.

23. Mon opinion diffère encore de celles émises par le Gouvernement sud-africain dans son exposé écrit en ce que je considère que l'article 24 de la Charte constitue également un fondement juridique à la résolution 276 du Conseil de sécurité. J'estime que cet article 24 confère au Conseil non seulement les pouvoirs spécifiques énoncés aux chapitres VI, VII, VIII et XII et énumérés à la fin du paragraphe 2 dudit article, mais aussi des pouvoirs généraux, compatibles avec les buts et principes des Nations Unies et qui sont nécessaires au Conseil pour s'acquitter des devoirs que lui impose la Charte et particulièrement le paragraphe 1 de l'article 24 qui énonce sa responsabilité principale du maintien de la paix et de la sécurité internationales.

J'ai étudié soigneusement l'argumentation du Gouvernement sud-africain présentée à l'appui de son opinion contraire aux paragraphes 21-30 de son exposé écrit sans toutefois être convaincu de sa justesse. Il ressort du paragraphe 30 que, selon deux commentateurs connus, le Conseil de sécurité ne s'est pas considéré en pratique comme strictement tenu par les dispositions spécifiques du chapitre VI et du chapitre VII de la Charte concernant la ligne de conduite à suivre lorsqu'il s'est occupé de différends et de certaines autres situations. Il est aussi indiqué de citer à ce propos un passage de l'avis du Secrétaire général qui est reproduit au paragraphe 28 dudit exposé. Le Secrétaire général disait que, par sa décision prise dans l'affaire de Trieste, le Conseil« avait admis qu'il était investi de pouvoirs suffisants aux termes de l'article 24 de la Charte pour assumer de nouvelles responsabilités, sous réserve qu'elles fussent liées directement, ou même indirectement, au maintien de la paix et de la sécurité internationales et que, en s'aquittant de ces pouvoirs, le Conseil de sécurité agisse conformément aux buts et aux principes de la Charte». Il suffit donc que la décision prise par le Conseil soit liée au moins indirectement à la fonction principale du Conseil, comme dans le cas de la résolution 276. Quant à l'opinion des auteurs modernes sur la question de l'interprétation de l'article 24 de la Charte, je me borne à citer la 3e édition révisée du traité publié en 1969 par Goodrich, Hambro et Simons, intitulé *Charter of the United Nations*. Les auteurs disent à la page 204:

> « Article 24 (2) states that 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.»

Nous avons vu que le Gouvernement sud-africain préfère un autre genre d'interprétation, à savoir littérale et formaliste, qui lui est plus convenable.

24. Pour conclure cette partie de mon exposé, je constate que les objections dudit gouvernement contre la validité intrinsèque de la résolution 276 du Conseil de sécurité doivent être rejetées.

VI. Effet juridique de la résolution 276 (1970) du Conseil de sécurité

25. Je suis maintenant arrivé à la question principale soumise à la Cour, à savoir l'effet et les conséquences juridiques de la résolution 276 (1970) du Conseil de sécurité. Mon gouvernement a déjà traité cette question assez amplement dans son exposé écrit, ce qui facilitera ma tâche maintenant. Je me permets de me référer, aussi à cet égard, aux exposés écrits de certains autres gouvernements, particulièrement à ceux du Gouvernement des Etats-Unis d'Amérique et des Pays-Bas, ainsi qu'à l'exposé écrit du Secrétaire général. Quant à la position du Gouvernement de l'Afrique du Sud, elle est déterminée par son attitude négative à l'égard de la validité formelle et intrinsèque de ladite résolution. Pour cette raison il déclare brièvement dans son exposé écrit que la résolution 276 est sans aucun effet juridique. Il ajoute que même si l'on tient cette résolution pour valable, seules certaines de ses dispositions ont des conséquences juridiques pour les Etats, et ces dispositions elles-mêmes n'ont pas un caractère obligatoire, mais constituent, par leur nature et leurs effets, tout au plus des recommandations.

26. La lecture du texte de la résolution montre qu'elle contient des dispositions de différentes natures. Certaines d'entre elles ont un caractère obligatoire, comme le Gouvernement finlandais l'a fait observer dans son exposé écrit. Il y en a d'autres qui ne sont que des recommandations. Les dispositions du préambule n'ont pas, bien entendu, la même valeur juridique que celles du dispositif. Il suffit de présenter quelques brèves observations complémentaires en ce qui concerne quelques-unes de ces dernières.

27. Les quatre premiers paragraphes du dispositif s'adressent en premier lieu à l'Afrique du Sud. Ils contiennent tous, particulièrement le paragraphe 2, des constatations importantes qui lient juridiquement ledit Etat. Il est donc tenu, en vertu de l'article 25 de la Charte, de changer son comportement dans l'affaire de la Namibie conformément aux décisions du Conseil de sécurité. Etant donné que la présence continue des autorités sud-africaines en Namibie est illégale, toutes les mesures prises par elles au nom dudit territoire ou en ce qui le concerne après la cessation du Mandat sont illégales et invalides. Cette constatation oblige aussi tous les Etats Membres des Nations Unies autres que l'Afrique du Sud. On ne saurait donc dire, comme le fait le Gouvernement sud-africain au paragraphe 49 du chapitre V de son exposé écrit, qu'il s'agit seulement de simples déclarations neutres sans aucune obligation juridique dont la vraie place serait dans le préambule et non dans le dispositif de la résolution.

Le paragraphe 5 du dispositif où le Conseil de sécurité demande à tous les Etats de s'abstenir de toutes relations avec le Gouvernement sud-africain qui soient incompatibles avec le précédent paragraphe 2 est également important, bien qu'il s'agisse dans ce cas seulement d'une invitation. Les conséquences juridiques des dispositions du paragraphe 5 ont été déterminées plus en détail,

comme nous le savons, dans la résolution 283 de 1970 du Conseil de sécurité qui a été l'objet d'une analyse assez longue dans l'exposé écrit de mon gouvernement à laquelle je me permets de me référer. Le Gouvernement sud-africain reconnaît lui aussi, au paragraphe 53 de son exposé écrit, que le paragraphe 5 ainsi que le paragraphe 6 du dispositif de la résolution 276 du Conseil peuvent imposer des obligations juridiques aux Etats et peuvent donc avoir des conséquences juridiques pour eux. De même, il y a lieu de noter que ledit gouvernement se réfère, au paragraphe 59 de son exposé, au paragraphe 2 de l'article 2 de la Charte qui impose à tous les Membres de l'Organisation le devoir de remplir de bonne foi les obligations qu'ils ont assumées aux termes de la Charte.

28. Il y a lieu de faire observer que l'Afrique du Sud a, en vertu du droit international, tant que dure sa présence illégale en Namibie, certaines obligations à l'égard dudit territoire et de sa population. Ces obligations sont pour la plupart les mêmes qui incombaient à l'Afrique du Sud avant la cessation du Mandat. Ainsi, elle est tenue de favoriser continuellement le bien-être et le développement des habitants du Territoire, conformément à l'article 22 du Pacte de la Société des Nations et au Mandat du Sud-Ouest africain. L'Afrique du Sud a également l'obligation d'agir conformément à la déclaration relative aux territoires non autonomes qui figure au chapitre XI de la Charte des Nations Unies. Les droits de l'homme doivent être respectés en Namibie comme partout sous n'importe quel régime.

VII. Quelques remarques sur l'historique et le contenu du Mandat pour le Sud-Ouest africain

29. Après avoir traité toutes les objections du Gouvernement sud-africain contre la compétence de la Cour pour rendre l'avis consultatif demandé et la validité des résolutions pertinentes du Conseil de sécurité, il reste encore deux questions importantes à examiner, à savoir la révocation du Mandat et la validité et l'effet juridique de la résolution 2145 de la vingt et unième Assemblée générale. Mais avant de les aborder il est indiqué, pour pouvoir mieux prendre position sur ces questions, de faire quelques remarques sur l'historique et le contenu du Mandat, y compris le traitement des affaires du *Sud-Ouest africain* à l'Organisation des Nations Unies et les avis consultatifs et les arrêts antérieurs émis par la Cour elle-même dans ces affaires, qui tous concernent les devoirs de la puissance mandataire, conformément au Mandat. Il y a lieu de dire aussi quelques mots sur la manière dont le territoire en question a été administré par l'Afrique du Sud. Le Gouvernement sud-africain, dans son exposé écrit, a consacré à ces questions plusieurs centaines de pages. Il semble que, à l'exception de l'administration dudit territoire, la description des faits et événements pertinents donnée dans cet exposé est, en règle générale, objective. On constate cependant parfois certaines omissions, aussi en ce qui concerne la citation des sources, entre autres, de la doctrine. Certaines conclusions dudit gouvernement sont, à mon avis, inacceptables. Je ne peux non plus me rallier à la critique sévère des avis consultatifs de la Cour déjà indiqués, critique qui se base sur les opinions dissidentes d'une petite minorité et sur les écrits de certains auteurs. L'interprétation des arrêts rendus par la Cour en 1962 et 1966 dans les affaires du *Sud-Ouest africain* et plusieurs conclusions tirées de leurs motifs et des opinions individuelles et dissidentes ne sont pas convaincants. Mais, comme je l'ai déjà dit, il n'est pas nécessaire d'entrer dans chaque détail, car la Cour connaît elle-même le mieux l'historique de la question, ce qui s'est passé à la Société des Nations et aux Nations Unies, ainsi que ses décisions antérieures. Voici mes propres commentaires, brefs.

30. Dans la première partie de son long exposé, le Gouvernement sud-africain tend à démontrer, sur la base des faits historiques, qu'à la dissolution de la Société des Nations l'Assemblée générale des Nations Unies n'aurait pu succéder aux fonctions de surveillance de l'exécution du Mandat du Sud-Ouest africain en vertu de clauses explicites ou implicites du Mandat, ou d'une règle juridique objective applicable à celui-ci, mais que le consentement du mandataire y est nécessaire, alors qu'il manque en réalité. Dans ses avis consultatifs souvent cités, la Cour a toutefois constaté qu'un tel transfert a eu lieu.

31. Il est intéressant de noter que M. Simon, ministre français des colonies, a souligné à une séance tenue le 28 janvier 1919 à la Conférence de la paix de Paris, que tout mandat serait révocable et que rien n'en garantirait la continuité, comme il est indiqué au paragraphe 17 du chapitre VII de l'exposé écrit du Gouvernement sud-africain. Le Gouvernement français actuel ainsi que le Gouvernement sud-africain soutiennent dans leurs exposés écrits que les mandats sont irrévocables. Il est vrai que les dispositions expresses proposées par le président Wilson à ladite conférence au sujet du pouvoir de révoquer un mandat et de remplacer le mandataire par un autre Etat ou organisme n'ont pas été retenues dans l'article 22 du Pacte de la Société des Nations. Or, ce fait ne saurait être interprété en faveur de la thèse de l'irrévocabilité du mandat. Probablement pour des raisons de discrétion envers les mandataires, on n'a pas touché la question de révocation ni dans ledit pacte, ni dans les mandats conclus avec les différents mandataires. On peut dire que le droit de révocation, qui est un élément indispensable des pouvoirs de surveillance dans le système des mandats, était sous-entendu.

32. La surveillance des mandats a été effectuée principalement par la Commission permanente des mandats instituée par le Conseil de la Société des Nations, conformément aux dispositions de l'article 22, paragraphe 9 du Pacte, aux termes duquel elle était chargée de recevoir et d'examiner les rapports annuels des mandataires et de donner au Conseil son avis sur toutes les questions relatives à l'exécution des mandats. La Commission est devenue une institution efficace malgré le fait que ses pouvoirs étaient limités.

Une autre forme de surveillance acceptée par le Conseil consistait à examiner les pétitions relatives aux griefs auxquels pouvait donner lieu la façon dont le mandataire s'acquittait de son mandat. Un mécanisme a été mis en œuvre malgré que l'article 22 du Pacte et les accords sur les mandats ne contenaient aucune disposition relative à cette possibilité. Le Conseil a même élaboré les règlements concernant la procédure à adopter à l'égard de ces pétitions.

L'audience, suspendue à 11 h 20, est reprise à 11 h 40

33. En ce qui concerne le contenu du Mandat pour le Sud-Ouest africain, je me borne à me référer au Mandat adopté par le Conseil de la Société des Nations le 17 décembre 1920, et surtout à ses articles 2, 5, 6 et 7. Le paragraphe 2 de l'article 2 souligne que le Mandataire est tenu d'accroître, par tous les moyens en son pouvoir, le bien-être matériel et moral ainsi que le progrès social des habitants du Territoire soumis au Mandat. L'article 5 parle, entre autres, du devoir du Mandataire d'assurer, sur toute l'étendue du Territoire, la liberté de conscience. Les articles 6 et 7 concernent la surveillance, le règlement des différends relatifs à l'interprétation ou à l'application des dispositions du Mandat ainsi que les conditions de sa modification. Les Mandats et les différentes expressions y employées ont fait l'objet d'analyses minutieuses en connexion avec les affaires antérieures relatives au Mandat pour le Sud-Ouest africain, d'où il ressort qu'il s'agit d'une institution spéciale du droit international.

34. Il est dit dans le texte du paragraphe 44 du chapitre VII (pages 424-425) de l'exposé écrit du Gouvernement sud-africain que jamais, en connexion avec les affaires du Mandat pour le Sud-Ouest africain,

> « aucun membre de la Cour n'a donné à penser qu'il pût exister un principe de succession qui, s'appliquant indépendamment de l'intention des parties, aurait pu avoir pour effet de remplacer automatiquement la Société des Nations, ses organes et/ou ses membres par l'Organisation des Nations Unies, ses organes et/ou ses membres ».

Or, dans la note 1 à la page 425, on voit que M. Alvarez, dans son opinion dissidente, de 1950, a conclu que l'Organisation des Nations Unies avait succédé « de plein droit » à la Société des Nations.

Comme je l'ai déjà indiqué, le Gouvernement sud-africain conteste aussi toute succession, sous n'importe quel motif, des Nations Unies aux droits de surveillance de son prédécesseur sur le Mandat pour le Sud-Ouest africain. On trouve les arguments principaux avancés à l'appui de son opinion et ses conclusions aux paragraphes 46, 55, 56, 60, 61 et 64. Sans me livrer à une polémique sur cette question plusieurs fois débattue devant la Cour, je tiens à répéter que la Cour a accepté cette succession.

35. Dans le chapitre VIII de son exposé écrit le Gouvernement sud-africain essaie de démontrer qu'il n'y a jamais eu, ni lors de la dissolution de la Société des Nations, ni plus tard pendant la période des Nations Unies, d'accord explicite ou implicite entre l'Afrique du Sud et les autres parties intéressées relatif au transfert des fonctions de surveillance du Mandat pour le Sud-Ouest africain à l'Organisation des Nations Unies. Or, le représentant de l'Afrique du Sud a déclaré à la séance du 9 avril 1946 de la Société des Nations, entre autres, après avoir d'abord constaté que la disparition des organes de la Société des Nations qui s'occupaient du contrôle du Mandat empêcherait de se conformer entièrement à la lettre du Mandat, que

> « le Gouvernement de l'Union se fera ... un devoir de considérer que la disparition de la Société des Nations ne diminue en rien les obligations qui découlent du Mandat; il continuera à s'en acquitter en pleine conscience et avec le juste sentiment de ses responsabilités, jusqu'au moment où d'autres arrangements auront été conclus, quant au statut futur de ce territoire ».

Cette déclaration est reproduite au paragraphe 26 de l'exposé écrit sud-africain. La Société des Nations a adopté à sa dernière séance, tenue le 18 avril 1946, une résolution relative au système des mandats dont les deux derniers paragraphes ont le libellé suivant:

> « 3. [L'Assemblée] Reconnaît que la dissolution de la Société des Nations mettra fin à ses fonctions en ce qui concerne les Territoires sous mandat, mais note que les principes correspondant à ceux que déclare l'article 22 du Pacte sont incorporés dans les chapitres XI, XII et XIII de la Charte des Nations Unies;
>
> 4. Note que les Membres de la Société administrant actuellement des Territoires sous mandat ont exprimé leur intention de continuer à les administrer, en vue du bien-être et du développement des peuples intéressés, conformément aux obligations contenues dans les divers Mandats, jusqu'à ce que de nouveaux arrangements soient pris entre les Nations Unies et les diverses Puissances mandataires. »

Ce texte figure à la fin dudit paragraphe 26 de l'exposé écrit sud-africain.

Il ressort du même document que le Gouvernement sud-africain, après que ses tentatives d'annexer le Territoire sous mandat eurent échoué sur la résistance énergique des Nations Unies et après qu'il eut refusé définitivement de soumettre ce territoire au régime de tutelle, a toutefois déclaré à diverses occasions qu'il maintiendrait le *statu quo* et qu'il continuerait à administrer le Territoire dans l'esprit du Mandat actuel.

36. L'Afrique du Sud a soumis aux Nations Unies, conformément à l'article 73 *e)* de la Charte, en 1947 et 1948 pour les années précédentes, deux rapports sur le Sud-Ouest africain, bien qu'elle ait fait la réserve qu'elle considérait que ladite organisation n'était pas compétente pour exercer un contrôle sur le Territoire.

Après 1948 elle a cessé de soumettre des rapports sous le prétexte que le Conseil de tutelle avait utilisé les rapports à des fins autres que celles qui avaient été prévues, en se prononçant sur la question de savoir si l'Union sud-africaine s'était acquittée de façon adéquate de ses responsabilités conformément au Mandat. On ne saurait accepter le motif invoqué par l'Union sud-africaine car l'organe auquel un rapport est soumis doit avoir le droit de le discuter et même de le critiquer au besoin. La Cour, dans son avis consultatif émis en 1950, a notamment constaté aussi le maintien en vigueur de l'obligation de l'Union sud-africaine de soumettre aux Nations Unies des rapports annuels pour le Mandat du Sud-Ouest africain.

37. Il est vrai que, avant que la Cour se fût prononcée sur le statut dudit Mandat, les opinions exprimées à l'Organisation des Nations Unies concernant cette question n'étaient pas claires. Ainsi, on trouve dans les comptes rendus des réunions des divers organes des Nations Unies, pendant les premières années de son activité, des déclarations de certains délégués impliquant que les obligations de l'Union sud-africaine en tant que Mandataire auraient été modifiées ou diminuées d'une manière considérable après la dissolution de la Société des Nations. Les paragraphes 42 à 46 de l'exposé écrit sud-africain rendent compte de ces déclarations. Mais si on les étudie de plus près on voit qu'elles sont souvent nuancées et leur pertinence a été contestée par des déclarations d'autres délégués.

38. Je passe maintenant aux avis consultatifs et arrêts antérieurs de la Cour relatifs au Sud-Ouest africain. Il s'agit toujours de la question de surveillance de l'administration dudit Mandat. Le Gouvernement sud-africain estime que la Cour devrait, contrairement à son avis consultatif de 1950, déclarer maintenant que les pouvoirs de surveillance à l'égard des mandats, qui avaient été conférés au Conseil de la Société des Nations, n'ont pas été transférés, même tacitement, à l'Assemblée générale des Nations Unies et que l'obligation de l'Afrique du Sud de faire des rapports et de rendre compte du Mandat pour le Sud-Ouest africain a pris également fin lors de la dissolution de la Société des Nations. Je considère, pour ma part, que ce serait une grave erreur que la Cour s'écarte à cet égard de son avis presque unanime (12 voix contre 2). Mais examinons les arguments principaux avancés par le Gouvernement sud-africain à l'appui de sa proposition. Il allègue d'abord que, depuis 1950, de nouvelles recherches auraient permis de découvrir de nombreux faits qui n'avaient pas été soumis à l'examen de la Cour en 1950. Il s'agirait de faits, traités dans les chapitres VII et VIII de l'exposé écrit du Gouvernement sud-africain, concernant la pratique des Etats entre 1946 et 1949 telle qu'elle résulte notamment des exposés écrits et oraux qu'un grand nombre d'Etats Membres ont faits dans des circonstances et des situations diverses et relativement peu de temps après la création des Nations Unies et la dissolution de la Société des Nations, et il est soutenu que ces exposés montreraient que les Membres des Nations Unies

auraient été généralement d'accord pour admettre qu'aucune fonction de surveillance relative aux Mandats, non transformés en territoires sous tutelle, n'ait été prise en charge. Je me permets de remarquer, en me référant à mes observations précédentes, qu'on ne saurait tirer de la pratique des Etats une telle conclusion. En plus, on ne peut pas parler de la découverte de nouveaux faits, car tous les documents en question et de la Société des Nations et des Nations Unies étaient bien connus en 1950 et étaient à la disposition de la Cour lorsqu'elle a émis son avis consultatif. Si tous les documents n'étaient pas soumis à la Cour, ils étaient consignés à la bibliothèque de la Cour au palais de la Paix. Il est difficile d'imaginer que la Cour aurait émis son avis sans consulter tous les documents pertinents.

39. Le Gouvernement sud-africain cite, aux paragraphes 20 à 27 du chapitre IX de son exposé écrit, les écrits de huit auteurs qui ont critiqué la conclusion de la Cour dans son avis de 1950 concernant le transfert des pouvoirs de surveillance. Il admet toutefois, au paragraphe 4, qu'il y a d'autres juristes connus qui ont approuvé cette conclusion, bien que pour des motifs que ledit gouvernement n'accepte pas. Et on peut penser que sinon tous les savants, du moins la grande majorité d'entre eux qui ont gardé le silence sur cette question, partagent l'opinion de la Cour.

40. J'ajoute encore quelques remarques sur l'analyse et les commentaires du Gouvernement sud-africain des motifs de l'avis en ce qui concerne le transfert des pouvoirs de surveillance. Tout d'abord, je me vois obligé d'attirer l'attention de la Cour sur le fait que le résumé de ces motifs qui figure au paragraphe 6 de l'exposé écrit dudit gouvernement est incomplet, comme on le voit en le comparant au texte original, aux pages 136 et 137 du *Recueil des arrêts*. Il ressort de ce passage que la Cour a invoqué plusieurs raisons comme fondement juridique de son opinion. A mon avis, déjà la première de ces raisons est décisive. L'intention des rédacteurs du Pacte de la Société des Nations était en effet de créer un système efficace des mandats, ce qui présuppose une surveillance internationale de l'administration des territoires sous mandat.

Sans cela le régime des mandats n'aurait eu aucun sens. On n'a pas institué ce régime seulement pour le profit du mandataire. Le but principal était de protéger et de développer les territoires sous mandat et leurs peuples. Et comme la Cour l'a bien exprimé dans son avis: « On ne saurait admettre que l'obligation de se soumettre à surveillance aurait disparu pour la simple raison que cet organe de contrôle (le Conseil de la Société des Nations) a cessé d'exister alors que les Nations Unies offrent un autre organe international chargé de fonctions analogues encore que non identiques ». Il ressort de l'article 80 de la Charte que le sort des territoires sous mandat était dans la pensée aussi des rédacteurs de la Charte et les décisions prises au cours des premières Assemblées générales relatives au Mandat du Sud-Ouest africain montrent que l'Organisation des Nations Unies avait assumé les responsabilités concernant ledit Territoire.

Les autres raisons invoquées par la Cour comme motifs du transfert de surveillance du Mandat du Sud-Ouest africain confirment la première d'entre elles, comme il découle du texte de l'avis. Même si l'on avait quelques doutes sur la pertinence de certaines de ces autres raisons, la conclusion de la Cour pourrait être acceptée. Je sais que le Gouvernement sud-africain est d'un autre avis, préférant une interprétation restrictive accentuée.

41. En ce qui concerne les avis consultatifs de la Cour émis en 1955 et 1956 sur certaines questions se rattachant à l'administration du Territoire du Sud-Ouest africain, ils semblent renforcer les conclusions auxquelles la Cour a abouti en 1950 relativement à la question de surveillance.

42. La Cour elle-même n'a pas pris position, dans son arrêt de 1962 relatif

aux exceptions préliminaires dans les nouvelles affaires du *Sud-Ouest africain*, sur ladite question de surveillance, mais certains membres de la Cour l'ont traitée dans leurs opinions individuelles ou dissidentes. Il suffit de citer un passage du paragraphe 32 de l'exposé écrit du Gouvernement sud-africain qui exprime l'opinion individuelle de M. Bustamante et dont la teneur est la suivante:

> « A mon avis, ce texte du paragraphe 2 de l'article 80 qui est lié avec celui des articles 77 (paragraphe 1 *a)*) et 81, définit clairement l'obligation — pressante, dirait-on — des Etats mandataires d'arriver sans retard à la mise en vigueur du nouvel accord de Mandat. Le raisonnement logique autorise pleinement cette interprétation, car l'intention des auteurs de la Charte ne peut pas avoir été celle d'abandonner indéfiniment à la seule discrétion du Mandataire — sans aucun contrôle — les territoires sous Mandat. Cela aurait dénaturé ce régime juridique ainsi que les intentions de ceux qui l'ont établi. C'est ce qu'on a appelé la «congélation» du Mandat, laquelle pratiquement se confond avec l'annexion. »

Je peux laisser de côté toutes les spéculations et les conclusions douteuses du Gouvernement sud-africain tirées des motifs de l'arrêt de 1962 et de certaines opinions dissidentes. Ledit Gouvernement reconnaît lui-même que même une analyse détaillée de ces motifs ne permet pas d'aboutir à une conclusion claire quant à l'opinion qu'ont eue vraisemblablement les auteurs sur la question de transfert de surveillance à l'égard des mandats à l'Organisation des Nations Unies. Qu'il me soit permis de faire seulement une remarque sur un point soulevé par le Gouvernement sud-africain. Il allègue que le raisonnement de la Cour concernant le maintien en vigueur de l'article 7, paragraphe 2 du Mandat du Sud-Ouest africain implique que la Cour considère vraisemblablement que l'article 6 dudit mandat est devenu caduc. J'estime au contraire qu'il n'y a aucune contradiction logique entre le maintien en vigueur simultanément de ces deux dispositions. Les modifications de la situation antérieure à laquelle la Cour a fait allusion peuvent viser autre chose que l'obligation de soumettre ces rapports annuels conformément à l'article 6 du Mandat en question, par exemple la disparition de la Commission permanente des Mandats et la substitution de l'Assemblée générale des Nations Unies au Conseil de la Société des Nations.

43. En ce qui concerne encore son arrêt de 1966 dans les affaires du *Sud-Ouest africain*, la Cour ne s'y est pas prononcée non plus sur l'aspect de la question relatif au transfert des fonctions de surveillance à l'égard du Mandat du Sud-Ouest africain. Le Gouvernement sud-africain soutient toutefois qu'il découlerait des motifs et des conclusions de la Cour que probablement, si elle avait été appelée à se prononcer sur ladite question, elle aurait statué en faveur de la cessation de la surveillance. Il est vrai qu'il y a certains passages dans les motifs de l'arrêt de la Cour, par exemple ceux reproduits aux paragraphes 56 et 57 de l'exposé écrit du Gouvernement sud-africain, qui semblent appuyer la thèse sud-africaine. Or, dans ces prononcés, on se borne à examiner la situation à l'époque de la Société des Nations quand la question de transfert des fonctions de surveillance n'était pas actuelle. Du reste, l'arrêt de 1966 était rendu par sept voix contre sept, comme nous le savons. Je ne pense pas qu'il soit nécessaire de le traiter maintenant plus en détail en je passe aussi outre aux opinions individuelles et dissidentes exprimées par certains membres de la Cour dans cette affaire.

44. Je termine cette partie de mon exposé par certaines observations concernant l'administration du Mandat du Sud-Ouest africain, ultérieurement le Territoire de la Namibie, pour répondre à la question supplémentaire, celle de

savoir si l'Assemblée générale avait aussi des raisons suffisantes basées sur des faits de révoquer le Mandat, ce qui a été également contesté par le Gouvernement sud-africain à plusieurs reprises et dernièrement dans le chapitre XI de son exposé écrit. Est-ce que le Mandataire a assuré et fait acroître le bien-être matériel et moral, le progrès social ainsi que le développement général des habitants du Territoire sous Mandat conformément à l'article 22 du Pacte de la Société des Nations et les dispositions de l'Accord de Mandat? Les droits de l'homme, les a-t-on respectés?

45. Le Gouvernement sud-africain allègue aux paragraphes 1 jusqu'à 3 et dans ses exposés antérieurs qu'il s'est conformé aux obligations du Mandataire, qu'il a pris bien soin des besoins matériels et moraux de la population du Territoire et qu'il est dans l'intérêt des habitants indigènes de continuer à être administrés par l'Afrique du Sud, Etat limitrophe. Selon lui, la campagne politique dirigée contre lui par la majorité des Etats Membres des Nations Unies est basée sur des informations fausses et des renseignements insuffisants, et le seul but en serait de permettre au Territoire d'accéder à l'indépendance pour former une seule et même entité politique constituant une fin en soi, indépendamment de toutes autres considérations, ce qui porterait gravement préjudice aux habitants du Territoire.

46. D'abord il y a eu certaines difficultés à se procurer les moyens de renseignement objectifs sur les conditions réelles relatives audit territoire. Ainsi le Gouvernement du Nigéria se plaint au paragraphe 14 de son exposé écrit que le *Gouvernement sud-africain a systématiquement refusé d'accueillir le Conseil* des Nations Unies pour la Namibie, chargé de l'administration dudit territoire, en déclarant qu'au cas où celui-ci parviendrait à y pénétrer, il ne pourrait garantir la sécurité de ses membres. Une source importante a été il y a longtemps les déclarations des pétitionnaires faites au Comité du Sud-Ouest africain de l'Organisation des Nations Unies. Le Gouvernement sud-africain allègue au paragraphe 16 que ces pétitionnaires seraient des «professionnels» et que leurs déclarations seraient, par conséquent, douteuses. Or, il découle du paragraphe 30 que les représentants dudit gouvernement n'ont jamais assisté aux auditions des pétitionnaires. Il y a lieu de mentionner encore à ce propos que l'Afrique du Sud n'a pas non plus transmis à l'Assemblée générale des Nations Unies les pétitions des habitants du Territoire du Sud-Ouest africain.

47. Aux paragraphes 68 et 69 il est dit que les habitants n'ont jamais formé une entité homogène et qu'ils désirent conserver leur propre identité. Pour cette raison on ne pourrait parler d'un peuple du Territoire et on a été obligé de créer pour chaque région une propre organisation politique, économique et sociale. Il semble cependant que l'on exagère un peu les difficultés de l'organisation; il existe des situations semblables ailleurs en Afrique et aussi dans les autres continents, ce qui n'a pas empêché de constituer des Etats indépendants viables sur ces territoires. Un procédé, auquel on a souvent eu recours dans des conditions pareilles, est de former un Etat fédéral.

48. Le Gouvernement sud-africain indique au paragraphe 83 de son exposé qu'il a accordé aux trois plus grands groupes de la population une espèce d'autonomie, mais nous ne connaissons pas les détails de ce nouveau régime et comment il fonctionne en pratique.

49. Aux paragraphes 87 et 88 il est allégué que, nonobstant les conditions défavorables dans un pays de grande étendue et de faible population, le développement économique, surtout pendant les dernières années, a été satisfaisant grâce aux efforts et à l'aide financière de l'Afrique du Sud. Au paragraphe 142 et aux suivants on cherche à démontrer, entre autres par la statistique, que l'éducation et l'enseignement ont atteint un haut niveau. Selon les exposés

qui figurent aux paragraphes 151 à 157, les services sanitaires sont également satisfaisants en comparaison de ceux de certaines autres régions africaines.

50. Tout cela paraît bon sur le papier; espérons qu'il en est ainsi aussi en réalité. Or, en étudiant ce long exposé, on constate que certaines questions importantes et particulièrement celles du respect des droits de l'homme et de la politique du Gouvernement sud-africain dite d'*apartheid* ont été laissées entièrement de côté ou n'ont reçu que peu d'attention. Il est vrai que, aux pages 48 et 49 de *South West Africa Survey 1967*, l'annexe A du chapitre XI de l'exposé écrit sud-africain, le problème de l'*apartheid* est brièvement traité. Les raisons avancées pour sa défense ne peuvent cependant convaincre le lecteur, les faits réels sont trop bien connus partout. Il suffit d'étudier la législation sud-africaine, par exemple la loi contre le terrorisme *(South African Terrorism Act)*, adoptée en 1967, et les règlements administratifs qui sont tous, par leurs termes et dans leur application, arbitraires, déraisonnables et injustes et par lesquels on tend à supprimer les droits et les libertés des habitants du Territoire. Il s'agit de faits notoires que l'on ne peut pas nier.

51. L'Afrique du Sud a donc exercé ses pouvoirs de Mandataire d'une façon incompatible avec le statut international du Territoire. On ne saurait permettre la continuation de ce régime inhumain et tout autre que satisfaisant. Les interventions des Nations Unies pour remédier à la situation ont été bien motivées et nécessaires de tous les points de vue. L'Organisation possède des moyens excellents pour administrer, assister et développer le Territoire et sa population en ayant comme but ultime son indépendance.

VIII. Révocabilité du Mandat

52. Dans mon exposé historique j'ai déjà touché par quelques remarques la question de la révocabilité des mandats en général et de celui du Sud-Ouest africain particulièrement. J'ai alors souligné la nécessité d'un droit de révocation comme complément de la surveillance efficace dans le système des mandats et j'ai aussi essayé de donner une explication acceptable des raisons pour lesquelles l'article 22 du Pacte de la Société des Nations qui établit les principes généraux gouvernant le régime des mandats et le Mandat du Sud-Ouest africain ne contient pas de disposition expresse relative à la possibilité de révocation. Je me permets de me référer en plus au paragraphe 5 de l'exposé écrit de mon gouvernement, où il présente des arguments à l'appui du droit de révocation et où l'on trouve aussi quelques références aux opinions de certains auteurs et d'un ancien membre de la Cour, qui défendent tous la thèse de la révocabilité.

53. Le Gouvernement sud-africain ainsi que le Gouvernement français, dans leurs exposés écrits, ne partagent pas ces opinions. Ces deux gouvernements estiment que ni la Société des Nations ni les Nations Unies n'étaient juridiquement habilitées à révoquer le Mandat du Sud-Ouest africain et que, par conséquent, la vingt et unième Assemblée générale des Nations Unies, en adoptant la résolution 2145, avait outrepassé ses pouvoirs. Je laisse pour le moment de côté la question de la validité formelle de ladite résolution, pour examiner d'abord les arguments principaux avancés par le Gouvernement sud-africain à l'appui de sa contestation.

54. Je suis d'accord avec ledit gouvernement que la Société des Nations ne possédait pas le droit de révoquer les mandats à volonté. Il y faut évidemment des raisons sérieuses, à savoir que le mandataire ait gravement manqué à ses obligations, comme l'exigent la majorité des auteurs qui acceptent le droit de révocation. Or, le Gouvernement sud-africain se trompe quand il

prétend, au paragraphe 66 du chapitre VII de son exposé écrit, que l'Assemblée générale des Nations Unies aurait adopté sa résolution 2145 à la légère. Comme je l'ai déjà démontré, et comme il est reconnu presque unanimement, l'Afrique du Sud s'est rendue coupable pendant une longue période de plusieurs sortes de manquements à ses obligations en tant que Puissance mandataire du Sud-Ouest africain.

55. Déjà le fait seul que le Mandataire avait omis de soumettre des rapports annuels à l'Assemblée générale suffit comme motif valable pour la révocation du Mandat, comme il a été souligné dans l'exposé écrit de mon gouvernement.

56. Mais revenons à l'époque de la Société des Nations. Le Gouvernement sud-africain dit au paragraphe 68 de son exposé écrit que l'on ne peut pas appliquer une règle de droit international indépendante de l'intention des parties et qu'elles auraient aussi la liberté de s'entendre pour écarter l'application des règles de droit international. Il en est ainsi, en règle générale, car la plupart des normes de droit international ont un caractère facultatif. Quant aux règles de droit impératives *(jus cogens)*, je ne pense pas non plus qu'elles soient applicables pour garantir la possibilité de révocation des mandats. Qu'il me soit, toutefois, permis de constater à ce propos, en passant, que l'on considère généralement que les normes du droit de l'homme relèvent du *jus cogens*.

57. Il existe cependant d'autres exceptions à la règle qu'un rapport juridique contractuel peut être rompu même contre l'intention originale des parties. La nouvelle convention de Vienne sur le droit des traités adoptée en 1969, mais qui n'est pas encore entrée en vigueur, contient plusieurs motifs qui peuvent être invoqués par les parties pour mettre fin à un traité. Il suffit de citer l'article 60 sur les conséquences de la violation grave du traité par une partie, mentionné déjà par mon gouvernement dans son exposé écrit. Le Gouvernement sud-africain conteste l'applicabilité du principe contenu dans cette disposition dans le cas présent, parce que l'Organisation des Nations Unies n'était pas partie à l'accord sur le Mandat du Sud-Ouest africain. Or, la Cour a constaté dans son avis consultatif, rendu en 1950, comme je l'ai déjà souvent indiqué, que certaines fonctions importantes de la Société des Nations ont été transférées à l'Organisation des Nations Unies qui a pris la place de son prédécesseur dans le système des mandats. Un rapport juridique a été ainsi constitué entre les Nations Unies et les mandataires.

58. J'admets que l'intention des auteurs du système des mandats est un facteur important, mais non décisif — comme il ressort de ce que je viens de dire — lorsqu'il s'agit de déterminer si le mandat est, en droit, révocable ou non. J'ai soutenu qu'un tel droit était implicitement introduit dans les mandats. Le Gouvernement sud-africain, de son côté, essaie de démontrer le contraire, aux paragraphes 73 à 88 de son exposé écrit, en invoquant, entre autres, des faits historiques. A mon avis, ni les travaux préparatoires de l'article 22 du Pacte de la Société des Nations ni ceux du Mandat du Sud-Ouest africain ne prouvent que l'intention aurait été d'exclure ledit important droit de révocation du système des mandats. Dans ces travaux préparatoires on trouve des prononcés tout à fait contradictoires, comme je l'ai déjà indiqué et comme il ressort du paragraphe 77 de l'exposé écrit du Gouvernement sud-africain.

59. Aux paragraphes 80 et 81 ledit gouvernement, en parlant toujours de l'époque de la Société des Nations, fait valoir qu'un droit de révocation sans celui de nommer un nouveau mandataire n'aurait été d'aucune utilité. Or, si l'on estime que la Société des Nations était vraiment dépourvue du droit de substituer un autre Etat ou elle-même aux fonctions du mandataire, il restait toutefois la possibilité de laisser la désignation du successeur aux Principales Puissances alliées et associées.

60. Le Gouvernement sud-africain se réfère encore, au paragraphe 83, au fait que, conformément aux dispositions du Pacte de la Société des Nations, toute décision du Conseil relative à un mandat déterminé était subordonnée à l'accord unanime de tous ses membres, le représentant de l'Etat mandataire y compris, de sorte qu'une décision de révocation du mandat n'aurait pu être prise contre sa volonté. Or, la doctrine a été divisée sur l'existence d'un tel droit de veto et même dans le cas affirmatif on ne saurait admettre un recours abusif à ce moyen.

61. Quant à l'attitude de la doctrine à l'égard de la question principale de la révocabilité du Mandat, elle est divisée, comme il est indiqué aux paragraphes 89 à 93 de l'exposé écrit dudit Gouvernement sud-africain. Je n'oserai pas parler, contrairement audit gouvernement, d'une majorité nette pour l'une ou l'autre opinion, et la valeur des divers arguments peut aussi être discutée. Je me borne à constater que ce gouvernement a omis de mentionner dans son énumération des partisans de la thèse de la révocabilité un auteur des plus connus, Paul Fauchille, cité par mon gouvernement dans son exposé écrit, bien que son nom figure dans un autre passage de l'exposé écrit sud-africain plutôt comme adversaire de la révocabilité. Deux autres juristes classés par ledit gouvernement comme appartenant au même groupe, G. Diena et Duncan Hall, ne se sont pas exprimés clairement sur le problème en question. Qu'il me soit permis de rappeler encore que les études approfondies de l'Institut de droit international aboutirent en 1931 à l'adoption, sans voix négatives, 38 pour et 18 abstentions, d'une résolution sur les mandats internationaux dont l'article VII prévoit que les fonctions de l'Etat mandataire prennent fin, entre autres, par décision du Conseil de la Société des Nations relative à la révocation du mandataire et par les modes habituels d'expiration des engagements internationaux.

62. Je passe maintenant à l'exposé écrit du Gouvernement français. Il est dit, aux pages 21 à 23, où l'on discute le bien-fondé de la résolution 2145 de la vingt et unième Assemblée générale, que le manquement aux normes inscrites dans la Déclaration universelle des droits de l'homme ne peut pas être invoqué comme motif pour la révocation du Mandat du Sud-Ouest africain. Certes, ladite déclaration n'est pas comparable à un traité international qui lie les parties. Or, le respect des droits de l'homme est un des principes directeurs de la Charte, et on peut dire que l'article 22 du Pacte de la Société des Nations ainsi que le Mandat du Sud-Ouest africain tendent aussi à protéger au moins certains des droits de l'homme. Comme je l'ai déjà indiqué, le Gouvernement français reconnaît que l'Afrique du Sud n'a pas respecté non plus les termes du Mandat, mais ledit gouvernement estime que ce fait ne donne pas à l'Assemblée générale le droit de prononcer la déchéance du mandataire.

Le Gouvernement français, en se ralliant à l'opinion du Gouvernement sud-africain, soutient en plus que le Pacte de la Société des Nations n'avait pas donné au Conseil la compétence, même implicite, de mettre fin à un mandat. Par conséquent, il n'admet pas que l'Assemblée générale des Nations Unies ait recueilli du Conseil de la Société des Nations un pouvoir de révocation. Le Gouvernement français souligne encore que la Cour, dans son avis de 1950, avait posé comme principe, entre autres, que le degré de surveillance à exercer par l'Assemblée générale des Nations Unies sur le Mandat du Sud-Ouest africain ne saurait dépasser celui qui avait été appliqué à l'époque de la Société des Nations par son Conseil, et ajoute:

> « Lors même, en 1956, que la Cour a interprété son avis de 1950 comme signifiant que l'ONU recueillait les pouvoirs, non pas seulement effective-

ment utilisés par le Conseil de la Société des Nations, mais aussi bien ceux qu'il n'avait pas mis en œuvre bien qu'ils lui fussent théoriquement conférés, elle n'a pas un instant admis que les pouvoirs des Nations Unies ... à propos du Mandat puissent être radicalement plus étendus que ceux du Conseil de la Société des Nations. Or, il est bien clair que c'est cependant à cette conclusion que l'on arrive si l'on admet que l'Assemblée générale a le droit de priver un mandataire de son mandat.»

Nous voyons que les arguments du Gouvernement français suivent d'assez près ceux du Gouvernement sud-africain déjà traités par moi. En ce qui concerne particulièrement la dernière conclusion, je me permets de faire observer que, même s'il est vrai que le droit de surveillance et de contrôle des mandats est étroitement lié avec celui de révocation, on ne saurait les confondre. Comme j'ai essayé de le démontrer, il est possible d'invoquer aussi des motifs indépendants, comme les principes généraux du droit, à l'appui du droit de révocation.

63. Le Gouvernement français soutient encore que même les manquements de l'Afrique du Sud à l'égard des principes de la Charte ne peuvent pas être considérés comme un motif valable de révocation du mandat, parce que la Charte a déjà établi une sanction spécifique d'une autre nature pour ce cas. Il s'agit de l'article 6 qui prévoit que, si un Membre de l'Organisation enfreint de manière persistante les principes énoncés dans la Charte, il peut être exclu de l'Organisation. J'estime, pour ma part, que cette disposition ne saurait être interprétée de façon que l'Organisation soit empêchée de recourir à certaines autres mesures plus adéquates contre un mandataire qui a méconnu ses obligations internationales de diverses natures, comme dans le présent cas.

IX. Validité et effet juridique de la résolution 2145 (XXI) de l'Asssemblée générale

64. La question de la validité et de l'effet juridique de la résolution 2145 de la vingt et unième Assemblée générale relative à la cessation des droits de la Puissance mandataire du Sud-Ouest africain, est étroitement liée à la question de la révocabilité des mandats que je viens d'examiner de certains points de vue à la lumière des exposés écrits du Gouvernement sud-africain et du Gouvernement français. Le premier d'entre eux a consacré dans son exposé écrit encore deux chapitres entiers à l'analyse et à la critique de ladite résolution. Ainsi il dit au paragraphe 4 du chapitre VI, en s'associant à l'opinion déjà examinée du Gouvernement français, que les violations de la Charte n'habilitent pas l'Assemblée générale à trancher les liens entre le mandataire et le territoire soumis au contrôle de l'Assemblée, ni à placer ce territoire sous la responsabilité directe des Nations Unies, parce que la Charte n'accorde pas de tels pouvoirs. Je reviendrai encore sur cette question. Le Gouvernement sud-africain ajoute, au paragraphe 5, que la résolution 2145 semble être fondée seulement sur les pouvoirs de contrôle dont l'Assemblée générale se réclame relativement au Mandat du Sud-Ouest africain, car l'Assemblée générale n'a pas prétendu agir en tant que partie contractante à l'Accord de Mandat. Plus loin, au paragraphe 16, ledit gouvernement allègue que, en adoptant la résolution 2145, l'Assemblée générale aurait outrepassé ses pouvoirs de contrôle et ceux que lui confère la Charte. Je me permets de me référer à cet égard à ce que j'ai déjà dit sur ces questions et aux commentaires que je ferai en passant maintenant sur le chapitre X de l'exposé écrit du Gouvernement sud-africain où il développe plus amplement ses idées et ses assertions.

65. Ce chapitre commence (au paragraphe 1) par l'allégation que même en

admettant les hypothèses que l'Assemblée générale des Nations Unies est fondée en droit à exercer les fonctions de surveillance sur le Mandat du Sud-Ouest africain précédemment exercées par la Société des Nations, et que les pouvoirs de la Société des Nations en la matière comprennent notamment le pouvoir de révoquer ledit mandat, l'Assemblée générale n'était pas elle-même habilitée par la Charte à révoquer ce mandat, et qu'en conséquence la résolution 2145, par laquelle elle a prétendu le faire, dépassait le cadre de ses compétences et n'avait aucun effet juridique.

66. Le Gouvernement sud-africain prend aussi cette fois comme point de départ l'interprétation textuelle en disant (au paragraphe 2) que la nature et la portée des pouvoirs de l'Assemblée générale ne peuvent être déterminées que d'après les termes de la Charte elle-même.

La compétence de l'Assemblée générale se déduit de plusieurs articles de la Charte, mais la disposition principale qui nous intéresse dans le cas présent est sans doute l'article 10, comme le souligne aussi le Gouvernement sud-africain. Cette compétence est très large en ceci que l'article 10 autorise l'Assemblée générale à discuter toutes questions ou affaires rentrant dans le cadre de la Charte et — sous réserve des dispositions de l'article 12 qui concernent la compétence spéciale et prioritaire du Conseil de sécurité à l'égard de certaines questions — à formuler sur ces questions ou à faire des recommandations, entre autres, aux Membres de l'Organisation et à certains de ses organes. D'un autre côté, il découle de ladite disposition que les décisions prises en vertu d'elle n'ont pas, en règle générale, de force obligatoire, contrairement aux autres décisions de l'Assemblée générale concernant, par exemple, des questions institutionnelles ou financières. Je suis donc *grosso modo* d'accord sur ce qui est dit à cet égard aux paragraphes 4 à 7 de l'exposé écrit sud-africain où l'on trouve quelques références aux travaux préparatoires et à la doctrine.

67. Toutefois, je suis obligé de faire une réserve. Les résolutions de l'Assemblée générale contiennent souvent des constatations de faits ou de situations qui peuvent servir de base ou donner lieu à des conséquences juridiques. Surtout s'il s'agit d'une constatation importante qui figure aux dispositifs et non seulement dans le préambule de la résolution, adoptée avec une large majorité, on peut faire valoir que tous les Membres, y compris ceux qui ont voté contre ou se sont abstenus lors du vote, devraient accepter cette constatation faisant autorité de l'organe principal de l'Organisation universelle et agir et adapter leur comportement conformément à elle.

On peut donc dire que de telles constatations ont une certaine forme obligatoire. Je me permets de me référer à cet égard à l'œuvre récente de M. Castañeda intitulée: *Legal Effects of United Nations Resolutions*, citée déjà par le Gouvernement finlandais dans son exposé écrit, et particulièrement aux pages 117 et suivantes de celui-ci, où les effets juridiques des résolutions de l'Assemblée générale ont été examinés de façon approfondie à la lumière de la doctrine et de la pratique des Etats. Or j'admets en même temps que toutes les résolutions de l'Assemblée manquent de sanctions. Il est regrettable que les Etats Membres ou certains d'entre eux ne tiennent pas compte de ces constatations de l'Assemblée, qui n'a pas le pouvoir d'aller plus loin. Or, le résultat peut être que cette indifférence ou inobservance crée une situation telle que le Conseil de sécurité estime nécessaire d'intervenir en recourant à ses pouvoirs étendus, ce qui peut arriver aussi dans le cas de la Namibie.

68. Je passe maintenant à l'examen de la résolution 2145 qui, selon l'opinion du Gouvernement sud-africain, constitue un excès de pouvoir de l'Assemblée générale et serait, par conséquent, dépourvue de tout effet juridique. Il est dit d'abord, au paragraphe 8 de son exposé écrit, que le point capital de cette

résolution est son paragraphe 4 du dispositif, aux termes duquel l'Assemblée générale décide que le Mandat du Sud-Ouest africain est terminé et que l'Afrique du Sud n'a aucun droit d'administrer le territoire en question qui désormais relève directement de la responsabilité des Nations Unies. Ledit gouvernement ajoute (au paragraphe 9 de son exposé écrit) que: «Il ressort clairement du texte du paragraphe 4 qu'il ne prétend pas avoir le caractère d'une recommandation», que l'Assemblée a dépassé le cadre de ses compétences et que ladite disposition est donc juridiquement invalide. Puis (au paragraphe 11) il est dit que: « Comme la validité du reste de la résolution dépend de cette décision (contenue au paragraphe 4), il s'ensuit que l'ensemble de la résolution n'a aucun effet juridique». A l'appui de son avis, ledit gouvernement cite (au paragraphe 10 de son exposé) six auteurs.

69. N'étant pas d'accord avec lui quant à la nature et à l'effet juridique de la résolution en cause, je me borne, pour commencer, à citer seulement un jurisconsulte, à savoir celui dont je viens de prononcer le nom, M. Castañeda. Il soutient, pour les raisons déjà mentionnées, que cette résolution est complètement valide et qu'elle a les mêmes effets juridiques qu'il faut conférer aux autres résolutions de l'Assemblée, adoptées par une large majorité et qui contiennent des constatations importantes.

70. Il me semble que l'interprétation du Gouvernement sud-africain du paragraphe 4 de la résolution n'est pas correcte. Il s'est probablement laissé trop influencer par l'expression « Décide» qui figure au début de ladite disposition. En vérité, il ne s'agit pas d'une décision, encore moins de caractère obligatoire dans le sens strict. Si on lit attentivement tout le texte de la résolution, le préambule et les dispositifs, on voit qu'elle ne contient qu'une décision. Il s'agit du paragraphe 6 relatif à la constitution d'un Comité spécial chargé de tâches préparatoires. On ne saurait prétendre que l'Assemblée ait dépassé sa compétence à cet égard. Toutes les autres dispositions de la résolution consistent en constatations, déclarations, invitations et prononcés comparables. En ce qui concerne particulièrement le paragraphe 4 du dispositif, il doit être lu conjointement avec le paragraphe précédent (3) auquel le mot «donc» renvoie. Le paragraphe 3 se lit textuellement comme suit:

> « *Déclare* que l'Afrique du Sud a failli à ses obligations en ce qui concerne l'administration du territoire sous mandat, n'a pas assuré le bien-être moral et matériel et la sécurité des autochtones du Sud-Ouest africain et a, en fait, dénoncé le Mandat. »

Voici assez de motifs pertinents pour la cessation du Mandat. Prise à la lettre, il découle de ladite disposition que l'Afrique du Sud, par son comportement condamnable, a *terminé* elle-même le Mandat. L'Assemblée n'a que constaté ce fait. De même l'expression «conclut» au début du paragraphe 5 peut conduire à des erreurs, car, en fait, l'Assemblée y constate ce qui est le devoir de l'Organisation elle-même. Or, bien qu'il ne s'agisse que de constatations, il découle de toute la résolution, y compris le préambule, que l'Assemblée s'est occupée de questions graves. Voici une raison de plus pour que tous les Membres de l'Organisation accordent une attention spéciale à la résolution et autant que possible se conforment aux constatations et invitations de l'Assemblée.

71. La résolution a été adoptée, comme nous le savons, à une très large majorité avec seulement deux voix contre et trois abstentions. Dans la pratique la plupart des Etats Membres ont accepté les invitations de l'Assemblée et se sont conformés aux constatations contenues dans la résolution. Le Conseil de sécurité, dont l'attention sur la résolution a été appelée, au paragraphe 8 de celle-ci, a confirmé à plusieurs reprises les constatations les plus importantes de

la résolution dans ses propres résolutions et a pris diverses mesures tendant à la mettre en œuvre. La plupart des Etats Membres et même certains non membres ont collaboré avec l'Assemblée et le Conseil dans l'affaire de la Namibie pour aider ce territoire et sa population, comme nous le savons.

72. Encore quelques mots pour expliquer pourquoi l'Assemblée générale a assumé la responsabilité directe du sort du Territoire de la Namibie, en vertu du paragraphe 4 de la résolution. Une fois établi que l'Afrique du Sud n'a plus le droit d'administrer ce territoire, quelqu'un d'autre doit s'occuper de cette tâche importante jusqu'au moment où le Territoire sera prêt à le faire lui-même. On ne peut pas le laisser sans l'aide et l'assistance nécessaires au moment critique. Qui serait plus capable de prendre la place de l'ancien maître que l'Organisation des Nations Unies qui, conformément à la Charte, a aussi des fonctions et obligations spécifiques relatives aux territoires non autonomes et qui a déjà exercé longtemps des fonctions de surveillance et de contrôle sur le territoire en question? Ce n'est pas la première fois que l'Organisation a administré des territoires lors d'une période intermédiaire comme les précédents du Territoire libre de Trieste, du partage de la Palestine et de l'Irian occidental le démontrent. Il est vrai que, dans ces cas, l'administration s'est faite d'accord avec toutes les puissances intéressées, quant à maintenant il y a un conflit entre l'ancien et le nouvel administrateur légal. Or, on ne saurait abandonner le territoire en question à la merci de l'ancien Mandataire. Il est à espérer que celui-ci se laisse encore convaincre de la justesse des mesures prises par les Nations Unies et de leurs bonnes intentions dans cette affaire.

X. Conclusions

Je termine mon exposé par les conclusions suivantes:

Premièrement, la Cour est compétente pour traiter l'affaire présente et il est fort souhaitable qu'elle rende l'avis consultatif demandé.

Deuxièmement, la résolution 276 (1970) du Conseil de sécurité des Nations Unies est valable du point de vue formel et intrinsèque.

Troisièmement, la présence continue des autorités sud-africaines en Namibie est illégale et en conséquence toutes les mesures prises par le Gouvernement sud-africain au nom de la Namibie ou en ce qui la concerne après la cessation du Mandat sont illégales et invalides, conformément au paragraphe 2 du dispositif de ladite résolution.

Quatrièmement, tous les Etats Membres des Nations Unies, en particulier ceux qui ont des intérêts économiques et autres en Namibie, devraient s'abstenir de toutes relations avec le Gouvernement sud-africain qui sont incompatibles avec ladite clause.

Cinquièmement, la résolution 2145 (XXI) de l'Assemblée générale des Nations Unies, par laquelle elle a déclaré: *primo*, que l'Afrique du Sud a failli à ses obligations en ce qui concerne l'administration du Territoire sous Mandat, n'a pas assuré le bien-être moral et matériel et la sécurité des autochtones du Sud-Ouest africain et a, en fait, dénoncé le Mandat qui est donc terminé, *secundo*, que l'Afrique du Sud n'a aucun autre droit d'administrer le Territoire qui désormais relève directement de la responsabilité de l'Organisation des Nations Unies, est valable; et, en conséquence, l'Afrique du Sud est tenue de retirer sur-le-champ son administration du Territoire.

L'audience est levée à 13 h

THIRD PUBLIC SITTING (10 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. ELIAS

REPRESENTATIVE OF THE ORGANIZATION OF AFRICAN UNITY

Mr. ELIAS: Mr. President and Members of this honourable Court, may I begin by saying that my junior and I consider it a great privilege and an honour to be appearing for the first time before this Court on behalf of the Organization of African Unity in connection with the question referred by the Security Council under its resolution 284 of 1970, namely, "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

The importance of this occasion is underlined by the fact that it is the first time that the Security Council is requesting the advisory opinion of this, the principal judicial organ of the United Nations. It is also the first time that the Organization of African Unity is privileged to appear in any proceedings before this honourable Court. It will be our endeavour to assist the Court in any way we can.

I propose to examine the following brief questions:

(a) the question of the validity of the resolutions of the General Assembly, especially resolution 2145 (XXI);
(b) the resolutions of the Security Council, especially resolution 276 (1970) and the issue of abstention;
(c) links between General Assembly resolutions and those of the Security Council;
(d) the competence of the United Nations to revoke South Africa's Mandate;
(e) breaches by South Africa of her international obligations; and
(f) legal consequences for States of the continued presence of South Africa in Namibia.

I then propose to make a number of submissions for the consideration of the Court.

The first question: *the question of the validity of the resolutions of the General Assembly, especially resolution 2145 (XXI).* It is proposed to consider this subject under the following items: first, the objection that there is no express power of revocation provided for under the League Covenant and that there can therefore be no implied power. This cannot be seriously maintained, in my submission. While during the period of the League the question does not appear to have been settled, the writings of jurists would appear to indicate that the League was regarded as possessing the power to abrogate a mandate for breaches of any of its fundamental conditions. Thus Wright wrote, in his *Mandates Under the League of Nations, 1930,* as follows, at pages 440-441:

> "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."

Again, reference may be made to General Smuts' well-known monograph, *The League of Nations—A Practical Suggestion, 1918*, in which he expressed the following opinion regarding modification of mandates:

"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."

While it is true that the Covenant of the League did not finally include such a provision, evidence exists that the Permanent Mandates Commission was of the view that the League could revoke a mandate in the event of a fundamental breach of its obligation by a mandatory.

One might also refer to the work of Professor Henry Rolin in connection with the Cambridge session of the Institute of International Law in 1931. In his report written in 1928 there occurred the following passage:

"The mandatory has an acquired right which can only be revoked in a case in which the mandatory has gravely violated his obligation . . . It is for the Council acting alone to revoke a mandate."

The following passage also occurs in Volume II of the *36th Annual of the Institute of International Law, 1931*, at page 60:

"The duties of the mandatory State shall be terminated by the resignation or discharge of the mandatory by the usual terms governing expirations of international commitments and also by the annulment of the mandate and recognition of the independence of the community under mandate."

I would like to refer the Court to the written statements, I, pages 857-860, in which occur very useful and extensive citations of the views of publicists, including those of Professor Alfred Verdross, to the effect that revocation—

". . . would be the equivalent of unilateral termination of a treaty in response to breach by the other party of its obligations. In such circumstances, unilateral termination was permitted by the general principles of international law."

Verdross has since received popular support for this view, in Article 60 of the Vienna Convention on the Law of Treaties. It will be sufficient to cite Oppenheim before leaving this part of my submission. He says:

"Although the majority of Trusteeship Agreements provide that the territories in question shall be administered as an 'integral part' of the Administering State, it was made clear at the time of the approval of the Agreements that that phrase does not imply any claim to sovereignty over

> the trust territories. That fact of delegation [and I would respectfully underline that part] implies also the ultimate power of revocation in case of abuse or failure of the trust vested in the Administering State." (*International Law*, Vol. I, 7th impression, 1961, pp. 237-238.)

Judge McNair, in his separate opinion in the *Status of South West Africa* case, while acknowledging with the majority that it is "not possible to draw conclusions by analogy from the notions of mandate in international law or from any other corresponding legal conception of private law", went on to refer to rules and institutions of private law as an indication of policies and principles rather than as directly importing these rules and institutions. Surely the idea of delegation of power by the United Nations to an administering authority and the concomittant delegation of accountability are general principles of law applicable in both municipal and international law.

The power of revocation is necessarily implied in the use of the terms "trust", "mandate" and "tutelage"; terms which are in the three domestic legal régimes of the Anglo-American common law, the Roman law and the civil law systems of the world. So that, in the absence of express stipulation for revocation in the mandate instruments, such a power can properly be implied from the use of these expressions in the Covenant itself. A mandate does not and cannot envisage a permanent state of affairs; it implies a temporary delegation by the grantor to the grantee.

Since this Court has, in its Advisory Opinion of 1950, declared the international legal status of South West Africa (Namibia), and since the United Nations has been declared to be the successor of the League of Nations, with the General Assembly being vested with the responsibility for mandated (now *trust*) territories, there is clearly no international organ or authority other than the United Nations to revoke the South African Government's Mandate over Namibia. If the League had the power to revoke the Mandate, the United Nations should be the only competent authority extant which is capable of exercising the right of revocation.

After all, there was no express provision in the Covenant for dissolution of the League of Nations and yet the League found it necessary, in the conditions of the post-war world, to wind itself up after the establishment of the United Nations by means of its resolution adopted on 18 April 1946, for which, it may be pointed out, no express provision had been made previously. The cases of the revocation by the General Assembly of the Mandates over Palestine in 1948 and the Japanese mandated islands in 1947 have been carefully documented in the written statements, at **I**, pages 861-862.

Another objection has been raised, that although this Court ruled in 1950 that the powers of control and supervision of the Council of the League had passed to the General Assembly of the United Nations, the General Assembly did not adopt resolution 2145 by the unanimity rule which the League Council would have had to follow in order for such a resolution to be valid.

In this connection we may recall briefly the conditions laid down by the Court in that case. These are two: *(a)* "The degree of supervision . . . should not . . . exceed that which applied under the Mandates System, and", *(b)* "should conform as far as possible"—and that is important—"as far as possible to the procedure followed in this respect by the Council of the League of Nations" (*I.C.J. Reports 1950*, p. 14 at p. 138).

In the *Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South West Africa*, in its Advisory Opinion (*I.C.J. Reports 1955*, p. 13 at p. 77), this honourable Court observed as follows:

> "... *in the nature of things* the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council".

The Court further pointed out that—

> "... the expression 'as far as possible' was designed to allow for adjustments and modifications necessitated by legal or practical considerations".

The particular procedure requiring unanimity under the League mandates system cannot be expected to have been regulated by the transmission of functions from the Permanent Court of International Justice to the International Court of Justice. The United Nations Charter, Article 21, provides, *inter alia*, that "The General Assembly shall adopt its own rules of procedure". It has never been argued that resolutions of the General Assembly require unanimity for their adoption. The most that is required of the Assembly is that certain of its resolutions shall be adopted by a two-thirds majority (see Art. 18, para. 2, in which some eight topics are enumerated including the trusteeship system).

In the particular case of resolution 2145, it was adopted by a majority of 114 in favour, 2 against and 3 abstentions (see written statements, **I**, para. 19, p. 130). The total membership of the United Nations, be it noted, was, at that time, 121.

I now come to the second point of my statement: *the resolutions of the Security Council, especially resolution 276 (1970) and the issue of abstentions.*

The Security Council adopted resolution 276 (1970) by 13 votes in favour, none against and 2 abstentions, the two abstainers being France and the United Kingdom (*ibid.*, para. 279, p. 185). According to Article 30 of the United Nations Charter, the Security Council has power to "adopt its own rules of procedure". But Article 27 (3) provides as follows:

> "Decisions of the Security Council on all other matters [non-procedural] shall be made by an affirmative vote of nine members, including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

In view of the details outlined in the statement by the Secretary-General at **I**, pages 203 to 206 of the written statements, I would do no more than draw the attention of the Court to evidence there provided of innumerable cases of voluntary abstention by permanent members of the Security Council, particularly paragraphs 3 to 6 on page 206.

It is clear that the Security Council has established the practice of treating a voluntary abstention by a permanent member as not preventing the adoption of a non-procedural decision, even in the case of decisions of the Council taken in accordance with Chapters I, VI, VII and XII. In paragraph 3 (written statements, **I**, p. 206) occurs the statement that this practice "has been endorsed by each permanent member", and in paragraph 5 that:

> "On three occasions decisions of the Security Council based expressly upon one or more Articles of Chapter VII were declared adopted notwithstanding the abstention of at least one permanent member" (*ibid.*, p. 206).

Finally, in paragraph 6 it is stated that the practice has not been affected by the entry into force of the amendments to the Charter (new Arts. 23, 27, 61 and 109) and that since 1965 "the Security Council has adopted 25 resolutions in the

voting upon the whole or parts of which at least one permanent member abstained" *(ibid.)*.

It is worth pointing out, in passing, that in respect of resolution 276, the reservations of the United Kingdom and France had to do with the scope of the question, not with the voting procedure adopted.

This practice of the Security Council in treating abstentions as being compatible with the requirement of unanimity enshrined in Article 27 (3) of the United Nations Charter is within the aim and purpose of Article 31 of the Vienna Convention on the Law of Treaties which, although it has not come into force, represents the latest development in the Law of Treaties to which the majority of States have subscribed. Article 31 of the Vienna Convention on the Law of Treaties provides that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Paragraph 3 *(b)* provides, in particular, that: "any subsequent practice in the application of the treaty which establishes the [understanding] . . . of the parties regarding its interpretation must be taken into account. And paragraph 3 *(c)* provides that "any relevant rules of international law applicable in the relations between the parties" are also relevant.

While it is true that the original Article 38 in the International Law Commission's draft, on Modification of Treaties by Subsequent Practice, was dropped at the Vienna Conference, paragraph 3 *(b)* of Article 31 clearly envisages the situation with which we are dealing in the present context, namely that by subsequent practice the Security Council has been treating cases of abstentions as being compatible with the provisions of Article 27, sub-paragraph 3, of the United Nations Charter. This should be a sufficient answer to the South African Government's contention to the contrary.

There are a number of other matters raised by South Africa in connection with the resolutions of the Security Council, particularly resolution 276 (1970): for instance, the contention that it was not invited to participate in the debates leading to the adoption of resolutions 276 and 284 in particular, as provided for in Article 32 of the United Nations Charter.

I need hardly dwell on this point, except to refer this honourable Court to its Advisory Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*I.C.J. Reports 1950*, p. 10, at p. 71) where an objection was raised against the Court's giving an Opinion on the ground that those States did not participate in the proceedings. The Court refused to recognize the validity of the objection. It added:

> "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 . . . to obtain enlightenment as to the course of action it should take."

It is an act of participation, the Court continues, in the United Nations activities, the Court itself being "an organ of the United Nations".

Again in the case *Conditions of Admission of a State to Membership in the United Nations*, the Court confirmed its competence to give an advisory opinion on questions involving the interpretation of the Charter. Again, South Africa contends that certain parties to the dispute had participated in, instead of abstaining from the vote, as enjoined in the proviso to Article 27 (3).

To save the time of the Court, I would like to adopt the argument of the

representative of the Secretary-General on this point to the effect that there had been no "dispute", but only a "situation" before the Security Council when the relevant resolution was adopted, so that there could have been no question of inviting anybody who considered himself a party to a non-existent "dispute".

Similarly, I would not want to take the time of the Court in trying to answer the objection that, in order for the South African Mandate to be validly terminated, South Africa's consent was necessary. The argument of the Legal Counsel of the United Nations on behalf of the Secretary-General is sufficient answer on this point also.

With a great deal of energy and resource, South Africa has presented argumentation on a number of other issues, some of which had already been disposed of by this honourable Court, either in its Advisory Opinions of 1950, 1955, 1956 and in the 1962 and 1966 Judgments, or in the various rulings handed down in January 1971. I do not consider it a worthwhile exercise to engage in discussing such issues during my present statement, so that if the Court notices that I have omitted to deal with some of these matters, I wish it to be understood that it is not out of lack of respect for the Court of for the learned counsel for South Africa that I do so refrain.

I now come to point three of my statement: *links between General Assembly resolutions and those of the Security Council.*

The chain of events begins with resolution 2145 and goes through resolutions 245 of 1968, 246 of the same year, 264 and 269 of 1969, 276 of 1970, to resolution 284, by which this question was referred to this Court. Let us consider fairly briefly the basis of resolution 2145 (XXI) and the way member States regarded it in the General Assembly.

The sponsors of the resolution presented the following resolutions as underlying the draft resolution: (i) that South Africa by its action had failed to fulfil its obligations under the Mandate; (ii) that South Africa had forfeited its right to administer the mandated territory; (iii) that the people of South West Africa had the right to self-determination and independence; (iv) that the General Assembly had the authority and the obligation to see to it that the rights of the people of South West Africa (Namibia) are restored; (v) that the Mandate should be taken away from the Government of South Africa and that it should be taken over by the United Nations, and (vi) that the action for which the draft resolution called was clearly inescapable in the circumstances (see para. 25, I, p. 131).

In the course of the debate, Austria, for example, said that:

> "As the International Court of Justice did not find itself in a position to deliver a judgment on the merits of the case submitted by Ethiopia and Liberia, the General Assembly had a duty to act on the basis of its own assessment of the situation."

That assessment was adequately summarized in the preamble of the draft resolution. There was general agreement regarding the termination of the right of the Mandatory Power. The representative of Finland said that, since there was general agreement that South West Africa was a territory having international status and that South Africa, by disavowing the Mandate and by introducing into the Territory the system of apartheid, had lost the right to administer the Territory then it followed that the United Nations must assume responsibility for South West Africa and its people.

The representative of Italy referred to the opinion widely held among Members of the United Nations that the General Assembly should declare that the Government of South Africa had forfeited the right to exercise the Mandate

and that the General Assembly should decide that the Territory must be brought to independence at the earliest possible date. This view was fully shared by the Italian delegation and implied, he said, in a political context, the termination of the Mandate. In explaining his affirmative vote, the representative of Italy said that the text of the resolution in its final version had commanded the support of an overwhelming majority of the Assembly.

The Netherlands representative said that, after a thorough consideration of the legal aspects, his delegation had come to the conclusion that the General Assembly was legally entitled to put an end to South Africa's Mandate, because of non-compliance by the Mandatory with the essential obligations ensuing from the mandate agreement. Every party to a treaty had the inherent right to terminate the treaty in case of a material breach by the other party. That right could, in this case, *a fortiori*, be claimed by the United Nations as the successor of the League of Nations, in view of the violations of the stipulations of the Mandate Agreement. The Netherlands delegation had no doubt that the Mandatory Power had violated the terms of the Mandate. It had, therefore, forfeited the right to administer the Territory. Further, that was the main aspect of the matter.

Norway's representative declared that, after 20 years of futile discussion about the South African administration of South West Africa, the consensus had arisen at the Twenty-first Session of the General Assembly that South Africa had lost its right to administer the Territory and that its Mandate was terminated.

In the view of the Swedish delegation, the Judgment of the International Court of Justice had placed upon the United Nations a duty to fulfil the sacred trust of civilization with regard to South West Africa, which had been betrayed by South Africa. The Swedish delegation felt that the General Assembly could, and should, go further, and decide that the Mandate as a consequence was terminated, a Mandate which South Africa itself had disavowed, and that the United Nations had specific responsibilities for transitory administrative arrangements, pending the exercise by the inhabitants of their right to self-determination.

Australia's representative said that his delegation found itself in a great deal of agreement with the statements made by the representatives of the United Kingdom and France, but that not having the special responsibilities which those two countries had under the Charter, Australia felt able to vote for the resolution. He said that he agreed with the point made by the representative of Japan, that the General Assembly must keep strictly within the framework of the Charter and of international law. But, he said, it was necessary also that the General Assembly should be active in the pursuit of justice by all lawful means, and justice clearly required that South West Africa should be administered by an authority fully committed to such principles as enjoyment, in freedom and without racial discrimination, of the basic human right, the principle of self-determination of peoples and so on.

Canada believed that South Africa had forfeited its right to administer the Mandate. With reference to the concern expressed by some speakers that the General Assembly might not enjoy full legal competence to assume the Mandate unilaterally, the Canadian delegation tended to the view that in the light of the advice which the General Assembly had received in the past from the International Court of Justice, the Assembly had an adequate basis for the action proposed.

Israel's representative said that the legal position as previously declared by the Court in the Advisory Opinions of 1950, 1955 and 1956, and in the Judg-

ment of 1962, remained unimpaired. In the Israeli view, the real effect of the 1966 Judgment was 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. The General Assembly could legitimately terminate the Mandate on the basis of the existing jurisprudence of the Court and any attempt to embroil the Court in the affairs of South West Africa would only add to the confusion and controversy and not assuage it, and would only complicate still further the work of the General Assembly.

It is pertinent to conclude this summary of views with that of New Zealand's representative, because it so aptly summarizes the General Assembly's mood and consensus, in these words:

> "In essence the issue was whether in the face of South Africa's failure to comply with its substantive obligations and its disavowal of the Mandate, the United Nations would assert the responsibilities which it undoubtedly had. In the resolution those responsibilities were unequivocally affirmed. The situation justified an act of solidarity on the part of the international community in support of a resolution incorporating the restatement of the collective view of the Organization, despite differences of view as to the most appropriate and effective wording of that resolution as a whole. The question of implementation remained for study."

The representative of France, after agreeing fully that the South African Government had committed violations of the Charter, of the Declaration of Human Rights and of the Mandate which South Africa had also disavowed, said as follows:

> "The views which led the French delegation to abstain in the vote did not relate to the basic findings of fact and of law, but related to the legal validity of the method proposed for putting an end to the policy of South Africa in South West Africa."

He added, in the same speech, that France's dissent related to the wisdom of having South West Africa administered by the United Nations. Although the French delegation had stated that it did not exclude the withdrawal of the Mandate, it could not agree with the manner in which the withdrawal had been decided upon.

Similarly, the United Kingdom representative said that the reservations he had expressed related to the last paragraph of the preamble, and that it had always been the United Kingdom's contention that the Assembly should not, at that stage, do more than state that the rights of the South African Government under the Mandate had terminated; that was a finding which the United Kingdom claimed to be right, in view of the failure of the South African Government to fulfil its international obligations.

France, for her part, expressed support for paragraphs 2, 3 and 7 of resolution 2145.

I want now to deal briefly with a sub-heading of the same point, namely *the relationship between resolution 245 (1968) of the Security Council and resolution 2145 of the General Assembly.*

In order to appreciate the importance of the Security Council resolution 245 in relation to the question now before the Court, it is to be noted that it was adopted unanimously by all existing members of the Security Council. This resolution included the first preambular paragraph, which was expressed as

taking note of the fact that the Mandate of South Africa over Namibia had been terminated by the General Assembly. The relevant paragraph reads as follows:

> "*Taking note* of General Assembly resolution 2145 (XXI) of 27 October 1966, by which it terminated South Africa's Mandate over South West Africa and decided, *inter alia*, 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."

This was the first time that the Security Council had occasion to pronounce itself on the subject of the termination, by General Assembly resolution 2145, of South Africa's Mandate over Namibia.

Under resolution 246 of 1968, the Security Council in the second paragraph referred to the termination by General Assembly resolution 2145 of South Africa's Mandate over South West Africa. The relevant paragraph is as follows:

> "*Taking into account* General Assembly resolution 2145 (XXI) of 27 October 1966 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."

It will be noticed that the wording of this provision differs somewhat from the wording of the corresponding provision of the first paragraph of the preamble of the Security Council resolution 245, according to which the Council had *taken note* of General Assembly resolution 2145, whereas in resolution 246, the Security Council took the General Assembly resolution *into account*.

The importance of resolution 246, like that of resolution 245, consists in the fact that, by it, the Security Council unanimously and without any abstention, confirmed the General Assembly resolution 2145 by saying that it took the latter *into account*.

Two permanent members of the Security Council who voted for the resolution, however, recalled their earlier reservations in regard to parts of the General Assembly resolution 2145. Under resolution 264, while also taking into account General Assembly resolution 2145 in the second paragraph of its preamble, and while re-affirming the special responsibility of the Security Council towards the people and the Territory of Namibia in the sixth paragraph of the preamble, the Security Council recognized in its first operative paragraph "... that the United Nations General Assembly terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the territory until its independence".

In the second operative paragraph the Security Council considered "the continued presence of South Africa in Namibia [to be] illegal and contrary to the principles of the Charter and the previous decisions of the United Nations ...".

In the third operative paragraph the Security Council called "upon the Government of South Africa to immediately withdraw its administration from the territory".

In the fourth operative paragraph the Council 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 paragraphs 5, 6 and 7 the Council declared that the Government of South Africa "has no right to enact the 'South West Africa Affairs Bill'", and condemned the refusal of South Africa to comply with its resolutions 245 and

246. It invited "all States to exert their influence in order to obtain compliance by the Government of South Africa with the provisions of the resolution".

Finally, in operative paragraph 8, the Security Council declared "that in the event of failure on the part of the Government of South Africa to comply with the provisions of the present resolution [resolution 264], the Security Council [should] meet immediately to determine upon necessary steps or measures [to be taken] in accordance with the relevant provisions of the Charter of the United Nations".

Let us now consider briefly resolution 269 of 1970. This resolution was adopted by 13 votes in favour, none against and 2 abstentions—France and the United Kingdom. The United States and Finland, who abstained in the vote on resolution 264, voted in favour of resolution 269. Both France and the United Kingdom favoured support for the self-determination of Namibia and opposed the policy of the creation by South Africa of autonomous areas in Namibia.

Operative paragraph 2 of resolution 264, which declares "the continued presence of South Africa in Namibia to be illegal" and operative paragraph 7 of resolution 269, which "calls upon all States to refrain from any dealings with the Government of South Africa which are inconsistent with . . . this resolution" are worthy of attention.

The Council also decided to establish an *Ad Hoc* Sub-committee on Namibia. It should be noted that resolution 276 was not only *recalled* and *reaffirmed* respectively in the preambles of resolutions 283 and 284, but that it is referred to in operative paragraph 1 of resolution 284, which contains the request of the Security Council for an advisory opinion on the "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)".

Under resolution 283 the Security Council reaffirmed resolutions 264 and 276 and noted the continued flagrant refusal of South Africa to comply with the decisions of the Council, demanding the withdrawal of South Africa from the Territory. It may therefore be concluded that the Security Council has accordingly established, as far as the consequences for South Africa are concerned, that South Africa has committed and continues to commit an internationally wrongful act for which it has incurred and continues to incur, international responsibility.

In regard to other States than South Africa, the resolution contains decisions in the field of diplomatic, consular and other relations, calls upon all States to take measures in regard to dealings with respect to commercial or industrial enterprises or concessions in Namibia, initiates action in regard to bilateral and multilateral treaties and expresses its interest in actions of the United Nations Council for Namibia regarding both passports and visas. It then calls for reports by States on measures which they have taken to give effect to the provisions of the resolutions.

It is thus clear from this brief analysis of the various resolutions of the Security Council and their relation to the General Assembly resolutions that both principal organs of the United Nations had agreed on the fundamental questions of fact and law relevant to the status of South West Africa, Namibia. All the 114 delegates who voted for resolution 2145, and the three delegations which abstained, agreed to re-affirm the right of the people of Namibia to self-determination, the Territory's international status, and the fact that South Africa had failed to fulfil its obligations and had disavowed the Mandate; that the Mandate had been duly terminated and that South Africa had no longer any right to administer the Territory. Apart from South Africa herself and Portugal, there was general agreement on the facts of this situation and on the

ends to be aimed at, although in later years, the United Kingdom and France had registered reservations on the methods to be applied.

As we have seen, 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 also *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.

The virtual unanimity of the international community, as expressed in the proceedings and the determinations of the General Assembly and of the Security Council, has been described as a phenomenon which is rare and almost unique in the history of the United Nations.

In connection with this resolution, the representative of France recalled that his delegation had stated in the General Assembly on 27 May 1968 that, if such were the desire of the majority, the French delegation would be in favour of the Security Council being seised of the problem of South West Africa. He asked whether the members of the Council were not already at one in desiring to see an end to the humiliation imposed on so many Africans and in wishing to restore the prestige of the Organization so gravely at stake in this matter.

The representative of Pakistan recalled that, not possessing the necessary authority to enforce the decisions of the United Nations, the General Assembly had to turn, as it did in resolution 2403, to the Security Council to take urgently all effective measures in order to ensure the immediate withdrawal of South Africa from Namibia.

The representative of the USSR noted that the positive aspects of the resolution were that it confirmed the decisions which terminated the Mandate and also that the General Assembly called upon South Africa to withdraw its administration from the Territory.

With regard to resolution 269, the representatives of Finland, the United Kingdom and the United States placed it on record that the differences of opinion in the Council were about means and not about ends, and that the differences did not relate to the essential facts pertaining to the state of affairs in Namibia, but concerned what steps or measures the Security Council could thus appropriately take.

Paragraph 3 of resolution 269 reads as follows:

> "*Decides* 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, a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia;".

The main innovations of resolution 269 may be stated briefly as follows:

1. the invocation of Article 25 of the United Nations Charter;
2. the characterization of the continued occupation of Namibia by South Africa as constituting an aggressive encroachment on the authority of the United Nations; and
3. the setting of a time-limit for the withdrawal of the South African administration from the Territory.

All these went beyond previous Security Council and General Assembly resolutions.

In view of the foregoing, it is difficult to accept the French memorandum, in which it is contended that there is nothing binding about the resolutions of the Security Council, especially resolution 276, and that all the resolution does is to make recommendations to States which they are free to disregard or to implement.

The French memorandum also attempts to draw a distinction between the Security Council resolution on Rhodesia and the present one on Namibia, by pointing out that whereas the language of Chapter VII of the Charter was used *in the Rhodesian resolution, no such phraseology had been employed with* respect to the resolution on Namibia.

I believe that a conclusive case has been made out against this contention and that the Security Council has left us in no doubt as to what its intention really was, namely to confirm the termination of South Africa's Mandate over Namibia which the General Assembly had earlier declared.

I may also submit to the Court that I am in agreement with much of the argument of the counsel for the Secretary-General on this point.

I now come to the fourth point of my statement: *the question of the competence of the United Nations to revoke South Africa's Mandate.*

Both the South African and the French Governments have expressly questioned the competence of the General Assembly to revoke South Africa's Mandate since, in their view, in doing so it would not appear to have acted under either Chapter V or Chapter VII, but only under Chapter VI, and that in any case the General Assembly had other remedies in the case of a recalcitrant member of the Organization which has persistently committed breaches of its obligations under the Charter. France fully agreed that South Africa had failed to observe internationally accepted norms—using the delegate's own words—and to honour its treaty obligations. In the view of the French Government there could be no doubt but that the Government of South Africa had violated and in a very real sense infringed those rules and regulations.

South Africa has violated the Charter, the obligations imposed upon it by the Mandate, as well as the principles and rules contained in the Universal Declaration of Human Rights.

The French Government contends, however, that the sanction provided for in Article 6, a Member of the United Nations which has persistently violated the Principles contained in the Charter, should have been applied by the General Assembly and the Security Council. This sanction provides that such a Member shall be expelled from the United Nations by the General Assembly upon the recommendation of the Security Council.

If this suggestion were accepted, we would then arrive at the impossible situation in which the only remedy would be the expulsion of South Africa and the apparent abandonment of Namibia to the Government of the Republic of South Africa forever. Indeed, such a course would have amounted to being asked to throw away the baby with the bath water.

Surely the United Nations should not be expected to be so callous regarding its clear duty to the Territory and people of Namibia, as "a sacred trust of civilization" given into its charge. How could the United Nations choose the more perilous course of the two—expulsion or termination of Mandate? What about the unfulfilled international responsibility towards the people of Namibia which has been laid upon it since the dissolution of the League of Nations in 1946?

South Africa, on the other hand, would apparently wish to keep Namibia and still remain a Member of the United Nations. Or she might welcome expulsion as a way out; one does not know. But the United Kingdom, for its part,

contents itself with asking that the General Assembly stop at declaring the termination of South Africa's Mandate but not go further to implement it by any enforcement action. Since there is then general agreement as to the end to be achieved, why not leave the choice of means to the United Nations?

In my respectful submission, it is best for all concerned to accept the competence of the General Assembly and the Security Council to deal with this matter in their discretion. The Court would do well to confirm that what has taken place in both public organs of the United Nations has been eminently within the bounds of the General Assembly and the Security Council and that the Court will not interfere on these points. Certainly there are abundant precedents for this in many a municipal legal system wherein the constitution provides that certain decisions, always mainly political, can be taken by the parliament or the political assembly whose duty it is to determine such matters. And when issues arise before a court in which the court is called upon to pronounce on the wisdom, or lack of it, of the assembly to take particular decisions, so long as those decisions are properly and regularly taken within the constitution and the procedures laid down, all that the court would be expected to do would be to say that this matter ought to be decided by the political assembly which has decided it, and unless reasons could be advanced to show that the procedures had not been followed, the court would declare itself unable to do more. I understand that this principle is common te both common law and civil law systems.

With regard to the General Assembly, I would like to remind the Court that Article 10 of the United Nations Charter gives it very wide powers. It authorizes the Assembly to discuss any question or any matters within the scope of the Charter or relating to the powers and functions of any organ provided for in the Charter, and to make *recommendations to the Members of the United Nations* or the Security Council or to both on any such questions or matters. To these must be added Article 11, sub-paragraph 2, which entitles the General Assembly to discuss international peace and security brought before it by any Member of the United Nations, or by the Security Council or even by a State which is not a Member of the United Nations. It may then make recommendations to the Security Council for any necessary action that should be taken.

Hans Kelsen has expressed the opinion in his *Law of the United Nations, 1950*, at pages 189-199, that:

> ". . . there is hardly any international matter which the General Assembly is not competent to discuss and on which it is not competent to make recommendations".

And it may be noted that some of these recommendations can have binding effects, for example, in matters relating to admission of members. To the same effect is the view of Goodrich and Hambro in their book, *The Charter of the United Nations, 1949*, at page 152.

When we turn to the Security Council, Article 24, paragraphs 1 and 2, of the Charter, read as follows:

> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsbility 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."

There are two main questions that deserve notice in connection with these paragraphs. The first is to determine whether the primary responsibility which the Security Council has for the maintenance of international peace and security is limited only to those duties that are specified in Chapters VI, VII, VIII and XII, or whether it extends beyond those enumerated. The second question relates to the first sentence of paragraph 2, which requires that the Security Council: ". . . shall act in accordance with the purposes and principles of the United Nations." Thus this phrase envisages also Articles 1 and 2 of the Charter, both of which are all-embracing and even cover the entire United Nations Charter.

It is respectfully submitted that the Security Council is given very wide powers; one would not say that they are powers of the "super-State", as has been mentioned in another case. But they are given, under the provisions of the Charter, very extensive powers which the Court could take time to consider before dismissing them as not as extensive as they really are. They are undoubtedly not unlimited in regard to matters outside the purview of the United Nations, but, as regards matters under the authority of the United Nations, within the competence of the United Nations as a whole—as a world body—the powers of the Security Council and of the General Assembly are very wide indeed.

We may recall, in this connection, the following observations in the case of *Certain Expenses of the United Nations, I.C.J. Reports 1962*, page 150, at page 168:

". . . when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations . . ."

"one of the stated purposes of the United Nations"—the purposes as laid down extensively in Articles 1 and 2 of the Charter, then "the presumption is that such action is not *ultra vires* the Organization". And I would invite the Court to give consideration to that aspect of the matter.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

I now want to deal briefly with the fifth point on which I propose to touch in my statement, and that is *Breaches by South Africa of its international obligations*. This may be considered under two main headings: *(a)* breaches towards the United Nations and *(b)* breaches towards Namibia and the Namibians.

Under *(a)* we may consider briefly the following questions:

First, the repudiation of the Mandate and of the supervisory authority of the United Nations, contrary to the Court's Advisory Opinions of 1950, 1955 and 1956. I do not propose to elaborate on these as I have dealt at some length with all of them in the earlier part of my statement. The international legal status of the Territory as well as the obligations incumbent upon South Africa to render annual reports on behalf of Namibia and to transmit petitions from the inhabitants to the Trusteeship Council on behalf of the General Assembly —all these are well-known facts which do not require any elaboration. The South African Government has consistently declared its complete rejection of the advisory opinions of this honourable Court in respect of these matters.

The second point I wish to mention is the hampering of the United Nations by South Africa in the exercise of its international responsibilities towards Namibia; for example, South Africa's refusal to withdraw from Namibia so that the United Nations Council on Namibia can perform its functions of administration within the Territory.

By refusing to permit the Council to enter Namibia, as well as by refusing to recognize the Council's authority in respect of Namibia and by forcibly retaining Namibia within its own exclusive occupation, South Africa has thereby prevented the Council and the General Assembly from exercising effective control or administrative responsibility within Namibia, with the result that the Council has thus far been obliged to base itself temporarily outside Namibia and to limit its activities accordingly (para. 114, written statements, I, p. 104).

The third point is the persistent defiance of the United Nations and persistent refusal to comply with resolutions of the United Nations, particularly resolution 2145 of the General Assembly and resolutions 276, 283 and 284 of the Security Council by which its Mandate over Namibia was terminated and by which it was also asked to withdraw completely from the Territory.

South Africa has thus continued to be in illegal occupation of what is to all intents and purposes foreign territory to South Africa.

The Security Council resolution 276 declares that "the defiant attitude of the Government of South Africa towards the Council's decisions [and other recommendations] undermines the authority of the United Nations" (para. 94, written statements, I, pp. 99-100).

The legal consequence for South Africa of her 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. These liabilities, both under the United Nations Charter and under general rules of international law concerning State responsibility, are in addition to the international responsibility already incurred by South Africa in the form of administrative or other acts and omissions in respect of Namibia.

Under *(b)*, that is, in relation to obligations towards Namibia and the Namibians, we may consider the following matters:

1. Denial of the Namibians of their right to self-determination and independence, a right which is enshrined in Article 22 of the League Covenant given to South Africa to nurture Namibia to self-government and independence, to ensure the material and moral well-being of the indigenous inhabitants of Namibia.

This clearly implies that South Africa had betrayed the sacred trust of civilization, which Namibia constitutes under the mandates system.

2. The extension of the laws and practices of apartheid from the Republic of South Africa to Namibia; for example, the creation of *Bantustans*, or so-called "home-lands". See, for example, the provisions of the South West Africa Affairs Bill. There is no doubt at all that in the practice of apartheid in Namibia, it is the rule rather than the exception that there is segregation of white from black and of one ethnic group from another, instead of the legitimate duty of the mandatory to promote the unity of the people of Namibia.

3. *Denial of the right to freedom* of movement, participation in modern government, education, adult franchise and all the other fundamental human rights which are enshrined in the Universal Declaration of Human Rights of the United Nations and in analogous instruments, guaranteeing the right to education, to franchise, to participation in government of one's own country, not merely in local government or other devices that keep the majority of the

inhabitants of Namibia from the main stream of administration of the Territory of Namibia.

The foregoing is by no means a full, or indeed, an exhaustive list, of breaches already committed by the Government of South Africa under the Charter of the United Nations against its mandate obligations and under general international law. It has been rightly asserted that, on the basis of the *Barcelona Traction* case decided by this honourable Court, early last year, the denial of fundamental human rights and other similar infractions of generally accepted standards of behaviour in the 1970s, not in the 1920s, constitute something of the nature of *jus cogens*, a peremptory norm of general international law from which States are not permitted to derogate. These are clearly enunciated in Articles 53 and 64 of the Vienna Convention on the Law of Treaties, and it is reassuring to find that this honourable Court has not been slow in pronouncing its general attitude *towards* such matters in the *Barcelona* case.

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, sub-paragraph 5, of the Charter in any action it takes in accordance with the Charter. The whole subject will be found dealt with in I, paragraphs 68-109, pages 92-103, written statements. This occurs in the portion submitted on behalf of the Secretary-General of the United Nations, to which the attention of the Court is hereby, respectfully, drawn. I do not, therefore, intend to elaborate this heading any further.

I now come to the sixth point: *Legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)*. One can afford to be brief in discussing this heading, since our analysis of the various General Assembly and Security Council resolutions has pointed up most of the international obligations devolving upon States in respect of South Africa's illegal occupation of Namibia. In particular, firstly, 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-determination and independence. Secondly, 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. Accordingly, all diplomatic, consular and other relations are forbidden to all States.

Third point: no international treaty or agreement may be concluded by any State either with South Africa or the illegal South African administration of Namibia since the termination of South Africa's Mandate. All such treaties and agreements that may have been entered into are declared null and void, *ab initio*.

Similarly, all mineral and other concessions granted or entered into on behalf of the Territory of Namibia with the Government of South Africa since the termination of its Mandate are also without effect and are void. States are also called upon to cease any dealings with and all commercial, investment and tourist activities in South Africa when purporting to act on behalf of the Territory of Namibia.

Fifthly, as a result of the continued and illegal presence of South Africa in Namibia, all member States of the United Nations have collective responsibility under the United Nations Charter to help fulfil the still undischarged international trust assumed by the United Nations on behalf of the people and Territory of Namibia.

Sixthly, in sum, any legal relations of any kind with or involving Namibia

can only be entered into or maintained through the sole authority legally responsible for the administration of Namibia. That authority is the United Nations Council for Namibia acting on behalf of the General Assembly. To deal with any other authority, such as the Government of South Africa, or the illegal South African administration in Namibia since the termination of the Mandate, would be absolutely void and without legal effect.

I would, at this point, refrain from further elaboration here, as details are available in paragraphs 110 to 148 of the written statement submitted on behalf of the Secretary-General in I, pages 103-110.

At this stage and before I make my final submissions, I would like to advert briefly to the letter [1] recently circulated by South Africa suggesting the holding of a plebiscite in Namibia in order to ascertain the facts on the spot.

Now, I have it on command from the Organization of African Unity to say that it does not consider that any useful purpose would be served by such an exercise. There is also the question whether the Court has the competence to undertake it, with or without the South African Government's participation. To whom would the experts report? Who would be judge of their findings? Would the Court not become embroiled in the political complications and implications of what is, in the final analysis, a purely political exercise? The umpire should not, in my respectful submission, descend into the arena.

What are the facts wanted for? To show that South Africa, as it claims in Chapter XI of its statement, has been governing Namibia well? Or even better than some other independent African countries? If so, why do we not agree that Namibia is therefore better qualified for political independence *right now*, and give it to it?

The facts are not in dispute, they are well known to the United Nations by all the available means of ascertaining facts. The argument that the Court gave its Judgment of 1950 *per incuriam*, so to speak, that all the facts were not made available to it and that new ones had been discovered, has already been disposed of by the Court itself in its Judgment of 1962. The important point in this respect is the denial of human rights and the degradation of the human person in Namibia.

May I be permitted to refer to Oliver Goldsmith's couplet in "The Deserted Village":

> "Ill fares the land, to hast'ning ills a prey,
> Where wealth accumulates, and men decay;".

Men in Namibia are decaying morally and spiritually because of the policies carried out in that part of the world.

May I request the permission of the Court, Mr. President, to make a number of submissions which I would recommend respectfully to your attention in considering whether or not to answer the question put to you by the Security Council and affirm what has taken place in the United Nations up to date. I make five submissions as follows:

1. That General Assembly resolution 2145 (XXI) of 1966 is valid, and
   (i) that accordingly South Africa's Mandate over Namibia has been validly terminated thereunder; and
   (ii) that South Africa's continued presence in Namibia is illegal and has been illegal since the date of termination of its Mandate.

[1] See **Correspondence**, No. 92, p. 673, *infra*.

2. That the Security Council resolution 276 (1970) is valid and that even if General Assembly resolutions were for any reason to be regarded as merely recommendatory, the combined effect of the resolutions of both public organs of the United Nations renders valid the termination of South Africa's Mandate over Namibia and makes the continued presence of South Africa therein illegal and *ultra vires*.

3. That the South African Government be asked to withdraw *holus-bolus* from Namibia, which should immediately be placed under the United Nations trusteeship system, with the declared objective of being assisted and prepared for complete self-government and independence within the shortest possible time.

4. That in the meantime, all States should refrain from entering into any diplomatic, consular, commercial and economic relations with South Africa in respect of Namibia and all illegal transactions, whether by treaty or otherwise, that might be entered into in contravention be deemed illegal and of no effect whatsoever.

5. That all States are under an obligation to co-operate with the United Nations towards the fulfilment and achievement of these purposes in accordance with Articles 2 (5) and 25 of the United Nations Charter.

May I implore the Court to permit me to end on a note based on the opinions stated by Australia and New Zealand in connection with the adoption of resolution 2145 in the General Assembly to which I alluded earlier in this address. They can certainly bear repetition here.

The Australian representative said that he had referred to the complexity of the legal and practical problems involved. He had agreed with the point made by the representative of Japan that the General Assembly must keep strictly within the framework of the Charter and of international law. But it was necessary also that the General Assembly should be active in the pursuit of justice by all lawful means, and justice clearly required that South West Africa should be administered by an authority fully committed to such principles as enjoyment, in freedom and without racial discrimination, of the basic human rights, the principle of self-determination of peoples, and so on.

The New Zealand representative said his delegation had voted in favour of the resolution because it believed that a very important principle was at stake. In a sense the issue was whether, in the face of South Africa's failure to comply with its substantive obligations and its disavowal of the Mandate, the United Nations would assert the responsibilities which it undoubtedly had. In the resolution these responsibilities were unequivocally affirmed. The situation justified an act of solidarity on the part of the international community in support of a resolution incorporating the re-statement of the collective view of the Organization, despite differences of view as to the most appropriate and effective wording of that resolution as a whole.

The New Zealand representative then went on to say that, "in the light of all the factors, New Zealand believed that the question whether the Assembly could properly regard South Africa as having forfeited the right to continue with the Mandate could be answered affirmatively. This conclusion could be stated with greater authority if it had the backing of an advisory opinion of the International Court of Justice. In the future there might well be a context in which the United Nations felt a cogent need for such corroboration."

I have no doubt but that the Organization of African Unity, Mr. President and Members of this Court, would wish me to invite this honourable Court to give that backing and that corroboration in an act of solidarity on the part of the international community in its search for justice, equity and fair play.

The PRESIDENT: Beginning with tomorrow morning's sitting, the Court will be ready to hear the statements on behalf of States who have intimated their intention of making oral statements to the Court in the alphabetical order of their names in English as has already been announced. The Court will expect that if, at the conclusion of his statement, there is time available towards the end of the sitting, then the representative of the State next in order should be ready to follow on.

The Court rose at 12.15 p.m.

FOURTH PUBLIC SITTING (11 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. CHAGLA

REPRESENTATIVE OF THE GOVERNMENT OF INDIA

Mr. CHAGLA: Mr. President and honourable Members of the Court, I have the honour and privilege to present to you the views of the Government of India in regard to the request of the United Nations Security Council for an advisory opinion of the International Court of Justice. By its resolution 284 (1970), adopted on 29 July 1970, the Court was requested to give its opinion on the following question:

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

The matter is of the utmost importance not only to the Security Council and the United Nations, but also to the international community of States as a whole. Certain aspects of the matter before the honourable Court have been before the League of Nations as well as the United Nations General Assembly for over 50 years. The International Court of Justice has also considered some questions relating to South West Africa in three Advisory Opinions and in a prolonged contentious case. In accordance with the decisions of the people of the Territory, the United Nations General Assembly by resolution 2372 (XXII) of 12 June 1968 has proclaimed that South West Africa shall henceforth be known as Namibia.

My Government has already filed a written statement which has been printed in the volume of written statements, I, at pages 830-842. The Government of India has also had the benefit of perusing the written statements filed on behalf of the Secretary-General of the United Nations, as well as other governments.

My Government is grateful to the honourable Court for the opportunity given to it not only to file its written statement, but also to participate in the oral proceedings. We have decided to appear before the honourable Court in person to assist the Court in rendering an opinion on the question requested by the Security Council, which will facilitate the further consideration of the question of Namibia in the United Nations.

The Foreign Minister of India, Sardar Swaran Singh, stated in the General Assembly on 26 September 1966:

> "The people of South West Africa [Namibia] have been deeply injured and sorely neglected for many decades; and it behoves the United Nations to take swift and effective action to bring to an end their subjugation and oppression." (United Nations General Assembly, 21st Session, Plenary Meeting, 1417th meeting, pp. 11-12.)

In the view of my Government the case of South West Africa—Namibia—has been a blot on the conscience of mankind in spite of international law and

overwhelming public opinion being on the side of the people of that Territory. It is incumbent on the international community to close this ugly chapter in the history of international relations.

I. Background

Before I express the views of the Government of India on the question which is before the honourable Court, may I briefly recall the background against which this question has been submitted to this honourable Court for its opinion.

As a result of the First World War, Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions, including the Territory of South West Africa.

To its people, the Covenant of the League of Nations applied the principle that their well-being and development was a sacred trust of civilization to enable them to stand by themselves. Security for the purpose of this trust was embodied in the Covenant. Countries which, by reason of their resources, their experience or geographical position could best undertake this responsibility, were given the responsibility, if they were willing to accept it, to carry out this sacred trust as mandatory on behalf of the League of Nations.

The mandatory was to render to the Council an annual report with regard to the territory committed to its charge. These reports were to be received and examined by the Permanent Mandates Commission. The Territory of South West Africa was placed under the tutelage of the Union of South Africa by a Mandate which was confirmed by the League Council on 17 December 1920.

Following the termination of the Second World War, the Assembly of the League of Nations adopted on 18 April 1946 a resolution wherein it recalled the sacred trust of civilization embodied in Article 22 of the Covenant, and recognized that, on the termination of the League's existence, its functions with respect to the mandated territories would come to an end, but noted that Chapters XI, XII and XIII of the Charter of the United Nations embodied principles corresponding to those declared in Article 22 of the Covenant of the League and took note of the expressed intention of the mandatory Powers to continue to execute the sacred trust of civilization (*League of Nations Official Journal*, 21st Assembly, 1946, Spec. Supp. No. 194, p. 58).

The Charter of the United Nations, in Chapters XI, XII and XIII contained provisions regarding non-self-governing and trust territories whereunder Members of the United Nations have accepted the obligation as a sacred trust to promote to the utmost the well-being of the inhabitants of these territories and recognized that their interests are paramount. Attention of the member States to these objectives and obligations was invited by the General Assembly by resolution 9 (I) adopted on 9 February 1946.

Despite its expressed intention to place the Territory of South West Africa under the trusteeship system, the Union of South Africa did not conclude any agreement in this regard placing the Territory within the descipline of the system.

It its Advisory Opinion rendered on 11 July 1950 regarding the *International Status of South West Africa*, the International Court of Justice stated that:

> "South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920 . . . the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa . . . the supervisory functions to be exercised by the United Nations."

They further advised that the Union of South Africa may bring the Territory under the trusteeship system of the United Nations, even though they have no legal obligation to do so and that the Union of South Africa acting alone has not the competence to modify the international status of the Territory, which competence rests with the Union of South Africa acting with the consent of the United Nations.

The implications of this Advisory Opinion on the supervisory functions of the United Nations were elaborated in the Opinions given by the Court on 7 June 1955 and 1 June 1956 respectively, which supported the taking of a decision by the General Assembly on questions relating to reports and petitions *concerning the Territory of South West Africa by a two-thirds majority* and the granting of oral hearings to petitioners on matters relating to the Territory of South West Africa by the Committee on South West Africa.

In the contentious proceedings before the Court instituted by Ethiopia and Liberia against South Africa, the Court was requested to adjudge and declare that South West Africa was a mandated territory, that the Mandate in question was a treaty in force, that the Union of South Africa remained subject to its international obligations, and that it had violated the Mandate and its international obligations by unilaterally modifying its terms, by failing to promote to the utmost the moral and material well-being and social progress of the inhabitants of the Territory, by establishing apartheid, by failing to render annual reports to the United Nations and transmitting petitions from the Territory's inhabitants and by other specified acts.

Although by its Judgment delivered on 21 December 1962 the Court overruled the objections of the Union of South Africa and held that it had jurisdiction to adjudicate upon the merits of the dispute, by its subsequent Judgment delivered on 18 July 1966 it held that the Applicants had no legal interest in the subject-matter of their claims and, therefore, refused to proceed on the merits.

In the meanwhile, the General Assembly made several efforts to ensure that the Union of South Africa performed its international obligations relating to the Territory of South West Africa. The resolutions adopted by the General Assembly on South West Africa until 1966 are referred to in the written statement of the United Nations Secretary-General. After 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 other earlier resolutions, convinced that the Territory had been administered by South Africa in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights, considering that all efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the Territory and its inhabitants had been of no avail, mindful of its obligations towards the people of South West Africa, and affirming its right to take appropriate action in the matter, including the right to revert to itself the administration of the mandated Territory, the General Assembly decided to terminate the Mandate of South Africa in relation to the Territory of South West Africa by adopting resolution 2145 (XXI) on 27 October 1966. The resolution was adopted by a vote of 114 in favour, 2 against, with 3 abstentions.

In the operative part of this resolution 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 achieved 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 for whole-hearted co-operation and assistance in implementing this resolution.

Subsequently, the General Assembly adopted resolutions 2248 (S-V), 2324 (XXII), 2325 (XXII), 2372 (XII), 2403 (XXIII), 2498 (XXIV), 2517 (XXIV), 2678 (XXV) and 2680 (XXV). The Security Council also considered the question of South West Africa (Namibia) 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). These resolutions related, *inter alia*, to the illegal detention and trial of South West Africans by the Government of South Africa (General Assembly resolution 2324 and Security Council resolutions 245, 246 and 276), the action of South Africa in establishing Bantustans in South West Africa in contravention of the United Nations Charter (Security Council resolution 264), extension and enforcement of South African laws in the Territory (Security Council resolution 276) and persistent defiance of the authority of the United Nations by the Government of South Africa (Security Council resolutions 245 and 246, 264 and 269, 276 and 283).

In these resolutions, the Security Council recognized that the General Assembly 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). Faced with the situation of the Territory being in the possession of the Government of South Africa, notwithstanding the resolutions of the General Assembly and the Security Council, the Security Council took certain decisions to ensure compliance with these resolutions by the Government of South Africa. The latest measures taken in this regard are embodied in its resolution 283 (1970).

Mr. President and honourable Members of the Court, it is against this background that the question which is before the honourable Court for its advisory opinion arose. When the Security Council was considering the measures as to how the decisions and objectives of the General Assembly, endorsed by the Security Council, could be implemented and further realized, it decided that an advisory opinion from the International Court of Justice would be useful. The request for an advisory opinion was made in resolution 284. 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, after reaffirming the inalienable right of the people of Namibia to freedom and independence and recalling its earlier resolution in which it had recognized the termination of the Mandate and called upon the Government of South Africa immediately to withdraw its administration from the Territory, strongly condemned the refusal of the Government of South Africa to comply with the General Assembly and Security Council resolutions pertaining to Namibia, declared that the continuing presence of the South African authorities in Namibia was 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 were illegal and invalid, and established an *Ad Hoc* Sub-Committee of the Council to study ways and means for effective implementation of the resolutions of the Council. The question referred to this honourable Court for its opinion was suggested in that *Ad Hoc* Sub-Committee which had also suggested some other measures.

The Secretary-General of the United Nations has not only transmitted the text of resolution 284 (1970) to the International Court of Justice but, in accordance with Article 65 of the Statute of the Court, has also supplied all documents likely to throw light upon the question. These narrate at length the developments in the General Assembly and the Security Council since the termination of the Mandate by the General Assembly resolution 2145 (XXI) of 27 October 1966.

II. The Question Before the Court

Permit me now to address myself to the question before this honourable Court.

The first question which will arise in regard to the request from the Security Council is whether the Court should give its opinion. Keeping in mind the fact that the International Court of Justice is a principal organ of the United Nations, that its Statute forms an integral part of the United Nations Charter, and that in fact, the Court is the principal judicial organ of the United Nations, that the question requested by the Security Council under Article 96 (1) of the Charter is a legal question, and that there are no compelling reasons for it to refuse its opinion, it is the view of the Government of India that the International Court of Justice should address itself to this question and give its opinion.

The essential principles which the Court would take into account in this regard have been laid down by the Court itself on a number of occasions. In its Advisory Opinion in the *Certain Expenses* case in 1962, the Court observed as follows:

> "It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things, it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (*I.C.J. Reports 1962*, p. 155.)

In the *Peace Treaties* case in 1950, the Court, after admitting that the consent of the parties is the basis of its jurisdiction in contentious cases, added that:

> "The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. 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. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; 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." (*I.C.J. Reports 1950*, p. 71.)

The second question will relate to the scope of the question referred. Resolution 284 (1970) states the question as follows:

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

Article 65 (2) of the Statute of the Court requires that the written request for opinion should contain "an exact statement of the question upon which an opinion is required". The language used in the question put is simple, clear and direct, and should be given its ordinary and natural meaning. If it becomes necessary, the Court may look at the documents supplied by the Security Council, in accordance with Article 65 of the Statute of the Court, to throw light upon the question and to help it to answer it. The Court has not been requested to advise upon the entire question of Namibia. The starting point for the opinion of the honourable Court should therefore be Security Council resolution 276 (1970), notwithstanding which South Africa continues to be present in Namibia. The question referred is, what are the legal consequences for States of such continued presence?

In resolution 276, 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. Hence, it will be necessary and appropriate for the honourable Court to look at these and other directly applicable resolutions to consider the legal consequences of the continued presence of South Africa in Namibia. However, 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.

It is respectfully submitted that it will not be within the scope of the question referred to the Court for its advice, and it will not be appropriate for the honourable Court, to examine the question of the validity of General Assembly resolution 2145 (XXI) or Security Council resolution 276 or 284, or for that matter any other resolutions adopted by these organs, whether they relate to matters of substance or procedure, unless a specific request to that effect has been made by the referring body.

Such a request not having been made, the honourable 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 its sister principal organs of the United Nations without specific

request to that effect. To do otherwise would be to introduce an element of uncertainty in the working of the United Nations and in the implementation of the Purpose and Principles of the Charter by the principal organs of the United Nations acting within their competence and jurisdiction. In the absence of a request for an advisory opinion on the point by the principal organ entitled to make such request, the competence and validity of its action should be assumed by the Court.

Such an assumption by the Court would be reasonable and justified, if it keeps in mind the following points which emerge from the background of this case referred to by me at the outset of this statement, namely:

that the Territory of South West Africa has a separate international status of its own;

that South Africa had obligations towards its administration as a Mandatory of the international community first organized in the League of Nations and later in the United Nations;

that the obligation of South Africa of the sacred trust of civilization was to enable the people of South West Africa to stand by themselves;

that this obligation survived the termination of the League of Nations as a result of its own resolution as well as the provisions of the Charter of the United Nations regarding the non-self-governing and trust territories and the right of its people to self-determination;

that South Africa did not place the Territory of South West Africa within the discipline of the United Nations trusteeship system but nevertheless could not escape its obligations towards the people of that Territory;

that after prolonged consideration of the question, including several references to the Honourable Court, the General Assembly, after being convinced that the Territory had been administered by South Africa in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights, and that South Africa had disavowed the Mandate, and thereby committed a material breach of the Mandate which was an international treaty, decided to terminate the Mandate and to assume direct responsibility for the administration of the Territory until its independence, namely until the sacred trust of civilization to enable the people of Namibia to stand by themselves was fulfilled;

that this action was recognized and endorsed by the Security Council, which has taken further steps to implement these resolutions and taken consequent action;

that the General Assembly resolution was adopted by an overwhelming majority, amounting almost to unanimity, of the representatives of the international community, a phenomenon which, as has been aptly described by the Secretary-General, was "rare and almost unique in the history of the United Nations and in the history of international organization and international relations in general" (I, p. 202);

and that international community has by near unanimity upheld the basic questions of fact and law relevant to the status of Namibia (*ibid.*, see p. 202).

Accordingly it will not be within the scope of the question for the Court to advise the Security Council or the General Assembly about the measures already taken by them, or which may hereafter be taken, in implementing these resolutions. Needless to add that the Security Council and the General Assembly will give due weight and consideration to the opinion rendered by the honourable Court on the question under reference, while taking further action.

III. The Law Relevant to the Question

Since the action taken has been by the United Nations, legal consequences for States arise from their membership of the United Nations and provisions of the Charter of the United Nations, an international treaty, to which they are party. Legal consequences also flow from obligations arising under general international law. The relevant provisions of the Charter appertaining to the question under reference may be summed up as under.

Basic Principles of the Charter

Under Article 1, paragraphs 2 and 3, of the Charter, the purposes of the United Nations are, *inter alia*:

> "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ." and
>
> "To achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."

Under Article 2, paragraph 4:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

Article 55 provides that:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> . . . . . .
>
> *(c)* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Under Article 73 of the Charter:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories . . ."

Under Article 2, paragraph 5, of the Charter:

> "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter . . ."

Under Article 56:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Under Article 25:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Under Article 2, paragraph 2, of the Charter:

"All Members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

Under Article 103 of the Charter:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Elaboration of the Law

Aspects of the basic principles of the Charter referred to above were further elaborated by the United Nations in several resolutions and declarations, and most comprehensively by the Special Committee on Friendly Relations which was established in 1964 and which completed its report in 1970. Based upon its report, the United Nations General Assembly adopted, on 24 October 1970, resolution 2625 (XXV) embodying a Declaration on Principles of International Law concerning the Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The relevant provisions of the Declaration which bear on the legal consequences for States of the continued presence of South Africa in Namibia may be summed up as follows.

As to Occupation of Territory and Non-Recognition

"The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter."

(*The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations*, para. 10.)

As to 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.".

(*The principle of equal rights and self-determination of peoples*, para. 6.)

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and cooperation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter." (*Ibid.*, para. 2.)

"Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter." (*Ibid.*, para. 3.)

As to Good Faith in Fulfilling Obligations

"Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations."
(*The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter*, para. 1.)

"Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail." (*Ibid.*, para. 4.)

The above principles of the United Nations Charter, as elaborated in the Declaration on Friendly Relations, have also entered the body of general international law. In fact, by this Declaration, the General Assembly has also declared further that:

"The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and develop their mutual relations on the basis of the strict observance of these principles." (Declaration, *ibid.*, General Part, para. 3.)

After the General Assembly had unanimously adopted the Declaration on Friendly Relations on 24 October 1970, the President of the General Assembly, Mr. Eduard Hambro, made the following statement:

"As a man of law I am particularly happy to have just announced the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. This marks the culmination of many years of effort for the progressive development and codification of the concepts from which basic principles of the Charter are derived. The Assembly will remember that when we first embarked upon these efforts many doubted that it would be possible to obtain a result which would be acceptable to all the various political economic and social systems represented in the United Nations. Today those doubts have been overcome. In a sense, however, the work has just begun. We have proclaimed the principles; from now on we

must strive to make them a living reality in the life of States, because these principles lie at the very heart of peace, justice and progress." (A/PV. 1883, 24 Oct. 1970, p. 7.)

I need hardly dwell at length on the value of General Assembly resolutions or declarations adopted by an overwhelming vote or near-unanimity for general international law. I would like, however, to cite opinions of two experts in this connection. Quincy Wright's view is that:

"A General Assembly resolution, even though it lacks legislative effect *per se*, may, if approved by substantial unanimity, manifest general acceptance of a norm and thus establish customary international law." ("Custom as a Basis for International Law in the Post-War World", *The Indian Journal of International Law*, Vol. 7, No. 1, January 1967, p. 9.)

Another author's views are as follows:

"If . . . a resolution contains an assertion that a certain action is incompatible with a particular norm of the Charter, this is not a recommendation, although the assertion may be contained in a recommendatory resolution. Again, a resolution may contain an assertion that a particular line of conduct is contrary to a principle of customary international law or it may contain a principle agreed upon by the Members of the United Nations to guide their future conduct on an issue. These statements of principle are not merely recommendations but evidence of what the community of States regards as law." (Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague, 1966, p. 6.)

IV. Legal Consequences

Applying the legal principles as set out in Part III to the situation arising from the continued presence of South Africa in Namibia notwithstanding the relevant Security Council and General Assembly resolutions, the legal consequences for States may be summed up as follows:

1. From the termination of South Africa's Mandate by the General Assembly and the assumption of direct responsibility by the United Nations over the Territory of Namibia until its independence, and since South Africa has no other right to administer the territory, it follows that its presence in that territory is illegal. It further follows that all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are without any legal authority and are consequently illegal and invalid. It is incumbent on South Africa to withdraw its administration from the territory. South Africa's continued illegal presence in Namibia will entail international responsibility because both the existence of the internationally unlawful act, as well as its imputability to South Africa, have been established by the action taken by the General Assembly and the Security Council.

2. Since the action taken has been by the United Nations, all Members of the United Nations shall give to the United Nations every assistance in the action taken by it in accordance with the present Charter (Art. 2, para. 5). Consequently, it would be the duty of every Member of the United Nations:

(a) to recognize the authority of the United Nations to administer the territory of Namibia;

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

(c) to take joint and separate action in co-operation with the United Nations for the achievement of the purposes set forth in Article 55 of the Charter, in particular respect for the principle of equal rights and self-determination of peoples—in this case the people of Namibia—and universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion (Art. 56 of the Charter);

(d) to act in aid of the recommendations from time to time made by the United Nations Council for Namibia as well as the United Nations High Commissioner for Namibia, such as travel documents issued by it to facilitate the travel of Namibians in other countries.

3. 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). By resolution 283 (1970), the Security Council, *inter alia*, requested "all States to refrain from any relations—diplomatic, consular or otherwise—with South Africa implying recognition of the authority of the South African Government over the territory of Namibia" and called upon them to take further related steps; called upon "all States to ensure that companies and other commercial and industrial enterprises owned by, or under direct control of the State, cease all dealing with respect to commercial or industrial enterprises or concessions in Namibia", and to take further related steps; requested all States to review all bilateral treaties between themselves and South Africa in regard to their application to the Territory of Namibia, in other words, to take steps to remove the application of treaties to Namibia, a similar step being requested to the Secretary-General to review all multilateral treaties in regard to their application to Namibia; called upon "all States to discourage . . . tourism and emigration to Namibia".

4. Conversely, all States have the obligation not to recognize the presence of South Africa in Namibia in contravention of resolution 276 of the Security Council and resolution 2145 of the General Assembly. Accordingly, States shall not act in aid of South Africa, recognize its presence or authority in Namibia, deal with Namibia through South Africa, exercise their rights or carry out their obligations arising from treaties, contracts or other sources with respect to Namibia through the Government of South Africa, or do any other act which would recognize directly or by implication the authority of South Africa over Namibia.

V. Summation and Conclusion

To sum up and conclude: it is respectfully submitted that, in the view of the Government of India, the honourable Court should accede to the request of the Security Council and render an advisory opinion on the question referred to it. The question is a legal one and there are no compelling reasons for the Court to decline to give its opinion.

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)? The honourable Court has to proceed from the assumption that resolution 276 was adopted by the Security Council in accordance with the Charter of the United Nations and that it should constitute the starting point in determining the legal consequences for States of the continued presence of South Africa in Namibia.

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 of South West Africa was terminated, assumed direct responsibility for the Territory until its independence, and reaffirmed its resolution 264 (1969) which recognized this termination and which called upon the Government of South Africa immediately to withdraw from the Territory.

It follows that the Mandate of South Africa over Namibia has been legally terminated. South Africa has no other title to administer the Territory. The United Nations has assumed direct responsibility for the Territory until its independence. Namibia continues to have a separate international status of its own. The presence of South Africa in this Territory is, therefore, illegal, amounts to illegal occupation of the Territory, and constitutes aggression.

States parties to the United Nations Charter have an obligation to act in aid of the United Nations and to give it every assistance in any action it has taken in this regard, especially having regard to the fact that the United Nations has assumed direct responsibility for the Territory of Namibia until its independence. States have, therefore, an obligation to implement the decisions of the General Assembly and the Security Council with regard to the steps which they have taken or which they may, from time to time, take to put an end to the continued illegal presence of South Africa in Namibia and to vacate the aggression and thereby facilitate the attainment of independence by the people of Namibia.

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 relevant principles of law embodied in this Declaration, applicable to the question referred to the honourable Court, have already been indicated by me a little while ago.

These basic principles, namely the inalienable right of the colonial people to self-determination and independence, the non-acquisition of territory by threat or use of force or any other form of aggression, the non-recognition of fruits of aggression or illegal occupation of territory, and the duty to fulfil international obligations in good faith, are in fact the foundations of international legal order. They are, therefore, of interest to the international community of States as a whole. Their recognition and application by the World Court is bound to strengthen and promote the rule of law in international relations.

Finally, I should briefly like to refer to the question of a plebiscite for Namibia raised by South Africa. It is a clever device to draw a red herring across the path of this honourable Court. In the first place the question of a plebiscite has no relevance whatsoever to the question posed by the Security Council for the advisory opinion of this honourable Court, and this Court will not travel outside the limits laid down by the Security Council for its guidance and enlightenment from the Court.

In the second place 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. In the third place it does not lie in the mouth of South Africa to talk of self-determination of the people of Namibia after having, for many years, flagrantly violated the terms of the Mandate, the resolutions of the Assembly and the Security Council and the principles of the Charter.

Finally, South Africa wishes to ascertain today what the conditions of the

people of Namibia are and what their wishes are. What we are concerned with is what South Africa has done in the past. The Secretary-General has given an impressive list in his documentation of the repressive legislation passed by South Africa and the equally flagrant disregard of what is perhaps the most basic principle of the Charter, namely the dignity of the human personality, and its clear and unequivocal refusal to respect the resolutions of the Assembly and the Security Council while continuing to remain a Member of the United Nations.

In my country's opinion, 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. My country does not wish to express any opinion on the merits of the plebiscite. India has always stood for self-determination but it is well known that certain political conditions must exist before the right of self-determination can be exercised. It is for the United Nations to determine the time and method of ascertaining the wishes of the people of Namibia.

It should not be forgotten that the General Assembly resolution assuming direct administration of Namibia by the United Nations was adopted by a vote of 114 in favour, 2—Portugal and South Africa—against, and 3 abstaining. This shows the overwhelming confidence of the international community in the United Nations. South Africa is the last country in the world to talk glibly of a plebiscite after treading under its feet the basic rights of the people of Namibia and denying to them the inalienable guarantees which are enshrined in the Charter.

Before closing, I should like to express to you, Mr. President, and the honourable Members of the Court, my deep appreciation for the patience with which you have heard the views of the Government of India in regard to the important question before the honourable Court.

QUESTION BY JUDGE SIR GERALD FITZMAURICE

The PRESIDENT: Sir Gerald Fitzmaurice wishes to address a question to Mr. Castrén, the representative of Finland.

Sir Gerald FITZMAURICE: Mr. Castrén, in your statement the other day (I am looking at the top of page 86, *supra*, of the French text of the verbatim report), you argued that Assembly resolution 2145 had not directly terminated the Mandate. What it did in effect, according to your argument, was to declare that the Mandatory, by its own culpable behaviour, had itself terminated the Mandate. The Assembly had merely registered this fact.

In the light of this argument, the question I want to put to you, Mr. Castrén, is this:

Would you not agree that, since the Mandatory has at no time admitted having broken the Mandate, a declaration by the Assembly that the Mandatory has itself terminated the Mandate by reason of its breaches of it, amounts, or is equivalent to, a finding or judgment by the Assembly that such breaches have occurred?

As Mr. Castrén knows I think, it is not necessary for him to answer the question now, and if owing to absence it is inconvenient for him to do so in person, or through a substitute, I shall be quite satisfied with a written reply in due course.

M. CASTRÉN *fait un signe d'acquiescement.*

The PRESIDENT: May I enquire from the distinguished respresentative of the Netherlands whether, having regard to his other commitments, it would be convenient for him to address the Court now or at its next meeting.

Mr. RIPHAGEN: Mr. President, I would prefer the next meeting, in view of other commitments.

The PRESIDENT: The Court, having been apprised of the convenience of representatives of States who are next in order on the list of speakers during the oral hearing, and having consulted their convenience, will meet on Monday afternoon at 3 p.m. to continue these hearings, when the distinguished representative of the Netherlands will first address the Court.

The Court rose at 11.05 a.m.

FIFTH PUBLIC SITTING (15 II 71, 3 p.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. RIPHAGEN

REPRESENTATIVE OF THE GOVERNMENT OF THE NETHERLANDS

Mr. RIPHAGEN: Mr. President and Members of the Court, in view of the fact that already on several occasions in the past and now again in the present proceedings, many written and oral comments have been presented to this Court, which have dealt at great length with virtually all legal problems relevant to the Security Council's request for an advisory opinion, you will perhaps allow me to limit myself to some very general observations only.

Since international law is at the present day still primarily a *jus inter potestates* and consequently the rights and duties of States *inter se* are still primarily based on the concept of each national government exercising sovereignty over a given territory and a given group of human beings, it would seem that the legal status of the peoples and Territory of Namibia are at the core of the question put to the Court. It should in our opinion, however, be realized at the outset that the very legal notions introduced on the international scene shortly after the First World War, in respect of some peoples and territories formerly under the sovereignty of vanquished States, are to a large extent based on an approach to international law which is fundamentally different from the one followed up until then in the elaboration of rules of international law.

In particular it would seem that by introducing the mandates system the international community of States, as it then existed, departed from the hitherto accepted basis of all international law rules, according to which any territory and its population should come under the full and permanent sovereignty of a particular national government. Indeed, the introduction of the new legal concept at that time has, it would seem, three important legal consequences which are inter-related. First of all, the normal rules concerning acquisition and loss of territory do not apply. Secondly, the organized world community has a say in the determination of the functional rights and duties of States in respect of the territory and the peoples concerned, and, thirdly, the peoples concerned have a separate status pending the full exercise of their right of self-determination.

The legal meaning of the various acts performed by the governments concerned at the moment of the introduction of the mandates system and subsequently culminating in the adoption of General Assembly resolution 2145 (XXI), can, it would seem, only be appraised in the light of the fundamental change in the approach to international law rules which underlies the setting up of the mandates system. Indeed, that system necessarily implies a departure from the classical rules of international law if only because the system postulates the independent status of two sorts of *potestates* hitherto not recognized in international law, that is, on the one hand the individual human being, in particular in the exercise of his right of collective self-expression, and on the other hand

the international organization, in particular as expressing the collective will of the world community.

The full legal impact of this new approach to the solution of international problems which in themselves were far from novel, makes itself felt beyond the direct definition of the status of the peoples and territories concerned. It has an important bearing on the interpretation and legal effect of the individual and collective decisions of national governments, taken in respect of these peoples and territories. Indeed, these decisions cannot in law be treated in exactly the same way as those taken in the normal course of formation of legally binding rules and legal relationships between States under the classical rules of the law of treaties and the law of inter-governmental institutions. In particular, the inter-relationship between those various decisions, both in their sequence in time and as regards their effects beyond the group of governments participating in such decisions, must of necessity follow a pattern different from that underlying the classical concepts in this field, since those classical concepts are based to a large extent on bilateralism, *res inter alios acta* and non-continuity under changed circumstances.

The two principles on which the mandates system is founded—first of all the permanent right of self-determination of peoples and, secondly, the permanent non-annexation of the territories—those principles imply an international régime of what we could nowadays call *jus cogens*, which, both as regards its function and in respect of its creation, cannot be governed by the normal rules of classical international law which derive all international rights and duties from the original sovereignty of each individual national government over a given people and territory.

Now the detailed history of the making of Article 22 of the League of Nations Covenant has been set out so often both before and by this Court and its individual Members that a repetition of the facts would seem superfluous. Besides, it is the interpretation of those facts which gives rise to controversies.

In particular, there is a tendency, which is clearly apparent in the written statement of the Union of South Africa but is not limited to that document only, to interpret the various acts performed by the governments concerned at the time of the institution of the mandates system in the light of the legal concepts which are largely based on the idea that a State, by entering into a treaty or similar instrument, entailing an international obligation, so to speak "disposes" of a part of the otherwise unfettered national sovereignty rather than "participates" in a process of international legislation. Now surely the rules of the law of nations in respect of the making, the interpretation and the effect of treaties, as those rules are generally interpreted and understood in the present century, reflect both approaches, but the mixture seems to be different according to the object and purpose of the particular treaty. And it would seem accordingly, *a fortiori*, it is respectfully submitted, that the various decisions taken by governments individually and collectively in connection with the introduction of the mandates system should be construed with due regard to the particular character of that mandates system.

Indeed, from the moment that it is generally accepted that specific peoples and territories will not be objects of sovereignty of an existing State, then the creation and further development of rights and obligations in respect of such peoples and territories of necessity is governed by rules different from those applying to a treaty through which existing States mutually contract obligations in respect of the exercise of their respective sovereignties.

This, it is respectfully submitted, is not a matter of choosing between a teleological interpretation of a treaty and an interpretation in accordance with

what is called the "will of the parties" of that treaty. It is rather a matter of considering the legal character of the individual and collective decisions taken by States in the light of legal premises on which those decisions are based and of not applying to the adoption, interpretation and effect of those decisions such rules as are clearly based on different legal premises.

In view of what is stated in the introduction to the written statement by South Africa, it should perhaps be noted in this connection that in itself the distinction between the intention of the parties, the text of the treaty, and the object and purpose of the treaty, for the purposes of rules of interpretation is certainly not meant as an indication of mutually exclusive categories.

Indeed, Articles 31 and 32 of the Vienna Convention on the Law of Treaties can be considered to refer to all these three elements together. And it would seem clear that the emphasis which is often placed on the first, that is the will of the parties, rather than on the third objective element, is inspired by the consideration that States should not lightly be presumed to have given away the freedom of action inherent in their sovereignty. However, even so, in the interpretation rules of the Vienna Convention it is not the intention of the parties, but the text of the treaty which has pride of place.

It is obvious that this shift of emphasis makes it necessary to place the text of the treaty within the context both of the object and purpose of the treaty and of any relevant rules of international law applicable in the relations between the parties, and this is exactly what Article 31 of the Vienna Convention prescribes.

So even if one were to ignore the fact that the interpretation rules of the Vienna Convention are primarily directed at treaties through which States accept a limitation of their sovereignty and, consequently, if one would apply, without adaptation, those rules to the interpretation of the various instruments by which the mandates system was established, then the clearly expressed object and purpose of that system, that is the realization of the self-determination of the peoples, and the accepted basic rule of international law, that is the non-annexation of these territories, would govern such interpretation, and it is respectfully submitted that under no circumstances could one justify a so-called interpretation of those instruments which would result in reducing either of those two principles into a nullity.

Now here the fundamental difference between the instruments establishing the mandates system on the one hand, and a treaty imposing a limitation on the exercise of sovereignty by a State party to it on the other hand, becomes clearly apparent. Whereas in the latter type of treaty, that is a treaty by which a State accepts limitations in the exercise of its sovereignty, any gap left by the text of the treaty and its interpretation in good faith is necessarily filled by the sovereignty of the States concerned, on the other hand, in the former type of instrument establishing the mandates system such process is excluded and another process is required with equal necessity, that is the construction of solutions which are compatible with the basic premises of the instrument itself, that is the self-determination of the peoples and the non-annexation of the territories.

Since one cannot, so to speak, fall back on the sovereignty of an existing State over those peoples and territories, such solutions must imply some form of powers to be exercised by the organized community of States.

Now actually the mandates system, by adopting the legal norm of self-determination of those peoples and by rejecting the classical, legal technique of territorial sovereignty, could only embody the approach of functionally limited powers in respect of the peoples and territories concerned. This applies to the

powers of the organized community of States, to the powers to be exercised by the mandatory States as well as to the interrelationship between those powers, in particular to the construction according to which the mandatory State exercises its powers on behalf of the organized community of States.

Now this functional approach, adopted with the introduction of the mandates system, has important implications with respect to the rules of international law applicable to situations involving the peoples and territories concerned. Its essential characteristic lies in its adaptability to changing circumstances without having recourse to the formal modes of inter-State treaties, transfers and adjudications which, under the classical rules of international law, are otherwise required in order to make the distribution of legally protected interests between sovereign States correspond to the needs resulting from fundamental changes in the factual conditions.

Now obviously this adaptability of the system is primarily inspired by the function of promoting the exercise of the right of self-determination of peoples. Accordingly the functional powers of the organized community of States as well as those of the mandatory States are essentially limited in time. They cease automatically at the moment this right of self-determination has been duly exercised.

A further consequence of this functional approach is that the powers of the organized community of States are at any time during the period of applicability of the mandates system exercised through such international organization as at that time represents that community of States.

Finally, the functional approach entails an adaptation of the relationship between the powers of the organized community of States and those of the mandatory State if and when such adaptation is required to give effect to the common purpose of these respective powers

In all three respects the functional approach inherent in the mandates system precludes, in principle, the application to the relationship between the powers of the organized community of States and those of the mandatory State of the rules of general international law, which are predicated upon a system of relations between independent States, each of which is presumed to be the outcome of a process of self-determination of its population and each of which is entitled to permanent sovereignty over a given territory.

The first of the three main consequences of the functional approach, that is the termination of the powers in respect of the territory by the exercise of the right of self-determination, is not directly relevant in the context of the present Request for an advisory opinion. It could be remarked, however, in passing, that in the relevant practice of States the question whether or not the consent of the mandatory State and/or of the organized community of States was legally required for the termination of their powers has not been put to the test. In any case there is a ground for the contention that as a matter of law such consent would not freely be given or refused and as such cannot be compared with the termination of a treaty by consent of all the parties.

Furthermore, it would seem that the Judgment of your Court in the *Northern Cameroons* case suggests that the regular exercise of the right of self-determination puts the stamp of finality on the resulting situation of the peoples and territories concerned, as normal parts of sovereign States, to the extent of precluding an adjudication upon the merits of a claim concerning the regularity of the exercise of powers under the trusteeship system.

Now the second main consequence of the functional approach is forcefully illustrated by the Advisory Opinion of your Court concerning the *International Status of South West Africa.* Indeed, it is respectfully submitted that this Ad-

visory Opinion could not be justified on the strength of a construction according to which the obligations of South Africa related to the exercise of its sovereignty and were contracted by it towards the League of Nations. In other words, it could not be justified on the strength of the normal application of the rules of international law concerning the effect of treaties between sovereign States. On the contrary, it would seem that this Opinion rightly approaches the question as one relating to the modalities of exercise of the powers of the organized community of States, modalities of which the rights and obligations of the mandatory State are an integral part. Actually the latter rights and obligations of the mandatory State have a legal character quite different from what, in the relations between sovereign States, are normally called rights and obligations.

Essentially the rights of the mandatory State are powers to be exercised on behalf of the organized community of States and for the benefit of the peoples of the territory concerned, whereas the obligations of the mandatory State are inseparable from such rights inasmuch as they express the functional limitation of those powers and their relationship to those of the organized community of States. Now the third main consequence of the functional approach relates to the manner in which the adaptation of the mandates system to changed circumstances is effected. Here again it is respectfully submitted that rules of general international law relating to treaties are in principle not applicable in this field. This, it is submitted, is of particular importance in respect of two questions which have given rise to controversy, to wit, first, the alleged existence of a right of the mandatory State to veto such adaptation and, second, the alleged character of such adaptation as a sanction on the non-performance of obligations by the mandatory State.

With regard to both questions it is, once again, essential to keep in mind the paramount function of the mandates system, which is the realization of the right of self-determination of the people concerned. Powers of the organized community of States as well as those of the mandatory State are subordinated to this function.

Now surely no State can be charged with the task of acting as the mandatory State without its consent and that is clearly expressed in Article 22 of the League of Nations Covenant. But this consent, once given, together with the decision of the organized community of States to entrust this task to the mandatory State do not together constitute a treaty laying down the rules and procedures according to which the objectives of the mandates system shall be realized.

Indeed, neither the character of the activities of the mandatory State, which is administration in the largest sense of the word, nor the nature of the primary purpose of the system, that is, self-determination of the people concerned, would admit any detailed blue-print to be laid down in terms of an agreement. Accordingly, the principles laid down in Article 22 of the Covenant of the League of Nations and in the resolution of the Council of the League of 17 December 1920 were more in the nature of constitutional guidelines for the co-operation of the various organs, both international and national, in the performance of their common task in respect of the people and territory of German South Africa, as it was then called. Significantly, a modification of those guidelines was formally envisaged in Article 7 of the resolution, and made subject to the consent of the Council and of the Council alone.

Turning now to question *(b)*, that is the question of the alleged character of the adaptation of the system as a sanction to the non-performance of obligations by the mandatory State, it would seem once again, in conformity with the general character of the mandates system, that an adaptation of its modalities is not a matter of applying a sanction to a violation of obligations but rather a

measure taken in order to serve the final purpose of the system in view of an unforeseen development of the factual situation.

The difference in approach between the one and the other legal phenomenon can, it is submitted, be illustrated by a comparison between the Advisory Opinion of your Court of 18 July 1950 on the *Interpretation of the Peace Treaties (Second Phase)*, and its Advisory Opinion of 1 June 1956 concerning the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*. In the first-mentioned Advisory Opinion your Court held, and now I quote from *I.C.J. Reports 1950* at page 229:

> "The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties."

In its Advisory Opinion of 1 June 1956, however, your Court noted and now I quote from *I.C.J. Reports 1956* at page 31, that "Rule XXVI of its Rules of Procedure . . . of the Committee on South West Africa . . . involved a departure . . . from the procedure prescribed by the Council of the League". But nevertheless your Court held, and now I quote from the same *Reports*, page 32:

> ". . . that it would not be inconsistent with its Opinion of 11 July 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions: provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory".

Now as noted by the late Sir Hersch Lauterpacht in his separate opinion (*I.C.J. Reports 1956*, p. 57), there is, as he called it, an "apparent inconsistency" between the two Advisory Opinions, an inconsistency which this regretted judge and scholar explained by the fact that, as he stated it, and now I quote from *I.C.J. Reports 1956*, page 58:

> "The clauses of the Peace Treaties of 1947 relating to settlement of disputes were, as shown in their wording and the protracted history of their adoption, formulated in terms which clearly revealed the absence of agreement to endow them with a full measure of effectiveness—including safeguards to be resorted to in the event of the failure of one of the parties to participate in the procedure of settlement of disputes."

Without contesting this statement of fact or the qualification of the resulting dissimilarity between the circumstances of the two cases as vital, it is, with due respect, submitted that the difference goes deeper and illustrates a fundamental distinction in legal approach between the mandates system on the one hand, and the settlement of disputes—as it stands today—on the other hand. While in treaties like the one the Court had to deal with in its Advisory Opinion of 1950 the regulation of settlement of disputes relating to the States-parties' specific rights and obligations under the treaty is an elaboration of the limitations in the exercise of their sovereignty, consented to by them, the mandates system starts from the opposite point of view, that is to say, from the functional powers of the organized community of States in relation to the realization of the right of self-determination of peoples. From the latter point of view the lack of co-operation of the mandatory State in the exercise of its powers is

not so much a failure to perform obligations to be sanctioned by the withdrawal of rights if, and to the extent such sanction is provided for in the instruments governing the system; it is rather a factual situation which obliges the organized community of States to take such alternative measures as are necessary to ensure the ultimate realization of the object and purpose of the system.

In order to assess the legal significance of the General Assembly resolution 2145 (XXI), it would seem necessary to keep in mind the particular status of the people and Territory of Namibia as that status was created after the First World War. The norms of general international law, accepted and recognized at that time by the international community of States as a whole, in relation to the territories and peoples "which, as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them"—this is a quotation from Article 22, League Covenant—have definitely not been abandoned since then nor replaced by other norms of international law having the same peremptory character. Accordingly, the Territory is still not subject to annexation by any existing State and the people are still entitled to self-determination.

Indeed, since the First World War, the right of self-determination has in the meantime been extended to peoples and territories which were—or still are—under the sovereignty of an existing State, but there is no indication whatsoever of a modification of rules of international law in the opposite direction, to the effect of bringing peoples and territories, which did not have that status, under the sovereignty of an existing State.

In other words, South West Africa or, as it is now called, Namibia, has retained its international status. What has changed in the course of time, however, is first, the organization and purposes of the international community of States and, on the other hand, the policy of the mandatory State in respect of the territory and its population; the former, the organization and purposes of the international community of States, have moved *towards*, and the latter, the policy of the mandatory State, has moved *away* from a full realization of the right to self-determination of peoples.

It would seem obvious that such a fundamental change of circumstances could not but affect the modalities of the legal status of the people and territory concerned. The international status had either to disappear, or its modalities had to be drastically revised. Not surprisingly, the former course was advocated by the Union of South Africa who persistently took the view that each and all international supervision under the mandates system over its administration of South West Africa had lapsed at the moment of dissolution of the League of Nations. The latter course, that is, drastically to revise the modalities, is the one taken by the General Assembly of the United Nations in its resolution 2145 (XXI), deciding, *inter alia*, that the powers of South Africa relating to South West Africa under the mandates system had come to an end.

It is submitted that, also from the legal point of view, the choice lies between the legal equivalents of those two solutions, that is to say between, on the one hand, a legal construction according to which the individual and collective decisions of governments after the First World War resulted in a transfer of the territory of German South West Africa to South Africa, coupled with a treaty relating to the exercise by the latter State of its sovereignty over the territory; that is one construction.

The other one is a legal construction according to which the territory of German South West Africa was placed under an international régime, the modalities of which were, in the final analysis, to be determined by the organized

international community of States, of course with the proviso that no State would be obliged to discharge a function under the international régime without its consent.

It is also submitted that the choice between the two constructions depends upon the question whether or not legal, in contradistinction to purely political, significance is to be attached to the notion of self-determination of peoples. Indeed it would seem that the status of the territory as not forming part of the territory of an existing State, as well as the international administration as a safeguard for the just treatment of the population, are the translation, in legal terms, of an inchoate title to sovereignty *erga omnes*.

It is finally submitted that, both at the time of the introduction of the mandates system and *a fortiori* at the present time, such legal significance was and is given to this notion of self-determination of peoples, and that consequently only the second of the two possible constructions could be retained as expressing the law as it stands.

Now on the basis of the opinion that an international status was created for the people and territory of Namibia after the First World War, and that such status implies a function of the organized community of States in relation to the administration of the Territory and the people, it would seem legally incorrect to test the powers and procedures of the General Assembly in this respect by the terms of the Charter of the United Nations only. Actually there exist several examples of situations in which one set of rules of international law provides for functions, within the application of such rules, to be fulfilled by an international institution established and governed by another set of rules of international law. In such situations, and provided of course that the international institution concerned has duly given its consent to the discharge of these functions, both sets of legal rules have to be taken into account in order to determine the effect of decisions taken according to certain procedures. Since each set of rules may stand on its own, such combination of the two sets of rules may require a process of mutual adaptation.

Thus it would indeed be strange to apply limitations of the powers of various organs of the United Nations, generally provided for in the Charter in order to safeguard the independent sovereignty of member States, to the powers held by the United Nations organs themselves under another set of rules, in relation to a State acting on behalf of the United Nations in fulfilment of a United Nations task in respect of a people and territory which is not under its sovereignty.

Now obviously the process of mutual adaptation of the two sets of rules on the one hand presupposes a common element in the general purposes of the two sets, in the absence of which, it may be remarked in passing, the international institution governed by one set of rules would hardly accept to discharge functions within the framework of the other set. On the other hand, this adaptation must respect the fundamental tenets of each set of rules. Both requirements are met in the present situation: the realization of self-determination underlying the mandates system is also one of the fundamental purposes of the United Nations system.

It would seem therefore that arguments against the validity of General Assembly resolution 2145 (XXI), in so far as they are based on the fact that under the Charter of the United Nations the General Assembly can generally only adopt recommendations addressed to member States, are not legally sound. That resolution deals with the modalities of exercise of United Nations powers, including powers which were exercised by a member State on behalf of the United Nations. It would seem that a comparison with the General

Assembly's powers of decision under the Charter with respect to specific organizational matters would seem legally more appropriate.

Now, for the reasons briefly indicated before, it is submitted that the United Nations General Assembly had the power to modify the organization of the administration of Namibia if and when such modification were required in order to fulfil the underlying purpose of the international status of the Territory, that is to say, the ultimate exercise of the right of self-determination of its people. The General Assembly has exercised this power by adopting resolution 2145. Consequently, the Union of South Africa is under a legal duty to discontinue its administration of the Territory and to take all steps necessary in order to enable the United Nations and its agents effectively to fulfil their functions in relation to the Territory.

Now it is obvious that the Union of South Africa has not complied with this duty and has, in fact, virtually annexed the Territory. The consequences to be attached to this factual situation are primarily a matter of policy to be pursued within the framework of the general rules of international law and the Charter of the United Nations. Surely the continued *de facto* exercise by South Africa of powers over Namibia cannot be recognized as legal and, consequently, all States are under a general duty to refrain from any conduct expressing, or necessarily implying, such recognition.

As regards the content of this duty of non-recognition, it results from the practice of States in similar cases that such non-recognition does not exclude taking into account the fact of exercise of powers in so far as that taking into account is necessary in order to do justice to the legitimate interests of the individual which is, in fact, subjected to that power. Now this principle is of particular importance in the present situation since the very purpose of the mandates system, as well as of General Assembly resolution 2145, is to protect the people of the Territory concerned. Accordingly the duty of non-recognition is again subject to the functional limitations flowing from the object and purpose of the international status of the Territory.

Now non-recognition of *de facto* administration is one thing; positive action to bring the factual situation into conformity with the legal status is another. In this respect there does not seem to exist under general international law any *automatic* duty incumbent on every individual State to take action designed to *enforce* the obligation of South Africa to discontinue its *de facto* administration of Namibia. Indeed such enforcement action would go beyond the scope of attaching consequences to the international status of Namibia and would be directed against South Africa itself. Any such action would clearly be reserved to the Security Council acting in conformity with the Charter of the United Nations.

Mr. President and Members of the Court, my Government is fully aware of the fact that the present Request for an advisory opinion raises a number of questions not treated in either its written statement or this oral argument. In particular there are many points in the written and oral statements of other governments and international organizations on which comment might be given. But both the nature of advisory opinion procedures, as distinguished from contentious procedures, and the role of individual governments intervening in such procedures would seem to justify some restraint in this respect. Mr. President and Members of the Court, I would like to thank you for the patience with which you have listened to me.

ORAL STATEMENT BY MR. ELIAS

REPRESENTATIVE OF THE GOVERNMENT OF NIGERIA

Mr. ELIAS: Mr. President and Members of this honourable Court, apart from the memorandum which the Nigerian Government submitted earlier to this Court, I wish to say that Nigeria adopts the argument put forward by me on behalf of the Organization of African Unity on Wednesday last week. Nigeria does not intend to add to that statement.

ORAL STATEMENT BY MR. PIRZADA

REPRESENTATIVE OF THE GOVERNMENT OF PAKISTAN

Mr. PIRZADA: Mr. President and honourable Members of the Court, this is the first occasion upon which Pakistan is being represented before the International Court of Justice, and I consider it a great honour to appear on behalf of Pakistan before this august Court.

Mr. President, the Security Council of the United Nations, in resolution 284 (1970) on 29 July 1970, has requested the honourable Court to give an advisory opinion on the following question: "What are the legal consequences for States *of the continued presence of South Africa in Namibia, notwithstanding Security* Council resolution 276 (1970)?"

The events leading to resolution 284 (1970) have been set out in the written statement filed on behalf of the Government of Pakistan, which is incorporated in the written statements, I, at pages 355 to 358 and I need not repeat them. The factual background of the material resolutions has been high-lighted in the illuminating written statement filed on behalf of the Secretary-General of the United Nations. Namibia is not new to the International Court; most of the points arising out of or relating to the question referred to have been dealt with by the distinguished representatives who preceded me. Except where necessary, I will try not to go over the ground already covered lest I encroach upon the precious time of the Court.

I fully support the submissions made by Dr. Elias on behalf of the Organization of African Unity and am in general agreement with the views expressed by the representative of the Secretary-General.

I would, however, like to make submissions, among others, on the following points:

1. Whether the Court should give an advisory opinion on the question referred?
2. What is the scope of the question?
3. What is the nature of the mandates system?
4. Whether the League of Nations had the right to revoke the Mandate?
5. Whether the United Nations has succeeded to that right, or is otherwise entitled to revoke the Mandate?
6. Whether the General Assembly was competent to determine the breach of the fundamental conditions of the Mandate?
7. What is the effect of the resolutions of the Security Council confirming the decisions of the General Assembly?
8. What are the legal consequences for States?
9. Miscellaneous points.

The list is somewhat long, but my submissions will be short. I must however state that my submissions on points 3 to 7 will be without prejudice to my contentions regarding the scope of the question referred to the Court.

Mr. President, I now come to the first point, namely whether the Court should give an advisory opinion on the question referred to it.

South Africa has referred to the permissive and discretionary nature of the advisory jurisdiction of the International Court and has relied on the *Eastern Carelia* case. In that case, the Permanent Court declined to give an advisory

opinion on the questions arising out of the Peace Treaty of Dorpat between Finland and Russia of 1920 regarding the autonomy of Eastern Carelia, as it bore on an actual dispute between the two States.

Firstly, on facts that case is distinguishable and does not apply to the circumstances of the present reference. Secondly, the *Eastern Carelia* case raised a question of fact which could not be elucidated without hearing both parties. Lastly, whatever may be the delimitation or delineation of the doctrine of the *Eastern Carelia* case, the distinction between the Covenant of the League of Nations and the Charter of the United Nations must be taken into account, as has been rightly done by this honourable Court in its recent advisory opinions.

Under Article 14 of the Covenant, the Permanent Court was empowered to give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly. The Permanent Court itself considered the distinction made by Article 14 of the Covenant between disputes and questions which might be referred to it for an advisory opinion. And in due course it developed the doctrine of the *Eastern Carelia* case, namely that the existence of advisory competence should not permit the surreptitious introduction of a form of compulsory jurisdiction. In the instant case, no such situation arises.

Further, under Article 92 of the Charter, the Statute of the International Court is an integral part of the Charter which reflects the fact that the Court is an integral part of the United Nations and is under a duty to participate in the activities of the Organization, and that no State is entitled to stop such participation.

The present advisory jurisdiction of the Court is governed by Article 96, paragraph 1, of the Charter; as well as Article 65 of the Statute. The right of the Security Council to seek an opinion on any legal question under Article 96 of the Charter is not subject to any limitations. The word "any" may be noticed, as it appears in Article 96 of the Charter as well as in Article 65 of the Statute of the Court. In the *Reservations* case, the International Court explained that Article 96 of the Charter confers upon the General Assembly and the Security Council, in general terms, the right to request the Court to give an advisory opinion "on any legal question".

Mr. President, the nature of the advisory jurisdiction of the International Court has been elucidated and explained by the Court itself in the *Interpretation of Peace Treaties* case, 1950, which has been referred to earlier by a number of distinguished representatives. I would, therefore, just like to sum up the principles embodied therein. They are that the Court's reply is only of an advisory character and, as such, it has no binding force.

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 desirable in order to obtain enlightenment as to the course of action it should take. The Court's opinion is given, not to the States, but to the organ which is entitled to request it. The reply of the Court, itself not only an organ of the United Nations, but the principal judicial organ of the Organization, represents participation in the activities of the Organization, and in principle therefore an advisory opinion should not be refused.

From the Advisory Opinions of this Court given in the *Interpretation of Peace Treaties* case, the case of the *Administrative Tribunal of the I.L.O.* and the *Certain Expenses* case, the following principles are deducible:

Firstly, the Court, being the principal judicial organ of the United Nations, is under a duty to co-operate with other organs, consequently, a request for an advisory opinion should not, in principle, be refused; secondly, even if a contention was raised that the question put to the Court was intertwined with

political questions, the Court cannot attribute a political character to the request; and lastly, only compelling reasons should lead the Court to refuse to give the requested opinion.

In the present reference, there are no compelling reasons for refusing to give an advisory opinion. This is especially so since refusal to give an opinion is likely to imperil the workings of the Security Council and the General Assembly. The due participation of the Court in respect of the important international issue of Namibia cannot be over-emphasized.

I therefore respectfully submit that this honourable Court should answer the question referred to it which, according to my submission, by any canon of construction is a legal question.

Mr. President, next I come to the question: what is the scope of the question.

The Court has an inherent power to interpret any request for an advisory opinion, to ascertain the object for which the question was put, and to establish an interpretation of the question itself. In interpreting the meaning of the question, the Court has to pay attention, *inter alia*, to the circumstances in which the request came to be made, the terms of the resolution embodying the request and the discussions in the requesting organ prior to the adoption of the request (see Rosenne, *Law and Practice of the International Court*, Vol. II, p. 107).

Having regard to the proceedings of the *Ad Hoc* Sub-Committee of the Security Council, established in pursuance of Security Council resolution 276 (1970), and the proceedings of the 1550th meeting of the Security Council held on 29 July 1970, and having regard to the language of resolution 284 (1970), it is respectfully submitted that the question referred to the Court only concerns the legal consequences for States of the continued illegal presence of South Africa in Namibia.

It may be noted that in the Security Council meeting itself it was pointed out by the representatives of France and the United Kingdom that the question was based on certain assumptions, among others, about the competence of the world body to terminate the Mandate and to assume direct responsibility (see Security Council proceedings, 1550th meeting, p. 18). It is therefore submitted, likewise, that the Court ought also to proceed on the basis of such assumptions.

Then it may be mentioned that in the *Interpretation of the Greco-Bulgarian Agreement* case, the Permanent Court explained that since the right to request opinions was given to only two organs mentioned in the Covenant, the Court was bound by the terms of the questions as formulated in the case by the Council. With respect, it is submitted that the Court is bound likewise by the terms of the question as formulated by the Security Council.

No doubt in its Advisory Opinion in the *Certain Expenses* case, the Court remarked that it "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.)

It is also noteworthy that in the *Peace Treaties* and *Reservation* cases it was argued on various grounds that the action of the General Assembly, in dealing with the agenda item out of which the request emerged, or the decision to request the opinion itself, were *ultra vires* the General Assembly. In neither of these cases did the Court go so far as to deny the validity of the arguments advanced against the jurisdiction of the Court based upon an alleged incompetence of the General Assembly to deal with the item which led it to request the advisory opinion. What the Court did was to demonstrate the inapplicability of those arguments in these two cases.

Discussing the approach of the Court in the said two cases, Rosenne observed:

> "Having regard to the very wide competence of the General Assembly under the Charter, it is difficult to conceive cases in which a request for an advisory opinion would be *ultra vires* the competence of the General Assembly, except, perhaps, where competence is specifically given by the Charter to another organ, or where the General Assembly had acted, say, in violation of a provision such as Article 12 of the Charter." (See Rosenne, *The Law and Practice of the International Court*, Vol. II, p. 715.)

Mr. President, it must be noticed that though the Court has the independent status of the principal judicial organ and is not subordinate to any external authority in the exercise of its judicial functions, it has to co-exist and co-operate with the other organs of the United Nations which are not subordinate to the Court either. It may be recalled that at least on one occasion the President of the Security Council, speaking as the representative of the Ukrainian SSR, said that the Court could not be regarded as a kind of court of appeal from the decisions of the General Assembly and the Security Council. On that occasion, the Security Council did not dissent from that view (see *Security Council Repertoire*, p. 233).

It is respectfully submitted that the International Court is not a court of appeal and does not possess any supervisory jurisdiction over the decisions and actions of the General Assembly and the Security Council. Of course, a requesting organ of its own accord can refer the question of the legality of its action. This was done, for example, in the *South West Africa (Voting)* case, where the General Assembly first decided upon its course of action and later asked if it corresponded to a correct interpretation of the 1950 Advisory Opinion of the Court. The question concerned the legality of action upon which the General Assembly had already decided, but I must emphasize that the Assembly itself had referred the question. In the instant case, this has not been done by the Security Council. The Court, *suo moto*, or at the instance of any especially interested party, cannot go behind the reference made to it.

To sum up, for the above reasons the Court is bound by the terms of the question as formulated by the Security Council, whereunder the validity of the relevant resolutions of the General Assembly and the Security Council is not under issue. The Court cannot sit in appeal or review such decisions. The Court ought to give an advisory opinion on the assumptions aforesaid without going into the legality of the resolutions adopted and the actions taken by the General Assembly and the Security Council.

Mr. President, the next question is—what is the nature of the mandates system? The mandates system was founded upon two principles, in fact, as was just said by the distinguished representative who preceded me. First, the principle of non-annexation, and second, the principle that the well-being and development of the peoples of the territories concerned formed a sacred trust of civilization. The tutelage which was established for those peoples was, under Article 22 of the Covenant of the League of Nations, to be entrusted to certain nations as mandatories on behalf of the League. The Mandate did not involve any cession of territory or transfer of sovereignty over South West Africa to the Union of South Africa. The Mandate was meant to be a responsibility rather than a right. A Power was free to accept or not to accept a mandate, but once it was undertaken no shrinking from the obligations resulting from the mandate was permissible.

These obligations were two-fold—to the people of the territory concerned and

to the international community. The rights of the mandatory in relation to the mandated territory and inhabitants thereof, as has been said by the Court itself, have their foundation in the obligations of the mandatory, and these rights are merely the tools given to enable it to fulfil its obligations under the mandate. If this foundation is disturbed or displaced, the whole edifice of the mandate must surely fall.

The doctrine of sovereignty has no application to the mandates system. Sovereignty over a mandated territory is in abeyance; if and when the inhabitants obtain recognition as an independent State, as has already happened in the case of other mandated territories, sovereignty will revive and vest in the new State. The mandatory Power, as such, was not the sovereign of the territory, it had no right of disposition and was merely a mandatory on behalf of mankind through the League. As was said by President Wilson in the Paris Peace Conference:

> "The fundamental idea would be that the world was acting as trustee through a mandatory and would be in charge of the whole administration until the day when the true wishes of the inhabitants would be ascertained."

Hyde points out:

> "A territory or entity under mandate is to be distinguished from the colonial possession, which in international contemplation is a part of the State to which it belongs. The outstanding and perhaps novel feature of the mandates system is the international obligation imposed upon and accepted by the mandatory to administer a territorial area, not its own, and not constituting a State, under the supervision of the international agency." (See *International Law Chiefly as Interpreted and Applied by the United States*, Second edition 1945, pp. 102-103.)

By its very nature, a mandate was not meant to be prolonged indefinitely, but only until the people under tutelage were capable of managing their own affairs. The sole justification given for the institution of the mandate was that the peoples of these territories were, to quote the words of Article 22 of the Covenant of the League "not yet able to stand by themselves under the strenuous conditions of the modern world". I emphasize the words "not yet". It was clear, and the fact was never left merely to inference, that the objective was to prepare such people for exercising their right of self-determination. It followed that any approach which would have the effect of freezing the mandate, or making it permanent, was repugnant and wholly inimical to the concept of the mandates system.

In short, the intention and the purpose of the mandates system was to internationalize instead of to annex, to make the principle of self-determination applicable, to exercise international authority to the full, and in case of abuse of trust even to revoke the mandate.

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Before the honourable Court rose I was about to begin my submissions on the point whether the League of Nations had the right to revoke the Mandate.

Before the Covenant of the League of Nations was finalized, the prospective mandatory States were aware that the mandate, by its very nature, was revocable, and with eyes open accepted their obligations.

The proceedings of the Paris Peace Conference of 1919 fully reflect this. Mr. Clemenceau, while expressing serious misgivings, said,

"The League of Nations was to be a League of Defence to ensure the peace of the world, but it appeared that it had gone beyond that limit when they proposed to create a League of Nations with governmental functions to interfere in internal affairs with trustees in various places, sending reports to . . ."

and he did not know whom. In answer to him, Mr. Lloyd George said that he regarded the system merely as general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation.

Realizing this nature of the mandate, some of the States indicated preference for annexation as compared to the mandates system. Mr. Massey, the Prime Minister of New Zealand, pleading for annexation pointed out the difference between a mandate and annexation, namely between lease-hold and free-hold tenure. The French Minister for Colonies was more explicit, favouring annexation he said "every mandate was revocable and there would, therefore, be no guarantee for its continuance". (See *U.S. Foreign Relations, Paris Peace Conference*, 1919, Vol. III, pp. 752-768.)

The proponents of the mandates system, especially President Wilson and General Smuts, both envisaged that the League of Nations would have the authority to terminate the mandate. General Smuts in his monograph, *The League of Nations: A Practical Suggestion*, at page 22, had clearly stated that the League in a proper case could assert its authority in full, even to the extent of removing the mandate. In particular, the following observations made by General Smuts must be noted: "Reversion to the League of Nations should be the substitute for any policy of national annexation."

Mr. President, it has been suggested that neither Article 22 of the Covenant nor the individual mandate agreements contain express reference to the right of revocation of the mandate. It is submitted that Article 22 of the Covenant provides that the welfare of the inhabitants of the mandated territories should form a sacred trust of civilization, and that the tutelage of such peoples should be entrusted to advanced nations and that this tutelage should be exercised by them as mandatories on behalf of the League. The Article thus makes a reference to the three private law institutions, namely trust, tutelage and *mandatum*. As pointed out by Lord McNair in his separate opinion in the *Status of South West Africa* case, under all the three institutions or domestic legal régimes of the Roman law, Anglo-American common law and the civil law systems of the world, revocation or termination was permissible.

Whatever may be the interpretation of Article 22 of the Covenant, the right of revocation must be regarded as an implicit part of the mandates system. The obligation of accountability by a mandatory to the League for the administration of its trust shows that the corresponding right and, in certain cases, the duty to revoke the mandate, rested in the League. In any case the ultimate sanction of revocation, in the event of the abuse of the sacred trust by the mandatory, is implicit in the supervisory powers. Mr. President, it cannot be denied that if the mandatory did not mend, the mandate could be ended.

It may be mentioned that Lord Lugard presented a memorandum to the Permanent Mandates Commission in 1924, in which he declared that revocation of a mandate may for practical purposes be regarded as inconceivable; but, he added, it could only take place in the event of gross violation of the mandate. (Permanent Mandates Commission, Third Session, 1923, p. 311.) In the discussion which ensued in the Commission, the members appeared to have agreed

in principle that the Council of the League could in the final resort dissolve the mandate. Several jurists, for example, Wright, Stoyanvsky, Batruch, Wessels, Feinberg and Hales, all accepted the possibility of revocation. I may add that when the nature of the mandates system was discussed by the South African Appeal Court in *R.* v. *Christian*, two judges raised the issue of the right of revocation and neither denied its existence (1924 A.D. 101). The pronouncement of the Supreme Court of New Zealand is more direct. In *R.* v. *Tammassee* the Supreme Court accepted the competence of the League of Nations to revoke New Zealand's Mandate for Samoa and appoint another mandatory "if New Zealand were to fail in its obligation to the Samoan peoples" (see 1733-34 A.D. and *Reports of Public International Law Cases*, Case No. 16).

Against this implied right of the Council of the League of Nations to revoke a mandate, it has sometimes been contended that while the Council of the League may have held the right to revoke a mandate, in principle, it could not have exercised such right in practice because the procedure of the Council was to invite each mandatory not represented on the Council to attend and vote at those meetings. It is even suggested that the mandatory—in this case the Union of South Africa—could have attended the meeting of the Council and would have been able to veto any resolution aimed at revocation. Thus the decision of the Council of the League would have been frustrated, since Article 5 of the Covenant required unanimity for passing of the resolution I would like to submit that such a view would run counter to the Advisory Opinion of the Permanent Court in the *Mosul* case *(P.C.I.J., Series B, No. 12)* in which it was held that the unanimity procedure was subject to the well-known rule that no one can be judge in his own suit. Furthermore, Judge Lauterpacht, in his separate opinion in the *Voting Procedure* case (*I.C.J. Reports 1955*, p. 67), declared that on the basis of this principle South Africa would have been prevented from voting in the Council on a dispute in respect of the rights of South Africa.

It may be added that if the mandate is to be regarded as a treaty, the Council would have had an implied right of revocation in the event of the violation of the obligations therein contained. The law of treaties entitles the innocent party to renounce the treaty in the event of a material breach of the treaty by the other party.

Thus Article 60 of the Vienna Convention on the Law of Treaties 1969, which to a large extent codifies the customary law, provides:

1. A material breach of a bilateral treaty by one of the parties entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a treaty, for the purpose of the Article, consists in:
   a repudiation of a treaty not sanctioned by the present convention;
   the violation of a provision essential to the accomplishment of the object and purpose of the treaty.

It may be noted that the Union of South Africa is not only in material breach of the mandate agreement but has also sought to repudiate that agreement.

In conclusion it is submitted that the League of Nations had the right to revoke the mandate in case of a breach of the basic conditions of the trust and there was nothing in the Covenant which could have prevented the Council of the League from doing so in practice.

Now I come to the point whether the United Nations succeeded to the supervisory functions of the League of Nations, including the right of revocation.

The competence of the United Nations in the matter of enabling the people of Namibia to attain their independence, which is their right, is beyond dispute

and challenge. Though South Africa has raised many technical contentions in recent years, its own representatives have admitted the continuation of their obligations under the Mandate and the power of the General Assembly of the United Nations in this regard. On 22 January 1946 the representative of South Africa stated in the Fourth Committee of the General Assembly that no agreement would be drawn up for the future status of the Territory until the freely expressed will of both the European and native population had been ascertained. He added—and the words which I now quote are rather significant: "when that had been done, the decision of the Union would be submitted to the General Assembly for judgment." The words "for judgment" must be noted.

Then in a statement of 9 April 1946, at the final Plenary Meeting of the League of Nations, the representative of South Africa said:

> "The disappearance of these 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."

On the day of its dissolution, that is, on 18 April 1946, the League Assembly in a resolution recognized "that on the termination of the League's existence, its functions with respect to the mandated territories will come to an end", but the League noted that Chapters XI, XII and XIII of the Charter of the United Nations embodied principles corresponding to those declared in Article 22 of the Covenant of the League, and took note of the expressed intentions of the members of the League then administering them for the well-being and development of the peoples concerned, in accordance with the obligations contained in the respective mandates, until other arrangements had been agreed between the United Nations and the respective mandatory powers.

The Union of South Africa refused to place the Territory under the trusteeship system and in the first General Assembly of the United Nations of 1946 it submitted a formal proposal for the incorporation of the Territory of Namibia for approval. When this proposal was rejected, South Africa, while expressing regret and disappointment, announced that it would continue to submit reports on its administration of the Territory as it had done vis-à-vis the League. Later South Africa discontinued submitting such reports to the General Assembly and went ahead with a strict application of its policy of apartheid and incorporation of the Territory within South Africa. Subsequent events, leading to the termination of the Mandate, are well known.

Mr. President, these declarations constitute recognition by the Union Government of South Africa of the continuance of its obligations under the Mandate. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value. This was accepted by this honourable Court in its Advisory Opinion on the *Status of South West Africa* case in 1950. In view of this, in the events that have happened—that is the declaration of the League on the day of its dissolution and the admissions of South Africa and its conduct at the material time—South Africa is estopped from challenging the authority of the United Nations.

The question of succession of supervisory functions of the League in this regard came up for discussion in the Advisory Opinion of the International

Court of Justice in 1950. The Court held 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" (*I.C.J. Reports 1950*, p. 137). This would mean that the General Assembly was empowered to exercise all the supervisory functions which the League could have exercised, including the right of revocation. The opinion of the International Court that the United Nations had succeeded to the supervisory functions of the League was confirmed by the Court in its subsequent Opinions of 1955 and 1956 and was substantially reaffirmed in its Judgment of 1962. This position is not affected by the decision of the honourable Court in 1966 in the Second Phase of the *South West Africa* cases, as the decision proceeded without pronouncing upon, and wholly without prejudice to, the question of whether the Mandate was still in force. This fact was rightly stressed by Judge Jessup in his opinion in the said case of 1966.

It would thus follow that the General Assembly of the United Nations succeeded to the right of the League Council to revoke the Mandate of South Africa over Namibia for breach of the basic conditions of the trust. The General Assembly could therefore, acting on behalf of the United Nations, terminate the Mandate by adoption of the resolution passed by a two-thirds majority vote in accordance with the provisions of Article 18 of the United Nations Charter. As to the non-applicability of the unanimity rule to the General Assembly, I completely concur with the comments made by Dr. Elias in his oral statement.

I may now refer to the arguments that are advanced in assailing the validity of the unilateral action of the General Assembly in terminating the Mandate. These arguments are based on the fact that the International Court held in its Advisory Opinion of 1950 that the competence to modify the international status of South West Africa rests with the Union of South Africa, acting with the consent of the United Nations (*I.C.J. Reports 1950*, p. 143).

It is argued that this declaration of the Court implies that the United Nations, acting alone, has no capacity to modify the status of the Territory and that any modification would require the consent of the Union of South Africa.

It is pertinent to point out that these findings of the Court were given in reply to a query as to whether South Africa could alter unilaterally the status of the Mandate. The question of the right of the United Nations, acting alone, to revoke the Mandate was not, in any way, before the Court and was, therefore, not considered by the honourable Court. It is obvious that the rights of the international personality which confers the mandate as a trust of civilization cannot be the same as the rights and obligations of the mandatory. The only reference to the question of revocation of the Mandate by the United Nations in the 1950 Judgment is to be found in the dissenting opinion of Judge Alvarez who stated:

> "It may happen that a mandatory State does not perform the obligations resulting from its Mandate. In that case the United Nations Assembly may make admonitions, and if necessary, revoke the Mandate. It has this right under Article 10 of the Charter" (*I.C.J. Reports 1950*, p. 182).

Now I come to the point whether the General Assembly was competent to determine the breach of the fundamental conditions of the mandate agreement.

The General Assembly of the United Nations had the right to determine the compatibility of apartheid and other practices of South Africa in Namibia with the provisions of the Mandate, and to revoke the Mandate on that basis. Of course, the General Assembly was free to request the International Court of

Justice for an advisory opinion to assist it in the task of deciding the unlawfulness of apartheid under the Mandate, but like the Council of the League, it was not legally bound to do so.

International law does not, in the absence of a treaty obligation, compel the innocent party to seek a pronouncement from a court of law before terminating the treaty on grounds of material breach by the other party.

It may be that in the days of the League of Nations a prerequisite for the revocation of a mandate by the Council of the League was a decision by the Permanent Court of International Justice that the mandatory's conduct violated the obligations under the mandate. Perhaps that was one of the reasons which led Ethiopia and Liberia to bring an Application before the International Court to adjudge and declare failures of South Africa under the Covenant. The Court was, however, unable to entertain a dispute between a member State of the League of Nations and the mandatory over the latter's treatment of the inhabitants because member States of the League had enjoyed no legal right or interest in such a matter.

The Court indicated that the political organs of the League had been the appropriate agencies for investigating a mandatory's administration of her sacred trust under the mandates system, and not the Court itself.

Mr. President, commenting on this decision, John Dugard, Senior Lecturer, University of Witwatersrand, South Africa, writes:

> "The result of the Court's decision, whether intended or not, was that the South West African dispute was handed over to the political organs of the United Nations for determination. For while the Court held that only the political organs of the League had been empowered to decide on the compatibility of a policy pursued in a mandated territory with the provisions of the Mandate in the days of the League of Nations, it failed to disturb its own previous finding of 1950 to the effect that the United Nations had succeeded to the supervisory functions of the League. The combined effect of the International Court's two most important pronouncements on South West Africa, namely those of 1950 and 1960, can only be that it is for the General Assembly, as successor to the Council of the League, to decide whether or not apartheid violates the provisions of the Mandate . . .
>
> *The Assembly . . . already had considerable judicial opinion to guide it* in the form of the separate opinions of those judges who did direct their attention to the ultimate merits of the South West African dispute in 1966. Six of the fourteen judges examined the compatibility of apartheid with South Africa's obligation to 'promote to the utmost' the welfare of the inhabitants, and only the South African Judge *ad hoc* Van Wyk found in favour of South Africa. Judges Wellington Koo, Tanaka, Padilla Nervo and Forster and Judge *ad hoc* Mbanefo all found against South Africa on this vital issue.
>
> In the light of the above considerations it can hardly be contended that the General Assembly acted improperly in determining that South Africa has failed to fulfil its obligations in respect of the administration of the mandated territory, as a prelude to revocation, without first obtaining an opinion from the Court on this matter" (*American Journal of International Law*, 1968, pp. 80 and 81).

I conclude this point by concurring in the comments of the learned author.

Another reason which merits consideration by the Court is that resolution 2145 (XXI) of the General Assembly was adopted by an overwhelming majority and is the expression of the world community in respect of the most

fundamental of all rights of a people, that is, the right of self-determination. The Assembly terminated the Mandate for the reason that the right of self-determination was being denied in Namibia by the Mandatory and the Territory was not being helped in its advancement so that it could in the future exercise its right of self-determination. It is submitted that the General Assembly was applying a rule of *jus cogens* overwhelmingly recognized and accepted by the comity of nations.

That the right of self-determination is a recognized rule of *jus cogens* is evidenced by the fact that the International Covenant on Civil and Political Rights has incorporated it in Article 1, paragraph 1, as follows:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The same principle has also been reaffirmed by the General Assembly in its declaration on the principles of friendly relations.

It will be pertinent to note that under Articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969, any treaty in conflict with a peremptory norm of general international law becomes void and terminates.

Now I come to the point, what is the effect of the resolutions of the Security Council confirming the decision of the General Assembly?

It is submitted that the General Assembly resolution 2145 (XXI) of 27 October 1966 was of a binding nature. In any case, defect therein, if any, was certainly cured by the subsequent Security Council resolutions which confirmed the termination of the Mandate. Even in the general case the General Assembly resolutions can become binding when the Security Council adopts them in its decisions.

The Security Council in its resolution 264 (1969) of 20 March 1969 recognized the decision of the Assembly to terminate the Mandate. The Council in the same resolution called upon South Africa "to immediately withdraw its administration from the Territory". This basic position was reiterated in subsequent resolutions. Now as this honourable Court is aware, Article 25 of the Charter provides:

> ". . . the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

It is therefore submitted that the Mandate of South Africa over Namibia stands validly dissolved. Thus the question arises, what are the consequences for States of the continued illegal presence of South Africa in Namibia. I now turn to that question.

In determining the legal consequences of the illegal presence of South Africa in Namibia it is relevant, first of all, to ascertain the nature of the illegality committed by the Union of South Africa. This would help us in ascertaining which particular provisions of the Charter are attracted. It will be recalled that the Security Council has characterized the presence of South Africa in Namibia as illegal (Security Council resolution 264 (1969), para. 2) and has also declared that "it constitutes an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia".

It is submitted that the Security Council has rightly categorized the continued presence of South Africa in Namibia as an act of aggression. Any State that continues to remain by the use of force in a dependent State, in breach of its

obligations under the Charter, Security Council resolutions, or its international commitments in bilateral treaties, commits an act of aggression and its actions are at least as culpable as those of a State which uses armed force to enter into another State and commit aggression in the traditional sense.

In both cases the act is condemnable as an act of aggression. In fact, the act of using force, in breach of international obligations, with the object of frustrating the right of self-determination, is certainly more grave in nature since the right of self-determination in the international society is a norm of the nature of *jus cogens* derogation from which is not permissible under any circumstances.

The first consequence that follows from the illegal act of aggression is that the powers of the Security Council under Articles 39, 40 and 42 of the Charter are attracted. The Security Council could under Article 39 make recommendations or decide what measures should be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. Article 41, as is well known, visualizes measures short of force such as the partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications and the severance of diplomatic relations. Such of these measures as have already been recommended by the Security Council in its various resolutions and listed in detail in the written statement of the Secretary-General are a legal obligation for States by virtue of Article 25 of the Charter. And by virtue of Article 2 (5) all Members shall give the United Nations assistance in the implementation and compliance thereof.

Article 42 provides that should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of the Members of the United Nations.

It may be noted that both under Articles 39 and 42 of the Charter the measures are to be attracted to maintain or restore international peace and security. In this context it is submitted that an action like that of the continued presence of South Africa in Namibia in breach of international obligations, being an act of aggression, must be regarded as a threat to international peace and security. In continuing its illegal presence, South Africa has placed the burden on other States to take action against it. This, however, does not mean that the threat to peace is from these other States, but from the act of aggression perpetrated by South Africa. In order to maintain international peace and security, therefore, it is the obligation of the Security Council by all the means available to it to ensure that South Africa vacates its aggression.

As the inalienable right of self-determination of the people of Namibia is being suppressed by the use of force by South Africa, a duty falls on all Members of the United Nations, by virtue of the obligations regarding self-determination in the Charter, to help and aid the people of Namibia in securing that right.

In this connection, reference may be made to paragraph 6 of the draft proposal submitted by the Soviet Socialist Republic in the Special Committee on the Definition of Aggression, which stated:

> ". . . nothing in the foregoing shall prevent the use of armed force in accordance with the Charter of the United Nations, including its use by a dependent people in order to exercise their inherent right of self-determination in accordance with General Assembly resolution 1514 (50)".

Reference may also be made to paragraph 125 of the written statement of the Secretary-General, filed in this Court, wherein the following is provided:

"It is also a duty of States not to grant extradition for any act committed in furtherance of the struggle of the people of Namibia against foreign occupation (for which struggle the Security Council requested all States to increase their moral and material assistance) or for an offence under a South African law deemed to be illegal and invalid either by reason of inconsistency with or repugnance to the provisions of the United Nations Charter or peremptory norms of international law." (Written statement, I, p. 106.)

Another legal consequence is that South Africa's act constitutes an offence against the peace and security of mankind, for which there is international responsibility. It may be recalled that the draft Code of Offences Against the Peace and Security of Mankind adopted by the International Law Commission in 1954, provides the following act as an offence in Article 2, paragraph 1:

"Any act of aggression, including the employment by the authorities of a State of armed force against another for any purpose other than national or collective self-defence, or in pursuance of a decision or recommendation of a competent organ of the United Nations."

Apart from the legal consequences that arise due to the nature of the illegality committed by South Africa which have been described above, certain necessary legal consequences follow from the fact that while the South African Government has no *locus standi* in Namibia, there is a *de jure* government existing for Namibia, that is, the United Nations Council for Namibia.

This not only means that States are obliged not to recognize the actions of the Government of South Africa in Namibia, or in respect of Namibia, but also that States must give due effect to the decisions of the Council of Namibia in respect of all matters concerning Namibia, both internal and external.

Thus, in accordance with the above, no international treaty or agreement may be entered into by any State with South Africa relating to the territory of Namibia, and also if any such treaty has been entered into after the termination of the Mandate it will be void and of no legal effect. Again, laws enacted by the authorities of South Africa, who are in illegal occupation in Namibia, must not be recognized by member States of the United Nations.

Turning once again to the right of self-determination of the people of Namibia and the duty of Members of the United Nations under the Charter in this regard, it is submitted that recently the General Assembly adopted a Declaration on the Principles of Friendly Relations and Co-operation among States, which is an authoritative interpretation by the Assembly of the fundamental obligations under the Charter. In respect of the right of self-determination of peoples, the following paragraphs apply directly to the situation of Namibia:

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

(a) to promote friendly relations and co-operation among States, and
(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations."

We have indicated a few of the many legal consequences for States of the continued presence of South Africa in Namibia, as a comprehensive analysis has already been made by the Secretary-General and the Organization of African Unity, which analysis has the complete concurrence of Pakistan.

Mr. President, may I now briefly deal with the two points raised by South Africa.

In the plethora of pleas put in the written statement on behalf of the Government of South Africa, the formal validity of Security Council resolutions in general has been attacked by posing the following question. And this I am quoting from the written statement:

"Whether the composition of the Security Council was lawful, and, in particular, whether the Republic of China was at all material times a member of the Security Council as required by Article 23, paragraph 1, of the Charter?"

South Africa has overlooked the distinction between the membership of the Republic of China in the United Nations and its representation in the various organs thereof. The membership of China in the United Nations has never been disputed. As regards its representation, South Africa, having recognized the government of Chiang Kai-Shek, is estopped from raising the objection. So far as Pakistan is concerned, it has from the inception not only recognized, but always maintained that the government of the People's Republic of China is entitled to its rightful representation in the various organs of the United Nations.

The question of the incapacity of the member concerned could only be raised in the competent forum and cannot be canvassed in collateral proceedings such as the instant case.

This principle is also recognized as a general principle in municipal jurisdictions. It has been held by the House of Lords, the Privy Council, the courts in Canada and by the American Supreme Court, that, notwithstanding the disqualification of the participant in the proceedings of the assemblies, courts, tribunals or other bodies, the validity of their decisions and actions cannot be assailed in collateral proceedings.

The relevant case law was reviewed by the Supreme Court of Pakistan in its recent decision in the case of *Leghari* which was reported in *Pakistan Legal Decisions* (PLD 1969).

This objection by South Africa certainly cannot be considered in the present proceedings before the International Court, which are to be confined to the question referred to it by the Security Council for an advisory opinion.

Even otherwise, the position has not been affected in any way, for if the representative of the People's Republic of China had been there at all material times, it can be asserted with confidence that he would have wholeheartedly concurred in the termination of the Mandate of South Africa over Namibia and would have voted in favour of all the resolutions in the General Assembly and the Security Council in respect thereof.

Mr. President, may I now briefly refer to the so-called proposal of plebiscite contained in the letter [1] dated 27 January 1971 of the representative of South Africa.

The said letter contains scandalous allegations against the United Nations and imputes incurable bias to it and proposes to put the allegations of oppression and repression in Namibia to test through a plebiscite. South Africa has no *locus standi* to make any such proposal which is a mere pretext to perpetuate its presence in Namibia notwithstanding Security Council resolution 276 (1970). It is an attempt to reopen the decisions taken by the General Assembly and the Security Council which are now irrevocable and irreversible. The proposal is beyond the scope of the question referred and is inconsistent with the previous stand of South Africa and is otherwise irrelevant and illegal.

At this stage, it is unnecessary to make any comments on the merits of the principle of plebiscite. The position of Pakistan regarding a plebiscite under the auspices of the United Nations is well known.

Mr. President and Members of this Court, before I conclude, I consider it pertinent to recall what I stated before the General Assembly in September 1966, as Foreign Minister of Pakistan when the matter of Namibia was under consideration:

> "We would be blind to the urgencies involved, if we treated the question of Namibia as if it were of a purely technical character. We must guard against the danger of legal obfuscation. The world is to be purged of the arrogance of race. It is to be cured of the cancer of colonialism. The time for half-hearted measures has passed."

The PRESIDENT: As there is no representative of the Republic of Viet-Nam present, the next speaker will be the distinguished representative of the Republic of South Africa.

The Court rose at 5.26 p.m.

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[1] See **Correspondence**, No. 79, p. 668, *infra*.

SIXTH PUBLIC SITTING (16 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. VIALL

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. VIALL: Mr. President, Members of the Court, at the earlier in camera session of these proceedings I expressed on behalf of my colleagues, and myself, the sense of privilege that we felt in appearing before this, the World Court. I do so again today when we speak for the first time during the public sittings of the Court.

The oral statement of the South African Government will, I fear, be rather longer than the oral statements made on behalf of the other governments and the two organizations which have thus far taken part in these proceedings. This is not because we are addicted to making long statements, Mr. President, but because the vast range, the generality and the complexity of the issues, both legal and factual, which have been raised by the distinguished representatives who have participated, and in the written statements submitted, make it necessary for us to reply at some length. We shall, however, as far as may be possible, certainly endeavour to avoid repetition of what we have already submitted in our written statement, though of course we shall be constantly referring to it.

Different parts of our oral statement will be presented by different members of our delegation, all of whom are fully authorized to speak on behalf of the South African Government. With these few remarks I shall, with the Court's permission, ask my learned colleague, Mr. de Villiers, to present the introductory part of our statement.

ORAL STATEMENT BY MR. DE VILLIERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: Mr. President, honourable Members of the Court, as the learned representative for South Africa has indicated, I intend to present an introductory statement to the Court today, a broad survey as it were, and an initial answer to the various oral statements which have been presented on behalf of other participating States and organizations, and I will include in that the subject of South Africa's plebiscite proposal. Unless the Court should indicate otherwise to us, we shall wish to follow this up with some more detailed statements on specific legal questions about which issues have been raised in these proceedings. We have informally intimated to the Registrar that after the presentation of this opening statement it would not be possible for us to take the matter further in this second phase, as I have described it, until Friday, and I understand that that would meet with the Court's convenience.

The PRESIDENT *indicated assent.*

Mr. de VILLIERS: After the second stage would follow an enquiry into the field of fact, and the procedures to be adopted in that respect would still be a matter for arrangement, as it seems to us.

At this stage I want to concentrate on certain of the broad aspects of the issues which have been indicated, mainly in the oral statements which have been presented thus far.

Certain distinguished representatives of participating States and organizations have expressed praise and appreciation of the industry and the professional standards that have gone into the South African written statement. This is, naturally, appreciated on our side, but we find at the same time that the praise serves as a basis for criticism of our case. Perhaps not surprisingly: I would be sorry to hear that the other representatives considered it their task to come here to *bury* us, but they could certainly not have thought that it was their task to *praise* us! The criticisms ran more or less like this: that South Africa in the first instance lives in the past: that the legal world in which the South African arguments operate is not that of 1971 but of 1945 and even 1920, and further, Mr. President, that South Africa seeks to apply concepts of 50 years ago to the promotion of moral well-being today. Again, the suggestion is that South Africa's approach to the international order and to the humanitarian problems of our times, is one of intransigence and of so-called "legal nicety", in which, moreover, we pay over-much attention to the literal texts of documents and play down considerations of object and purpose.

That, broadly, was the line of attack, and it came in part from one speaker and in part from another. For our part, I propose to show that these criticisms are without foundation, and I want to answer them at this stage very briefly, but nevertheless in proper context.

In regard to the international order generally, it may well be recalled—and *we* do so not without a measure of pride—that a South African premier of former times, the late General J. C. Smuts, played a very prominent part in the establishment first of the League of Nations and its mandates system, and, some 25 years later, of the United Nations. In proceedings of the United Nations

in the course of the years South Africa came to be subjected to constant treatment which, certainly as seen from the South African point of view, has been unfair, frustrating and unpleasant in the extreme. Yet South Africa has not only remained a Member of the United Nations, it is said to be one of the most faithful in the discharge of its commitments to that organization.

South Africa very much regrets the ostracizing movement which has excluded it from normal participation in much of the excellent work being done by United Nations specialized agencies and organizations in the field of economics, social welfare, health and so forth. Our regret arises mainly from the fact that we consider that we have a valuable contribution to make to those causes, particularly on the continent of Africa, as South Africa was in a position to do in a very substantial measure in the past, but is now to a considerable extent precluded from doing.

To this Court, South Africa has, on the several occasions of appearing before it, given full support and co-operation, while naturally fighting hard for what we have considered to be our just dues.

I could, Mr. President, but I do not propose to do so, give further demonstration that South Africa is firmly committed to the maintenance and development of an international order of the highest possible quality, in the political, the economic and social, and the judicial spheres. What I do want to stress at this stage is that South Africa believes that this very cause which it supports is being brought into mortal danger by some of the propositions that have been advanced in this Court in these proceedings. Our apprehension arises exactly from the fact that we are not tied down to the letter and the text of relevant instruments, but that we do appreciate some of the basic underlying practical realities as distinct from the "legal niceties".

We believe that growth and development in the international order are desirable, provided that that proceeds according to acknowledged processes of international law; and much, Mr. President, has occurred, and beneficially occurred, in this respect since 1920 and, again, since 1945. What we should like to do in these proceedings, and particularly in this statement, is to take a closer look at this world of 1971 as it has been pressed upon this Court by several representatives, and to look at it particularly in the perspective and against the background of the corresponding situations in 1945 and, in so far as it may be relevant, 1920.

I want to approach it first from this background angle: the setting up of the two world organizations, the first one in 1920 and the second one in 1945. These enormous steps were taken by the States concerned with high idealistic objectives, but at the same time with a strong sense of practical realism. The idealism pertained chiefly to peace-keeping, the preservation of international peace and security, but as is well known, it extended also to attendant and additional matters of considerable importance in themselves. In each instance these organizations were set up by multilateral convention, whereby the States concerned voluntarily agreed to such measure of curtailment of their sovereign rights and prerogatives as might be necessary for the particular purpose in hand. And that is exactly where the practical realism came in. In view of the enormous political implications of, as it were, carving into the sphere of State sovereignty, extreme care was displayed in express and exact definition and delimitation of these incursions into State sovereignty.

A particularly sensitive area was that of the extent, if any, to which resolutions of organs of the organizations, taken by ordinary or special majorities, could be made binding in law upon non-consenting States. Let me explain that by non-consenting States I mean those which had not specially agreed to be bound

by such resolutions and had not voted for them or in any other way associated themselves with such resolutions. I am not suggesting, in giving this general concept of a non-consenting State, that by voting for a resolution in an organization a State necessarily incurs legal liabilities from that resolution; whether that would be so or not in a particular case would depend upon a variety of circumstances.

I am merely approaching the matter from the other side of the coin. I am looking at the position of a State which has in no way associated itself with a resolution whether by special consent, by voting for it, or in some other way; a State which may indeed have vehemently opposed the adoption of that resolution. And the question would then be: to what extent could such a State nevertheless incur a legal obligation from such a resolution by virtue of the fact that it was taken by an organ of one of these organizations by a special or an ordinary majority? And that is the sphere in which, as I have said, there was special sensitivity in setting up these world organizations. As the Court would know, the limits to the inroads upon State sovereignty were very largely set by limits upon the powers of the organs in this respect—the powers to bind non-consenting States. And, Mr. President, as the Court would also know, the approach was from the start a conservative one.

By deliberate design the organizations were not to be anything approaching super-States or super-parliaments. In the case of the League of Nations, the basic pattern was set by the unanimity rule which applied both in the Assembly and in the Council, the only exception, as the Court knows, being matters of procedure. And as the Council was a body of limited membership, there was the special provision in Article 4, paragraph 5, of the Covenant that a League member not represented on the Council was to be invited to "sit as a member" of the Council during consideration of matters specially affecting that member's interests.

This Court has twice decided, as a Court, in 1962 and in 1966, in the two phases of the *South West Africa* cases, that the result of these provisions of the Covenant was a right of veto for such a member invited to sit specially as a member of the Council during consideration of matters specially affecting its interests: and indeed, with respect, that is what the wording of the Covenant clearly seems to indicate.

Only in Article 15 of the Covenant which related to the handling of disputes by the Council was there provision for the Council to act without the concurrence of specially affected members, but then it was only on a recommendatory basis.

So, Mr. President, outside of procedural matters, non-consenting League members enjoyed absolute protection against being bound by decisions specially affecting their interests.

That brings us to the Charter. In the Charter there was considerable innovation in regard to the mechanics of this protection, but rather less in regard to its substantive scope.

Let us look at the position first of the General Assembly. There the unanimity principle was abandoned in favour of an arrangement of a two-thirds majority for important questions and a bare majority for others. But, at the same time, except again for procedural and budgetary matters, the powers of the General Assembly were limited to discussion and recommendation. These two things went hand in hand: the dropping of the unanimity principle and the arrangement, save for the exceptional cases, that the resolutions were to be of recommendatory character only. It was part of the basic design of the General Assembly or, if one prefers, one could say it was part of the balance that was

struck or the bargain that was struck. In the 1955 Advisory Proceedings on South West Africa concerning the *Voting Procedure* in the General Assembly, this point was particularly stressed by two of the judges—Judges Klaestad and Lauterpacht. Both of them saw in the non-binding effect of General Assembly resolutions a reason why supervision by that body would not be more onerous than it had been by the League Council, despite the fact that in the General Assembly the unanimity principle had been abandoned. I refer to *I.C.J. Reports 1955* at pages 88 and 123.

I am aware of the fact, of course, that Judge Lauterpacht in that very same opinion stated some qualification to the proposition of the non-binding effect of General Assembly resolutions, but that is not for the moment relevant to my purpose. This Advisory Opinion was in 1955. It was only 11 years, Mr. President, before the General Assembly adopted resolution 2145, without South Africa's concurrence and against its will, the supporters of the resolution insisting that it had binding effect upon South Africa, and upon other States concerned, in the sense of rendering South Africa's presence in South West Africa illegal.

Now let us look at the case of the Security Council. There the innovation, even substantively, went further. The unanimity principle was dropped for the Council as a whole and, in addition, the Council was granted the power to make, in certain circumstances, decisions that could be binding even upon non-consenting United Nations Members whose interests were specially affected. This was, therefore, a very important innovation. But, for that very reason, because it was so important substantively, it was, as one might expect conditioned by very important safeguards: and I want to mention four of them. The first one is that, except again for procedural matters, the unanimity principle was retained for the five permanent members of the Security Council, although it did not apply to the Council as a whole. Contemporary comment, of which we cite various passages in our written statement, emphasized the importance which was attached to this arrangement, the basic substantive idea being that in the field of peace-keeping, that very important and onerous responsibility being placed upon the Council, it would not serve either the interests of the major powers or the interests of the world as a whole to permit coercive action to be taken in the name of the United Nations unless it could be taken with the full support of all of the permanent members.

The second important safeguard was the requirement that a non-member of the Security Council, if he was a party to a dispute being considered by the Council, had to be invited to participate in the discussion, although without vote.

The third safeguard was that a member of the Security Council, if a party to a dispute, was to abstain from voting. And the fourth safeguard, the overridingly important one, was the fact that the grant of power to make decisions that would be binding upon non-consenting States was very carefully limited to circumstances which were explicitly and carefully defined in the Charter.

I am not going into detailed analysis at this stage, Mr. President, but our submission is that if one analyses the position under the Charter, in accordance with its natural meaning and as it was seen at that stage by the founders of the United Nations, it really amounted to this: that, apart possibly from one or two specific cases which I need not define at this stage, this grant was confined to cases falling under Chapter VII of the Charter—in other words, cases where the Council had, in terms of Article 39, determined the existence of a threat to the peace, a breach of the peace or an act of aggression. Those were the limited circumstances in which it was conceived that the Security

Council could act in what, up to that stage, had been a completely unknown method in international organization.

Now, Mr. President, let us look by contrast at what is being urged upon the Court concerning the world of 1971 in these respects.

First, again, concerning the General Assembly. On behalf of the Secretary-General one finds in the oral statement presented last week the contention that "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". I stress the words "to act in the name of the latter [United Nations]". The distinguished representative proceeded to state that in such cases it was the United Nations itself that was acting and he defined those cases as being especially—

> ". . . 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" (pp. 51-52, *supra*).

Now, Mr. President, we have looked at those contentions very carefully in their context, and this much seems to us to be clear—if we misunderstand the Secretary-General it is for him to say so—but it seems to us that he makes it clear that he suggests that this is a power even to bind non-consenting member States, which could be *any* member States. He does make special submissions, with which I shall deal later, concerning States in the position of administering trust or mandated territories. But this particular contention which I have now read out to the Court we understand as relating to all States. If that were so, let us look at what could happen, in these various spheres, which he has defined, in this world of 1971.

For the United States of America, a socialistic policy could be prescribed or dictated, or for the Soviet Union a capitalist one, by the appropriate majority decisions in the General Assembly; because, after all, although those are both permanent Members of the Security Council, they have no right of veto in the General Assembly. For both, there could be a prohibition of space flights. And let us look at the possibilities for other States.

First of all, as soon as action of this kind is taken, or decisions of this kind are made in regard directly to particular States, it sets in motion a chain of consequences indirectly for other States. They could then be prohibited from having, with those States directly affected, dealings or relations which would be inconsistent with the resolutions taken by the General Assembly—much along the lines of what has happened, or what is purported to have happened, in regard to the South West Africa situation.

Let us look at other possibilities, still in the economic sphere. Is it now suggested that the economically under-developed countries, who are probably by far in the majority in the General Assembly, could impose international obligations on the developed countries? International obligations, shall we say in the first place, to pay an annual contribution to development aid, based upon some formula such as a certain percentage of the gross domestic product of the developed country. Is that the suggestion? Because that does seem to be one of the implications following from this contention of the Secretary-General. Could the under-developed countries, by their majority, exact an obligation from the developed ones to pay minimum or floor prices for raw products coming from the under-developed countries, and the counterpart of being bound by frozen or maximum prices for the manufactured goods of the developed countries exported to the under-developed ones? Are those matters

in which it is suggested now that the General Assembly, in the economic sphere, could lay down internationally binding obligations for States?

Let us look at the social sphere, Mr. President. Majority decisions, according to this contention of the Secretary-General, could prohibit State religions, whether they were Christian, or Hindu, or Moslem, or any other religion. They could promote non-discrimination for instance by enforcing equal rights for women in Islamic countries; or they could provide that the King of England may be a non-Anglican, and that the Pope, in his capacity as Head of State of the Vatican, may be a non-Catholic—all in the sphere of promoting non-discrimination. Majority decisions could rigidly prohibit traditional customs in Africa; they could lay down curricula for education; they could lay down rules about mother-tongue instruction, either making it compulsory or prohibiting it. They could require the United States to adopt different policies than they are doing at the moment with regard to their Negro and Indian populations.

There is no end to the examples that one could give as to what this body could do, if this Court were to place its sanction upon the contentions that are being pressed upon it as to the powers of the General Assembly.

In order to promote self-determination or to terminate colonial or semi-colonial situations, there could be binding resolutions by the General Assembly that Estonia or Lithuania be declared independent, or that a plebiscite be arranged in those areas. They could do the same about a possible Basque territory, say partly in Spain and partly in France. For different States which have lately experienced some difficulty or another in regard to their State organization, there may be binding prescriptions as to what kind of governmental system or civil rights there should be: let us say in Northern Ireland; in Spain or in Greece, or in Uganda, Nigeria, Cyprus and so forth. As I have said, there is probably no end to it and I do not want to pursue the matter any further. One might ask generally, if this were the world of 1971, what would then have become of the essentially deliberative character of the Assembly, which was so intentionally designed and so explicitly described by the authors of the Charter.

I want to quote at this stage only one of those descriptions given at the relevant time. It was one by Mr. Edward R. Stettinius, Jr., a former Secretary of State of the United States, and I quote from his Report to the President of the United States on the Results of the San Francisco Conference:

> "It will be the responsibility of the General Assembly to discuss, debate, reveal, expose, lay open—to perform, that is to say, the healthful and ventilating functions of a free deliberative body, without the right or duty to enact or legislate." (Department of State, Publication No. 2349, *Conference Series* 71, p. 14.)

By way of contrast, Mr. President, in these proceedings, the distinguished representative of the Organization of African Unity, in identifying himself with the Secretary-General's contentions, now explicitly asks this Court to view decisions of the General Assembly on the basis as if they had been taken by a parliament or a political assembly. And if I understand him correctly, by suggestion more than by what he said, it should be looked upon as a kind of sovereign parliament, because he ascribes to it the kind of attributes of a sovereign parliament, namely that what appears to be formally in order by publication of the parliament itself, must be accepted without question by the Court—we find that at page 100, *supra*.

Now we come to a second astounding claim made for the General Assembly,

and that is, Mr. President, that in the event of disputes, the General Assembly can act as a kind of a court of law. And, apparently without special submission to its jurisdiction by the sovereign States concerned, it can make findings of fact and apparently of law, which are binding on the member States concerned, even against their will, and binding upon them in such a way as not to be questionable even in this Court, so that this Court is called upon to accept them as being absolute. One finds that in the oral statement on behalf of the Secretary-General, pages 34-35, *supra*, and at the same pages of the Organization of African Unity statement to which I have just referred.

So, Mr. President, the General Assembly is to be the complainant, the prosecutor and the judge combined, apart from being a parliament.

A third claim which is made is really allied to the second one, and that is that the General Assembly may make final and binding decisions on the question which of two rival governments of a particular member State may represent that State in the United Nations. That claim is made by the distinguished representative of Finland at page 68, *supra*.

I believe that the distinguished representative of Pakistan yesterday associated himself with this contention. Unfortunately I cannot yet refer to any record in that respect. So those are the claims now made for the General Assembly.

For the Security Council, we find that the powers claimed are no less remarkable. Each one of the four safeguards which I have mentioned is simply sought to be swept away. Let us look first at the unanimity principle among the five permanent members. This is said, Mr. President, to have fallen away because of a practice of disregard which has now become binding upon everybody concerned (pp. 39-41, *supra*). And in addition it is contended that the Security Council is the final judge which renders the matter *res judicata* through an announcement that a resolution has been adopted. In other words, the Security Council itself finally judges whether that resolution has been properly adopted and is valid. That contention one finds on behalf of the Secretary-General at page 41, *supra*.

There is an associated question about the composition of the Council, in respect of which the Secretary-General contends that when there is a dispute between rival governments about the right to represent a particular member State—in this case, a permanent member, namely China—the Security Council gives the final and binding decision when it decides on the credentials of representatives. That submission we find at pages 38-39, *supra*.

Now we come to the second of the safeguards I have mentioned, the inviting of a non-member party to a dispute to take part in the discussion—a party to a dispute which is a non-member of the Security Council. It is apparently conceded that the obligation to invite such a non-member to the discussion is an obligatory or a mandatory one, but then it is contended that the Security Council can really render nugatory this qualification or limitation upon its powers by deciding for itself whether what is coming before it is a "dispute" or a "situation"; and once the Security Council has said it is a "situation", then no matter how much it might look like a dispute to anybody else, it is to be regarded in law as a "situation"; and then that limitation upon powers of the Security Council comes to nought, and not even a court of law could pronounce upon it. That seems to be the effect of the contentions advanced to this Court at pages 41-43, *supra*.

In regard to the safeguard that parties to a dispute are to abstain from voting, the same contention is advanced. Here again the Security Council is the final and binding judge in its own cause in deciding whether it is dealing with a "dispute" or a "situation". That is at page 43, *supra*.

And now coming to the most important aspect of all, the limited grant of powers to the Security Council: here, Mr. President, one finds the most astounding attitude of all, an attitude which seeks to ignore those limitations entirely—perhaps I should not say entirely, but subject to one confinement only, and that is a very broad one, the confinement or limitation that the Security Council is to remain within the broad confines of the purposes and principles of the United Nations. However much room there may be for difference of opinion as to appropriate and desirable methods for achieving those purposes and principles, the Security Council may decide all that for itself: and it may in that broad sphere exercise powers of binding non-consenting member States. That is the effect of the contention, as we understand it, advanced at pages 44 to 49, *supra*.

Mr. President, again it would be obvious that the implications of this contention are enormous in regard to potential inroads into the sovereignty of member States finding themselves in a minority on a particular subject. In this instance the threat is probably a more direct one to the smaller—or shall I say, ordinary—Members of the United Nations, Members other than permanent members of the Security Council who have a right of veto in the Security Council. But if one takes into account the requirement that a party to a dispute is to abstain from voting under the proviso of Article 27 (3) of the Charter, and if one takes into account the contention that the Security Council is to be the final and binding arbiter and judge as to whether proper procedures have been adopted and whether a valid resolution has been passed, then the position may become uncomfortable also for permanent members of the Security Council. And in that way, Mr. President, and in general, many of the practical examples which I have cited to the Court in regard to the General Assembly, and many similar ones could arise on this basis by way of binding resolutions by the Security Council too. They need—according to this contention—*not* relate to a situation where the Security Council has determined that there is a threat to the peace or a breach of the peace or an act of aggression, or even a situation which immediately makes likely the development of circumstances of that kind: the Security Council could go very, very far beyond those limits and travel anywhere within the purposes and principles of the United Nations.

Then there is a further significant contention, about combined action on the part of the General Assembly and the Security Council. If I understand that contention correctly it comes to this: one has a case where the General Assembly, so it is assumed, does not have the power to pass a binding resolution on a particular subject, but it nevertheless passes one; the Security Council too, standing by itself, has no power to pass a binding resolution on that subject; but the matter goes from the General Assembly to the Security Council, which then confirms the action of the General Assembly and then it becomes a valid resolution, a valid and a binding one. That contention one finds at page 52, *supra*, and here again I believe—subject to correction—that the distinguished representative of Pakistan associated himself with that contention yesterday.

Again, Mr. President, this is a startling thing. I do not contest for one moment that it would be possible in a particular constitutional instrument to make a provision of that kind: to say we have two organs, and this matter we regard as important; so we are not going to give either of them separately a power to pronounce upon that in a binding way; but if both of them do then it will be binding. But then the constitution would have to provide for it. Otherwise in general law one finds this: proceeding from the hypothesis, organ "A" begins by passing a resolution which is beyond its powers and therefore invalid; then organ "B" comes and, on the same hypothesis, that subject-matter is beyond

its power too; it passes a resolution purporting to confirm the resolution of the first organ, so a nullity is now by a non-competent organ made into something valid and binding. That is the effect of the contention, unless, of course, the Court should imply into the Charter a power of that kind which was not written there.

Mr. President, the aspects which I have so far dealt with concern all member States of the United Nations. But now, as I intimated before, there are special or alternative arguments pertaining to States administering mandated or trust territories. They are singled out for very special treatment in the contentions about the world of 1971. As a background to those contentions as they have been advanced, let us look first at the general understanding about the mandates system and the trusteeship system on this particular point.

Both of those systems were devised in such a way as *not* to subordinate the mandatory or the administering authority to the dictates of a supervisory body. The proposition is really a trite one, and it could be demonstrated at great length; but for present purposes I wish to give the Court only two references, the first one a very brief one. It comes from the Judgment in the *South West Africa* cases in 1966 (*I.C.J. Reports 1966*, p. 46); this is after a very careful and extensive analysis, in that Judgment, historical, legal and otherwise, of the mandates system, the constituent documents, their background and history, the practices in the time of the League and so forth. The conclusion is:

> "The plain fact is that, 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—the system adopted was one which deliberately rendered this impossible."

That is about the mandates system; now about the trusteeship system. I refer to the same opinion (as before) of Judge Lauterpacht in *I.C.J. Reports 1955*, at page 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. 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 ...
>
> 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."

That was said in 1955: and now, Mr. President, for the contrast with this world of 1971.

Running like a theme through the oral statement given on behalf of the Secretary-General is the contention that in the case of a State performing an administrative function over a trust or a mandated territory the international supervisory organs, including the General Assembly, have the power to issue "binding directives"—those are his words, not mine—binding directives to such a State; and he says the supervisory organs may do that by way of decla-

rations and resolutions which bind those administering authorities although they may not necessarily be legally binding upon States generally in the exercise of their individual sovereign powers.

On this latter qualification I did not understand him to make any binding admissions, he leaves that open, whether these so-called standards or interpretations in regard to trusteeship or mandates matters would be binding upon sovereign States generally; but he says, apparently, that for the purposes of his argument he need not take it further than to say they are binding, as directives, upon the administering authority. And I refer you to pages 36, 49, 56 and 59, *supra*. The process by which this can occur is described in various ways by the Secretary-General.

Sometimes it is described as the international development of rules; sometimes it is described as a valid or an authoritative interpretation of the obligations pertaining to the trust or mandated territory; sometimes it is described as the definition or identification of "contemporary prevailing norms", or of contemporary concepts which have to be applied in promoting moral well-being. But whatever label is given to the process, Mr. President, the descriptions have this feature in common, namely that the process is said to result in binding directives to the administering State concerned, even where that State does not consent to them and in the face of its opposition. For this proposition no provision of the Charter is cited in support, no legal argument even is offered in support: the propositions are simply stated to this Court as if they were dogma pertaining to the world of 1971, and we are at a loss to know what processes of law are said to have operated in the meantime to have produced this result, which is directly the opposite of the result contemplated and explicitly enunciated when the trusteeship system was devised.

So it will be evident, Mr. President, that the international legal world of 1971 as urged upon the Court on behalf of the Secretary-General and certain of the other participants, rests upon what one might call "a doctrine of implied powers" of enormous implications and extent.

By way of a summary I can give the Court a concise list of all the propositions which are relied upon for the purposes of the case being presented, so to speak, against South Africa in these proceedings, which rest upon a basis not to be found anywhere in the text of relevant instruments and which therefore has to be implied in some way or another.

The list begins with, firstly: a power of unilateral termination or revocation of a mandate on the part of the League authorities. The mandate instruments did not provide for it in their texts. The Covenant did not provide for it. So, if it exists, it would have to be implied.

Secondly: the transfer of supervisory powers from the Council of the League to the General Assembly of the United Nations. There the matter goes even further. There are relevant texts which provide for the manner in which a transfer is to be effected in each particular case if it is intended, and we know from the records that those procedures were not followed in the case of South West Africa. Yet, it is contended, despite that position, despite the absence of express provision which automatically brought about a transfer of supervisory powers, the Court is to imply that such a transfer has taken place.

Thirdly: a power on the part of the General Assembly to adopt resolutions, outside of procedural and budgetary matters, which are binding on non-consenting States, whether they are States generally or States administering mandated or trust territories.

Fourth: a power on the part of the General Assembly to make binding determinations on questions of fact or law or both.

Fifth: a power on the part of the Security Council to adopt resolutions, outside of procedural and budgetary matters, which bind non-consenting States, despite the fact, in the first place, that the matter does not fall under Chapter VII or some other specific empowering provision of the Charter and, secondly, that all the permanent members have not agreed to it. That is the fifth heading to powers to be implied.

The sixth one is this: a power on the part of the Security Council to make final and binding determinations; (i) generally, on questions of law and fact, and then particularly on the questions: (ii) whether a resolution has validly been adopted; (iii) whether a matter coming before the Security Council is a "dispute" or a "situation" for purposes of Articles 27 (3) and 32 of the Charter; and (iv) whether the Security Council is properly constituted.

Finally, my seventh heading: a power on the part of the General Assembly and the Security Council to do in combination what is beyond the powers of each acting separately.

I have said that my list numbers seven, but the Court will have noticed that some of the items have sub-divisions, so in fact, the list comes to about 11 items where powers would have to be implied in order to support the case being brought to this Court on behalf of the Secretary-General. And now it will become clearer why I expressed at the beginning, on behalf of South Africa, concern about the cause of international organization and international adjudication if the Court were to accede to these contentions concerning the world of 1971. Because it so happens that in order to justify the opinion which the Organization (the Secretary-General) and several other participating States are apparently seeking—the generally unfavourable opinion to the position taken by South Africa—virtually every one of the powers in this list I have given would have to be implied by the Court. There are one or two instances where the contentions run on an alternative basis, so that would shorten the list to maybe eight or nine, but in general, the position is that a finding against the suggested implication on any one of those items in the list must result in an over-all conclusion favourable to South Africa.

In other words, Mr. President, in order to put South Africa in its place, as it were, all the Members of the United Nations are now to be told, on the authority of this Court, that the interpretation and application of the Charter and associated instruments are subject to a doctrine of implied powers, which has already resulted in the two principal political organs of the United Nations having vastly greater powers of binding non-consenting States than were written into the instruments by their authors. That is what it amounts to. In addition, as I shall endeavour to demonstrate, this Court is asked to act, in this process of implication which is suggested upon it, not on a judicial or a juridical basis, but upon a basis which is essentially non-judicial and non-juridical and really a legislative one. That is what it further amounts to.

In our respectful submission, one could hardly imagine a combination of circumstances which would be more likely to frighten off States from international organization generally, and in particular from voluntary participation in the proceedings of the United Nations and from voluntary submission of their disputes to the judicial processes of this Court. That is the basis of the concern which I expressed at the beginning of this address.

Let me try to illustrate that somewhat to the Court with reference to the realities in the world of today as we see them.

I want to begin a few years ago, not so many years before 1971. The year 1965 takes us back far enough. That was the year in which the issue which one might call the one pertaining to the *Certain Expenses of the United Nations*

developed into one of near crisis within the United Nations, when the Organization itself was on the brink of a break-up.

There is a volume of documentation, of comment and of debates at the time on these particular problems, to which I could refer. I do not want to do so in detail at this stage, but I want to refer to some of the statements then made because they are so pertinent to the present subject of discussion. In the debates about that situation, one found that member States of the United Nations, of all political persuasions and of all shades of political opinion about the particular questions being debated at the moment, agreed about one thing, and that is that the root cause of the difficulties into which the Organization had run at that stage was the tendency on the part of majorities to exceed the constitutional limits of the particular organs. One finds that running like a theme through the whole of their discussions.

I can take it back even to a preceding phase of that same matter, shall I say, the advisory proceedings in this Court on the *Certain Expenses* matter. In our presentation to the Court in 1965, during the *South West Africa* cases, we gave many quotations which are apposite to this matter, in a survey which is to be found in Volume IX of the 1966 *Pleadings, Oral Arguments and Documents* at pages 643-649, from which I should like to read some portions. I am not going to give the exact original citations, Mr. President, with your leave, because they are all given in these pages of our presentation in 1965. In order to save time I will not do that now and I am not going to quote extensively. I want to take just a few of the passages, the others are there to be read if the Court should wish to study them. I will begin with a statement to this Court in a written memorandum of the Soviet Government, in the advisory proceedings:

> "It should be added that the resolutions of the UN General Assembly, as it is stipulated in Article 10 of the Charter, are of the nature of recommendations and are not binding upon States. The UN Member States themselves determine their attitude to these resolutions. All measures that follow from the General Assembly resolutions are also of only recommendatory nature and cannot establish legal obligations for the Member States of the Organization."

Now two passages from the Russian oral presentation to the Court. The first one:

> "It is universally recognized in international law that none of the parties to a treaty is obliged to bear more responsibility than was assumed by it according to this treaty. For the State Members of the United Nations such a treaty is the Charter within the limits of which they bear their responsibility."

Now the second brief quotation:

> "The competence of each organ of the United Nations is determined by the provisions of the United Nations Charter. The Charter is a treaty concluded between States, and no organ of the United Nations can amend it except according to the provisions described by the Charter itself."

And so, Mr. President, one proceeds to a list of other States. There is Venezuela—I quote only a few words, these are now in the debates during April to June of 1965 in the United Nations (p. 644 of the 1966 *Pleadings*, etc.). The quotation is: "The United Nations Charter is thus a treaty that can be revised only through the special procedures laid down in the Charter itself and accepted

by all the signatories." And then later in the same quotation "only a unanimous consensus could provide a final solution to any problem of interpretation".

Now I will proceed to the distinguished representative of France, two brief quotations from a larger passage which occurs at the pages to which I have referred. The first one is this: "There is one common denominator"—meaning thereby, Mr. President, a basis for coming to a solution of the difficulties in the United Nations. And then the representative proceeds to state what it was: ". . . the Charter which we have signed or to which we have adhered, the Charter which, until it has been amended or revised in accordance with the procedures which it provides for that purpose, remains binding law for us all. It is because there has been a departure from the Charter that the difficulties and conflicts weighing today on the Organization have arisen. It is only by reverting to that incontestable source, and not by the invention of new artifices, that we can put an end to the differences of opinion which are paralysing us."

Next, the representative of India:

> "Past experience has proved beyond doubt that a resolution of the General Assembly which does not conform to the provisions of the Charter cannot solve a problem. This would be true even if such a resolution were to be supported by all the great Powers."

It goes on, Mr. President, at the pages to which I have referred, with quotations from statements by the representatives of Brazil, of the Argentine and of various others. I want to quote two more and that will be the end of my reference to these debates. One is the statement by the representative of the Soviet Union in these debates, on 25 May 1965. He said:

> "The Soviet Union, along with other States, became a Member of the United Nations under certain specific conditions which are clearly stated in the United Nations Charter. During the 20 years of the existence of the United Nations the Soviet Union has unswervingly adhered to the provisions of the Charter. Any attempts to force upon the Soviet Union essentially new conditions for membership in the United Nations . . . constituting a violation and distortion of the wise principles of the Charter . . . are not going to succeed.
>
> We also wish to point out that it is not only the States Members of the United Nations that signed the Charter in San Francisco 20 years ago which are obliged to follow unswervingly the provisions of the Charter. All the young countries which have become Members of the United Nations in recent years, and whose acceptance as Members has greatly strengthened the United Nations and made it more representative and more viable, must also be guided by the provisions of the Charter. As is known, in becoming members of our Organization, those countries gave a solemn promise to respect the United Nations Charter which is the basic law governing the activities of the Organization."

And finally, just this brief one from the representative of Mexico, which is important because he sponsored the eventual resolution. Speaking about the draft resolution, he said: "Paragraph 4 emphasizes strict respect for the Charter. Not just any interpretation of it, but the Charter itself as the embodiment of the spirit of international solidarity."

That, as I have said, was as recent as five-and-a-half years ago, but we can come nearer to today.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

I should like to refer to present-day evidence of concern about maintaining a proper balance between the grant of powers to international organizations and the desire for preserving State sovereignty, in spite of the very urgent need for new forms of international organization. Last Friday, there were various discussions on high level in the United Kingdom about the possibility of British entry into the European Community. We have the evidence of *The Times*, Saturday, 13 February 1971, of which we shall hand photostats to the Registrar. I wish to refer briefly to three elements only.

The British Prime Minister, Mr. Heath, emphasized the need for new thinking, saying that the Community was the "sort of organization that had never been seen in the world before", and adding (front page of *The Times*):

> "We should be thinking in fresh terms of fresh institutions as the founding fathers thought when they first began the creation of this work in the early 1950s."

In this Mr. Heath was supported by the Foreign Secretary, Sir Alec Douglas-Home, in a memorial lecture on the same day; but the latter added a note of realism:

> "Successful economic integration must inevitably lead to closer and closer political association and that means more collective decisions and developing machinery for putting them into operation for the good of all.
>
> In a continent where the nation-State has played so large a part, I forecast that new political machinery will evolve slowly and that new institutions will be limited to those where there is a practical job to be done."

In an editorial, *The Times* was quick to put its finger on the spot:

> "Most people might grant the case that a united Europe would be a force for good in the world. What some of them fear is that in joining in the enterprise British sovereignty, all that we hold most valuable in our tradition of parliamentary government, might be curtailed in some way."

Mr. President, those considerations are still very much alive in the world of today. The need for taking them into account in advancing along the road of more effective international organization is as strong as ever.

Right up to this time there is in leading countries in the world a continuing debate, of which Members of this Court would no doubt be aware, about the subject of distribution of voting powers in the United Nations in relation to the powers of the organs concerned. South Africa is one of the smaller Members of the United Nations, each one of which can, in the General Assembly, bring out a vote which then counts the same as the vote of any of the largest States in the world. That is a very favourable position for us smaller States. (Some of us are even referred to as "mini-States".) But some of the larger States—representatives of those States or leading personalities debating these issues within those States—have indicated that while this situation lasts, the larger States could hardly be called upon to agree to an extension or a growth of the powers of the General Assembly in the direction of a body with legislative or parliamentary power. As a pre-requisite for any growth of that kind, however desirable it might be—that in itself, of course, is a matter for debate—but assuming the desirability of a development in that direction, informed sources seem to be agreed that a prerequisite would be a re-distribution of voting powers within the Assembly, a re-distribution which would take more realistic cognizance of differences in sizes in populations, in strength and so forth of the various State Members. And it must be very obvious, Mr. President, with the greatest

respect, that in this atmosphere which prevails very much in 1971, prominent Members of the United Nations are not going to take kindly to a surreptitious process of developing the General Assembly into a legislative body by freely importing so-called implied powers into the Charter, without taking into account these considerations of practical balance which I have just mentioned. In particular, if that should happen through pronouncements of this Court, one could hardly expect States to be keen to submit their international disputes to adjudication, by voluntary submission to the jurisdiction of this Court.

It is true, Mr. President, that some of the implied powers which I have listed are specifically designed, by those who contend for them, in such a way as to hit at South Africa. That I suppose is something new in international law too, international law as opposed to international politics. The general idea of law is to make rules and principles for all, and not to make some rules for one and other rules for all others. But, be that as it may, the questions which have been put by Judge Gros have, with respect, very clearly drawn attention to the fact that direct action taken against a particular State may have important consequences of law, or suggested legal consequences, for various other States. And in any case, if a legally unjustified process is once begun with a view to getting at South Africa, if I may use that expression, how does one know where is the rot going to stop.

That brings me to the basis upon which this Court is asked to make the implications under discussion. There is, as we all know, a well-established basis in law and in logic for importing an implied provision into a contractual or a similar instrument. We deal with the authorities and the principles in our written statement, I, Chapter II, paragraphs 10 to 13, pages 387-388. It amounts very briefly to this, that an implication of that nature is only permissible where it appears from the record, either directly or by inference, that the parties were in fact agreed that such was to be a part of their contract, but that they only omitted to record it because they thought is was too clear, because they considered that it was self-evident and went without saying. Or, to put it perhaps more formally, the inference that the parties were actually agreed upon the suggested term or provision or power must, in the first place, be consistent with all the relevant facts and, in the second place, it must be a necessary inference from those facts, in the sense that all reasonable alternative inferences are excluded, i.e., that no other reasonable inference can be drawn. So that is a considerable discipline to apply, and rightly so, to a suggestion that a term is to be implied in a contractual instrument, particularly in the international sphere with multilateral conventions, where one has the position that certain States agree upon the convention and others come in later by accession.

Now in the list of changes in the powers of organs of the United Nations, as suggested by various representatives, there is one which is said to rest on a modification of the law by practice, and that is the one concerning unanimity amongst the permanent members of the Security Council. But in all the other instances in that list, the discipline of the law and of logic, which I have just mentioned, would have to be applied in order to see whether the implied power which is suggested can justifiably be said to form part of the Charter. The discipline requires a very careful investigation over a considerable field. It requires an investigation into all the relevant data which could throw light on the probable intent of the parties: the antecedent history, the *travaux préparatoires*, the structure, the scheme and the wording of the written instrument, the general probabilities, the subsequent conduct of those affected and so forth.

Now, Mr. President, is this the approach of the distinguished representatives

who have been urging these implied powers upon this Court? Decidedly not, they do not refer to this discipline at all. Their approach is rather an argument of so-called necessity; and if one analyses the argument it amounts really to no more than this, that if the implication is not made, it will not be possible to force the situation along the lines desired by the majorities in the United Nations organs against the will of South Africa. That is what it amounts to in essence, in the first place. In the second place, the consideration is raised that the United Nations may be inconvenienced in regard to constitutional practices which have evolved over the years. I know it is put into more dramatic language than that, but that is what it amounts to in effect. (Statement on behalf of the Secretary-General: pp. 31 and 48-50, *supra.*)

And thirdly, Mr. President, it is suggested that this Court should show its solidarity with the other United Nations organs, whatever that might mean. This last suggestion came from the Organization for African Unity, at page 105, *supra.*

Now, Mr. President, demonstration could hardly be necessary that such an approach is wholly unfounded in law, regard being had to the principles which have been so clearly expounded by this Court itself in its jurisprudence. One need merely refer to the principles which I have just mentioned in regard to the implication of a provision into a contractual instrument to see that the Court is in effect here urged to act, not on a judicial, but on a legislative basis. And, in addition, this Court very pertinently and authoritatively disposed of similar contentions in its 1966 Judgment in the *South West Africa* cases:

> "... if, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law" (*I.C.J. Reports 1966*, p. 36).

Now, Mr. President, this passage from the Court's Judgment postulates even desirability from a political point of view in particular situations, which nevertheless could not influence the position in law. I want to take up that element in relation to the present case and I want to put it very strongly to the Court on behalf of South Africa that as unjustified as this suggested approach of a legislative nature, which is urged upon the Court, is in law, so unjustified it is when regard is had to the facts of the situation which properly come before the Court for consideration in these proceedings.

Our contention is that satisfactory progress towards solution of the problems of South West Africa, humanitarian problems and other problems, can only lie along the road which was wisely indicated by the authors of the mandates system and the trusteeship system: the process of discussion, understanding and dialogue, and not the process of trying to force a situation upon an authority and upon a people who do not want that particular remedy for their situation.

I say that, in the full realization and with full acknowledgement of the fact that circumstances in South West Africa, as in South Africa, are not perfect—nobody could claim that for any particular country. But at the same time they are not static, they are evolving; there are forces at work within the communities, taking into account the historical antecedents and proceeding with a view to finding a solution, in a multi-national situation, and in the circumstances of a world which is rather emotionally charged about the problems involved. The objectives are the same as far as the humanitarian considerations are con-

cerned: objectives of self-determination, of human rights and human dignity; the problem is one of finding appropriate methods in the particular circumstances.

In the *South West Africa* cases, South Africa went out of its way to present to this Court, and through this Court to the world, as systematic and as comprehensive and as well-documented an account as could ever be expected of the facts and the problems of South West Africa, of South Africa's policies in the Territory, of the objectives and the aims of those policies and of the measure and extent of progress already made in putting those policies into effect. South Africa offered extensive oral testimony, and it invited the Court to inspect the Territory, in further refutation of the charges of oppression, repression and denial of self-determination of the indigenous peoples which had regularly been made in the United Nations and which had been taken up by Ethiopia and Liberia in their pleadings in that case. Those expositions made it clear, Mr. President, that South Africa's methods differed from those desired by the United Nations majorities but, at the same time, they emphasized that the objectives were, in principle, in accord with the modern concepts I have mentioned.

Now, the further developments in that case are well known. The applicant States, evidently realizing their inability to establish the crude charges upon which their case had been based, in the course of the oral proceedings accepted as true South Africa's expositions of fact, and they modified their Submissions so as to omit the charges of oppression, repression and denial of self-determination. Even then South Africa proceeded to put before the Court uncontested testimony by 14 experts to show that the absolute rules of non-discrimination and non-separation urged upon the Court by the Applicants could not possibly, in South West Africa, serve the cause of promoting well-being and progress.

The Court's Judgment in 1966 eventually did not pronounce upon this latter aspect of the issues. The South African delegation then went to the twenty-first session of the General Assembly fully prepared and eager, Mr. President, to discuss the South West Africa position fully and constructively on the basis of this enormous record which had been built up in this Court—the full and fully documented account which has been given to the Court—and on the basis of the developments in the course of the case which were there on record. The delegation found themselves confronted by a wall of emotionalism and of utter unwillingness to listen to or to discuss anything with them, least of all the court case or the developments in the court case.

When South African representatives went to the rostrum to address the General Assembly, blocks of representatives of certain other States walked out. South African representatives, in their presentations to the General Assembly, recapitulated briefly what had happened in the court case, and what had been the gist of their expositions. They invited study of those records, all to no avail. There were extensive consultations—informal consultations, the proceedings were adjourned for the purpose—between all concerned with a view to reaching the maximum of consensus, so it was said; but the one party able to throw most light on the situation, and probably the most interested in it, particularly from the point of view of the humanitarian considerations involved—South Africa—was never invited to any of those consultations; it was a matter of those aligning themselves against South Africa trying to find maximum consensus between themselves. And so, Mr. President, a great opportunity for starting and getting off the ground with constructive dialogue was lost. The old charges of oppression, repression, denial of self-determination, were brought forth again by one

delegate after another with renewed vigour, as if they had somehow been enhanced and not discredited in the *South West Africa* cases. And no attempt was made at establishing any of them or bringing material in support of them; they were simply stated as if they were gospel, just say so, *ipse dixit* propositions.

Representatives of the States that had brought the case against South Africa in the *South West Africa* cases went so far as to deny that the course of events in the proceedings of this Court which I have just mentioned, ever occurred. The outcome was, as we know, resolution 2145.

South Africa continued to seek avenues of dialogue. It presented the *South West Africa Survey* in 1967. It presented a host of detailed information afterwards; it invited diplomatic representatives of other States to visit South West Africa and, except for a few creditable cases, the reaction was a legalistic one of not wishing to recognize South Africa's right to administer South West Africa and therefore of not being willing to visit the Territory.

Meanwhile, Mr. President, South Africa has continued within the Territory with spectacular developments in the political field, in the economic, social, educational, health and other spheres. It has done so throughout in close consultation with, and with the co-operation of, the peoples involved. And in the field of human relations, I wish to say again that matters are not static, they are evolving. They are evolving in the direction of better understanding and better accommodations, although the end of the road, where the evolution is to lead to, has not been reached yet, by far. It is in these circumstances that South Africa seeks and invites dialogue and discussion, criticism, if necessary, but let us proceed and see where we can get from there.

There are encouraging signs that this is positively responded to in the black Africa of today, not only in neighbouring States of South Africa but in States further afield, where there are responsible leaders who are seeking or favouring contact and dialogue with South Africa, even though reserving vehement differences of opinion and of attitudes about policies being applied. South Africa looks forward to the day when the Organization of African Unity will no longer be an organization hostile to it, in the forums of the world or in the practical every-day business of developing Africa; that it will be an ally and a friend, particularly in the development of the true potential of the great African continent. That is what South African policies and the South African approach in regard to South West Africa mean, in real terms, in the world of 1971. And that is why I say that, under these circumstances, an attempt at forcing solutions against the will of the peoples and the authorities concerned could get one nowhere, and particularly not at the price of established precedents, principles and disciplines which are so necessary in the international order of today.

There are, regrettably, some who still seem to be bent on a collision course with South Africa, and particularly in regard to South West Africa. They have endeavoured to spur the Security Council to coercive action and they are here in this Court with a renewal of the old charges and in the hope that these proceedings may be a spur to coercive action.

Mr. President, I say that is very much to be regretted, but it is part of the reality and it is necessary to test their approach. The complete hollowness of that approach when it relates to the well-being and the self-determination of the peoples of South West Africa is demonstrated best by South Africa's plebiscite proposal and the reactions that have so far been announced to this Court.

If those bringing these charges against South Africa had seriously believed in them, Mr. President, one would have expected that they would have welcomed a proposal to have a plebiscite, they would have welcomed it is a means of proving their case and of cutting the very ground from under South Africa's

feet. But what do we find in fact? We find from them complete and utter rejection of the proposal, coupled with the flimsiest pretence at technical and legal objections and excuses. It is, I might say, the label of legal nicety in reverse. It is the extreme of legalism and it very obviously has the practical purpose of trying to conceal something. Let us examine these points which have been raised.

First of all there is the question of the competence of the Court. That was raised by the Organization of African Unity (p. 104, *supra*) and by the distinguished representative of Finland (p. 65, *supra*). The queries about the competence of the Court are posed in a rather vague and unspecified manner.

Mr. President, our plebiscite proposal is made on the basis that the Court finds it necessary to investigate and pronounce upon the factual issues which have been squarely raised. Some of those factual issues, as being raised for the Court's consideration in the written as well as the oral presentations to the Court, concern the basis of the General Assembly's purported termination of the Mandate in resolution 2145. Others serve a different purpose. They are raised by way of allegations of continuing violations, after 1966, of international obligations on the part of South Africa—international obligations owing to the inhabitants—and it is said that South Africa has incurred and is still incurring international responsibility because of those violations.

Now, Mr. President, in each instance where these facts are raised by the other participants for consideration by the Court, the accent is very heavily on alleged inhumanities and on an alleged denial of self-determination to the inhabitants. As illustration one need merely refer to the concluding remarks offered on behalf of the Secretary-General at pages 61 to 62, *supra*, and to the list of alleged violations as offered on behalf of the Organization of African Unity at page 102, *supra*. In both cases the Court will see the accent on alleged inhumanities, and very strongly on alleged denial of self-determination. So on the basis that these issues are to be investigated and pronounced upon by the Court, what possible doubt could there exist about the Court's competence to avail itself of an offer to provide the Court with probably the best and the most relevant, and potentially the most crucially significant, evidence for this purpose, the evidence of what the inhabitants themselves say.

It is true, Mr. President, that the Court in advisory proceedings does not usually engage upon extensive investigations into disputes of fact. But on the basis under discussion, on the basis that the Court does find it necessary, in order to determine the question put to it by the Security Council, to go into the factual field in this case, the Court is surely left with only one of two alternatives: the one alternative would be to say we decline jurisdiction because advisory proceedings are not appropriate for this kind of investigation; the other alternative is to say we avail ourselves of the Rules of the Court, or of the provisions of the Statute, which enable us to adapt advisory proceedings—or shall I say, the procedures in advisory proceedings—to those applicable to contentious cases as far as may be necessary in order to do justice in a particular instance. That is specifically provided for in Article 68 of the Statute. And if this second alternative is adopted, then there could be no difficulty whatsoever about the appointment by the Court of a committee of independent experts in accordance with Article 50 of the Statute.

So we do not understand what the technical difficulties are which are suggested—and the objectors do not say what they are. The main point for the present is that if there were technical objections one would have expected the accusers to offer to assist, even by their consent as far as may be necessary, to overcome the technicalities so as to make the plebiscite possible, rather than to shield behind the technicalities with a view to avoiding a plebiscite.

The next point that was raised was one of relevancy. Under this heading we are again met by an attitude which is technical in form but of much deeper significance in substance. It is an attitude of being very loud on the one hand in accusing, and even condemning, South Africa of violations by reasons of policies and practices, but of pleading, on the other hand, that although South Africa consistently denies these allegations, and still does so in this Court, this Court must please not pronounce upon those issues, because they have been finally determined in the organs of the United Nations and the Court must now simply rubber-stamp the findings that have been made in those political organs.

That is an attitude which we first of all met in the course of the oral proceedings in the *South West Africa* cases. As we demonstrated earlier in these proceedings, that is in the application for the appointment of a judge *ad hoc*, those cases were really conducted by Ethiopia and Liberia acting as agents for the Organization of African Unity—I refer to the record of those proceedings which I believe has now been authorized for publication, Mr. President (p. 7, *supra*). So it is not surprising to see that the Organization of African Unity is still pursuing that same line in these proceedings before the Court—we find that at page 99, *supra*, read in contrast with page 102, *supra*. Now the Organization of African Unity is joined in these proceedings by the Secretary-General who makes the same contentions (pp. 34-35, *supra*), by India (pp. 112-113 and 118-119, *supra*), and I believe, subject to correction, that the distinguished representative of Pakistan identified himself with that line yesterday—the line, that is, of relying on allegations of fact against South Africa but saying that this Court must please not determine them. It must be added that Finland, to its credit, does not join in this disingenuous display. (I wanted to say *phonus bolonus* but my learned colleagues say that would be slang so I would rather not use the term!) (*Finland*: pp. 77-78 *et seq.*, *supra*.)

Mr. President, that suggestion that the facts are there but that they have been determined by political organs and the Court must accept that as final—that serves as the basis for these various States and organizations to say that this proposal about a plebiscite is not relevant to the issues before this Court. I do not think I need say more about that, except, again, that it is an attitude of relying on the allegations but not wishing to stand up to a test about them.

Then, thirdly, a point is raised about South Africa's so-called "standing". Finland contends that South Africa has no standing to propose or organize the plebiscite since it no longer has any right to administer the Territory (p. 65, *supra*). But, Mr. President, surely that is question-begging of the highest degree. It begs the very question at issue in this Court: is South Africa there legally or illegally? South Africa in making the plebiscite proposal does not beg that question. The fact is that South Africa is in *de facto* control of the Territory at the moment, whatever the legal position might be, and the plebiscite proposal merely proceeds from that practical basis. Without South Africa's practical co-operation, a plebiscite would be impossible in South West Africa at the moment, so the proposal is made on that basis and South Africa explicitly says, in its letter to the Court of 6 February, 1971, page 3 [1].

> "Acceptance of the proposal by the Court, or support for it by any State, person or organization, will be entirely without prejudice to the legal positions adopted by them, or to any contentions or findings that might later be advanced or made."

[1] *See* ***Correspondence***, *No. 92, p. 673, infra.*

And the letter proceeds to explain that this particularly safeguards attitudes or contentions about the legality of South Africa's presence in the Territory. So it is an absolutely neutral and legally correct basis upon which the proposal is made and yet we are met with this attitude that South Africa has no standing to make it.

Next, questions are asked about the report of the committee of experts. The Organization of African Unity asks: "To whom would the experts report? Who would be the judge of their findings?" (p. 104, *supra*). But surely, Mr. President, the answers are obvious, with respect. The report will be made to this Court. And the Court will presumably give other participants an opportunity for comment, and it will then decide what significance it should attach to this report on the plebiscite, for the purposes of the Court's opinion in these proceedings and for no other purpose whatsoever.

Next we find that the Organization of African Unity and India express concern about the Court's becoming "embroiled" in a political matter which, they say, should resort with the United Nations (pp. 104 and 119, *supra*). Mr. President, this is perhaps the most sardonic touch of all. If the Court is likely to become embroiled in a political matter it is because of the nature of this question which has been put before it—because of the nature and the political background, which is so well known, pertaining to this case. The plebiscite proposal does not create a situation of political overtones or implications, it merely suggests a form of very pertinent evidence for resolving the factual disputes which have now come before the Court.

The Court will be required to pronounce on the plebiscite only within the course of its judicial task and in the context of its judicial task in these proceedings.

Then, finally, the Organization of African Unity and India pose various questions about the potential value of the plebiscite. The answers to most of those questions which they pose have in effect been given in what I have said already. They have in effect even been given earlier, in South Africa's letter in which the proposal was made to the Court. But the interesting factor is that the reasons or conclusions advanced by the Organization of African Unity on the one hand, and by India on the other hand, for rejecting the plebiscite proposal as being of insufficient value, are directly contradictory. One finds India saying, on the one hand, that "certain political conditions must exist before the right of self-determination can be exercised". They imply that such is not yet the case in South West Africa, and so India contends that "it is for the United Nations to determine the time and method of ascertaining the wishes of the people . . .". I refer to page 120, *supra*.

Now, the Organization of African Unity, on the other hand, says directly the opposite. It says that if things in the Territory should be as good as South Africa claims, then:

> ". . . why do we not agree that Namibia is therefore better qualified for political independence *right now*, and give it to it?" (p. 104, *supra*).

The Court will see the obvious contradiction: one says the time is not yet here; the other says it is overdue. And this last point, Mr. President, is perhaps the most callous contention of all when related to the well-being of the inhabitants and their self-determination; because it is suggested that the Territory should now be given an unspecified form of independence—unspecified in relation to forms of government and so forth—without consultation with the inhabitants and merely on the basis of a debating point which has emerged between two participants in the proceedings before the Court. I think the

kindest interpretation of this suggestion is probably that it is not seriously made.

So, Mr. President, all this smokescreening, because that is all that it really could be called, serves to emphasize rather than to hide the fact that South Africa's leading accusers have now run into rather serious trouble about these very accusations of fact that they have been seeking to present to the world. They have already demonstrated their aversion to having the factual issues investigated by the Court. Now they have shown an equal or a stronger aversion to hearing the views and the wishes of the inhabitants of South West Africa, those people whose cause they profess to champion.

The principle of self-determination which is so useful when they use it as a weapon for attacking South Africa, now comes to nothing when it is to be applied in practice; when an opportunity is being offered for the peoples concerned to be consulted on the shaping of their future destiny, under circumstances where the Court will be able, through a committee of independent experts, to inform itself about the fairness and the adequacy of the procedures adopted; and when the Court can, and is invited to, enter into a discussion and investigation into appropriate and fair conditions under which a plebiscite could be held.

So, Mr. President, to revert now to the theme which I have been developing, the theme in regard to international organization and international adjudication: *this* is now the type of cause for which this Court is asked in effect to betray its judicial function and to indulge in a legislative rewriting of the Charter, a course which, in our respectful submission, can have only the most dire consequences for international organization in general and for international adjudication in particular. Yet, Mr. President, if the Court should decline to do what is urged upon it, there can hardly be any doubt about the kind of pillory which is likely to be heaped on the heads of its Members again, as we so shockingly experienced in 1966: racism, colonialism, bribery, corruption and so forth. Those are some of the dangers inherent in this very situation; and it was because of this kind of dilemma that we, in our written presentation, contended that this Court should, as a matter of discretion or judicial propriety, decline to entertain the request for an advisory opinion even if it should consider that it has jurisdiction. Our concern was not so much, Mr. President, the potential reaction of individual judges to pressure as the potential implications for the future of this Court, particularly the good name and reputation of the Court and the esteem in which it is publicly held, and thus for the cause of international adjudication as such. The Court has ruled against our contention and I do not want to say anything more about it, except that we sincerely hope that this may lead to a better end-result in the context of the international order.

We believe, indeed, that it *could* do so. The best way in the long run could well be the hardest way for the immediate future. That would be a way of firm rejection, on their merits, of each and every one of the revolutionary and essentially non-judicial propositions which have been urged upon the Court under the guise of legal interpretation. It would, in particular, involve rejection of all notions that the organs of the United Nations are now clothed with extensive so-called "implied powers" to bind non-consenting member States, where such powers cannot be shown to have been either contemplated by the authors of the Charter, or subsequently created by regular processes of amendment. Furthermore, Mr. President, it would involve an insistence on the essentially judicial functions of this Court and on its refusal to indulge in judicial legislation.

As I have mentioned, the taking of this line would necessarily mean an overall

result which would be favourable to South Africa; and for that reason there would no doubt be an outcry. The more responsible members of the international community would have to stand firm against such an outcry. But nevertheless one knows, and one says this with warm appreciation, that the consequences for individual judges could be very unpleasant.

However, Mr. President, it seems to us, with respect, that such a firm adherence to basic values and disciplines must in the long run make their mark, not the least amongst those who may temporarily be disappointed as a result of being kept in check by those disciplines.

In municipal legal systems, experience has shown that it is exactly by the fearless and impartial administration of justice, regardless of the popularity or the unpopularity of its verdicts, that a court of law wins the confidence and respect of the public which it serves. And so it must be too, in the international sphere. And the winner will not be South Africa, but mankind.

That great Roman, Cicero, in an oration on the Roman Law delivered more than 2,000 years ago, posed the question rhetorically: "What sort of thing is the Civil Law?" And he proceeded to answer his question thus: "It is of a sort that cannot be bent by influence, or broken by power, or spoilt by money." Such, Mr. President, is the heritage, one of the proudest of mankind, which it is this Court's duty and privilege to preserve and to enhance.

Unless we hear otherwise from you, we shall be prepared to continue our oral presentation on Friday.

The Court rose at 12.40 p.m.

SEVENTH PUBLIC SITTING (19 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. VIALL

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. VIALL: Mr. President, Members of the Court, I wish to deal at the outset today with the order of presentation of our submissions on the various legal questions upon which we shall start speaking. We feel that it may be useful to the Court to indicate in advance the approximate scheme or order in which we propose to deal with these legal questions.

I say "approximate" because factors not foreseen at the moment may later make it necessary or desirable for us to modify or deviate from what we now have in mind, and we wish, Mr. President, to remain free to do so, though we shall naturally apprise the Court of any substantial deviations.

With this reservation, I will broadly explain the scheme we have in mind. Now that the hearings have started and proceeded up to this stage on a basis of non-separation of the preliminary questions from those pertaining to the merits, we do not, in our own presentation, intend to maintain such a separation fully as we did in our written statement. This decision, Mr. President, is due to various factors which include the following:

Firstly, the Court has already decided on some of the preliminary matters;

secondly, some of the remaining matters are, in their nature, preliminary only, that is to say, they bear only on questions of the Court's jurisdiction or the propriety of exercising that jurisdiction, whereas others again bear in addition upon important aspects of the merits; and thirdly, an important advantage of not maintaining a rigid separation is that all the various questions concerning the relevant resolutions of the Security Council can be brought together for purposes of presentation.

Consequently the scheme we propose to adopt falls naturally into three parts, namely first of all, certain preliminary questions and basic principles; secondly, all questions, preliminary or otherwise, concerning the validity and effect of the relevant resolutions of the Security Council; and thirdly, legal questions pertaining to the validity and effect of the relevant General Assembly resolutions and more particularly resolution 2145 (XXI).

With that, Mr. President, I am now in a position to give a more detailed subdivision of these three parts:

Part I: Certain Preliminary Questions and Basic Principles

Under this head we intend dealing with the following:

Firstly, the scope of the question submitted to the Court;

secondly, the contention that that question bears on an actual dispute between South Africa and other States, and the effect thereof, and here, Mr. President, I would refer the Court to paragraph B.3 *(b)* of the Brief Statement of South Africa's contentions. I think, Mr. President, that this document has been circulated informally to Members of the Court. If it has not, of course

we shall supply copies, but I would request that it be treated as an annexure to this part of our Statement [1];

then, thirdly under Part I, we shall deal with the contention that extensive and unresolved issues of fact underlie the question posed—and the effect of that. (Here I refer to paragraphs B.1 *(b)* and B.3 *(c)* of the Brief Statement);

fourthly, we deal with certain matters concerning principles of interpretation and of modification of a treaty by subsequent conduct.

Part II: The Validity and the Effects and Consequences of the Relevant Security Council Resolutions

Broadly, there is a division here between formal validity, intrinsic validity and effects and consequences. Under formal validity will fall, firstly, the effect of the abstention from voting of certain permanent members of the Council; this concerns, Mr. President, the validity of all four resolutions, that is to say, resolution 284 (1970), 264 (1969), 269 (1969) and 276 (1970). Here I refer to the Brief Statement, paragraphs B.1 *(a)* (i) and C.1 *(b)*. Secondly, under the question of formal validity, there is the effect of the non-invitation of South Africa under Article 32; this likewise concerns the validity of each of the above resolutions (Brief Statement, paragraphs B.1 *(a)* (ii) and C.1 *(c)* refer). Thirdly, there is the effect of the non-abstention of certain members of the Council under Article 27 (3); this concerns the validity of resolutions 264 (1969), 269 (1969) and 276 (1970) (Brief Statement, paragraph C.3 *(a)*).

Then, under the intrinsic validity of the resolutions, we shall deal with, firstly, the relationship between General Assembly resolution 2145 and the relevant Security Council resolutions (Brief Statement, under "The Merits", Part A), and secondly, under this head, the question of whether, in any event, resolution 276 (1970) fell substantively within the powers of the Security Council. The Brief Statement reference there, Mr. President, is paragraph C.3 *(b)*.

Then, under effects and consequences will fall the questions of whether, firstly, if resolution 276 (1970) is valid, are its terms binding or recommendatory? And secondly, what are its consequences? (Brief Statement, C.4.)

Part III: The Validity and Effect of General Assembly Resolutions, particularly Resolution 2145 (Legal Questions)

Here would come the various legal questions listed in the section of the Brief Statement headed "B. The Purported Termination of the Mandate". The probable order in which we shall deal with these questions, will be:

Firstly, introductory matters, including the question of whether the General Assembly could have acted or purported to act as a party to a treaty, or, as contended by South Africa, purported to act as a supervisory authority. Here may I refer the Court to paragraph *(b)* (i) of the section of the Brief Statement just referred to.

Secondly, the powers of the supervisory organs of the League of Nations, and the question of whether those powers included one of unilateral termination or revocation of the Mandate. (*Ibid.*, para. *(b)* (iii).)

Thirdly, whether the General Assembly of the United Nations succeeded to the supervisory powers of the Council of the League. (*Ibid.*, para. *(b)* (ii).)

Fourthly, the question of whether, in any event, the General Assembly had the power to make a decision with binding effect. (*Ibid.*, para. *(a)*.)

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[1] See p. 609, *infra*.

Finally, Mr. President, after having disposed of the legal questions, we shall deal with questions concerning the factual basis for General Assembly resolution 2145 (XXI), but we shall advert to this in more detail at a later stage.

THE SCOPE OF THE QUESTION BEFORE THE COURT

I shall now turn, Mr. President, to the first of our submissions, that concerning the scope of the question before the Court. The question put to the Court in Security Council resolution 284 (1970) reads as follows:

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

Now, Mr. President, if South Africa's presence in South West Africa is legal, one set of consequences for States would follow; if, on the other hand, it is illegal, another and completely different set of consequences would follow. It is therefore, we submit, logically impossible for the Court to give a proper answer to the question put to it without first deciding the prior question of whether South Africa's presence is legal or illegal, and that question can only be decided by enquiring into and determining the validity or otherwise of the action taken by organs of the United Nations with a view to terminating the Mandate for South West Africa. States which contend that South Africa's presence in South West Africa is illegal rely for their contentions basically on General Assembly resolution 2145 (XXI); some, however, rely also, or alternatively, on certain resolutions of the Security Council and notably resolutions 264 (1969) and 276 (1970).

In order to answer the Council's request it is therefore necessary for the Court firstly to examine the validity of the General Assembly's purported revocation of the Mandate and the alleged confirmation of that action by the Security Council, and then to determine the legal consequences for States upon the basis of the answers that it arrives at. This, Mr. President, would seem to us to be logically unanswerable.

Nevertheless, *in two of the written statements submitted to the Court it is* contended that the question was framed by the Security Council so as to prevent the Court considering the validity of General Assembly resolution 2145 (XXI) —I am referring here to the written statements of the Government of India at I, pages 830 to 836, and the Secretary-General's written statement in I, paragraphs 3 to 11, pages 75-77. It is even said, Mr. President, by the Government of India, that the question put to it does not entitle the Court to express an opinion on the competence of the Assembly to revoke the Mandate—that is at page 833 of India's written statement.

And now again, in the oral statements of some distinguished representatives, we have heard that the scope of the question must be restricted. The distinguished representative of the Secretary-General stated that he would not expand further upon the information contained in his written statement regarding this matter of the scope of the question—I would refer the Court here to page 31, *supra*. Nevertheless, his attitude—that is, the Secretary-General's—is not unequivocal, for in referring to points relating to preliminary questions of jurisdiction and the validity of United Nations actions and decisions purporting to terminate the Mandate he went on to state:

> "Viewed strictly, these points may go beyond the scope of the question put to the Court. However, they have been raised. Since, in its Advisory

> Opinion concerning *Certain Expenses of the United Nations*, the Court remarked that it '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. 151 at p. 157), the Court [the Secretary-General goes on] may wish to consider the relevance of the points just mentioned to the issues before it." (*Supra*, p. 31.)

In our submission, Mr. President, as will become apparent, it is not a question of whether the Court may wish to go into these matters; it has, we contend, no alternative but to do so.

The distinguished representative of India went even further in his oral statement than did his Government in its written statement for not only would he exclude from the consideration of the Court the validity or otherwise of General Assembly resolution 2145 (XXI), he would also exclude from consideration the validity of every one of the relevant resolutions adopted by either the General Assembly or the Security Council, including even resolution 284 of 1970 by which the Council requested the opinion—that appears at page 112, *supra*. He would thus deny the Court, Mr. President, even the competence to consider its own jurisdiction, its very *compétence de la compétence*. The Court, he says, "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 distinguished representative of Pakistan too would have the Court restrict the scope of the question before it. This appears from pages 133 to 136, *supra*, where he is reported as stating, among other things, that the Court ought to proceed on the assumption that the world body—here, I take it that he is referring to the United Nations—was competent to terminate the Mandate and to assume direct responsibility for South West Africa.

It will be noted, Mr. President, that of the 13 participants who have thus far made presentations to the Court, either written or oral or both, only three—and here I name the Secretary-General, India and Pakistan—contend for a limitation of the scope of the question. They base their contentions mainly on the following: firstly, the language of Security Council resolution 284 (1970)—I would refer here, Mr. President, to the oral statements of the distinguished representatives of Pakistan at page 134, *supra*, and of India at page 112, *supra*, of the records—and they place particular reliance on the retention of the phrase "notwithstanding Security Council resolution 276 (1970)" after a separate vote upon it in the Council. That appears in the written statement of the Government of India at I, page 834.

Secondly, they also base their contentions on proceedings and debates in the Security Council and in the *Ad Hoc* Sub-Committee which preceded the adoption of Security Council resolution 284. References here are to the written statements of India, I, pages 830-834, and of the Secretary-General, paragraphs 3-11, I, pages 75-77; and the oral statements of India at page 112, *supra*; and Pakistan at page 134, *supra*.

Then there are subsidiary arguments, and these relate to an alleged duty of this Court to co-operate with other United Nations organs and appear in the written statement of India, I, pages 834-835, and the oral statement of the distinguished representative of Pakistan at page 135, *supra*. These arguments also relate to the right of competent organs to define and restrict legal questions on which they desire an opinion. We may see here, Mr. President, the written statement of India again, at I, pages 834-835.

I shall proceed to deal with these subjects *seriatim*, but first I would just

point out that in the present context India and Pakistan also rely on arguments which appear to ascribe to the organs of the United Nations the powers of final and binding adjudication by decisions not subject to review except at their own request. That appears in the written statement of India, **I**, page 833, the oral statement of India at page 112, *supra*, and the oral statement of Pakistan at page 135, *supra*. These arguments, it seems to us, Mr. President, really pertain to the merits, the merits regarding the powers of the General Assembly and the Security Council, and we will therefore deal with them later in that context.

Now, Mr. President, as regards the language of Security Council resolution 284 of 1970, it is our submission that the interpretation of the question as framed presents no difficulty, no difficulty at all; there is no ambiguity or obscurity in the language used nor in the application of the language to the subject-matter to which it relates. By the use of the word "notwithstanding" the question suggests that there is, or may be, an antithesis between Security Council resolution 276 (1970) and South Africa's continued presence in South West Africa. The wording of the question does not of itself explain the antithesis but that becomes quite clear upon referring to the contents of resolution 276 (1970). Operative paragraph 2 of the resolution "declares that the continued presence of the South African authorities in Namibia is illegal", and the preamble, together with operative paragraph 1, explicitly indicates the basis for this declaration, namely General Assembly resolution 2145 (XXI) of 1966 "by which the United Nations decided that the mandate of South West Africa was terminated" and, secondly, 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". These are quotations from the second and third preambular paragraphs of resolution 276.

Consequently, the question as posed indicates in the clearest possible way that the basic field of enquiry must relate at least to the validity and effect of both these resolutions together with Security Council resolution 276 of 1970 itself. To suggest that the whole or a part of this basis is to be assumed or accepted without enquiry by the Court—for example the validity of Assembly resolution 2145—is to import into the question a restrictive qualification which it does not contain. And there is, in the result, Mr. President, no substance in the contention by India that the phrase "notwithstanding Security Council resolution 276 (1970)" is to be seen as in some way containing or implying some such restriction, much less as placing the matter beyond doubt, as averred by India in her written statement at **I**, page 834.

The relevant records of the Security Council show that in the view of France the language of the resolution presented by the five Powers sponsering it was imperfect—I refer here to pages 87 and 88 of Security Council record S/PV. 1550—and indeed we may agree with that for the phrase does not carry the *question any further and could, in our view, just as well have been omitted.* But that, Mr. President, is a very far cry from saying that its retention, after a separate vote on it, demonstrated beyond all doubt the intention of the Council to restrict the scope of the question so as to exclude the Court from considering the validity of the termination of the Mandate.

Finally there is the contention of India, at page 833, **I**, of its written statement, that had the Council's intention been to ask the Court "to express its opinion directly on the competence of the United Nations to revoke the Mandate of South Africa" it could have asked the Court to do so. The obvious answer to that contention is that had the Council *not* wished the Court to

express its opinion on that matter it could have asked the Court *not* to; it could have asked the Court to assume the validity of General Assembly resolution 2145 (XXI). Significantly however, it did not.

Now in view of the absence of obscurity or ambiguity in the question as finally formulated by the Council, it is really unnecessary for the Court in interpreting the question to go into the records of those meetings of the Security Council and the *Ad Hoc* Sub-Committee which preceded the adoption of Security Council resolution 284 of 1970. However, it is to a very large extent upon these records that the Secretary-General, India and Pakistan rely in support of their contentions to which I have already referred. And India and Pakistan also rely upon arguments relating to the Court's advisory jurisdiction.

In these circumstances, I propose to deal next with the debates of the Sub-Committee and the Security Council, analysing them also in the light of the statements submitted to the Court both orally and in writing and, more particularly, those submitted by governments which were represented on the Sub-Committee and on the Council at the relevant times. Thereafter, I shall deal with the matter of the competence of the Court to interpret the question put to it and the considerations which it is submitted should guide it in this connection.

Mr. President, in the debates of the *Ad Hoc* Sub-Committee, Finland, in sponsoring the proposal to seek an advisory opinion from the Court, stated that the proposal—

> "... was not intended to call into question or to subject to the ruling or opinion of the Court the basic decisions taken by the General Assembly and the Security Council on the termination of the mandate, for the termination was an irrevocable step by which the United Nations had assumed direct responsibility for the future of Namibia" (S/AC.17/SR.12, p. 3).

However, Finland then qualified this statement in such a way as to make it virtually meaningless, by going on to state, as reasons for requesting the opinion, *inter alia*, the following—and I quote here from the same document at page 4. The representative said:

> "Thirdly, an advisory opinion from the Court could make it clear once and for all that South Africa had forfeited its mandate over South West Africa by violating the terms of the mandate and by acting contrary to its own international obligations, the international status of the Territory, international law and the fundamental rights of the inhabitants of the Territory.
>
> Fourthly, by giving the Court another chance to pronounce itself, the Council would provide an opportunity to divest the South African authorities of the cloak of false legality assumed after the Court's decision of 1966, which they regarded as a ruling in their favour."

Now, these statements, Mr. President, can surely only be construed to mean that what Finland envisaged from the Court was an opinion which would make it clear that South Africa had *forfeited its right* to the Mandate over South West Africa because it had violated its international obligations in connection therewith, and which would thus expose the so-called "false legality" of South Africa's position on South West Africa. Since the Court could not possibly arrive at these conclusions without first going into the question of the validity of the termination of the Mandate, it is apparent that the reasons given by Finland in the *Ad hoc* Sub-Committee for requesting the opinion throw con-

siderable doubt on her earlier statement that it was not intended to call into question the decision of the General Assembly to terminate the Mandate.

The statement made in the Sub-Committee by Colombia (I refer to document S/AC.17/SR.12 at p. 5) appears to favour a narrow formulation of the question, which would exclude consideration by the Court of the validity of the revocation of the Mandate. On the other hand, the statements of France (*ibid.*, p. 6) and of the United Kingdom (S/AC.17/SR.17, at p. 5) indicated their support for a wider formulation which would take that validity into account. None of the other members of the Sub-Committee, Mr. President, expressed themselves on this one way or the other and they cannot therefore be regarded as having committed themselves on the question of what they intended to ask of the Court.

Then we come to the debate in the Security Council which preceded the adoption of resolution 284 of 1970. It is of particular significance that Finland, as sponsor of the draft resolution, firstly, repeated that an advisory opinion from the Court: "could underline the fact that South Africa has forfeited its mandate" on the grounds mentioned by it in the Sub-Committee. Secondly, Finland also repeated that it was important "to expose the false front of legality" presented to the world by South Africa (S/PV.1550, p. 18), but, at the same time, thirdly, did *not* repeat her earlier statement that it was not intended to call into question the termination of the Mandate.

We can, of course, only conjecture what the reasons were for Finland's silence on this specific issue, but since the issue was by then a central one, and one which was pertinently raised by certain States during the debate, it is not unreasonable, surely, to assume that after reflection and private consultations among the members of the Sub-Committee and later of the Security Council, Finland had come to accept that the legal consequences for States could not properly be determined without considering the validity of the General Assembly's purported revocation of the Mandate, and that the reasons which she advanced in favour of requesting an opinion were irreconcilable with her earlier statement in the Sub-Committee that the termination of the Mandate should not be called into question.

This inference is reinforced, Mr. President, in our contention beyond any doubt, when regard is had to Finland's presentations to the Court in these proceedings. Firstly, there is the written statement which Finland submitted to the Court. In it, she stated that although the question to the Court is briefly worded "its scope is rather extensive" (written statements, I, p. 370). She also stated that the observations made by herself and by a number of other countries in the Security Council and the *Ad Hoc* Sub-Committee "give considerable, although perhaps not conclusive guidance in this respect". That quotation is also to be found at I, page 370. And although she states that, "having taken the initiative leading to this request" for the opinion she "therefore deems it appropriate to explain in greater detail the essence of the question on which the Court is requested to pronounce itself" *(ibid.)*, she nevertheless carefully refrains in her explanation from stating that the Court should not examine the question of the validity of the termination of the Mandate. On the contrary, she states that—and this is still at I, page 370:

> "... the Court's Opinion should make it clear that South Africa lost its Mandate over South West Africa precisely because it acted contrary to its aforementioned international obligations, thereby violating the legal status of the Territory".

No longer, Mr. President, does she aver unambiguously, as she did in the Sub-Committee, or even in passing, as she did in the Security Council, that

the decision of the General Assembly to terminate the Mandate was an "irrevocable step". Instead, she says that that decision, and I quote again from **I**, page 370, "has been described as final and irrevocable by the overwhelming majority of United Nations member States". It "has been described as final and irrevocable".

Finally, perhaps the most conclusive indications arise from Finland's oral statement before this Court. At no time during that statement did the distinguished representative of Finland even suggest that the scope of the question should be restricted.

Indeed, on the contrary, it is more than apparent from his statement that he regarded the question of the validity of the relevant General Assembly and Security Council resolutions as of vital importance to the determination of the question put to the Court. He treats these matters at length, and I would refer the Court here to pages 65 to 70, 78 to 84, *supra*. He regards the question of the legal effect of Security Council resolution 276 as "the main question put to the Court", thus clearly implying that there are other and antecedent questions which call for examination.

He argues at length, at pages 82 to 84, *supra* of the record, in an attempt to show that the General Assembly *did* have the power to terminate the Mandate, and at pages 76 to 77, *supra*, and the following pages, he addresses himself specifically to the question "whether the General Assembly had sufficient reason, on a basis of fact, to terminate the Mandate"—thereby acknowledging that South Africa disputes the point.

Finally, at the end of his statement he stated what he called in French his *conclusions* at p. 87, *supra*), the word in French for formal submissions. These included, *inter alia*, that "Security Council resolution 276 (1970) is formally and intrinsically valid" and that "resolution 2145 (XXI) of the General Assembly of the United Nations . . . is valid".

In other words, he has, as formally as can be done in advisory proceedings, on behalf of Finland asked the Court to pronounce upon the propositions.

All this, it is submitted, wholly refutes the assertion of the Secretary-General in paragraph 5 of his written statement that:

> "The sponsor of the proposal . . . 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. For this had been as 'irrevocable step' . . ." (written statements, **I**, p. 75).

Most of the States represented on the Security Council did not during the debates in the Council, express themselves on the scope of the question put to the Court. Of those that did, Nepal and, somewhat more ambiguously, Syria, Zambia and Burundi indicated their view that the Court should not examine the validity of the General Assembly's revocation of the Mandate, and that is to be found at Security Council record S/PV. 1550, pp. 37, 47, 53, and 71 respectively. On the other hand, France and the United Kingdom (*ibid.*, pp. 87, 89-90, 91, respectively) expressed the contrary view. Thus again, as in the case of the Sub-Committee, a majority of the members of the Council, to be exact eight, apart from Finland, were apparently uncommitted in regard to this matter of the scope of the question.

However, as has already been indicated, in two of the written statements submitted to the Court it was suggested that all the members of the Security Council, excepting France, shared an understanding that the Court was being asked to limit the scope of the question put to it so as to exclude consideration of the validity of resolution 2145 (XXI), and that the intention of the Security

Council to thus restrict the question was clear and beyond doubt (written statement of the Secretary-General, I, para. 10, p. 77, and of India at I, p. 833).

It is submitted, Mr. President, that these propositions are untenable. Apart from the statements of Nepal, Syria, Zambia and Burundi on the one hand, and France and the United Kingdom on the other hand, there is nothing, nothing at all, in the relevant debate of the Security Council to show that the remaining nine members of the Council shared any understanding that the Court was being asked to restrict the scope of the question put to it. Eight were completely silent on the point, and the statements of Finland would seem to indicate the contrary, as I have just shown.

Nor, it is submitted, can any such understanding be deduced from the mere fact that seven of these remaining nine members voted in favour of the resolution requesting the opinion and the other two abstained from voting. Before them, Mr. President, they had two points of view: one, that the Council was not being asked to pronounce on the validity of the termination of the Mandate, and the other, that even "the imperfect language" of the request to the Court made it possible for the Court "to clarify the legal position as regards the legality of the revocation" of the Mandate—that appears in the statement of France, S/PV. 1550 at page 87. The scope of the question was thus an open one. It is submitted that it is, in such circumstances, impossible to attribute to a member of the Council concerned, an intention to request the Court to limit the scope of the question because it voted in favour of requesting the Court for an opinion, or abstained from voting.

That such was in fact *not* the intention of at least some of the members of the Council which so voted or abstained is, moreover, borne out by the written statements now submitted by them to the Court. Thus, the United States, which voted for resolution 284 (1970):

> "... believes that, apart from some preliminary and incidental questions, the following legal issues need to be discussed in connection with this request:
>
> (1) Whether the rights and authority of South Africa with respect to Namibia (South West Africa) were validly terminated by United Nations action.
>
> (2) Whether South Africa is in illegal occupation of Namibia." (Written statements, I, p. 843.)

The position of Finland, which voted for the resolution, I have already adverted to, and that position also puts forward this natural interpretation of the question put to the Court.

It will be seen therefore that no reliance can be placed on the proposition that an affirmative vote indicated an understanding that the Court is being asked to limit the scope of the question put to it.

It is submitted then that the records of the discussions of the *Ad Hoc* Sub-Committee and of the Security Council, which preceded the adoption of resolution 284, by no means indicate an intention on the part of the Council to restrict the scope of the question put to the Court so as to exclude the basic question of the validity of the General Assembly's termination of the Mandate in its resolution 2145 (XXI), and that the indications are indeed to the contrary.

In the circumstances, Mr. President, there is really no problem of interpretation. In view, however, of some of the other arguments which have been raised, it is pertinent to refer to certain aspects of the Court's functions and powers vis-à-vis the request for an advisory opinion.

There can of course be no doubt that the Court is competent to interpret the

request for the advisory opinion now before it. This I think, Mr. President, is generally admitted. I would only refer here to the oral statement of the distinguished representative of Pakistan at page 133, *supra*.

As Rosenne states in his work *The Law and Practice of the International Court*, at page 701:

> "It is not a matter for discussion, being inherent in the quality of the Court as a judicial organ, that it has the power to interpret any request for [an] advisory opinion. This has been applied by the Court both to establish the object for which the question was put, and to establish an interpretation of the question itself."

Now in the present case, the object of requesting an advisory opinion is clear. It was stated by the Security Council in the preamble to its resolution 284 (1970) to be that such an opinion:

> ". . . 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".

India, in her written statement, at I, pages 833 to 834, gives this object as one of the reasons why the question, as formulated by the Council, "does not entitle the Court to express an opinion on the competence of the General Assembly to terminate the Mandate". The Court, say both India and Pakistan in effect, must co-operate with other organs of the United Nations in order that the objectives of the latter may be effectively implemented.

That may be so, Mr. President, but surely it can hardly be seriously suggested that the Court must lend itself to the implementation of those objectives by any means whatsoever.

The Court, after all, is a judicial body. It is indeed the principal judicial organ of the United Nations, as Article 92 of the Charter states. As such, it is bound to act in a judicial way, that is to say, in accordance with its judicial function. If it fails to do that it would become merely another political organ—a political organ of the United Nations—and indeed there would be no reason for its existence. And, as the Court said in the *Northern Cameroons* case (*I.C.J. Reports 1963*, at p. 30):

> "The Court may, of course, give advisory opinions—not at the request of a State but at the request of a duly authorized organ or agency of the United Nations. But both the Permanent Court of International Justice and this Court have emphasized the fact that the Court's authority to give advisory opinions must be exercised as a judicial function. Both Courts have had occasion to make pronouncements concerning requests for advisory opinions, which are equally applicable to the proper role of the Court in disposing of contested cases, in both situations the Court is exercising a judicial function. That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved. This Court, like the Permanent Court of International Justice, has always been guided by the principle which the latter stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923:
>
> 'The Court, being a Court of Justice, cannot even in giving advisory opinions, depart from the essential rules guiding their activity as a Court. (*P.C.I.J., Series B, No. 5*, p. 29.)' "

I refer the Court also in this connection, Mr. President, to the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 155); *The Administrative Tribunal of the I.L.O.* case (*I.C.J. Reports 1956*, p. 84); and the *Maritime Safety Committee* case (*I.C.J. Reports 1960*, p. 153). I refer also to an article by Sir Gerald Fitzmaurice, being one of a series by the learned author, entitled "The Law and Procedure of the International Court of Justice", in 29 *British Year Book of International Law* (1952), at page 53.

The extract that I have just quoted, Mr. President, shows that the Court must exercise a judicial function. How must it do that?

In the first place, as the Court itself has more than once said, as a judicial body it is "bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character". I refer here, again, to those cases and authority that I have just cited at the same pages.

Now in order to exercise properly its judicial function, the Court must naturally be faithful to its task of applying the law and not making it *(jus dicere sed non dare)* and, within that discipline, it must surely be master of its own reasoning and free to take into account all the relevant legal aspects of any question before it. As Ibrahim Shihata states in his work *The Powers of the International Court to Determine its Own Jurisdiction*, at page 236, the International Court has not surrendered in the advisory field the judicial freedom which it enjoys as a court of justice.

Therefore, in the light of these considerations, it is surely to be presumed that the Security Council, another organ of the United Nations, in requesting the International Court of Justice for a legal opinion in order to further certain of its objectives, was not seeking to fetter the Court in the exercise of its judicial function by asking it to ignore legal considerations which in logic are vital and fundamental to the proper determination of the question being put to it. If that were the intention of the Council, Mr. President, it will in effect be asking the Court to depart radically from its judicial function, in fact to prejudge, in favour of a majority of the Council, what is clearly the fundamental legal issue in dispute.

It is no doubt true as India contends, that the competent organs of the United Nations need not submit all their decisions for judicial review, and that the Court is not a court of appeal or review against decisions of these organs. But, Mr. President, once such an organ does submit a question to the Court, it cannot simply separate the inter-dependent legal issues involved to suit itself because while it wants judicial confirmation that a certain legal situation exists, it must at the same time accept the risk that the Court's views will not coincide with its own. It cannot exclude that part of the question to which it thinks the risk is attached; that would make a mockery, Mr. President, of the Court's judicial role and, furthermore, while the Security Council can, of course, prescribe the broad limits of the question which it decides to put to the Court, that is a very different matter from attempting to interfere with the power of the Court, as master of its own reasoning, to take into account all the legal issues relevant to the proper determination of the question before it. These two concepts should be clearly distinguished. In limiting a question on which they desire advice, organs of the United Nations may please themselves. So, by way of example, it would be competent for the Security Council merely to ask a question such as this: having particular regard to practices since the inception of the United Nations, would the abstention from voting of one or more permanent members of the Security Council invalidate that resolution? It could ask it if that would be so *(a)* in any circumstances, or *(b)* in some particular circumstances, and if in some particular circumstances, what would those circum-

stances be. That, Mr. President, would obviously have been a much more limited question than the one now before the Court. But what is not permissible for organs of the United Nations is to interfere with or fetter the Court in determining the area and the scope of considerations which the Court may consider relevant in answering the question decided upon by those organs.

As Judge Bustamante stated in his dissenting opinion in the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 288):

> "But I think that the General Assembly's power to determine the limits of the questions upon which it asks an opinion is not incompatible with the power of the Court as master of its own reasoning, to take into consideration all the elements of appraisement which it thinks useful or necessary in order to arrive at a definition of its standpoint on the question on which an opinion is asked . . ."

Then I skip a passage and the quotation goes on "Any limitation whatever on this point would run counter to the principle of judicial independence". That is the end of the quotation, and I would just add this quotation from Carsten Smith, "The Relation Between Proceedings and Premises", an article which appeared in 32 *Nordisk Tidsskrift for International Ret* (1962), page 5 at page 113:

> "With regard to the legal reasoning in an advisory opinion it must be a consequence of the purpose of these opinions [he was there, Mr. President, referring to advisory opinions] that the Court enjoys full freedom to consider the various legal aspects of the presented question . . ."

In the present case, it is submitted that the proper exercise of its judicial function demands that it is for this Court itself to determine not only the proper limits of the question put to it but also which are the legal considerations that it must take into account in arriving at its answer to the question.

In the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 157), the Court stated:

> "The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper 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."

In the light of all these considerations, Mr. President, it is submitted that in giving its opinion on the question now before it, the Court is bound to enquire into and pronounce upon the validity of the General Assembly's purported termination of the Mandate for South West Africa.

It has been shown *ex facie* the question itself, as well as from the record of the *Ad Hoc* Sub-Committee and the Security Council, read in conjunction with some of the written and oral statements presented to the Court, that that is in fact what the Court is being *asked* to do. It has been shown that both as a matter of principle and in accordance with its past practice, the Court is *competent* to do so. And finally, it is submitted that it is *bound* to do so because, from what I have already said, it is apparent that if it did not do so, it would be acting completely contrary to the proper exercise of its judicial function and the rules which must guide its activities as a Court.

The essential links between the relevant Security Council resolutions and the decision of the General Assembly to terminate the Mandate appear clearly

from the wording of the Council resolutions and are not really in issue between the participants in these proceedings, Mr. President.

It follows that were the Court to exclude from its consideration the question of the validity of that decision and of the Security Council's resolutions following upon it and to consider only the legal consequences for States, it would be proceeding upon a legal assumption which is contested by South Africa, the country most concerned, and certain other States as well. That, in fact, as I have already pointed out, is exactly what the Court has been urged to do by India, Pakistan and the Secretary-General of the United Nations.

An opinion predicated upon such an assumption, Mr. President, an assumption which relates to what is essentially the main question in dispute, would be futile and meaningless. It would be an abuse of the Court's judicial function and a travesty of justice.

As the then President of the Permanent Court, Judge Anzilotti, said in the *Free City of Danzig* case:

> "As the hypothesis assumed by the request relates to a point of law, the Court cannot accept it without first ascertaining whether it is sound or not ... To my mind it is equally inadmissible for the Court to comply with a request based on a hypothesis which is legally unsound" (*P.C.I.J., Series B, No. 18*, at pp. 19 and 20).

And here I would also refer the Court to the individual opinion of the same judge in the *Customs Régime between Germany and Austria* case (*P.C.I.J., Series A/B, No. 41*, at p. 68). And we may ask, Mr. President, would it not be ridiculous if, say, in a municipal court of law "A" were to come to court saying that "B" had no title to occupy a certain house or a certain piece of property and although "B" contested "A's" claim, the court, in agreeing to a request by "A" and in adjudicating upon the matter, should *assume* the matter of title, should assume that "B's" title to occupy the house or the property was invalid, and merely pronounce itself upon the consequences of the invalid occupation.

That, as I say Mr. President, would be quite ridiculous, the court would not be fulfilling any judicial function, it would not be fulfilling its proper function of adjudication, it would be assuming the law and pronouncing something upon that assumption.

To summarize therefore, Mr. President: if the Security Council had in truth intended the Court to assume, without investigation, the validity of the action taken in organs of the United Nations with a view to terminating the Mandate, that would have amounted to an improper and impermissible attempt to harness the Court in the fulfilment of its judicial function. In that event the Court would have been faced with a choice between two alternatives, namely first, to ignore the attempt to fetter it and therefore to give the opinion on the basis of all the considerations which it considers to be legally relevant; or, secondly, to decline to give the opinion altogether.

In our submission, however, Mr. President, this situation does not arise, for on a proper interpretation of the request there is nothing to justify the contention that the Security Council itself, as distinct from a few of its members, intended to impose such a fetter upon the Court.

In conclusion, Mr. President, we may ask: *why* this reluctance on the part of certain States and organizations to go into the fundamental question of the validity of General Assembly resolution 2145 (XXI) and the resolutions based upon it? Can it be perhaps that the States and organizations concerned realize that the purported termination of the Mandate and the assumption of control and administration of South West Africa by the General Assembly and the

consequent resolutions of the Security Council have no basis in the law of the Charter or in international law in general? Is it perhaps that they fear the consequences of a judicial investigation into these matters or, if not the consequences, the broader implications thereof? We need not attempt to answer these questions, Mr. President, we merely put them.

ORAL STATEMENT BY MR. GROSSKOPF

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. GROSSKOPF: Mr. President and Members of the Court, as my learned colleague, Mr. Viall, indicated in his introduction this morning, the next topic to be discussed is the question of the Court's discretion to grant or to decline a request for an advisory opinion.

In paragraph 1 of Chapter IV of our written statement we pointed out that Article 65 of the Statute of the Court confers on the Court a discretion whether or not to accede to a competent request for an advisory opinion and that the Court itself has stated, on a number of occasions, that even in cases where it is legally entitled to do so it is not obliged to give an opinion. This does not appear to be disputed. In that chapter we advanced three grounds why, in our submission, the Court should in the present case, in the exercise of its discretion, refuse to accede to the request of the Security Council. These grounds were, firstly, the political background of the question and the involvement of the Court therein; secondly, the existence of a dispute between South Africa and other States; and thirdly, the fact that the question before the court can only be answered by deciding, *inter alia*, extensive disputed factual issues. The Court has already decided that it will not decline to give an opinion by reason of the first ground, which I have just mentioned, and I consequently do not propose to deal with that.

I would merely say that our failure to deal with this topic must not be construed as agreement with the expressions of opinion thereon by such of the participants who have, despite the Court's prior ruling, discussed it.

As regards the second ground, that is the question of a dispute, we demonstrated, I submit, in paragraphs 34 to 43 of Chapter IV of our written statement that there in fact does exist a dispute between South Africa and a number of other States relative to issues which, in our submission, will have to be determined by the Court in these proceedings.

In his oral address to the Court, the distinguished representative of the Secretary-General, when dealing with the ground under consideration, stated that he hoped to prove in a different context later in his statement that the present proceedings do not relate to an existing dispute between South Africa and other States (p. 33, *supra*). He adverted to this topic again when considering the question of the applicability of Article 32 of the Charter. In that context he said that when the relevant resolutions of the Security Council were adopted there did not exist a dispute between South Africa and other States within the meaning of that article of the Charter. The reason which he assigned for this contention was that neither the Security Council nor member States who brought the question of South West Africa before the Security Council had referred to the question as a dispute, but that, on the contrary, it was dealt with and treated as a situation. I do not propose to go into this argument. It will be dealt with in due course by my colleague, Professor Wiechers. For present purposes it suffices to point out that even if the Security Council were legally empowered to decide whether a particular question related to a situation or a dispute for the purposes of Article 32 of the Charter, its decision can obviously not bind this Court in considering whether it should or should not exercise its discretion.

In other words, even if the representative of the Secretary-General were

correct in his contention that the Security Council having once decided that it was a situation that decision could not be disputed by anybody, that contention would obviously have no bearing on the discretion of the Court nevertheless to decline to give an opinion because it relates to an existing dispute. The Court would clearly have to consider the matter for itself.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Before the break I contended that the Court must necessarily have power to determine for itself whether there exists a dispute and whether the existence of any such dispute should lead the Court to decline to give an opinion. In paragraph 37 of Chapter IV of our written statement, we noted that in its 1962 Judgment in the contentious *South West Africa* proceedings, this Court had found that a dispute existed between South Africa and the then Applicants, Ethiopia and Liberia, and that it was a dispute within the meaning of Article 7, paragraph 2, of the Mandate for South West Africa.

We pointed out that the Court had held that the number of parties on one side or the other of a dispute is of no importance and that a dispute could be generated within the framework of the organs of the United Nations and their operation. We also showed that the dispute which then, according to the Court, existed, still exists and that further disputes were generated in subsequent developments. These aspects have, however, already been dealt with in connection with our argument for the appointment of an *ad hoc* judge and I consequently do not want to elaborate on them any further. I may just add that my colleague, Professor Wiechers, will also advert briefly to this matter when he discusses the application of Article 32 of the Charter.

As regards the question whether, if there is a dispute as we contend there is, the Court should accede to the request for an advisory opinion, we relied primarily on the decision of the Permanent Court in the *Eastern Carelia* case to which my learned friend, Mr. Viall, also referred this morning. We also referred to the passage in the Opinion of the Court in the *Peace Treaties* case, in which the view was expressed that:

> ". . . no State . . . 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 conduct it should take". (*I.C.J. Reports 1950*, p. 71.)

However, as we noted, the Court did not, in the *Peace Treaties* case, express any disagreement with the decision in the *Eastern Carelia* case, but said that:

> ". . . the circumstances of the present case are profoundly different from those which [existed in the former case when the Permanent Court] declined to give an opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States . . .".

In the *Peace Treaties* case, the Court found that the request for an opinion did not touch the merits of the dispute between the States concerned, and it consequently acceded to the request.

In other words, Mr. President, it was not that the *Peace Treaties* case had overruled the principle of the *Eastern Carelia* case; it had merely found that the circumstances were different and it consequently distinguished the opinion which had been given by the Permanent Court in the *Eastern Carelia* case.

It was on the strength of these cases that we submitted that the jurisprudence of the Court seems to support the proposition that the Court should not accede to a request if the question relates directly to a main point of a dispute between States, and, as I have already said, we submitted that that is the situation in the present case. Now in reply to our contentions, the representative of the Secretary-General submitted that after the Permanent Court was requested to give an advisory opinion in the *Eastern Carelia* case, the law and practice concerning the giving of advisory opinions on legal questions pending between two or more States underwent a certain modification and development. That is at page 33, *supra*. He referred to the various changes which had been brought about in the Statute and Rules of Court and said that these changes rendered the *Eastern Carelia* case no longer of the same weight and force as previously. The first point that he made was that the Permanent Court was not organically linked with the League, and that the present Court is the principal judicial organ of the United Nations. That, he said, made a substantial difference to the position inasmuch as it related the present Court to the activities of the United Nations. And, he continued, on that basis, this Court has on several occasions taken a stand different from that of the Permanent Court in the *Eastern Carelia* case.

He went on to refer to the decisions of the present Court in the *Interpretation of Peace Treaties* case and also in the *Judgments of the Administrative Tribunal of the I.L.O.* case and the *Certain Expenses* case. However, Mr. President, in none of these cases did the Court express any disagreement with the decision of the Permanent Court in the *Eastern Carelia* case or with the principle applied by it. In fact, as I have already noted, the Court, although referring in the *Peace Treaties* case to the earlier *Eastern Carelia* case, merely stated that it was not applicable and so distinguished it. Of course, Mr. President, it is so, that the Rules and Statute of the Court have been changed since the *Eastern Carelia* case was decided, but, on the other hand, that is not of much assistance to a party who comes before this Court unless the proceedings are in fact assimilated to those pertaining to contentious proceedings. So, unless the Secretary-General were to go further and to state that in a case where there is a dispute the Court should apply those principles, it in fact does not avail him, I would respectfully suggest, merely to state that such provisions exist and may be applied.

In his oral address, the distinguished representative of Finland also took up the attitude that the question put to the Court cannot be described as a dispute between two or more States, since it concerns the interpretation of the resolution of the Security Council and it was the Council itself which requested the opinion —that is at page 18, *supra*. Now, it is clear, and one must agree, that the question itself cannot be described as a dispute. However, Mr. President, 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; and we cannot see the relevance, with respect, of the statement that the question concerns the interpretation of the resolution of the Security Council. Mr. President, after all, the validity or the interpretation of a resolution of the Security Council may itself form a part of a dispute; so, if one were to determine whether a dispute exists it would, in our respectful submission, not be a relevant criterion and certainly not a decisive criterion that the question relates to the interpretation and effect of Security Council resolutions.

Apart from the two representatives to whom I have already alluded, namely those of the Secretary-General and Finland, the distinguished representative of Pakistan is the only participant in these proceedings who dealt with this

question, and he did so at pages 132-134, *supra*. He commenced by stating that the *Eastern Carelia* case was distinguishable and that it did not apply to the circumstances of the present proceedings. However, Mr. President, in my submission he failed to indicate any grounds of distinction and he did not develop this part of his argument at all.

His second point was that in the *Eastern Carelia* case there were raised questions of fact which could not be elucidated without hearing both Parties. Our submission is, of course, that in the present proceedings that is also the case, and that here also questions of fact are raised which cannot be elucidated without hearing all parties fully and without applying procedures which are not customary in advisory proceedings.

His third point was that the distinction between the Covenant and the Charter should be taken into account, that the present Court is an integral part of the United Nations and under a duty to participate in the activities of the Organization, and that no State is entitled to stop such participation. Well, Mr. President, we have never contended that we or any State would have a right to stop the participation of the Court in the activities of the United Nations or to stop the Court giving an opinion. Our contention is that in certain circumstances the Court should itself decline, not because we so wish or because we want to stop it, but because the Court, in the exercise of its judicial discretion, should decide that the circumstances are not appropriate for the giving of the opinion which is requested of it. And in the present context we suggest that the Court should do so because of the existence of an actual dispute on the matter on which the Court is asked to give the opinion.

This brings me naturally to the last point which we argued in this regard and to which I have already made brief reference, namely that there exist factual issues which the Court will have to decide were it to accede to the present request. In paragraph 45 of Chapter VII of our written statement we contended that since the Court may only give an advisory opinion on a legal question it may be doubted whether it is entitled to furnish an opinion if, in order to do so, it also has to make findings as to primary facts. In other words, Mr. President, the whole concept of an advisory opinion is that by making a request for such an opinion the particular organ authorized to do so can obtain advice on a point of law. It was, we suggested, clear from the terms of the relevant documents—the Charter and the Statute—that it was never contemplated that the Court should make extensive factual enquiries in the course of advisory proceedings. But even if one were to assume that the Court does have the competence to do so, we submitted that the Court, in the exercise of its discretion, should refuse to do so, particularly where, as we submitted is the position in the present case, it would have to establish controverted primary facts which do not fall within a limited compass and which are not capable of easy and speedy ascertainment.

In addition to the theoretical objections based upon the wording of the Statute and the Charter to which I have already referred, we pointed out the many practical disadvantages which would be attendant upon the Court engaging in such a factual enquiry in proceedings such as the present. These practical considerations arise from the circumstance that, when the Court gives an advisory opinion which is not binding upon parties, there is no onus upon parties to assist the Court in making factual enquiries, and there is no onus of proof in the ordinary sense which would enable the Court to make factual findings in the absence of sufficient evidence. Although the proceedings may be adapted by making use of the methods of contentious proceedings that is a matter within the Court's discretion and, in any event, that raises a number

of difficulties relating to definition of issues, the manner of presenting evidence, the order of presenting evidence, and so on.

These practical considerations, we suggested, would lead the Court, as a matter of discretion, to decline to answer a request for an opinion where such extensive factual enquiries have to be made, even if such a request were to be regarded as one relating to a legal question.

I do not again want to traverse the arguments advanced to demonstrate that there are factual enquiries involved in the present question. We contended, in paragraph 48 of Chapter IV of our written statement, that these factual issues which the Court will have to decide relate to a large extent to the validity of resolution 2145 (XXI) of the General Assembly but, of course, they would also go wider because, as the Court will have noted, some of the participants in these proceedings contend that South Africa has incurred international liability by virtue of certain acts allegedly done, certain procedures adopted, and certain obligations not complied with.

So these questions would have to be gone into, in our submission, and they would involve an enquiry into a large field of factual allegation and denial. As regards the promotion of well-being, many of the participants here contend that we have failed to comply with our obligations in that respect, whereas the South African Government has always contended that it has complied with those obligations.

So, Mr. President, on all these aspects, which will be amplified later, it is our submission that the question before the Court cannot be answered without the Court's going into these factual questions.

In his oral address the representative of the Secretary-General did not appear to contest our contention that if the Court has to decide these controverted factual issues the question can no longer be considered a legal one. He did not advert to the theoretical proposition as to what the effect would be if the Court were to find it necessary to go into these factual questions, as we submit the Court should do. His argument was solely that there are no factual issues to be determined by the Court, in that, as he contended, the factual issues had already been decided by the competent international bodies which had dealt with it; in other words, by the various political organs of the United Nations. In answer to our contention on this aspect he thus stated that the Court cannot, should not, and may not, enter into this factual field. He did not, therefore, contest our proposition that if the Court were to find it necessary to enter into this field, then the Court should decline to give an opinion altogether.

At a later stage we will deal with the argument that the political organs of the United Nations are empowered in some way to make these findings of fact. It is not relevant to the present topic. We will then contend that that statement is incorrect, that that contention should not be accepted and that there is no such power in any of the organs of the United Nations. Indeed, we will say that the Court itself would have to make the necessary factual determinations if it were to give the Opinion; and our contention is that if that situation arises, the Court will be in a position where it either cannot or should not give an opinion on the question.

The representative of Finland adopted a somewhat different attitude to this matter. He conceded that the Court cannot answer the question before it unless it is "acquainted with at least some of the relevant factual issues in the South West Africa and Namibia questions" (p. 67, *supra*). He contended, however, that many of the relevant facts are common knowledge or can be verified by looking up official documents such as those of the United Nations. He also stated that in resolution 2145 (XXI) the General Assembly had relied

on various grounds for its decision and that some of these grounds are of such a nature that their validity can be established without the necessity of going into any factual issues.

Now, Mr. President, the difficulty about that contention is that the distinguished representative of Finland did not state which are the facts which are common knowledge or could be verified in the manner suggested by him so as to have a decisive bearing on the issue before the Court. It is true that later in his oral presentation, at page 50, *supra*, of the record I have mentioned, he was slightly more exact, but his only specific reference to a measure to which he objected, and which he regarded as a breach of the South African obligations concerning the administration of South West Africa, was one passed in 1967, in other words after the purported termination of the Mandate.

Mr. President, it may be that one can take one or two facts in isolation and out of their context, facts which are not controverted and cannot be controverted, but my submission is that no Court can make any conclusion or make any finding upon an incomplete presentation of facts of that sort. One cannot take one single Statute or one single measure, or a couple of Statutes or measures, as apparently suggested by the distinguished representative of Finland, and consider them in isolation. One would have to look at the whole background and context in which these measures are passed and one must have regard to all the factual features and all the aspects of policy which dictated their application. Without such a full enquiry it would, in our submission, be quite impossible to come to any conclusion on the merits of the apparently small number of measures or facts which the distinguished representative of Finland suggested are common knowledge.

And, indeed, Mr. President, at a later stage we propose showing that the so-called facts contained in many United Nations official documents differ profoundly from reality in South West Africa. In short, Mr. President, we propose to show that the General Assembly very often, as a matter of fact in general, proceeded on a wrong factual appreciation and that there is no question that many of the facts are common knowledge as stated by the representative of Finland.

So, in brief, Mr. President, we repeat our submission that because of the existence of these factual issues, because of the fact that they do not fall within a small compass, the question before the Court can on analysis not be regarded as a legal one, and that the Court consequently has no jurisdiction to accede to the request of the Security Council. Alternatively, we contend that because of the existence of these factual issues, the Court in the exercise of its discretion should refuse to accede to the request. Of course, Mr. President, as we have already indicated, if the Court were nevertheless to decide to accede to the request, there would have to be some procedure, in our submission, whereby the advisory proceedings are adapted to comply with the requirements in a matter such as the present; in some manner appropriate to the determination of these factual issues that arise. This aspect was mentioned pertinently by my learned colleague Mr. de Villiers on Tuesday, at pages 166-167, *supra*, and it is not necessary for me to say anything more about that.

That then, Mr. President, concludes our argument on the question of the Court's discretion and, as indicated by my learned friend Mr. Viall this morning, the next topic which we will deal with is the interpretation and modification of treaties. I will deal with this with particular reference, of course, to the attitudes displayed by other participants in these proceedings. I propose dealing with this matter in the following sequence. First I will consider the general principles of interpretation applicable to treaties, conventions and other

instruments embodying international obligations. Secondly, I will consider the extent to which treaties may be modified by the subsequent practice of parties to the treaties. Thirdly, I propose dealing with the effect of subsequent practice of organizations such as the United Nations. Thereafter, I will proceed to the specific application of the rules relating to practice within the United Nations, to the provisions of Article 27, paragraph 3, of the Charter. This will then go beyond a general theoretical statement of the rules of interpretation and modification, but because of the close correlation between the rules of modification and the application to the specific question of Article 27, paragraph 3, it will be convenient to deal with them in that sequence.

That part of my argument will therefore constitute the first section of our contentions concerning the formal validity of Security Council resolutions, but since it links up naturally with the topic of modification by practice, I will deal with it whereas the rest of the argument on that topic will be dealt with by my learned friend Professor Wiechers.

Dealing first with the general principles of interpretation and modification, I would point out that in Chapter II of our written statement these principles, in so far as we regard them of importance for the purposes of the present case, were set out in some detail. We there indicated that the general approach which one adopts to these matters could well have an important bearing on the outcome of the present proceedings, or indeed, for that matter, any proceedings in international law. I would respectfully suggest that the correctness of that contention has been borne out by the oral proceedings in this Court, both where representatives have criticized our Chapter II in express terms and also where lip service has been paid to some of the principles set out in that Chapter, but those principles were not applied in the actual arguments presented by such representatives.

It will therefore, Mr. President, be convenient first to summarize our contentions in very broad outline, and then to devote some more specific attention to those which have been contested before this Court.

In Chapter II, paragraph 2, we stated the rather trite proposition that the aim or purpose of treaty interpretation is to ascertain and give effect to the common intent of the parties. We showed that, in addition to a teleological approach which does not always accept this basic premise, there are two schools of thought in regard to the interpretation of treaties with respect to the intent of the parties. There is firstly the textual approach, which proceeds from the assumption that the ascertainment of the meaning of the text is really the true aim to be pursued, inasmuch as that must be taken to embody the intention of the parties, and the other approach which engages in an investigation *ab initio* into the intentions of the parties, and has regard to the text as one of the elements, and naturally an important element, to be taken into account.

We shortly summarized the proceedings at the United Nations Conference on the Law of Treaties, where the textual approach proved to be more acceptable to the delegates than any other. This aspect will be dealt with in some more detail later, in the light of comments by some of the distinguished representatives which have appeared here before the Court in this session.

However, Mr. President, I must emphasize right at the outset that the fact that the textual approach prevailed in Vienna is not of any great significance for our case. The important point which we stressed in Chapter II, paragraph 5, of our written statement was the following:

"In the result, the fundamental principle which has emerged is that the aim and purpose of treaty interpretation is to ascertain and give effect to the common intent of the parties. The teleological approach according to which 'necessity creates the law independently of the will of the parties and those concerned' has been shown to be completely unacceptable to States as well as to publicists and the Court."

As I will point out later, our case does not depend, as has sometimes been suggested, on a strict and rigid and unbending application of the text to the disregard of all other features. As a matter of fact the important points of interpretation argued by us in these proceedings are all cases where the text and the actual intention of the parties, as ascertained from *travaux preparatoires*, from conduct and other *indicia* of intention coincided, so what we really set out to do was to show that the teleological approach, whereby one could have rights and obligations established without the consent of the parties and possibly even despite their dissent, had been decisively rejected at the Vienna Conference. My submission is that this is clearly so and that it has not been contested by any of the representatives who have participated up to now.

We also showed in paragraph 6 of Chapter II of our written statement that the teleological approach was rejected by this Court in its 1966 Judgment on the *South West Africa* cases.

Now, Mr. President, from the purpose of the interpretative process, namely to ascertain the intention of the parties, there flow certain consequences. One of these consequences is embodied in the so-called principle of contemporaneity, which we mention in paragraph 8 of Chapter II of our written statement. According to this principle the text of any instrument should be appraised in the light of concepts and linguistic usage current at the time of its execution. That really follows from the principle that one is seeking to ascertain the intention of the parties. Obviously the parties expressed their intention in accordance with linguistic usage obtaining when they entered into the treaty and in the light of concepts which were current when they concluded their pact.

Of course, Mr. President, this principle does not mean that once a treaty is interpreted in the light of contemporary linguistic usage and other circumstances it necessarily follows that in its application regard may not be had to circumstances, or linguistic or legal principles prevailing at the time of its application. It might well be that when parties enter into a treaty they intend that if at the time of its application the law should be different, then that law should be applied. And it was considerations such as these which led the International Law Commission to make no provision for inter-temporal law in its draft convention. (*I.L.C. Yearbook, 1966*, Vol. II, p. 222.)

So it does not follow, as we have sometimes been accused of contending, that because one applies the principle of contemporaneity to the interpretation of a treaty, that its application for ever afterwards must be on the basis of the factual or legal situation prevailing at the time of its conclusion. What rules of law, what factual considerations, or other circumstances are to be taken into account when the treaty is to be applied will, of course, depend on the original intentions of the parties ascertained in the manner I have suggested.

An important part of our Chapter II was that dealing with the implication of agreement. (Chap. II, paras. 10 to 13.) The principles which were stated there were not disputed in terms by any participants before this Court, but it appears to us, with respect, that these principles were ignored in the arguments which were employed by a couple of such participants. I would accordingly, with the Court's leave, summarize them shortly here again.

Firstly, the expression "implied agreement" is used in two senses, either where there is an existing treaty between the parties, or in circumstances where there is no existing treaty at all.

Secondly, where there is an existing treaty, the text would normally, in accordance with the principles I have mentioned above, be regarded as a conclusive record of the parties' agreement, unless there is some necessary or inevitable implication that some part thereof was not expressly incorporated. This must be something which was either agreed to in fact, or it must be something which is so obviously implied in the written text that the parties did not think it necessary to state it in express terms.

From that principle my third proposition flows which has two aspects, namely:

(a) Such an implied term, which the parties regarded as too obvious to put in their written agreement, must be capable of formulation substantially in one way only. If it is not capable of formulation substantially in one way only, then one clearly cannot, in my submission, come to the conclusion that it is an inevitable or a necessary consequence of the parties' written agreement.

Where the written document makes express provision for a particular contingency or a particular topic, it would be very difficult indeed for anybody to contend or to find that the parties in addition had entered into an implied agreement or an implied term which covers the same field as the express terms of the contract. Clearly, Mr. President, if the parties deal with a topic specifically and expressly, it is very difficult to imagine that they would at the same time have had an intention to deal with it in an implicit and an unexpressed manner; the two are, in the ordinary run of cases, completely irreconcilable.

My fourth general proposition deals with the situation where there is no written convention or treaty. In such cases one may have an agreement concluded by conduct between the parties. However, Mr. President, to establish such an agreement by conduct, the circumstances of the case must, we submit, be entirely and completely clear. In this regard we also referred in paragraph 12 of Chapter II to the recent Judgment of this Court in the *North Sea Continental Shelf* case for the proposition that where specific machinery is provided for the conclusion of a treaty, which machinery is available to a State, it will be extremely difficult for anybody to allege that the same treaty was concluded by different means. The circumstances would then be such that one cannot imply an intention, except perhaps in the clearest possible case, that the parties performed the same act by a procedure different from that expressly provided for the purpose.

I would just at this stage note that this consideration would also apply to the modification or amendment of a treaty such as the Charter, where specific provision is made for such modification or amendment. But that is an aspect to which I will come later.

A fifth element in the interpretation of treaties, with which we dealt in Chapter II, was the principle of effectiveness, which we considered in the light of our whole general approach to interpretation. I will not discuss it now, because some of the delegates, one in particular, namely the distinguished representative of Finland, had some comment on our statement in that regard, and I will therefore deal with it in more detail later.

In paragraphs 19 and 20 of Chapter II of the written statement we indicated that these principles of interpretation are of universal application and not of application only to some treaties or some conventions. Our contention was that they are applicable to all, and, in particular, also to multilateral treaties which are open to accession by States or parties who were not originally parties

to the instrument. That does not of course mean that the weight to be given to the various *indicia* of intention must necessarily be the same in all classes or types of instruments. In this regard we noted, in particular in paragraph 20, the following:

> "It is submitted that in 'constitutional' instruments the text of the instrument attains increased importance as against other *indicia* of the intentions of its authors, inasmuch as these instruments are open to accession by States which might have no knowledge of features such as the *travaux préparatoires*, or subsequent conduct of the original parties, and whose intentions can in any event not be ascertained by reference to such features."

Because instruments of this sort are open to accession, one must, we submitted, have perhaps even greater regard to the text of the instrument than in other cases where there are a limited and fixed number of parties and where the *travaux préparatoires* or the subsequent conduct, or features such as those, might indeed be an indication of the intention of those parties when they concluded their contract. We quoted substantial authority for this proposition, and I did not understand the proposition to have been contested before the Court.

I now turn, Mr. President, to the comments of participants in these proceedings. I propose dealing first with those of the distinguished representative of the Netherlands. Before I come to the main burden of his comments, there are one or two small points I wish to mention. He refers, at page 124, *supra*, to something supposed to have been stated "in the introduction to the written statement by South Africa". He presumably means Chapter II when he says "introduction". Be that as it may, he states the following:

> ". . . in itself the distinction between the intention of the parties, the text of the treaty, and the object and purpose of the treaty, for the purposes of rules of interpretation is certainly not meant as an indication of mutually exclusive categories".

If I understand him correctly, he is suggesting that we have stated or implied that these are mutually exclusive categories. It will suffice therefore to state that we certainly did not intend to suggest anything of the sort.

Later he states that "it is not the intention of the parties, but the text of the treaty which has pride of place". *(Ibid.)*

Now there we can agree with him, on the basis that the text of the treaty is presumed to incorporate or embody the intentions of the parties. But, if his approach is, as I understand it, that one must have regard primarily to the text, then we are in thorough agreement with each other.

Coming now, Mr. President, to the major point of criticism, which, with all respect, I would submit to the Court, that relates to his contention that the rules of interpretation, to which I have alluded previously, apply only to "treaties through which States accept a limitation of their sovereignty". *(Ibid.)* And he contends that some other rules apply in respect of the interpretation of Article 22 of the Covenant and the mandate declaration. In regard to these he says:

> ". . . the principles laid down in Article 22 of the Covenant of the League of Nations and in the resolution of the Council of the League of 17 December 1920 were more in the nature of constitutional guidelines for the co-operation of the various organs, both international and national, in the performance of their common task in respect of the people and territory . . ." (*ibid.*, p. 126).

So, Mr. President, his general attitude may be summarized, that he agrees basically with our submissions as to what rules ought to be applied in the interpretation of treaties and conventions but he says those rules are not applicable to the type of instruments which we are now dealing with. He says that the rules which we have set out, although apparently he concedes their correctness generally, apply only to treaties or conventions involving in some way the sovereignty of States.

I must concede, with respect Mr. President, I find it difficult to follow that argument. There is no doubt that the Covenant was a multilateral convention and one would therefore prima facie expect that the ordinary rules applicable to the interpretation of conventions should apply. Whether the mandate instrument as such was a treaty or not has been hotly disputed in this Court—I do not want to go into that now, save to say that whatever the position might be, the mandate instrument was clearly intended to have certain legal effects.

If one were to accept it, as we have always contended that it is, as a quasi-legislative act of the League Council, that does not detract from the fact that it was an instrument which was intended to have legal consequences and to have legal effects. Now, is it suggested by the learned representative of the Netherlands that the legal effects of these instruments are to be ascertained independently of the intentions of the parties thereto, as these intentions are expressed in these instruments? That seems to me to be the burden of his argument: that one is not to have effect to the intention of the authors of these instruments when one ascertains their meaning and effect. He does not, however, quote any authority at all in respect of any such proposition. In my submission, Mr. President, such a proposition would be contrary to the most basic principles, not only of international law, but of general municipal and national law applied throughout the world. The most basic principle, I would most respectfully suggest, is that the meaning and effect of any legal document, be it a law, a contract, a will, a treaty, anything of the sort must necessarily primarily depend on the intention of its author or authors.

It is not, Mr. President, something peculiar to documents concerning State sovereignty. Those of us who appear in municipal courts deal with these instruments daily. One interprets statutes, contracts, wills, and the primary object is always to ascertain the intention of the author. That is the primary purpose of the whole process of interpretation, even in matters where sovereignty, as such, plays no role whatsoever.

So, I would suggest, with respect, Mr. President, that if one ignores this basic principle that in all documents intended to have legal effects, it is the intent of the author which must prevail, then one is moving in a field of law which is quite outside that which has been applied over the centuries throughout the world. On a revolutionary basis such as that, one could no doubt allow one's imagination to roam freely and to evolve all sorts of theories. I would, however, suggest that this sort of exercise, although intellectually stimulating, is not, with respect, of any great practical assistance in a concrete case like the present.

I now come, Mr. President, to the more detailed points of criticism which were raised by the distinguished representative of Finland.

The distinguished representative of Finland started from the same basic premise as we did, namely that Articles 31 and 32 of the Vienna Convention on the Law of Treaties constitute a sound basis for the interpretation of international treaties. That is to be found in his oral statement at page 65, *supra*. He then, however, adds:

"But it seems to me that the South African Government attaches too much importance to literal interpretation, i.e., of the actual wording of a treaty and the ordinary meaning of its terms. It is wrong to play down the other principal means of interpretation mentioned in Article 31 of the Vienna Convention, such as the object and purpose of the Treaty and the subsequent practice of the parties in its application, which often reflect their real intention."

Mr. President, as I have already said, we discussed in Chapter II, paragraphs 4 to 5, the debate which there was in the Vienna Conference on the antithesis or dispute between the two different schools of thought: whether it is the intention, *ab initio*, that has to be ascertained, or the intention as expressed in the wording of the text. The attitude of the International Law Commission which had prepared the draft Convention appears from the following comment on its draft Article 27, which was ultimately incorporated in the Convention as Article 31. The International Law Commission said the following:

"The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute."

The International Law Commission then mentioned that the textual approach commended itself by the fact that, as one authority which they quote put it: the signed text is in general the only and the most recent expression of the common intent of the parties. After referring to this authority, the International Law Commission continued as follows:

"Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain." (*Yearbook of the International Law Commission, 1966*, Vol. II, at pp. 220-221.)

As we showed in Chapter II, paragraph 4, this approach by the International Law Commission was criticized by certain delegates at the Vienna Conference, particularly by the representative of the United States of America. We also quoted, in that paragraph, certain passages from the address by the representative of Uruguay in which he emphasized the importance of the text as the authentic expression of the parties' intentions, and in which he also mentioned the dangers of permitting recourse to a real or supposed true intention of the parties divorced from the text. We also gave references to the statements of other delegates and to the ultimate rejection of the United States proposal, which was opposed to the textual approach recommended by the International Law Commission. It is of interest to note, Mr. President, that the Finnish delegation to the Conference supported the approach of the International Law Commission in unqualified terms. The reference there is to the *United Nations Conference on the Law of Treaties, Official Records, First Session*, at page 182.

Now, concerning the two aspects specifically mentioned by the distinguished

representative of Finland, namely the objects and purposes of a treaty and subsequent conduct, I wish to make a few observations. I deal first with the objects and purpose of a treaty as a means of interpretation.

The attitude of the International Law Commission to the principle expressed in the maxim *ut res magis valeat quam pereat* was stated by the Commission in its report published in its 1966 *Yearbook*, Volume II, page 219, as follows:

> "The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

Just pausing here, Mr. President, I would wish to emphasize these words: "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

In other words, there is no suggestion that the objects and purpose could have an effect to give to the treaty a meaning which its language will not bear. I carry on with the quotation, Mr. President:

> "Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'. The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *ut res magis valeat* for this purpose. In the *Interpretation of Peace Treaties* Advisory Opinion it said:
>
> > 'The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit.'
>
> And it emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty."

The quotation shows clearly, Mr. President, that the International Law Commission, in proposing these articles in the draft Convention, did not consider that the object and purpose of a treaty could play a role in interpretation where there was no ambiguity or uncertainty in the text itself. And I might add that this comment of the International Law Commission on its draft Articles 27 and 28, which ultimately became Articles 31 and 32 of the convention, did not cause the Finnish delegation to add any reservations to its support at the Conference of the International Law Commission's proposals.

In conclusion, on this aspect of my presentation, I might just state, Mr. President, that reference to our written statement, Chapter II, paragraphs 14 to 16 and paragraph 18, will show that our attitude was, in my submission, in entire accord with that advanced by the International Law Commission. My respectful submission is accordingly that the Finnish representative's criticism of our statement in that regard is not justified.

Now the second point raised specifically by the distinguished representative of Finland concerned subsequent conduct as an aid to interpretation. He did not agree with our contention that subsequent practice can be of assistance in the interpretation of treaties only where there is some ambiguity or uncertainty in the treaty itself. In this regard, I may add, he seems to be supported by the distinguished representative of the Organization of African Unity at pages 91-92, *supra*. Neither of these distinguished representatives, however, referred to any authority at all in support of their attitude save the wording of the Vienna Convention itself; nor, in my submission, did they attempt in any way, to counter the authorities which we quoted in our statement, Chapter II, paragraphs 22 and 23—Lord McNair, D. W. Bowett and Sir Percy Spender.

As I shall show later, the same principle emerges also from certain cases to which reference will be made when I deal with the argument of the distinguished representative of the Secretary-General concerning Article 27 (3). Those cases again, in my submission, indicate clearly that subsequent practice can be of assistance as an aid to interpretation only where there is some uncertainty or ambiguity in the treaty itself.

As stated, the distinguished representatives of Finland and the Organization of African Unity referred to the wording of the Vienna Convention. My submission is that the wording by itself is inconclusive. It says no more than that—

> "There shall be taken into account together with the context any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation."

The Convention does not, however, indicate in what circumstances or to what extent weight should be accorded to such subsequent practice. It merely says that it shall be taken into account. In the same way the Vienna Convention does not, of course, indicate the circumstances in which, or the extent to which regard is to be had to the object and purpose of a treaty. As I have just indicated certainly as far as the International Law Commission was concerned, the object and purposes were to be taken into account only to resolve some ambiguity or uncertainty. So the mere fact that the Vienna Convention does not state to what extent and with what weight these features should be taken into account does not mean, in my submission, that they may be taken into account in *all* circumstances and to be accorded great weight irrespective of the clarity or otherwise of the text of the instrument.

Mr. President, in view of the pre-existing law, as we set it out in our written statement; in view of the textual approach which was followed not only in the Vienna Convention and in the comments of the International Law Commission but also in the debates at the Vienna Conference; and also in view of the very strong resistance which emerged at the Vienna Conference to the concept that treaties may be modified by subsequent practice, which is a matter to which I shall allude later, there would, in my submission, be no warrant for accepting that the Vienna Convention intended to provide that subsequent practice could, for the purposes of interpretation, detract from the clear and unambiguous meaning of the text.

If that was the intention of the Vienna Convention, it would have gone against not only the pre-existing law, but also against the basic tenets of the textual approach, which underlay the whole Convention, and really all the work at the Conference, and also it would have gone against the very strong feelings that were obviously felt at the Vienna Conference against the possibility that treaties might be modified by subsequent practice. If that had been the intention then the Vienna Convention would, in my submission, not have been a codifying one as far as that part of it was concerned. It would in that respect then have gone beyond existing law and would then not be applicable to the present proceedings because, of course, the Convention does not as such apply to any of the instruments with which we are dealing here now. Its only relevance really is as a convenient codification of the existing law of interpretation and, in so far as they may be applicable to these proceedings, of the existing rules concerning other aspects of treaty law. But, Mr. President, if that had been the intention of the parties to the Convention, there would, in my submission, have been clear language to that effect, because the result which would then have been achieved would have been almost startling and one cannot imagine that this would just have been allowed to slip through as it were almost unnoticed.

Of course, Mr. President, I must add one qualification to the submissions I have made and that is that although for the purposes of interpretation I contend that subsequent practice can be of assistance only where there is some ambiguity or uncertainty in the text, it does not follow that a party may not be able to show that a particular word, although apparently clear, had a special meaning in the intention of the parties. That is something else, that is a principle which is not interpretation perhaps in the strict sense of the word and for which special provision is made in Article 31 (4) of the Vienna Convention, which provides that a special meaning shall be given to a term if it is established that the parties so intended.

So I must leave open that possibility that the parties can always show that they intended to give a special meaning to a particular word. But, apart from that possibility, and apart from the proof which might be adduced, whether by evidence of subsequent practice or otherwise, to establish such a contention, there would, in my submission, be no warrant for making use of subsequent practice as an aid to interpretation unless there is some ambiguity or uncertainty in the text itself.

So, to conclude, Mr. President, for the reasons given we contend that the summary of principles of interpretation set out in Chapter II gives a correct reflection of the contemporary international law. But, even if we were to have erred somewhat in the direction of a too rigid adherence to the text, I pose the rhetorical question: how would that affect the outcome of this case? In my submission neither the Finnish representative nor the distinguished representative of the Organization of African Unity apparently advocates the type of teleological approach to interpretation which would ignore both the text and the subjective intentions of the parties so as to give maximum effect to the objects and purposes of a treaty. At any rate they have not come here to say so explicitly and if they do so, it appears perhaps only in the arguments and in the application of rules of interpretation to certain documents. But, Mr. President, none of them has come here and said that the intentions of the parties should not prevail and if they were to adopt this teleological approach all I need say is that, as we have shown in Chapter II, they would represent a school of thought which has insignificant support in modern international law.

But if one does accept that the aim and object of treaty interpretation is to ascertain the intentions of the parties, it does not really matter for our purposes

whether one gives slightly more or slightly less effect to the text as against that accorded to other *indicia* of intention. In the present case, as we have shown, and as we propose showing again, the interpretations which we have advanced to the Court are in accordance not only with the text, not only with the ordinary meaning of the words, but also, in our contention, with the subjective intentions of the parties as these subjective intentions may be derived from any legitimate evidence, such as the preparatory work, practice or other relevant features, general probabilities and so on.

Before I leave the subject of interpretation of treaties, there is one further topic with which I might conveniently deal at this stage. The United States of America in its written statement at **I**, pages 855 to 856, included a section entitled "There is a Legal Obligation to Observe Treaties in Good Faith". Although it does not appear that any significant conclusion is drawn in the written statement of the United States by the application of this principle it might nevertheless be convenient to say a few words about it.

As a principle it has, of course, often been stated, and is again embodied in Article 26 of the Vienna Convention. It also appears in the Charter in Article 2 (2), so one must accept that as a general principle treaties are to be observed and carried out in good faith. However, it is not always so easy to give a definite, distinct meaning to this concept. Schwarzenberger stated that "treaties are to be interpreted and applied as *jus aequum*" (*International Law*, 3rd ed., Vol. I, p. 447). He continued:

> "Compliance with this rule means more than absence of *dolus*, malice or fraudulent intent. It calls for interpretation and application of treaties in accordance with their spirit, as distinct from their letter" *(ibid.)*.

Later, he states that this rule "demands both reasonableness and good faith in the interpretation and application of treaties" *(ibid.)*.

Lord McNair in his work on the *Law of Treaties* also discussed this concept and he stated at page 465 that "the performance of treaties is subject to an overriding obligation of mutual good faith". In a footnote he acknowledged that "it is difficult to give the expression a precise meaning", but he gave a number of examples from which one can get an impression of what he had in mind when he stated the general proposition. Thus, he stated that it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties *(ibid.)*.

Moreover, he stated that rights or concessions granted by treaty to be exercised in the territory of the grantor State may be regulated by such State but that the principle of good faith would operate in such circumstances so as to place some limitation on the powers of the grantor State. Consequently regulations cannot be made in order to destroy or frustrate the treaty rights (*ibid.*, pp. 449-450 and 762-764, in which he referred to the *North Atlantic Coast Fisheries* arbitration which the United States cited in its written statement at **I**, p. 856).

Another authority quoted in the United States written statement is Hudson, who in his work on the *Permanent Court of International Justice*, at page 636, also referred to this principle of good faith, but his only conclusion was that "little hospitality has been shown to reasons advanced by parties for the non-performance of their obligations". The lack of hospitality was, of course, that of the Permanent Court: the Permanent Court did not accept or did not lightly accept the reasons advanced by parties for the non-performance of their obligations.

It seems clear, in my submission, from the above authorities, that the principle

of good faith is not something which can operate independently of the intention of the parties. As Judge Lauterpacht said in the *Norwegian Loans* case:

> "The question of the obligation to act in good faith arises only in relation to legitimate expectations of the other party" (*I.C.J. Reports 1957*, p. 53).

So it is the legitimate expectations of the other party that are protected by this rule of good faith. Bin Cheng stated that the principle:

> "... means, essentially, that treaty obligations should be carried out according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning". (*General Principles of Law*, p. 114.)

He conceded, however, at page 116, that this principle should be read subject to the textual approach to interpretation to which I have referred. Ultimately, Cheng gave the same type of example of the application of good faith as that given by Lord McNair to which I have referred, namely that treaty obligations may not be frustrated by the *mala fide* exercise of a right, e.g., of a right of control (that is again the *Fisheries* arbitration); that a dispute may be said to be incapable of settlement by negotiation even if one of the parties *mala fide* professes a willingness to negotiate (he refers to the *Mavrommatis* cases for that proposition); that a *pactum de contrahendo* requires a genuine effort by the parties to reach agreement; that clear errors and ambiguities in treaties cannot derogate from the parties' true intentions; that a condition of *rebus sic stantibus* may sometimes be implied, and that abuse of rights is unlawful in certain circumstances. These examples are given in the quoted work at pages 114-119.

Mr. President, if one analyses these examples, they really cover a number of different legal institutions, and it may, with respect, be doubted whether any useful purpose is served by classifying them under the general heading of good faith in the performance of treaties. However, be that as it may, it is clear that there is no rule of good faith which could result in the variation of the content of a treaty, otherwise than pursuant to the intentions or expectations of the parties. Thus, for instance, the principle of *rebus sic stantibus*, which was referred to as a principle of good faith, could, where applicable, prevent the extension of a treaty to circumstances which fall within its terms, literally interpreted, but were not contemplated by the parties when the treaty was concluded.

One might, of course, have an implied term, as I have already stated, which could possibly extend the application of a treaty beyond what is expressly stated in the text. But the legitimate expectations and the true intentions of the parties must, it is submitted, always prevail. I might just add, in conclusion of this part of my argument, that the conception of the rule of good faith as directed to the giving of effect to the legitimate expectations of parties also appears from the proceedings of the International Law Commission in its 1966 *Yearbook*, Volume II. It mentioned this principle, for instance, in the context of the rule of *ut res magis valeat quam pereat* at page 218; I have already referred the Court to that passage. It also refers to the rule of good faith in its comment on the principle that the text of a treaty is to be read in its context, that is at page 221, and it also referred to this principle in support of its view that inter-temporal law did not require express mention in its draft convention since the element of good faith would require its application where the parties intended it to apply. That is at page 222.

The Court rose at 1.05 p.m.

EIGHTH PUBLIC SITTING (22 II 71, 3 p.m.)

Present: [See sitting of 8 II 71].

Mr. GROSSKOPF: Mr. President and honourable Members of the Court, on Friday I dealt with the principles which we submit should govern the interpretation of such treaties and conventions and other instruments having legal effect as may be relevant for the purposes of the present case.

Today I propose considering the rules relating to the modification of treaties by subsequent practice. This, in our submission, is a matter of some importance for the present case. There have been repeated references in the course of the proceedings up to now, both in the written and in the oral statements, to the practice of States and also to the practice of United Nations organs. Often these references were given without any argument or discussion as to the basis of relevance on which it was presented or as to the weight which was to be accorded to it.

By way of introduction I would mention that I have already dealt with the effect of the practice of States in two respects as it affects interpretation.

Firstly, I contended on Friday that the subsequent practice of the parties to a treaty may be invoked as an aid to interpretation in cases where the text is obscure or ambiguous and, secondly, I also stated that the subsequent practice of the parties may in particular circumstances provide relevant evidence to assist in showing that a particular word or an expression, although prima facie clear, was nevertheless used by the parties in a special sense. In both these aspects, Mr. President, the subsequent practice of the parties is directed to ascertaining what the actual intent of the parties was when they concluded the agreement. In other words, in these circumstances the subsequent practice is not adduced to add to or to change or alter what the parties had intended to establish by their agreement, but merely to provide clarity as to what it was they had agreed upon.

The concept of modification by practice, on the other hand, in so far as such a principle may exist, serves an essentially different purpose. The purpose of modification by practice is not to ascertain what the intention of the parties was but to effect an alteration in the parties' agreement in accordance with an intention of the parties which supervened subsequent to the conclusion of the original treaty. It is therefore, in essence, a method whereby an agreement is reached rather than a method whereby the meaning of an existing agreement is determined or ascertained.

Before I consider the comments of other participants in these proceedings, it will be convenient to summarize briefly what we said in Chapter II, paragraphs 26 to 32, of our written statement. In those paragraphs we said, firstly, that there exists substantial scholarly support for the proposition that a treaty or convention may be revised or modified by the subsequent conduct of the parties thereto. In accordance with this prevailing view, the International Law Commission had proposed a draft Article 38 in its draft convention on treaties, which incorporated this proposition.

However, at the Vienna Conference on the Law of Treaties delegates showed strong resistance to this proposal and the grounds advanced by them were mainly twofold, namely firstly, that the recognition of any such principle would

detract from the value of written treaties or, alternatively, that the recognition of any principle without substantial qualifications would so detract. The second main ground of opposition, we submitted, was that modification by practice could result in treaties being altered otherwise than in accordance with the constitutional processes of States, i.e., that the recognition of such a principle might lead to a conflict with the internal constitutional law of many States. The proposal incorporated in the draft Article 38 was accordingly rejected in the Committee of the Whole of the Conference.

Our conclusion from the events at the Conference was that these events "must necessarily cast doubt on the ambit, and, indeed, the very existence of a rule permitting modification of treaties by subsequent conduct of the parties" (written statement, I, Chap. II, para. 29, p. 394).

However, Mr. President, we continued to say that if such a rule did exist, it could only be invoked in circumstances where the conduct was absolutely clear and unambiguous; and where it was concurred in by all the parties to the treaty in some way which involved their treaty-making organs or institutions. And, finally, in order to be effective such conduct would have to be accompanied by an intent to modify the treaty.

So those were the rules we contended were applicable if, as a matter of general principle, one were to accept that it was possible to modify a treaty by the subsequent conduct of the parties thereto, but we added that where a treaty provides specifically for the manner of its amendment, an informal modification by conduct would not be permissible. For that proposition we quoted the separate opinion of Sir Percy Spender in the *Certain Expenses* case.

In any event our contention was that whatever the possibility might be of effecting modifications to the Charter by the practice of parties thereto, it is hardly conceivable that the practice of organs of a body such as the United Nations, particularly those organs which have limited membership, could have an effect of modifying the constitutive instrument. I shall revert to this aspect later.

Our analysis of this topic drew the following comment from the distinguished representative of Finland. He stated that the deletion of draft Article 38 at the Vienna Conference—

> ". . . does not, as the South African Government asserts . . . signify that the actual principle of the effect of subsequent practice on the contents of a treaty was rejected at Vienna" (*supra*, p. 65).

Now, firstly, of course, Mr. President, that is not what we asserted. What we asserted was what I have just read and that is that the events at the Conference cast doubt on the ambit and indeed on the existence of such a principle; merely that the events cast doubt, not that the principle was actually rejected.

The distinguished representative of Finland gave the two reasons which he contended were those on the basis of which the draft Article 38 was rejected. They were, firstly, the view held by several delegations that no one could possibly deny that subsequent practice could modify a treaty, so that the provision was superfluous. That was the first reason adduced by the representative of Finland as to why the draft Article 38 was rejected. Now all I would say about that, Mr. President, is that if that were so, it would certainly be remarkable inasmuch as the Conference was, on the whole, a codifying one and a number of propositions that are completely trite were included in the Convention. One amongst them is, of course, the most trite of all and that is

the principle of *pacta sunt servanda*, which was incorporated in Article 26 of the Convention.

The second reason adduced by the representative of Finland was that the draft was not sufficiently clear but that it would be difficult to find a better form of words. Now it is apparent from the official records of the Conference that the lack of clarity of the draft was, indeed, criticized but it was criticized not only by people who might have been prepared to accept the principle of Article 38, subject to qualifications, but it was also criticized by those who were against the whole principle of the article.

So my overall submission, Mr. President, is that the reasons advanced by the distinguished representative of Finland for the rejection of this proposal are not borne out by the official records of the Conference. In particular, it is my contention that it appears quite clearly from the official record that there was considerable opposition to the whole principle of modification by conduct of treaties. I would like to refer to some of the relevant documents for this purpose of this contention and I must just express the hope that those Members of the Court who were present at the Conference do not find it unnecessarily tedious.

I would first refer to the actual proposal of the International Law Commission which appears in the *Yearbook* of the Commission for 1966, Volume II, at page 236. There the draft article is formulated in simple terms as follows:

> "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."

In its commentary the International Law Commission intimated that this article was intended to cover those cases where the parties by common consent in fact apply the treaty in a manner which its provisions do not envisage.

The International Law Commission pointed out that "a consistent practice establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions may have the effect of modifying the treaty". *(Ibid.)* Subsequently, on the same page, the International Law Commission stated that although the line may some times be blurred between interpretation and amendment of a treaty through subsequent practice, legally the processes are distinct.

That, Mr. President, was then the basis upon which the matter was brought before the Vienna Conference, and the principle laid down in draft Article 38 immediately came under heavy attack by some of the delegates.

I would, with the Court's permission, merely quote a couple and give references to the rest.

I would firstly quote some of the comments of the representative of Venezuela. These comments appear in the *Official Records of the United Nations Conference on the Law of Treaties, First Session*, paragraph 60, page 208. There the distinguished delegate said:

> "Practice incompatible with a treaty constituted no basis for a new rule of law, but an abuse of law and a violation of the treaty. When the parties found that circumstances had changed, they could not authorize a violation of law, but should proceed to modify the treaty by concluding another or by preparing an additional protocol which would legalize the new situation; that had always been the procedure followed by the international community. Practice in itself could not be a basis for derogation from written, domestic or international law . . ."

The representative of Viet-Nam was to much the same effect at page 208, paragraph 61, where he said his delegation—

> "... could see no advantage in including a provision on modification of treaties by subsequent practice. If, in applying the treaty, the parties noted that new circumstances had arisen since the signature of the treaty, which made modification or re-drafting desirable or necessary, they could at any time agree in writing on an appendix, protocol or annex to the original treaty. To allow for the possibility of modifying the treaty by subsequent practice would open the door to all kinds of interpretations, in the course of which the treaty might lose much of its substance."

The representative of France, at page 208, paragraph 63, said:

> "Although the idea of recourse to State practice in the application of a treaty as a means of interpretation was unexceptionable, it was quite a different matter to lay down a rule whereby that practice could in itself alter the substance of treaty obligations. The formulation of article 38 was open to three main objections.
>
> First, many international agreements contain specific provisions on the conditions of their revision: to admit that the parties could derogate from those clauses merely by their conduct in the application of the treaty would deprive those provisions of all meaning.
>
> Secondly, adoption of the article might raise serious constitutional problems for many States. The principle of formal parallelism required that modifications of a treaty at the domestic level should follow the same procedure as the original text. If the manner in which the responsible officials applied the treaty was in itself capable of leading to modification, that requirement of parallelism could hardly be met. Moreover, it was doubtful whether the precise and strict conditions laid down in article 6 and the following articles of the draft, on consent to be bound by a treaty, would retain any meaning if the treaty could be subsequently modified in the manner provided for in article 38.
>
> Thirdly, the rule proposed in article 38 would hardly conform with the harmony in international relations. Indeed, if States were given the impression that any flexible attitude towards the application of a treaty was tantamount to agreement to modify the treaty, they would tend in future to become much more circumspect and rigid in their attitudes."

The representative of France went on to state that in certain technical agreements he thought there might be some scope for the application of a principle of modification by practice, but not otherwise.

Then, Mr. President, at page 210, there is a statement by the representative of Chile who said that his delegation:

> "... would vote for the deletion of article 38, in the belief that the adoption of the provision would weaken the principle of *pacta sunt servanda* which the Committee had adopted in article 23. Once a treaty was in force, the parties were bound by it until it was modified in accordance with article 35 by agreement between the parties. That agreement implied express consent by the States in question. If article 38 were adopted, any State wishing to evade its obligations under a treaty could invoke subsequent practice with a view to modifying the treaty for its own ends."

The other quotations, Mr. President, are fortunately short. There is one from the United States of America, paragraph 6, pages 210-211, where the distinguished representative said:

> "What particularly worried the United States delegation was that relatively low-ranking officials, such as vice-consuls and third secretaries might interpret a treaty erroneously and follow a course of conduct which, unknown to governments, could lead to modification of the treaty."

Columbia, paragraph 20, page 211:

> "Article 38, . . . was contrary to law and to democracy, because treaties were unmade in the same way as they were made, and if a particular procedure had been followed in the negotiation, signing, internal approval and ratification of a treaty—a procedure which involved compliance with the internal constitutional system—the same procedure must be followed for any modification of the treaty, so as to ensure the desired balance between the internal powers of governments and parliaments in the process of contracting or modifying international obligations."

Then, Mr. President, I would refer to the representative of Uruguay, paragraph 34, page 212. He said:

> "There was no rule of international law laying down that a treaty could be modified by subsequent practice, even if that practice resulted from the tacit agreement of the parties. Furthermore, it was not practice that modified a treaty; an agreement could be modified only by another agreement."

The representative of Tanzania, at page 212, paragraph 38, said:

> ". . . he had come to the conclusion that it would be better to delete article 38. For the rule stated in that article did not exist, and even if it did, it would be a bad rule."

I would quote only one further extract, Mr. President, and give the references to the others. The last is from the representative of the Philippines, paragraph 43, page 213, where he:

> ". . . pointed out that many constitutions provided that any modification of a treaty must be ratified by the legislative organs of the country. That applied to the Philippines, where the approval of the Senate was required. Thus article 38 would create serious problems, since it would lay down a rule that was incompatible with the provisions of internal law in force in many States. The article would introduce an element of uncertainty and it would be better to delete it."

In addition to these passages I have quoted, I would refer the Court to the statement by the representative of Japan, paragraph 58 at page 208; Spain, paragraph 65, and following, pages 209 to 210; the USSR, paragraph 1, at page 210; Turkey, paragraph 27, page 211; Cuba, paragraph 40, page 213; Portugal, paragraph 42, page 213; and Czechoslovakia, paragraph 52, page 214.

These delegates all made it quite clear, in my submission, that they opposed the very principle of the draft Article 38. It was not just a matter of faulty formulation—they were in opposition to the whole concept that formal treaties might be modified purely by the subsequent conduct of the parties thereto. And I might add that the basis upon which representatives objected to the draft article also appears from the comments of the expert consultant at page 214 of the record I have mentioned.

I cannot of course say, Mr. President, that the delegates who ultimately voted against the article and *a fortiori*, those who abstained, were all opposed to the principle incorporated in draft Article 38, but what I do say is that the published *Official Records* show that there was a strong current of opposition to this principle, which was demonstrated in the addresses of many of the representatives.

But even, Mr. President, if one were to assume in principle that a treaty may be modified by practice, that still leaves the question: what are the rules applicable to this type of modification?

I have already summarized our contentions in this regard. They evoked no comment or criticism save the bare statement, without authority, by the distinguished representative of Finland, that the Charter also "can be modified in the light of the subsequent practice of member States" (*supra*, p. 66). This was, however, said without any argument, or without any citation of authority. Nor was any consideration given to the requirements which had to be complied with for such modification.

Specifically on this point of the Charter, it is of interest that some States at the Vienna Conference were opposed to the principle of modification of treaties by subsequent practice, *inter alia*, because of a fear that this principle might be invoked to modify treaties for which a particular method of amendment was provided.

That has already appeared from the passage I have read from the address by the distinguished representative of France, but it also appears from what was said by the representatives of Spain, at page 209, paragraph 70, and Uruguay, page 212, paragraph 36. The former said:

> "Another difficulty would arise if the treaty contained a clause on modification. In that event, could an official who did not possess treaty-making authority nevertheless modify the special revision or modification clause? If so, article 38 could mean that it was possible and legal to do by tacit agreement what it was impossible and illegal to do by formal agreement; it could only be regarded as conflicting with the principle *pacta sunt servanda*."

In other words, Mr. President, this refers to exactly the sort of circumstances with which we are dealing here now: a treaty which provides for a special method of amendment and which is said, nevertheless, to have been modified by conduct in an informal manner. To the same effect was what was said by the representative of Uruguay at page 212, paragraph 36:

> "In addition, it was clear that during the proceedings of the International Law Commission, its members had not agreed on the conditions to be satisfied by subsequent practice if it was to modify multilateral treaties. Any modification of those treaties should be made in accordance with certain conditions laid down in the treaty itself."

In the result therefore, Mr. President, it is contended that the exposition of law in Chapter II of our written statement has not been shown to be inaccurate in any respect.

I turn now to the effect of practice within the United Nations. In Chapter II, paragraphs 33 to 40, of our written statement we considered how, if at all, the practice within the United Nations could affect the meaning or interpretation of the Charter, either by way of interpretation or by way of modification. Since the Charter is a multilateral treaty open to accession by new Members, the subsequent conduct of parties can be of little or no assistance in

interpretation and in any event only if it complies with the requirements which I have already mentioned.

The Court will recall that when I considered the special problems of such multilateral treaties on Friday, I made the point that because these multilateral treaties are open to accession, one must be very circumspect in making use of aids to interpretation such as preparatory work or subsequent conduct which might not have any bearing on the intentions of these subsequently acceding parties. They, when they accede, would normally accede on the basis of the text and might not have intended the same consequences as might appear from the preparatory work or other extraneous aids to interpretation.

As regards modification of the Charter by conduct, that possibility seems to be excluded, in our submission, by the existence of Articles 108 and 109 of the Charter, which expressly provide for amendment. We referred in this regard to the separate opinion of Sir Percy Spender in the *Certain Expenses* case where he said so explicitly, and I have also just quoted similar views expressed by certain governments at the United Nations Conference on the Law of Treaties.

In any event, quite apart from the existence of Articles 108 and 109, if there were to be any modification by practice of parties to the Charter, that practice would have to comply with the general requirements which I have just summarized.

Now, Mr. President, that then applies to the practice of parties. When one comes to the effect of the practice of organs, as distinct from parties, the problems are, it is submitted, even greater. We discussed the problems which arise there in our Chapter II, paragraphs 36 to 40, of the written statement. There is no provision in the Charter itself which permits any organ to interpret the Charter with binding effect, so that any practice within the Organization can, we submit, not be accorded greater weight than would have been accorded to the conduct of the Members acting outside the organ. As a matter of fact we suggested in Chapter II, paragraph 36, that the attitudes adopted by Members inside the United Nations might well have less value as a feature in interpreting the Charter than the conduct of such Members might have had if pursued outside the organization. The reason for that is the essentially political activities of the Organization, which would often encourage Members to adopt attitudes which might not be in conformity with their conception of what the legal position is, or what the meaning of the Charter is, but might be dictated rather more by the considerations that their own interests are not affected and that it might be inexpedient or unwise to oppose a certain course of action proposed by others.

The result is that this type of continuous political activity requiring the adoption of attitudes by Members on all sorts of aspects, all sorts of controversies, in which they might not have any particular interest themselves, might lead them to accept certain procedures which are not strictly in accordance with what they conceive the Charter to provide. But be that as it may, our suggestion is at any rate that the practice within the organs of the United Nations cannot have any greater probative value than it would have had had it been pursued by these States individually outside the organization.

Regarding the modification of the Charter by practice within the organs of the United Nations, one must accept that the organs do have a role to play in the evolution of practices which are not inconsistent with the Charter and which relate to the internal workings of the Organization. That is a proper field in which practice could operate. But we submit that no practice within the Organization can alter the meaning of the Charter so as to affect the rights which Members have in terms thereof. Consequently we say here also that practice of an organ

can have no greater effect to modify than practice pursued by Members outside the organ. In fact, here also, probably less, because firstly, the organs of the United Nations on the whole do not consist of all the Members. Many or most of the organs have a limited membership and their practice, therefore, does not represent the participation of all Members. Secondly, most decisions are not taken unanimously, so that one normally has a number of States, greater or lesser, who do not agree with a particular decision. Thirdly, the Members when they take a decision, or adopt an attitude, in the United Nations would very seldom be actuated by any animus to modify the Charter. The proceedings, as I have already tried to show, are of an *ad hoc* political nature and delegates do not participate with the intention of altering the substance of the Charter. Indeed the fourth point we make is that the delegates to the United Nations are not, in the ordinary course, authorized to consent on behalf of their governments to any revision or modification of the Charter.

So, Mr. President, for all these reasons, we submitted in our written statement that the possibility of any modification of the terms of the Charter by subsequent conduct, if it were at all legally permissible, would arise very seldom in practice, because one could hardly ever have a situation in which all these requirements were complied with.

Now, in the present proceedings, the modification by practice of the Charter has been considered by other distinguished representatives principally in connection with provisions of Article 27, paragraph 3, of the Charter, to which I shall presently come. But I would emphasize that it does, of course, have a wider significance. It is a question which would also arise in relation to the various powers of the Organization and it could also arise in relation to various other requirements of a procedural nature. So that, although most others, and we ourselves, treat of it particularly with reference to Article 27, paragraph 3, it does have, in my submission, a wider significance.

I come now, Mr. President, to Article 27, paragraph 3. The problem which is posed here arises, of course, from the words "affirmative vote of nine members, including the concurring votes of the permanent members". In Chapter III, paragraphs 13 to 26, we considered the problem whether a voluntary abstention by a permanent member of the Council may be said to be a compliance with this provision. A voluntary abstention, of course, is an abstention otherwise than pursuant to the proviso to the paragraph which provides that parties to a dispute should abstain from voting. But the question which arises is whether permanent members who are not required to abstain are nevertheless permitted to do so without preventing the adoption of a valid resolution.

We showed, firstly, Mr. President, in my submission, that as a matter of interpretation, no resolution can be taken to have been validly adopted if one or more of the permanent members abstained. That is as a matter of interpretation, in other words a matter of ascertaining the meaning of the text as also the intentions of its authors. Here, as, I submitted, as in all other cases, the two in fact coincide. The natural meaning of the English text, in my submission, supports this construction—we contended that in paragraph 14, of Chapter III of our written statement—and it was placed beyond doubt, in our submission, by the equally authoritative versions in the other languages (Chap. III, para. 15). The *travaux préparatoires* reveal that the text, in fact, correctly reflected the intentions of the authors of the Article. We set out to demonstrate that in paragraphs 16 to 20. Moreover, Mr. President, we pointed out that early commentators on the Charter were all agreed on this, that a permanent member of the Council could not properly abstain voluntarily from voting without causing the failure of the resolution.

So, in our submission, it seems quite clear that, as a matter of interpretation—that is, as a matter of ascertaining what was meant by the Charter and what was intended by its authors—a resolution can clearly not be adopted despite the voluntary abstention of a permanent member.

Now, Mr. President, the distinguished representative of the Secretary-General in his oral statement, at page 39, *supra*, contended to the contrary. He relied basically upon a rule of customary law which, he said, had changed the Charter but, at the same time, he did not abandon the theory that one could also as a matter of interpretation achieve the result that a resolution could be adopted despite the voluntary abstention of a permanent member. In contending that, he was adopting much the same attitude as he had in his personal capacity advanced in an article entitled "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27 (3) of the Charter of the United Nations" which appeared in the *American Journal of International Law*, Volume 61, page 737, at pages 741 to 742. I must just add that reference was also made to this article in the addendum to the written statement of the Secretary-General. So that both in this article and in the oral statement made here by the distinguished representative of the Secretary-General the proposition was advanced that as a matter of interpretation one could somehow reach the result that the voluntary abstention of a permanent member was not necessarily fatal to the adoption of a resolution. I shall come to that later, and might just add that the distinguished representative of the Organization of African Unity also supported him in this contention—that is at pages 91 to 92, *supra*.

The other comment which has been made in this Court on this topic was by the distinguished representative of Finland at pages 66 to 67, *supra*, where he relied basically on a concept of modification. So that in general, to sum up the attitudes adopted by other participants here, there is some difference of approach between them. The Secretary-General relied mainly on the evolution of a rule of customary law, and, alternatively, on an interpretation of the Charter by subsequent practice within the Security Council; in the latter respect he was supported by the OAU. The learned representative of Finland, on the other hand, considered that we were dealing here with a case of modification by conduct.

The difference between a modification of a treaty by conduct and the evolution of a new rule of customary law is, of course, quite substantial. The idea of modification was the one which Mr. Stavropoulos had advanced in his article in the *American Journal* and the concept of evolution of a customary rule of law, which he advanced here, is, in my submission, basically something else. I will come to that later but I would like to point out at this stage that the two concepts differ in my submission in this respect, that whereas in modification by subsequent practice there must be an intent to modify—in other words an intent to change the law, an intent to create a new law—the very reverse is the position when one in dealing with the evolution of customary law. This is so because one of the elements of customary law, as I will attempt to show later, is the *opinio juris sive necessitatis*, the contemplation that one is, in fact, complying with the law, so that there one does not have an intent of changing the law—on the contrary one has a contemplation that one is acting in accordance with the law.

But I will come to that later, Mr. President. I just wanted to make it clear at the outset that when I deal with these concepts that these two are in fact separate, they do in fact involve different principles and different rules.

So, Mr. President, the three main contentions advanced before this Court are: firstly, that as a matter of interpretation the Charter permits of a voluntary abstention by a permanent member; secondly, that a rule permitting such

voluntary abstention had been established by customary international law; and thirdly, that the Charter had been modified by practice in order to permit such voluntary abstention. Those were the three main contentions advanced here and I propose dealing with them in turn; then there are a few lesser ones with which I shall deal later.

Now the first one is interpretation. From what I have already said, my contention on this will be apparent to the Court. Nevertheless I must refer to what the Secretary-General's representative said at pages 39-40, *supra*. In that passage he referred to the separate opinions of Sir Percy Spender and Sir Gerald Fitzmaurice in the *Certain Expenses* case and he made the point that although both these learned judges were, in general, rather dubious about the permissibility or the value of subsequent practice in the organs of the United Nations as an aid to interpretation, even Sir Percy Spender, he said, did permit of it in a certain situation and that situation, the learned representative of the Secretary-General said, was where there is "a practice which is of a peaceful, uniform and undisputed character accepted in fact by all current Members". Where there is such a practice, the representative of the Secretary-General said, then even according to Sir Percy Spender one could use such a practice in interpretation.

Now, Mr. President, reading the passage from the separate opinion of Sir Percy Spender in the *I.C.J. Reports 1962*, page 151 at page 195, it is with respect, not so clear to me that the learned judge did say that in these circumstances the practice of the organs would necessarily be of value. It seems to me, with respect, that all he did was to admit the theoretical possibility that it might, in a particular case, so be. However, he was not dealing expressly with such a situation and he did not advert at all to the weight which any such practice might have if its use were permissible. In fact, if one reads his opinion as a whole, and has regard particularly to the stress which he placed on the proposition that subsequent practice could be of assistance only where there is some uncertainty or ambiguity in the text, it seems clear, in my submission, that this sort of practice would, in his view, if permissible at all, not have been of any great weight in general, and that it could really only have been of any weight at all where there was some ambiguity or uncertainty in the text of the Charter.

The relevant passages from the separate opinion were quoted by us in Chapter II, paragraph 23, and it is not necessary for me to refer to them again.

That practice can be employed as an aid to interpretation only in cases of ambiguity or uncertainty is again emphasized in the passages quoted by the representative of the Secretary-General himself—I would refer the Court to the passage quoted by him at page 40, *supra*, from the case concerning the *Competence of the I.L.O.* Also in the *Admissions* case, which he quoted at page 41, *supra* (*I.C.J. Reports 1950*, p. 4 at p. 8), the Court emphasized that extraneous means of interpretation can be resorted to only in cases of ambiguity or uncertainty. So there also was not a case where subsequent practice was invoked, or where it was said that it could be invoked, to change the clear meaning of the text. In fact in the *Admissions* case the Court referred to subsequent practice only after it had found that the meaning of the words was clear and unambiguous. Thereafter it found comfort in the consideration that subsequent practice was also in accordance with such clear and unambiguous meaning. But there was no suggestion, in my submission, that subsequent practice could effect an interpretation which was contrary to the meaning of the words.

The further case quoted by the distinguished representative of the Secretary-General was the *Constitution of the Maritime Safety Committee* case (*I.C.J. Reports 1960*, p. 150) which was cited by the Secretary-General's representative

at page 41, *supra*. In that case the Court was confronted with a real case of ambiguity and uncertainty in the document itself, and it did pay attention to the subsequent practice. But in general none of the cases referred to by this distinguished representative of the Secretary-General would support any modification of the Charter under the guise of interpretation.

I come now, Mr. President, to the second argument advanced by the distinguished representative of the Secretary-General, namely that a rule of customary international law had evolved which would permit the Security Council to adopt resolutions despite the voluntary abstention of permanent members. This contention of his, of course, must rest on the basis that such an abstention was not permitted under the Charter as originally framed, so it is really in the nature of an alternative argument. It is trite law that for the evolution of a rule of customary international law there must be not only a clear and consistent practice but there must also be the *opinio juris sive necessitatis*, in other words the conception or the contemplation that the practice is required by or consistent with prevailing international law.

I need hardly cite authority for this but I could refer the Court to the statement by Judge Hudson, when he was president of the International Law Commission in 1950, in the *1950 Yearbook of the Commission*, Volume II, page 26. Oppenheim states in this regard:

> "International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right." (*International Law*, Vol. I, 8th ed., p. 26.)

In that regard, he distinguishes between a custom and a usage. A usage exists "when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to international law, obligatory or right". He states that such usage does not create a binding rule of international law. The reference is to the same page of the same work.

Now, Mr. President, save to refer to the existence of customary international law and to make the contention that it applies to the present case, the distinguished representative of the Secretary-General presented no argument in support of his contention. It is my submission that the problems which would arise in a case like this as a result of the interaction of custom with treaty law are difficult indeed and would require careful consideration. A convention like the Charter embodies legal rules created by the agreement of the parties thereto. The Charter itself makes provision for its amendment. Now, how can a non-compliance with the clear terms of the Charter ever have the effect of circumventing these provisions? In my submission, Mr. President, it cannot. In my submission, if there is a provision for amendment, then that provision must be complied with before there can be any revision, and this aspect was not dealt with at all by the distinguished representative of the Secretary-General.

The next aspect which, in my submission, requires consideration but was not dealt with is the whole question of *opinio juris sive necessitatis*. Can one really say that there is any *opinio juris* in a case like this where the practice is contrary to the clear terms of the Charter; can one say that the parties, the Members of the United Nations, when they adopted this practice, or when they participated in it, were under the impression that they were complying with the Charter in doing so? This aspect, Mr. President, was not canvassed at all by the representative of the Secretary-General and, in my submission, there is nothing before the Court to show that that was in fact so. As a matter of fact one knows the practical and other reasons which have led up to the

adoption of this practice; they relate to considerations of policy and practical convenience much more than to any contemplation that what is done is required by or consistent with the Charter.

Another aspect which was not dealt with at all was the question of what sort of practice would have been necessary to bring about the suggested rule of customary law. At what stage did the practice crystallize into a rule of law? Because, as I have noted, this argument must necessarily rest on the premise that, at least initially, the conduct of the parties was not in accordance with the Charter. So at what stage did the conduct which was contrary to the Charter obtain this element of legality which the representative of the Secretary-General contended for?

Furthermore, there is the feature that I have already mentioned: that one is here dealing with an instrument which is open to accession by new members. Now, in theory, how does a practice which is said to create a rule of customary law bind States who accede to the convention at a subsequent stage?

In my submission, Mr. President, the concepts inherent in this whole line of argument—that one can have a rule of customary law, which adds to or detracts from the rights and obligations of parties to a multilateral treaty, otherwise than by amending the treaty—create such problems of a legal and practical nature that, in my submission, this contention cannot be accepted. The only way, I would suggest, in which the Charter could be changed or amended, would be in accordance with the provisions made therefor in the Charter itself.

I come now, to the third main ground upon which it was contended before this Court that the voluntary abstention of a permanent Member would not cause the invalidity of a purported resolution, and that is the contention that the Charter had become *modified* by subsequent practice. That was the contention advanced by the distinguished representative of Finland at pages 69-70, *supra*. I have already pointed out that the distinguished representative of Finland made no attempt to argue or to present any authority in support of the proposition that such a modification would be possible or what the requirements would be. Nor did he make any attempt to show that such requirements had been satisfied. He also, in my respectful submission, did not really discuss the effect of the 1965 amendments to the Charter which would, if his contention were correct, have resulted in the possibility of a valid Security Council resolution despite the absence or the abstention of all the permanent members. In other words, Mr. President, this rather vital change which had taken place in the composition of the Security Council in 1965 and which would, in our submission, necessarily have affected this issue also, was not really dealt with in depth by any of the participants who have appeared.

We discussed this whole aspect in Chapter III, paragraphs 34-35, of our written statement and I do not have to repeat it here. Basically it amounts to this: firstly that if indeed there was this general contemplation that the voluntary abstention of a permanent member is permissible, then one would have expected that it would have been incorporated in the formal amendments which were effected in 1965.

The response to this argument by the distinguished representative of Finland was that this modification was not included because of a general policy whereby "Other modifications were at that time intentionally avoided so as not to compromise the success of the main aim". (*Supra*, p. 70.) But, Mr. President, does this not support our contention? If indeed there was a general consensus amongst all Members of the United Nations that a voluntary abstention should be permitted, why would there have been any difficulty

about including it in the formal amendments? There would then have been no possibility of thereby compromising the success of the main aim as the representative of Finland said; there would have been no possibility of such compromising because there would have been complete unanimity on the part of everybody that such an amendment would be a wise thing to have.

Secondly, there has also been no discussion of what effects these amendments would have had upon any modification that might have existed previously. We also pointed out in Chapter III, paragraphs 34-35, that had there been such a modification by conduct before the amendments, it does not follow that it would necessarily have continued afterwards, because States might well have been satisfied or acquiescent in having a possibility of abstention by permanent members where the Security Council was still the smaller body but might, on the other hand have raised grave objections afterwards when, as I have said, decisions could then, in accordance with this alleged modification, have been taken despite the abstention of all the permanent members. That, in my submission, would have created such a substantial change in the suggested modification that the amendments themselves must necessarily have cast doubt upon it even had it previously been generally accepted.

Those then, Mr. President were the main arguments advanced; there were also others, apparently subsidiary, with which I must nevertheless deal. Thus the representative of the Secretary-General said at page 41, *supra*, that the Security Council can determine its own composition and procedure. He stated that once the chairman has declared a resolution adopted without objection, the matter is, as it were, *res judicata*. In our respectful submission there are various confusions of concepts in this contention on behalf of the Secretary-General.

Firstly, we would respectfully suggest that there is a confusion between *(a)* the Council's own view about the validity of its resolution and *(b)* the question whether the resolution is really valid or invalid. Now, Mr. President, it must be accepted that when a chairman announces that a resolution has been duly adopted and no member of the body objects or subjects the ruling to a vote of the meeting or some other form of review or appeal, the resolution can be said to be treated by that meeting or body itself as if it were valid; so for the purposes of that meeting or that body it may be regarded as valid. But that, in our submission, does not mean and cannot possibly mean that it is to be regarded as valid for all purposes—for instance, that it is to be regarded as valid even in respect of a non-member who is potentially affected by it and who then, if that were so, would be precluded from relying on a defect in the purported adoption of the resolution.

Certainly, in our submission, that cannot be the case, that a non-member may then be prevented from contesting the validity of the decision taken by the meeting or body on the grounds of some irregularity in its proceedings. It also, in our submission, does not mean that if ultimately the validity of that decision were to be disputed before a court of law that a court of law can be precluded from enquiring into the matter and pronouncing upon it. The distinction there, Mr. President, is between the internal validity in the meeting itself and the validity which it would have as against some third party who might contest it in court and, in our submission, would always be entitled to show that it was not properly adopted.

A second point in respect of which we respectfully submit there is some confusion of concept in the contention advanced by the distinguished representative of the Secretary-General, relates rather more to a suggestion made

by him than something explicitly stated. It arises from the circumstance that there are of course in various constitutional systems protections for particular legislative organs against having their procedural matters tested or reviewed in a court of law. So although we have stated the general proposition that people can contest the validity of proceedings, one must immediately concede that there are certain constitutional systems where particular legislative organs do have the privilege of being the masters of their own procedure.

In British constitutional law such a privilege of being exclusive and final judges of their own procedure became established for each of the Houses of Parliament through the growth and development of *lex et consuetudo Parliamenti*. It was the result of long historical development in which the Houses strongly resisted ideas of interference by the courts of law and, Mr. President, the courts of law in time acquiesced in this attitude of parliament. This historical process is described in constitutional cases such as *Edinburgh and Dalkeith Railway Company* v. *Wauchope* which was reported in 8 *English Reports* at page 285, then the well-known case of *Bradlaugh* v. *Gosset*, 12 Queens Bench Division, at pages 285-287, and the case of *Rex* v. *Irwin* of which I unfortunately have only the reference to the *English and Empire Digest*, at Volume 42, page 601. This, however, was a peculiar development and because it had this particular nature, it followed that when parliamentary institutions were created for the colonies by letters patent or other legislation the privilege was not regarded as being conferred upon the Houses concerned unless it was expressly done in the constituent instruments or in associated legislation. This was so decided by the Privy Council in the cases of *Kielly* v. *Carson* (1842) 4 Moore's Privy Council cases, 63 at page 88, and *Barton* v. *Taylor* (1886) 11 A.C. 197 (P.C.), at page 203. So, Mr. President, this particular privilege which the British Parliament had in time demanded and obtained was not automatically exported to the colonies. There had to be special provision either in the letters patent or in other legislation before any of the colonial houses of parliament or legislative bodies could obtain such a privilege of being masters of their own procedure.

The Court adjourned from 4.20 p.m. to 4.40 p.m.

Before the adjournment I was dealing with the contention advanced by the distinguished representative of the Secretary-General that the Security Council can determine its own composition and procedure and that, accordingly, once the Chairman has declared a resolution adopted, without objection, the matter is, as it were, *res judicata*.

I pointed out that, in our view, this contention betrayed a confusion between two concepts, being, *(a)* the Council's own view as to the validity of its resolution and, *(b)* the objective question whether the resolution is really, as a matter of fact or law, valid or invalid. Secondly, I pointed out that there are indeed, in certain constitutions, protections for particular legislative organs against having their procedural matters tested or reviewed in a court of law. I contended, however, that where that is the position, it occurred either by a long historical process or, otherwise, it was expressly so provided by legislation. I referred, as an example, to the position in Great Britain where both Houses of Parliament, as a result of a long historical development, in time managed to obtain this privilege of being master of their own procedure, but I pointed out that that did not apply automatically to colonial legislatures and I referred the Court to certain cases.

This subject is further dealt with in *Halsbury's Laws of England*, third edition,

Volume V, at pages 478 to 479, paragraphs 1058 to 1060, and also at page 588, paragraph 1261. The last-mentioned paragraph commences:

> "A colonial legislature has no right to privileges of the type enjoyed by the House of Commons under the *lex et consuetudo Parliamenti* and has only the power to secure the due conduct of its proceedings, save in so far as additional authority may be taken by legislation."

The important point is that such additional authority must be taken by legislation, otherwise it does not exist. The result was that special legislative provision was made in such cases where it was intended to confer this privilege. In South Africa, for instance, it exists for the two Houses of Parliament by virtue of a special Powers and Privileges of Parliament Act of 1911. So for the Houses of Parliament this privilege does exist but it does not exist for our provincial councils. It therefore follows that from time to time the courts are called upon to decide on the correctness or otherwise of procedural decisions in the provincial councils. One example to which I may refer the Court was in the case of *Berman* v. *The Chairman of the Cape Provincial Council* reported in 1961, Volume II, *South African Law Reports* 412, at page 414. Now these are examples of British constitutional law which has also been taken over in some respects by their colonies and former colonies, but they illustrate the position which is no doubt true in other municipal legal systems also, namely that the privilege of being master of its own procedure does not exist in the absence of either *(a)* long historical development and acceptance in the particular constitution as customary law or *(b)* a special provision in a constituent or associated instrument. In other words, Mr. President, there can be no justification for regarding such a privilege as a general principle of law for which special provision need not be made if intended to be conferred upon an international organ. As far as an international organ is concerned, our submission is that the ordinary position would have to obtain, namely that its procedural decisions may always be impugned by any third party who is potentially or actually affected thereby.

A third important distinction to bear in mind for present purposes, in our respectful submission, is that even where the above privilege exists, it concerns only questions of procedure, as such, in the legislative assemblies. It is limited to matters which are purely procedural. It does not extend, in our submission, to cases where a constitutional instrument lays down a requirement which is in form concerned with procedure, but is in substance intended as a limitation upon the legislative powers of the legislature.

That, for instance, occurs where the legislature is required for particular purposes to adopt a special procedure which is more onerous than its usual procedure—for instance, a joint session of two houses plus a two-thirds or a three-quarters majority, or something of that sort. Where such procedural provisions are inserted in a constitutional instrument, the reasons are very frequently, if not almost always, in order to protect some special interest or some substantive right.

Now, in our submission, where provisions which are apparently procedural nevertheless serve to protect substantive rights of that sort, the courts may, and do, enforce them when they are violated by the legislatures.

If one has regard to all these aspects, Mr. President, then we submit that the claim of privilege for a Security Council decision in the cases under consideration must fail.

Firstly, the question before the Court is not whether the members of the Security Council have acquiesced in a procedural ruling, but whether a reso-

lution can be regarded as binding on a non-member of the Council notwithstanding what we contend to have been violation of mandatory requirements of the Charter in the processes of the adoption of the purported resolution. So, here is not simply a case where a member of the Council is afterwards seeking to upset a resolution which he did not oppose at the time. Here we are dealing with third parties who were not parties to the resolutions in question.

Secondly, there is no special provision for conferring upon the Security Council an exclusive right or privilege of deciding whether procedural requirements have been complied with, and, in the absence of such provision, no such right or privilege exists. In our submission they have not been given the right to take a final decision on that matter, but, in our submission, the Court must decide whether they in fact complied with the prescribed requirements.

Thirdly, we contend that the requirements of Article 27, paragraph 3, and Article 32 of the Charter, though in form concerned with procedure, serve the purpose of protecting substantive rights. In respect of such cases it would, in our submission, be contrary to normal practices to confer on the organ concerned such a special right or privilege, which further, we contend, confirms that the presumption of such a grant is out of the question.

This also, with respect, Mr. President, must follow as a matter of general principle. If the powers of a body are restricted for the benefit of others, or to protect certain substantive rights, then it must surely as a matter of principle not normally be in the hands of that very body, whose powers are limited, to decide whether it has complied or not.

So for all these reasons, we submit that the claim made on behalf of the Secretary-General that there is some sort of privilege which attaches to the Security Council and which would have the result that it can be the final judge of whether its procedure has been followed, is not a correct contention.

The final contention with which I wish to deal was also made by the representative of the Secretary-General, and that was his statement that the consequences of accepting our contentions would be extremely far-reaching. He referred to the large number of Security Council resolutions which have been declared adopted despite the voluntary abstention of one or more of the permanent members, and he also pointed to the future, saying that the workings of the Security Council might well be rendered very difficult, or it might be frustrated completely, were our contentions to be accepted as sound.

In strict law of course, Mr. President, these are irrelevant considerations, with respect, and our submission is that if the consequences of a legal situation are far-reaching, or if they are disadvantageous, that cannot empower the Court to avert those consequences. The legal principles must be applied, irrespective of where they lead, in my submission. But, in any event, the results are not, in my submission, as far-reaching as the representative of the Secretary-General contended. On any basis, save possibly the basis of interpretation of the Charter, some resolutions of the Security Council were invalidly adopted by reason of the wrongful abstention of permanent members. If one adopts any of the arguments which have been propounded here, there must be at least some of those resolutions which were invalid. If one takes the argument that a rule of customary law has evolved which must, in some way, be superimposed on the Charter to render these decisions valid in future, then there must have been a certain period of time during which they were still invalid and during which this rule was in the process of evolution.

The same consideration applies if one were to consider that the Charter has been modified by practice. There again, the modifications would not have come into effect on the very first occasion when a permanent member abstained.

There must have been some period during which this modification took effect. There must have been some course of practice which resulted in the modification and during this process of modification one would then presumably have had certain resolutions that were invalid, certain resolutions the validity of which was doubtful, and then after the modification had crystallized into law, certain resolutions which were valid.

So on any basis, save the one of pure interpretation, one must accept that some resolutions were invalidly adopted.

But from that it does not of course follow, in our respectful submission Mr. President, that those resolutions, whether they be few or many, are entirely devoid of legal effect, even today. As we have shown in our written statement, Chapter III, paragraph 39, in international law one has various processes which mitigate the invalidity of acts. One has processes such as acquiescence, lapse of time, estoppel, and similar ones, which might have had the effect of rendering valid resolutions which might originally have been invalid for non-compliance with Article 27, paragraph 3.

It is, in my respectful submission, not for us to go into all of these nor would we be physically able to do so but I would just make the point that it does not follow from our argument that all these other resolutions are now invalid; all we are saying and all we are asking the Court to find is that the particular resolutions with which we are now concerned are invalid. The fate of the others is not now before the Court and it does not follow *ipso facto* that they must also necessarily be invalid.

For the reasons I have advanced, Mr. President, we contend that our arguments concerning Article 27, paragraph 3, still stand and that the relevant resolutions of the Security Council are, by reason of non-compliance with that Article, void of effect. This then deals with the first part of our argument concerning the formal validity of Security Council resolutions. We still have certain further contentions on that subject, relating to the provisions of Article 32 and to the proviso to Article 27, paragraph 3.

ORAL STATEMENT BY MR. WIECHERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. WIECHERS: Mr. President, honourable Members of the Court, in view of the oral submissions made by the distinguished representatives of the Secretary-General and other member States, it has become necessary for the Government of South Africa to give further attention to the contentions contained in its written statement, as regards the scope and applicability of the proviso to Article 27 (3) and of Article 32 of the Charter of the United Nations. We shall show that, in the oral submissions presented to this Court, the contentions raised by the South African Government have not been met and that, for the rest, these submissions are based on an incorrect interpretation of the meaning and scope of these Articles. For reasons of clarity, I propose, in this respect, briefly to summarize the contentions advanced by the South African Government. Thereafter, the submissions made by the other distinguished representatives will be dealt with.

Firstly, the submissions made by the South African Government: the South African Government, in its written statement, submitted that there was a dispute between South Africa and other members of the Security Council and/or the General Assembly at the time when Security Council resolutions 264, 269, 276 and 284 were adopted, and as a result thereof:

(a) Members of the Security Council who were parties to that dispute should, in terms of Article 27 (3), that is to say the proviso to this sub-section, have abstained from voting (in this respect, see Chap. III; para. 41, of written statement); and

(b) South Africa should, in terms of Article 32, have been invited to participate in the proceedings of the Security Council antecedent to the passing of the above-mentioned resolutions. (I refer you to Chap. III, paras. 51-55, of written statement.)

None of these particular objections raised by the South African Government was dealt with by the Secretary-General or participating States in written statements to this Court. In their oral representations, some representatives did, however, deal with them. All of them who dealt with these objections in the oral submissions suggested to the Court that it should not uphold the objections raised by the South African Government.

It should be noted that the mandatory nature of the provisions was not in any manner contested. Indeed, the distinguished representative of the Secretary-General expressly conceded the mandatory character of Article 32, and this he did at page 41, *supra*. The contentions were mainly directed at denying the existence of a dispute within the meaning of the provisions in question.

Before I come to deal with this main argument, I would like to answer some subsidiary arguments raised by the distinguished representatives.

In his discussion of the applicability of Article 32, the distinguished representative of the Organization of African Unity referred, at page 92, *supra*, to the Advisory Opinion of this Court concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, page 10 at page 71, where it was stated that:

> "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 . . . to obtain enlightenment as to the *course of action it should take.*"

Now, with respect, the relevance of this quotation is not altogether clear. It has never been suggested that South Africa, by not being invited to participate in the discussions of the Security Council, prevented or endeavoured to prevent the Court from giving an advisory opinion. What has been contended is that the organ which asked for the advisory opinion, that is, the Security Council, by its own non-compliance with the provisions of the Charter, has not made a valid request for such an advisory opinion.

The distinguished representative of the Secretary-General also raised other, more or less independent, considerations, namely:

Firstly, that the Security Council is under no obligation to invite a non-member to participate if the matter under discussion has not as yet been determined to be a dispute—I refer you to page 42, *supra.* The rather startling result of this argumentation would be that if the Security Council chooses not to determine the nature of the matter which is under its discussion, or if the Council's attention, for some or other reason, has not been drawn to the nature of that matter, then Article 32 ceases to apply—notwithstanding the fact that Article 32 is an objective legal rule with mandatory force, and also notwithstanding the fact that the matter under discussion might very well be in the nature of a dispute. Stated tersely, the argument of the representative of the Secretary-General would be that if the Security Council does not want, or forgets, to apply Article 32, that Article simply has no need to be applied, even though, objectively, there does exist a dispute. This is surely in direct opposition to his recognition of the mandatory character of Article 32.

Secondly, at page 42, *supra*, the representative of the Secretary-General then goes on to state that:

> "The characterization of the question brought to the attention of the Security Council—the consideration of which led to the adoption by the Council of the resolutions rejected by South Africa—appear in the communications addressed to the Security Council and in the requests for meetings. [And that] in no such communications and requests, nor during the debates, has the question of Namibia been referred to as a 'dispute'."

Therefore, he contends, it is not a dispute, but a situation. This, with respect, is another startling argument. Surely the neglect of the Security Council, for the reason stated here by the representative of the Secretary-General, to apply the provisions of Article 32, can never be advanced as a justification for the Security Council's non-compliance with the peremptory provisions of that article.

Thirdly, at page 42, *supra*, the representative of the Secretary-General states:

> "Perhaps even more significantly, South Africa never demanded, at any relevant time, that it be invited under Article 32 of the Charter to participate in the relevant discussions."

It is very difficult to understand the relevance of this remark and also his conclusion at page 43, which goes to the same end:

> "Article 32 of the Charter was therefore not applicable and, until the present case, South Africa has not itself argued that it was so applicable."

How can these remarks be reconciled with his argument at page 41 that there is no disagreement on the mandatory character of Article 32 and that the Security Council has the obligation to invite a State which is a party to a dispute to participate? Surely, if the matter of South West Africa was a dispute, the Security Council had to invite South Africa to participate, whether she demanded it or not.

In passing, it must be remarked that the representative of the Secretary-General, at page 42, *supra*, also, reverted to Article 31 of the Charter and Rule 37 of the provisional rules of procedure of the Security Council in order to mention that:

> "Except for rare instances, the invitations to participate in the debate on the substance of the matter have been granted, upon request, under Article 31 of the Charter or under Rule 37 of the provisional rules of procedure of the Council."

And then the distinguished representative went on to say:

> "There is no doubt that in that case the Security Council, if it had considered that the interests of South Africa were specifically affected, would have agreed to South Africa's participation."

Again, the relevance of this argument is not quite clear. The fact that the South African Government did not avail itself of its opportunity, according to the provisions of Article 31, can surely not deprive it of its right to be invited to participate under Article 32, which has a mandatory character.

Having dealt with these subsidiary arguments, I now come to the main reason advanced by the distinguished representatives why the provisions of Article 32 and the proviso to Article 27 (3) did not find application in the proceedings of the Security Council antecedent to the adoption of resolutions 264, 269, 276 and 284. The gist of the representations is, apparently, that the South West Africa question, in the way it came before the Security Council in 1968, 1969 and 1970, was not a dispute between legal subjects, that is, States, but an abstraction labelled a "situation". This being the main argument used by the distinguished representatives, I shall now proceed to deal with the distinction between a dispute and a situation for the purposes of Article 32 and the proviso to Article 27 (3).

In doing this I shall refer briefly to the Judgment of this Court, to the facts on which South Africa contends that there is a dispute, the opinion of one eminent publicist, and the practice within the Security Council itself.

I. Firstly, the Judgment of the International Court of Justice of 21 December 1962. The conflict which led to the contentious proceedings between Ethiopia and Liberia on the one side, and South Africa on the other side, involved the *presence and actions of South Africa in the Territory of South West Africa.* That basic conflict contained questions such as the continuance of the Mandate and the succession of the United Nations to the supervisory powers of the League Council, and the obligations of South Africa towards other States and the inhabitants of the Territory.

As has been argued in the written statement of the South African Government, in paragraph 41, Chapter III, I, p. 417, if it is accepted that the Judgment of this Court on the Preliminary Objections (*South West Africa* cases, *First Phase, I.C.J. Reports 1962*, p. 318), is correct, then it must follow that the question pertaining to the legal status of South West Africa and the attendant matters mentioned above rest on a dispute between South Africa and other Members of the United Nations.

Allow me in this respect to draw the attention of the Court to the written statement of the South African Government, Chapter IV, paragraphs 31 to 38, where the dispute underlying the 1962 contentious *South West Africa* cases is explained in detail.

Turning to the decision itself, at pages 343 and 344 of the 1962 Judgment, the Court found that any disagreement between South Africa and other ex-members of the League of Nations as to the scope and the applicability of the provisions of the Mandate—thus also a disagreement on the question of how the moral and material well-being of the inhabitants of the Territory should be promoted—constitutes a justiciable dispute for the purposes of Article 7 of the Mandate.

In its preliminary objections, the South African Government contended, in 1962, that the matter brought before the Court had been dealt with only in the United Nations and that it could consequently not be said, within the meaning of the compromissory clause of the Mandate, to be a dispute which was incapable of settlement by negotiations between South Africa and the applicant States. This, of course, bears on the provisions of the compromissory clause, Article 7 of the Mandate. *A propos* of this contention, the Court held, at page 346 of the Judgment:

> "The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition." *(I.C.J. Reports 1962.)*

The latter finding of the Court was further explained in the separate, supporting opinions of Judges Bustamante and Jessup. In his separate opinion, the former Judge remarked:

> ". . . for several years the two Applicant States, *in their capacity as members of certain organs and committees of the United Nations*, have maintained points of view fundamentally opposed to those of the Mandatory with regard to the interpretation of various provisions of the Mandate and with regard to the application of the Mandate by the Mandatory in a series of concrete cases. A dispute could not have been more clearly established." (*Ibid.*, p. 381, italics added.)

Judge Jessup, at page 436, remarked:

> "An international organization may indeed be something more than the sum of its parts, but, to change the metaphor, one must not overlook the trees when one sees the forest.
>
> There are numerous instances in the history of the United Nations where it might be said that certain States which are in a minority in the voting on some action to be taken by the Organization, have a 'dispute' with the Organization, . . ."

that is to say, a dispute with the Organization. And then Judge Jessup goes on, and I would like to emphasize this:

> ". . . but it cannot be doubted that in many of these cases the States in the minority also have a 'dispute' with certain States in the majority and that the latter States can easily be identified" (*ibid.*, p. 436).

At this stage I would like to emphasize, as Mr. de Villiers did in support of the application for the appointment of an *ad hoc* judge in the present proceedings, that there was a divergence amongst the Members of the Court on the question whether manifestations within the United Nations were sufficient for constituting a dispute within the meaning of the particular compromissory clause. Even if one supports the minority view, as South Africa did and still does, this becomes immaterial for present purposes since the matter has now gone very much further. In many important instances, and previous to the Security Council's dealing with the matter in 1969, the differences of opinion and the conflicting attitudes have extended to the direct inter-State level. An explanation of aspects of this development is to be found in the *compte rendu* of this Court of its closed session, pages 3 and following, *supra*, and I do not want to repeat them here.

Before I deal with the above-mentioned *dicta* of the Court, it would be worthwhile to recall the content, that is to say the subject-matter of the dispute which the Court in 1962 found to exist between South Africa and the applicant States. The content of that dispute was the continuance of the Mandate, in other words the status of the Territory, and the obligations of the Mandatory vis-à-vis the inhabitants, especially the promotion of their material and moral well-being, and the obligations of the Mandatory towards the United Nations and its Members, particularly as regards the submission of the Mandatory to supervision by the General Assembly.

As I have already indicated, the representative of the Secretary-General, in his oral submissions, suggested that the dispute between South Africa and the other member States of the United Nations, which the Court in 1962 found to exist, by 1969 resolved itself into an abstract "situation". At page 43, *supra*, that representative averred: "This [the matter before the Security Council in *1968, 1969 and 1970*] *was a question fundamentally different from that which* had been before the Court in the contentious *South West Africa* cases."

Although not disputing the Court's finding that "the number of parties to one side or the other of a dispute is of no importance" and that "it depends upon the nature of the question at issue"—cf. the Judgment of 1962 in *I.C.J. Reports 1962*, at page 346—the distinguished representative of the Secretary-General claimed that, and I quote his exact words, "*the nature of the question* regarding South West Africa, has changed fundamentally since 1966".

However, if one analyses the Security Council resolutions pertaining to South West Africa of the years 1969 and 1970—and I think only those two years are important here to note because all the Security Council resolutions which are of importance in the present case have been adopted during those two years—and also General Assembly resolution 2145 of 1966, on which they were founded, one still finds that the questions upon which South Africa and other Members of the Organization differ remain basically the same, although admittedly, some aspects have, over the years, been added. It can be stated that exactly the same dispute which underlay the *South West Africa* cases in 1962, led up, after the Judgment of 1966, to the purported revocation of the Mandate by the General Assembly and the ensuing resolutions of the Security Council, in regard of which the Court is now being asked to give an opinion.

To put it in other words: the crucial and over-all aspect of the dispute was by 1969, as it is now in this Court, whether South Africa's continued presence in, and administration of, South West Africa, was lawful or unlawful. This depended essentially on the validity of the purported termination of the Mandate. That purported revocation rested on the disputed assertions of general violations by South Africa of its essential obligations. So this basis of the dispute

was still very much the same as the basis for the dispute which existed from 1960 up to 1966 when this Court dealt with the *South West Africa* cases. Since then, other elements for dispute came to be added, that is, disagreement as to the power of the General Assembly and the Security Council to take the actions which they did. The matter was fully dealt with by Mr. de Villiers in the closed hearing and I wish to refer particularly to the summaries at pages 9 and 10, and 16 and 17, *supra*.

It is therefore submitted that the dispute which was before the Court in 1962 remained fundamentally the same, although not in all the exact trimmings. The fact that the whole problem of South West Africa since October 1966 has gained in dimensions and complexity, only emphasized the growth of the original dispute; it can in no way be said that that dispute has thereby been eliminated or ceased to exist.

To summarize, our submission is that the present dispute which concerns the legality or not of South Africa's presence in South West Africa, is a dispute which finds its origin in and indeed developed from the same dispute that was before the Court in 1962 and, of course, in 1966. The basic components of that dispute remain the same, although its development within the United Nations and on an inter-State level has brought many new causes for divergent and conflicting view-points, for example, conflicting view-points concerning the powers of the organs of the United Nations, the legal validity and force of General Assembly and Security Council resolutions and the duties of member States to give effect to these resolutions.

Mr. President, Members of the Court, in its final analysis the primordial element of the dispute of 1962 which, in our submission, was and still is the promotion of the material and moral well-being of the peoples of South West Africa, remained exactly the same when the matter of South West Africa was discussed and decided upon by the Security Council in the years 1969 and 1970. Whatever the technical issues about this may have been on a particular occasion, it would simply not make practical common sense to deny the existence of the basic dispute about this matter between South Africa and other United Nations Members over a very long period of years.

II. Secondly, I would now like to refer to the opinion of an eminent publicist as regards differences between a dispute and a situation for the purposes of Article 32 and the proviso to Article 27 (3).

The late Professor Georg Dahm in his monumental *Völkerrecht*, Volume II, 1961, writes at page 228 as follows about the distinction between a dispute and a situation for the purposes of the proviso to Article 27 (3) and Article 32:

> "The concept of a situation is wider than that of a dispute. Every dispute rests on a situation, but every situation is not a dispute-situation. A dispute exists in the fact that there are two parties [or more of course], who hold conflicting convictions. The one demands a thing, which is formulated more or less concretely and which is denied or refused by the other party." [I just want to remark that this is my own free translation from the German.]

Applying this distinction to Security Council resolutions 264, 269, 276 and 284, it is clear that although they could also largely be said to rest on a certain situation, it is moreover patent that this situation has all the characteristics of a dispute-situation. This contention is clearly borne out by the fact that all these resolutions reflect and indeed find their *raison d'être* in the conflicting views of South Africa and other members of the Security Council and/or the General Assembly.

It should also be noted that Professor Dahm, at page 228 of Volume II of

his work, is of the opinion that the proviso to Article 27 (3) should be given an extensive application, even though of course it might result that the Security Council, for that reason, finds itself unable to exercise its powers under Chapter VI. The reason for this view, although not expressed by the eminent author himself, is, in my submission, altogether clear: it is namely the consideration, which is good in law as well as in equity, that the Security Council should not express itself on a dispute if more than six of its members are themselves parties to that dispute. The fact that so many of its members have, in some way or other, committed themselves may affect the soundness and impartiality of the recommendatory resolution which has to be passed by the Security Council under Chapter VI.

III. Thirdly, I should like now to discuss briefly the practice of the Security Council as regards the distinction between a dispute and a situation for the purposes of the proviso to Article 27 (3) and Article 32.

In examining the practice of the Security Council itself, it is possible to quote from many debates during the course of the years in which members expressed themselves very clearly that the Council should never simply assume that a matter coming before it is a situation rather than a dispute without having heard the parties concerned. It will suffice to quote one or two statements to this effect.

On 10 December 1946 Judge Padilla Nervo, who was then the Mexican delegate to the Security Council, in a discussion of the Greek complaint concerning the situation in Northern Greece, remarked as follows:

> "In London I stated that it would be unfair to any State if this Council intended to decide the secondary question of whether there was a dispute or a situation solely on the basis of the complaint or letter sent by the complaining State, which would be at liberty to call the case a situation, thereby eliminating the possibility of the other State's being heard in accordance with Article 32.
>
> My idea is that those States [in that case it was Albania and Bulgaria] should be heard. If, after they have been heard, this Council decides that this is just a situation and that, therefore, those States should not take part without a vote in the discussion, that is another matter. But I believe that we cannot decide the secondary question of whether or not this is a dispute." (I refer to the *SC, OR*, lst Year, Second Series, at p. 535.)

Then towards the end of the debate on the same question Mr. Padilla Nervo sounded a warning: "I think this Council must not assume anything. This Council could act objectively only after hearing the facts, and we cannot hear the facts if the parties concerned are not called to this table." (*Ibid.*, p. 541.)

Mr. Padilla Nervo, in this statement, did not indicate what criteria the Security Council, for purposes of Article 32, should apply to determine whether a matter is a dispute or situation, and he also did not express himself on the question whether such a determination would be final and binding on members, but he did make it clear that before the Security Council makes such a determination the parties concerned should be heard, thereby emphasizing the importance of full compliance with the mandatory provisions of Article 32.

The second example from the practice of the Security Council which I would like to refer to we find in the Security Council debate of 16 August 1951 on the Suez question where the Egyptian delegate, quoting the delegate of the United Kingdom, Mr. Bevin, in a previous debate, gave the following rather concise definition of a dispute for purposes of the proviso to Article 27 (3):

"If a State makes a charge against another State and the State against which it is made repudiates or contests it, then there is a dispute" (*SC, OR*, 553rd Meeting at p. 23).

The general tenor of these remarks and of the opinions expressed by members of the Security Council during all the years was always that: *Firstly*, for the purposes of Article 32, the Security Council should not simply assume, when a matter comes before it, the existence of a mere abstract situation; furthermore that it is, particularly in view of the mandatory provisions of Article 32, incumbent on the Security Council when a matter comes before it, to invite to hear the parties in order to determine whether a dispute does exist or not; *Secondly*, for the purposes of the proviso to Article 27 (3), a member should abstain from voting if, previous to the Security Council's dealing with a given matter, he has acted in that same matter in such a way that his actions have been contested or repudiated by another member of the organization.

I deliberately use the word "act" in order to signify that I mean something more than a mere objective expression of opinion or difference of opinion. By using the word "act" I mean something to which—and I do not try to be exhaustive in this regard—there attaches an element of demand, accusation, challenge or repudiation of title, or authority, or the like.

Mr. President, honourable Members of the Court, I now come to my conclusion.

In the light of the aforegoing, it is submitted by the South African Government that the Security Council, in not allowing South Africa to participate in its discussions prior to the adoption of Security Council resolutions 264, 269, 276 and 284, violated the mandatory provisions of Article 32 of the Charter. It is the submission of the South African Government that to discard the mandatory provisions of Article 32 because a matter is simply labelled to be a "situation" would amount to sophistry in its most abstract and cynical form.

It is also submitted, for the reasons advanced in the written statement of the South African Government as well as those supplied by me here today, that the 13 members of the Security Council who participated in the discussions and took part in the voting on these resolutions have, through their previous deeds and the expression of their views, revealed themselves to be parties to a dispute of which South Africa is an opposite party and that they should therefore have abstained from voting. In this regard I refer to their participation and voting in the General Assembly on resolution 2145 which purported to revoke the Mandate and, as has been shown in the oral submission by Mr. de Villiers to the fact that many of these States also on a direct inter-State level carried this dispute much further and that therefore this dispute at a practical, inter-State level resulted in some very definite clashes of opinion and conflicting views with South Africa on the very same matter, i.e., the presence of South Africa in the mandated territory.

To conclude, I wish to repeat that the dispute which existed in 1962, and which then led this Court to pass judgment on the existence of such a dispute between South Africa and other Members of the United Nations, still exists today and that, although the original dispute has gained in proportions during the last years, not only in the United Nations Organization itself but, as I have said, also on a direct inter-State level, it is still that very same basic divergence of conflicting views on the promotion of the material and moral well-being of the inhabitants of the Territory which forms the basis of Security Council resolutions 264, 268, 276 and 284.

Our submission is that Article 32 and the proviso to Article 27 (3), although

superficially they may seem to be in the nature of formal procedural provisions, in truth entail much more, as has been pointed out by my learned friend Mr. Grosskopf. They present a basis on which members have agreed to submit their disputes to the Security Council. As such they are binding conditions under which the Security Council can exercise its powers for the pacific settlement of disputes and the maintenance of world peace. If the Security Council does not fulfill these conditions, it does not simply neglect rules of procedure but it in fact transgresses its powers under the Charter.

Mr. President, honourable Members of the Court, by baptizing the South West Africa dispute, which confronts South Africa with other Members of the United Nations Organizations and which has evidenced itself on many levels over the course of many years, simply as a situation, Mr. Stavropoulos did not dispense with the objection raised by the South African Government in this respect. Allow me to conclude, perhaps in a lighter vein, this explanation of mine by quoting the Russian delegate, Mr. Gromyko, at the Security Council meeting of 10 December 1946, during the debate on the same question which we mentioned before, i.e., the Greek complaint concerning the situation in Northern Greece. He said "I do not think that it would be appropriate for us to follow the example of one of the characters of the French writer Dumas. This personage wanted to eat meat on a day in Lent and killed a chicken. He roasted it and ate it, but before doing so he baptized it and called it a fish. Of course, the chicken did not become a fish as a result of this, nor will a dispute become a situation because the Greek representative calls it a situation." (*SC, OR*, First Year, 2nd Series, p. 537.)

The Court rose at 5.50 p.m.

NINTH PUBLIC SITTING (23 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. VIALL

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. VIALL: Mr. President, Members of the Court, I turn today to the question of the substantive powers of the Security Council, the validity or otherwise of their exercise in the resolutions relevant to this case and the effect and consequences, if any, of that exercise. These matters, Mr. President, were dealt with in Chapter V of our written statement and we showed there that even if the relevant resolutions of the Security Council were to be regarded as formally valid, which of course is not conceded, nevertheless they were *ultra vires* the Council on substantive grounds and thus of no legal consequence. And then we went in our written statement still further and showed that even were they to be regarded as both formally and intrinsically valid, they could have no binding consequences for States, but could at most be recommendatory in nature.

Some of our contentions in this connection have been challenged by various governments and organizations in their written and in their oral statements presented to the Court. With all due respect, we submit that the arguments of these governments and organizations do not bear scrutiny. I say "arguments", Mr. President, but I must qualify that word, for in many cases the contentions consist merely of a bare statement unsupported by any argument or any authority whatsoever. Nevertheless, the points have been raised and I must deal with them.

I shall briefly indicate to the Court the order in which I propose to do this.

Firstly, I shall consider the contention that the Security Council acted independently of, or in concert with, the General Assembly in order to terminate the Mandate.

Secondly: the contention that the Council acted under Chapter VII of the Charter and, more specifically, Article 41.

Thirdly: the contention that it acted by virtue of certain residual powers contained in Article 24 of the Charter.

Fourthly: that it acted under Chapter VI and, more specifically, Article 36 of that Chapter.

Lastly, I shall consider the effects and consequences of the Council's resolutions, assuming them to have been validly adopted.

The first point then, Mr. President, with which I shall deal, is the proposition that somehow or other the Security Council, in adopting its various resolutions, acted either independently of or in concert with the General Assembly, in order to terminate the Mandate.

Thus it is stated that, in the first place, the Council *confirmed* the termination of that Mandate by the Assembly, and I refer here to the written statement of the Government of Finland (written statements, I, at p. 371) and the oral statement of the distinguished representative of the Organization of African Unity to be found at pages 98-99, *supra*.

Secondly, it is said that even if the Assembly's termination was legally defective, the subsequent action of the Council cured the defect and invested the termination with legal validity. There we have the written statement of the Government of Nigeria at page 895 in the written statements, I, and the oral statement of the distinguished representative of Pakistan at page 142, *supra*.

Thirdly, we have the proposition that the General Assembly and the Security Council, acting together, could terminate the Mandate even if the General Assembly, acting alone, could not do so. That proposition is to be found in the written statement of the Government of the United States at page 877, I, and in the oral statement of the distinguished representative of the Secretary-General at pages 52-53 *supra*.

Mr. President, these are startling propositions indeed, but the fact remains that they have been made. Now, I would refer the Court only to the following passages from the various statements submitted in this connection.

One is the written statement of the Government of Nigeria at the place I have just indicated, where it is stated:

> "Even if the General Assembly resolution 2145 (XXI) were to be regarded as defective by itself, it has acquired the force of a Security Council resolution by its adoption and reaffirmation by and in the following Security Council resolutions . . ." (written statement, I, p. 895).

Then operative paragraph 1 of resolution 264 and operative paragraph 3 of resolution 269 are quoted, and reference is also made to resolutions 283 and 276, apparently to show the truth of the main statement.

Much the same contention was voiced, Mr. President, by the distinguished representative of Pakistan, who said in his oral statement:

> "It is submitted that the General Assembly resolution 2145 (XXI) of 27 October 1966 was of a binding nature. In any case defect therein, if any, was certainly cured by the subsequent Security Council resolutions which confirmed the termination of the Mandate. Even in the general case the General Assembly resolutions can become binding when the Security Council adopts them in its decisions." (*Supra*, p. 142.)

Next there is, in the written statement of the United States Government, this passage:

> "If there were any doubt that the General Assembly alone could do so [that is, terminate a mandatory's authority], surely the General Assembly and Security Council acting together could make such a decision; both those organs have decided that South Africa's rights under the Mandate have been terminated." (Written statement, I, p. 877.)

Finally, there is the oral statement of the Secretary-General to which I wish to refer, in which he too appears to consider that the mere endorsement by the Security Council of resolution 2145 (XXI) would have the effect of rendering it valid. I refer here to page 53, *supra*, where the distinguished representative is reported as follows:

> "It may be recalled that of the two States, South Africa and Portugal, casting negative votes on resolution 2145 (XXI), the latter advanced as one of its arguments that the resolution went beyond the competence of the General Assembly, that under the Charter, the Security Council is the decision-making organ. Whatever legal questions one may have had

concerning the right of the General Assembly to act alone, or the right of the Security Council to act alone—and I must emphasize that in the view of the Secretary-General there can be no doubts on this point—it cannot be denied that the combined action of both principal organs with respect to Namibia is effective beyond any constitutional or legal challenge."

That, Mr. President, is indeed a startling statement—"it cannot be denied that the combined action of both principal organs with respect to Namibia is effective beyond any constitutional or legal challenge"—where there is some doubt as to whether the prior organ would have had the power under the Charter to do as it did.

Now the first thing that strikes one about all these statements is that they are that, and nothing more. They are made without any attempt whatsoever to substantiate them. They ignore completely the full argument of my Government in Part B, of Chapter V of our written statement, I, and I refer here to paragraphs 6 to 15. In Part B, we set out to show that Security Council resolution 276 of 1970, like the other relevant resolutions of the Council, is based entirely upon the decision of the General Assembly in paragraph 4 of resolution 2145 (XXI) to terminate the Mandate over South West Africa, to deny South Africa any other right to administer the Territory and to place it under the direct responsibility of the United Nations. No attempt is made by any of the participants in these proceedings to meet or refute any of the information given in Part B of our statement, or the conclusions clearly flowing from it.

Mr. President, the most important first point I wish to underscore, and this with reference to an undisputed record, is that the essential dependence of the Security Council's action upon the prior action of the General Assembly appears clearly from the Council's own evidence as to what it was doing or purporting to do. It appears, Mr. President, in both a positive way and in a negative way.

Let us, first of all, look at what the Council did *not* do, or did not purport to do. It did not purport to investigate or consider, firstly, the question of whether there was, or in 1966 had been, justification for terminating the Mandate for South West Africa. It did not investigate or consider whether the General Assembly had the legal right or power to take a termination decision. Thirdly, it did not investigate or consider whether, if the Security Council had been asked to do so, it would have been within its powers to terminate the Mandate.

In the result it is not surprising to find that the Security Council did not purport to terminate the Mandate itself or to confirm anything the General Assembly had done in that regard.

Stated positively, what the Security Council did was to assume or accept, without question or investigation, that the General Assembly's decision was justified, valid and binding, and to proceed upon that basis with a view to implementing that decision.

The evidence of this is clear and unmistakable. It is supplied both by the terms of the relevant resolutions themselves and from the debates and the correspondence preceding the adoption of those resolutions. Mr. President, without repeating the contents of all those documents, already dealt with in our written statement, I would look again at some of the main points.

Thus, for example, the 46 States which in March 1969 brought the question of South West Africa to the notice of the Security Council themselves recognized that it was the Assembly which had terminated the Mandate, or at any rate purported to have done so. In their letter to the President of the Council, which was referred to in paragraph 8 of our Chapter V, these States wrote:

"Your Excellency and the members of the Security Council will recall that the General Assembly, by its resolution 2145 (XXI) of 27 October 1966, terminated the mandate of the South African Government to administer Namibia (South West Africa), and decided that 'henceforth South West Africa comes under the direct responsibility of the United Nations'."

You will observe, Mr. President, that they say it was the General Assembly, by its resolution 2145, which terminated the Mandate of the South African Government.

Then there are Security Council resolutions 245 and 246 of 1968 which were not dealt with in our Chapter V but which have been adverted to in the present context by, for example, the distinguished representatives of the Organization of African Unity and of the Secretary-General.

The first preambular paragraph of resolution 245 of 1968 reads:

"*The Security Council,*

Taking note of General Assembly resolution 2145 (XXI) of 27 October 1966, by which it terminated South Africa's Mandate over South West Africa and decided, *inter alia*, 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, . . ."

Then, Mr. President, there is the second preambular paragraph of resolution 246 which reads:

"*The Security Council,*

. . . . . .

Taking into account 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."

The second preambular paragraph of Security Council resolution 264 of 1969 is in exactly the same words. Operative paragraph 1 of that resolution reads:

"*Recognizes* that the United Nations General Assembly terminated the mandate of South Africa over Namibia and assumed direct responsibility for the territory until its independence."

Again, in resolution 276 of 1970, the Council, in preambular paragraph 2, 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."

Notice, Mr. President, the change of wording there from General Assembly to United Nations.

And in preambular paragraph 3 of the same resolution, the Council reaffirmed its 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".

In adverting, Mr. President, to the change of wording to which I have just referred, any suggestion that by the substitution of the generic term "United Nations" for "General Assembly" in preambular paragraph 2 of resolution

276 the Security Council intended to convey that it was now itself acting to terminate the Mandate, perhaps in conjunction with the General Assembly, is at once dispelled when reference is had to preambular paragraph 2 of its next resolution on South West Africa, that is, resolution 283 of 1970, for that paragraph reads:

> "Reaffirming its resolutions 264 (1969) and 276 (1970) by which the Security Council recognized the decision of the General Assembly to terminate the mandate of South West Africa and assume direct responsibility for the territory until its independence . . ." [I need not continue further with that quotation.]

What I have said serves to show that at no time did the Security Council even purport to terminate the Mandate itself. All it did was to *recognize* the action of the General Assembly. It *took note* of General Assembly resolution 2145, it *took it into account* and it *reaffirmed* it. In its ordinary meaning the word "affirm" means, and I quote from the *Concise Oxford Dictionary*, 5th edition: "assert strongly, aver, make formal declaration", but it does not mean "confirm".

It is also clear that it was the view of those members of the Security Council who participated in the debates leading to the adoption of resolutions 264 and 269 of 1969, and of 276 of 1970, that the Security Council was not being called upon either to terminate the Mandate or to confirm that termination. Here I would merely refer to one example in connection with each of these resolutions.

Thus in the case of resolution 264 of 1969 the representative of Finland stated that the starting point of the Council—

> ". . . must, of course, be the recognition of the fact that the United Nations General Assembly has terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence. Adoption by the Security Council of a resolution expressing such recognition . . . will mean that for the first time the authority and the power of the Security Council will be fully engaged in the task of translating that decision into reality."

Then in the case of resolution 269 of 1969, the representative of Paraguay said:

> "There can be no doubt that the major importance of resolution 264 (1969) of the Council lies in the express recognition of the fact that the General Assembly has terminated the Mandate . . . and that the United Nations has assumed direct responsibility for the Territory until its independence. The other provisions of that resolution have a juridical basis in that recognition."

Finally, resolution 276 of 1970, where the representative of Poland stated that the foundation of the political and legal framework for the United Nation's action on South West Africa—". . . is contained in . . . resolution 2145 (XXI) terminating the Mandate of the Republic of South Africa over South West Africa now . . . Namibia".

And furthermore, Mr. President, as we indeed pointed out in paragraph 13 of Chapter V of our written statement, it is of particular significance that at no time during the relevant Council debates did any representative deny that the resolutions of the Council were founded upon, based upon, the decision of the General Assembly which purported to terminate the Mandate. There is no

indication at all in those debates that members of the Council considered they were acting to terminate the Mandate or to provide independent confirmation of that action.

Now, Mr. President, the conclusion that the Security Council itself did not purport to act at all in the matter of terminating the Mandate, either independently or by way of confirmation of the General Assembly's action, renders it, strictly speaking, unnecessary to enquire into the question of what the Council's powers are in relation to such independent or confirmatory action, or perhaps I should say, what they would be did it exist. Nevertheless, in view of the contentions advanced by other participants in these proceedings, we must give some attention now to this aspect of the matter.

We are concerned particularly with the contention spelled out by some and merely suggested by others, that in so far as there may have been legal flaws or defects or deficiencies attaching to the General Assembly's action, these must be regarded as having been cured by the Security Council's subsequent decisions. In any enquiry as to whether the Council would have had the power to achieve such a result, had it set out to do so, two questions fall to be considered: firstly, does the Security Council itself have the necessary power whereby it could, by independent action, have terminated the Mandate without South Africa's consent and despite its objections; and secondly, if the Security Council does not have such a power could the two organs, that is to say the General Assembly and the Security Council, by joint or combined action have achieved what was legally impermissible for either of them to do acting separately?

It will be convenient, Mr. President, to deal with the second of these questions first.

It is significant that those States and organizations who contended for a positive answer to the question advanced, advanced no legal argument in support of their contention, no analysis of the provisions of the Charter, no reference to customary international law or general principles of law, or jurisprudence, or the writings of publicists—indeed nothing except bare assertion.

This is not surprising, perhaps, for it is only in bare assertion that the contentions may even be made to sound like something worth considering at all. There is, perhaps, a superficial attractiveness in the suggestion that, after all, both organs have spoken, and even though separate action may have been open to question, all objections must surely fall away when both have acted. But there, Mr. President, it ends. Once one starts to analyse the contention, its attractiveness fades, we find, very rapidly.

Perhaps a confusion of thought arises from an unconscious assumption that one is dealing here with a situation akin to that in a federal State, for example, where the totality of the legislative powers is divided between State or provincial legislatures, on the one hand, and the central federal legislature, on the other. In such a situation it is conceivable that certain legislative action may lie somewhere along the border-line of the division of powers, so that it is questionable whether the action falls within the competence of the provincial or of the federal legislature; and it is conceivable too that in such cases combined action by provincial and federal legislatures might sometimes remove any doubts which might otherwise pertain to the separate action of either. But such a possibility, Mr. President, would flow from the basic premise that the power must reside in either the one legislature or in the other, or partly in one and partly in the other, the totality of possible legislative powers within the federation having been divided between the two of them.

Now it will be immediately apparent that this basic premise does not apply to the General Assembly and the Security Council of the United Nations.

There is just no such thing as a division of the totality of possible powers between these two organs. Each was granted rigidly limited and circumscribed powers only, and there is a vast field of potential actions falling outside the competence of either or of both of them. At the time when the Charter came into operation, nobody could surely have suggested that it would be competent either for the General Assembly, or for the Security Council, or for the two of them combined, to ordain, for example, that the year is to consist of 10 months or the day of 20 hours—and one doubts whether even the Secretary-General would so contend today. Consequently, there is no legal or logical basis either for saying that combined action by the General Assembly and the Security Council must necessarily be valid action, or that it must necessarily resolve doubts as to whether either could have done something alone. To put it this way, Mr. President, the question is not one of whether a power lies on the border-line of a delimitation of powers between the General Assembly or the Security Council, it is one of considering whether the power was conferred at all, upon either one of these organs, acting singly or acting jointly.

The Secretary-General, indeed, accepts as an hypothesis that a particular power may not have been granted either to the General Assembly acting alone, or to the Security Council acting alone. And he contends that even in such a case joint action could produce a valid result, apparently even so as to bind a non-consenting United Nations member State. As already stated, he does not say on what ground he contends this. Nor does he say whether by such combined action the two organs could exercise a power of binding action in regard to any subject or matter under the sun, or whether there are any limits, and if so, what these limits are.

Mr. President, in his opening statement on behalf of South Africa last Tuesday, my learned colleague, Mr. de Villiers, dealt with this contention of the Secretary-General, though only briefly. I would refer the honourable Court to pages 155-156, *supra*. Yet, although he dealt with this only briefly, little more need be said about it in this more detailed argument.

If one postulates that organ A has no power to make a binding decision on a certain matter, yet it purports to do so, then, surely, the result must be something which is either null and void or, at any rate, not binding. Now organ B comes on to the scene, and the postulation is that it, too, acting alone, has no power to make a binding decision on that matter. Surely, if it should purport to do so, either independently of the action of organ A or in confirmation of that action, the result must remain the same as before—still something which is either null and void or at any rate not binding. It would remain merely a case of two organs both acting outside the scope of their respective constitutional powers.

The only factor which could change this would be an enabling grant of power which specifically accords to joint action by the two organs, or to confirmatory action by organ B, a legal effect which is denied to separate and independent action of either organ. As Mr. de Villiers indicated, it is not logically inconceivable that such an arrangement could be made in a particular constitution; the important point is that this was not done in the Charter, and that the omission to do so was, apparently, a deliberate one.

In general, one would expect that if a constitution was intended to contain an arrangement of the kind I have just referred to, then the arrangement would be expressed in some provision or provisions of precise wording, which would carefully indicate the scope and the limits of what might be done by joint action beyond the sphere of individual action.

This, Mr. President, is *par excellence* the case where the Charter of the United

Nations is concerned. And this is so for various reasons, some of which I shall mention briefly.

There are, first of all, the general considerations, described by Mr. de Villiers the other day, of a cautious and conservative approach in the matter of granting to international organs powers of binding decision over non-consenting States. He correctly described this as a particularly sensitive area in international relations, and it will be noted that the sensitivity applies not merely to a matter of distinguishing between the functions of two organs, but in particular to the matter of granting such powers to any international body, in the first place, at all.

Secondly, against this background, it is not surprising to find that the authors of the Charter set out to describe in its provisions; expressly and as clearly and precisely as possible, the contents, the scope and the limits of the powers conferred upon the General Assembly, the Security Council, and both those organs combined, where such was intended. This third category is of particular importance in the present context.

Now, several articles of the Charter indicate what might be called the normal relationship between the General Assembly and the Security Council. They are provisions which specifically contemplate the making of recommendations by the General Assembly to the Security Council, for example, there is Article 10, in general; there is Article 11, paragraph 1, concerning general principles of co-operation in the maintenance of international peace and security; there is paragraph 2 of the same Article, concerning specific questions relating to the maintenance of international peace and security; and there is paragraph 3 concerning situations which are likely to endanger international peace and security.

The general intention here is clear: the peace-keeping function is that of the Security Council; upon it the Charter in this respect confers powers which are withheld from the General Assembly—including, in particular circumstances, a power of binding decision; so the function of the General Assembly is—after discussion, of course, and if it so resolves—no more than to bring the matter to the attention of the Security Council, with or without recommendation. It is even required to desist from making further recommendations, except at the request of the Council, while the Council is exercising its functions in respect of a dispute or situation—that appears from Article 12, paragraph 1. The contemplation here is clearly that once such matters are before the Security Council, the latter will independently exercise its functions and powers, within the limits applying thereto, whether the matters have come before it by way of recommendation from the Assembly or in some other way.

But, Mr. President, besides this normal relation, as I have termed it, there are exceptional cases of more or less combined action; combined action for which explicit provision is made. Important examples are to be found in Article 4, paragraph 2, of the Charter, and in Articles 5 and 6 concerning, respectively, the admission, the suspension and the expulsion of States as members of the United Nations. There is Article 97, concerning the appointment of the Secretary-General, and Article 109, going to the convening of a general conference of United Nations Members for the purpose of reviewing the Charter. There are Articles 4, and 8 to 12 of the Statute of the Court itself, concerning the election of judges. In the case of Articles 4, 5, 6 and 97, a power of decision is given to the General Assembly, but only upon a recommendation of the Security Council, which is therefore to consider the matter first.

In the other two instances I mention, that is, Article 109 and the relevant articles of the Court's Statute, the organs proceed separately, and according

to specifically prescribed voting requirements—two-thirds majority for the General Assembly, less stringest requirements than normal for the Security Council. But the results must concur.

The most significant aspect of all these provisions is exactly the care with which they define what may be done by joint or combined action of the two organs, as regards both the enabling aspect and the limitative aspect—this extends even to the laying down of procedural requirements which differ from one case to another; for example, the time sequence in which the organs should consider the matter, the requisite majorities and so on. All this, Mr. President, emphasizes a very important point, that such cases are exceptions—exceptions carefully devised and carefully circumscribed.

And the normal inference would be that it could not have been the intention of the authors of the Charter that there should be other, unmentioned and uncircumscribed cases in which the organs might, by joint action, do what was impermissible to each of them acting separately.

In this scheme of things, Mr. President, it is of obvious significance that neither the Secretary-General nor anybody else suggests that even a single factor exists which makes it likely that the authors of the Charter were agreed upon an implied grant of power to the organs in this respect. Of comparable significance, furthermore, is the fact that none of them suggests any definition or criteria for ascertaining the scope or limits of such a power. Far from being able to contend that such an implication goes without saying, they would be constrained to admit, I think, that the whole scheme of the Charter militates directly against it.

To conclude, therefore, in regard to this contention that the two organs have a power to do by joint action what neither can do separately, such a power could not, in the first place, exist without a specific grant—whether that grant be of a wide ambit or a narrow ambit does not matter; there must, however, be a specific grant. Secondly, there is no express grant in the Charter. It is just not there, it does not exist. Thirdly, no grant can be implied on the basis of the intent of the authors of the Charter and any such implication by the Court would, therefore, in effect have to rest on a basis of judicial legislation or at any rate on bases which, in the past, have consistently been rejected in the jurisprudence of this Court.

This brings me, Mr. President, to the further question mentioned earlier in this connection, the question:

Does the Security Council itself possess power whereby it could have terminated South Africa's Mandate had it set out to do so, against South Africa's will, and whether or not upon the recommendation of the General Assembly?

Various participants, participating governments or their representatives in these oral proceedings, seemed to assume that this must be so though nobody has addressed any argument to it.

The question really amounts to this: does the Security Council, in the absence of some special consent, have a power of making a binding determination upon a question of a territorial nature, or one concerning a territorial settlement of a title?

I must confess, Mr. President, I for one am completely at a loss to know from where in the Charter the Security Council could possibly be said to derive such a power. Such a determination, it seems to us, could only be in the nature of deciding a dispute, or disposing of a situation—action contemplated in Chapter VI of the Charter. But the powers of the Council under Chapter VI, and I think that in these proceedings this has been more or less generally admitted, are recommendatory only.

Thus the only sources for a power of binding decision to be found in the Charter are Chapter VII, which is limited to situations constituting a threat to the peace, a breach of the peace or an act of aggression and, therefore, does not extend to a territorial or title settlement *per se*; and, besides Chapter VII, possibly one or two specific cases which do not however include territorial or title settlement. Some participants rely upon a third source, a source, I may say, which is disputed by us, and that is Article 24 of the Charter. This article, too, operates only in the sphere of the maintenance of the international peace and security and it cannot, therefore, extend to a territorial or title settlement as such. Chapter VI and Chapter VII of the Charter, as well as Article 24, will be dealt with presently.

Support for this contention that the Security Council has no power of effecting a binding territorial settlement is to be found, Mr. President, in a statement made by the representative of the United States in the Security Council on 24 February 1948 in regard to the question of Palestine. That representative said:

> "The Security Council is authorized to take forceful measures with respect to Palestine to remove a threat to international peace. The Charter of the United Nations does not empower the Security Council to enforce a political settlement whether it is pursuant to a recommendation of the General Assembly or of the Security Council itself.
>
> What this means is this [he continued] the Security Council, under the Charter, can take action to prevent aggression against Palestine from outside. The Security Council, by these same powers, can take action to prevent a threat to international peace and security from inside Palestine. But this action must be directed solely to the maintenance of international peace. The Security Council's action, in other words, is directed to keeping the peace and not to enforcing partition." (*SC, OR*, Third Year, 253rd Meeting, p. 267.)

The learned authors, Goodrich and Hambro, in the second edition of their work, *The Charter of the United Nations*, at page 207, state that the Security Council apparently accepted this argument and on that basis refused to accede to the General Assembly's requests concerning Palestine. Upon reading the debates in question, I must agree with the learned authors that it was on that basis and no other that the Council refused to accept the responsibilities which the General Assembly sought to impose upon them.

If we are right in saying that the Security Council has no power of making a binding territorial or title settlement as such, it must therefore follow that the Security Council could not have terminated South Africa's title to administer South West Africa even if it in fact purported to do so. And the remaining question would be whether the General Assembly had the power to do so. A negative answer, for which we contend, would effectively dispose of the contention that South Africa is now, as a result of United Nations action, illegally in South West Africa.

However, even if one approaches the matter on the basis that General Assembly resolution 2145 was valid and binding, there are still various questions which fall to be considered concerning the validity and effect of the Security Council resolutions under discussion in these proceedings. I shall now proceed to deal with some of these in the order in which I indicated earlier on.

That brings me, Mr. President, to the question of the applicability of Chapter VII of the Charter.

In paragraph 16 of Chapter V of our written statement we submitted that it clearly appears that in adopting its relevant resolutions the Security Council did not intend nor purport to act in terms of Chapter VII of the Charter. In the first place, we pointed out that the Council did not, in terms of Article 39, make any determination, either expressly or tacitly, that there existed any threat to the peace, breach of the peace or act of aggression, and that such a determination is a condition precedent to further action under Chapter VII. In the second place, we demonstrated that it is manifest from the debates surrounding the adoption of the relevant resolutions that the Council deliberately declined to impose measures under Chapter VII and that, despite pressure brought to bear upon it by certain members of the Council who argued strongly that such measures should be imposed.

In none of the written statements in these proceedings was any argument advanced that the Council in fact acted under Chapter VII. However, although that may not appear expressly, the contention is implied, and implied fairly clearly, in paragraph 9 of the statement of the Government of Pakistan which reads in part:

> "... the measures listed in Article 41 of the Charter have already been taken by the Security Council to restore peace. The termination of the Mandate, the call on all States ... may be treated as 'measures', within the meaning of Article 41, to restore peace."

And in the final paragraph of its statement Pakistan submitted that the Court should list a number of legal consequences for States as a result of South Africa's continued presence in South West Africa, one of these being:

> "All the resolutions adopted by the Security Council in this behalf, especially resolutions 264 (1969), 276 (1970), and 284 (1970), and the decisions, calls and recommendations contained therein, are covered by Article 41 of the Charter and are valid and justified."

In his oral address to this Court the distinguished representative of Finland expressed agreement with our contention that the Security Council did not intend to act within the framework of Chapter VII of the Charter. He then went on to say:

> "Articles 39 *et seq.* are therefore not applicable in this case. It cannot be said that the situation created by the question of Namibia has yet caused 'any threat to the peace, breach of the peace or act of aggression' on the part of South Africa ..." (*Supra*, p. 71.)

The distinguished representative of Pakistan in his oral statement again appeared to contend that the relevant resolutions of the Security Council were adopted under the provisions of Chapter VII of the Charter. He referred to resolution 264, which declared that South Africa's presence in South West Africa "constitutes an aggressive encroachment on the authority of the United Nations", and he went on to say:

> "It is submitted that the Security Council has rightly categorized the continued presence of South Africa in Namibia as an act of aggression." (*Supra*, p. 142.)

He then set out certain consequences which he considered flowed from this so-called illegal act of aggression. The first consequence he mentioned was that the powers of the Security Council under Articles 39, 40 and 42 of the Charter were attracted—that is at page 143, *supra*.

It will be observed, Mr. President, that the words of the Security Council

"an aggressive encroachment on the authority of the United Nations" have become in the mouth of the representative of Pakistan "an act of aggression". Having so misinterpreted the wording of the relevant resolution, it is of course not a matter of any great difficulty to contend that the Security Council in fact acted under the provisions of Chapter VII of the Charter.

But the distinguished representative made no attempt to question the exposition contained in Chapter V, paragraphs 16-20, of our written statement. In particular, he did not attack our contention that a determination that there exists a threat to the peace, breach of the peace or act of aggression, is a condition precedent to further action under Chapter VII, nor did he attempt to demonstrate that such a determination was in fact made by the Security Council. Furthermore, he made no reference to the debates preceding the adoption of the relevant resolutions which, in our submission, are of primary importance for the purpose of deciding whether the Security Council in fact intended to act in terms of Chapter VII. I do not here, Mr. President, wish to repeat unnecessarily what is contained in our written statement, but I do deem it necessary to refer once again to certain of the more important expressions of opinion during the relevant debates.

Thus in the debates preceding the adoption of resolution 264 (1969), the representative of Zambia, who introduced the draft resolution, said:

> ". . . we should have liked the provisions of Chapter VII to come into immediate play, but we are realistic enough to recognize the social, political and economic structure of the international community".

It will be observed that this representative said in so many words that although he would have liked to invoke the provisions of Chapter VII, he realized that it was not feasible to do so.

The representative of the United States said that he was able to support the draft resolution ". . . because it wisely does not commit the Council to the narrow path of mandatory sanctions under Chapter VII of the Charter". (UN doc. S/PV.1465, p. 7.)

And the representative of the United Kingdom stated in the same document at page 41:

> ". . . *it is well that an original intention to include language from Chapter* VII of the Charter has been abandoned. I have already made it clear that my Government is not and will not be prepared to agree to commitments under Chapter VII of the Charter in this regard."

The final position of the Council in regard to the applicability of Chapter VII appears unequivocally from statements made by the representatives of Zambia and Nepal at the close of the debate. The former referred to the reasons advanced why permanent members of the Security Council were not prepared to apply Chapter VII of the Charter, and the representative of Nepal stated that the draft resolution fell far short of the requirements of the situation. It fell far short, he said, because it failed to commit the Security Council to a specific course of action under Chapter VII of the Charter.

During the debates preceding the adoption of resolution 276 (1970), there were fewer calls made for action under Chapter VII of the Charter than was the case when the draft resolution that I have just mentioned was debated, and the reason for this was quite clearly the general realization that such a course of action would be quite unacceptable to certain of the permanent members of the Council. This was clearly recognized, we submit, by the representative of Finland, who introduced the draft resolution, for he said:

"The crucial question concerns, of course, the use of coercive measures under Chapter VII of the Charter. The division of opinion on that question in the Council seems to be irreconcilable, at least for the present . . ."

In the ensuing discussion there was clear acceptance by members of the Council that the draft resolution did not represent action taken under Chapter VII of the Charter. Thus the representative of Nepal stated that the draft resolution did not initiate the appropriate measures called for in General Assembly resolution 2517 (XXIV). He went on to express the conviction of his delegation that no measure by the United Nations which fell short of those provided for in Chapter VII would be sufficient to persuade South Africa to withdraw its presence from South West Africa, and stated his realization of the difficulty in the way of securing the application of those measures by the Council. (UN doc. S/PV. 1528, p. 57.)

And the representative of the Soviet Union stated that in different conditions and with a different approach on the part of some delegations the Security Council could adopt an effective resolution in keeping with the provisions of Chapter VII of the Charter. (*Ibid.*, p. 87.)

I would also like to refer the Court to the other relevant expressions of opinion, which are set out in the paragraphs of our written statement to which I have already referred. I know of no representative who, during the course of the debates preceding the adoption of the resolutions, expressed the view that the draft resolution did in fact fall under the provisions of Chapter VII of the Charter, nor has any participant in these proceedings attempted to prove that such was in fact the intention.

I think, therefore, Mr. President, that it consequently suffices for me to repeat the submissions contained in paragraph 20 of Chapter V of our written statement, that is that it is abundantly clear that in adopting the resolutions in question the Security Council never intended nor purported to act, and accordingly did not in fact act, under Chapter VII of the Charter; that having regard to the attitude of certain of its permanent members, it could not have acted in terms of that Chapter, and that consequently the measures adopted in resolution 276 (1970) were not preventative or enforcement measures within the meaning of Chapter VII.

There is thus, in the event, Mr. President, no substance, we contend, in the contention that the Security Council acted in terms of Chapter VII in adopting its relevant resolutions.

With that, Mr. President, I come to the question, the very important question, of the powers of the Security Council under Article 24 of the Charter. In Part D of Chapter V of our written statement we showed that although Article 24 confers upon the Security Council primary responsibility for the maintenance of international peace and security, it confers no powers other than those specifically provided for in Chapters VI, VII, VIII and XII of the Charter, that is, it contains no reserve of powers, it is not a source of authority which can be drawn on to meet situations not covered by the specific grants of power in those Chapters.

We showed this by reference to the plain language of the Article itself and the probabilities regarding the intentions of those who framed the Charter. We showed, Mr. President, why the Article was inserted in the Charter, and we showed the unabashedly political and extra-legal nature of the arguments which have, from time to time, both in the Council and elsewhere, been adduced to the contrary.

Of all those governments and organizations which submitted written state-

ments to the Court, it was only the Secretary-General who saw Article 24 as the legal basis for the action of the Security Council in adopting its relevant resolutions—I refer here to his written statement, paragraphs 91 and 95. All the governments which submitted statements were silent on the matter of the source of the Security Council's authority to act in the matter, except in the case of Pakistan which, as I have shown, incorrectly invoked the provisions of Chapter VII. Then when we come to the oral statements presented to the Court, we find that the distinguished representative of the Secretary-General repeats his written contention regarding Article 24, I refer here to pages 44 to 45, *supra*. And the distinguished representative of Finland also finds in Article 24 a legal basis for the action of the Council (*supra*, pp. 72 to 73). This is, perhaps, also the attitude of the distinguished representative of the Organization of African Unity, because with reference to Article 24 he describes the powers of the Security Council as very wide indeed in regard to matters under the authority of the United Nations (*supra*, pp. 100 to 101).

So that in the result, of all the written and oral statements presented to the Court to date it is only in those of the Secretary-General, Finland and perhaps the Organization of African Unity, that Article 24 of the Charter has been invoked as the source of authority for the action of the Council.

The ground advanced in support of this invocation is that Article 24—and here I quote from page 72, *supra*, the oral statement of the distinguished representative of Finland, which sums up the matter, with respect, well—

> ". . . confers on the Council not only the specific powers set forth in Chapters VI, VII, VIII and XII, listed at the end of paragraph 2 of that Article, but also general powers, consistent with the aims and principles of the United Nations, such as may be necessary to the Council for the accomplishment of the duties imposed upon it by the Charter and in particular paragraph 1 of Article 24 thereof, which states that the Council has primary responsibility for the maintenance of international peace and security".

The distinguished representative of the Secretary-General is to the same effect, here I refer to page 45, *supra*, of his oral statement, and so, it would appear, is the distinguished representative of the Organization of African Unity, though as I say, this is perhaps not quite certain. The latter, in any case, simply ignores the arguments of the South African Government. He says merely that the Security Council is given very wide powers, very extensive powers, which the Court could take time to consider before dismissing them as not as extensive as they really are.

However, the Secretary-General and Finland seek to substantiate their contentions by reference to: firstly, the text of Article 24: secondly, the legislative history of the Article; thirdly, the object and the purpose of the Charter; fourthly, the practice of the Council; and fifthly, the opinions of recent writers. All these contentions, all these grounds, appear from the oral statement of the Secretary-General (*supra*, pp. 44-49), and of Finland (*supra*, pp. 72-73).

Furthermore, Mr. President, it is said by the Secretary-General in his written statement, paragraph 95, and I quote a passage that is apparently put forward as a sixth item:

> "That the Security Council was acting in the exercise of its powers as defined in Article 24 of the United Nations Charter is evident from the nature of the violation committed by South Africa of her international obligations, and of the measures which the Council found it necessary to take."

I propose, Mr. President, to deal briefly with all these aspects one by one.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Just before the adjournment I was dealing with the grounds upon which the Secretary-General and Finland seek to substantiate their contentions regarding Article 24 and I had just reached the stage of the first of those grounds, namely the text of Article 24.

Now, in paragraphs 22 to 24 of Chapter V of our written statement, we pointed out that paragraph 1 of Article 24 is clearly general in its nature and effect. As we said, in paragraph 22 of our statement, paragraph (1) of Article 24:

> ". . . provides in essence that the Members of the United Nations confer upon the Security Council primary responsibility for the maintenance of international peace and security. It indicates that this responsibility is conferred in order to ensure prompt and effective action by the United Nations, and that in carrying out its duties under this responsibility the Council acts on behalf of the Members of the United Nations. It says no more than that." (I, p. 502.)

There is nothing, it is submitted, in the language of this paragraph 1 that can be construed to imply any grant or reserve of powers. We showed that the whole object of inserting the paragraph was merely to emphasize the paramount importance of the Council's so-called "peace-keeping" function and its primary responsibility in this regard. We showed that the conferment upon the Security Council of primary responsibility for the maintenance of international peace and security implies no more than that the General Assembly has only a secondary responsibility in this regard. In other words, paragraph 1 is of the nature of a delimitation of functions between the Security Council, on the one hand, and the General Assembly, on the other. But it does not purport to grant powers for fulfilment of the functions, that is something which is left to paragraph 2.

As regards paragraph 2 of the Article, we pointed out that it provides in plain language that in discharging "these duties", that is, its duties under its primary responsibility for the maintenance of peace and security, the Council "shall act in accordance with the purposes and principles of the United Nations" —an obvious reference to the purposes and principles set out in Articles 1 and 2 of the Charter—and furthermore, that the "specific powers granted to the Security Council for the discharge of these duties" shall be those "laid down in Chapters VI, VII, VIII and XII".

We quoted authority for these propositions and we say again, today, that the plain language of Article 24 allows, in our submission, of no other interpretation than the one for which we contend. That wording, Mr. President, draws the clearest possible distinction between, on the one hand, "responsibilities" or "duties", to be carried out "in accordance with the purposes and principles of the United Nations"; and on the other hand, "the specific powers granted to the Security Council for the discharge of these duties". I would emphasize that word *these*, Mr. President, "the specific powers granted to the Security Council for the discharge of *these* duties".

In all logic, it seems to us that this can only mean, firstly, that the grants of powers are to be found in the chapters indicated, and secondly, that those powers are, apart from limits indicated in the grants themselves, subject to a two-fold general limitation, this being, firstly, the limitation of being granted for a purpose, that purpose being the discharge of the "primary responsibility"

or "duties" for "the maintenance of peace and security", and secondly, the limitation of being required to act, in the discharge of those duties, in accordance with the purposes and principles of the United Nations.

So that the reference in the Article to responsibilities, duties and the purposes and principles of the United Nations, far from adding to or enlarging the powers granted, serves in fact to limit them.

As we indicated in our written statement, a contention such as that advanced by the Secretary-General and by Finland would render the last sentence of paragraph 2 of Article 24 meaningless. That sentence reads, and I read it again at the risk of repetition, Mr. President: "The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII."

If Article 24 conferred the virtually unlimited powers contended for by the Secretary-General and Finland then, we ask, what possible meaning could that sentence have? It would be, Mr. President, superfluous.

It is to be noted that none of the arguments which we have adduced in regard to the text of Article 24 has been refuted, or even adverted to, in any of the submissions, written or oral, presented to the Court. All there is, is the following quotation by the distinguished representative of the Secretary-General—I refer to his oral statement at page 46, *supra*, with reference to a statement by the then Secretary-General at the 91st meeting of the Security Council in connection with the question of Trieste:

> "Regarding the text and legislative history of Article 24, the Secretary-General observed:
>
> > 'The words, "primary responsibility for the maintenance of international peace and security", coupled with the phrase, "acts on their behalf" constitute a grant of power sufficiently wide to enable the Security Council to approve the documents in question and to assume the responsibilities arising therefrom'."

It will be observed that the then Secretary-General ignored altogether the provisions of paragraph 2 of Article 24 and the true significance of the distinctions drawn between various concepts in the Article as a whole, as does the present Secretary-General, or his representative, in these proceedings. Nor are we even told how or why the two phrases referred to in the quotation constitute a grant of power at all, let alone one which would enable the Security Council to assume the responsibilities sought to be placed upon it in the case in question, responsibilities, I may add, for which no provision is made in any chapter of the Charter and which, I may add further, are sought to be applied in such a way in the present case as to be binding upon a non-consenting State.

Again we find ourselves faced with but a bare and unsupported statement.

Then, secondly, the legislative history of Article 24 is also invoked by the Secretary-General in support of his contention that Article 24 contains a reserve of implied powers said to be binding. In this connection he refers to the report of the then Secretary-General made in connection with the debate of the Security Council, again on the question of Trieste, in which the latter relied on the discussion which took place at the 14th meeting of Committee III/i at the San Francisco Conference. He stated:

> ". . . it was clearly recognized during that discussion by all the representatives that the Security Council was not restricted to the specific powers set forth in Chapters VI, VII, VIII and XII. (I have in mind, document 597, Committee III/i/30.) It will be noted that this discussion concerned a

proposed amendment to limit the obligation of Members to accept decisions of the Council solely to those decisions made under the specific powers. In the discussion, all the delegations which spoke, including both proponents and opponents of this amendment, recognized that the authority of the Council was not restricted to such specific powers. It was recognized in this discussion that the responsibility to maintain peace and security carried with it a power to discharge this responsibility. This power it was noted, was not unlimited, but subject to the purposes and principles of the United Nations."

At the relevant meeting an amendment by the representative of Belgium to paragraph 4, section B of Chapter VI of the Dumbarton Oaks Proposals, corresponding to the present Article 25, was discussed. That paragraph read as follows:

> "All members of the Organization should obligate themselves to accept the decisions of the Security Council and to carry them out in accordance with the provisions of the Charter" (Russel, *A History of the United Nations Charter*, p. 1022).

In terms of the proposed amendment by Belgium, the words "taken under Chapter VIII" were to be inserted after the words "Security Council". Chapter VIII contained provisions which eventually became Chapters VI and VII of the Charter, but did not contain any provision corresponding to the present Article 24. That was in altogether another chapter.

The representative of Belgium stated that he was fully aware that the Council had other duties in addition to those stipulated in Chapter VIII. He assumed that on a proper interpretation of paragraph 4 it was only applicable to the powers laid down in Chapter VIII, but he introduced his amendment to make it clear beyond the possibility of doubt that this was the case.

The representative of the United Kingdom, in the same discussion, stated that it might be dangerous so to limit the powers of the Security Council. He suggested that the phrase "in accordance with the provisions of the Charter" sufficiently met the point raised by the representative of Belgium and he pointed out that paragraph 1 of Chapter XII, which concerned certain transitional arrangements, provided that the States parties to the Moscow declaration should consult with one another and, as occasion arose, with other members of the Organization, with a view to such joint action on behalf of the Organization as might be necessary for the purpose of maintaining international peace and security. This implied, according to the representative of the United Kingdom, action by the Security Council even though it was not specifically mentioned. He thought that if the application of paragraph 4 were to be limited, perhaps both Chapter XII and Chapter VIII ought to be specified.

It appears that the only objection of the representative of the United Kingdom against this proposed Belgian amendment was that paragraph 4 should also be applicable to decisions taken in terms of Chapter XII, the corresponding provisions of which in the Charter are of course not relevant to our present purposes.

The representative of the Soviet Union also voiced objection to the Belgian proposal. He stated that the obligation of members vis-à-vis decisions of the Security Council should not be restricted to the functions and powers under Chapter VIII, but without indicating, however, what other powers he had in mind.

The representative of Canada expressed the view that paragraph 4 should be interpreted as referring exclusively to. Chapter VIII, whilst the Australian

representative expressed dissatisfaction with the language of paragraph 4 but for reasons which are immaterial for present purposes. No other representative took part in the debate and eventually the Belgian amendment was rejected because, although it received a favourable vote of 14 to 13, it lacked the necessary two-thirds majority. And all this is apparent, Mr. President, from the UNCIO documents, Volume II, pages 393-395.

Now, it will be at once apparent that the fact that the Belgian amendment was rejected cannot possibly be invoked in favour of a contention that the Security Council may take binding decisions under some supposed grant in Article 24 of the Charter. That Article or its provisions were not even mentioned in the debate.

It will also be seen that the only two representatives who voiced opposition to the Belgian proposal did so for different reasons. The representative of the United Kingdom appeared to be satisfied if the application of paragraph 4 should be limited to decisions taken in terms of Chapters VIII and XII of the Charter, whereas the representative of the Soviet Union stated in rather vague terms that the applicability of paragraph 4 (now Article 25) should not be restricted to functions and powers under Chapter VIII. On the other hand, the representative of Canada expressed the view that on a proper interpretation of paragraph 4 his application was limited to decisions taken in terms of Chapter VIII. It is consequently, we submit, impossible to conclude whether the representatives who voted against the Belgian proposal did so because they agreed with the Canadian representative, and consequently considered the amendment to be unnecessary, or whether they agreed with the United Kingdom representative that paragraph 4 should also be applicable to decisions taken under Chapter XII, or whether they agreed with the views of the representative of the USSR, or, perhaps, for reasons of their own.

We consequently submit that the discussions relating to the Belgian amendment do not afford any support whatsoever for the contention that it was intended that the Security Council should be able to take binding decisions in terms of Article 24 of the Charter.

There is, Mr. President, indeed, another aspect of the history of Article 24 which indicates that that Article was not intended to confer powers on the Security Council, but on the contrary to lay down limitations to be observed by the Council in exercising the powers to be granted to it. And I refer here to the wording of the relevant paragraphs of the Dumbarton Oaks proposals, which I proceed to quote from the text of the third edition of Goodrich, Hambro and Simons, at page 668. That text, Mr. President, under "Section B—Principal Functions and Powers" reads as follows:

> "1. In order to ensure prompt and effective action by the Organization, members of the Organization should by the Charter confer on the Security Council primary responsibility for the maintenance of international peace and security and should agree that in carrying out these duties under this responsibility it should act on their behalf."

Very much the same, it will be observed, as the wording of the present Article 24, paragraph 1.

Then, paragraph 2:

> "2. In discharging these duties the Security Council should act in accordance with the purposes and principles of the Organization."

And then, paragraph 3:

"3. The specific powers conferred on the Security Council in order to carry out these duties are laid down in Chapter VIII."

It will be recalled that Chapter VIII corresponds to Chapters VI and VII of the present Charter.

Mr. President, as regards the third ground advanced in favour of the reserve of powers said to be contained in Article 24—that is, that the existence of these wide powers is substantiated by the object and the purpose of the Charter—no argument is advanced in any of the submissions before the Court to take this proposition any further. There is simply the statement of the Secretary-General, at page 45, *supra*, and again at pages 48-49 of the record of his oral statement, that this is so.

The objects and the purposes of the Charter are to be found in Articles 1 and 2, setting out the purposes and principles of the United Nations. And, as we showed in paragraph 23 of Chapter V of our written statement, neither the purposes nor the principles add to the powers conferred elsewhere in the Charter upon the Security Council. Nor, as we stated in paragraph 23:

"... do they indicate, except in the most general way, the *means* by which the stated purposes are to be implemented, and understandably so, because that is something which is left to and governed by other provisions of the Charter".

We quoted examples. We also quoted authority from the jurisprudence of this Court to show that the purposes of the United Nations, broad though they may be, cannot be implemented by any means whatsoever, but only in accordance with the means specifically provided in the Charter. At the risk of repetition, I would refer the Court in this connection to the pertinent words of Judge Winiarski in his dissenting opinion in the *Certain Expenses* case (*I.C.J. Reports 1962*, p. 230), where he stated:

"The Charter has set forth the purposes of the United Nations in very wide, and for that reason too indefinite, terms. But—apart from the resources, including the financial resources, of the Organization—it does not follow, far from it, that the Organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action."

I emphasize those words, Mr. President "and means of action".

"The intention of those [the learned Judge continued] who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article I of the Charter, but that is the way in which the Organization was conceived and brought into being."

In the result, Mr. President, our arguments remain unanswered and stand unimpaired in this connection.

Then we come to the next ground, advanced by both the Secretary-General

and Finland, that is to say, the practice of the Council. I refer here to the oral statements of the Secretary-General at pages 45-49, *supra*, and of Finland at pages 72-73, *supra*, of the respective records of their statements.

Now the only practice, so called, relied upon in this connection, is the question of the Free Territory of Trieste, which was considered by the Security Council in January 1947, and the statement of one representative at the 553rd meeting of the Security Council in August 1951, in connection with the question of the passage of ships through the Suez Canal.

As regards Trieste, Mr. President, reliance is placed upon a statement submitted to the Council at its 91st meeting by the then Secretary-General of the United Nations, to which I have already referred, as well as upon certain statements made by the five permanent members of the Council during the course of the debate on the question. The statement of the Secretary-General was based largely upon the legislative history of Article 24—a question with which I have already dealt. The statements of the five permanent members, as the Secretary-General correctly points out at pages 45-46, *supra*, of the record of his oral statement, drew attention either to implicit powers or to the spirit of the Charter. It should, however, be remembered that in that case the Council was being requested to act on the basis of the consent of the interested parties, and the permanent members were in effect merely saying that the approach should not be narrow and technical in such a case.

As we pointed out in paragraphs 28 to 30 of Chapter V of our written statement, these arguments, as well as arguments in other cases dealt with by the Council in the early years of its practice, were undoubtedly political rather than legal and were, in some respects, based upon a teleological interpretation of the Charter. They sought to justify action in situations for which the Charter in truth did not provide. Apart from the statements of the permanent members, as quoted by the Secretary-General, we quoted in our written statement other statements made in this connection, statements showing the clearly political and extra-legal nature of the contentions advanced. And, as we concluded in paragraph 30 of our written statement:

> "Political arguments such as these and decisions taken in pursuance of them cannot override the provisions of the Charter or be used to supplement a supposed *lacuna* in the Charter. As the Court has said, 'the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers'. The Security Council is no exception to this rule. It has only the powers conferred upon it by the Charter and it must act in accordance with them." (**I**, p. 508.)

And in this connection, Mr. President, we may repeat here a statement made by the representative of the Soviet Union in the Security Council during the latter's discussion of the Greek Frontiers Incidents question in 1947, a statement which is as true today as it was then. He said:

> "While the Charter exists in the form in which it was adopted at the Conference [he was talking there of the San Francisco Conference] and ratified by the States, we should adhere to it and not try by giving interpretations to bypass it or act as it suits us—one way in 1945 and a different way in 1947. If we follow such a policy, our work in the Security Council will have no sound foundation and it will be difficult for us to work normally."

Now it is submitted that it can hardly be said that the action of the Council in

the Trieste case, and the statement of one representative in the Suez Canal case —the representative of Egypt—(I am referring here to the oral statement of the Secretary-General at p. 48, *supra*) constitutes authority for the proposition that the practice of the Council shows that Article 24 contains a grant or reserve of powers and that in the maintenance of international peace and security it can therefore act otherwise than in accordance with the specific provisions laid down in Chapters VI, VII, VIII and XII of the Charter.

In any case, the question of Trieste, we submit, is distinguishable from the present case. As the Secretary-General pointed out, in the Trieste case the Security Council was being asked by the Council of Foreign Ministers to assume certain responsibilities. The element of consent was thus present. That is a very different matter from the present case where the Security Council is seeking to exercise powers which, in our contention, it does not have and, against the will of a member State to impose upon it measures which that State maintains were not taken in accordance with the Charter. The element of consent cannot, of course, justify action which would, even with that consent, be beyond the powers of the Council as laid down in the Charter; but it can, perhaps understandably, lead to a practical attitude on the part of Security Council members that they should not be over-technical in declining power to help the interested parties in terms of their own consent.

Now, however, the Council is seeking to go much further even than it did in the Trieste case, because in the present case the consent is altogether lacking. Moreover, Mr. President, there is no sustained body of practice which could be invoked to support the action of the Council in the present case. All we have in reality are one or two isolated instances of action by the Security Council which occurred some 20 years ago. The legality of that action, which was political rather than legal, has never been contested in a court of law, it has been accepted in a political forum. Now, for the first time, the validity of the principle involved is being put to the test, and now for the first time the International Court of Justice is being asked to pronounce upon the matter. The actions of the Council 20 years ago may well have been invalid; they remained uncontested then because the interested parties consented. Alternatively, they may perhaps be regarded as valid, not so much on the basis of the Charter as on a sort of quasi-arbitral basis, flowing from the consent of the interested parties. However, whatever the position, those actions cannot today be invoked in support of a theory of a reserve of powers said to be contained in Article 24 and sought to be invoked against the will of a non-consenting member State.

In support of his contention the distinguished representative of Finland invoked, and I refer to pages 72-73, *supra*, of his oral statement, the "opinion of recent authorities with regard to the interpretation of Article 24 of the Charter". There follows, however, merely a quotation from page 204 of the Third Revised Edition of the work of Goodrich, Hambro and Simons, *The Charter of the United Nations*, in which the authors conclude that "the more liberal interpretation" has generally been accepted. It will be found, Mr. President, that this conclusion is based principally upon what took place in the Council in connection with the question of the Free Territory of Trieste, with which I have just dealt, and that certainly does not bear out their sweeping contentions.

Finally there is the statement of the Secretary-General contained in paragraph 95 of his written statement, that in adopting the resolutions with which we are now concerned it is evident that the Security Council was acting in the exercise of its powers under Article 24; evident, it is said, from the nature of the alleged violation by South Africa of her international obligations and of the nature of the consequent measures which the Council found it necessary to take.

With respect, we do not understand the statement or its supposed relevancy. It cannot mean that the nature of the violations and the measures taken show that this was not a case where international peace and security were endangered, since if that were the case Article 24 would clearly not be applicable at all—because that Article refers only to powers in connection with the maintenance of international peace and security. That being so, it seems to us that the statement can only mean one thing and that is, that the applicability of Article 24 is evident because no other provision of the Charter regarding the maintenance of international peace and security is applicable. That, of course, is obviously no argument; it amounts, in the present context, to saying that because Chapters VI and VII of the Charter do not apply, therefore the action of the Council must be justified under Article 24. Again, the question-begging kind of attitude which is so evident throughout in the contentions against us.

It is submitted, Mr. President, that in the event there is no substance in the contention that in adopting its relevant resolutions the Security Council acted, or could have acted by virtue of a reserve of powers contained in Article 24 of the Charter, and that the arguments adduced in support of that contention do not bear analysis. It may be pointed out that even if Article 24 had contained an implied reserve of powers, we yet fail to see where that would really lead us in this case for it is uncontested and incontestable that Article 24 is confined to the field of the maintenance of international peace and security. Such implied powers would therefore have to be confined to the purpose of the maintenance of international peace and security, and, as I will proceed to show, when dealing just now with the powers of the Council under Chapter VI of the Charter, the Council did not in adopting its resolution relevant to the present proceedings act in order to maintain peace and security but for quite different purposes.

In conclusion on this point, Mr. President, I would like perhaps to put this question of the importance of Article 24 in some sort of perspective. It is important from the point of view of those who contend against us; it is important because all are apparently agreed, with the one exception of the Government of Pakistan, that Chapter VII does not apply in these proceedings. When we come to Chapter VI we will show that there again it is generally accepted by all participants, or so at any rate it seems to us, that action under Chapter VI of the Charter cannot amount to more than a recommendation—in other words, that it cannot be binding. Therefore, if we have in this case to deal with any action of a binding nature, then that action can only have been taken under Article 24 and the arguments that have been advanced, the contentions that have been made in various statements, both written and oral, regarding Article 24 appear to us, Mr. President, to be perhaps, juridically speaking, the weakest contentions or arguments of all.

Mr. President, I come now to the question of relevancy and the requirements of Chapter VI of the Charter in the present case.

In paragraphs 32 *et seq.* of Chapter V of our written statement, we contended firstly that the powers of the Security Council, under Chapter VI of the Charter, can only be invoked for the purpose of maintaining international peace and security, and that since the real purposes of the Council in adopting the resolutions concerned were altogether different and quite unrelated to the maintenance of international peace and security, its action—the action of the Council—was not authorized by the provisions of this Chapter. And we contended secondly that the Council did not act in conformity with the provisions of the Chapter because it did not conduct an impartial and an objective investigation in order to determine whether the dispute or situation was likely to

endanger international peace and security. We furthermore contended that such an investigation is a *sine qua non* for any action that the Council may take under Chapter VI.

As regards the scope of the powers of the Council under Chapter VI, we demonstrated that the only relevant powers under this Chapter are those conferred in Articles 34, 36 and 37, since the Council clearly did not act in terms of Article 33, paragraph 2, since it could not have acted in terms of Article 38 because the parties did not so request, and since Article 35 does not confer any powers whatsoever upon the Council. Moreover, since Article 34 concerns only powers of investigation, we submitted that the resolutions could only be justified, if at all, under the relevant paragraph of Article 36 or of Article 37.

As regards the provisions of those two Articles, we contended that the Security Council can only act in order to maintain international peace and security, when it acts under those two Articles. It is for that purpose, for the maintenance of peace and security, and for that purpose alone, that the powers of the Council under Chapter VI were conferred. Moreover, the Council cannot intervene in every dispute or situation, but only in one which, in the words of the Charter, is "likely to endanger the maintenance of international peace and security". Consequently, if this requirement is not satisfied the Council has no basis for action. In support of this proposition we relied upon the views of a number of well-known publicists. We also pointed out that statements supporting our contention had frequently been made in the proceedings of the Security Council itself. Thus, for example, during the consideration of the Corfu Channel case, it is said in the *Repertory of United Nations Practice*, Volume II, page 283:

> "Several members observed that the Charter had circumscribed the functions of the Council by providing that it might make recommendations under Article 36 only when the continuance of the dispute was likely to endanger the maintenance of international peace and security. The consideration of any other dispute or situation enlarged the competence of the Council beyond the limits fixed by the Charter."

And we showed that it was for the very reason that all the other articles of Chapter VI, including Articles 36 and 37, required the dispute to be one the continuance of which is likely to endanger the maintenance of international peace and security, that Article 38 found its way into the Charter. For that reason alone, the insertion of that Article, which did not apper in the original Dumbarton Oaks Proposals, was proposed by the sponsoring governments and motivated as follows:

> "The purpose of this amendment was to give the Security Council, at the request of the parties to a dispute, the power to make recommendations concerning its settlement, even if the dispute was not of such a character as to constitute a threat to the peace. Under the Dumbarton Oaks Proposals the Security Council did not possess authority to deal with such secondary disputes and it has been thought desirable thus to broaden its competence."

That was the proposal of the sponsoring governments. In other words, but for the provisions of Article 38 the Security Council would not legally have been empowered to act under Chapter VI if a dispute or a situation did not constitute a threat to the peace.

Now, Mr. President, in the present proceedings only one participant has contended that the Security Council, in adopting the resolutions in question,

in fact acted under Chapter VI of the Charter. Having agreed with our contention that the Security Council did not act in terms of Chapter VII, the distinguished representative of Finland stated that "the legal foundation for Security Council resolution 276 may be sought in the powers conferred upon the Council in paragraph 1 of Article 36 of the Charter". (*Supra*, p. 71.)

Although he referred to that portion of our written statement dealing with the relevance and requirements of Chapter VI of the Charter, the representative of Finland made no attempt to dispute the basic correctness of most of our contentions. He did not dispute, firstly, that the sole purpose for which the powers under Chapter VI, and more particularly under Article 36, can be invoked is the maintenance of international peace and security. He did not contest, secondly, that the only disputes or situations with which the Council may deal are those which are likely to endanger the maintenance of international peace and security; and he also did not dispute, thirdly, that if the Council is to act under Chapter VI, it must conduct an impartial and an objective investigation in order to determine whether the dispute or the situation is of such a nature.

But it seems that perhaps the representative of Finland may have misunderstood our contentions regarding this third requirement. He said:

> "It is true that some writers maintain that before having recourse to that clause [he was referring there to paragraph 1 of Article 36 of the Charter], the Security Council should have determined by a preliminary decision, whether the prolongation of the dipute or of the situation in question seemed to constitute a threat to the maintenance of international peace and security. But that is not a condition *sine qua non*, as is alleged in paragraphs 32 and 42 of the South African Government's written statement." (*Supra*, p. 72.)

Now it is true that we contended that a determination to the effect that the continuance of a dispute or of a situation constitutes a threat to the maintenance of international peace and security is a *sine qua non* for action in terms of Chapter VI. We did not, however, contend that such a determination has to be made by way of a preliminary decision—in other words, that as a matter of procedure the Security Council should make two separate decisions: firstly, a preliminary decision as to the nature of a dispute or a situation, and secondly, a recommendation regarding appropriate procedures or methods of adjustment in case the Council should find that a continuation of a dispute or situation does in fact constitute a threat to the maintenance of international peace and security.

Our contention was, and is, that the Council must make the necessary determination, that this must appear either expressly or impliedly, from the relevant resolution itself or from the debates preceding and surrounding its adoption, and that as far as the Security Council resolutions under consideration are concerned, it appears quite clearly that the Council did not consider that there existed any dispute or situation the continuance of which might be said to be likely to constitute a threat to the maintenance of international peace and security.

In support of his argument, the distinguished representative of Finland also referred to the practice followed by the Security Council. He contended that the relevant practice has been that directly after the Security Council discusses a question it takes a decision concerning the appropriate procedures or methods of adjustment, if, of course, it has found it necessary to take action for the peaceful settlement of the matter, and that in such a case the gravity of the situation is implied. He consequently appears to agree with our contention that

there must be at least an implied determination that the continuation of that dispute or situation is in fact likely to endanger international peace and security.

And when the representative of Finland stated that in adopting resolution 276 the definite aim of the Security Council was to obtain the withdrawal of the South African authorities from South West Africa, he added that at the same time the intention was to strengthen the maintenance of international peace and security and to reduce the existing tension—I refer here to page 72, *supra*. However, he made no attempt whatever to point out any *indiciae* of such intention or purpose, either in the wording of the resolution itself, or in the debates preceding its adoption. We will deal presently, Mr. President, with the relevant expressions of intention, but before doing so, I wish to point out that the representative of Finland also did not dispute our contention that there is a further reason why the relevant resolutions of the Security Council were *ultra vires* Chapter VI of the Charter and that is, that the Council did not act in conformity with Article 34 of that Chapter. We submitted that even if it can be said that the Council did make the necessary determination, it still did not act as required of it by that Article in that it did not act in conformity with principles of justice and international law. In elaborating upon this we submitted that Article 34 requires the Council to consider all the facts, to consider them objectively and dispassionately and to consider both or all sides of the question. We showed further that in adopting its relevant resolutions the Council did not fulfil any of these requirements.

Neither the representative of Finland nor any other participant in these proceedings questioned the validity of these requirements or attempted to show that they were in fact fulfilled at the time that the relevant resolutions were adopted or even before then.

Reverting now, Mr. President, to the intention or purpose of the Security Council, it is our primary contention that the Council invoked the powers conferred upon it by Articles 36 and 37, if in fact it acted under those Articles, not for the purpose of maintaining international peace and security but for an altogether extraneous purpose, that is to say, the removal of the South African authorities from South West Africa. At the outset of the debate which led to the adoption of resolution 264 (1969), the President of the Council drew the Council's attention to a letter from the Secretary-General in which the latter transmitted the text of General Assembly resolution 2403 (XXIII) and "drawing particular attention to operative paragraphs 3 and 4 which are of immediate concern to the Security Council". (UN doc. S/PV.1464, pp. 7-10.)

Paragraph 3 of this resolution drew the attention of the Council to the "serious situation which has arisen as a result of the illegal presence and actions of the Government of South Africa in Namibia", while paragraph 4 recommended to the Security Council the adoption of measures to ensure the immediate withdrawal of South African authorities from South West Africa so as to enable the latter to attain independence in accordance with the provisions of General Assembly resolutions 1514 (XV) and 2145 (XXI). I draw attention to those words to "ensure the immediate withdrawal of South African authorities from South West Africa so as to enable the latter to attain independence".

The debates preceding the adoption of resolution 264 (1969) afford, in our submission, ample proof of the preoccupation of members of the Council with the objective contained in paragraph 4 of the resolution which I have just quoted, that is to say, the attaining of independence by the peoples of South West Africa. Thus the first speaker in that debate, the representative of Algeria, described the question before the Security Council as "the adoption of practical means to achieve our objectives, which are the accession of the Namibian people

to sovereignty and the independence of that country". (UN doc. S/PV.1464, pp. 11-12.)

The representative of Pakistan, in the same debate, stated that the General Assembly had requested the Security Council to take measures in order to enable South West Africa to attain independence.

The representative of the USSR declared that his country's opposition to colonialism would determine the position of the Soviet Union in the problem of South West Africa.

The representative of Finland, having said that no progress had been made to help the people of South West Africa to achieve self-determination and independence, referred to the steps that the Security Council should take, so that the United Nations could discharge its responsibilities for South West Africa. And then, finally, the representative of the United Kingdom reiterated an earlier statement made in the General Assembly, on behalf of his Government, wherein he had said: "Let me state again plainly that our motive, our aim, our determination must be to set the people of South West Africa free, free to advance to the destiny of their own choice in full self-determination."

Similar statements were made, Mr. President, by the representatives of the United Arab Republic, Paraguay, China, the United States, Spain and Colombia. References to all these statements are contained in paragraph 37 of Chapter V of our written statement, where they are set out *in extenso*. They indicate quite clearly that the purpose of the draft resolution was the attainment of freedom and independence by the people of Namibia rather than the maintenance of international peace and security. That purpose is also apparent from the debates preceding the adoption of resolutions 269 (1969) and 276 (1970). In these debates relevant statements were made by the representatives of Syria, Sierra Leone, the USSR, Poland, Colombia, Zambia, India and Pakistan, all of which bear out the contentions I have advanced. The references to these statements are to be found in the last footnote to paragraph 37 of Chapter V of our written statement.

The general conviction of the Council that its resolutions were directed to the attainment of freedom and independence by the people of South West Africa also appears from the terms of the resolutions themselves. In this regard, it is important to keep in mind that, as has already been demonstrated in our written statement, and again in our oral statement, these resolutions were based squarely upon the decision of the General Assembly to terminate the Mandate for South West Africa, and that the measures subsequently adopted by the Council were taken in pursuance of that decison and in order to implement it.

We will demonstrate at a later stage that the purpose underlying the decisions of the Assembly was also to secure at all costs the speedy independence and the self-determination of South West Africa as a single territorial unit. Not only the Council, but the Assembly too, had this goal. However, as far as the Council is concerned, its resolution 264 (1969) reaffirmed "the inalienable right of the people of Namibia to freedom and independence". And, in resolution 269 (1969) the Council decided that the continued occupation of the territory by South Africa constituted "a denial of the political sovereignty of the people of Namibia", and the Council further requested all States to "increase their moral and material assistance to the people of Namibia in their struggle against foreign occupation". Then in resolution 276 (1970) the Council again reaffirmed "the inalienable right of the people of Namibia to freedom and independence".

It will be seen, therefore, that the emphasis here fell on freedom, on independence and upon self-determination, not upon the maintenance of international peace and security.

It is true that there were some members of the Council who did maintain that the situation in South West Africa constituted a threat to international peace and security. In the letter addressed by 46 States to the President of the Council, to which I referred earlier, it was stated that South Africa's continued occupation of South West Africa constituted a grave threat to international peace and security. (*SC, OR*, Supplement, Jan.-Mar. 1969, pp. 126 to 127.)

In the debates leading to the adoption of resolutions 264 (1969), 269 (1969) and 276 (1970) a number of representatives made a similar allegation and advanced various reasons why the situation in South West Africa should be viewed as constituting a threat to international peace and security. Those reasons are set out in paragraph 39 of Chapter V of our written statement.

However, despite these allegations and these expressions of opinion, the terms of the resolutions themselves as eventually adopted do not indicate that the Council, *qua* Council, considered the situation in South West Africa to be a threat to international peace and security, or in any way likely to endanger that peace and security.

On the contrary, Mr. President, the Council rather significantly refrained from saying this. Instead it spoke of the grave consequences of South Africa's continued occupation of the territory, of an aggressive encroachment on the authority of the United Nations, but, be it noted, not of an act of aggression. It spoke also of a violation of the territorial integrity and the denial of the political sovereignty of the people of South West Africa. It is consequently quite clear that the Council did not make a determination, either express or implied, that there existed in relation to South West Africa a situation or dispute the continuation of which was likely to endanger international peace and security.

If the Council had in fact considered that there existed such a dispute or situation, it would certainly, we submit, have said so. Apart from this, there are other indications which firmly negative a conclusion that the Council made even a tacit determination to this effect.

Firstly, there is the fact that the Council refused to apply measures under Chapter VII of the Charter, and that leads to the inference, we submit, that it did not consider that there existed any threat to the peace, breach of the peace or act of aggression.

Secondly, although certain representatives urged that the situation in South West Africa was one likely to endanger international peace and security, the Council deliberately avoided making any assertion to this effect.

Thirdly, of the 15 members of the Council as constituted when it discussed resolutions 264 and 269 (1969), only five, namely Algeria, Zambia, Nepal, Senegal and Pakistan, indicated that in their opinion the international peace was endangered, or likely to be endangered. And of the members of the Council as constituted when it considered resolution 276 (1970) and resolutions 283 and 284 (1970) only four, Zambia, the Soviet Union, Nepal and Burundi, gave any such indication. The relevant references here are to be found in paragraph 40 of Chapter V of our written statement. No other member of the Council, Mr. President, indicated that he in any way shared this opinion.

Fourthly, the evidence already adduced to show the real purpose of the Council indicates that it was not even concerned with the question of peace and security and thus still less with making a determination in that connection.

We consequently submit, Mr. President, that in adopting the relevant resolutions the Council's only motivation was to secure the immediate independence and self-determination of the peoples of South West Africa in pursuance of General Assembly resolution 2145 (XXI). It did not act with the purpose of securing international peace and security and it did not make a determination

that there existed a dispute or situation the continuance of which was likely to endanger such peace and security. Thus, even on the assumption that the Security Council did intend to act under Chapter VI of the Charter, it invoked its powers for a purpose altogether unauthorized by that Chapter and, we submit, the relevant resolutions are therefore *ultra vires*.

In conclusion on this point may I say that from all that I have said in regard to the source of the Council's authority in adopting the various resolutions with which we are here concerned, both in regard to Article 24 and Chapters VI and VII, there arises one point of more than ordinary significance and one which I am sure will not escape the attention of the Court.

I refer to the fact that in all the written statements and in all the oral statements which have thus far been presented to the Court, it is only the Secretary-General and the Governments of Finland and Pakistan that have indicated clearly the provisions of the Charter which they consider authorized the Security Council to take the action it did.

That is significant, Mr. President, for while we may agree with the Secretary-General that it is not the usual practice of the Council to indicate the provision under which it acts in adopting any particular resolution, nevertheless, one might surely have expected that in a case of this nature, at least more than three of the participating States and organizations would have attempted to indicate the actual source in the Charter of the Council's authority, especially since they were aware of South Africa's position in the matter. After all, that question is one of cardinal importance in these proceedings. Yet, the great majority did not even venture a suggestion in this connection, much less any motivated argument.

The inference seems inescapable, that in regard to the Security Council, as in regard also to the General Assembly, the States and organizations concerned were simply unable to point to any specific enabling provisions in the Charter, and for that reason sought refuge in the vague generalities in which, with respect, their statements abound. Moreover, even the three participants who did attempt an answer differ in their positions. The Secretary-General invokes Article 24, Finland invokes Articles 24 and 36, and Pakistan invokes Chapter VII.

In short, there is considerable confusion in the matter. Perhaps, Mr. President, that is not strange in the circumstances.

The Court rose at 1.05 p.m.

TENTH PUBLIC SITTING (24 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

Mr. VIALL: Mr. President, honourable Members of the Court, I come now to the last part of our argument concerning the powers of the Security Council, that is, the part dealing with the legal effects and the consequences of Security Council resolution 276 of 1970.

I demonstrated yesterday, Mr. President, that only three participants in these proceedings even attempted to indicate the source of the Security Council's authority in its adoption of the various resolutions which are relevant. Of these, one, the Government of Pakistan, invoked the provisions of Chapter VII. In our respectful submission we have shown clearly and convincingly that the Council did not act, nor purport to act, under that Chapter and, consequently, this contention need detain us no further.

Of the other two, one, the Secretary-General, invoked the provision of Article 24, and the other, the Government of Finland, those of Article 24 and of Article 36.

Now, in a number of statements both written and oral, it has been contended that the resolutions concerned are binding on States Members of the United Nations by virtue of the provisions of Article 25, which reads as follows:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

The obligation imposed in this Article is, in the words of Kelsen,

> "... a specification of the general obligation of the Members stipulated in Article 2, paragraph 5: to give the United Nations every assistance in any action it takes in accordance with the present Charter" (*The Law of the United Nations*, p. 97).

However, Mr. President, as we pointed out in Chapter V, paragraph 54, of our written statement, it is generally agreed that the obligation under Article 25 extends only to those decisions which are taken in accordance with the Charter. It follows that if a particular resolution of the Security Council is not validly adopted under an empowering provision of the Charter, in other words, if it is *ultra vires* the Charter, there can be no legal obligation for the Members of the United Nations to accept and carry out any decision taken in terms of such a resolution.

In paragraphs 55 to 58 of Chapter V of our written statement, we showed, moreover, that Article 25 does not apply to all decisions of the Council in the wide sense of that term "decisions" and thus including recommendations. In the first place, the word "recommend" which is used in Article 36, paragraph 1, and in Article 37, paragraph 2, connotes in its ordinary meaning a form of advice or suggestion, the essential characteristics of which, we pointed out, are that it must be addressed to some person or body and it leaves that person or body a choice of action. By its very nature it cannot, of itself, impose upon those to whom it is addressed an obligation to behave in conformity therewith. I would quote here from the statement of Judge Winiarski in the context of the

Charter and in the case of *Certain Expenses of the United Nations*, where he said in his dissenting opinion:

> "Recommendations are never binding and the United Nations must in all its activities ever have in view that its means of action are thus limited.
>
> . . . . . .
>
> It is difficult to see by what process of reasoning recommendations could be held to be binding on States which have not accepted them. It is difficult to see how it can be conceived that a recommendation is partially binding . . ." (*I.C.J. Reports 1962*, pp. 233-234.)

In the second place, Mr. President, it was made clear at the San Francisco Conference that recommendations under Chapter VI of the Charter were to have no binding force. Thus, when the delegate of Belgium to that Conference requested a more precise answer to his previously posed question as to whether the term "recommend" in Chapter VIII, section A, of the Dumbarton Oaks Proposals, which corresponds to the present Chapter VI of the Charter, entailed obligations for States parties to a dispute, or whether it meant only that the Council was offering advice which might or might not be accepted, the delegate of the United States expressed agreement with the views of the delegate of the United Kingdom and said that he had intended to make it clear that in section A, *no compulsion or enforcement* was envisaged. And that is to be found in the documents appearing in UNCIO, Volume XII, at page 66.

Moreover, it appears both from the jurisprudence of the Court and from the views of publicists to be generally accepted that recommendations under Chapter VI have indeed no binding legal force. The relevant references on this are to be found in paragraph 56 of Chapter V of our written statement.

Thirdly, statements made in the Security Council itself bear out our interpretation, that is, that Article 25 of the Charter does not apply to recommendations made by the Security Council. Thus, during the debates in connection with the case of the Greek Frontier Incidents, the question arose whether a decision by the Council to conduct an investigation in terms of Article 34 was a decision in the sense of Article 25, or merely a recommendation.

Those members of the Council who were opposed to the establishment of a commission argued that all resolutions under Chapter VI were merely recommendations, that States which did not carry them out bore only a moral responsibility, and that it was only measures under Chapter VII which took on a binding quality. Those members, on the other hand, who favoured the establishment of a commission did not deny these propositions, except in regard to a determination under Article 34 which they considered constituted a binding decision. It was said during the debate that Chapter VI conferred two distinct powers upon the Council, one of conciliation, one of investigation. The conciliatory powers could, according to them, not be enforced upon the States concerned, since by definition they implied voluntary co-operation. That is taken, Mr. President, from the *Repertory of United Nations Practice*, Volume II, 1955, at pages 237 to 239.

Here, I would in conclusion refer to the third revised edition of Goodrich, Hambro, and Simons, *The Charter of the United Nations*, at page 208, where the learned authors say:

> "Obviously, the Charter does not impose any obligation on members to accept and carry out 'recommendations' that the Security Council might make, for example, under Article 36 or 37. It was made clear at San Francisco that such recommendations have no binding force and there have been repeated statements to that effect in the Security Council."

It follows then that if it be assumed, contrary to what we have already submitted, that resolution 276 (1970) was validly adopted under Chapter VI of the Charter, the resolution cannot be characterized as embodying injunctions, but, on the contrary, can at the most be said to contain recommendations. That being so, the Members of the United Nations are not obliged in terms of Article 25 to give effect to the recommendations. To put it at its highest, Members are required, in terms of Article 2, paragraph 2, to consider such recommendations seriously and in good faith and to decide for themselves whether to implement them or not.

Although the representative of Finland contended that the legal foundation for resolution 276 (1970) may be sought in the powers conferred upon the Council in terms of paragraph 1 of Article 36 of the Charter, he also stated that Article 24 constitutes a further legal basis for the resolution. I refer here to page 72, *supra*. When dealing with the legal effect of this resolution he stated that some of the provisions of the resolution are of a binding character whilst others are only recommendations. And he stated that such recommendations have no binding character (p. 73, *supra*). The representative of Finland therefore agrees with our submission that Article 25 of the Charter is not applicable to recommendations of the Security Council. Therefore, and since he also did not dispute our contention that under Article 36 of the Charter the Council is merely empowered to make recommendations and nothing more, it is difficult to understand how he can ascribe binding effect to certain provisions of resolution 276 on the first basis advanced by him for the validity of that resolution, that is, Article 36 of the Charter. And the only possible inference with which we are left is that the recommendatory provisions of the resolution are, according to the distinguished representative, based on the provisions of Article 36 and the so-called binding provisions on those of Article 24.

Both he and the Secretary-General contended that resolution 276 was validly adopted under Article 24 of the Charter, and a number of participants have sought to demonstrate the general binding character of the resolution for Members of the United Nations by invoking Article 25. Thus, for example, in his written statement the Secretary-General, having said that the Security Council was acting in the exercise of its powers as defined in Article 24 of the Charter, went on to state that the powers and responsibilities conferred upon the Council are complemented by a specific corresponding obligation on the part of member States under Article 25 of the Charter. That appears in the Secretary-General's written statement at paragraph 96.

Other participants who relied on the provisions of Article 25 did so without indicating any legal basis in the Charter for the adoption of resolution 276. For example, in its written statement the Government of Nigeria, summarizing the so-called principal legal consequences for States of the continued presence of South Africa in South West Africa notwithstanding Security Council resolution 276, merely stated that member States of the United Nations are under "an inescapable duty under Article 25 of the Charter" (written statements, **I**, p. 896).

Pakistan, India and the Organization of African Unity are to similar effect, but again we are faced with bare and unsupported assertions. The Government of Hungary—I refer to page 359 of its written statements, I—does not even invoke Article 25; it says merely that "member States of the United Nations are expected to respect and accept this resolution of the Security Council in accordance with the Charter, and they are obliged to give the United Nations every assistance in any action it takes in order to make the termination of the Mandate effective".

Mr. President, I have already submitted that for various reasons Article 24 of the Charter does not contain a reserve of powers and that it does not confer upon the Council any powers beyond those contained in Chapters VI, VII, VIII and XII of the Charter. However, even if it be assumed that Article 24 *does* contain a reserve of powers which *does* enable the Council to take decisions under that Article, the question arises: what is the nature and effect of these powers, are they mandatory in nature in the sense that they bind States, or are they merely recommendatory, or may they be both, or are they neither? It is this sort of dilemma, Mr. President, with which one is faced when one reads into a provision of the Charter implied powers which are not there.

But since we are assuming the existence of these powers in the case of Article 24, let us see what reasons are advanced for the contention that they are of a binding character. As I have already adumbrated, seven of the participants in these proceedings maintain that proposition but, except in the case of the Secretary-General, we look in vain, Mr. President, for the reasons—they are simply not there. We find only a series, as I said just now, of bare and unsupported statements.

As for the Secretary-General, we find that the only ground which he advances is that, and I quote from footnote 160 to paragraph 96 of his written statement:

> "The records of the San Francisco Conference show that Article 25 of the Charter of the United Nations applies to all decisions of the Security Council. [And then he quotes, he says] 'The obligation of the Members to carry out the decisions of the Security Council applies equally to decisions made under Article 24 and to decisions made under the grant of specific powers'; see statement by the Secretary-General, Security Council, Second Year, No. 3, 91st meeting, pp. 44-45 (with reference to the obligations resulting from the acceptance by the Security Council of the responsibility for ensuring the integrity and independence of the Free Territory of Trieste, see Security Council, Second Year, 91st meeting, p. 60)."

This statement of the then Secretary-General is the one to which I referred yesterday in the context of Article 24. The paragraph of the statement in which the quoted passage appears reads as follows, and I read from the sources just indicated:

> "The record of San Francisco also demonstrates that this paragraph applies to all the decisions of the Security Council. As indicated above there was a proposal in Committee III/i to limit this obligation solely to those decisions of the Council undertaken pursuant to the specific powers enumerated in Chapters VI, VII, VIII and XII of the Charter. This amendment was put to a vote in the Committee and rejected (doc. 597/III/i/30). The rejection of this amendment is clear evidence that the obligation for Members to carry out the decisions of the Security Council applies equally to decisions made under Article 24 and to the decisions made under the grant of specific powers."

The amendment to which the then Secretary-General referred in that statement, is the Belgian amendment with which I dealt yesterday in some detail. Accordingly, I will merely quote my conclusion in this connection, and here I refer to page 245, *supra*, where it is stated:

> "We consequently submit that the discussions relating to the Belgian amendment do not afford any support *whatsoever for the contention that* it was intended that the Security Council should be able to take binding decisions in terms of Article 24 of the Charter."

If that submission is accepted, Mr. President, and we contend that it should be, it means that the contention of the various States and organizations to which I have referred, the contention that decisions of the Council under Article 24 are binding by virtue of Article 25, stands completely and wholly unsubstantiated.

On the other hand, there can, in our submission, be no doubt that even upon the assumption that the Security Council can take decisions under Article 24, such decisions cannot be binding upon States. The whole scheme of the Charter negates such a conclusion. Article 24 deals only with the responsibility of the Council for the maintenance of international peace and security, but the same is true of Chapters VI and VII. In Chapter VI the powers of the Council in regard to the specific settlement of disputes are carefully delimited and circumscribed and in this Chapter the Council is required, after investigation of the matter but before taking action, to determine whether the continuance of a dispute or situation is likely to endanger the maintenance of international peace and security.

Having so determined, it can then take action of a recommendatory character. Its powers in this connection are carefully set out.

In Chapter VII the powers of the Council are again carefully delimited and circumscribed, but here with respect to threats to the peace, breaches of the peace and acts of aggression. Before taking action under this Chapter the Council is required to determine the existence of a threat to the peace, breach of the peace or act of aggression; once it does that, it may invoke its powers under Article 41 or 42, powers which are carefully, although not exhaustively, enumerated and, moreover, which are of a binding nature.

But in Article 24 there is nothing of the sort. The only reference to powers in that Article is the general provision in paragraph 2 that the specific powers granted to the Council for the discharge of its duties in relation to the maintenance of peace and security are those laid down in Chapters VI, VII, VIII and XII. But in spite of all this, if, as has been averred in these proceedings, the powers of the Council under Article 24 are binding, the result would be that the carefully delimited distinctions between Chapters VI and VII would be swept away. Under that Article, and upon that assumption, the Council could, for example, take binding measures, including enforcement measures, in a situation which was merely likely to endanger peace. It would not be limited to recommendation.

Again, it could take the same measures without even properly determining that there existed a threat to the peace or a breach of the peace, or even a dispute or situation likely to endanger peace and security. And, once again, it could take recommendatory measures without any real or proper investigation or determination that the situation was likely to endanger the peace.

So that, whenever in a vague and general sort of way a situation could be said to involve the maintenance of international peace and security, the Council, acting under Article 24, could take any of the measures laid down in Chapters VI and VII, but without being subject to the limitations imposed by those Chapters. Thus, the conclusion is that the Council would never need to act under Chapter VI and VII. Article 24 would render their provisions redundant and, in fact, a mockery.

It may be argued against this, Mr. President, that the Council can only take action under Article 24 in situations which are not covered by the detailed provisions of Chapters VI and VII. But analysis will show that there can exist no such situations, for, in the field of international peace and security, every situation must either be one which might *possibly endanger* peace, in

which case Article 34 in Chapter VI would come into play, it being clear that the Council cannot act until it has determined that this possibility amounts to a likelihood; or it could be one that is *likely to endanger* peace and security, which is therefore covered by Chapter VI; or it could be a situation which does, *in fact, endanger* peace and security, as where there is an actual threat to the peace; or it could be one which *actually disturbs* the peace, as in the case of a breach of the peace or an act of aggression, and these latter situations are therefore covered by Chapter VII.

It may further be argued against us that the *means of action* laid down in Chapters VI and VII are not exhaustive and that, therefore, under Article 24, the Council could take any measures consistent with the Charter, any measures at all which are necessary for the maintenance of peace and security, even though Chapters VI and VII do not provide for them. But while, in terms of Chapter VI, the powers of the Council are, in general, restricted to the making of recommendations, under Chapter VII they are very wide indeed. And if, for example, the Council has any powers of territorial control and administration at all, which, of course, is contested by us, it could conceivably have them in terms of Article 41 of the Charter. Subject to the other provisions of the Charter, it could conceivably administer a territory with binding effect if it decided that such a measure was in fact necessary *to give effect to its decisions under Chapter VII*—provided always that it had properly determined the existence of a threat to the peace, breach of the peace or act of aggression.

The point here, Mr. President, is that under Article 24 there can be no conceivable measures for the maintenance of peace and security which are not already provided for in Chapters VI and VII, between them. And the measures would be binding by virtue of the provisions of Chapter VII read with Article 25, not by virtue of Article 24, read with Article 25. In the result, then, it is submitted that the whole scheme of the Charter, in regard to the maintenance of peace and security, militates strongly against any suggestion that the Council can have binding powers of decision under Article 24. And the argument that I have adduced in this connection also goes to support the contention I made yesterday that Article 24 was never in fact intended to, and does not, confer powers upon the Council over and above those specifically provided for in Chapters VI, VII, VIII and XII.

Nevertheless, if, in spite of what I have said, we assume, for the sake of argument, that the Council *can* take binding decisions under Article 24, the next question is whether, in adopting resolution 276, the Council *intended* to take such decisions and, if so, to what extent? Some participants in these proceedings, such as the Government of Nigeria, appear to have assumed that the Council was empowered to take binding decisions and intended to do so. Other participants, such as the representative of the Secretary-General, contended that the Security Council was legally empowered to take binding decisions, but merely *assumed* that it intended to do so.

In what follows, I ask the Court to bear with me if I repeat some of the more important contentions contained in Chapter V of our written statement in this regard, for they are, we maintain, very important.

Every paragraph of a resolution of the Security Council may be regarded as a separate decision of the Council which reflects and sums up the opinion of a majority of its members on the particular matter which is dealt with therein. And in this sense, every part of a resolution is a decision, in the wide sense of that term. However, we have pointed out that a decision, in the ordinary sense of the word, must be distinguished from a recommendation. Furthermore, in the wide sense of that word, decisions may be essentially either

preambular statements, binding decisions, declarations of attitude or expressions of opinion, injunctions or requests.

Now, if the Council is, for example, authorized to make a definitive determination, it may, no doubt, do something less, such as express its opinion or declare its attitude on a matter. For, in the words of Blaine Sloan, *British Year Book of International Law*, Volume XXV, page 3, "even where a body may be competent to make a binding decision it may voluntarily limit its action to something less".

If the Council intends to make a definitive determination, it may, *inter alia*, "decide", or "determine", or "declare" something. On the other hand, if it intends to do something less, it may "consider", or "regard", or "deem" something. The choice of words will usually indicate the intention of the Council. In the light of these considerations, I will proceed to examine briefly the nature and the legal effect of the various parts of Security Council resolution 276. The preamble consists of a series of reaffirmations. These are only statements, essentially explanatory in nature, which define the attitude of the Council. They may serve to clarify the intentions of the Council as expressed in the operative paragraphs, but they do not establish, nor do they purport to establish, any legal obligations.

Paragraph 1 of the operative part of the resolution, in which the Council "strongly condemns the refusal of the Government of South Africa to comply with General Assembly and Security Council resolutions pertaining to Namibia" is clearly no more than a mere condemnatory statement, a declaration of attitude on the part of the Council. As such, it also imposes no legal obligations.

Operative paragraphs 2, 3 and 4 of resolution 276 were analysed in paragraph 49 of Chapter V of our written statement. We pointed out that paragraphs 2 and 3 are in the nature of definitive findings or determinations on the part of the Council, namely a legal finding in paragraph 2 and a finding of fact in paragraph 3. Operative paragraph 4 may have been intended as either a binding decision, a legal or a factual finding, or a non-definitive expression of opinion or declaration of attitude. We also pointed out, however, that all three of these paragraphs might have been intended to be merely declarations of attitude made by the Council in pursuance of purported definitive findings of the General Assembly, or even to represent mere recommendations.

If the paragraphs were intended to be definitive and binding determinations of law and fact, they still do not achieve their object, since alone and of itself a finding imposes no legal obligations, in this case, particularly, upon South Africa. For obligations to flow, some further act of the Council is necessary, for example, a binding injunction to States which is based on a finding to take measures in terms of Article 41. That would be an example.

In his oral address, the distinguished representative of Finland contended that the first four paragraphs of the operative part of the resolution contain findings which bind South Africa legally. He then said that South Africa is therefore put under an obligation to modify its conduct in South West Africa in conformity with the decisions of the Security Council (*supra*, p. 73). Now, if it is assumed that South Africa's presence in South West Africa is indeed illegal, then as a matter of law South Africa would, no doubt, be required, in the words of the Finnish representative, to modify its conduct. This duty, however, would not be created by the mere finding of the Security Council as to the legal or the factual position. On the other hand, if the Security Council were to make a finding that South Africa's presence is illegal, *and*, on the basis

of this finding, acting in terms of specific powers conferred on the Council, to *enjoin* or *prescribe* to South Africa and to other States the course of action to be adopted by them, member States of the United Nations would, prima facie, be obliged to give effect to such prescriptions by virtue of the provisions of Article 25. For those prescriptions would be injunctions *binding* in their effect. But this is precisely what the Security Council failed to do when adopting the resolution under consideration: it failed to *enjoin or to prescribe* to States, including South Africa, what steps they should take on the basis of its finding.

In operative paragraphs 6 and 9 of resolution 276, the Council decided, respectively, to establish an *ad hoc* sub-committee for certain purposes and to resume consideration of the question of South West Africa after receiving the recommendations of the sub-committee. It is obvious that these are institutional decisions, decisions which relate to the functioning of the Council itself, and that they can impose no legal obligations upon States.

Operative paragraph 8 is likewise irrelevant for present purposes, since it merely requested the Secretary-General to give assistance to the Sub-Committee in the performance of its task.

Then we come to operative paragraph 5 of the resolution, where 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".

Then again, in operative paragraph 7, the Council—

> "... *requests* all States as well as the specialized agencies and other relevant United Nations organs to give the sub-committee all the information and other assistance that it may require in pursuance of this Resolution".

Mr. President, in paragraph 52 of Chapter V of our written statement we submitted that the expressions "calls upon" and "requests" may have been intended by the Council to introduce either an injunction or a recommendation. Since we were dealing with the legal effect of the resolution on the assumption that it had been adopted under the provisions of Chapter VI of the Charter, and since under the relevant articles of that Chapter the Council may clearly only make recommendations, it was unnecessary for our purpose to determine the real intention of the Council as it appears from the wording of operative paragraphs 5 and 7. However, we agree with the arguments advanced by the Government of France in its written statement in favour of the view that in the paragraphs under consideration the Council did not intend to make binding decisions. We also agree that this can be inferred from the wording of the resolution itself as well as from the debates preceding its adoption and I would refer here, Mr. President, to the written statement of the Government of France (written statement, I, p. 362). Thus, as stated by that Government, in resolution 276 (1970) the Council employed the word "decides" solely in connection with procedural measures concerning its own functioning and not when addressing States. When it did address States, it used the language of recommendation or of declaration. This should be contrasted with the language employed by the Security Council when it decided on sanctions against Rhodesia, as the Government of France points out. In that case the Council prescribed the action to be adopted by other States in unequivocal terms. We also agree with the following statement made by the Government of France:

"Moreover, the terms which resolution 276 (1970) employs in regard to member States while within the normal range of expressions employed in recommendations, are not even particularly forceful compared with other expressions concerning, for example, the cease-fire in the Middle East, which although it had not been 'decided' either, was nevertheless made the subject of more cogent phraseology" (written statement, I, p. 363).

The distinguished representatives of Finland and the Netherlands appear to agree at least partially with these views expounded by France. Thus the former stated that paragraph 5 of the operative part of resolution 276 (1970) amounted to no more than an invitation; in other words, it did not amount to a binding decision (p. 73, *supra*). And the distinguished representative of the Netherlands concluded that there exists no obligation for States to take positive action designed to force South Africa to discontinue its administration of South West Africa (p. 130, *supra*).

For the reasons given then, Mr. President, we submit that even if, contrary to our contention, it were to be held that the Security Council may take a decision binding upon States in terms of Article 24 of the Charter, it did not do so in the present case. An analysis of the wording of the resolution shows that the relevant parts thereof were intended to be mere findings of fact or law, or otherwise recommendations to States other than South Africa. As I have said, a recommendation by very definition leaves to the person or body to whom it is addressed a choice of action. At the most, therefore, the adoption by the Council of resolution 276 (1970) requires that member States should consider the recommendations contained in operative paragraphs 5 and 7 seriously and in good faith in order to decide for themselves whether to implement them or not.

That, Mr. President, we submit, could be the only consequence for States of resolution 276 (1970).

Mr. President, that brings me to the end of our argument on the question of the powers of the Security Council.

ORAL STATEMENT BY MR. GROSSKOPF

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. GROSSKOPF: Mr. President and honourable Members of the Court, this morning I propose giving a general introduction to our contentions that General Assembly resolution 2145 is invalid. I would commence by considering on what legal basis the General Assembly purported to act and what bases have been suggested by others for its action.

In Chapter VI of our written statement we demonstrated, Mr. President, that General Assembly resolution 2145 (XXI) was based squarely on powers claimed to vest in the General Assembly as successor to the supervisory functions previously exercised by the Council of the League of Nations. We showed we submit, that *those* were the powers which the General Assembly claimed to exercise in passing this resolution.

However, various other bases have been suggested in the statements before the Court as affording the necessary competence to the General Assembly. The most comprehensive list of such bases was that of the distinguished representative of the Secretary-General. He stated at page 50, that the General Assembly had, in adopting resolution 2145 (XXI), acted:

> "in its capacity as the supervisory authority for the Mandate for South West Africa;
>
> — as a party in the contractual relationship arising from the Mandate;
> — 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;
> — as the organ primarily concerned with Non-Self-Governing and Trust Territories;
> — as the organ authorized, by Article 13 of the Charter, to make recommendations for the purpose of assisting in the realization of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion;
> — as the organ of the United Nations which is authorized, by Article 10 of the Charter, to make recommendations to the Members of the United Nations, or to the Security Council, or to both, on any questions or any matters within the scope of the Charter, and
> — as the organ which may make recommendations, under Article 11 of the Charter, with regard to any question relating to the maintenance of international peace and security to the State or States concerned, or to the Security Council, or to both."

Now, Mr. President, the last three of these roles may, in my submission, be disregarded for present purposes. These are those said to have been performed under Articles 10, 11 and 13 of the Charter. In each of these cases the role assigned to the Assembly by the representative of the Secretary-General was that of making recommendations. As we have shown in Chapter X of our written statement, resolution 2145 (XXI) cannot be justified on the basis of the exercise of a power to make recommendations. The resolution, in our respectful

contention, clearly purports to go beyond a mere recommendation. This is, however, a matter with which we shall deal at a later stage.

The role of the General Assembly as the organ primarily concerned with non-self-governing and trust territories will also be considered at a later stage. We propose demonstrating that the General Assembly has no general power to make territorial settlements of the sort which it purported to make in resolution 2145. This, in my submission, is quite clear as regards non-self-governing territories. It is, in my submission, quite clear, and will be amplified later, that the General Assembly does not have the power, for instance, to declare that a particular territory shall no longer fall under the sovereignty of some State.

But we will proceed at a later stage to show that the same applies, in principle to the trusteeship system.

I then come, Mr. President, to the role which the representative of the Secretary-General suggested was played by the General Assembly as the sole organ responsible for ensuring the fulfilment of the obligations and sacred trust assumed in respect of the people and territory of Namibia. This suggested role, I would respectfully contend, need not detain us for long either. The powers of the General Assembly derive from the Charter and, in our submission, from the Charter only.

Whatever role it has to play as the sole organ responsible for ensuring the fulfilment of the sacred trust could therefore, in our submission, only be performed by making use of the powers granted under the Charter. This as I have said will be dealt with later. The Court will recall that in the 1950 Opinion of the Court Article 10 was identified as the provision of the Charter which is relevant for the purposes of supervisory action by the General Assembly.

It must be accepted that the subjects which could be considered and upon which recommendations could be made by the General Assembly are very wide. To that extent it may have a role to play also in respect of mandated territories and other similar territories. It is not clear whether the role which the representative of the Secretary-General assigns to the Assembly in this respect is the same as that of supervisory organ in respect of mandated territories, but be that as it may, it is our submission that the General Assembly could not, by reason of any succession from the Council of the League of Nations have acquired any greater powers than those conferred upon it in the charter. The concept of United Nations succession to the supervisory powers of the League has not, in our submission, in the past been regarded by this Court as a grant of greater powers. Indeed, as we propose demonstrating, the Court's attitude was that the General Assembly could act only in terms of its own constitution, both substantively and procedurally. It could give attention only to such subjects as were within its competence in terms of the Charter and it was limited by the procedure laid down for it in that instrument.

The whole concept of succession of functions related basically to the obligations of the mandatory rather than to the rights of the United Nations. The concept of succession involved that the mandatory, so it was held, became obliged to submit reports and generally account to a different organ from that to which it had to submit reports and account previously; and, Mr. President, in 1950 the Court held that the extent of this obligation was not to be increased, that it was not to be greater than it had been under the League of Nations. The concept that the obligation of the mandatory should remain the same necessarily, in our submission, imposed a corresponding restriction on the powers of the General Assembly not to impose a more onerous form of supervision than had been in force previously.

So it is our submission that the role of the General Assembly in respect of

mandates was, according to the Court, as follows: *(a)* in examining mandatories' reports and recommending upon them, it exercised its powers subject to such substantive and procedural limitations as were laid down in the Charter, and *(b)* in addition, it was under a further restriction to ensure that the degree of supervision should not exceed that which applied under the mandates system. Therefore the role sought to be assigned to the General Assembly as the protector of the sacred trust could, in our submission, not serve to extend the powers of the General Assembly. It could rather serve to limit them to less than might otherwise have been available under the Charter.

On analysis therefore, Mr. President, we contend, with respect, that the power of the General Assembly to revoke the Mandate must be found in the Charter or else it does not exist. On the other hand, its alleged functions as supervisory authority, on which it purported to rely, could have derived only by succession from the League Council in the sense in which I have used the expression, in the sense that there was imposed on the mandatory an obligation now to report and account to the General Assembly.

These matters also will be considered at a later stage; in particular, we will deal at a later stage with the question whether the mandatory did in fact become under an obligation to report and account to the General Assembly as successor to the Council of the League.

The main remaining question then is whether resolution 2145 (XXI) could be justified by considering the General Assembly as a contractual party to a mandate treaty which denounced the treaty by reason of a material breach by the other. In other words, Mr. President, there is a suggested distinction between the General Assembly seen in a role as a contractual party as against the General Assembly seen in the role as a supervisory organ. Its role as suggested supervisory organ we will deal with later; I propose dealing this morning with the suggestion that it acted as a contractual party to a mandate, or at any rate that its action could be justified on such a basis.

The contention that the General Assembly acted in this capacity was made not only by the distinguished representative of the Secretary-General but it was also made in the written statement of the United States of America at I, pages 856 to 857, and it was made in the oral proceedings by the distinguished representatives of Pakistan (p. 138, *supra*) and of Finland (p. 82, *supra*). I must add however, that the last-mentioned statement was not very clear on this point. The distinguished representative of Finland referred, at the page mentioned, to our contention that the United Nations was not a party to any mandate treaty, but he then mentioned the 1950 Opinion as authority for the proposition that "important functions" were transferred to the United Nations and that a legal relationship was thus instituted between the United Nations and the mandatories (*supra*, p. 82).

It is accordingly, with respect, not quite clear to me whether the distinguished representative of Finland intended to contest our contention that there was no contractual relationship between the General Assembly and South Africa or whether he agreed with that but stated that there was a different legal relationship which resulted in the same consequences. But be that as it may, for present purposes I shall assume that he supported the representative of the Secretary-General in contending that resolution 2145 could be justified on a contractual basis.

Now, Mr. President, our submission on this topic was, firstly, that in adopting resolution 2145 the General Assembly purported to act as supervisory authority in respect of mandates, and not as contractual party to any mandate agreement. That was in Volume II, Chapter VI, of our written statement, at paragraphs 2 to 5.

We did this by analysing the resolution and showing that it did not purport to contain a revocation of a contract on the grounds of breach by the other party, but that it purported to be an act justified by its powers or authority as supervisory organ. So whatever rights it might have had as party to a contractual arrangement, we submitted that the General Assembly did not purport to exercise such rights.

But, Mr. President, we continued to contend that any claim to have acted as a contractual party to a mandate agreement would have been misconceived.

We submitted, in this regard, firstly that the League itself was never a contractual party to a mandate agreement for the simple reason that the mandate was, in our submission, not a treaty but, on the contrary, owed its legal force to an administrative or quasi-legislative act of the Council of the League acting in terms of Article 22, paragraph 8, of the Covenant. This was an issue which was extensively canvassed in the preliminary objections proceedings in the contentious cases between Ethiopia and Liberia and South Africa. We dealt with it in the *I.C.J. Pleadings, South West Africa* cases, 1966, Volume II, pages 193 ff.

The argument, in very broad outline, was that Article 22, paragraph 8, of the Covenant had provided the following:

> "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."

We sought to show that in fact the degree of authority, control or administration had not been previously agreed on by the members of the League (whatever meaning that expression might have been intended to bear), and that it was accordingly subsequently defined by the Council in a resolution. The result was, in our submission, that the Mandate was never a treaty and that, therefore, no rights could have accrued to any person on a contractual basis.

Moreover, Mr. President, we contended that if the League had been a contractual party to a mandate treaty it would in that capacity have had only such rights as the parties to the treaty had agreed upon. And, we continued to say, it is hardly conceivable that the authors of the mandates system would have differentiated between the rights vesting in the League in its capacity as supervisory authority and those vesting in it in its capacity as contractual party. We deal with this in our written statement, I, Chapter VII, paragraph 70.

After all, Mr. President, the rule that a contract may be cancelled by reason of the breach of the other party is only a rule which exists as long as, and to the extent to which, the parties wish it to obtain in their contractual relationship. Where one was dealing with a new institution like the mandate, which had many novel features, one would hardly attribute to its authors any intention to separate the powers which the League might have as contractual party from those it might have as supervisory authority. The parties would, in our submission, clearly have looked at the substance of the matter and would have determined for themselves substantially which powers they wanted the League to exercise. In our submission they would not have distinguished between two different bases upon which the League might have acted.

As to the actual powers which we contend the League was intended to have, that matter will be dealt with later.

Then, Mr. President, as regards the contention that the United Nations acted as a contractual party, we submitted that even if the Mandate had initially been a treaty it ceased being such on the dissolution of the League, whatever might have happened to its real or its dispositive aspect.

Our contention was that if the Mandate was a treaty the only parties to such a treaty, other than the mandatory itself, would have been the League, as an Organization, or the members of the League in their capacities as such. So if it were a treaty or a convention it would have been a treaty between on the one hand the mandatory and on the other either the League, as an organization, or its members. Both the League and the capacity of membership of the League fell away on the dissolution of the League. Therefore we say that even if the Mandate had been a treaty it ceased being such on the dissolution of the League. That does not, of course, exclude the possibility that the Mandate might have continued in its institutional aspect as providing a status for the Territory. This matter is dealt with more fully in the *I.C.J. Pleadings, South West Africa* cases, 1966, Volume II, pages 193 ff. This was also a matter which was strongly contested in the preliminary objections stage of the previous contentious proceedings, and the propositions that I have advanced, both that the Mandate never was a treaty and that it ceased being such on the dissolution of the League, are both inconsistent with the findings of this Court in its 1962 Judgment.

For the reasons which we give in *I.C.J. Pleadings*, 1966, Volume II, to which I have referred, we respectfully contend that the majority Judgment was incorrect in that respect.

But, Mr. President, the point I wish to stress is that even if we were to assume for the sake of argument that the 1962 Judgment was correct in what it held, then it is still clear, according to the Court's Judgment, that the Mandate was, after the dissolution of the League, not a treaty to which the United Nations was a party. The Court's finding was that the Mandate became, after dissolution of the League, a multilateral treaty and, in the form in which it is stated, it is clear that in the Court's view the United Nations as an organization was not a party thereto. So our contention is that it is not necessary for us to show that the 1962 Judgment was incorrect, because even if one were to accept that it was correct then there would still have been no basis for any purported action of the United Nations as a contractual party to a mandate treaty.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Before the adjournment I was dealing with the contention that resolution 2145 could be justified on the basis that the General Assembly was acting as a party to a mandate treaty. I referred to our arguments that the Mandate never was a treaty and that it in any event ceased being such on the dissolution of the League of Nations. If the Court were to accede to our contentions in that regard that would mean that it would have to depart from the 1962 Judgment on the preliminary objections. But, Mr. President, even acceptance of the correctness of that Judgment would, in our submission, not support the argument that the General Assembly resolution 2145 could be justified on the basis of action taken by a contractual party.

The Court's attitude in 1962 was that the Mandate had initially been an agreement "between the Mandatory and the Council representing the League and its Members" (*I.C.J. Reports 1962*, p. 331). The Court said further, at page 332, "the Mandate for South West Africa . . . is an international instrument of an institutional character, to which the League of Nations, represented by the Council, was itself a Party". The initial agreement found by the Court to have existed was accordingly between the Mandatory and the League and the Members of the League.

From that initial finding the Court had been invited by the Applicants to proceed to one of two alternative conclusions, namely firstly, that the United

Nations and its Members had succeeded as contractual parties to the Mandate in the place of the League and its Members. That was the first contention advanced by the Applicants; but they also advanced an alternative one, namely that the Mandate continued, on dissolution of the League, as a treaty or convention between the States which were Members of the League at the time of its dissolution. These contentions on the part of the Applicants may be found in the *I.C.J. Pleadings, South West Africa* cases, Volume I, pages 443-449.

So those were the two alternative contentions that they advanced: that the treaty relationship continued, after dissolution of the League, between the Mandatory and the United Nations and its Members; or alternatively, between the Mandatory and the Members of the League at its dissolution.

In the result, the Court chose the second alternative. It based its findings mainly on the final League resolution of 18 April 1946, which the Court held "was adopted precisely with a view to continuing the Mandate as a treaty between the Mandatory and the members of the League of Nations" (*I.C.J. Reports 1962*, p. 341 read with p. 334).

So, Mr. President, the Court, in its 1962 Judgment, identified the parties to the mandate treaty after 1946 as the Mandatory on the one hand and, on the other, the States which were Members of the League at the time of its dissolution. In the Court's view, accordingly, firstly the treaty was a multilateral one. There were not merely two parties to it, all the Members of the League which were such at the time of the League's dissolution were individually parties to such a treaty.

The second consequence of the Court's finding is that the Members of the United Nations were not as such parties to any mandate treaty. They might be parties thereto, according to the Court, individually, because they had been Members of the League at its dissolution, but as Members of the United Nations they were not parties to any mandate treaty, and, of course, Members of the United Nations who had not been Members of the League at its dissolution could, on that basis, not be parties to the treaty at all.

The third consequence of the finding of the Court in 1962 was that the United Nations as an organization was not a party to the mandate treaty. If, as the Court found, an agreement was concluded in the final meeting of the League Assembly to continue the Mandate as a treaty between the Mandatory and the States then Members of the League, then it follows clearly that the United Nations as an organization could not have been included in that agreement—it was not represented at that Assembly, apart from anything else. And in addition, of course, Mr. President, the whole basis upon which the Court dealt with this matter in 1962 was on the alternative contention of the Applicants, which I have mentioned. In other words, the Court expressly refrained from holding, as invited to do by the Applicants, that the Mandate had been continued as a treaty between the United Nations, its Members and the Mandatory. That contention, the principal contention of the Applicants, was not accepted by the Court. One must accordingly accept, in my submission, that if the correctness of the 1962 Judgment be assumed, then the United Nations as an organization was not a party to any mandate treaty. The parties were the States Members at the dissolution of the League. I might add that these aspects are dealt with in more detail in our written statement, I, Chapter 6, paragraphs 9-11.

We also demonstrated, we submit, in our written statement that resolution 2145 clearly could not have been and did not purport to be an act of the States which were Members of the League at its dissolution, or even an act in which they participated in any such capacity. It clearly purported to be an act of the United Nations General Assembly, an organ of an organization acting in

terms of its constitution. It did not purport to be an act of the limited number of Members of the United Nations which also had been Members of the League. And, of course, Mr. President, we know that some of the States who were represented at the dissolution of the League are either no longer in existence, or are not members of the United Nations.

Even if the United Nations were now to be considered, contrary to the findings of the 1962 Judgment, as a party to the Mandate, it can certainly not be considered the only party to a mandate treaty other than South Africa. So, even if one were now to find on some basis that the United Nations were to be regarded as *a* party to a mandate treaty, then it would be a party in common with all the States which were Members of the League at its dissolution and, of course, then also the other party would be South Africa. We deal with that in Chapter VI, paragraph 16, of our written statement.

So we contended that resolution 2145 cannot be justified on the basis of any theory to the effect that the General Assembly exercised a right of cancellation vested in it as a contractual party to a mandate treaty.

Now, Mr. President, those participants who did seek to rely on this principle made, in our respectful submission, no effort either to examine the correctness of the 1962 Judgment or even, assuming its correctness, to apply it properly. Those participants who were attracted by the notion that resolution 2145 could be justified on a contractual basis simply stated or assumed that the Mandate was a bilateral treaty between the United Nations and the Mandatory, and that because it was a bilateral treaty the General Assembly was entitled to cancel this treaty by reason of the alleged violations thereof on the part of South Africa. I will deal with these statements in some greater length presently.

The first statement to which reference should be made is that of the Secretary-General. He did not deal with this aspect in his written statement but his distinguished representative in the oral proceedings made the allegation which I have already quoted, to the effect that the General Assembly acted as a party to the contractual relationship with South Africa arising from the Mandate. However, he apparently appreciated the problems involved in that contention with the result that he also advanced an argument, apparently in the alternative, which did not necessarily involve that there was a direct bilateral relationship between the United Nations and South Africa. This is at page 54, *supra*, where he said the following:

> "Whether the relationship between South Africa and the international community is contractual, or the result of the establishment of an objective situation, or both, or whether it is a relationship *sui generis* which has no parallel in other fields of international law or in other geographical locations and historical situations, it is nevertheless governed by certain fundamental principles which apply in every legal system, including international law. One of those principles is the proposition that in any bilateral relationship or, for that matter, in any multilateral relationship, a party which disowns its own obligations flowing from the relationship, or a party which does not fulfil the obligations incumbent upon it and arising from the relationship, cannot be recognized as retaining the rights which it claims to derive from the relationship. This is a principle which is not restricted to the law of treaties. It would be applicable even if, contrary to the findings of the Court in its 1962 Judgment—which is *res judicata* vis-à-vis South Africa—one would assert that the Mandate was not, in July 1966, a treaty or a convention in force."

Now, Mr. President, it appears that the distinguished representative of the

Secretary-General seeks in this passage to evade the impossibility of equating the Mandate with a bilateral treaty between the United Nations and South Africa. It is my respectful submission, however, that the principle which he seeks to invoke does not assist him in doing so.

Our submission is that in a contract, whether in international or municipal law, where there is a mutuality of rights and obligations, there generally follow two consequences. The first is that one party cannot demand performance by the other where the former refuses to carry out his own obligations. The latter may in such circumstances resist a claim for performance. The Roman remedy in such a case was that called the *exceptio non adimpleti contractus*. The second consequence which, in our submission, flows from this mutuality of rights and obligations is that a fundamental breach by one party would entitle the other to cancel.

The distinguished representative of the Secretary-General has given reference to authority for both these propositions. However, Mr. President, he does not seem to have appreciated that neither of these rules is of automatic application. Both may be invoked by the innocent party against the guilty one, but need not be. It follows that in neither of these two cases would a third party have any say in the matter at all: "C" cannot claim that a contract between "A" and "B" has lapsed by reason of "A" 's non-performance.

The consequence of that is that these principles do not assist the distinguished representative of the Secretary-General to present an argument on some basis which is not that of a bilateral treaty. They do not assist him in getting away from the necessity of showing that there was a bilateral treaty, because the principles which he invokes are only applicable in circumstances where there is a mutuality of rights and obligations.

They only exist where two parties stand as against one another with reciprocal rights and obligations. In those circumstances, these two principles follow, but it is not something that can be invoked by an outsider. It is something that the party who has a complaint against the other may or may not invoke.

So, for instance, Lord McNair says, in his *Law of Treaties* at page 553:

> "One point is clear: a breach by one party (including an unlawful denunciation) does not automatically terminate the treaty, for the other party may prefer to maintain it in existence. Viewed from one angle, the right of abrogation is a remedy which the party wronged may or may not pursue."

And the International Law Commission in its 1966 *Yearbook*, Volume II, at page 254, in paragraph 5, stated:

> "The Commission was agreed that a breach of a treaty, however serious, does not *ipso facto* put an end to the treaty, and also that it is not open to a State simply to allege a violation of the treaty and pronounce the treaty at an end."

The implications following from the last part of the sentence will be dealt with later. The point I wish to make now is merely the one that the cancellation of the treaty does not follow automatically. It has to be invoked by the party who alleges that there has been a breach.

Since, therefore, the right to refuse performance in the absence of counter-performance and the right to cancel for non-performance obtain only in respect of synallagmatic contracts and vest only in the parties thereto by reason of the mutuality of their rights and obligations, if follows, in my submission, that

these rules do not assist the distinguished representative of the Secretary-General unless he goes so far as to contend that there was a synallagmatic contract and that there was a mutuality of rights and obligations between South Africa and the United Nations. This, for the reasons I have given, I respectfully submit, he cannot do. I might just add in passing, Mr. President, that if the General Assembly, or the United Nations as an organization, were only one of a number of parties to a mandate treaty and this whole number of parties were entitled to claim performance, then the General Assembly could not, of course, by itself unilaterally terminate the whole contractual relationship. The other parties would then also have had a say in the matter.

Now I will proceed to certain other examples given by the distinguished representative of the Secretary-General, such as the removal of trustees and guardians for breach of trust. He dealt with that matter at page 55, *supra*. These examples are, in my respectful submission, equally irrelevant for present purposes. Here also one does not have a situation which happens automatically. The trustee or guardian is not removed automatically once he commits a breach of trust. Some organ—governmental organ or judicial organ—must act in order to remove him and such organ must, of course, be duly empowered so to act. So, if one were to apply situations in private law such as those to the present one, the Secretary-General would, in my submission, have to show that the General Assembly became empowered in some way to remove the Mandatory from office. He does not, I submit, do so merely by showing that the Mandatory's rights were subject to the performance of correlative duties and obligations. It does not avail him merely to show that the Mandatory was under certain obligations of a trust nature. He must go further and show that the General Assembly was the organ which could do something about it if the Mandatory did not perform his duties.

Mr. President, that again brings us right back to the beginning. The Secretary-General must show in some way that there is some instrument or some authority vested in the General Assembly to act as it has done. These analogies with private law do not assist, in my submission, because in all these cases there is some person or organ which has authority, by reason of some process of law, to act.

I may just, in passing, offer some comment on the statement made by the Secretary-General's representative that the 1962 Judgment "is *res judicata* vis-à-vis South Africa". Of course, the principle of *res judicata* operates only between the parties to a suit and their privies as a matter of general law. This principle is also incorporated in Article 59 of the Statute. I would just ask in passing, does the Secretary-General claim to have been a party to the previous proceedings? If so, does he contend that these are now subsequent proceedings to which he and we are both parties? If not, I would ask on what basis does he say that this Judgment is *res judicata* vis-à-vis us and apparently not in favour of or vis-à-vis anybody else. Certainly he, himself, with respect, has not applied it according to its terms.

I have already noted that the United States of America has also raised this question of contractual breach in its written statement. I would merely comment that that Government also assumed that the Mandate was a bilateral treaty between the United Nations and South Africa without offering any argument in support of that proposition or without considering the effect of the 1962 Judgment on such a proposition.

So, Mr. President, for the reasons given, I submit that there is no substance in law for the contention that the Mandate was a treaty which was cancelled in resolution 2145 on the grounds of material breach. However, before leaving

this topic there is one further implication of this contention which I think I should draw to the Court's attention. If the Mandate were a treaty, who would be authorized to determine whether there has been a material breach justifying cancellation? The Secretary-General apparently considers that the General Assembly has this competence; in other words, that the General Assembly, although itself a party to the treaty, may also give a final decision on the question whether the other party had committed a violation thereof. That is at pages 34 to 35, *supra*.

Now, Mr. President, I would suggest that this is quite a startling proposition. Whatever might be the position of the General Assembly as an alleged supervisory organ, which is something with which we will deal later, there can, in our submission, clearly be no justification for any view that as a contractual party the General Assembly can be judge in its own cause.

The usual position would, in my submission, have to obtain, Mr. President, namely that if a party claims to have had justification for cancelling a contract and this is disputed by the other party and the matter comes to court, it becomes the task of the court to determine whether there was a breach which justified cancellation. The court would then, in my submission, have to determine all the matters of facts and law necessary for a decision on this issue.

That is clearly so, Mr. President, in all systems of municipal law—certainly of which I am aware—namely that if there is a contract between two parties and one of them sues the other for performance and the other claims non-performance by the former, then the matter has to be thrashed out in court. The court has to determine: did the party break his contract or did he not; was the other party entitled to cancel or was he not; did he exercise his right to cancel in a proper and timely manner or did he not? Those are questions which the court has to determine; it is not open to one of the parties to say "not only have you broken your contract by doing thus and so, but I have now finally determined that, and nobody else shall have any say in the matter; no court of law may now pronounce on that; I have said that you have broken your contract and that is the end of the matter".

In my submission that principle must also obtain in international law. Of course, in international law, recourse to adjudication is not as simple and as automatic as it is in municipal systems. One might therefore well have the position that a party to a treaty must make up its own mind whether it feels it has a right of cancellation, and must then act upon the attitude which it adopts; it might have to take the responsibility of saying "I no longer accept this treaty as valid". But, Mr. President, if there then does happen to be a compromissory clause, or perhaps some process for adjudication, and the matter does come before an international court, then, in my submission, the international court would clearly have to determine whether the party cancelling was entitled to do so, if it is in dispute. If that is the subject-matter of the dispute between the parties, the court would have to determine it, not one of the parties itself.

Consequently, Mr. President, if this is the legal position, as we submit it is, then the Court would, in the present case, have to consider whether these fundamental breaches of the Mandate were committed as alleged by the Secretary-General, or not, as alleged by us. The Secretary-General's representative does not appear to have contested that, if that were so, the Court should not give an opinion at all. That is at page 34, *supra*. The Court will recall that that was in reply to our argument that the factual issues raised in the present case should lead the Court to decline to exercise its jurisdiction.

But, be that as it may, if the Court does not decline, then we would suggest

that at least some practical arrangements would have to be made along the lines proposed in our letter to the Court dated 14 January 1971[1].

Mr. President, in my submission, that disposes of the contention that resolution 2145 (XXI) may be justified on some basis of contractual breach. So, the only one of the various roles suggested by the Secretary-General's representative in which the General Assembly might have acted in passing the resolution is that of supervisory organ in respect of the Mandate for South West Africa. I now proceed to an introduction to our argument that it could not be justified on that basis.

Before going into any detail, it is, in my submission, expedient to define the problem which arises in this respect so as to avoid any confusion. The position can be stated very simply. During the lifetime of the League of Nations, the Union of South Africa was under an obligation as Mandatory to submit annual reports to the Council of the League of Nations, assisted by the Permanent Mandates Commission. In 1946, the League of Nations was dissolved, so that there were no longer any of the original supervisory organs in existence. What could the consequences of this changed situation have been, conceivably? Firstly, it is conceivable that the Mandate could have continued as an institution without any obligation on the part of the Mandatory to report and account to any international organization. This was the view stated by Judges Read and McNair in their dissenting opinions in 1950. A second possibility which might conceivably have existed, is that the Mandate could conceivably have continued as an institution but with a new obligation on the part of the Mandatory to report and account to some organ of the United Nations. That was the view of the majority in 1950.

Then, a third possibility which might conceivably have happened on the dissolution of the League was that the Mandate could have lapsed completely as an institution, which would have entailed the lapse of the whole of it, including, *inter alia*, an extinction of the obligation to report and account. The contention that the Mandate had lapsed *in toto* was rejected unanimously by the Court in 1950.

Those are the three possible results which might have supervened on the dissolution of the League.

The main contention of the South African Government in the present proceedings, as it was in the 1966 contentious proceedings, is that whether or not the Mandate as a whole lapsed on dissolution of the League, there was, after the dissolution of the League, no obligation to report and account to a supervisory authority in respect of the Mandate. So that whether or not the Mandate, as an institution, continued, there was no obligation to report to a supervisory authority. This may be expressed in terms of the views of the Members of the Court in 1950 as follows: We assume, for the purposes of this argument, that the Court was right in its unanimous holding that the Mandate, as an institution, survived the dissolution of the League. On that assumption, we contend that Judges McNair and Read were correct in holding that there was no transfer of supervisory functions to the General Assembly of the United Nations. We also, therefore, contend, respectfully, that the majority finding to the contrary was incorrect.

Mr. President, this attitude thus stated seems simple enough, and, as I have said, also formed the basis of the South African argument in the contentious proceedings. This approach has repeatedly been emphasized. In the 1966 case,

[1] See **Correspondence**, No. 65, p. 659, *infra*.

our only argument on whether the Mandate lapsed was tied to the question whether, as a result of the lapse of accountability, the Mandate itself could have survived. In other words, we contended that accountability lapsed and we said that it was possible that that might have had the result of causing the lapse of the Mandate as a whole. However, that was a further contention—the prime contention was that accountability had lapsed.

For the rest, our argument assumed that the Mandate existed, both for legal purposes and, of course, for practical purposes. We have always accepted, as a moral obligation, the substantive duties under the Mandate.

However, Mr. President, although we thought we had made our position quite clear, our attitude has often been stated incorrectly—I will not say misrepresented, but certainly stated incorrectly—as being that, because the Mandate has lapsed, therefore the United Nations has no supervisory powers. In other words, the argument was turned upside down—whereas our argument was that supervisory powers had lapsed and that, as a consequence of that, the Mandate might be said to have lapsed, people have represented us as saying the opposite.

One is tempted to think, Mr. President, that the reason for this is that it enables the matter to be disposed of with a couple of vague generalities, and without examining how and when the General Assembly of the United Nations could have succeeded to the functions which, in terms of the Mandate, vested in the Council of the League, or to put it the other way round, how the South African Government could have incurred an obligation to report and account to the General Assembly. That is really the problem, Mr. President, and that problem cannot be solved by representing our attitude as if it involved the contention that accountability had fallen away because the Mandate, as a whole, has lapsed.

In our submission, a typical example of this attitude was seen in the dissenting opinion of Judge Jessup in 1966, and this attitude is now again being adopted by the distinguished representative of the Secretary-General. In the contentious proceedings in the *South West Africa* cases, we referred to a number of facts which were not before the Court in 1950, and which, we say, negatived the finding by the majority that the General Assembly of the United Nations had succeeded to the powers of the Council of the League. These facts were not directly relevant to the decision of the Court that the Mandate, as an institution, had survived the dissolution of the League, and these facts were not presented as directly relevant to that issue. Nevertheless, Judge Jessup, in his separate opinion, dealt with them as if they had been presented as directly relevant to the question whether the Mandate as a whole had lapsed or not.

We pointed out in our written statement (I, Chap. IX, para. 66), with full reference to the earlier proceedings, that Judge Jessup's statement of the position was basically wrong, and that his comments on these aspects were consequently completely misdirected. We also emphasized again there what should have been, we respectfully suggest, apparent to any person who has read our written statement, namely that our attitude in the present proceedings remains unchanged.

Nevertheless one finds the following statement by the representative of the Secretary-General:

> "Through more than 25 years the Government of South Africa has continued to assert that, as a consequence of the dissolution of the League of Nations, the South African Mandate for South West Africa, now Namibia, has lapsed and that, as a result, South Africa is freed from any international supervision . . ." (*supra*, p. 35).

Our objection, of course, Mr. President is to his representing our contention as being that South Africa is freed from international supervision as a result of the lapse of the Mandate.

He builds on this:

> "In his dissenting opinion in 1966, Judge Jessup dealt in considerable detail with these alleged 'new facts' and concluded that it was apparent that there was nothing in this argument concerning 'new facts' to induce the Court to alter decisions about the international status of South West Africa which it had reached after full argument and full deliberation (*I.C.J. Reports 1966*, p. 4, at pp. 339-351). I need only add that had these 'new facts' been such as to lead the Court, as South Africa contends, to the conclusion that the Mandate did not survive the demise of the League the result, for the reasons I have just given, would have been the loss of any right on the part of South Africa to remain in the territory." (*Supra*, pp. 55-56).

There again, Mr. President, an argument is attributed to us to the effect that these new facts should lead the Court to the conclusion that the Mandate did not survive the demise of the League. Our submission is that these new facts and, as a matter of fact the rest of our argument on this point, should lead the Court to the conclusion that there was no obligation of supervision, no obligation to report, after the demise of the League, and in this respect we contend that these facts most pertinently fortify the conclusion reached by Judges McNair and Read in 1950 that, on the dissolution of the League, there was no substitution of United Nations organs for the supervisory organs of the League. In fact, Mr. President, we contend that our arguments in this respect have never been met squarely by anybody.

If the falling away of supervisory organs were to be regarded by the Court as so important a change in the Mandate as to cause its total lapse, these proceedings would, of course, come to naught in a completely fundamental way. The consequence would then be that resolution 2145 and all subsequent United Nations action concerning South West Africa would have been null and void, and there would be no point in a question concerning South Africa's continued presence in South West Africa, notwithstanding Security Council resolution 276. We dealt with this matter in Chapter I, paragraph 10, I, of our written statement.

We are not in these proceedings, Mr. President, offering any argument on the question whether the Mandate itself lapsed on dissolution of the League. If it be assumed that the Mandate survived the dissolution of the League on an institutional basis, which is the basis on which we proceeded to deal with it in the written statement and also now, we do contend that it could have done so only in an incomplete manner, that is, without any supervision by an international organization.

I proceed now, Mr. President, to give a short outline of our argument in this regard.

In our written statement, we examined every legal principle which could, in our submission, notionally have led to a transfer of supervisory functions from the Council of the League to the General Assembly of the United Nations, or to a substitution, for the purposes of the obligation to report, of the General Assembly for the Council of the League. In doing so we demonstrated, I submit respectfully, that no such transfer occurred. Thus we showed *(a)* that the express and implied terms of the Mandate made no provision for possible transfer of supervisory functions on the dissolution of the League—that was in Chapter

VII of our written statement; and *(b)* that no objective rule of international law existed which could, independently of consent of all interested parties, have caused such a transfer (*ibid.*, Chap. VII).

The only remaining basis upon which a transfer of supervisory obligations and functions might conceivably have been effected was the subsequent consent of all interested parties. In this regard the appropriate time when such consent, if it existed, would have been manifested was during the years 1945 to 1946, when the United Nations was established and when the League was dissolved, or possibly in the immediately supervening years.

In Chapter VIII of the written statement we examined the events during those years carefully, and we submit we showed that far from any consent to a transfer of supervisory functions having been given, the record shows a clear and consistent contemplation that mandatories would not be subject to United Nations supervision in respect of mandated territories which were not voluntarily placed under trusteeship.

The conclusions which we thus reached were, of course, as I have already indicated, inconsistent with the majority Opinion of 1950, which we analysed and criticized in Chapter IX. In addition, we referred in that Chapter to a great mass of comment, both judicial and scholarly, on the correctness of the 1950 *majority Opinion concerning the transfer of supervision.*

As we demonstrated, the weight of reasoned comment has been almost universally critical of this aspect of the Opinion, save by a few jurists who advocate a teleological approach which has been shown to be unacceptable to modern conceptions of international law. I would refer the Court to the proceedings at the Vienna Conference on the Law of Treaties which we discussed the other day. The reason why the Court erred in 1950, as we respectfully submit it did, might well be that it was not fully aware of the clear factual record as we have set it out in Chapter VIII. Indeed, Mr. President, we submit that some of the Court's findings are explicable only on this assumption. However, Mr. President, it is not for us to say why the Court erred, in our respectful submission, it is sufficient to show that it did.

This aspect will be considered in more detail later. At present I would only quote the words of Chief Justice Hughes, which were relied upon by Judge Jessup in his dissenting opinion in the *South West Africa* cases 1966:

> "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed." (*I.C.J. Reports 1966*, pp. 325-326.)

It is our submission that the dissenting opinions of Judges McNair and Read in 1950 on this aspect have been vindicated in the years that have elapsed since they were delivered.

In our argument on the question concerning succession, we propose following the same course as before. First, we shall consider to what extent attempts have been made in the written and oral statements before the Court to meet our arguments concerning the nature and contents of the Mandate. For practical convenience, we shall have regard to this matter in both its aspects, that is, to consider not only whether the Mandatory's obligation to report and account was *ab initio* of such a content as to have become owing, without more, to the General Assembly of the United Nations, but also whether the Mandate was revocable at the instance of the Council of the League. The argument is presented in this manner because these aspects are only different facets of the compromise worked out at the Paris Peace Conference.

In considering them together we therefore avoid a repetition of reference to the same instruments and to the same events. This part of the argument will be presented by my learned friend Mr. van Heerden. Thereafter I shall deal with the question whether any agreement was concluded subsequent to the establishment of the League for a transfer of supervision. At that stage I propose also discussing the earlier pronouncement of the Court itself in so far as such a discussion has become necessary in view of statements by other participants.

That then concludes this introductory part, Mr. President. Mr. van Heerden will, at a time which is convenient for the Court, resume the argument.

The PRESIDENT: The Court understands that it would be convenient for the representative of South Africa that the Court should now adjourn until tomorrow morning, and that tomorrow morning it should hear the representative of Viet-Nam, and that when he finishes it would be convenient for the representative of South Africa to resume their argument.

Mr. GROSSKOPF: That is so Mr. President, it is mutually convenient for us and the representative of Viet-Nam to do it in that fashion, if the Court pleases.

The Court rose at 12.45 p.m.

ONZIÈME AUDIENCE PUBLIQUE (25 II 71, 10 h.)

Présents: [voir audience du 8 II 71.]

EXPOSÉ ORAL DE M. LE TAI TRIEN

REPRÉSENTANT DU GOUVERNEMENT VIETNAMIEN

M. LE TAI TRIEN: Monsieur le Président, Messieurs de la Cour, mon premier devoir est de vous présenter mes plus profondes excuses pour n'avoir pu me trouver à l'audience de la Cour du 15 courant. Mon retard était dû à des circonstances matérielles tout à fait indépendantes de ma volonté et je suis sûr qu'avec sa bienveillance coutumière la Cour me l'a déjà pardonné.

Je vous remercie, Monsieur le Président, de m'avoir accordé la parole. Mes remerciements chaleureux s'adressent aussi aux distingués délégués de l'Afrique du Sud qui, si aimablement, ont bien voulu me céder pour un moment cette place ce matin.

J'ai ainsi le très grand honneur de m'adresser pour la première fois, en tant que représentant de la République du Viet-Nam, à la plus haute juridiction internationale qui soit.

J'ai pour charge devant la Cour d'exposer au nom de mon gouvernement son point de vue dans cette affaire « Afrique du Sud-Namibie ».

La Cour a déjà eu l'occasion, en d'autres circonstances, de se prononcer sur certains autres aspects de cette affaire.

Cette fois vous êtes saisis d'une résolution du 29 juillet 1970 du Conseil de sécurité.

A cette date, après d'ultimes débats sur l'attitude adoptée par l'Afrique du Sud en tant que Puissance mandataire en Namibie, le Conseil de sécurité, à l'issue de ses débats, a décidé de solliciter l'avis de la Cour internationale de Justice.

La question posée pour avis à la Cour est ainsi formulée:

> « Quelles sont les conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie, nonobstant la résolution 276 (1970) du Conseil de sécurité? »

La présence de l'Afrique du Sud en Namibie est une longue et vieille histoire. *Je ne vais pas abuser des instants de la Cour en refaisant entièrement l'historique* des événements. Toutefois, la question soumise à la Cour est susceptible de plusieurs interprétations; et, par ailleurs, sa formulation même devant le Conseil de sécurité n'a pas satisfait toutes les délégations. En conséquence, pour délimiter la portée de la question d'une part et circonscrire le domaine de l'avis à donner d'autre part, il nous faudra, de temps à autre, faire un retour en arrière pour rappeler brièvement les principaux événements ayant donné lieu à la présente procédure.

Et tout d'abord, qu'est-ce donc cette résolution 276 de 1970 du Conseil de sécurité à laquelle s'est référée la question du Conseil de sécurité? Cette résolution fait suite à une série d'autres résolutions de l'Assemblée générale des Nations Unies et du Conseil de sécurité lui-même; son dispositif comporte

huit paragraphes dont il faut, pour ce qui nous occupe, extraire deux idées maîtresses.

Primo, le Conseil condamne le refus du Gouvernement sud-africain de se conformer aux résolutions de l'Assemblée générale et du Conseil de sécurité relatives à la Namibie.

En conséquence, le Conseil déclare que la présence continue des autorités sud-africaines en Namibie est illégale et qu'il s'ensuit que toutes les mesures prises par le Gouvernement sud-africain au nom de la Namibie, ou en ce qui la concerne, après la cessation du Mandat, sont illégales et invalides. Cette idée a la valeur d'une condamnation de principe.

Secundo, le Conseil demande à tous les Etats, en particulier à ceux qui ont des intérêts économiques et autres en Namibie, de s'abstenir de toutes relations avec le Gouvernement sud-africain, relations incompatibles avec l'illégalité de la présence de celui-ci. Cette idée équivaut à une mesure prise par le Conseil de sécurité, mesure prise dans le sens courant de ce terme.

Nous allons successivement examiner les problèmes soulevés par ces idées.

I. Le maintien illégal de l'Afrique du Sud en Namibie

La question posée par le Conseil de sécurité a pour base cette idée essentielle que la présence actuelle des autorités sud-africaines en Namibie est illégale. Si, en effet, il est demandé à la Cour de tirer les conséquences juridiques de la présence de l'Afrique du Sud en Namibie c'est que, aux yeux du Conseil de sécurité, cette présence constitue une violation du droit international.

Nous sommes ainsi amenés à nous interroger sur les raisons de cette *illégalité*, et, pour le savoir, il nous faut nous reporter à diverses résolutions antérieures, notamment celle portant le n° 269 de 1969 du Conseil de sécurité et celle, fondamentale, portant le n° 2145 de la vingt et unième réunion de l'Assemblée générale des Nations Unies.

Par cette dernière résolution — celle qui porte le n° 2145 —, après avoir constaté que l'Afrique du Sud a failli à ses obligations de Mandataire et, de ce fait, dénoncé le Mandat, l'Assemblée générale décida

> «[que le] Mandat *confié à Sa Majesté britannique pour être exercé en son* nom par le Gouvernement de l'Union sud-africaine est donc terminé, que l'Afrique du Sud n'a aucun droit d'administrer le Territoire et que désormais le Sud-Ouest africain relève directement de la responsabilité de l'Organisation des Nations Unies».

Cette résolution se trouve sanctionnée en premier lieu le 20 mars 1969 par le Conseil de sécurité — c'est la résolution 264 — puis, en second lieu, le 12 avril 1969: il s'agit, cette fois, de la résolution 269 que nous avons visée plus haut. Par cette dernière le Conseil de sécurité, prenant une mesure énergique concrète, invita l'Afrique du Sud à retirer son administration de la Namibie avant le 4 octobre 1969. Le Conseil ajouta qu'en cas de refus toutes les mesures seraient prises. L'Afrique du Sud n'a pas obtempéré à cette injonction.

Pour la clarté de cette histoire de Mandat, pour la clarté de ce qui vient d'être dit, il convient de rappeler ici que la Namibie, alors Sud-Ouest africain, était une colonie allemande. Après la première guerre mondiale, elle fut placée sous le régime des Mandats instauré par l'article 22 du Pacte de la Société des Nations; et le Mandat, formalisé par un accord du 17 décembre 1920, fut confié au Gouvernement de Sa Majesté britannique pour être exercé en son nom par l'Afrique du Sud.

Au lendemain de la seconde guerre mondiale, on le sait, le régime des mandats

disparaît avec la Charte des Nations Unies qui, dans ses articles 75 et suivants, établit un régime international de tutelle.

Or, invitée à passer un accord de tutelle dans les normes du nouveau système, l'Afrique du Sud s'est toujours refusée à le faire et, au contraire, a proposé l'incorporation pure et simple du territoire de Namibie dans son propre territoire, proposition évidemment inacceptable que l'Assemblée générale rejeta.

A cette résistance de l'Afrique du Sud s'ajoutaient, selon les Nations Unies, de graves actes d'oppression à l'égard du peuple namibien, notamment en ce qui concerne la liberté d'aller et de venir, la liberté de travail, le droit à l'instruction, le droit de participation aux affaires publiques, etc. On consultera avec profit à cet égard, outre les documents officiels des Nations Unies, l'étude publiée en juin 1967 par la Commission internationale des juristes sur l'*apartheid* en Afrique du Sud et dans le Sud-Ouest africain.

Bravant ouvertement les Nations Unies, l'Afrique du Sud déclara en outre qu'elle n'avait pas de comptes à rendre à l'Organisation et en 1949 elle informa officiellement le Secrétaire général qu'elle n'enverrait plus aux Nations Unies de rapports concernant la Namibie.

Tous ces faits constituent des violations graves et répétées des devoirs et obligations imposés à la Puissance mandataire investie par le Mandat et aux termes mêmes du Mandat d'une mission civilisatrice.

Tels sont les faits qui ont conduit l'Assemblée générale et le Conseil de sécurité à prononcer la révocation du Mandat confié à l'Afrique du Sud pour placer la Namibie sous l'autorité directe des Nations Unies. Les Nations Unies ont ainsi apprécié les faits en sorte que la question soumise actuellement à l'avis de la Cour est une question de droit axée sur ces faits considérés comme acquis.

Mais cette question comporte un autre problème qu'il nous faut préalablement éclaircir et ce sera la deuxième partie de notre exposé.

II. Le droit des Nations Unies de révoquer le Mandat

Nous venons de voir ici apparaître l'illégalité qui entache l'occupation poursuivie et actuelle de la Namibie par l'Afrique du Sud. Cette illégalité fait surgir le deuxième problème que nous avons à examiner, à savoir le droit des Nations Unies à révoquer le Mandat. Dans la question posée à la Cour par le Conseil de sécurité il semble que ce droit n'est pas à discuter; la formulation de la question laisse entendre que le problème n'est plus que de tirer les conséquences juridiques d'une situation illégale, situation illégale parce que se prolongeant au mépris d'une décision en sens contraire des Nations Unies, tandis que le droit de révocation des Nations Unies est déjà une chose acquise.

a) *Les doutes quant au droit de révocation*

Il y a lieu cependant de noter qu'au cours des débats devant le Conseil de sécurité, certaines délégations n'avaient pas vu les choses de la même façon. Les délégations de la France, du Royaume-Uni, notamment, pensaient qu'il devrait être plus explicitement demandé à la Cour de se prononcer sur deux autres points, à savoir:

Primo, si les Nations Unies avaient le droit de révoquer le Mandat confié à l'Afrique du Sud, étant donné que ce droit n'était pas originairement prévu en ce qui concernait la Société des Nations.

Secundo, si le Territoire de la Namibie pouvait être valablement placé sous l'autorité directe des Nations Unies.

Les deux points qui viennent d'être relevés conditionnent en théorie le

problème posé à la Cour car il n'y aurait lieu à se prononcer sur les conséquences de la présence de l'Afrique du Sud en Namibie qu'autant que cette présence serait illégale.

b) *Le droit de révocation s'induit des principes généraux*

Il appartient à la Cour de décider si elle a à examiner ces deux points. Pour notre part, nous pensons que si elle le fait, ce serait, abstraction faite de toute autre considération, une bonne occasion pour le droit international de s'enrichir d'un nouvel élément sur un important problème juridique.

Nous pensons d'ailleurs qu'en révoquant le Mandat confié à l'Afrique du Sud les Nations Unies n'ont fait qu'user d'un droit légitime.

Ce droit, les Nations Unies le tiennent en effet du Mandat lui-même. Il n'est certes pas question de transposer en droit international les règles du droit privé concernant le mandat, puisque le mandat du droit international a la valeur d'une institution, tandis que le mandat du droit privé est un simple contrat.

N'empêche que dans l'un et l'autre cas, qu'il s'agisse de mandat international ou de mandat privé, leur essence est la même, c'est la confiance du mandant dans la capacité, la loyauté, l'honnêteté du mandataire. C'est en considération de ces diverses qualités, aussi nécessaires les unes que les autres, pour l'exécution du mandat, que le mandant habilite le mandataire à agir pour son compte. Il s'ensuit que si le mandataire trahit la confiance qui a été mise en lui, si à l'expérience il se montre incapable, déloyal, on doit nécessairement admettre que le mandant est en droit de retirer au mandataire les pouvoirs qui lui ont été conférés. Dans ce cas, en effet, rien ne justifie plus le mandat, son objet ne peut plus être atteint. Et surtout, il y a là une question de moralité, indispensable dans les relations privées et plus importante encore dans les relations internationales car, en dehors du droit international, au-dessus du droit international, il y a encore en plus une moralité internationale, qui est composée d'un certain nombre de concepts unanimement admis.

Or, les faits démontrent que l'Afrique du Sud a failli à la mission civilisatrice à elle confiée par le Mandat. Bien plus, par la pratique de l'*apartheid*, elle a fait tout le contraire de ce qu'elle aurait dû faire. Peut-on laisser se prolonger cet état de choses? La communauté internationale admet-elle un tel recul du droit international et de la morale internationale? Si la réponse à ces questions doit être négative, alors c'est que le droit de révocation des Nations Unies doit être admis.

c) Le droit de révocation s'induit des avis antécédents de la Cour

Nous venons de voir ainsi que le droit de révocation des Nations Unies en ce qui concerne le Mandat confié à l'Afrique du Sud s'induit des principes généraux. Il y a mieux. Ce droit s'induit encore des avis antécédents de la Cour. En droit, selon l'avis exprimé par la Cour le 11 juillet 1950, les obligations du Mandat subsistaient pour l'Afrique du Sud et les fonctions de surveillance devaient être exercées par les Nations Unies. Or, en se refusant à déposer son rapport annuel, l'Afrique du Sud a rendu inopérant le contrôle et pratiquement privé les Nations Unies du droit de surveillance. Dès lors, que pourraient faire d'autre les Nations Unies sinon révoquer le Mandat? La révocation est la seule arme juridique efficace dont disposent les Nations Unies et c'est à bon droit qu'elles en ont fait usage.

Certes, il reste deux choses: il reste que le Mandat de la catégorie C, qui s'applique au Sud-Ouest africain, veut que ce Territoire soit administré comme partie intégrante de l'Afrique du Sud. Il reste aussi que selon l'avis de la Cour du 11 juillet 1950, l'Afrique du Sud n'était pas tenue de conclure par application

des articles 75 et suivants de la Charte un accord tutelle. Et on serait tenté de s'appuyer sur ces deux faits pour dire que l'Afrique du Sud est autorisée à continuer à exercer son administration en Namibie. Mais il ne faut point jouer sur les mots. Il est faux de dire que le Territoire, administré comme partie intégrante, est un territoire annexé; l'annexion est inadmissible comme étant diamétralement opposée à l'idéal, aux principes élevés du Pacte de la Société des Nations. Administrer un territoire comme partie intégrante, cela veut dire plutôt qu'il faut l'administrer avec la même vigilance, le même intérêt, les mêmes soins que s'il s'agissait du sien propre. Et si la Cour disait que l'Afrique du Sud n'était pas tenue de conclure un accord de tutelle, c'était parce que l'Afrique du Sud n'y était pas juridiquement obligée. Accepter une tutelle est un acte de volonté, obliger l'Afrique du Sud à le faire, alors que pour une raison ou pour une autre elle ne le voulait pas, ce serait contraire au droit. Mais cela ne veut pas dire que l'Afrique du Sud peut perpétuer sa présence en Namibie et en dehors de tout titre. Si elle dénonce le Mandat et ne veut pas davantage souscrire un accord de tutelle, alors elle n'a plus de titre pour administrer la Namibie, elle doit s'en retirer et là, ce serait conforme au droit.

Telle est et telle doit être, croyons-nous, l'interprétation exacte de la pensée de la Cour.

L'Assemblée générale des Nations Unies, et le Conseil de sécurité ont donc valablement révoqué le Mandat confié à l'Afrique du Sud. La décision de placer la Namibie sous l'autorité directe des Nations Unies est aussi juridiquement correcte, car selon l'article 81 de la Charte, l'autorité chargée de l'administration peut être constituée par l'Organisation elle-même.

III. Les conséquences juridiques de la présence illégale de l'Afrique du Sud en Namibie

Etant ainsi admis que l'Afrique du Sud, en se maintenant en Namibie, se met dans une situation illégale, quelles sont donc les conséquences, et c'est là le troisième problème que nous abordons, quelles sont les conséquences, on dirait peut-être mieux les incidences, les répercussions juridiques inter-Etats de cette situation?

a) *En ce qui concerne l'Afrique du Sud elle-même*

Tout d'abord l'Afrique du Sud, en se mettant elle-même en dehors du droit international, ne saurait tirer profit de sa propre turpitude. L'illégalité qu'elle a délibérément commise ne crée pour elle aucun titre nouveau qui lui permette de se dégager des obligations spéciales nées du Mandat. Le fait matériel même, le fait de la prolongation de l'occupation, voulu par elle, perpétré par elle au mépris du droit, prolonge à la charge de l'Afrique du Sud l'obligation de continuer à assurer le bien-être, le développement de la population namibienne, dans l'esprit de l'article 22 du Pacte de la Société des Nations et selon les termes de l'article 2 du Mandat. L'action interne de l'Afrique du Sud en Namibie continue à être dominée par la recherche de ces objectifs. De par son maintien sur place, l'Afrique du Sud, sans doute, est à même d'accomplir des actes qui intéressent l'existence des Namibiens, mais ces actes ne sont valables qu'autant qu'ils sont conformes aux pouvoirs conférés par le Mandat. Autrement dit, la survivance illégale du pouvoir laisse survivre les obligations qui sont la raison du pouvoir.

Par contrecoup, l'illégalité dans laquelle s'est mise l'Afrique du Sud ne saurait faire naître à son avantage une source de nouvelles prérogatives. En révoquant le Mandat, les Nations Unies entendent prendre elles-mêmes en

main la responsabilité de la Namibie et non la vouer à l'arbitraire de l'Afrique du Sud. Il suit de là qu'en exerçant son autorité de fait, l'Afrique du Sud doit s'abstenir de tous actes de spoliation, de toute mainmise sur les ressources économiques, financières de la Namibie, au détriment de celle-ci.

b) *En ce qui concerne les Etats Membres des Nations Unies*

Ceux-ci sont tenus d'accepter et d'appliquer les décisions du Conseil de sécurité, ainsi que l'article 25 de la Charte leur en fait l'obligation. Mais si le principe ne peut être ainsi aisément affirmé, la situation pratique est plus complexe.

Par sa résolution 283 de 1970, le Conseil de sécurité a demandé aux Etats de s'abstenir vis-à-vis de l'Afrique du Sud de toutes relations qui pourraient impliquer une reconnaissance de l'autorité du Gouvernement sud-africain sur le Territoire de Namibie. A côté de cette abstention, le Conseil a aussi demandé aux Etats une action positive, celle de déclarer formellement qu'ils ne reconnaissent pas l'autorité de l'Afrique du Sud et de rappeler leurs représentants en fonction en Namibie s'il y en avait.

Là où le problème se complique, c'est lorsqu'il s'agit de l'application des traités. Le Conseil a invité les Etats à réexaminer les traités conclus avec l'Afrique du Sud dans les dispositions qui concernent la Namibie. Il semble que ces dispositions doivent cesser de recevoir application, à moins que l'intérêt de la Namibie ne commande une solution contraire et que les Nations Unies, en considération de cet intérêt même, ne prennent toute autre décision jugée plus adéquate.

Il y a en outre des traités multilatéraux dont l'objectif est un objectif d'intérêt général, par exemple un traité sur le trafic des stupéfiants. Il semble alors que, en raison même du but poursuivi, ces traités doivent rester en vigueur et continuer à être appliqués en Namibie.

Nous nous contentons de ces principes pour ne pas aborder des détails qui retiendraient trop longtemps l'attention de la Cour.

c) *En ce qui concerne les Etats non membres des Nations Unies*

Ceux-ci n'ont pas l'obligation juridique d'appliquer les décisions du Conseil de sécurité. Mais ils ont quand même une obligation morale, celle d'agir conformément aux principes des Nations Unies dans la mesure nécessaire au maintien de la paix et de la sécurité internationales, ainsi qu'il est dit à l'article 2, paragraphe 6, de la Charte.

Or l'attitude de l'Afrique du Sud est un défi à l'égard des Nations Unies, une violation des principes qu'elles ont la charge de faire respecter. En conséquence, les Etats non membres doivent, eu égard aux résolutions adoptées par l'Assemblée générale et par le Conseil de sécurité, considérer que, juridiquement, le Mandat international confié à l'Afrique du Sud en Namibie a été révoqué, qu'elle n'a plus aucun titre pour s'y maintenir et y exercer une autorité quelconque, que le Territoire relève de la responsabilité directe des Nations Unies. Par suite, les Etats non membres doivent aussi, comme les Etats Membres, s'abstenir de toutes relations avec la Namibie par le truchement de l'Afrique du Sud, car cela équivaudrait à une reconnaissance indirecte de l'autorité de l'Afrique du Sud sur la Namibie. Les Etats non membres se doivent également de faire ce qui leur est possible pour empêcher leurs ressortissants d'entretenir des relations économiques, commerciales ou autres avec la Namibie.

Conclusions

De tout ce qui précède, Monsieur le Président, voici les conclusions que nous soumettons à la haute appréciation de la Cour:

Primo, le Mandat confié à l'Afrique du Sud ayant été régulièrement révoqué, l'Afrique du Sud n'a plus aucun titre pour maintenir et exercer son autorité en Namibie; ce territoire est placé sous la responsabilité directe des Nations Unies.

Secundo, tant qu'elle poursuit son occupation illégale, l'Afrique du Sud est tenue de remplir les anciennes obligations nées du Mandat, de poursuivre l'amélioration du bien-être et le développement de la Namibie.

Tertio, les Etats Membres des Nations Unies ont l'obligation juridique d'appliquer les décisions du Conseil de sécurité, de s'abstenir de tout acte qui impliquerait la reconnaissance de l'autorité de l'Afrique du Sud en Namibie.

Quarto, les Etats non membres doivent se comporter de telle façon que leur ligne de conduite soit en harmonie avec les mesures prises par les Nations Unies à l'encontre de l'Afrique du Sud.

J'en ai terminé. Je vous remercie, Monsieur le Président.

ORAL STATEMENT BY MR. VAN HEERDEN

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. VAN HEERDEN: Mr. President, as already indicated, we deal in this section of our argument with the history and content of the Mandate for South West Africa and the mandates system generally. This is done for the same purposes as those set out in Chapter VII of our written statement, namely in order to determine whether, without fresh consent on the part of a mandatory, the United Nations could have succeeded to the supervisory powers formerly exercised by the League of Nations and whether the League of Nations enjoyed a power of revocation of a mandate.

Now, although I have just spoken of a devolution of supervisory powers and although, for reasons of convenience, I will again use expressions such as a succession of supervisory powers, I wish to emphasize, as has already been done by my colleague, that the real question concerns the obligations of a mandatory and, more particularly, whether South Africa became obliged to account to the United Nations.

In view of certain arguments advanced in the written statements and in the oral addresses in these proceedings, it will also be necessary to deal with two further topics. The first concerns the question whether the League was empowered to prescribe rules, standards or policies by way of binding directives which a mandatory was obliged to follow or adopt in the execution of its obligation to promote the interests of the inhabitants of the mandated territory. Associated with this topic but not quite identical is a fourth topic, namely whether the League enjoyed the judicial or quasi-judicial function of unilaterally determining whether a mandatory had acted in breach of its obligations. In this regard the Court will recall the argument of the representative of the Secretary-General to the effect that the factual issue whether South Africa has acted in conflict with its obligations has already been determined by the bodies competent to do so, that is, the General Assembly and the Security Council (*supra*, pp. 34-35). A similar argument has been advanced by the representative of the Organization of African Unity (*supra*, pp. 100-101). These arguments will be dealt with at a later stage. For present purposes it suffices to consider a question very relevant, in our submission, to those arguments, namely whether such a power vested in organs of the League of Nations. In other words, whether there vested in organs of the League of Nations a power to make factual findings binding on a mandatory.

The final portion of this section of our argument will consequently be devoted to an examination of, *inter alia*, the fact-finding powers of those organs.

At the outset, it is convenient to summarize the main aspects of the presentation in our written statement relative to the nature of the accountability of a mandatory and the possibility of revocation of a mandate.

As regards the former topic, that is the accountability of a mandatory, we demonstrated in Chapter VII of our written statement that a mandatory was accountable to the League of Nations and to the League of Nations only and that the supervisory powers of the League, and more particularly the Council thereof, could not have devolved upon the United Nations or any other organization without the consent of a mandatory. In other words, Mr. Presi-

dent, our contention was that the accountability of a mandatory existed within the framework of a specific organization. In this regard we gave consideration to four bases which, in our submission, would cover every conceivable argument to the effect that the United Nations had succeeded to the supervisory powers of the League. First, the interpretation of the express provisions of the mandate documents with reference to both the meaning of the words used and the light thrown thereon by surrounding circumstances; second, the possibility of implied terms or intentions in the mandate provisions; third, the possibility of succession by virtue of an objective principle of international law; and, fourth, the possibility of an agreement, express or implied, in 1945-1946 or thereafter.

Now this last basis, the possibility of the conclusion of an agreement during the important transitional years, was considered in Chapters VIII and IX of our written statement and will be dealt with by my colleague, Mr. Grosskopf. I will concentrate on the first three bases on the strength of which it can possibly be contended that a substitution of supervisory organs could have occurred without the consent of a mandatory.

Now, Mr. President, what arguments have been advanced by other participants in these proceedings regarding the legal basis for substitution of supervisory powers? The answer is, virtually none. Such written statements as do refer to the substitution of supervisory powers and supervisory organs merely rely on the Court's 1950 Opinion, but without indicating the legal basis for that Opinion.

In the oral proceedings only the representatives of the Netherlands and Pakistan have put forward contentions relative to the basis on which the United Nations could have succeeded to the supervisory powers of the League or to a justification of the 1950 Opinion.

The representative of the Netherlands has contended that a functional approach should be adopted in regard to the mandates system. On the basis of this functional approach, he argued that South Africa's obligations to report and account in respect of its administration of South West Africa survived the dissolution of the League and that the relevant supervisory powers vested in the United Nations, consent on the part of South Africa apparently not being required. On the same basis he argued that the competence to adapt or modify the modalities of the mandates system vested in the supervisory power, formerly the Council of the League. This competence could be exercised in order to serve the final purpose of the system if an unforeseen factual situation should make it necessary to do so. Since this is a somewhat novel approach, since it is diametrically opposed to a number of contentions put forward by other participants in these proceedings, and since, furthermore, it has a bearing on both issues, i.e., the succession of supervisory powers and the possibility of a power of revocation vesting in the League, it will be convenient to deal with the arguments of the representative of the Netherlands only after an examination of all other submissions made in these proceedings, that is, submissions made relative to the two issues of succession of supervisory powers and revocation of the Mandate which will be considered in the light of the contentions advanced in our own written statement.

The representative of Pakistan has based his argument that the United Nations succeeded to the supervisory powers of the League on events which took place during 1945 and thereafter. Consequently his argument will be dealt with by Mr. Grosskopf.

The representatives of the Secretary-General, the Netherlands and Pakistan have, in various contexts, laid stress on the relationship between a mandatory

and the international community or, as it has also been termed, the organized international community. Thus the representative of the Secretary-General has referred to:

> "... the legal character of the relationship between South Africa and Namibia and between South Africa and the international community, the latter represented by the League of Nations and subsequently by the United Nations" (*supra*, p. 53).

It will be observed, Mr. President, that the emphasis is on a relationship between South Africa and not the League of Nations as such, but the international community as represented by the League and, in the words of the Secretary-General, "later by its successor, the United Nations".

Now a contention such as this may serve as the basis of an argument that the Mandate for South West Africa created a legal relationship between South Africa, on the one hand, and, on the other hand, not the League of Nations as such, but the international community as represented by the League of Nations or, of course, any successor of the League representing the international community. I will deal in due course with the feasibility of such an argument which, for reasons of convenience, I will refer to as the organized international community argument.

As regards the possibility of revocation of a mandate, we demonstrated in Chapter VII of our written statement that a power on the part of the League to revoke a mandate could have been derived only from the express terms of the mandate instruments, read with Article 22 of the Covenant, or an implied term, or the application of some objective principle of international law (written statement, **I**, Chap. VII, para. 67).

In some of the written statements in these proceedings, as well as during the oral proceedings, attempts have been made to justify the thesis of revocability of a mandate on the basis of an implied term or an objective principle of international law. Now, significantly, in our submission, no participant attempted to meet our detailed argument in support of the contention that a term conferring upon the League the power of revocation cannot be implied in the mandate instruments and that there is no principle of international law which, operating *aliunde* the mandate instruments, could have conferred such a power upon the League. In particular, no or very little reference has been made to the events preceding the conferment of the mandates, especially the proceedings at the Paris Peace Conference which, in our submission, clearly show that it was the intention of the authors of the mandates system that mandates should not be revocable. In fact, only the representatives of Finland and Pakistan referred to these events and then only very briefly.

Furthermore, Mr. President, no representative referred to the passage from the Court's 1966 Judgment quoted in Chapter VII, paragraph 83, of our written statement and which we contend is diametrically opposed to the notion that the League was empowered to revoke a mandate. If it were thought that this passage does not support our contention, one would have expected at least some comment in this regard. Thus the failure of representatives who contended in this Court, that the League was empowered to revoke a mandate to refer to this passage in the Court's 1966 Judgment is highly significant. The only inference is that they agree that the passage cannot be reconciled with the notion of a power vesting in the League to revoke a mandate. If they thought otherwise, they surely would have contended that the passage does not mean what we say it does.

Mr. President, I turn now to a more detailed discussion of a possible legal basis for a contention that a substitution of supervisory powers could have occurred without the consent of a mandatory power. First of all, to the possible existence of an objective principle of international law which operating *aliunde* the mandate could have had this effect.

Now in their observations on the preliminary objections in the *South West Africa* cases, the then Applicants, Ethiopia and Liberia, relied on a so-called doctrine of automatic succession which they then said had formed the basis of the majority Opinion in 1950. They said:

> "Both the Majority and the Minority in the 1950 Advisory Opinion held that the Mandate instrument did not lapse with the dissolution of the League . . . Having achieved this common understanding, the Majority and Minority then divided on one question: succession of the United Nations to the League's supervision of the Mandate. The Majority found that there had been an automatic succession; the Minority did not agree. Although the Minority held that the instrument of Mandate continues in existence, in declining to employ the doctrine of succession, Judges McNair and Read held that Article 6 could not be enforced only for the mechanical reason that there is no Council of the League to which Respondent could report." (*I.C.J. Pleadings*, 1966, Vol. I, p. 429.)

I quote again:

> "The Mandate is a creature of the organized international community, as well as the subject of a legal interest of such community and its Members . . . The only question is, which representative of the organized international community does one look to, the League of Nations or the United Nations, the organ in existence when the Mandate was conferred or the organ now in existence? The Majority Opinion applied the doctrine of succession and looked to the United Nations." (*Ibid.*, pp. 442-443.)

The Applicants also said:

> "The Court, in determining that the International Court of Justice has replaced the Permanent Court and that the United Nations has replaced the League of Nations for purposes of the Mandate, similarly applied the principle of succession, explicit in one case and implicit in the other, in order to give effect to the purposes of the Mandate." (*Ibid.*, p. 445.)

Mr. President, it is apparent to what extent reliance was placed by the then Applicants on this doctrine of principle of succession, which, according to them, had formed the basis of the Court's 1950 Opinion. This doctrine of automatic succession was, in our submission, refuted by South Africa in the pleadings and oral proceedings. It was also demonstrated that the majority Opinion in 1950 was not based upon any such doctrine. In the result, the doctrine of automatic succession received no support whatsoever from any Member of the Court in 1962. The only discussion regarding this doctrine in 1962 is to be found in the dissenting opinion of Judge van Wyk, who held that no such principle exists. He said:

> "There is no substantive rule of international law which provides that where an international organization comes to an end, and another international organization performing similar functions exists at that time, that the powers and functions of the dissolved organization pass automatically to the organs of the new organization, or that the rights of the

Members of the former pass to the Members of the latter, irrespective of the intention of the parties to the relevant instruments relating to these organizations." (*I.C.J. Reports 1962*, p. 603.)

Judge van Wyk then quoted the following passage from the opinion of Judge Levi Carneiro in the *Ambatielos* case (*I.C.J. Reports 1952*, p. 54):

"Even when the organ which was formerly competent has been abolished, its powers cannot be regarded as automatically transferred to the new organ which replaces it."

Judge van Wyk continued:

"No such rule of automatic transfer is to be found in any of the sources of international law enumerated in Article 38 of the Statute of this Court. There are no international conventions, general or particular, establishing such a rule, there is no general international custom to this effect, nor is such a rule to be found in the general principles of law recognized by civilized nations." (*I.C.J. Reports 1962*, p. 603.)

In his separate opinion in 1962 Judge Bustamante also, in passing, rejected the notion of automatic succession of the United Nations to the League of Nations. He said:

"The above findings do not in any way imply an intention to establish or to regard as established the principle of automatic or *ex officio* succession of the United Nations to the League of Nations. It has been sufficiently clearly shown, in the course of the written and oral proceedings in this case, that the theory of automatic succession is inconsistent with the historical background of the discussions and resolutions of the two great bodies during the transitional period in 1945-1946." (*Ibid.*, p. 364.)

Now, Mr. President, it was presumably statements such as these and also the lack of support for their contention in the 1962 Judgment and other opinions that caused the Applicants to discard their contention during the oral proceedings on the merits in 1965. At that stage they expressed regret for having used the expression "automatic succession" and stated explicitly that they did not conceive "that the United Nations acquired title to the League's supervisory power over mandates by virtue of some general international legal principle of devolution or succession, *aliunde* the mandate". (*I.C.J. Pleadings*, Vol. VIII, p. 132.)

It was probably by reason of this concession that the possibility of succession by virtue of an objective rule of international law was not dealt with at all in either the Judgment or the opinions in 1966.

As far as we are aware, no publicist of repute has ever seriously suggested that there exists any principle of succession which, operating independently of the intention of the parties, could automatically have effected a substitution of the United Nations, its organs and/or members, for the League of Nations, its organs and/or members. We consequently do not deem it necessary to say anything more in this regard, save to make the submission that any contention based on the existence of such a principle is clearly untenable.

However, before leaving this topic, I wish to draw attention to a remark made by the representative of Finland in his address before the Court. Having referred to a statement in paragraph 44 of Chapter VII of our written statement to the effect that there was no suggestion by any Member of the Court in the 1950 Opinions, or in the Judgment and opinions in 1962, or in the Judgment

and opinions in 1966, that there exists any such principle of automatic succession, the representative of Finland continued:

> "However, note 1 on page 425 shows that Judge Alvarez in his 1950 dissenting opinion concluded that the United Nations had succeeded 'ipso facto' to the League of Nations." (*Supra*, p. 76.)

Now, Mr. President, it is true that Judge Alvarez's statement was a possible qualification to what we said in the paragraph in question—that is why we drew attention to it in the footnote. But the real gist of the note lies in our comment that "Judge Alvarez failed, however, to formulate any legal principle or rule on which his conclusion could be based, nor did he cite any authority in support thereof". In other words, in the absence of an explanation by Judge Alvarez we do not know what he really meant. It is, perhaps, significant that the distinguished representative of Finland did not associate himself with the views of Judge Alvarez.

I turn now to the second possible ground on which a succession of supervisory powers could have occurred, namely the express terms of the mandate instruments and the Covenant. A consideration of these terms is also important for another purpose, namely to establish whether a term can be implied in the mandate instruments. It is therefore necessary to deal with the express terms of the mandate instruments in some detail.

Provisions relating to the supervisory powers of the League and what, for reasons of convenience, may be called the procedural obligations of the mandatories, are to be found in two articles of the Covenant and one article of the mandate instruments. Firstly, Article 22, paragraph 7, of the Covenant, which reads:

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

Then, Article 22, paragraph 9, of the Covenant, which reads:

> "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."

Finally, Article 6 of the Mandate for South West Africa and also corresponding articles in other mandate instruments:

> "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."

Now, Mr. President, these provisions—these provisions in the Covenant as well as in the mandate instruments—make reference to specific supervisory organs only, that is, the Council of the League and the Permanent Mandates Commission, which organs, upon the dissolution of the League, ceased to exist.

The concept "supervisory powers or functions of the League", frequently employed by commentators, was, in essence, derived from the obligation of mandatories, imposed by the provisions which I have just quoted, to report with reference to the territories under their administration and to the measures taken to carry out their substantive obligations.

In practice, the regular consideration of reports by mandatories and of petitions forwarded by them, together with the mandatories' comments on such petitions, constituted League supervision correlative to the mandatories'

obligation to report and account to the Council. In the absence of such an obligation—in other words, in the absence of an obligation to report and account—it would be impossible to infer that the League Council was intended to exercise a supervisory function or to speak, in this regard, of any obligation to submit to such a provision.

The essence of the supervisory functions of the League was consequently the mandatory's obligation to report and account to the Council of the League. The further obligation or function, the forwarding of petitions, was subsidiary and dependent on the fact that the Council was the supervisory organ.

In our submission, there can be no doubt that the clear wording of the provisions relating to the mandatories' obligation to report and account imposed an obligation to report and account, not to some abstract undefined entity, but to a specific supervisory body, constituted and functioning under the provisions of a particular convention.

Mr. President, we would again like to stress, as was done in Chapter VII, paragraph 49, of our written statement, that it was not an obligation to submit generally to international supervision or to supervision by the international community, or the family of nations, or the civilized nations of the world, or the like. It was an obligation to report and account to a specific organ of a specific organization, an organization embracing certain of the nations of the world, the Council of the League of Nations.

In this regard it is important to bear in mind that the League was constituted by a covenant, the provisions of which were known to the mandatories and to which all mandatories were initially signatories. The constitution of the Council required "the agreement of all the Members of the League represented at the meeting" and Article 4 provided for an invitation to any Member of the League not represented on the Council to sit as a member of the Council at any meeting during the consideration of matters specifically affecting the interests of such a Member. I will demonstrate at a later stage that it is now settled law that a mandatory could thus in effect have vetoed any decision of the Council relating to its administration of the particular mandated territory.

It was to supervision through machinery governed by these provisions of the Covenant, and to no other, that, according to the express terms of the mandate instruments, the mandatories consented to submit. As a matter of interpretation, how can it possibly be contended that the mandatories also consented to submit to the supervision of a successor of the League should the League cease to exist; a successor, Mr. President, the nature and constitution of which would have been completely unknown at the time? Is it, for instance, conceivable that any mandatory would have consented to submit to the supervision of an international organization which could, by a bare majority, adopt decisions binding on a mandatory? Surely it cannot seriously be contended that although a mandatory was accountable to a specific organ of a specific organization, which organ had to take decisions unanimously, that mandatories nevertheless consented to be accountable to the so-called organized international community in whichever form it might exist in the future.

Statements made by delegates at the Paris Peace Conference also show that considerable practical importance was attached to the fact that the obligation to account related to specific supervisory machinery. When the compromise agreement relating to the mandates system was arrived at on 30 January 1919, the South African Prime Minister, General Louis Botha, stated that although he felt very strongly about the question of South West Africa, and though he thought it differed entirely from any other question which they were discussing at the time, he would be prepared to say that he was a supporter of the draft

resolution embodying the compromise, "because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country". (*Foreign Relations of the United States, The Paris Peace Conference, 1919*, Vol. III, pp. 801-802.)

Two days earlier, that is on 28 January 1919, Mr. Lloyd George had said that he agreed with Mr. Clemenceau that if the League of Nations were made an executive for purposes of governing, and charged with functions which it would be unable to perform, it would be destroyed from the beginning. He furthermore said that he had not so interpreted the mandatory system when he had accepted it in principle, and President Wilson then stated that he also had not so interpreted it.

The idea of a mandatory being obliged to submit to the supervision of some undefined organ or organization was clearly unacceptable to Mr. Clemenceau. He expressed the following misgivings:

> "The League of Nations, he thought, was to be a League of Defence to ensure the peace of the world. But it appeared they had now gone beyond that limit when they proposed to create a League of Nations with governmental functions to interfere in internal affairs, with trustees in various places sending reports to—he did not know whom . . . It had been said that an International Legislature and some sort of executive power, about which he knew nothing, would have to be created, without any power to administer penalties, since this question had never been raised. The idea of an unknown mandatory acting through an undetermined tribunal gave him some anxiety." (*Ibid.*, pp. 768-769.)

Mr. President, in our submission it is accordingly clear that the prospective mandatory powers required clarity as to the content of the mandates system before consenting thereto and that they were strongly influenced by the contemplation that supervision by the League would be exercised in a conservative manner. As is pointed out in our written statement, I, Chapter VII, paragraph 51, this contemplation became a reality upon the establishment of the League of Nations; this is evidenced by the Hyman's report and by the expressed endeavour of the Permanent Mandates Commission to exercise their authority "less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour" (League of Nations, *Official Journal*, 1921, Nos. 10-12, p. 1125).

It is consequently also clear that the wording of the obligation to report and account as relating to a specific supervisory authority and no other, was quite evidently not a matter of mere form or technicality but one of basic practical importance. We therefore submit that as a matter of interpretation there can be no doubt that the parties never intended nor contemplated any other supervisory authority than the Council of the League of Nations assisted by the Permanent Mandates Commission.

The correctness of this conclusion can be demonstrated in a number of ways. The following question may be posed: Is it possible to interpret the Mandate in such a manner that a mandatory would have been obliged during the lifetime of the League of Nations to submit to supervision by some other international organization or another organ of the League itself? The answer must clearly be in the negative.

Without fresh consent on their part the mandatories could not have been

obliged to submit to the supervision of, for instance, the International Labour Organisation. Similarly, if a group of States which did not join the League had formed an organization of their own, mandatories would obviously not have been obliged to submit to international supervision by some organ of the other organization, for the simple reason that the mandatories had never agreed to accept such an obligation. And, Mr. President, it would have made no difference if this new parallel organization eventually was more representative of the so-called world community than the League itself, in the sense that it had more members than the League, and it also would have made no difference if eventually most of the original Members of the League had joined this new parallel organization.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

At the adjournment I was considering the question whether if, during the lifetime of the League a parallel international organization had been formed, a mandatory would have been obliged to submit to the supervision of this new organization, and concluded that the answer must be clearly in the negative.

There is another possibility that must be considered. Let us assume that the Covenant was amended so as to transfer the supervision of the Council of the League to the Assembly or to provide that the Council could, in matters of mandate supervision, arrive at valid, binding decisions by a simple majority. It is obvious that such alterations would seek to impose upon the mandatories obligations with a content different from those to which they had assented. The Covenant did provide for amendments thereto, but it also provided that no amendment would bind a Member signifying dissent therefrom, although it would then cease to be a Member of the League. If a mandatory had refused to agree to an alteration in supervisory machinery, it could therefore lose its membership in the League, but the alteration, as such, would not be binding upon a mandatory without its consent.

Of course, these considerations do not only operate to the benefit of mandatories in the sense that without their consent they would not have been obliged to submit to other supervision, they also operate, in a sense, to the detriment of the mandatories. The Covenant and the mandate instruments were, as far as supervision is concerned, obviously binding not only on the Council and the League in general, but also on the mandatories. A mandatory would therefore not have been entitled during the lifetime of the League of Nations to claim a right to perform its obligations of accountability by submitting reports to some other international organization or to some other organ of the League of Nations.

I have already referred to statements made during the present oral proceedings to the effect that South Africa was obliged to account to the League and to its successor, the United Nations, as representing the international community or the organized international community. Similar statements were made by the Applicants in the *South West Africa* cases. Their "organized international community" argument may be summarized as follows.

Firstly, the Covenant of the League vested responsibility in the organized international community to assure that mandatories would promote the well-being and progress of inhabitants of mandated territories; secondly, any reference in the mandate documents to the performance of supervisory functions by organs of the League must accordingly be construed as a reference to such organs in their capacities as constituting or representing the organized international community; and thirdly, since the dissolution of the League of Nations,

the obligations of the mandatory have been owed to the United Nations as the new organized international community.

I have already pointed out, Mr. President, that the provisions regarding supervision in respect of mandates by organs of the League referred to such organs by name and without any qualifications whatsoever. In order to arrive at the conclusion that such organs acted merely in a special capacity, that is, as constituting or representing the organized international community, it would consequently be necessary to read into the mandate instruments an unexpressed intention: that the supervisory powers would be exercised by the League, not as an organization, as such, but as representing the organized international community. In other words, the term would have to be implied.

I will deal shortly with the question whether such a term or a similar term can be implied in the Covenant or mandate instruments. For present purposes it suffices to point out that an organized international community argument cannot possibly be based on the express terms of the Covenant or the mandate instruments.

As a matter of interpretation, we consequently submit that there cannot be any warrant for reading the mandatories' duty to submit to supervision by the Council of the League of Nations as meaning supervision by any other international organization, or as being equivalent to a wider obligation of international accountability, or something similar, which could have survived the dissolution of the League.

Mr. President, I have now dealt with two of the possible three bases on the strength of which it can be said that, without fresh consent on the part of the mandatory, obligations relating to supervision survived the dissolution of the League.

The third and last possible basis is the existence of an implied term which would have had this effect. We will demonstrate at a later stage that the Court in its 1950 Opinion apparently did not rely on any such implied term. In the proceedings on the preliminary objections in the *South West Africa* cases, only Judge van Wyk dealt with the possibility of such an implied term and he had no difficulty in rejecting it, as can be seen from *I.C.J. Reports 1962*, pages 605 ff. In the proceedings on the merits Judge van Wyk came to the same conclusion, and he was supported by Judge Tanaka, who delivered a dissenting opinion. Judge Tanaka said:

> "As the mechanism of implementation of international supervision, the majority opinion of 1950 refers to the United Nations as its organ . . . contrary to the views of Lord McNair . . . and Judge Read . . . This conclusion cannot be derived from the express or tacit intent of the parties to the mandate agreement and those concerned, because at the period of the inception of the Mandate an event such as the dissolution of the League surely could not be foreseen by them, and because the intention of the parties and those concerned, and the surrounding circumstances at the period of the dissolution of the League are susceptible of diverse interpretations." (*I.C.J. Reports 1966*, p. 275.)

It is clear therefore, Mr. President, that Judge Tanaka was of the view that a succession of supervisory powers could not have taken place because of any provision in the mandate instruments of the Covenant, whether expressed or implied.

The arguments which have already been adduced in regard to the express terms of the mandate documents also serve to refute any possible suggestion of an implied term in conflict with the expressed terms. In the passage cited from

Judge Tanaka's dissenting opinion, there is reference to a further fundamental obstacle to any possibility that the authors of the mandates system could have intended to provide for the consequences of a future dissolution of the League of Nations. The question may be asked: what would have necessitated such a provision? The only answer is a contemplation of the possible future dissolution of the League and/or the creation of another body to take its place.

Now, Mr. President, as pointed out by Judge Tanaka, at the period of the inception of the mandates system an event such as the dissolution of the League surely could not have been foreseen by those concerned. Similar views have been expressed by other judges of this Court. In his separate opinion on the preliminary objections in the *South West Africa* cases, Judge Bustamante stated:

> "Obviously the provisions of the Covenant which had instituted the international Mandates System did not envisage the possibility of the dissolution of the League of Nations and did not foresee its possible effects on the Mandate agreements in force." (*I.C.J. Reports 1962*, p. 362.)

In their joint dissenting opinion in 1962 Judges Sir Percy Spender and Sir Gerald Fitzmaurice stated that it is ". . . evident that those concerned did *not* foresee, and would have refused to contemplate, a possible break-up of the league". (*Ibid.*, p. 514.)

In 1966 the Court found that the circumstances of the League dissolution were "neither foreseen nor foreseeable" by the framers of the mandates system (*I.C.J. Reports 1966*, p. 49). References to further similar expressions of opinion are to be found in our written statement, Chapter VII, paragraph 57.

But, Mr. President, even if we assume that the authors of the mandates system did contemplate the possibility of a future dissolution of the League, it would still be impossible to impute to them an intent that after such a dissolution mandatories would be obliged to account to another international organization. In this regard it should be stressed that several of the mandatories could only with great difficulty be prevailed upon to accept the mandates system at all in substitution for contemplated annexation of the territories concerned.

This was especially true of the Australian Prime Minister, Mr. Hughes, who on 29 January 1919, at a meeting of the Imperial War Cabinet, still insisted on outright annexation of New Guinea. By this time, the well-known compromise draft resolution, which had been prepared by General Smuts, had already been worked out, but it was only after Mr. Lloyd George, the British Prime Minister, had assured Mr. Hughes that a Class "C" Mandate for New Guinea was the equivalent "of a 999 years' lease as compared with a freehold", that Mr. Hughes notified Mr. Lloyd George of his acceptance of the draft. The reference is to Slonim's paper in *The Canadian Yearbook of International Law*, Volume VI, page 135.

When the draft resolution was discussed in the Council of Ten, President Wilson initially indicated that he did not think that the Council could make a final decision at that stage. At a later stage President Wilson said that he was willing to accept the proposals contained in the draft resolution subject to reconsideration when the full scheme of the League of Nations had been drawn up. (*Foreign Relations of the United States, The Paris Peace Conference, 1919*, Vol. III, p. 791.) Mr. Hughes was not satisfied with the purely provisional arrangement. He enquired whether they should await the acceptance of the League of Nations by the Conference and by the world whilst they were waiting for a decision. He asked, "Was not the *de facto* League of Nations already in

existence in that room?", and he expressed the opinion that this League should say who were to be the mandatories. (*Ibid.*, pp. 793-794.)

It is clear therefore that to Mr. Hughes the League of Nations, to which mandatories would be accountable, was not an undefined abstract entity, but, on the contrary, something very real. It is therefore surely inconceivable that he and other proposed mandatories, who accepted the compromise with reluctance and were strongly influenced by the composition and nature of the supervisory organs, would have agreed in advance in 1920 to submit at some unknown date in the future to supervision to be exercised by an unknown body, especially since the composition, procedure and attitude of such an unknown body could obviously also not be known at that stage. Moreover, Mr. President, the circumstances whereunder the League would be dissolved could also not be known.

It is important to have regard to the circumstances in which a term may be implied in an agreement. As has already been pointed out, courts in all legal systems guard themselves against assenting to a proposed implication on any but the most cogent grounds. We dealt with this in I, Chapter II, paragraph 10, of our written statement, and my colleague Mr. Grosskopf has again dealt with the circumstances under which a term can be implied.

Consequently the requirement is stressed that an implication of consensus must arise necessarily or inevitably from relevant facts, in the sense that all other reasonable inferences are excluded. As was said by Judge Scrutton in his famous formulation in the case of *Reigate* v. *Union Manufacturing Company*, "a term can only be implied if . . . it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'what will happen in such a case', they would both have replied 'of course so and so will happen, we did not trouble to say that, it is too clear'".

Surely, Mr. President, if one had asked the founders of the mandates system what was to happen if the League were to dissolve, their answer would have been: it is inconceivable that the League will be dissolved, but should it happen, some new arrangement will have to be arrived at. They certainly would not have answered the question by saying: oh, it is so clear that mandatories will be accountable to a new international organization that we have not even bothered to state this in the Covenant or the mandate instruments.

I revert now, Mr. President, to the organized international community argument which, as I have said, can only be based on an implied term. The first question which arises is, what is the content of the provisions, sought to be implied? This nobody has indicated as yet. But whatever this organized international community may be, the arguments already advanced in regard to the untenability of any suggested implication in the mandate documents of a provision regarding future succession of supervisory organs are, in our submission, fully applicable to the particular implication contained in the organized international community argument.

These arguments, and others contained in Chapter VII of our written statement, may be briefly summarized as follows.

Firstly, since nobody in 1920 contemplated the possibility of a future dissolution of the League of Nations, it would be unrealistic to impute to the authors of the mandates system an intention to guard against the possible consequences of such a dissolution.

Secondly, even if it is assumed that the future dissolution of the League was, in fact, contemplated at the relevant time, it must be borne in mind that certain of the mandatories were reluctant to accept the extension of the mandates system to particular territories occupied by them, being influenced in their

acceptance by the nature of the supervisory machinery which rendered unlikely any injurious, biased or unfair interference with the mandatory government, and so as to contain a minimum of political element and a maximum of independent expert approach.

It is therefore inconceivable that they would have agreed in advance, in 1920, to submit to supervision at some unknown date in the future by a body, the composition, procedures and attitude of which were *ex hypothesi* unknown to them, and in circumstances which were unpredictable.

Thirdly, the provisions regarding amendment in Article 7 of the Mandate for South West Africa and similar provisions in other mandate instruments, enabled the mandates to be amended to meet changing circumstances, and indicate an attitude on the part of the authors of the mandates that such changes should be dealt with as and when they arose. Is it then likely, Mr. President, that they would have attempted to make provision in advance, and not even expressly, for something as uncertain in its nature and consequences as the dissolution of the League of Nations?

Fourthly, no State alleged the existence of such an implied agreement, despite discussions concerning the future of mandates by the founders of the United Nations, including many founders of the League, in 1945 to 1946, by the Members of the League at its final session in 1946 and by the Members of the United Nations in the years 1946 to 1949.

We consequently submit, Mr. President, that, as in the case of the interpretation of the express provisions of the mandate instruments, there is nothing in the Mandate or its surrounding circumstances which would by way of an implied term provide a warrant for rejecting the prima facie conclusion that the mandatories' obligation to report and account lapsed on the dissolution of the League. This conclusion is fortified by the following statement contained in a report of the United Nations Special Committee on Palestine:

> "Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had no international authority to which it might submit reports and generally account for the exercise of its reponsibilities in accordance with the terms of the Mandate." (*GA*, *OR*, 2nd Sess. 1947, Supp. 11, Vol. I, p. 26.)

As I have already indicated, the second part of this section of our argument is devoted to the question whether the League, and more particularly the Council thereof, was legally empowered to revoke a mandate. In our written statement, I, Chapter VII, paragraph 65, we pointed out that a number of writers and other commentators on the mandates system have posed the question whether the League had the legal power to revoke or terminate a mandate. We furthermore pointed out that it is necessary to obtain clarity as to the different concepts involved and appropriate phraseology to describe them.

Now, Mr. President, although terms are in themselves not of any overriding importance, it is necessary to distinguish between two different concepts, namely the taking away of the title of a particular mandatory and the bringing to an end of the mandatory status of a territory. In our written statement we referred to the first concept as revocation and to the second concept, as termination. Some confusion between these two concepts, that is between revocation and termination, are to be found in written statements and oral addresses in the present proceedings. So for instance, in the written statement of the United

States, at I, page 861, it is said that the early practice of the United Nations supports the conclusion that it has the competence to terminate mandates. Reference was then made to the so-called termination of the Mandates for Palestine and the Japanese mandated islands.

At a later stage, and in another context, we will deal fully with the circumstances surrounding the adoption of the relevant resolutions by the United Nations. For present purposes we merely wish to stress that, at least as far as Palestine is concerned, there was no question of a mandate being revoked because of breach of its obligations by the mandatory State. In fact, Great Britain voluntarily and unilaterally announced its intention to relinquish the Mandate. To put it in another manner, the intention was that the Mandate for Palestine as such, that is, the mandatory status of Palestine, should come to an end and not merely Great Britain's rights as mandatory. I will therefore use the word "revocation" to connote the taking away of a mandate from a particular mandatory resulting in the mandatory being deprived of its rights, and as a necessary corollary being freed from its obligations, under the mandate, but the status of the mandated territory as such remaining unaltered. This should be contrasted with termination of a mandate which completely brings a mandate to an end because it has served its purpose, in other words, because the inhabitants of a particular mandated territory have developed to such an extent that the need for administration by the mandatory has fallen away.

As also stated in the paragraph of our written statement to which I have referred, the League's rights, if any, of termination in this sense are not of any relevance in the present proceedings. This is so since the General Assembly did not in resolution 2145 purport to terminate the Mandate in that sense, despite the use of the word "terminated", but to revoke it because of alleged breaches by South Africa.

It has not been suggested in the present proceedings that the League had the far-reaching power of revoking a mandate at will. It is consequently not necessary to say anything more in this regard, but that it would be completely unrealistic to contend that the League was so empowered. The question for consideration is therefore whether the League could have revoked a mandate by a reason of serious violations by a mandatory of its obligations under the mandate.

In paragraph 67 of Chapter VII of our written statement, I, we pointed out that a power of revocation on the part of the League could have been derived only from the express terms of the mandate instruments, or an implied term, or the application of some objective principle of international law. No other basis has been advanced in the present proceedings. Moreover, nobody has contended that the League enjoyed a power of revocation by virtue of the express terms of the Covenant and the mandate instruments.

It is consequently only necessary to deal with the possibility that a mandate could have been revoked by virtue of an implied term or the application of some objective principle of international law.

The contention that a mandate was revocable by virtue of the application of such a principle of international law has been advanced in these proceedings by the United States, Finland, the Secretary-General and the Organization of African Unity.

In the written statement of the United States, at I, pages 856-857, reliance is placed on a rule of treaty law codified in Article 60 of the Vienna Convention on the Law of Treaties. Paragraph 3 of that Article—that is, Article 60—provides that a treaty may be terminated, in the sense of revoked, in the case of a repudiation thereof or the violation of a provision essential to the accom-

plishment of an object or purpose of a treaty. According to the United States written statement, the provisions of Article 60 summarize traditional international law doctrine regarding breach of treaties. The statement continues:

> "The fact that the Mandate is not a treaty between States does not affect the applicability to it of the treaty law contained in the Treaties Convention. Article 3 of the Convention provides that any of the rules set forth in the Convention may be applied to treaties between States and international organizations where such rules would be applicable 'under international law independently of the Convention'."

The submission is then made that the rule relating to material breach was recognized before the adoption of a convention as applying to all treaties, not only to those between States.

Now, Mr. President, save for one important point, we have no quarrel with this exposition of the law by the United States. It is undoubtedly true that, unless the parties otherwise provide, an ordinary treaty may be revoked by the innocent party in the case of a material breach by the other party. I will return shortly to the important qualifications, i.e., the will of the parties and the nature of the treaty.

In its written statement, Finland commenced its discussion of the revocability of a mandate with the following extra-legal statement:

> "It seems natural, as is obviously the case of South Africa, that if the mandatory continuously violates its obligations, the organization that supervises the administration may declare the mandate forfeited."

Finland then referred to the views of two publicists and also in a single sentence to the principle embodied in Article 60 of the Law of Treaties.

In his oral address, the representative of Finland relied both on an implied power to revoke a mandate and on a principle of international law conferring such a power. As regards the existence of such principle, reliance was again placed on Article 60 of the Law of Treaties, but in a context slightly different from that to be found in the written statement of the United States, a context with which I will deal in due course.

In his oral statement the representative of the Organization of African Unity although referring to Article 60 of the Convention on the Law of Treaties, appeared to base his contention that a mandate was revocable on an implied term (*supra*, pp. 88-90).

The representative of the Secretary-General, in his oral address, relied heavily on the applicability of the maxim *non adimpleti contractus*. He said that whether the relationship between South Africa and the so-called international community is contractual, or the result of an objective situation, or both, or whether it is a relationship *sui generis*, it is nevertheless governed by certain fundamental principles, one of which is the principle embodied in the said maxim (*supra*, pp. 53-54). The representative of the Secretary-General went on to refer to certain authorities which he claimed support his general proposition.

Now, Mr. President, in the first place we would like to stress that, contrary to the Secretary-General's suggestion, the determination of the legal nature of the relationship between a mandatory and the League of Nations is in fact of the utmost importance for the purpose of establishing which legal principles applied to his relationship.

Both in municipal law and international law there are but few principles which apply to every relationship, irrespective of its nature. As Mr. Grosskopf has pointed out, an essential pre-requisite for application of the maxim relied

upon by the representative of the Secretary-General is that the relationship must be synallagmatic; that is, the rights and obligations of the parties must be reciprocal or inter-dependent, like giving delivery of the thing sold in return for payment of the purchase price. The maxim simply means that in such a relationship either party may refuse to perform his own obligations until the other party has performed his obligations, or offered to do so. No loss of rights or obligation is involved for either party unless the contract itself is lawfully cancelled or brought to an end in some other manner.

It is consequently obvious that the maxim could find no application in the relationship between a mandatory and the League of Nations—a relationship, Mr. President, which did not involve anything in the nature of simultaneous acts of performance and counter-performance of obligations.

Indeed, the representative of the Secretary-General seeks to apply the maxim wrongly. He says that "a party which does not fulfil the obligations incumbent upon it and arising from the relationship, cannot be recognized as retaining the rights which it claims to derive from the relationship". As Mr. Grosskopf has demonstrated, a loss of rights or obligations does not occur automatically. It follows only on an act of cancellation or other form of termination of the agreement.

This wrong application of a maxim leads the Secretary-General's representative, in our respectful submission, into polemics, irrelevant for present purposes, in which he attributes to South Africa an attitude of continuing to lay claim on the rights obtained from the Mandate while repudiating the obligations which arose from it (*supra*, pp. 54-55). Suffice it to say, Mr. President, that that is not South Africa's attitude. On the basis that the Mandate came to an end upon dissolution of the League, South Africa accepts that it cannot base a claim of rights to South West Africa on the Mandate as such.

On the basis that the Mandate remained in existence as an institution—which is the basis on which this argument is presented—she accepts that her obligations under the Mandate remained in force, except for those which, in the description of Judges McNair and Read in 1950, depended essentially on the existence of the League for their fulfilment.

However, Mr. President, this is beside the point in the present enquiry as to the position in the time of the League. The question is not whether, in the event of a failure or delay in the performance of its obligations by a mandatory, the League could have withheld some benefit or other from the mandatory. It is simply whether the League had the power to revoke a mandate in the event of the mandatory acting in violation of its obligations. The principle of *non adimpleti contractus* does not help to answer this question.

The representative of the Secretary-General, in his oral address, also relied on the common law principles that an innocent party may revoke an agreement should the other party substantially fail to fulfil his part of the bargain or should he renounce his obligations under the agreement, and that a trustee may be removed for breach of trust, and a guardian for neglect of duties or violation of his obligations. The first principle is identical to that set out in Article 60 of the Treaty on Conventions, and the second principle is closely akin thereto. However, Mr. President, even if one were to treat the League in relation to its powers in respect of mandates as an ordinary contracting party, the cardinal question still remains whether such principles were intended to be applicable to the mandates system.

In paragraph 68, Chapter VII, of our written statement, I, we pointed out that legal rules in international law operate between subjects only when and to the extent that the parties so desire. In other words, it is open to the parties to

exclude such operation by agreement. To put it in another manner: the parties are entitled to create whatever relationships they wish, and may by agreement, either express or implied exclude any rule of international law which otherwise would have added to the incidents, effects or consequences of their transactions. There is only one exception, that is, if the rule which the parties wish to exclude is of a peremptory nature *(jus cogens)*. Thus it was said in the Court's Judgment in the *North Sea Continental Shelf* cases *I.C.J. Reports 1969*, p. 42:

> "Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties . . ."

In the present case it is unnecessary to consider to what extent peremptory rules of law have evolved in international law, since there clearly exists no such peremptory rule of law which could have introduced a right of revocation into the mandates system even against the will of the authors thereof.

I have already shown, Mr. President, that participants in these proceedings have contended that a right of revocation was introduced into the mandates by a generally recognized principle of law, either on the basis of an ordinary right of a party to a treaty to renounce it in the event of a fundamental breach by the other party, or by analogy with the three institutions of private law to which reference was made, directly or indirectly, in Article 22 of the Covenant, namely mandate, trust and tutelage. From what has been said regarding the powers of parties to an agreement to exclude rules of international law which would otherwise have governed their transactions, it follows that no right of revocation on either of these bases could have existed if contrary to the intentions of the authors of the mandates system. In order to determine the applicability of such rules, one would therefore first have to enquire into these intentions, express or implied. If it appears that the authors of the mandates system did not intend any such rule to apply to the relationship between mandatory and the League of Nations, then *caedit quaestio*: the rules could not have been applicable.

The basic soundness of this approach has been conceded by the representative of Finland in his oral address, no other participant having dealt with it either in his written or oral statement. The representative of Finland agreed that a rule of international law cannot be applied independently of the intention of the parties, that they are at liberty to agree to exclude the application of rules of international law, and that there are no peremptory rules of law which are applicable in regard to the possibility of revocation of a mandate. He went on to say:

> "I admit that the intention of the framers of the mandates system is an important factor, but not a decisive one—as can be seen from what I have just said—in seeking to determine whether in law the Mandate is revocable or not." (*Supra*, p. 82.)

Mr. President, it should be observed that although recognizing that the intention of the framers of the mandates system has to be taken into account in determining whether a right of revocation was introduced into the system, a qualification is made, namely that such intention was not a decisive one. The Finnish representative stated that this followed from what he had just said. With all due respect, Mr. President, we must say that we have looked in vain for anything said by the Finnish representative from which it can possibly be concluded that the intention of the framers of the mandates system was not decisive. In fact, this qualification is diametrically opposed to his concession

that the rules of international law may be excluded by the intention of the parties.

Let us assume that either Article 22 of the Covenant or a particular mandate instrument provided in so many words that the League would not have the power to revoke a mandate for any reason whatsoever. It would clearly then have been the express intention of the framers of the mandates system that a mandate should not be revocable, and that any rule of international law which otherwise might have introduced a right of revocation on the part of the League should be excluded. Surely such an expression of intention would have been decisive, and it is hardly necessary to say that in quality there is no difference between an expressed intention and one that is implicit in or follows necessarily from an agreement.

In approaching the matter from the basis of the mandates system, it is important to bear in mind that the League itself and the concept of supervisory powers were innovations in the field of international law. It has repeatedly been emphasized that the mandates system was *sui generis* and that mandates could not be equated with ordinary treaties. I refer to our written statement, I, Chapter VII, paragraph 70.

As already stated, the representative of the Secretary-General in his oral address stated that it is immaterial whether the relationship between South Africa and the so-called international community, which during the life-time of the League could only have been this organization, was contractual, or the result of the establishment of an objective situation, or both, or whether it was a relationship *sui generis*. Whatever was the precise legal relationship, he said, it was nevertheless governed by certain fundamental principles.

Mr. President, this, in our respectful submission, is a complete *non sequitur*. If a relationship which is created is *sui generis*, it can surely not be contended that principles applying to other relationships would automatically be applicable to the new relationship. The fact that a relationship is new and exceptional must by definition necessarily mean that it is governed by its own legal rules. Whether principles which are applicable to other and recognized relationships will also apply to this new relationship, must depend upon the intentions of the creators of the new relationship. Therefore, even assuming that the mandate was a treaty, it was at the time a treaty differing from any other treaty known to international law, and it would consequently be absurd, in our submission, to apply to the mandates principles applicable to ordinary treaties unless it could be concluded from the intentions of the authors of the mandates system that such principles were meant to be applicable to mandates.

What I have just said applies *a fortiori* to a contention that the principles of the private law institutions of mandate, trust and tutelage governed the relationship between a mandatory and the League of Nations. This contention, of course, goes further than the contention relating to the applicability of principles of law relating to treaties, since it seeks to introduce into the mandates system, not principles of international law which existed at the inception of the mandates system, but principles of municipal law which were at the time not known to or recognized in international law.

In our submission, the only possible basis on which reliance can be placed on the use of the words "mandate", "trust" and "tutelage", would be by way of inference that the authors of the mandates system intended the legal incidents of those institutions in municipal law to be applicable to mandates. But, since it was not expressly provided that the League would enjoy a power of revocation, one would then have to fall back on an implied term, on an implication derived from the use of those words in the Covenant, and the impli-

cation would not be justified in the face of contrary indications regarding the intentions of the authors of the mandates system.

It therefore cannot be correct to say, as did the representative of the Organization of African Unity, that "the power of revocation is necessarily implied in the use of the terms 'trust', 'mandate' and 'tutelage'" (*supra*, p. 90). All relevant indications of intent are to be considered before an answer can be arrived at. These indications, particularly as set out in Chapter VII of our written statement, the representative of the Organization of African Unity did not attempt to consider.

Mr. President, it was contended this morning by the distinguished representative of Viet-Nam that although rules of municipal law cannot without more be transposed into international law, nevertheless mandates were revocable for the same reasons that mandates or institutions are revocable in municipal law, that is, for instance, because of the dishonesty of the mandatory. Now of course this is a similar argument as that advanced by the representative of the Organization of African Unity and our submission in this regard is that one can only on the basis of an implied term contend that because the word "mandate" is used in Article 22 of the Covenant and in the mandate instruments, a right of revocation was introduced into the mandates system.

Here again we find that the distinguished representative of Viet-Nam did not refer to any other indications of the intentions of the authors of the mandates system.

Now the first consideration to bear in mind is that if it had been the intention to confer a power of revocation on the League, it would have been strange not to have incorporated it in the Covenant or in the mandates themselves, especially since, as we will demonstrate, specific proposals for the inclusion of such a power in the Covenant had in fact been made. Apart from this, a term providing for revocation would have been a potentially far-reaching provision with a number of implications affecting not only the population of the territory concerned, but also the League and its members, the mandatory and any new mandatory to which the territory might be entrusted.

Consequently, had it been the intention to confer upon the League the power under consideration, that is, the power to revoke mandates, one would have expected express agreement concerning, *inter alia*, the grounds which would justify revocation, the manner in which it would have to be effected, the methods by which the future administration of the territory would have to be determined and the adjustments of the rights, financial and otherwise, of the various interested parties. The failure to make express provision in this regard becomes even more significant when one examines the conflicting points of view which were ultimately resolved in the compromise relating to the mandates system. I will deal presently with these points of view.

The second consideration, Mr. President, is that, as we stated in **I**, Chapter VII, paragraph 38, of our written statement, the wording of Article 22 of the Covenant as a whole, as well as its historical background suggests strongly that the references to trust, tutelage and mandatories were not intended to bear technical legal meanings, by exact or close analogy to municipal law institutions of trust, tutelage and *mandatum*. This is also borne out by the fact that the English word "trust", which is capable of a technical legal meaning as well as of a more general ordinary meaning, was rendered in the French version by the word "mission", meaning in this context task or undertaking. It is also significant that in the actual mandate instruments themselves, the words "trust" and "tutelage" did not appear at all. Even the words "mandatory" and "mandate" which were retained in the mandate instruments themselves, are, in our

submission, not indicative of an intention to import into the mandate instruments the rules governing the *mandatum* of private law. Were it otherwise, the Council of the League might have enjoyed the power to dismiss a mandatory at will, and this has never seriously been contended. It is therefore not surprising that the majority of the Court in the 1950 Advisory Opinion expressed the view that it was "not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law." (*I.C.J. Reports 1950*, p. 132).

Now, Mr. President, if it is not permissible to draw any conclusions by analogy from any legal conception of national law, it can surely not be contended that a term empowering the League to revoke a mandate can be implied from the mere use of the words "trust", "mandate" and "tutelage" in Article 22 of the Covenant. Yet this is exactly what the representatives of the Organization of African Unity and Viet-Nam appear to have done.

In I, Chapter VII, paragraphs 4 to 24, of our written statement, we set out the history and origin of the mandates system. This exposition, in our submission, clearly shows that the authors of the mandates system did not intend mandates to be revocable. Indications of intention are so important for present purposes, and some relevant events have been quoted so completely out of context in these proceedings, that at the risk of repetition we deem it necessary to refer once more to the most important events preceding and surrounding the conferment of the Mandate.

In the first instance it should be observed that as early as March 1917 the British Imperial War Cabinet decided that Australia, New Zealand and South Africa should be allowed to annex the territories occupied by their forces and more or less adjacent to their own territories, namely German New Guinea, German Samoa and German South West Africa respectively. The United States was not a party to this decision, and at the termination of the war President Wilson strongly advocated a policy of no annexations. In October 1918, Colonel House, who had been chosen by President Wilson as a member of the United States delegation to the Peace Conference, met with the British Prime Minister, Mr. Lloyd George, and gained British acceptance, in principle, of a trusteeship system for all enemy territories with the exception of South West Africa and the Asiatic Islands. According to the Prime Minister, the Dominions were not prepared to give up any of the territories conquered by them during the war and contiguous to their own territories. However, in November 1918, President Wilson in course of a meeting on board ship, stated that the German Colonies, that is all German Colonies, should be declared the common property of the League of Nations and that the resources of each Colony should be available to all members of the League.

In December 1918, General Smuts published the well-known pamphlet in which he linked a proposed mandates system with a proposed League of Nations. Some of his proposals were of primary importance for present purposes. General Smuts suggested in the first instance that the mandates system should apply only to territories formerly belonging to Russia, Austria-Hungary and Turkey. He expressly excluded the German Colonies in the Pacific and Africa from his proposals.

As far as the first-mentioned group of territories were concerned, he suggested that the League of Nations should be considered as the reversionary in the most general sense and as clothed with the right of ultimate disposal in accordance with certain principles. Thus, any authority, control or administration which might be necessary in respect of the territories to which he intended the system to apply should be the exclusive function of and vested in the League of Nations.

It should be lawful for the League to delegate its authority to some other State and the degree of authority to be exercised by the mandatory State should in each case be laid down by the League in a special act or charter, which, and this is important, should reserve to the League complete power of ultimate control and supervision as well as the right of appeal to it from the territory or people affected against any gross breach of a mandate by the mandatory State.

In terms of these provisions, Mr. President, administration of the territories concerned would vest in the League which could entrust such administration to a State. If this occurred, the Act or charter appointing such State had to reserve to the League complete power of ultimate control as well as a right of appeal to it against breaches of its obligations by the Mandatory. There can thus be little doubt, in our submission, that General Smuts had in mind that the League should have the power to revoke a mandatory's authority and to appoint another mandatory in its place. In his oral address, the representative of the Organization of African Unity makes reference to General Smuts' monograph in which, according to this representative, "he expressed the following opinion regarding modification of mandates" and he then proceeded to quote the following extract from the monograph:

> "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." (*Supra*, p. 89.)

I would like to stress these words, Mr. President—the League should "assert its authority to the full even to the extent of removing the mandate".

Now the context in which reference was made to General Smuts' monograph is of some significance. The representative of the Organization of African Unity started off by referring to an alleged objection that since there is no express power of revocation provided for under the League Covenant, there could therefore be no implied power, which he naturally dismissed as something which cannot be seriously maintained. This, of course, has certainly never been South Africa's argument. We rely on the fact that there was no express provision regarding revocation in the Covenant or the mandate instruments, but coupled with the evidence that the authors of the system did not intend such a power to be implied; this included the fact that suggestions that the League should be expressly so empowered were not adopted.

The representative of the Organization of African Unity proceeded to state that the question whether the League had a power of revocation was not settled during the lifetime of the League and he then referred to the writings of certain jurists which, he said, would appear to indicate that the League was regarded as possessing such a power.

Reference was then made to the views of Quincey Wright and immediately thereafter to General Smuts' monograph. In this context and because of the statement that General Smuts expressed the opinion contained in the quoted statement regarding modification of mandates, the impression is created that General Smuts was commenting on the mandates system as eventually adopted. Now this is, of course, not the case. As already stated, General Smuts' pamphlet merely contained proposals relating to an envisaged mandates system, a mandates system, at that, which was not to be applicable to all former enemy territories, but was to exclude from its operation South West Africa and the Asiatic islands to which Australia and New Zealand laid claim. This the representative of the Organization of African Unity also failed to point out; in

other words, that General Smuts did not intend the system to apply to all ex-enemy territories.

It is, therefore, of primary significance that whilst the compromise which was eventually reached included these three territories, proposed provisions relating to the revocation of a mandate and the appointment of a new mandatory were excluded from the compromise arrangement and also later from the Covenant and the mandate instruments. This significance was also overlooked by the representative of Pakistan, who also alluded to General Smuts' pamphlet in support of a contention that the prospective mandatory States were aware that the mandates were to be revocable.

Mr. President, I revert now to the events indicative of the intentions of the authors of the mandates system. During a discussion in London in December 1918 between President Wilson and Mr. Lloyd George, the latter pointed out that it would be quite impossible to separate South West Africa from South Africa because the former was essentially part of South Africa. The President did not seem prepared to contest this contention, but he expressed the view that the position of Australia with regard to the Pacific colonies was not quite the same. Hereafter President Wilson proceeded to Paris where he drew up a draft covenant in which he incorporated much of the thought and language of General Smuts. In this draft, known as Wilson's First Paris Draft, it was suggested that the mandates system should apply to all German colonies. The President also proposed that all authority, control or administration which might be necessary in respect of the said territories should be the exclusive function of the League. A right of appeal to the League for the redress and corrections of any breach of the mandate by the mandatory State was reserved to the people of any such territory, and provision was also made for the conferment of mandates on organized agencies, other than States, and for the substitution of mandatories by the League of Nations.

It is apparent, Mr. President, that the proposals of President Wilson and those of General Smuts were almost identical. The only basic difference was that General Smuts intended the mandates system not to apply to South West Africa and the Asiatic islands whilst President Wilson intended his system to apply to all German colonies and that he also made provision for organized agencies to be mandatories.

The future of the German colonies was discussed as from 24 January 1919 in the so-called Council of Ten at the Paris Peace Conference. Prior to this, President Wilson had prepared his Second Paris Draft which, as far as the mandates system was concerned, did not differ materially from his first draft save that it provided that any expenses of the administration of a mandated territory which could not be borne by the resources of the people or territory under the charge of a mandatory should be borne by the several signatory powers, unless the mandatory State or agency was willing itself to bear the excess cost. This proposal was, of course, in keeping with his notion that the League would enjoy the complete power of ultimate control and supervision of mandated territories.

It is hardly necessary to say, Mr. President, that these proposals of President Wilson were not acceptable to the other States concerned. Mr. Lloyd George and the Dominion Prime Ministers continued to press for the annexation of South West Africa and the Pacific islands and Mr. Simon, the French Minister for Colonies, for the annexation of the Cameroons and Togoland by France. It was in the course of developing his argument against the acceptance of President Wilson's mandatory system that Mr. Simon pointed out that every mandate would be revocable and that there would, therefore, be no guarantee for its continuance. Thus, he said, there would be little inducement for the invest-

ment of capital and for colonization in a country, the future of which was unknown.

In his oral address, the representative of Finland made the following reference to the speech of Mr. Simon:

> "It is interesting to note that Mr. Simon, French Minister for Colonies, emphasized at a meeting of the Paris Peace Conference on 28 January 1919 that every mandate would be revocable and that there could be no guarantee of its continuance" (*supra*, p. 75).

In this manner the impression was created that Mr. Simon was of the opinion that mandates would be revocable. The same impression was created by the distinguished representative of Pakistan who, in support of his contention that the prospective mandatories were aware that mandates would be revocable, also referred to the misgivings expressed by Mr. Simon. It should consequently be emphasized, Mr. President, that Mr. Simon's opinion was expressed relative to President Wilson's proposals, as contained in his First and Second Paris Drafts, and in the course of an argument intended to demonstrate why President Wilson's proposals were unacceptable to the French Government. In other words, it was precisely because in terms of President Wilson's proposals mandates would, for one thing, be revocable that Mr. Simon was not prepared to accept these proposals.

The Court rose at 12.59 p.m.

TWELFTH PUBLIC SITTING (26 II 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

Mr. VAN HEERDEN: Mr. President, at the adjournment yesterday I was dealing with the events preceding the conferment of the mandates with a view to ascertaining the intentions of the authors of the mandates system. I referred to a speech made by Mr. Simon of France, at the Paris Peace Conference, when in developing his argument against the acceptance of President Wilson's proposals, he stated that mandates would be revocable. I showed how this statement has been quoted out of context by certain participants in these proceedings, and I concluded that it was precisely because President Wilson's proposals relative to mandates would, for one thing, entail the element of revocability, that Mr. Simon was not prepared to accept the same.

Similar sentiment were expressed by Mr. Balfour of Great Britain. He pointed out that if the tenure of the mandatory were merely temporary difficulties would arise, and he stated that in his opinion the mandates system could only work if a mandatory was secure in his term of office.

I have already referred to the meeting of the Imperial War Cabinet, when the compromise resolution, which was worked out by General Smuts, was considered. It is worth repeating that it was only after Mr. Lloyd George had convinced the Australian Prime Minister, Mr. Hughes, that a Class "C" mandate for New Guinea would be tantamount to Australian ownership of the island, subject of course to certain conditions on behalf of the inhabitants, that Mr. Hughes notified Mr. Lloyd George of his acceptance of the draft resolution.

The Smuts draft resolution was considered at the next meeting of the Council of Ten. Mr. Lloyd George then said that the document embodying the draft resolution did not represent the real views of the Dominions, but that they had accepted it as an attempt at a compromise. Consequently three classes of mandates would have to be recognized, the third category being described by Mr. Lloyd George as follows:

> "Mandates applicable to countries which formed almost a part of the organisation of an adjoining power, who would have to be appointed the mandatory."

Mr. Lloyd George consequently made it clear that as regards the Pacific Islands and South West Africa, Australia, New Zealand and South Africa would have to be appointed as mandatories.

In the event, Mr. President, the draft resolution was provisionally accepted and, with certain alterations and modifications which are not of any relevance for present purposes, eventually became Article 22 (6) of the Covenant.

It is also relevant to refer to a discussion between Colonel House and Lord Robert Cecil on 27 January 1919. In his diary Colonel House recorded that there were some strong points of difference between the American drafts and the draft of Lord Robert Cecil regarding, *inter alia*, the League of Nations, for example, upon the question whether or not the mandatory principle should be applied to the German colonies. Colonel House contended that the mandatory principle should apply to these colonies and Lord Robert Cecil was prepared to accept it, but he objected to the clause in President Wilson's proposals in terms

of which a territory could, by applying to the League of Nations, ask for a substitution of mandatories. Lord Robert Cecil thought that the Dominions would not be prepared to accept such a proposal. The reference is Seymour, *The Intimate Papers of Colonel House*, Volume IV, page 307.

It was only three days later, on 30 January 1919, that the Smuts resolution was provisionally adopted. This resolution constituted the corner-stone of the compromise between the conflicting points of view. In terms of this compromise President Wilson had to abandon certain of the extreme aspects of his proposals concerning, for instance, League supremacy. The mandates were to be allocated by the Principal Allied and Associated Powers, not the League and, as far as "C" mandates were concerned, the allocation would have to be to the adjacent claimant States. But, Mr. President, most important for present purposes, President Wilson's provisions relating to revocation of mandates and substitution of mandatories did not appear in the Smuts draft and consequently also found no place in Article 22 of the Covenant. It is hardly necessary to say that this omission could not have been accidental or fortuitous.

It is significant that only the representatives of Finland and Pakistan, in their oral addresses, have seen fit to refer at all to the events preceding the conferment of the mandates, which events are set out at length in Chapter VII of our written statement. They did so very briefly, and, as I have shown by quoting not only out of context but also directly contrary to context. I have already stated that the representative of Finland conceded that the intention of the framers of the mandates system is an important factor in seeking to determine whether mandates were revocable or not. I have also said that this qualification that such intention is not decisive is in direct conflict with his concession that the applicability of rules of international law to legal relationships must be dependent upon the intention of the parties. In regard to the events relied upon by South Africa the representative of Finland said:

> "In my view, neither the *travaux préparatoires* concerning Article 22 of the Covenant of the League of Nations nor those relating to the Mandate for South West Africa prove that it was intended to exclude this important power of revocation from the mandates system. In these *travaux préparatoires* there are quite contradictory indications to be found, as I have already shown, and as emerges from paragraph 77 of Chapter VII of the South African Government's written statement." (*Supra*, p. 82.)

This, Mr. President, is the sum total of the comment of the representative of Finland on the *travaux préparatoires*. It will be observed that according to him contradictory indications are to be found in the *travaux préparatoires*, as already shown by him, and as emerges from the said paragraph of our written statement. If he really meant "contradictory" there would of course be no basis for implying a right of revocation. He therefore probably meant "contrary" to our contentions. But, Mr. President, we are left in the dark as to what these contrary indications are which are, in the words of the representative of Finland, to be found in our written statement. Presumably he had in mind the proposals of President Wilson relating to the revocation of mandates and the substitution of mandatories, since at the Paris Peace Conference nobody else indicated that in his view mandates should be revocable. On the contrary, delegates in opposing President Wilson's proposals particularly objected to the idea of revocability and stated that in their opinion the tenure of a mandate should not be temporary. If the representative of Finland in fact intended to refer to the disagreement between President Wilson and the representatives of other States, then, in our respectful submission, he appears to have missed the whole point,

namely the significance of the fact that the express proposals in President Wilson's drafts regarding the points already mentioned were pointedly omitted in the Smuts resolution and in Article 22 of the Covenant.

In the passage quoted from the oral statement of the representative of Finland, he also said that he had already shown that there were contradictory indications to be found in the *travaux préparatoires*. We have read the verbatim record of his statement very carefully, and the only other reference to the *travaux préparatoires* which we could find was one to the speech of Mr. Simon and with which I have already dealt. It is consequently only necessary to repeat that Mr. Simon, far from expressing his conception that mandates would be revocable, explained that President Wilson's ideas were unacceptable to him precisely because in terms thereof mandates would be revocable.

As already stated, the representative of Pakistan stated that the prospective mandatory States were aware that mandates would be revocable. He said that the proceedings of the Paris Peace Conference fully reflected this and referred to remarks made by Messieurs Clemenceau, Lloyd George, Massey and Simon, not all of which appear to be relevant. It is true that Messieurs Lloyd George and Simon stated that mandates would be revocable, but, Mr. President, which mandates?

It cannot be over-emphasized that these remarks were made with reference to President Wilson's proposals and not to the mandates system as eventually adopted. It was precisely because of the fundamental objections to his proposals that a compromise was eventually agreed upon, a compromise in which the elements involving revocability were deliberately deleted. How can it then possibly be said, as did the representative of Finland, page 75, *supra*, that this fact cannot be interpreted in favour of the view that mandates are not revocable, that it was probably out of tact towards the mandatory powers that the possibility of revocation was not dealt with in the Covenant or the mandate instruments, and that the power of revocation was tacitly understood?

Mr. President, this must surely be one of the few, if any, occasions in legal history that it has been contended that a term must be implied in a legal relationship when that very term was expressly proposed, stated not to be acceptable to interested parties, and thereafter discarded in the final arrangement. Yet this is precisely what the contention means. And why was tact necessary if it was understood that mandates would be revocable? No tact was shown at the earlier stage when revocability was proposed and strongly opposed. And who were the authors of the Covenant and the mandate instruments who had to exercise tact towards the mandatory powers? Three of the five principal powers were in fact mandatories, and one of them, Great Britain, acted on behalf of the three Dominions. Thus, Mr. President, according to the representative of Finland, the mandatories were in effect tactful towards themselves.

It is of obvious significance, as we pointed out in our written statement, that there was ultimately a failure of the number of interrelated proposals, particularly those concerning powers of direct administration of mandated territories by the League, or an organized agency, and powers of the League of substitution of mandatories—that is, the power of revoking a mandate from a particular mandatory and of appointing a new mandatory.

Ultimately the League did not even have control over the initial appointment of mandatories. As stated in I, paragraph 23 of Chapter VII of our written statement, "in terms of a compromise that competence was granted to the Principal Allied and Associated Powers".

With reference to our statement that the power of revocation would have been of no avail without the power to appoint a new mandatory, the representative

of Finland did not endeavour to show that our argument was not sound, but merely said:

> "If it is considered that the League of Nations really lacked the power to substitute another State or itself in the performance of the functions of the mandatory, there still remained the possibility of leaving the appointment of a successor to the Principal Allied and Associated Powers." (*Supra*, p. 82.)

Surely, Mr. President, this is just a vague speculation about a possibility unrelated to any indications that such a possibility was ever contemplated, let alone agreed upon, at the Paris Peace Conference. One may well ask if this is the kind of argument on which the Court is asked to make an implication. Indeed, the very fact that the compromise agreement provided for the mandatories to be *initially* appointed by the Principal Powers, a group for which no permanent role was envisaged in the mandates system, without making any provision for subsequent appointments is, in our submission, one of the consistent indications that the idea of substitutions or revocation was, in the end, firmly excluded.

In the total framework, a most important feature emerges from the provisions of the Covenant whereby any decision of the Council pertaining to a particular mandate required the agreement of, *inter alios*, the representative of a mandatory State. For it follows that a decision to revoke the mandate could not have been taken had the mandatory opposed such a course. Now, had it been the intention that a mandate should be revocable at the instance of the League, it is indeed inconceivable that the founders of the League would have made it mechanically impossible for this competence to be exercised in practice.

In his oral address, the representative of Finland referred to our contention that a decision to revoke a mandate could not have been taken against the will of the mandatory concerned. His only comment in this regard was: "The writers, however, are divided as to the existence of such a power of veto, and even if it existed, its abuse could not be accepted." (*Supra*, p. 83.)

Now, in a note to paragraph 83, Chapter VII, of our written statement, we submitted that in view of the Judgments of this Court and the opinions of individual judges in both 1962 and 1966, it can now be regarded as settled law that a decision to revoke a mandate could not have been taken against the will of the mandatory concerned. It is consequently difficult to understand why the representative of Finland should choose to refer to the divided views of writers and not to the pronouncements of this Court. In its 1962 Judgment, the Court, with reference to the consideration of the annual reports by mandatories in the Council of the League, said:

> "If some Member of the Council had doubts on some point or points in the report, explanations would be asked from the representative of the Mandatory present. If the explanations were considered satisfactory, approval of the annual report would follow. In either case the approval meant the unanimous agreement of all the representatives 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. But if some measure proposed to the Mandatory on the recommendation of the Permanent Mandates Commission in the interest of the inhabitants of the mandated territory and within the terms of the Mandate and of Article 22 of the Covenant should be opposed by the Mandatory, it could not be adopted by the Council. . . . Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory." (*I.C.J. Reports 1962*, pp. 336-337.)

The Council's ultimate lack of effectiveness would, of course, also have rendered it impossible for the Council to revoke a mandate against the wishes of a mandatory. The only logical conclusion to be drawn from this is that it was not the intention of the authors of the mandates system that the Council of the League would be entitled to impose its will on a mandatory, be it in order to revoke a mandate or for any other purpose whatsoever.

In its 1966 Judgment, the Court again emphasized the requirement of unanimity. On this occasion, Mr. President, the Judgment was supported by seven different Members from the six who joined in or supported the 1962 Judgment, and neither in 1962, nor in 1966, did any judge indicate disagreement on the point under consideration. In its 1966 Judgment, the Court said:

> "In the Council, which the mandatory was entitled to attend as a member for the purposes of any mandate entrusted to it, if not otherwise a member . . . the vote of the mandatory, if present at the meeting, was necessary for any actual 'decision' of the Council, since unanimity of those attending was the basic voting rule on matters of substance in the main League organs . . . Thus there could never be any formal clash between the mandatory and the Council as such." (*I.C.J. Reports 1966*, p. 44.)

The Court went further and made it clear that the Council would have been legally powerless if a mandatory had acted in conflict with the mandate itself. In other words, the Council would have been legally powerless not only if a mandatory had acted in conflict with the views of the Council, but also if it had acted contrary to the terms of the mandate itself. The Court said:

> "The plain fact is that, 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—the system adopted was one which deliberately rendered this impossible. . . . 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; and that the risk was remote, the event proved." (*Ibid.*, p. 46.)

So, Mr. President, what the Court said was that the authors of the mandates system took the risk with their eyes wide open that the mandatory could act not only contrary to the wishes of the Council, but contrary to the mandate itself, and that the League and the Council would then be powerless. Obviously, if the Council was legally empowered to revoke a mandate, it would not be powerless. There can thus be no doubt that the Court in 1966 was of the opinion that the Council of the League did not enjoy the power to revoke a mandate and was never intended to enjoy such a power.

This, Mr. President, renders the more astonishing the contention of the representative of Pakistan to the effect that the prospective mandatories "with eyes open" accepted that mandates would be revocable. This is to be found at page 136, *supra*.

The fact that the League did not enjoy the power to impose its will upon a mandatory was also stressed by Judge Mbanefo. In his dissenting opinion in 1966, he posed the question how a dispute between South Africa and the majority of the members of the Council as to whether South African policies were in breach of the mandate provisions could be resolved. He gave the following answer:

> "The Judgment says that the Mandate provides no remedy for such a situation and that it was a risk the League members took with their eyes

wide open. It seems to me that it was to meet such a situation that Article 7 (2) was introduced." (*I.C.J. Reports 1966*, p. 505.)

Mr. President, it will be observed that Judge Sir Louis Mbanefo did not question the Court's statement that the League as such would have been powerless had a mandatory acted contrary to the wishes of the Council, or in conflict with its obligations. However, he thought that the Members of the League acting in terms of Article 7, paragraph 2, of the Mandate, as distinct from the League itself, would have had a remedy in invoking the jurisdiction of the Permanent Court. But, since he conceded that the League itself would have been powerless, it follows that he was also of the opinion that the League could not have revoked a mandate. I repeat, Mr. President, that if the Council could have revoked a mandate, it would not have been powerless.

I have already pointed out that no participant in these proceedings has made any reference to the passages in the Judgment of the Court in 1966 and in the dissenting opinion of Judge Sir Louis Mbanefo which I have just quoted. It is worth repeating that the only inference which can possibly be drawn is that they agree that these passages cannot be reconciled with the notion that the League enjoyed the power to revoke a mandate.

In view of the fact that the Court decided in 1962 and again in 1966 that the Mandatory could, in effect, have vetoed a decision of the Council relating to its administration of the mandated Territory, and that we drew attention thereto in our written statement, stating that this resolved the difference of opinion on this point between Judges Klaestad and Lauterpacht in the 1955 Opinion, one would hardly have expected a participant in these proceedings to rely upon the views of Judge Lauterpacht without dealing at all with the Court's 1962 and 1966 Judgments. Yet, this is exactly what the representative of Pakistan did. Apart from relying on the views of Judge Lauterpacht, he also said that the notion that a mandatory could have, so to speak, vetoed a decision of the Council is in conflict with the decision of the Permanent Court in the *Mosul* case. No reference was made by him to the Judgments of this Court in 1962 and 1966. This is to be found at page 138, *supra*.

We wish to repeat our statement that it can now be accepted as settled law that a mandatory could, in the words of the representative of Pakistan, "have frustrated a decision of the Council of the League". However, it may be as well to point out that the relevant views of this Court in 1962 and 1966 do *not* in fact run counter to the Advisory Opinion of the Permanent Court in the *Mosul* case.

In this case the Permanent Court was not concerned with an interpretation of the Covenant but with the interpretation of the Treaty of Lausanne. It was because of the special competence of a judicial character, which the Treaty bestowed upon the Council, that the Court eventually decided that the States concerned could not exercise a vote in the Council of the League. (*P.C.I.J., Series B, No. 12*, p. 32.)

Judge Klaestad referred to this fact in his separate opinion in 1955 when, after concluding that by virtue of the provisions of the Covenant South Africa as mandatory was entitled to be represented with voting power when the Council considered matters relating to South West Africa, he said, with reference to the *Mosul* case:

> "The principle enunciated in that Advisory Opinion, namely, that 'no one can be judge in his own suit', was found to be applicable in view of the special competence which was conferred upon the Council of the League by the Treaty of Lausanne of 1923—a competence of a judicial character to give a definite binding decision in a particular dispute between two

States with regard to the final determination of a frontier." (*I.C.J. Reports 1955*, p. 86.)

Mr. President, it must surely be obvious that the principle that nobody may be a judge in his own suit cannot be of application if it was not intended to apply, and that this was the intention of the framers of the Covenant is apparent from the provisions of the Covenant in terms of which a non-member of the Council was entitled to participate in the vote on a decision affecting the interests of such non-member.

I come now to another argument to which there has been no response whatsoever in these proceedings. In paragraph 85 of Chapter VII of our written statement we point out that as far as "C" Mandates were concerned there is an additional reason for concluding that the Council did not have the power to revoke the mandates falling in that category. During the discussion of the Council of Ten stress was laid on the contiguity of the Pacific Islands to Australia and New Zealand and especially of South West Africa to South Africa. Thus, on 24 January 1919, the British Prime Minister, Mr. Lloyd George, pointed out that South West Africa was contiguous to the territories of South Africa and went on to say that there was no real natural boundary. On 28 January 1919, he again stressed the contiguity of the Pacific Islands and South West Africa to the territories of the Dominions which laid claim to those colonies. This contiguity, according to Mr. Lloyd George, suggested that the territories in question "should form an integral part of those countries".

In addition, the decisions of the Imperial War Cabinet that the Dominions might annex the territories concerned, and the fact that they felt very strongly about it, were further points to overcome in order to reach the compromise solution.

When discussing the Smuts' resolution, Mr. Lloyd George said that three classes of mandate would have to be recognized, the third category being described as "mandates applicable to countries which formed almost a part of the organisation of an adjoining power, who would have to be appointed the mandatory".

When regard is had to the formulation of the Smuts' resolution and to what Mr. Lloyd George had said, there can be no doubt that the Pacific Islands and South West Africa would be territories to which the third category of mandates would apply, and that South Africa, New Zealand and Australia would have to be appointed mandatories. I wish to repeat the words "who would have to be appointed the mandatory". Surely, Mr. President, these words are inconsistent with any notion that at a future date some other State might be the mandatory of the territories concerned.

The conception that the Dominions would have to be the mandatories was expressly formulated in paragraph 6 of Article 22 of the Covenant which reads as follows:

> "There are territories, such as South West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population."

In view of all this, it is inconceivable that the framers of the Covenant could have intended that the mandatories in respect of the territories concerned could

ever be any other State than the three Dominions. Therefore even if it is assumed for the purposes of argument that the Council did enjoy the power to revoke an "A" or "B" mandate, we submit that there can be no doubt whatsoever that it was not intended that the Council should have the power to revoke a "C" mandate and to substitute a new mandatory. I repeat, Mr. President, not a single one of the participants in these proceedings has even attempted to meet this argument.

Reference should also be made to paragraph 8 of Article 22 of the Covenant which reads as follows:

> "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."

The degree or extent of authority, control or administration to be exercised by a mandatory necessarily had to be different depending on whether or not the League had the power to revoke a mandate, and the difference would be a rather substantial one. Since such authority, control or administration had to be explicitly, and I emphasize the word "explicitly", defined by the Council of the League in the mandate instruments, there can, in the absence of express provision in the mandate instruments for revocation of mandates, hardly be room for an implied term conferring such power upon the League. The very notion of an explicit definition militates against the possibility of introducing an implied term. The reason why the word "explicitly" was used in paragraph 8 of Article 22 of the Covenant seems obvious; the framers of the Covenant wished to leave no room for doubt regarding the degree of a mandatory's authority, control or administration and, as a necessary corrollary, the powers of the League.

Various participants in these proceedings have referred to the views of publicists and jurists regarding the revocability of mandates. We dealt with such views in paragraphs 89 to 95 of Chapter VII of our written statement and pointed out that conflicting views were held by writers and commentators. We divided these writers and commentators into three groups, namely those who held the view that the League had a power of revocation, those who expressed the opinion that if the Permanent Court had ruled that a mandatory had acted in breach of its obligations the Council of the League could have revoked the mandate, and those who held the view that the League enjoyed no power of revocation.

As regards the writers who fall into the first group, we pointed out that by far the majority of them gave no grounds for their expression of opinion and that they made no reference whatsoever to the relevant historical events preceding the conferment of the mandates. Furthermore, not one of the writers falling into the first group made any distinction between "A" and "B" mandates on the one hand, and "C" mandates on the other. Nor did they attempt to explain how, if the League could have revoked the mandate, a new mandatory could have been appointed, or how the provisions of Article 22 of the Covenant relating to the special circumstances of territories under "C" mandates could have been applicable to such a new mandatory—for instance, geographical contiguity and attendant factors.

Here again, Mr. President, we find that participants in these proceedings have made no attempt to question the correctness of our exposition. With the exception of the representative of Finland, the participants who referred to the views of authors and commentators mentioned only those whose views support contentions advanced by them or their governments in their written statements and

oral addresses, and they made no attempt to deal with publicists and others who advanced different views.

Reliance was placed on the views of Quincy Wright in *Mandates Under the League of Nations* by Nigeria in its written statement (written statement, I, pp. 892-893), and by the representative of the Organization of African Unity in his oral address (*supra*, pp. 88-89). In the passage relied upon, Wright merely stated that the power of the League to appoint a new mandatory, and to dismiss a mandatory, may be implied from the Covenant assertion that the mandatories act on behalf of the League. He made no attempt to analyze the relationships between a mandatory and the League or to determine the intentions of the authors of the mandates system from the events preceding and surrounding the conferment of a mandate.

It should be pointed out, however, that in a later paragraph of his book he appears to have introduced a qualification to his former expression of opinion. At page 521 he said:

> "The members of the Permanent Mandates Commission have generally assumed that a power of revocation exists in case the mandatory violates his agreement but recognize that the general procedure of the League would have to be resorted to. Articles 13 and 14 of the Covenant, in connection with the compromissory article in each of the mandates, would require decision by the Permanent Court of International Justice before action could be taken. If the Court decided that the mandatory had violated the mandate, and its decision were not observed, then the final paragraph of article 13 of the Covenant would become applicable. 'The members of the League agree that they will carry out in full good faith any award or decision that may be rendered and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out any such award or decision, the council shall propose what steps should be taken to give effect thereto'. The Council under this article and under its specific supervisory powers over mandatories would seem competent to transfer the mandate."

It seems, therefore, that Wright was of the opinion that before the Council could revoke a mandate and appoint a new mandatory, it would have been necessary for the Permanent Court to decide that the mandatory had in fact violated its obligations.

I might point out, Mr. President, that Wright was one of those writers who expressed the opinion that a mandatory would not have been entitled to exercise a vote when the Council was about to take a decision relative to its administration of the territory concerned—this is at page 522. In view of what has already been stated, Wright's expressions of opinions can hardly be accorded much weight.

In the written statement of the United States, at I, page 860, reliance is placed on the views of Professor Verzijl and Dugard, to which reference is made in our written statement, Chapter VII, respectively in paragraphs 69 and 90. We referred to certain relevant remarks of Professor Verzijl as a typical example of the facile approach of by far the majority of writers who have expressed the opinion that the League was legally empowered to revoke the mandate. It will be recalled that Professor Verzijl did no more than to assert that:

> ". . . it was reasonable to hold that the League should have a power to revoke the mandate should the mandatory fail to discharge its duties or should it act against the fundamental principles of the League".

We furthermore pointed out, Mr. President, that a conception of what is reasonable and as to what should be, cannot serve as a substitute for historical and legal analysis and we referred to the Court's rejection, in its 1966 Judgment, of an argument introducing necessity as a factor in ascertaining what the rights of the League Members were. It is hardly necessary to say that if a power to revoke the mandate cannot be implied because of the necessity that the League should be so empowered, it follows *a fortiori* that the power cannot be implied on a basis of what is or is not reasonable.

In his oral address, the representative of Finland conceded that the views of writers with regard to the revocability of mandates were divided. He then said:

> "I confine myself to noting that in its list of those in favour of the revocability argument the South African Government has omitted to mention one of the best known writers, Paul Fauchille, cited by my Government in its written statement, although his name is included in another passage in the South African Government's written statement rather as an opponent of revocability." (*Supra*, p. 83.)

Now, Mr. President, in the first place, we never suggested that Fauchille was, in the words of the representative of Finland, an opponent of revocability. Our only reference to the views of Fauchille was in paragraph 66 of Chapter VII of our written statement, where we stated that he pointed out the reason why German writers readily accepted a power of the League to revoke a mandate at will, that is, irrespective of whether a mandatory had acted in breach of its obligations. This reason was because Germany—or certain German writers—intended that Germany should be appointed mandatory in respect of former German colonies.

In the second place, and more important, it is not correct that Fauchille was of the opinion that the Council had a unilateral power of revocation of mandates. As we understand the passage referred to in Finland's written statement, Fauchille regarded as necessary the consent of the Principal Allied and Associated Powers and he furthermore considered that the mandatory Power would have a right of recourse to the Permanent Court of International Justice to test the revocation.

Suggestions have been made by certain participants that discussions in the Permanent Mandates Commission support the proposition that if a mandatory breached its obligations, the League would be empowered to revoke the mandate. I refer to the written statement of the United States, I, page 858, and the oral addresses of the representatives of the Organization of African Unity and Pakistan, *supra*, page 88 and page 138.

Now, Mr. President, it is certainly not true that this was at any stage the unanimous or even general view of members of the Permanent Mandates Commission. We dealt with this topic in paragraph 94 of Chapter VII of our written statement where we referred to a memorandum presented by Lord Lugard to the Commission in which he concluded that, although a mandate could be revoked in the event of a gross violation thereof, such a revocation might, for practical purposes, be regarded as inconceivable. However, in the ensuing discussion, Mr. van Rees stated that the possibility of unilateral revocation "did not really exist either in law or in fact". With reference to these statements, we pointed out that too much importance should not be attached to them since they did not profess to be based on a legal analysis of the mandates system and its origins, but were in essence merely speculations directed to the abstract hypothesis of the revocability of a mandate.

The representative of Pakistan also pointed out that certain publicists favoured the view that a mandate could be revoked by the League. He then went on to rely on two decisions of municipal courts, *R.* v. *Christian*, a South African case, and *In Re Tammassee*, a New Zealand case (*supra*, p. 138). In the latter case, the Court in a cryptic passage stated that if New Zealand were to fail in its obligations to the Samoan peoples, the League would take steps to take away the Mandate. This was said after it was stated that New Zealand acted as a trustee for the League. We have already given reasons why, in our submission, rules of municipal law relating to, *inter alia*, trusts do not govern the mandates system. Indeed, as was pointed out, this Court so held in its 1950 Opinion. It is also important to note that the New Zealand court does not appear to have made any attempt to ascertain the intentions of the authors of the mandates system on this point.

As regards the South African case, *R.* v. *Christian*, the representative of Pakistan merely said that two judges raised the issue of the right of revocation and that neither denied its existence. It is difficult to understand why reference was made by him to this case. The two judges concerned stated that it was not necessary to decide the issue and consequently expressed no opinion either way; in other words, Mr. President, they neither denied nor affirmed the revocability of a mandate. If anything, this implicitly recognized that research was necessary in order to answer the question.

In the written statement of the United States, at I, pages 858-860, heavy reliance is placed on the work of the Institute of International Law, and particularly on a resolution on mandates adopted by the Institute, which, in the words of the American Statement, "affords valuable and persuasive evidence that in the view of the leading jurists of the day the League had the power to modify a mandate when the mandatory Power breached its international obligations under the mandate agreement" (written statement of the United States, I, p. 858.)

Now, Mr. President, the exposition in the statement of the United States of proceedings at the Institute's Cambridge Session in 1931, and events preceding it, may be summarized as follows:

Firstly, in 1928, Professor Rolin, who served as rapporteur on mandates, submitted a report in which he stated, *inter alia*, that a mandatory's rights could be revoked in a case in which a mandatory had gravely violated his obligations.

Secondly, in 1931, the Institute debated a revised proposal which referred to the discharge of a mandatory.

Thirdly, in the ensuing debates, Professors Rolin and Verdross justified the revocability of mandates on an implied term and on the application of the ordinary rules of international law governing treaty relationships.

Fourthly, in a separate vote to decide whether the word "revocation" should be retained in the proposed text, the Institute decided by a substantial majority to retain Professor Rolin's text.

Fifthly, in a subsequent roll-call vote on the resolution as a whole, no member of the Institute cast a negative vote.

Now, Mr. President, although the exposition of the United States is, generally speaking, a true version of relevant events, it is, in our submission, necessary to have regard to the nature of the work done by the Institute, and of its proceedings generally, in order to evaluate the proceedings at the Cambridge Session and the decisions there taken. One must look, in the first instance, at the objectives and the usual *modus operandi* of the Institute. In this regard we may refer to Article 1 of its Statute as it existed at the time of the Cambridge

Session in 1931. This article, *inter alia*, expressly provided that the purpose of the Institute was to stimulate the progress of international law. And indeed, Mr. President, the over-riding aspect of the work of the Institute was directed to demonstrating how international law should or ought to develop in the future. In short, the Institute normally did not express itself *de lege lata* but *de lege ferenda*.

Professor Paul Guggenheim, a member of the Institute, has emphasized this strongly:

> "Some scientific associations which occupy themselves with international law do not have the purpose of studying the positive law; they interest themselves in the first place in questions *de lege ferenda*. Their resolutions have often served as a basis for new collective conventions. Here is to be mentioned in the first place the Institute of International Law, founded in 1873 and the Yearbooks of which have a great value in that field." (*Traité de Droit International Public*, 2nd ed. Vol. I, p. 320.)

Here is evidence, Mr. President, that the Institute of International Law was not so much concerned with the existing rules of international law at any particular time; it concentrated on the future development of international law through conventions and the like.

Now, of course, in considering how the law should develop, regard was also had to existing principles, but, Mr. President, and this is important, when one has regard to the work of the Institute and to views expressed, the probability always is that members of the Institute, whether in taking part in the debates or whether in voting for a specific resolution, intended to express themselves as a matter of *de lege ferenda* rather than *de lege lata*.

In his opening address at the Cambridge Session of 1931 the President of the Institute, Professor Alex Pearce Higgins, made the following observation in regard to the work of the Institute:

> "As scientific jurists we examine the old rules in the light of modern conditions in order to realize for ourselves the necessary reforms to assure a legal system which would facilitate agreement between nations" (*Annuaire 1931* (translation), Vol. 2, p. 24).

It is in the light of the considerations already mentioned and of further considerations to which I will refer that one has to approach the discussions at the Cambridge Session relative to the issue of revocability. A study of the Rolin report and the Cambridge debates reveals that Professor Rolin himself and participant members of the Institute embarked on a very tentative discussion of mandate termination and also deliberately evaded crucial issues in the expression of rather divergent views.

The statement of the United States focuses attention only on the debate between Professors Rolin, Verdross, Borel and Politis. It is, however, necessary to have regard to the general tenor of discussions and viewpoints on mandate termination in order to obtain a clear picture of the divergent attitude of members of the Institute.

At the outset of the discussions regarding the revocation of mandates, Professor Wehberg stated that the League Council had the power to revoke a mandate whether or not a mandatory had committed a grave breach of its obligations. In other words, Mr. President, the League had the power, according to Professor Wehberg, to revoke a mandate at will.

Professor Verdross did not agree although he conceded that, according to general principles of international law, the League might have the power to

revoke a mandate in cases of breaches of obligations on the part of the mandatory (*ibid.*, p. 64).

Yet another point of view was put forward by Sir Fisher Williams who declared that *de lege lata* it was impossible for him to admit that the Council of the League could extend the degree of its supervisory powers to the point of pronouncing a revocation of a mandate without the consent of the mandatory.

By referring to the fact that in the subsequent roll-call vote on the Rolin resolution as a whole, no member of the Institute cast a negative vote, the United States apparently seeks to create the impression of an overwhelming consensus amongst the members of the Institute. A consensus, moreover, relating to the existing law of the time.

However, Mr. President, when regard is had to the extreme views expressed by, for example, Professor Wehberg, it seems clear that among the members who voted in favour of the resolution, in total 38, there was a marked difference of opinion as to the basis on which a mandate could or should be revocable. Furthermore, among the members who abstained, 18 in all, some were in complete disagreement with the majority view. The fact that amongst members of the Institute an abstention very often amounted to a complete disagreement with the proposed resolution, may be illustrated by the fact that Professor Diena refused to vote for the Rolin draft since it contained the following phrase: "The collectivities [that is the peoples] under mandate are subjects of international law" (translation). This portion of the resolution was as a matter of *de lege lata* indeed untenable, and serves to emphasize the academic nature of the Rolin proposals.

During the course of the debate, Professor Borel stated that a decision by the Council revoking a mandate, in order to be effective, would have to be taken unanimously. Since it would be impossible to obtain the mandatory's concurring vote, the proposed sanction would, according to him, remain without effect. Thereafter, Professor Seferiades proposed that any decision by the Council of the League relating to the revocation of a mandate should be taken with the exclusion of the mandatory State concerned (*ibid.*, p. 58). However, Mr. President, Professor Rolin was hesitant to go into this matter and, after a discussion between Professors Seferiades and Politis, the former decided to drop the proposal which he had made. It seems reasonably clear that this proposal did not relate to the existing law, but was rather meant to be an expression of opinion as to how the League *should* function which would, of course, have entailed an amendment of the Covenant.

Mr. President, it should be emphasized that the *Yearbooks* of the Institute do not contain a verbatim record of the debates. In fact they contain only very short summaries of what was said by different members of the Institute. It is therefore, not possible to ascertain from these very short summaries whether any specific member of the Institute, when he expressed an opinion, intended to express himself *de lege lata* or *de lege ferenda*. However, Mr. President, in view of the general nature and scope of the work undertaken by the Institute, and to which I have already referred, the probability is that also during the Cambridge Session when the Rolin proposal was debated and the resolution was eventually adopted, the members of the Institute, both when debating the issues and when voting for the resolution, intended to express themselves as a matter of *de lege ferenda* rather than *de lege lata*. We do not say that some members of the Institute might not have expressed an opinion as to the position *de lege lata*. We do contend, however, that the relevant debates are inconclusive as to whether the majority was of the opinion that as a matter of the existing law of their time, the League enjoyed a power of revocation. This conclusion

is fortified by the further consideration that it does not appear that the members of the Institute made any examination of relevant expressions of intention by the authors of the mandates system.

A notable feature, Mr. President, is the attempt during the Cambridge Session to focus attention on the aspect of the unanimity rule and to which I have already referred. I have mentioned that the point was raised by Professor Borel and that eventually the proposal was dropped. One could hardly have a better indication that the eminent jurists were not seriously directing their efforts at stating what the existing law was, but at respective reforms.

I may also point out, Mr. President, that towards the end of the Cambridge debates, Professor Rolin suggested that his last and all-important draft article relative to the question of sovereignty over the territories under mandate should not be discussed because of the time-factor. This serves to show that the discussions of the Institute, although obviously of high scientific quality, did not purport to be a thorough examination by jurists of the positive law of the time.

Mr. President, it is of some significance that no participant in these proceedings has made reference to the serious study given to the mandates system by the Inter-Parliamentary Union as from its 20th session in 1922. It is hardly necessary to say that this Inter-Parliamentary Union consisted mainly of members of parliament from France and Great Britain.

We pointed out in paragraph 95, Chapter VII, of our written statement that during its 22nd Conference in 1924, the Union adopted a resolution recommending that the Assembly of the League be empowered to modify and revoke mandates. This recommendation was obviously based on the assumption that no organ of the League did have the legal power to revoke a mandate.

Mr. President, in our respectful submission, nothing has been said in these proceedings, either in the written statements or the oral addresses, which in any way impairs the following conclusion set out in Chapter VII, paragraph 97, of our written statement, that is, that neither Article 22 of the Covenant nor the mandate instruments contain any provision, express or implied, empowering the League to revoke a mandate and either to assume powers of administration itself or to appoint another mandatory; that there is no objective legal principle, the application of which could have conferred such powers on the League; that the weight of scholarly opinion favours the view that the League did not enjoy those powers, and that *dicta* in the relevant Judgments of the Court and in opinions of individual judges strengthened these conclusions.

In conclusion on this part of my agreement, it is necessary to correct a wrong and misleading statement made by the representative of the OAU in his oral statement:

> "Another objection has been raised, that although this Court ruled in 1950 that the powers of control and supervision of the Council of the League had passed to the General Assembly of the United Nations, the General Assembly did not adopt resolution 2145 by the unanimity rule which the League Council would have had to follow in order for such a resolution to be valid." (*Supra*, p. 90.)

Mr. President, such objection has never been raised by South Africa. We never contended that resolution 2145 was not validly adopted because it was not unanimously adopted.

Presumably the representative of the OAU intended to refer to the written statement of France. If so, the quoted statement is based on a misinterpretation of the French argument. France concluded in its written statement that the General Assembly was not legally empowered to revoke the Mandate for South

West Africa. One of the reasons assigned for this conclusion was that the Covenant did not confer on the Council of the League the power to revoke a mandate, and that such a power cannot be implied since it would have been necessary, if such a power were to have any practical effect, for express provision to be made for derogation from the unanimity rule which prevailed in the Council and in the Assembly (written statement, I, p. 366).

It is consequently clear that France did not contend that resolution 2145 was invalid because the General Assembly did not unanimously adopt it, on the contrary, the argument was that the General Assembly had no power whatsoever to revoke the Mandate since the Covenant did not confer on the Council of the League, either expressly or impliedly, a power to terminate a mandate. Reference was made by France to the unanimity rule merely to counter any argument that such a power could have been implied.

I turn now to a consideration of the argument advanced by the representative of the Netherlands relative to the two issues under consideration, that is, the questions whether the United Nations could have succeeded to the supervisory powers of the League of Nations without fresh consent on the part of a mandatory and whether the League enjoyed a power of revocation. The reasons why his argument on both issues is considered separately have already been indicated, the main reason being that his novel approach forms the basis for his contentions in regard to both issues.

The argument of the representative of the Netherlands may, we think fairly, be summarized as follows:

Firstly, the introduction of the mandates system necessarily implied a departure from the classical rules of international law because it postulated the independent status of two sorts of *potestates* then not recognized in international law, that is, on the one hand the individual human being, in particular in the exercise of his right of collective self-expression, and on the other hand, the international organization, in particular as expressing the collective will of the world community. Consequently the rights and obligations in respect of mandated territories are not governed by rules applicable to treaties.

Secondly, the rules to be applied to the mandates system cannot be derived from either a teleological interpretation of a treaty or an interpretation in accordance with the will of the parties, but only on the basis of considering the legal character of the decisions taken by States in the light of legal premises on which those decisions were based.

Thirdly, whereas in the case of an ordinary treaty any gap left by the text of a treaty and its interpretation is necessarily filled by the sovereignty of the States concerned, in the case of the mandates system such process is excluded and solutions must imply some form of powers to be exercised by the organized international community.

Fourthly, the essential characteristic of the functional approach to the mandates system lies in its adaptability to changing circumstances, a consequence of which is that the powers of the organized community of States, at any time, must be exercised through such international organizations as at that time represent the community of States.

And lastly, a further consequence is that an adaptation of the modalities of a mandates system is not a matter of applying a sanction to a violation of obligations but rather a measure taken in order to serve the final purpose of the system in view of an unforeseen development in the factual situation.

This then is a summary of the contentions of the representative of the Netherlands.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

With regard to the first point made by the representative of the Netherlands, it is indeed welcome to find that in these proceedings there is a point on which another representative appears to agree with our own views. In considering the argument that the principle that an innocent party may revoke a treaty in the case of a material breach by the other party is applicable to mandates, I stressed that the mandates system was a novel institution, a *sui generis* institution in international law, and that there could consequently be no justification for automatically importing into the system principles applicable to other institutions of international law.

I furthermore stressed that such principles could be applicable only if the authors of the mandates system intended them to be applicable and that it was therefore necessary to ascertain what their intention was. Now, the representative of the Netherlands also contended that the mandates system, being a novel institution, could not be governed by ordinary rules applicable to treaties. In fact, according to him a mandate cannot be regarded as a treaty. He said:

> "Now surely no State can be charged with the task of acting as the mandatory State without its consent and that is clearly expressed in Article 22 of the League of Nations Covenant. But this consent, once given, together with the decision of the organized community of States to entrust this task to the mandatory State do not together constitute a treaty laying down the rules and procedures according to which the objectives of the mandates system shall be realized." (*Supra*, p. 126.)

I repeat the words "do not together constitute a treaty".

It is a pity, Mr. President, that the representative of the Netherlands could not have taken part in the proceedings on the preliminary objections in the *South West Africa* cases in 1962. It will be recalled that South Africa then argued that the Mandate for South West Africa was not a treaty in force within the meaning of Article 7 of the Mandate, but the majority of the Court held otherwise.

However, this is where the common ground seems to end. According to the representative of the Netherlands, if we understand him correctly, no ordinary principles of law were applicable to the mandates system, it was in fact governed by a completely new set of rules. This is the point of departure. We contend that ordinary rules could not without more be applicable and that one has to have regard to the intentions of the authors of the mandates system in order to determine the applicability of such rules. Thus, since the mandate was in the nature of an agreement, and there is nothing whatsoever to indicate that the authors of the system did not intend ordinary rules of interpretation to apply to the mandate instruments, there appears to be no reason why such rules should not be held to be applicable.

The representative of the Netherlands submitted that his approach did not involve the making of a choice between a teleological interpretation of a treaty and an interpretation in accordance with what is called the "will of the parties" to a treaty. He said:

> "It is rather a matter of considering the legal character of the individual and collective decisions taken by States in the light of legal premises on which those decisions are based and of not applying to the adoption, interpretation and effect of those decisions such rules as are clearly based on different legal premises." (*Supra*, p. 124.)

But, Mr. President, if all rules of international law existing at the inception of the mandates system are to be completely discarded, how does one determine

the legal character of the decisions relating to the system, or the legal premises on which they were based?

One looks in vain to the statement made by the representative of the Netherlands in order to find an answer to this question. It is true that he stated that these decisions should be construed with due regard to the particular character of a mandates system. But the cardinal question which, in our submission, remains, is how that particular character is to be determined. We submit that it should be determined in the ordinary manner, that is by ascertaining the intentions, expressed or implied, of the authors of the mandates system. The representative of the Netherlands, on the other hand, appears to base his functional approach on the objectives of the mandates system and primarily the so-called permanent right of self-determination of peoples, to which he assigns an overriding importance instead of having regard thereto merely as one of the aspects to be taken into account in determining the intention of the authors of the mandates system. Mr. President, with the best will in the world, we cannot see that his approach is based on anything else but an extreme teleological interpretation of the mandates system and instruments.

The particular kind of distinction which he seeks to draw between a treaty between sovereign States and a mandate agreement leads the representative of the Netherlands, in our submission, to untenable conclusions—in particular, the conclusions I have mentioned about the filling of gaps left by the text of a treaty and its interpretation in good faith. In treaties between sovereign States, he says, these gaps are "necessarily filled by the sovereignty of the States concerned". On the other hand, in the type of instrument establishing the mandates system, he says that:

> ". . . such process is excluded and another process is required with equal necessity, that is the construction of solutions which are compatible with the basic premises of the instrument itself, that is the self-determination of the peoples and the non-annexation of the territories.
>
> Since one cannot, so to speak, fall back on the sovereignty of an existing State over those peoples and territories, such solutions must imply some form of powers to be exercised by the organized community of States." (*Supra*, p. 124.)

Mr. President, it will be apparent that by this stage one's feet are far off the ground already. In the first instance, it is difficult to see how, upon the traditional approach of international law as we know it, a gap left by the text of a treaty, and its interpretation can ever be said to be filled by the sovereignty of the States concerned. I assume that by a gap the representative of the Netherlands has in mind that situation where a treaty properly interpreted, makes no provision for an occurrence which was either not foreseen by the parties or deliberately left unprovided for by them. This is sometimes also called a lacuna in the treaty. But surely in such a case the lacuna is not filled by the sovereignty of the States concerned. The truth is that it is just not filled at all. One can at most say in that respect that the sovereignty of the States concerned has been left unaffected by the treaty.

But, Mr. President, even assuming that one can properly say that the lacuna is filled by the sovereignty of the States concerned, what justification is there for the conclusion that a lacuna in a mandate instrument must be solved by the exercise of powers by the organized world community. Why not the mandatory, or the mandatory and the so-called organized community of States acting together? Surely, if it was in fact the intention of the authors of the mandates system that the Council of the League would not have the power to impose its

will on a mandatory—and it was so held by this Court in 1966—there cannot be any room for concluding that a lacuna in a mandate instrument is to be filled by the exercising of powers by the organized community irrespective of the consent of the mandatory, and even against its will. Such a conclusion, in our submission, would be a complete inversion of one of the fundamentals of the mandates system, by what legal justification we do not know.

I have already dealt with the organized community of States argument and do not intend doing so again. Suffice it to repeat our basic submission that there is no justification whatsoever for concluding that the mandate instruments created a legal relationship between a mandatory and the organized community of States as represented by the League or its successor. On the contrary, it is abundantly clear that the mandatories consented to submit to supervision to be exercised by the Council of the League and not by another organ or organization.

Mr. President, the representative of the Netherlands lays stress on the two principles on which, according to him, the mandates sytem was founded, namely the so-called permanent right of self-determination of peoples and secondly, the non-annexation of the territories concerned. This leads him to the conclusion that the functional powers of the organized community of States as well as those of the mandatory States are essentially limited in time, that they cease automatically at the moment this right of self-determination has been duly exercised, and that the powers of the organized community of States are at any time during the period of applicability of the mandates system exercised through such organized international community as at that time represents the community of States (pp. 123 and 124, *supra*). It is on this basis that the representative of the Netherlands justifies the Court's 1950 Opinion.

Now, if it is assumed, for purposes of argument, that the basic principle on which the mandates system was founded was in fact the promotion of self-determination and, as a corollary, the non-annexation of the territories concerned, it is still a far cry from concluding that the mandatory's obligations to account were intended to remain in existence even should the specific machinery created relative to supervision of those obligations disappear.

In our submission, such a conclusion can be reached only by applying to the mandate instruments, as does the representative of the Netherlands, an extreme form of teleological interpretation.

The representative of the Netherlands does not contend that the League was empowered to revoke a mandate. In fact, he appears to shy away from the notion of revocation. He states that an adaptation of the modalities of the mandates system:

> ". . . is not a matter of applying a sanction to a violation of obligations but rather a measure taken in order to serve the final purpose of the system in view of an unforeseen development of the factual situation" (*supra*, pp. 126-127).

In our submission, Mr. President, the representative of the Netherlands appears to confuse the effect and the purpose of the exercising of a right of revocation. In the case of an ordinary treaty, the purpose of an innocent party in exercising such a right may well be to protect his own interests rather than to penalize the other party, but clearly, the effect of revocation is the sanction of a violation of obligations. Therefore, if the modalities of a mandates system should be adapted because a breach of obligations by a mandatory State would render it impossible to serve the purpose of the system, such adaptation in effect does constitute a sanction of the mandatory's violations of its obligations.

But, Mr. President, the important point is not whether one calls the action a sanction or a purpose-serving measure: the important point is that the action is one of asserted authority vis-à-vis the mandatory, one by which the mandatory is said to be legally bound without its consent and against its will. And the question remains: from what legally recognized basis can such authority be said to be derived?

Although the representative of the Netherlands does not say so in so many words, his thesis must mean either that the League of Nations enjoyed the power to revoke a mandate or, to use his own words, to adapt its modalities, against the consent of the mandatory, or that such a power has, through mere change of circumstances, come to be vested in the United Nations organs vis-à-vis South Africa. This conclusion is also based on his functional approach which, as I have already stated repeatedly, can only be justified on the basis of an extreme teleological interpretation of the mandate instruments.

It may be pointed out that the arguments advanced by the representative of the Netherlands would have to apply *a fortiori* to the trusteeship system of the United Nations since the concept of self-determination is spelled out much more explicitly in the Charter than in the Covenant of the League of Nations. He alleges that in the relevant practice of States the question whether or not the consent of the mandatory State and/or the organized international community was legally required for a termination of the powers of the mandatory has not been put to the test. But, Mr. President, in our view it is relevant to refer to the practice of States in regard to the termination of trusteeship agreements. We will deal at a later stage fully with the circumstances under which a trusteeship agreement was concluded in respect of the former Japanese mandated islands, Micronesia. For present purposes it suffices to point out that the draft agreement proposed by the United States provided that its terms could not be altered, amended or terminated without the consent of the administering authority, that is, the United States.

The Russian representative in the Security Council proposed that the relevant article of the draft should be redrafted to read as follows: "The terms of the present agreement may be altered, supplemented or terminated by decision of the Security Council."

This proposal was unacceptable to the representative of the United States. Having referred to Articles 79 and 83 of the Charter he continued:

> "In other words, obviously it is not the Security Council which originates the amendment; certainly it cannot authorize the termination; the most it can do, under the Charter, is approve or disapprove. Moreover, the Charter is the guide and the law regarding the powers of the Security Council. We cannot sit here and change them by agreement between the United States and the Security Council. We cannot grant to the Security Council powers that the Charter does not grant. The only way in which the Security Council could be granted the power to alter, amend and terminate this contract would be by amending the Charter; no lesser authority than that would be necessary." (*SC, OR*, 2nd Year, 116th Meeting.)

In the event only the Soviet Union voted for the proposed amendment of Article 15 of the draft agreement. It would therefore appear, Mr. President, that the other members of the Security Council shared the views of the United States' representative that the Council is not empowered by the Charter unilaterally to terminate a trusteeship agreement.

It would be interesting to hear whether the representative of the Netherlands would contend that this State practice is in accordance with the so-called

functional approach, which, for the reasons already given, should, in our submission, be rejected by the Court.

Mr. President, I turn now to the last part of this section of our argument concerning the question whether the Council of the League could have dictated to a mandatory the policies which the latter had to adopt in fulfilling its substantive obligations, and whether the Council enjoyed the judicial function of determining whether a mandatory had acted in conflict with its obligations to the extent that, if it made an affirmative decision, the Permanent Court as well as all States would have been bound by such a decision. For reasons of convenience, we will deal with the question only on the basis of the provisions of the Mandate for South West Africa.

Article 2 of the Mandate reads 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 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."

In Articles 3 to 5 of the Mandate, provision was made for the safeguards referred to in Article 22, paragraphs 5 and 6, of the Covenant. These safeguards, consisting mainly of the prohibition of abuses, placed certain limitations on the governmental powers of the mandatory and were in effect merely specific implementations, in certain defined spheres, of the over-riding objective of the mandates system. However, beyond making such specific provisions for the safeguards, it was in the nature of things impossible, and certainly not considered feasible, to reduce the objective of promoting the well-being and progress of the inhabitants of South West Africa to a series of specific injunctions or prohibitions.

In the nature of things, Mr. President, no comprehensive set of rules can be devised, the application of which in the sphere of government would inevitably and in infinity have a beneficial effect on the people governed. The authors of the mandate consequently coupled the grant to the mandatory of full legislative and administrative powers with a provision which required the mandatory to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. These words in effect merely constitute a paraphrasing of the main objective of the mandates system as expressed in the Covenant—that is, "the principle that the well-being and development of such peoples form a sacred trust of civilization"—and in their context they consequently indicate the objective to be pursued by the mandatory, or the spirit with which he should be imbued, in exercising the power of administration and legislation.

Reading Article 2 as a whole, and in the light of the provisions of Article 22 of the Covenant, there can be no doubt, in our submission, regarding the intention of the authors of the mandates system, and the Mandate for South West Africa particularly. Save for Articles 3 to 5 containing specific injunctions, no limits in respect of subject-matter were placed on the full power of administration and legislation granted by the Article; but the Mandatory was nevertheless obliged to promote to the utmost the well-being and interests of the inhabitants of the Territory. Consequently, the Mandatory was required to exercise these full powers for this purpose. It follows logically that the particu-

lar methods whereby this purpose was sought to be attained, were left to the discretion of the Mandatory. As the Permanent Court said:

> "... any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent; ... It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of a political situation, is alone qualified to undertake" (*Lighthouses case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62*, p. 22).

More specifically with reference to "C" mandates, the Chief Justice of Australia said:

> "In the case of C mandates ... the mandatory power ... has full powers of 'administration and legislation over the territory subject to the mandate as an integral portion of its territory' (Article 2 of the Mandate). This provision is in accordance with the terms of Article 22 [of the Covenant]. In the original draft of the covenant the relevant provision of Article 22 provided that the territories in respect of what are now known as "C" mandates were granted 'can be best administered under the laws of the mandatory *as if* integral portions of its territory'. But on the suggestion of the Japanese delegate the word 'if' was omitted ... It is clear that it was intended that in the case of C mandates, the fullest power of government should be conferred upon the mandatory power." (*Frost* v. *Stevenson*, 58 C.L.R., p. 550.)

And in 1946 Lord Hailey, who had himself been a member of the Permanent Mandates Commission, having referred to the specific negative prescriptions in the Mandate for South West Africa regarding the policy to be observed in respect of native affairs, said:

> "... in other respects it left the Mandatory Government to interpret the methods by which it should promote the well-being of the Natives of the Territory. Thus it remained for it to frame its own policy, within the general objective, in respect of matters such as the control of the land, the system of justice, the procedure of taxation, the extent to which regard should be had to native law and custom, the provisions to be made for the social services of health and education, and the part to be taken by the Native population in the political institutions of the country." (Lord Hailey, *Survey of Native Affairs in South West Africa*, pp. 51-52.)

It follows, Mr. President, that the only qualification imposed by Article 2, paragraph 2, of the Mandate for South West Africa on South Africa's full powers of legislation and administration in respect of the Territory was that South Africa was required to use such powers for the purpose of promoting to the utmost the material and moral well-being and social progress of the inhabitants of South West Africa.

The discretion to decide as to the most appropriate means of attaining such purpose vested in South Africa. In exercising this discretion, South Africa could be influenced by, but not dictated to by, the supervisory organs of the League. Therefore, in order to establish a breach by South Africa of the provisions of Article 2 of the Mandate, it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed towards the objective purpose of promoting to the utmost the material and

moral well-being and the social progress of the inhabitants of South West Africa.

If a court of law were to decide whether South Africa had acted in conflict with its obligations under Article 2 of the Mandate, it would follow that the political and technical merits or otherwise of particular legislative and administrative measures, practices and policies could be of relevance only in so far as they might tend to prove that South Africa is or is not pursuing the authorized purpose. Whatever the Court might think of the merits of a particular legislative or administrative act, practice or policy, if it was devised and performed or practised in the exercise of the mandatory's discretion, seriously and honestly applied, as being in its view the best means of pursuing the objective of promoting the well-being and progress of the inhabitants of South West Africa, it could not constitute a violation of Article 2.

This situation, Mr. President, is logically inherent in all cases where courts have to decide on the legality or otherwise of the exercise of a discretionary power, whether conferred by treaty or by statute. In the latter instance, municipal courts "have repeatedly affirmed the incapacity to substitute their own discretion for that of the authority in which the discretion has been confided" (de Smith, *Judicial Review of Administrative Action*, p. 167).

There are, of course, various special grounds upon which courts in municipal legal systems may set aside an exercise, or a purported exercise, of a discretionary power: grounds such as excess of limits in regard to time, place, subject-matter, the person who is required to act, etc. In dealing with this same subject in this Court in 1965, my colleague, Mr. de Villiers, gave a list of these, and indicated at the same time why they could hardly find practical application to the situation under the Mandate for South West Africa. I refer the Court to the *South West Africa* cases, *Pleadings*, Volume IX, pages 494-495.

So, Mr. President, for practical purposes—ruling out those special cases—one is left with the general test, upon which all legal systems which we know seem to be agreed, for deciding whether a discretionary power has been abused.

That test is whether the purpose of the holder of the power, that is, the subjective purpose with which he acts or with which he inspires his action, is in conformity with the prescribed purpose, that is, the purpose for which the power was conferred. This means that two things have to be compared: the purpose of the instrument conferring the power and the purpose with which the holder of the power acted in a given case. Thus in French law the general test is applied under the process known as *détournement de pouvoir*, of which I quote the following brief description:

> "This case of invalidating administrative acts differs profoundly from all others, in that it does not concern any longer an objective appreciation of conformity or non-conformity of an act to a legal provision, but the making of a double research into subjective intention: it has to be ascertained whether the incentives or motives which have inspired the author of an administrative act are such as, according to the intention of the legislator, should have inspired it." (Waline, *Droit administratif*, 7th ed., p. 417.)

The necessity of enquiring into the mind of the holder of a discretionary power is also emphasized by Rohkam and Pratt:

> "But the question of *détournement de pouvoir* presupposes an inquiry into the mind of the agent, into his secret intentions which he has probably made every effort to conceal. Each case thus resolves itself into a two-fold inquiry into: (1) the purpose for which the law vested this particular power

in the agent; (2) the purpose for which the agent actually exercised it. If the motive fails to measure up to the purpose for which the power was conferred, the act is nullified." (*Studies in French Administrative Law*, p. 37.)

Mr. President, the same position obtains in other legal systems. Reference may be made, as far as Dutch law is concerned to Kranenburg, *Het Nederlandsch Administratief Recht*, pages 50 to 52; as regards Belgian law to Mast, *Overzicht van het Belgisch Administratief Recht*, pages 388 to 390; as regards Italian law to Galeotti, *Judicial Control of Public Authorities in England and Italy*, pages 109 to 115; and as regards English law to Griffith and Street, *Principles of Administrative Law*, pages 215 to 217.

Mr. President, to summarize: our submission is that the Mandate conferred upon South Africa a discretion as to which policies and practices to adopt in order to promote the well-being and progress of the inhabitants of South West Africa, and consequently South Africa could only act in breach of its obligations through policies or measures adopted with a purpose other than that of promoting progress and well-being.

The vesting of a discretionary power in South Africa is obviously incompatible with a notion that the Council of the League had the power to prescribe which policies and practices should be applied by South Africa in the Territory. There is nothing whatsoever to indicate that such was the intention of the authors of the mandates system; on the contrary, as I have shown, an interpretation of the mandate instruments read in the light of the provisions of the Covenant leads to a directly opposite conclusion. This was also plainly and emphatically stated by the Court in its 1966 Judgment, after exhaustive enquiry:

> "The plain fact is that, 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—the system adopted was one which deliberately rendered this impossible." (*I.C.J. Reports 1966*, p. 46.)

Mr. President, in our submission it is consequently clear that the Council of the League of Nations did not enjoy the competence which, according to the Secretary-General's written statement at I, page 85, the organs of the United Nations enjoy, that is, "the competence to interpret and apply to Namibia the international obligations which are owing to the latter under the . . . mandates system".

The final question is whether, assuming that the Council of the League was empowered to revoke a mandate, a decision to this effect, based on alleged breaches by a mandatory of its obligations, would have been final and conclusive and not open to review, by the Permanent Court, on its merits. In our submission there is certainly nothing in the mandate instruments, the Covenant or in the events leading up to the conferment of the mandates which affords the slightest indication that such was the intention of the authors of the mandates system; nor are we aware of any publicist or commentator who has ever made such a suggestion. On the contrary, as I have already pointed out, Fauchille, who was of the opinion that a mandate could be revoked by the Council of the League with the consent of the principal allied and associated powers, reserved for the mandatory a right of recourse to the Permanent Court. And Sir Frederick Lugard who stated that in theory a mandate might be revoked, proceeded to say that "there can be no doubt that in this almost inconceivable contingency the International Court of Justice would be the agency employed" (*Permanent Mandates Commission, Minutes*, Vol. 3, p. 286).

The basic absurdity of any suggestion that the Council would have been the only organ competent to decide whether a mandatory had acted in conflict with its obligations may be illustrated by the following example. Suppose that there was a conflict of opinion between a mandatory and the Council regarding the question whether the mandatory had fulfilled its obligations under its mandate and the Council thereupon asked the Permanent Court of International Justice for an advisory opinion and that the Court found in favour of the mandatory—in other words, the Court found that the mandatory had in fact not acted in conflict with its obligations. Suppose further that thereafter the Council rejected the opinion and purported to revoke the mandate. Suppose still further that upon the mandatory failing or refusing to give up its administration of the territory concerned, the Council requested another advisory opinion from the Court on the question of legal consequences for States as a result of such a refusal. Mr. President, it could surely not be contended that in such a case the Permanent Court would have been bound, notwithstanding its ealier opinion, to conclude that the question whether the mandatory had acted in conflict with its obligations had been conclusively settled by the Council and that the validity of a revocation of the mandate had to be assumed by the Court. Yet this is exactly what the contention of the Secretary-General entails.

Mr. President, it follows that there is not the slightest foundation in law for the contention to the effect that the Council of the League enjoyed an unreviewable and final judicial function of determining whether a mandatory had acted *contrary to its obligations under its mandate.*

In conclusion, our submissions relating to this part of our argument may be summarized as follows:

First, the League's supervisory powers in respect of mandates could not have devolved upon the United Nations or, for that matter, any other organization, without fresh consent on the part of a mandatory.

Second, the League was not legally empowered to revoke a mandate; alternatively, it was not so empowered in respect of "C" mandates.

Third, the League did not enjoy the competence to impose its views on a mandatory and therefore could not dictate to a mandatory the policies and practices to be adopted in a mandated territory.

Fourth, even assuming that the League was empowered to revoke a mandate, it clearly did not enjoy an unreviewable judicial function of determining conclusively whether a mandatory had acted in conflict with its obligations.

ORAL STATEMENT BY MR. GROSSKOPF

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. GROSSKOPF: Mr. President, honourable Members of the Court, my learned friend, Mr. van Heerden, has just expressed the conclusion that the Mandate could not, without more, have adapted to the change effected by the dissolution of the League so as to impose on the mandatory a new obligation to report and account to organs of the United Nations.

It follows, in our submission, that such an obligation could notionally have been established only by the subsequent agreement of the parties concerned, to which agreement the mandatory would necessarily have had to be a party. Now, if one accepts the conclusion which he has just stated, which we submit one must, then the appropriate time when such agreement would have been manifested would have been the time when the League of Nations was dissolved and when the United Nations was established. It would have been the appropriate time for considering the future of the mandates which depended, for their full performance, on certain organs of the League.

In Chapter VIII of our written statement we discussed the events in the transitional years 1945-1946, and the years immediately supervening, with the object of demonstrating that no obligation was assumed during those years whereby the mandatories in general, or South Africa in particular, undertook to report and account under the mandate to the United Nations. Our demonstration of this contention in Chapter VIII led up to a discussion in Chapter IX of the 1950 majority Opinion which, as we interpret it, was based upon a finding of tacit agreement concluded during those years.

In the present proceedings certain participants have again sought to rely on events during the years 1945-1946 in support of their contention that the General Assembly of the United Nations had succeeded to the supervisory powers formerly exercised by the Council of the League. Others have relied only on the 1950 Opinion for this proposition, whereas still others have sought to support the 1950 Opinion on bases not advanced before.

All this renders, in my submission, it necessary for me to traverse again the historical events relevant to the issues before the Court and to analyse the legal reasoning of the 1950 Opinion in the light thereof.

Since the arguments on the historical record to which I reply are based on the presentation, we submit, of a few isolated events out of their proper context, it will be necessary for me to repeat to some extent material which is already contained or cited in our written statement. That is necessary, in our view, because the full picture has to be presented so that these events on which other participants have relied may be viewed in their proper context and in their proper perspective.

The first series of events which may be relevant are those relating to the establishment of the United Nations. In Chapter VIII, paragraphs 2 to 20, we gave a detailed resumé of the events during the years of the establishment of the United Nations, and the first year or so of its existence. In what follows I propose only summarizing this briefly.

The United Nations Organization arose out of war-time co-operation and as we know, the Charter came into force on 24 October 1945. The important point to bear in mind is that the League of Nations was then still in existence. There

was no suggestion that the United Nations was to be the League under a new name, or an automatic successor in law to the assets, obligations, functions or activities of the League. Two of the major powers which were instrumental in establishing the United Nations were opposed to any such notion. They were the USSR and the United States of America. I propose showing how this basic objection to the idea of succession was implemented in the relevant aspects.

Discussion of the mandates in the course of the drafting of the Charter and thereafter, arose mainly in the context of the establishment of the new trusteeship system. It was the establishment of this system which naturally led people to discuss the future of the mandates. In that context various expressions of view were expressed *inter alios* also by the South African representatives. It will be necessary in my submission to have particular regard to such expressions of attitude, since an argument is sought to be based thereon by some distinguished representatives who have appeared here, particularly that of Pakistan (pp. 138 to 140, *supra*) and that of Finland (pp. 76 to 77, *supra*).

The first statement made in connection with this topic which may be of relevance for present purposes, was made at San Francisco by the South African representative there. His statement is quite a long one and is quoted in full in **I**, Chapter VIII, paragraph 4, of our written statement. It is therefore not necessary for me to repeat the whole of it, but I would quote the most pertinent paragraphs. It commences as follows:

> "I wish to point out that there are territories already under mandate where the mandatory principle cannot be achieved.
>
> As an illustration, I would refer to the former German territory of South West Africa held by South Africa under a 'C' Mandate."

Then there follows quite a long passage in which the representative discusses the nature of the Mandate and what had happened in the territory in the preceding years. He then concluded his statement as follows:

> "There is no prospect of the territory ever existing as a separate State, and the ultimate objective of the mandatory principle is therefore impossible of achievement.
>
> The delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.
>
> As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the mandates question."

The important point which I wish to stress, Mr. President, is that as early as the San Francisco Conference, the delegation of the Union of South Africa made it quite clear that in its view South West Africa had gone beyond the stage of the mandates system and should be incorporated within the Republic. That is also, of course, in my submission, a clear indication that as far as South Africa was concerned there was no intention or desire to continue any system of international supervision of the territory, and clearly no intention to incur new reporting obligations.

I may just advert at this stage to a possible additional paragraph in respect of which there is some evidence that it was added at the end of this statement. This matter is referred to in a footnote to Chapter VIII, paragraph 4, of our

written statement. There is some evidence that Dr. Smit, the South African representative at San Francisco, added the following additional paragraph:

> "As stated in the memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the Conference 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 organization."

In the footnote to Chapter VIII, paragraph 4, we refer to a discussion in the dissenting opinion of Judge Jessup in 1966 of the question whether this additional paragraph was, in fact, delivered by Dr. Smit or not. There appears to be evidence both ways, but whatever the position might be, it seems to be generally accepted also by Judge Jessup that this extra paragraph does not really add anything to what is already implied in the rest of the statement, namely that South Africa indicated a clear intention not to be bound to further supervisory obligations.

Towards the end of the San Francisco Conference, there was established a Preparatory Commission of the United Nations consisting of one representative of each signatory State. The duties of this Commission were in general to prepare for the efficient functioning of the United Nations, particularly at its commencement. Amongst these duties were those of formulating recommendations concerning the possible transfer of activities, assets and functions of the League of Nations.

There was also established an executive committee, which consisted of representatives of 14 States, to operate when the Preparatory Commission was not in session. So that, Mr. President, there was established this machinery to provide for the transition from the League of Nations to the United Nations, the transfer of assets, functions, activities and so on, amongst others, and also to provide for the proper functioning of the United Nations when it commenced its own activities under the Charter.

Two of the sub-committees of the executive committee are of particular importance for present purposes. The first sub-committee to which I will refer was Committee 9, which was entrusted with the task to—

> ". . . formulate recommendations concerning the possible transfer of certain functions, activities and assets of the League of Nations which it may be considered desirable for the United Nations to take over on terms to be arranged".

This sub-committee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League. However, and this is important, in my submission, it expressly excluded mandates for the following reason, namely "since the questions arising from the winding up of the mandates system" were dealt with in the report which emanated from the other committee with which I wish to deal, namely Committee 4.

So, Committee 9 which dealt in general with the transfer of functions, activities and assets of the League to the United Nations, did not consider that it was called upon to deal with the question of mandates. That was specifically entrusted to Committee 4, which had as its terms of reference, *inter alia*, the following:

> "It should study the questions arising if the mandates system were to be wound up and examine the feasibility of providing for such interim arrangements as may be possible, pending the establishment of the Trusteeship Council."

This committee was thus specifically entrusted with the problems arising from the winding up of the mandates system and it dealt in its recommendations with this topic. Its main recommendation was that a temporary trusteeship committee be established, since under Article 86 of the Charter the Trusteeship Council could not be formed until a number of territories were first placed under trusteeship.

Amongst the functions recommended for the temporary trusteeship committee was the following:

> "To advise the General Assembly on 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."

Now, Mr. President, when this recommendation of Committee 4 was discussed, there were two proposals made by the United States of America on two separate occasions which, in our submission, are of some importance in this case. On both occasions the United States submitted proposals that the following further function should be conferred on the temporary trusteeship committee:

> "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."

I must just add for complete accuracy, Mr. President, that this was the first of the two United States proposals, the subsequent one was to the same effect, although there were some slight changes in the wording. They are, however, both quoted in our written statement in the paragraphs mentioned and they are there available to the Members of the Court who might wish to compare their *ipsissima verba*. The important point here, Mr. President, is that this proposal specifically adverted to the problems that would arise between the ceasing of the mandates system under the League of Nations and the commencement of the United Nations trusteeship system.

It specifically adverted to the fact that the supervisory authorities would fall away on the dissolution of the League and that they would not automatically be re-established under the trusteeship system. And the proposal which was made to cope with that situation was that the Temporary Trusteeship Committee should in the interim period perform the function previously performed by the Mandates Commission and that the Trusteeship Council would, upon its establishment, perform that function.

The second United States proposal to this effect was accompanied by a memorandum which we quote in paragraph 11 of Chapter VIII in full and which I therefore do not have to read in full here today. I would, however, quote two of the paragraphs thereof. They read as follows:

> "*In order to provide a degree of continuity between the mandates system and the trusteeship system, to permit the mandatory powers to discharge their obligations, and to further the transfer of mandated territories to trusteeship, the Temporary Trusteeship Committee (or such a committee as is established to perform its functions) and, later, the Trusteeship Council should be*

specifically empowered to receive the reports which the mandatory powers are now obligated to make to the Permanent Mandates Commission.

. . . . . .

To bridge any possible gap which might exist between the termination of the mandates system and the establishment of the trusteeship system, it would appear appropriate that the supervisory functions of the Permanent Mandates Commission should be carried on temporarily by the organ of the United Nations which is to handle trusteeship matters." (Written statement, I, Chapter VIII, p. 597.)

But, Mr. President, one finds the very significant feature that although both of these proposals were submitted, neither of them was apparently ever formally moved and the whole idea of a Temporary Trusteeship Committee which would have these functions ultimately came to naught, as we indicate in more detail in Chapter VIII. So that although these matters were pertinently raised at that stage nothing in fact was done to cope with this situation, of which everybody was made fully aware.

During the debates of the Preparatory Commission certain statements were made on behalf of South Africa to which reference might be made here since it bears on arguments which have been presented to the Court.

The first statement to which I would refer is one made by the South African representative in favour, or in support, of the establishment of an interim body ". . . as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report". I refer to this statement, Mr. President, not because I think it is of any significance or importance, but because it has, in the past, been relied upon as suggesting an acknowledgment of some responsibility or obligation on the part of South Africa. I would merely, in order to anticipate any such possible thought, wish to refer to the treatment of this statement in the *I.C.J. Reports 1966* at pages 100-101 by Judge *ad hoc* van Wyk and at page 345, footnote 1, by Judge Jessup. It seems apparent, in our submission, that this statement could not have any of the sort of effect which has, in the past, been attributed to it, if it is read in the light of the earlier and later statements by the South African representatives and regard is also had to the actual content of the statement, which did not suggest that South Africa itself was now undertaking to report to any other body than the Permanent Mandates Commission.

That South Africa had no such intention was, in our submission, rendered abundantly clear by further statements made in the course of the debate on the proposal, which was ultimately accepted by the Preparatory Commission, namely the proposal that the General Assembly should adopt a resolution calling on States administering territories under mandate to undertake practical steps for submitting trusteeship agreements. That was the resolution which was ultimately adopted and, in the course of the discussion preceding its adoption, the South African representative said that he:

". . . reserved the position of his delegation until the meeting of the General Assembly, because his country found itself in an unusual position. The mandated territory of South West Africa was already a self-governing country, and last year its legislature had passed a resolution asking for admission into the Union. His Government had replied that acceptance of this proposal was impossible owing to their obligations under the mandate.

The position remained open, and his delegation could not record its vote on the present occasion if by so doing it would imply that South West

Africa was not free to determine its own destiny. His Government would, however, do everything in its power to implement the Charter."

Three days later, he said again:

". . . the South African delegation associated itself wholly with the desire of Committee 4 to apply the principles laid down in the Charter and that its efforts had been directed towards that end. In view, however, of the special position of the Union of South Africa, which held a mandate over South West Africa, it reserved its position with regard to the document at present under review, and especially because South Africa considered that it had fully discharged the obligations laid upon it by the Allies, under the Covenant of the League of Nations, on the advancement towards self-government of territories under mandate, and that the time had now come for the position to be examined as a whole. For that reason, the South African delegation reserved its attitude until the Assembly met."

Now, Mr. President, a clearer indication one cannot get of the South African attitude that there was no intention of concluding a trusteeship agreement and that, in its view, the mandates system had outlived its usefulness as far as South West Africa was concerned.

On 17 January 1946, when addressing a plenary meeting of the General Assembly during the discussion of the recommendation of the Preparatory Commission, to which I have already alluded, the South African representative stated:

"Under these circumstances, the Union Government considers that it is incumbent upon it, as indeed upon all other mandatory Powers, to consult the people of the mandated territory regarding the form which their own future government should take, since they are the people chiefly concerned. *Arrangements are now in train for such consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the mandate, together with its right of full liberty of action,* as provided for in paragraph 1 of Article 80 of the Charter.

From what I have said I hope it will be clear that South West Africa occupies a special position in relation to the Union which differentiates that territory from any other under a C mandate. *This special position should be given full consideration in determining the future status of the territory.* South Africa is, nevertheless, properly conscious of her obligations under the Charter. I can give every assurance that any decision taken in regard to the future of the mandate will be characterized by a full sense of our responsibility, as a signatory of the Charter, to implement its provisions, in consultation with and with the approval of the local inhabitants in the manner best suited to the promotion of their material and moral well-being" (italics added).

This again, Mr. President, emphasizes the point repeatedly made that the South African Government at that stage was not undertaking any new responsibility towards the United Nations, as has been suggested, nor was it making any statements that might estop it from later denying the authority of the United Nations, as was contended before this Court. Its attitude was a clear and explicit one, that it was not prepared to enter into a trusteeship agreement, but that it was going ahead with consultations with the people towards an ultimate object of incorporation. This was again the theme of a statement on 22 January, in the Fourth Committee, where the South African representative said:

"Referring to the text of Article 77, he said that *under the Charter the transfer of the mandates régime to the trusteeship system was not obligatory.* According to paragraph 1 of Article 18, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this Article invalidated paragraph 1. *The position of the Union of South Africa was in conformity with this legal interpretation.*

He explained the special relationship between the Union and the territory under its mandate, referring to the advanced stage of self-government enjoyed by South West Africa, and commenting on the resolution of the Legislature of South West Africa calling for amalgamation with the Union. *There would be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained.* When that had been done, the decision of the Union would be submitted to the General Assembly for judgment."

The Court rose at 1 p.m.

THIRTEENTH PUBLIC SITTING (1 III 71, 3 p.m.)

Present: [See sitting of 8 II 71.]

Mr. GROSSKOPF: Mr. President, honourable Members of the Court, on Friday I commenced our consideration of the events that we consider relevant which occurred during the transitional years, 1945 to 1946, which were the years during which the United Nations was established and the League of Nations was dissolved. I showed that the United Nations was not regarded as a universal successor to the assets, powers and functions of the League. On the contrary, as from the end of the San Francisco Conference, detailed discussions were held about the manner in which and the extent to which the United Nations should take over the assets, powers and functions of the League. The League was still then in existence but its dissolution was clearly inevitable and contemplated.

The discussions concerning transfer of functions, activities and assets of the League were initiated in Committee 9 of the Executive Committee of the Preparatory Commission. This Committee did not, however, deal with questions arising from the winding up of the mandates system. As I showed, the latter question fell under the tasks entrusted to Committee 4.

Committee 4 dealt generally with the introduction of the trusteeship system. Amongst its recommendations was that a Temporary Trusteeship Committee be established which would, *inter alia*, advise the General Assembly on matters arising with regard to the transfer to the United Nations of any functions and responsibilities which were, up to that stage, exercised under the mandates system. That was one of the functions which the Temporary Trusteeship Committee was recommended to have.

During the debates on the recommendation concerning a Temporary Trusteeship Committee, proposals were submitted on two occasions that the Temporary Trusteeship Committee, and later the Trusteeship Council itself, should undertake the functions previously performed by the Permanent Mandates Commission in respect of such mandated territories as were not placed under trusteeship.

As I showed on Friday, neither of these proposals was apparently moved. Ultimately, as I pointed out, the whole idea of a Temporary Trusteeship Committee came to nothing, without any provision whatsoever having been made for interim supervision of mandates, that is, for the supervision of mandated territories until they came under the trusteeship system or for mandated territories that did not come under the trusteeship system at all.

I also showed that during the debates as from the time of the San Francisco Conference the South African representatives repeatedly stated that the South African Government reserved its position concerning South West Africa which it considered should be incorporated in the Union after the wishes of the inhabitants had been ascertained.

The last statement in this regard to which I referred was that made on 22 January 1946 in the Fourth Committee.

Now, Mr. President, continuing from there I would wish to point out that other mandatories, particularly the United Kingdom and France, also made statements at that session in which they indicated that they would not, or might

not, place certain mandated territories under trusteeship. We deal with this in Chapter VIII, paragraph 16, of our written statement.

Thus both these Governments indicated that their willingness to place certain territories under trusteeship would depend on the terms of the relevant agreements and in any event the United Kingdom pointed out the unique position occupied by Palestine.

Ultimately the work of the Preparatory Commission concerning mandates led up to a resolution—resolution 11, which read as follows:

> "*With respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> *Welcomes* the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories and, in respect of Transjordan, to establish its independence.
>
> *Invites* the States administering territories now held under mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter [which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the trusteeship system], in order to submit these agreements for approval, preferably not later than during the second part of the first session of the General Assembly."

So that ultimately, Mr. President, the whole discussion on the future of mandates was resolved by an invitation to the States administering mandated territories to undertake practical steps for the implementation of Article 79 of the Charter.

No other obligation was imposed upon them and no other solution was decided upon for the matter of interim accounting or interim supervision.

I would also point out that resolution 11 itself clearly indicates that its authors realized that all mandated territories would not end up as trusteeships. It is, in my submission, significant that reference is made to the declarations made by "*certain* States" administering mandated territories of an intention to negotiate agreements "in respect of *some* of these territories", whereas the invitation contained in the resolution is directed at "*the States*" administering mandated territories. So, the General Assembly seems to have been perfectly aware, as indeed it could, in my submission, not be otherwise, that certain of the States administering mandated territories had no present contemplation of placing them under trusteeship.

The conclusions to be drawn from the history of the establishment of the United Nations will be dealt with later, after comparison has been made between the treatment accorded to mandates and that accorded to other League functions and to League assets. At this stage, Mr. President, it is, in my submission, necessary to emphasize only one aspect and that is the repeated reservations of the South African representative concerning any possible commitment to the United Nations in respect of South West Africa—reservations which were made because, in the view of his government at the time, the Mandate had outlived its usefulness and should, if the inhabitants so wished, be terminated by incorporation into the Union.

As shown, in respect of mandates no specific arrangement was ultimately made save the creation of machinery for the voluntary conclusion of trusteeship agreements, and a resolution inviting mandatories to make use thereof. This should, in our view, be compared with the arrangements which were made in

respect of other League functions and powers, and in respect of the assets of the League.

As I have already stated, Committee 9 of the Executive Committee of the Preparatory Commission recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League. Expressly excepted however were the questions arising from the winding up of the mandates system. These questions, as I have just pointed out, were separately dealt with in the manner I have mentioned, commencing with the recommendations of Committee 4 and concluding with General Assembly resolution 11, which invited the conclusion of trusteeship agreements. Also excepted from the general recommendation of a transfer of League functions to the United Nations were the political functions of the League. These were also not included in the general recommendation that League assets, functions and activities should be transferred.

The Executive Committee accepted in general the Sub-Committee's recommendation. Concerning the exception of political questions, which I have just mentioned, it stated categorically:

> "The Committee recommends that no political questions should be included in the transfer. It makes no recommendation to transfer the activities concerning refugees, mandates or international bureaux."

However, Mr. President, this form of wording was not explicit enough for all the delegates. There was some concern amongst them that the word "transfer" in the recommendations concerning functions and activities of the League could imply a legal continuity which would not in fact exist, with the result that the resolution, as ultimately adopted by the General Assembly, used instead of "transfer" the expression "the assumption of responsibility for certain functions and powers".

Mr. President, that is a point, in our view, of some significance; that the initial Members of the United Nations were so concerned that there should be no impression of a continuity between the League of Nations and the United Nations that they objected to the word "transfer" as relating to functions and activities and in fact insisted that it be replaced by "assumption". "Assumption" of course does not imply that there is any going over from the one to the other, it is a merely unilateral process whereby, in their view, the United Nations would then acquire these functions.

The resolution which provided for this assumption was resolution 14 of 12 February 1946 which we quote in full in Chapter VIII, paragraph 20. It is consequently not necessary for me to quote the whole of it, but I would summarize it shortly and quote the most pertinent part. Briefly, this resolution embodied the agreement of Members of the United Nations to the assumption, on the dissolution of the League, by the United Nations of functions or powers previously exercised by the League. The resolution emphasized, however, that the United Nations reserved the right to decline to assume any particular function or power. So that, in respect of all functions and powers, the United Nations stated quite explicitly that it reserved to itself the right to decline to assume any particular one of them. In regard to functions and powers of a technical and non-political character there was, nevertheless, in the resolution, a general expression of willingness on the part of the United Nations to assume those functions and powers. However, Mr. President, this expression of willingness to assume, in principle, functions and powers, did not apply to functions and powers under treaties, international conventions, agreements and other instruments having a political character. It was limited to matters of a technical and

non-political nature. In respect of functions of a political character, the General Assembly merely said:

> "*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 . . ."

In respect of such functions and powers, therefore, the General Assembly did not declare a general willingness to assume them but merely expressed a willingness to examine or submit for examination a request of the parties that it should assume the exercise of such functions or powers.

Ultimately, Mr. President, the only part of the League's legacy which, in the contemplation of the United Nations, was transferred—as distinct from assumed—was its assets, in respect of which a common plan of transfer was drawn up by agreement between a committee of the United Nations and the Supervisory Commission of the League.

I come now, Mr. President, to the conclusions which, I submit, the Court should draw from the events during the establishment and first session of the United Nations. The purpose of the survey of these events was to determine whether any agreement was concluded whereby South Africa, either on its own, or together with other mandatories, consented to the transfer to or assumption by the United Nations of supervisory functions in respect of mandates, or whether, as stated in these oral proceedings by the distinguished representative of Pakistan, South Africa said or did anything which would estop her from denying such consent. The effect of the events during the establishment of the United Nations is stated in some detail in Chapter VIII, paragraphs 50-59, of our written statement, and it is accordingly necessary only to summarize them briefly here.

Now, Mr. President, the first point which, we submit, is significant, is that the Charter itself made no provision for any function to be exercised by the United Nations in respect of mandates as mandates. As stated by the Court in 1950:

> ". . . the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System." (*I.C.J. Reports 1950*, p. 140.)

And, Mr. President, the placing of mandated territories under trusteeship was to be voluntary, as was also held, in my respectful submission correctly, by the Court in 1950—that was, of course, by the majority of the Court.

It has in the past sometimes been suggested that Article 80, paragraph 1, of the Charter served in some way to effect a substitution of supervisory organs in respect of mandates. However, since the majority of the Court in 1950, in deciding on the transfer of supervisory functions, appeared to attach considerable weight to this Article in its reasoning, I propose dealing with it later when analysing and considering the 1950 Opinion of the Court. I would, at this stage, merely submit that Article 80, paragraph 1, could not have had any such effect. I shall, however, later present more argument in support of this submission.

Secondly, the United Nations resolutions relating to assumption of League functions and the establishment of the trusteeship system, show:

(a) that the United Nations, by clear design, was not a universal or an automatic successor to the League functions and activities; before the United Nations would take over or assume any such functions or activities, some

active arrangement would have been necessary. It was not regarded as a process that was to take place automatically; something additional would have had to be done in order to invest the United Nations with these powers and functions.

(b) This applied particularly in respect of political functions where the United Nations had not expressed any general willingness to assume such functions, but had merely undertaken to examine, or have examined, any request from the parties that the United Nations should assume the function in question.

(c) Even this rather grudging attitude was not designed for mandates as such. It was not designed for functions pertaining to mandates. As we attempted to show, mandates were dealt with separately all along, and, although there had been suggestions that supervisory organs should be established in respect of mandated territories, in their capacity as mandated territories so to speak, these suggestions came to nothing. In the end, the only resolution concerning mandated territories invited the mandatories to conclude trusteeship agreements expeditiously (resolution 11).

(d) It was made clear that all mandates would not or might not be placed under trusteeship. This was quite apparent to everybody concerned. A number of the mandatories had clearly pointed out that they would not, or might not, place certain territories under trusteeship. This was so, particularly, in the statements made on behalf of the South African Government as from the time of the San Francisco Conference onwards, in which it was clearly intimated that the South African Government desired incorporation of the territory with the Union in accordance with the wishes of the inhabitants.

It is accordingly clear, we submit, that no arrangement was in fact made for continued supervision of mandates, after the contemplated dissolution of the League, other than by their voluntary placing under trusteeship. That, Mr. President, we submit, was the only arrangement which was in fact made by the authors of the United Nations for the continued supervision of mandates after the League was dissolved. Of course, it might have been possible to come to some arrangement with the United Nations under resolution 14. But that resolution, as I have noted, was not designed for mandates and, in any event, then that also would have had to be a matter of active arrangements.

Furthermore, we submit that in view of the pertinent manner in which the question of supervision of mandated territories was adverted to, it seems clear that the failure to make any specific arrangement was by deliberate design. It was not something which had been overlooked, or something which had been forgotten, but by deliberate design the authors of the Charter made no specific provision for the further supervision of mandates.

Now, of course, it is not necessary for our purposes to show that it was by deliberate design, it is sufficient to show that no arrangements were made—whether intentionally or unintentionally does not really, I submit, matter for our purposes. But, on the other hand, we do submit that when one looks at the facts one can only come to the conclusion that there was an intentional decision not to make provision for the supervision of mandates as such, that is, otherwise than by placing them under trusteeship.

I turn now to the events during the dissolution of the League. After the establishment of the United Nations, the dissolution of the League obviously had to follow quite soon and the League Assembly held its final session in April 1946.

As I have said, at that stage the United Nations had already made provision

for the method of transfer of League assets and for the manner in which it might assume functions or powers which had been exercised by the League up to that stage. It must therefore, Mr. President, in our submission, be emphasized that the League or its members could not transfer any functions or powers to the United Nations without the active co-operation of the United Nations, which it had not undertaken to give automatically.

So, at its final meeting, the League Assembly could not pass over any functions to the United Nations by itself. It would have had to have some form of co-operation with the United Nations and the United Nations had clearly indicated that it would not necessarily assume all the functions of the League.

I have already adverted to the difference in its attitude as between technical and political functions.

The object of the final session of the League Assembly was accordingly to put the League's affairs in order so as to enable the transfer of assets and the assumption of non-political functions and powers. In addition, of course, the object was to provide for the final liquidation of the Organization. The manner in which this final Assembly performed its functions is detailed in Chapter VIII, paragraphs 21-30, of our written statement and I do not propose to traverse it again in detail here. I would only mention a few main aspects, particularly those relating to mandates. These are set out mainly in paragraph 26 of Chapter VIII of our written statement. Mr. President, as will appear from our written statement, the process which was applied was that the various mandatory powers made statements about their intentions in regard to the territories under their control of which the Assembly, in its final resolution, took note. I do not want to read all the statements made by the mandatories, they are there for the Court to see, but I must again emphasize that there was clearly no contemplation that all mandates would end up under the trusteeship system. So, for instance, the British statement quoted in paragraph 26 *(b)* (i) of Chapter VIII of our written statement mentioned Palestine, it mentioned also the necessity of satisfactory terms before it would be prepared to place any of the other territories under the trusteeship system. The same feature appears, in my submission, from the French statement which is quoted in paragraph 26 *(b)* (iii) of the same Chapter.

The South African statement, Mr. President, I would with the Court's leave read in full in view of the arguments which have been advanced here in the oral proceedings. It reads as follows:

> "Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates. As was fully explained at the recent United Nations General Assembly in London, the Union Government have deemed it incumbent upon them to consult the peoples of South-West Africa, European and non-European alike, regarding the form which their own future Government should take. On the basis of those consultations, and having regard to the unique circumstances which so signally differentiate South-West Africa—a territory contiguous with the Union—from all other mandates, *it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union.* As the Assembly will know, it is already administered under the terms of the mandate as an integral part of the Union. 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" (italics added) (written statement, I, Chap. VIII, para. 26, pp. 608-609).

Interrupting the quotation there, Mr. President, I would suggest that these last words are not without significance. The intention expressed by the South African representative was to administer the Territory in a manner as she had done during the six years when meetings of the Mandates Commission could not be held and when, in fact, no reports were submitted. But the representative of South Africa went on in another pertinent passage as follows:

"*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." (Italics added.) (*Ibid.*, p. 609.)

It is our submission, reading the statement as a whole, that it is quite clear that the attitude of the representative was merely that the substantive provisions of the Mandate would be performed, namely those imposed in the interests of the inhabitants, but that there would be no further reporting. That seems clear not only from the passage I stressed a moment ago, but also from the very pointed reference to the disappearance of the supervisory organs of the League.

On 9 April 1946, after the South African and the United Kingdom statements had been made, the representative of China proposed the following draft resolution:

"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 territories under trusteeship;

Considering that the League's function of supervising mandated territories should be transferred to the United Nations, in order to avoid a period of interregnum in the supervision of the mandatory régime in these territories.

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" (*ibid.*, p. 611).

Now, Mr. President, as I have already stated, this was after the South African statement in which, I submitted, it was made clear that pending further arrangements there would be no reporting.

I will shortly point out that the same follows from the United Kingdom statement. So after these two statements, which both indicated an intention on the part of the mandatories not to report pending trusteeship or some other arrangement, the Chinese representative proposed this draft resolution. In fact the draft resolution was not discussed because the Chairman ruled that it was not relevant to the topic that was then being debated. He ruled that this draft resolution could be discussed later, it could be raised and moved later when the appropriate time arrived.

However, Mr. President, when the representative of China spoke again on 12

April he had an entirely new draft which differed completely from the one which he wanted to propose earlier. This new draft was described by the seconder as one which "had been settled in consultation and agreement by all countries interested in mandates" (*ibid.*, para. 26 *(d)*).

This new draft had been agreed upon since the last one had been proposed and, in moving the new one, the Chinese representative said:

> "[He] recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the transfer of functions from the League to the United Nations. The United Nations Charter in Chapter XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect *were not transferred automatically* to the United Nations" (italics added) *(ibid.)*.

I pause there for a moment, Mr. President—he is still dealing with this concept that these functions were not transferred automatically to the United Nations, something had to be done before the trusteeship system comes into operation. He then continued:

> ". . . The Assembly should therefore take steps to secure the continued application of the principles of the mandates system. As Professor Bailey had pointed out to the Assembly on the previous day, the League *would wish to be assured* as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates.
>
> It was *gratifying* to the Chinese delegation as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers *had announced their intention* to administer the territories under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon. It was to be hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply, in full the *principle of trusteeship* underlying the mandates system.
>
> The Chinese delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in a concrete form and the position of the League clarified" (italics added) *(ibid.)*.

The resolution moved by the Chinese representative and adopted read as follows (I quote only the two last operative paragraphs which are the only directly relevant ones for present purposes):

> "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" (written statement, I, Chap. VIII, p. 613).

Mr. President, that was then the contrast between the first draft proposal which the representative of China wanted to move and the one which was ultimately agreed upon by all concerned. The first one in express terms stated that the Assembly should consider that the League's function of supervising mandates should be transferred to the United Nations, and the recommendation in the first resolution was that the mandatory powers should 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".

That, Mr. President, was a specific proposal that a specific form of supervision should be instituted in respect of mandated territories not placed under trusteeship. However, Mr. President, after discussions with the others interested in mandates, the ultimate resolution had an entirely different content. The main features of the resolution that was ultimately passed are the following. The resolution, firstly, merely takes note of what has occurred. It does not adopt any attitude thereanent, nor does it purport to perform any act or to create any obligation. All that the resolution does is to take note; it does not approve or disapprove, it does not recommend, it does not make any decision which would bind anybody, it merely records that something has occurred. And, secondly, when one looks at what is thus recorded, all one finds are expressed intentions.

Now, Mr. President, an intention is, of course, a subjective state of mind which by itself, even when expressed, creates no obligation. So it is clear that the resolution as ultimately adopted did not even purport to take note of agreements or undertakings or promises, but just of expressed intentions. The third point, which I would submit is significant, Mr. President, is that the intentions of which the Assembly took note were to continue to *administer* the territories for the well-being and development of the peoples concerned. The word "administer" is used and that is the only extent to which there was an express intention. The resolution did not suggest that the expressed intentions went any further, so, for instance, as to include an intention to submit reports or to do something of that sort.

And the fourth point which I would suggest emerges from the resolution and is of some importance is that the resolution contemplated that other arrangements would be agreed upon between the United Nations and the mandatory Powers. The resolution did not itself purport to speak the final word on what was to happen to the mandated territories. It contemplated that the final arrangements would still have to be a matter of agreement between the mandatory Powers and the United Nations.

In the light of the debates, the past events, these other arrangements could have covered quite a number of different institutions. They might have been trusteeship agreements, they might have been incorporation, or they might have been something entirely *sui generis*. But something else was still contemplated which should be done to determine the final position of the mandatories.

Now, Mr. President, when referring to the expressed intentions of the mandatories I made the point that nothing in the resolution indicated that these intentions covered any reporting to the United Nations. In my submission that also appears clearly from the statements made by the mandatories themselves. In view of the whole background to this matter at the United Nations, which had happened shortly previously, and also in view of the Chinese proposal, it is in itself significant that there was no express reference to reporting in any of the statements, in my submission. Certainly, that would apply to all the statements, made after the Chinese proposal. As I have already said, the two made prior to the first Chinese proposal had in any event clearly indicated a contemplation

that there would be no reporting until the possible conclusion of trusteeship agreements.

Not only is there a lack of reference to reporting, but some of the statements clearly and positively suggested that the mandatories did not intend to report to any organization pending the possible conclusion of trusteeship agreements. I have already pointed that out with relation to the statements made on behalf of the South African Government. In my submission, it also appears very clearly from the statement made by the Australian representative. His statement is quoted in Chapter VIII, paragraph 26 *(b)* (vi), of our written statement and I therefore do not have to read it in full. I would, however, with the Court's permission, just read one or two pertinent passages.

The first is as follows:

> "*After the dissolution of the League of Nations and the consequent liquidation of the permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety.* . . . In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance. In due course these territories will be brought under the trusteeship system of the United Nations; until then, the *ground is covered not only by the pledge which the Government of Australia has given to this Assembly today but also by the explicit international obligations laid down in Chapter XI of the Charter*, to which I have referred. *There will be no gap, no interregnum to be provided for.*" (Italics added.)

The earlier reference to Chapter XI, which the Australian representative mentioned, was as follows:

> "Amongst other things, each administering authority under that chapter undertakes to supply to the United Nations information concerning economic, social and educational conditions in its dependent territories."

So, what the Australian representative was saying was this. He was saying that in this interim period the ground was covered, firstly, by his pledge to administer the territories in accordance with the principles of the mandate and, secondly, by the provisions of Chapter XI. So as regards administration he had given a pledge; as regards reporting Chapter XI is applicable. That was his view. I shall come to the content of Chapter XI in the respects under consideration in a moment, but all I would say at this stage is that a contemplation that information should be given under Chapter XI clearly excluded any view that reports would be submitted under the Mandate. Quite apart from the fact that it would be a strange situation if two separate sets of reports were to be sent, the information to be submitted under Chapter XI covers a very much narrower ambit than that which had been required under the mandates. So that if there had been a contemplation that reports under the mandates would continue, it would have been quite—one could almost say—ridiculous to state at the same time that there was also this much lesser obligation under Chapter XI. The fact that any obligation under Chapter XI might have been owed would then have been of no relevance whatsoever—the reporting under the mandate would have been a much more important provision in that field.

Now Mr. President, that then is the Australian statement which was made after the first Chinese draft proposal and, therefore, also after that very explicit

suggestion that there should be a supervisory function transferred to the United Nations.

The representatives of other mandatories were not equally explicit, but the United Kingdom and New Zealand both confined their expressions of intentions to the administration of the territories. They also limited themselves to an intention of administering the territories for the well-being of the inhabitants. Thus the representative of the United Kingdom stated ". . . it is the intention of His Majesty's Government in the United Kingdom to continue to administer these territories in accordance with the general principles of the existing mandates" (written statements, **I**, Chapter VIII, p. 608).

It is of some importance to note how these statements were understood at the time because I will later submit that a great deal of *ex post facto* rationalization has gone into certain arguments concerned with the South West Africa issue. For that purpose it is useful to see how these various statements were interpreted at the time. This British statement, for instance, was commented upon by the United Nations Special Committee on Palestine in its report which we quote in Chapter VIII, paragraph 44 *(c)*, of the written statement. I may just read the pertinent passage to the Court to show how this Committee understood the statement. I might add that the Committee consisted of representatives of Australia, Canada, Czechoslovakia, Guatemala, India, Iran, Netherlands, Peru, Sweden, Uruguay and Yugoslavia. In its report the Committee said the following:

> "Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had no international authority to which it might submit reports and generally account for the exercise of its responsibilities in accordance with the terms of the Mandate."

I would repeat that, Mr. President—"the mandatory power . . . had no international authority to which it might submit reports and generally account". The quotation then continues:

> "Having this in mind, at the final session of the League Assembly, the United Kingdom representative declared that Palestine would be administered 'in accordance with the general principles' of the existing Mandate until 'fresh arrangements had been reached'."

So, Mr. President, in 1947 when these events were, of course, very recent, the United Kingdom statement was clearly interpreted as one which had been inspired by the fact that there was no longer any international authority to which it might submit reports and that therefore there was this stated intention on its part to administer the territory in terms of the Mandate.

The same appears, in my submission, from the statement made on behalf of New Zealand and which appears in paragraph 26 *(b)* (iv), Chapter VIII, of our written statement. I would just direct the Court's attention to the fact that the New Zealand statement also specifically refers to the dissolution of the League and of the Permanent Mandates Commission. It is to the effect that these events would not lessen the New Zealand Government's intent of administering the territory for the benefit of the inhabitants. So the New Zealand statement specifically adverted to these facts, but once again there was the very significant lack of any stated intention to submit reports.

The representatives of France and Belgium merely intimated an intention of placing their territories under trusteeship.

As I indicated a while ago, I propose at this stage briefly to summarize the differences between the reporting requirements under the mandate and the provisions of Article 73 of the Charter. The purpose is the one I have already indicated, namely to show that the submission of information under Article 73 could not have been regarded as the equivalent of reporting under the Mandate and that in any event the two of them could not have co-existed.

Mr. President, under Article 6 of the Mandate for South West Africa and the corresponding provisions of other mandates, the Mandatory was required to make to the Council of the League an annual report to the satisfaction of the Council containing full information in regard to the Territory and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5. So it was to be an *annual* report to the *satisfaction* of the Council and it was to contain *full* information on all aspects of the administration of the territories. It was then intended that the report be discussed by the Permanent Mandates Commission and by the Council. That is, of course, how it also worked in practice. These reports were submitted, they were discussed by the Permanent Mandates Commission and ultimately went to the Council. As against this Article 73 *(e)* merely contained a "declaration regarding non-self-governing territories" whereby Members of the United Nations administering such territories, *inter alia*, accepted as a sacred trust the obligation to promote to the utmost the well-being of these territories, and, to this end:

> "*(e)* To transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories . . ."

In my submission, it is apparent that there were a number of important differences between Article 73 *(e)*, as it was framed and as it was read when the Charter came into force, on the one hand, and on the other, reporting under the mandate. The two methods of providing information were, in my submission, entirely different.

Article 73 only required the regular transmission, whereas under the mandate it had to be annual. That is perhaps not of any great significance, but what is more important is that under Article 73 the information is to be transmitted only for information purposes. Under the mandate, of course, as we know, reporting was an important feature in an active system of supervision. There was under the mandate, certainly, no conception that the reports were to be only for information purposes.

Then thirdly, under Article 73, the governing authority is entitled to refuse to transmit information if required by security and constitutional considerations. These considerations could lead to information not being supplied. There was no corresponding limitation under the mandate.

Then, fourthly, under Article 73 the obligation relates only to statistical and other information of a technical nature. The Article does not in terms require any statement of policy or anything of that sort; only statistical and other information.

And, fifthly and finally, the information required to be transmitted under Article 73 was only that concerning economic, social and educational conditions. Political information was, in accordance with the original contemplation of

the authors of the Charter, not included in the type of information which had to be transmitted.

As a matter of fact, Mr. President, when one has regard to the drafting history of the Article, one finds that political matters were intentionally excluded. The reference to the drafting history may be found in Russell, *A History of the United Nations Charter*, pages 813-824.

Of course, Mr. President, I realize that in recent years the Article has been extended quite considerably beyond what was accepted in earlier years. For a description of this process I could refer the Court to Goodrich, Hambro & Simons, *Charter of the United Nations*, 3rd edition, pages 453-458.

I do not want to go into any debate as to whether it has been extended further than its language will bear, or to consider the merits of the extensions, but the only point I would make is that any later interpretations or any later extensions which have been grafted on to the Article or to which the Article has been subjected are not of any relevance for present purposes. I am here concerned only with the contemplation of the representatives of States in 1946 and thereabouts, when the Charter had been newly framed; and certainly in 1946, when the Australian representative referred to Article 73 *(e)*, he would have contemplated a very limited obligation contained in or imposed by that Article. He would certainly not in that year have given the Article the wide interpretation which has sometimes been advanced in recent years.

So, I would repeat, Mr. President, that when the Australian representative in 1946 stated that Chapter XI would be applicable, he had in mind, in my submission, a very limited obligation to submit statistical and other information for the information of the United Nations, and such a contemplation on his part would clearly, I submit, have excluded any intention of performing the much more onerous obligation of submitting reports under the mandate.

That then was the history of the final session of the League Assembly. Our submission is that the events at that final session clearly show that there was no contemplation of any reporting under the mandate to any organization pending the possible conclusion of trusteeship agreements or other arrangements. This, in our submission, is fortified by the events which occurred immediately thereafter.

The Court adjourned from 4.20 p.m. to 4.45 p.m.

After the conclusion of the final session of the League Assembly, a Board of Liquidation, which had been appointed during the session, performed the tasks necessary to give effect to the resolutions passed by the League Assembly. In Chapter VIII, paragraph 27, or our written statement, we discussed the report of the Board of Liquidation in which we showed the detailed arrangements that were made for the liquidation of the League, for the transfer of its assets to the United Nations and the possible assumption of its powers and functions by the United Nations.

In the report of the Board of Liquidation the subject of mandates was dealt with in a chapter entitled "Disposal of Non-Transferable Activities, Funds and Services". I would suggest that the word "non-transferable" is not without significance in the context. The report itself said only the following about the mandates system:

> "On the proposal of the First Committee, the 1946 Assembly adopted a resolution whereby it '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'.

The mandates system inaugurated by the League has thus been brought to a close, but the Board is glad to be able to record that the experience gained by the Secretariat in this matter has not been lost, the United Nations having taken over, with the small remaining staff, the Mandates Section's archives, which should afford valuable guidance to those concerned with the administration of the trusteeship system set up by the Charter of that organization."

I would emphasize the words "the mandates system . . . has thus been brought to a close". Certainly the Board of Liquidation did not consider that there was anything remaining under the mandates system to be transferred to, or assumed by, the United Nations with the one exception, which they mentioned, namely that there were still the small remaining staff and the Mandates Section's archives.

Those were the only matters in the contemplation of the Board of Liquidation which could be of assistance to the United Nations and which could be taken over or assumed by it.

Mr. President, these various arrangements which were made at the time of the dissolution of the League for transfer to, or assumption of assets and functions by the United Nations, were duly registered in the *United Nations Treaty Series*. So one finds that all these arrangements were properly recorded and were properly registered. We deal with this matter in Chapter VIII, paragraph 28, of our written statement, where we point out that the definition of the expression "treaty" adopted by the Secretariat for the purposes of treaty registration, was quite a wide one, and would include unilateral engagements accepted by some other juristic person. But, although all the matters in respect of which arrangements had been made for transfer to, or assumption by, the United Nations were dealt with in the *Treaty Series*, there appears no reference to any transfer of functions relating to mandates.

That is, of course, what one would expect if one has regard to the events that occurred previously but, we submit, it fortifies our conclusion that no arrangement was in fact arrived at concerning mandates as such.

In Chapter VIII, paragraph 60, and the following paragraphs, of our written statement, we presented an appraisement of the events at the final session of the League Assembly, which I have just summarized. There, Mr. President, we point out that the League confined itself to functions, powers and activities of a non-political character, which the United Nations had expressed a general willingness to assume. No provision was made by the League for functions and powers arising out of international agreements of a political character. The reason for that was clearly that they knew there was no point in doing so inasmuch as the United Nations had already indicated that they would only consider taking over such functions and powers on an *ad hoc* basis if requested to do so by the parties. That appears from General Assembly resolution XIV, Part 1, 3, C.

Regarding mandates in particular we contend that the Assembly deliberately refrained from making any provision for transfer of the League's functions. The proposal which had been raised by the Chinese representative, to make provision for such a transfer, was not proceeded with. Instead of making provision for reporting under the mandate until the Trusteeship Council was established, the Assembly ultimately contented itself with taking note of "expressed intentions" to continue to administer the mandated territories "until other

arrangements have been agreed upon between the United Nations and the respective mandatory powers".

So we can say, that in the result, the provision made for this interim period between the dissolution of the League and the establishment of the trusteeship system or the making of some other arrangement, was entirely different from that envisaged in the first Chinese draft proposal. We also contend, Mr. President, in Chapter VIII, paragraph 64, that the Chinese representative was well aware of this difference, as appears from a comparison of his own words on the two occasions. One can see by putting his words in juxtaposition how he clearly appreciated that on the second occasion he was advancing quite a different proposal. This is, of course, also quite clear from the terms of the proposal.

We contend further that the reason for the change in the attitude of the Assembly is not far to seek. The mandatories did not intend to maintain in a changed form the reporting requirements of the mandate. It is, in other words, the same picture as emerged from the events during the drafting of the Charter and thereafter. The mandatories did not propose continuing the mandates as mandates. They all expected to have a changed situation in one way or another. They intended to place them under trusteeship, if they could get satisfactory terms; they intended possibly to make some special, as yet undetermined arrangements, as in the case of Palestine, with which I propose dealing shortly; or in the case of South West Africa, the intention of the mandatory was to incorporate it after consultation with the inhabitants.

We submit that this deliberate intent of the mandatories and of the Assembly in general not to make any provision for supervision of mandates, as such, is also evident from the pointed way in which the statements by the mandatories indicated that there would be no reporting pending the conclusion of other arrangements.

In brief, we submit that these events demonstrate that there was no agreement at the final session of the League Assembly whereby the United Nations might have acquired rights of supervision in respect of mandates, or whereby the mandatories might have become obliged to submit reports under the Mandate to the United Nations. Indeed, we submit, the parties deliberately refrained from doing anything of the sort. Of course, Mr. President, any agreement that might have been come to at the final session of the Assembly would not *per se* have granted any rights to the United Nations. The United Nations was not, as such, represented there, so that something further would have had to happen to grant any functions or rights to the United Nations, and it was indeed envisaged, that something further would happen; it was envisaged not only in the final League resolution on mandates, but also in General Assembly resolution XI, which invited the conclusion of trusteeship agreements, and XIV, which provided the machinery, at least, whereby political functions could be assumed by the United Nations.

Accordingly, Mr. President, we contend that if any rights were to have accrued to the United Nations or if any obligations were to have been imposed on the mandatories, one would expect to find that provision was made therefor during the events subsequent to the dissolution of the League. However, an examination of the record shows, in our submission, that no arrangement as contemplated in the final League resolution concerning mandates was ever made with respect to South West Africa. South Africa, as she had consistently indicated since the days of the San Francisco conference, held consultations with the inhabitants of South West Africa, who were overwhelmingly in favour of incorporation. In November 1946, this matter was raised before the United Nations by the then Prime Minister of South Africa, Field-Marshal Smuts.

We discussed this matter in Chapter VIII, paragraphs 30-31, and here again, I do not propose being exhaustive in my argument in these oral proceedings. I do, however, propose quoting one or two of the relevant passages. Now the first I would quote was a statement made on 13 November 1946 by General Smuts; I stress the date because of certain incorrect statements made before this Court in these proceedings. At that stage he said the following:

> "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."

Pausing here, I would particularly emphasize the words immediately following:

> "In particular the Union would, in accordance with Article 73, paragraph *(e)* of the Charter, transmit regularly to the Secretary-General of the United Nations 'for information purposes, subject to such limitations as security and constitutional regulations might require, statistical and other information of a technical nature relating to economic, social and educational conditions' in South West Africa. There was nothing in the relevant clauses of the Charter, nor was it in the minds of those who drafted these clauses, 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."

That is the end of the quotation. I have already stressed, Mr. President, that the information which General Smuts said would be transmitted, was in accordance with Article 73, paragraph *(e)*, of the Charter and I would again draw the Court's attention to the fact that this was as early as 13 November 1946.

However, despite the results of the consultations with the inhabitants, the General Assembly in resolution 65 (1) rejected the incorporation proposal on the ground "that the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory". The Assembly consequently recommended that South West Africa be placed under trusteeship. In response to this recommendation, the South African Government wrote:

> "The Union Government desire to reiterate their view that it is implicit in the mandates system and in the mandate for South West Africa that due regard shall be had to the wishes of the inhabitants in the administration of the Territory. The wish clearly expressed by the overwhelming majority of all the native races in South West Africa and by unanimous vote on the part of the European representatives of the Territory that South West Africa be incorporated in the Union therefore debars the Union Government from acting in accordance with the resolution of the General Assembly, and thereby flouting the wishes of those who under the Mandate

have been committed to their charge. In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the territory in the spirit of the existing Mandate."

In this letter reference was made to a resolution of the House of Assembly of the South African Parliament, which resolution read as follows:

"Whereas in terms of the Treaty of Versailles full power of legislation and administration was conferred on the Union of South Africa in respect of the Territory of South West Africa, subject only to the rendering of reports to the League of Nations; and

Whereas the League of Nations has since ceased to exist and was not empowered by the provisions of the Treaty of Versailles or of the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization, or to any other international organization or body, and did not in fact do so; and

Whereas the Union of South Africa has not by international agreement consented to surrender the rights and powers so acquired, and has not surrendered these by signing the Charter of the United Nations Organization and remains in full possession and exercise thereof; and

Whereas the overwhelming majority of both the European and non-European inhabitants of South West Africa have expressed themselves in favour of the incorporation of South West Africa with the Union of South Africa;

Therefore this House is of opinion that the Territory should be represented in the Parliament of the Union as an integral portion thereof, and requests the Government to introduce legislation, after consultation with the inhabitants of the Territory, providing for its representation in the Union Parliament, and that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate."

This resolution of the House of Assembly of Parliament was quoted in the letter sent in response to Resolution 65 (1). The letter also continued to refer to the fact that "the Union Government have already undertaken to submit reports on their administration for the information of the United Nations". This last reference was clearly one to the statement by Field-Marshal Smuts, to which I referred shortly before.

Mr. President, I have quoted at length from this letter, and I have also quoted this resolution of the House of Assembly because of certain references made thereto in these proceedings, in particular by the United States of America in its written statement, I, at pages 845-846. So, because some significance seems to have been attached to this resolution, and particularly that part of it where it expresses the opinion that the Government should continue to render reports, it has been necessary to quote it, and I would also wish to make one or two observations about it.

Now, firstly, it was a resolution by one of the Houses of Parliament. South Africa has a bicameral legislative system, so this was not a resolution by the South African Parliament, as is sometimes incorrectly stated—for instance, in the 1950 Opinion, and also in the written statement of the United States of America at I, page 846. It is only one of the constituent houses of Parliament and not Parliament itself. As a resolution of the House of Assembly, it has no legislative or executive effect whatsoever. It merely is an expression of the point of view of the Assembly. It is only a recommendation to the Cabinet as the

executive authority, but in itself it has no effect, either legislative or executive.

Moreover, Mr. President, this resolution clearly proceeded on the assumption that at the time when it was passed there no longer was any obligation to report under the Mandate, and, in particular, that there was no obligation to report to the United Nations. I would in that regard refer to the second paragraph which I have read, in which the House of Assembly expressed the view that the League of Nations had ceased to exist and was not empowered by the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization, or to any other international organization or body, and had not in fact done so. So the view of the House of Assembly was that the League of Nations was not empowered to transfer its rights and powers in respect of the Mandate, and in any event it had not in fact done so.

So clearly, in the view of the House of Assembly, there was no obligation on the South African Government to report to the United Nations. But apart from the specific provisions of the second paragraph, the whole resolution is of course aimed at making recommendations to the Government of the Union of South Africa—to the executive authority, in other words. If one reads it one sees that there are two recommendations. The one is a recommendation that the Territory should be represented in the Parliament of the Union, which was not then the case but which the House of Assembly wished should happen. Consequently, because it felt that the Territory should be represented in the Parliament it passed this resolution recommending to the Government the introduction of appropriate legislation.

And the second recommendation which it then made was the following: inasmuch as there was no longer any *obligation* to report, the Assembly recommended to the Government that it should send nevertheless reports to the United Nations Organization, as it had done under the Mandate.

And, Mr. President, the letter in which this resolution was conveyed to the United Nations indicated in what sense the Government was proposing dealing with this recommendation, what the Government intended doing pursuant thereto. In effect, it merely stated that Field-Marshal Smuts had already indicated that information would be sent. So that, as far as the Government was concerned, this second recommendation of the House of Assembly had already been complied with in that Field-Marshal Smuts had already intimated that information would be submitted in accordance with Article 73.

On 25 September 1947, the South African representative again informed the General Assembly that South West Africa would not be placed under trusteeship, but that the *status quo* would be maintained. Once again, I would emphasize the date, Mr. President—25 September 1947. When asked what was entailed by the *status quo*, he said:

> "The annual report which [his] Government would submit on South West Africa would contain the same type of information on the Territory as is required for Non-Self-Governing Territories under Article 73 *(e)* of the Charter. It was the assumption of [his] Government [he said] that the report 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,] since 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 or supervision, and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South Africa."

So, Mr. President, in that statement on 25 September 1947, the South African representative explained more fully what type of information it was contemplated would be submitted, and he also emphasized that the South African Government did not accept that there was any right of control or supervision with regard to South West Africa.

On 1 November 1947, the South African representative again adverted to the recommendation that South West Africa be placed under trusteeship, and he gave the reasons why his Government could not accede thereto.

He then added:

> "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" (italics added) (written statements, **I**, p. 620.)

So, Mr. President, summarizing briefly, all these statements were to the effect that information would be presented in accordance with Article 73, or that the same type of information as is provided for in Article 73 would be transmitted, and that it will keep the United Nations informed in much the same way as it will be kept informed under Article 73 of the Charter. In none of them was there any contemplation of reporting under the Mandate.

As shown in Chapter VIII, paragraphs 38-40, of the written statement, the South African Government did submit a report in September 1947 which was later amplified in response to a request for further information.

It was then again emphasized that the transmission of information was "on a voluntary basis and is for purposes of information only" and that the South African Government had "on several occasions made it clear that they recognize no obligation to transmit this information to the United Nations". Moreover, the submission of information "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".

As appears from the written statement, no further reports were sent. In the view of the South African Government, the United Nations Organization did not observe the conditions upon which the first report, and the addendum, were sent and the United Nations, for its part, continued to press for the conclusion of a trusteeship agreement.

So, summing it all up, our contention is that the record of events subsequent to the dissolution of the League shows that no agreement was concluded whereby South Africa became obliged to report and account to the United Nations under the Mandate.

This may be a convenient stage, Mr. President, to consider to what extent the exposition which I have just summarized was controverted in the written or the oral statements of other participants in these proceedings.

Now, Mr. President, the distinguished representative of the Netherlands did not deal with this historical record at all, but he contended that a succession of supervisory functions had taken place as a result of the inherent adaptability of the mandates system. I do not need to deal with that argument here. All I need say is that this was clearly not the understanding of States during the period in question.

Not only did the States during the relevant period make no reference to such

an automatic succession, but the extent and the nature of the discussions concerning the establishment of the trusteeship system and the future of the mandates system exclude, in my submission, any contemplation that the mandates system could, by reason of its inherent adaptability, so to say, look after itself.

There was, in my submission, clearly no contemplation that arrangements were unnecessary in respect of the mandates system. Like all the other functions and activities of the League there were discussions, proposals and so on, but, as I have shown, they came to nothing in the end, and the reason for that is clearly not that there was some inherent adaptability in the Mandate itself which would enable it to overcome anything that might happen to any of the institutions to which it was attached.

Mr. President, this part of the record was also considered before this Court by the Government of Pakistan. In its written statement at I, page 356, paragraph 5, it stated that in the beginning, after 1946, South Africa conceded the existence of the Mandate and her obligations thereunder, including that of rendering reports to the United Nations (written statement, I, p. 356).

No references were however given as to when and where and how these concessions were allegedly made by South Africa. In the oral statement (*supra*, pp. 138-139) the distinguished representative of Pakistan amplified his written statement by taking a few sentences out of two statements, in my respectful submission, out of context. The one sentence was from the statement on 22 January 1946 in which the South African representative announced his Government's intention of submitting, after ascertaining the wishes of the inhabitants of South West Africa, its decision on the proposal to incorporate the Territory to the General Assembly "for judgment". The Court will recall the statement made by the South African representative—I read it out the other day and I do not have to do so again. It concludes by stating that after the wishes of the inhabitants had been ascertained, the decision of the South African Government would be submitted to the United Nations for judgment.

Now this certainly indicates that the South African Government did not propose incorporating the Territory without the approval of the United Nations. It is quite clear that the South African Government was not proposing any unilateral action. It was proposing to submit this issue to the United Nations. Obviously practical and political considerations militated against any unilateral action by the South African Government. But, Mr. President, I pose the question: could any person reasonably have thought that the South African Government, which was hoping to incorporate the Territory, was, by making this statement, acknowledging supervisory powers on the part of the United Nations, whereas its obligations towards the League were in terms about to lapse? In my submission the answer must clearly be in the negative. Quite clearly, in my view, the South African Government was not suggesting that because it wanted to submit this issue of incorporation to the United Nations it was therefore acknowledging an obligation to submit reports under the Mandate to the United Nations.

The two things, in my submission, are not related at all. Certainly nobody contended at the time that in this way South Africa had acknowledged an obligation to report and account under the Mandate to the United Nations.

The second passage relied on by the distinguished representative of Pakistan is from the South African statement during the final session of the League Assembly.

Now, Mr. President, in my submission, the distinguished representative seems to have overlooked the first sentence of the passage quoted by him at page 139, *supra*, where the South African representative pointedly said that the

disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, would necessarily preclude complete compliance with the letter of the Mandate. Those very pointed and, in my submission, very specific words were, it seems, not fully appreciated by the distinguished representative. But the distinguished representative also refrained from reading an earlier passage in which the South African Government expressed the intention of administering the Territory 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 full passage is quoted in our written statement, Chapter VIII, paragraph 26. I stressed these words earlier today, Mr. President, when dealing with this statement by the South African representative at the final session of the League because they are, in my submission, important. He was clearly envisaging a continuation of the situation which had prevailed during the period when there was no supervision by the League, when the Permanent Mandates Commission did not sit and when reports were, in fact, not submitted. So that, reading the statement as a whole, there can, in my submission, be no doubt that the South African Government was not accepting any obligation to report to the United Nations but, on the contrary, was clearly asserting that there was no such obligation.

At page 139, *supra*, the distinguished representative of Pakistan continued to state that South Africa announced, after dismissal of its incorporation proposal ". . . that it would continue to submit reports on its administration of the Territory as it had done vis-à-vis the League".

Now here again no reference is given for this proposition. I have this afternoon read the various statements made by the South African representatives and none of them goes beyond a contemplation of the transmission of information, such as is required by Article 73. At no stage was there an undertaking to submit reports as had been done vis-à-vis the League. It was always contemplated that there would be a voluntary transmission of a limited type of information.

Mr. President, on the basis of these statements, the distinguished representative of Pakistan contended that South Africa is estopped from challenging the authority of the United Nations. Estoppel in international law, Mr. President, in my submission, has certain fairly clear requirements. In my submission, in order to invoke an estoppel against a party the other party must show *(a)* an attitude clearly adopted previously by the party sought to be precluded, *(b)* the bringing about, as a result of the adoption of such attitude, of a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both, and *(c)* a present claim which is manifestly contrary to the attitude adopted previously.

As authority for these propositions I would quote the *Temple of Preah Vihear* case, *I.C.J. Reports 1962*, page 6, particularly the separate opinions of Judges Alfaro, Sir Percy Spender and Sir Gerald Fitzmaurice, and Bowett, D. W. "Estoppel before International Tribunals and its Relation to Acquiescence", in *British Year Book of International Law*, Volume XXXIII, 1957, pages 176-202.

Mr. President, in the authorities I have just quoted, it is emphasized that estoppel is essentially a means of excluding a denial that might be correct and preventing the assertion of what might in fact be true. The previous statement of attitude on which reliance is placed must accordingly, in my submission, have been a completely clear and unambiguous one.

In the present case the South African statements during the relevant period consistently denied, in my submission, any supervisory powers on the part of

the United Nations. The undertaking, as I have already said, was purely in regard to information of the sort covered by Article 73. Moreover prior to the 1950 Opinion it was not the attitude of the United Nations that it had supervisory powers under the Mandate, nor did the United Nations rely on any alleged representation on the part of South Africa to accept the supervisory authority of the United Nations. That is as far as the United Nations as an organization is concerned—the attitude of United Nations Members at the time will be considered shortly.

I might just, at this stage, note that as late as 1961 a United Nations committee considered these same statements to which reference was made by the distinguished representative of Pakistan and came to a diametrically opposite conclusion. This was in the report of the Committee on South West Africa concerning the implementation of General Assembly resolutions 1568 (XV) and 1596 (XV) which is in United Nations *General Assembly Official Records*, Sixteenth Session, Supplement 12A (A/4926). I read from paragraph 157, as follows:

> "157. Consequently, the Committee is more than ever convinced that no peaceful solution to this question of South West Africa is likely to be acceptable to the South African Government except on the basis of its outright or virtual annexation of the Mandated Territory in whole or in part. South Africa's reservations to the last resolution on Mandates adopted by the League of Nations before its dissolution in 1946 and to the applicability of the Charter provisions on international trusteeship over mandates upon the adoption of the Charter in San Francisco in 1945; its proposal to annex the Mandated Territory at the second part of the first session of the General Assembly in 1946; . . ."

and then I delete a number of further acts committed, or alleged to have been committed by the South African Government, to reach the Committee's conclusion which is that ". . . all these are eloquent proof of its resolve at all costs to annex and appropriate, for its own use and benefit the object of its sacred trust".

So, Mr. President, whereas the distinguished representative of Pakistan saw these statements as being representations which would estop South Africa from challenging the authority of the United Nations, the United Nations itself has seen it in quite the opposite light as an indication of intention on South Africa's part altogether to exclude the United Nations. In some way they are seen by different people to be to exactly the opposite effect.

And, Mr. President, I might add that this paragraph amongst others was singled out by the representative of Pakistan in the Fourth Committee as deserving the fullest consideration. (Vide *GA*, *OR*, Fourth Comm., 1225th Meeting, 27 November 1961, p. 490, para. 33.) The report itself was noted with approval by the General Assembly in resolution 1702. So in 1961 these statements were given quite a different interpretation. But, Mr. President, perhaps one should go back even further and see how the representative of Pakistan or the Government of Pakistan saw the matter shortly after these statements were made. And that one finds from a statement by a representative of Pakistan in 1947. It is quoted in the second part of the Annex to Chapter VIII of our written statement. There Mr. Pirzada of Pakistan said the following:

> "A simple comparison of the relevant Articles in Chapters XI and XII of the Charter will show clearly the advantages of one system over the other. The first advantage that I would stress is that under the present mandates

system only one country is responsible for the proper administration and the development of political and other institutions within the Territory. It is the conscience of one State which will be guiding it all the time to follow the provisions laid down in Chapter XI of the Charter. On the other hand, if it comes under the International Trusteeship System, it will be the conscience of all the United Nations, as represented in the Trusteeship Council, which will be guiding the administration of the Territory and which, therefore, has a greater chance of being directed in the interests of the people of that Territory.

The second advantage which the Trusteeship System has over the ordinary administration under Chapter XI is that international supervision is provided under the International Trusteeship System, according to Article 75 of the Charter. As against that, under Chapter XI of the Charter which relates to the administration of Non-Self-Governing Territories—to which class this Territory of South West Africa will have to belong if it is not brought under the Trusteeship System—there is no provision for international supervision, and the only supervision that exists takes the form of supplying information on non-political matters for the consideration of the United Nations: in other words, economic social, and other matters.

There are two systems under the Charter of the United Nations, namely, the administration of Non-Self-Governing Territories, and the administration of territories under the Trusteeship System. This would be a third system—administering in the spirit of the mandate—which the Charter does not recognize and which the Charter seems to abolish altogether.

Therefore, by refusing to place this Territory under the Trusteeship System, the Union of South Africa is going back on both principles recognized by the Covenant of the League of Nations: first, trusteeship of an international body; second, supervisory control of an international body."

That was on 1 November 1947, Mr. President, and certainly at that stage the Government of Pakistan was apparently not under any impression that South Africa had either accepted an obligation to recognize United Nations authority as supervisory organ, or even that South Africa had been estopped from denying anything of that sort. At that stage the contemplation of the Government of Pakistan was apparently that if South Africa failed to conclude a trusteeship agreement then Article 73 would be applicable, and only Article 73. That, in the view of the Government of Pakistan, was not a desirable situation because the reporting requirements under Article 73 could not be regarded as equivalent to international supervision. The effect would therefore, in its view, have been that in the absence of a trusteeship agreement there would have been no international supervision.

But the point I really wish to make is that there was no contemplation in 1947 by the representative of Pakistan that there was any commitment by South Africa towards the United Nations other than that appearing from the Charter. So one might pose the question, Mr. President, if estoppel does operate who is estopped—South Africa or Pakistan?

I come now to a further participant, namely the United States of America. It referred in its written statement I, at page 846 to the resolution of the South African "Parliament", which I have already mentioned. For the reasons I have already given, that resolution of the House of Assembly, in my submission takes the matter no further. I might even say it is of positive advantage to us inasmuch as it shows a clear contemplation that the House of Assembly did not

consider that the Mandate still imposed any reporting obligations on the South African Government. But it is certainly not relevant for any point sought to be made by the Government of the United States of America.

The written statement of the United States also made the bare allegation that South Africa "did, in fact, submit such reports for a time—that is at page 846—and the expression "such reports" obviously, in the context of the statement, refers to reports under the Mandate. Now, in my submission, that is an incorrect statement. The voluntary basis upon which the information was supplied, as well as its limited scope, have already been demonstrated by me and I don't propose repeating our contention.

Then, Mr. President, the United States continues to state that in 1948 South Africa changed its position, *inter alia*, by contending that South Africa was not accountable to the United Nations for any action in South West Africa.

The South African Government was said to have changed its attitude in 1948 by contending thereafter that is was not accountable to the United Nations. In fact, Mr. President, as I submit I have shown this afternoon, it had been the consistent attitude of the South African Government that it was not accountable to the United Nations. I specifically drew the Court's attention to statements made by South African representatives as early as 1946 and 1947. So in my submission there was no change of attitude as stated in the United States written statement. The attitude, in fact, remained the same throughout.

The written statement of Nigeria, or the OAU on whose behalf it was apparently submitted, on the other hand, stated the matter substantially correctly at I, page 890 (in the last two sentences of para. 6) and I have no great quarrel with the exposition set out there, so I do not want to read it. But there is a reference to an agreement to submit information, which I would just wish to qualify by noting again the voluntary nature of the undertaking to transmit for information purposes, the sort of information for which provision is made in Article 73.

I then come to the distinguished representative of Finland who at pages 76 to 77, *supra*, referred to a few of the facts which I have summarized in these proceedings. However, he did not appear to reach any relevant conclusion which was contrary to any that I have submitted to the Court, although he does suggest—he does not state so directly, but he does suggest that the South African statement at the final session of the League Assembly involved some form of commitment to the United Nations. In my submission I have already dealt with it. This suggestion is not borne out either by the text of the statement or by the surrounding circumstances. And I submit that the statement by the distinguished representative of Finland at page 78, *supra*, to the effect that the decisions taken at the first session of the United Nations show that the United Nations had undertaken the responsibilities concerning South West Africa, is not correct. My submission is that the decisions taken at the first session of the United Nations do not show any undertaking of the responsibilities by the United Nations. On the contrary the Court will recall the United Nations merely invited the States holding mandates to submit trusteeship agreements, and that was the United Nations attitude consistently throughout.

The final oral statement I wish to refer to is that by the distinguished representative of India which is at page 108, *supra*. At that page he referred to the "expressed intention to place the Territory of South West Africa under the trusteeship system". This expressed intention was, in the context, said to be that of South Africa. In other words, he contends that South Africa had expressed an intention to place the territory of South West Africa under the trusteeship system.

I would merely say, Mr. President, that the resumé of events that I have given would show that that is an incorrect statement on the part of the distinguished representative of India.

I turn now to the practice of States on this question of mandates. As I said earlier, much of the argument one hears in support of the proposition that South Africa had undertaken an obligation towards the United Nations to report under the mandate is, in my respectful submission, based on an *ex post facto* type of rationalization, because supervening events rendered it desirable from the point of view of certain people or States that there should be supervision. Therefore I submit that many people have looked for pegs to hang this supervision on. However, if one has regard to what was said and what was done in the years immediately after the establishment of the United Nations and the dissolution of the League, then one finds that the attitudes expressed by States were quite different. One does not then find that the same interpretations were given to statements as were sometimes given later, on this sort of *ex post facto* rationalization basis. One finds that the general attitude of States was entirely different, words were accepted in the ordinary meaning and in their context. In general one finds, in my submission, that the practice of States in those years showed a general understanding that the League's supervisory powers in respect of mandates had not been transferred to, or assumed by, the United Nations and that the mandatories, in particular South Africa, had not undertaken an obligation to report and account to the United Nations as any successor to the League.

We discussed this in our written statement, Chapter VIII, paragraphs 42 to 46, and 72 to 77 and also in the Annexes from which I have just read the statement by the representative of Pakistan in 1947.

South Africa expressed its attitude at that time very clearly before the various organs of the United Nations to the effect that the South African Government was not obliged to conclude a trusteeship agreement for South West Africa and was not prepared to do so, and that in the absence of a trusteeship agreement the United Nations had no right of control or supervision or supervisory jurisdiction in respect of South West Africa. That attitude was stated very clearly by the South African representative. If other Members of the United Nations did not agree with these contentions one would have expected them to say so. For instance, the contention advanced by South Africa that it was not obliged to conclude a trusteeship agreement was indeed contested by a number of representatives. There were quite a number of States who adopted the attitude that there was an obligation to conclude a trusteeship agreement.

However, Mr. President, we show in the passages to which I have referred that although representatives of 41 States addressed the various organs of the United Nations on the question of South West Africa during 1947, and although the question of reporting was a very actual one, not one of these 41 States averred that the supervisory functions of the League had passed to the United Nations. On the contrary, at least 14 of these States acknowledged either expressly or by clear implication that in the absence of a trusteeship agreement the United Nations would have no supervisory powers in respect of South West Africa.

During 1948 and 1949 four additional States associated themselves with this view.

When I refer to supervisory powers I, of course, mean supervisory powers under the Mandate as such. Some of them did contend that South Africa was under an obligation under Article 73, but that is something else again. There was no contention that the functions of the League concerning mandates had

been transferred to the United Nations. As I say, at least 14 of these States acknowledged a contrary contemplation.

As we show in the passages quoted, Mr. President, it was only in 1948 and 1949 that five States averred that there was an obligation under the mandate to the United Nations. However, as we note in Chapter VIII, paragraph 45, there was considerable inconsistency in the contentions advanced by these representatives.

Also in respect of other mandated territories, the practice of States up to 1948 shows a clear understanding that the United Nations would have no supervisory powers over the administration of a mandated territory which was not placed under trusteeship. This understanding appears from quite a number of instances which, for the most part, we have detailed in our written statement.

There is firstly the case of Nauru where the Trusteeship Agreement was entered into as late as November 1947, and where there was no reporting prior to such conclusion of the trusteeship agreement. We mentioned that in paragraph 46 of Chapter VIII of our written statement.

As regards Western Samoa, it appears that on 22 November 1946, the representative of New Zealand expressed a clear understanding that the United Nations would have no supervisory functions in respect of Western Samoa unless a trusteeship agreement were entered into. We deal with that in paragraph 44 *(a)* of Chapter VIII.

The Court rose at 6 p.m.

FOURTEENTH PUBLIC SITTING (2 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

Mr. GROSSKOPF: Mr. President, honourable Members of the Court, yesterday I dealt with the events during the period of the establishment of the United Nations and the dissolution of the League with the object of showing that no agreement was concluded and no representation was made which would have had the result in law that South Africa became bound to report and account to the United Nations under the Mandate.

I also contended that the United Nations itself did not claim that such an obligation existed. I referred to certain statements to the effect that the decisions taken at the first sessions of the General Assembly concerning the Mandate for South West Africa showed that the United Nations had undertaken the responsibilities concerning the territories. It might be convenient for the Court if I were to give the references to the relevant resolutions and a brief summary of them.

In 1946 there was resolution 65, to which reference has already been made, and which stated in its operative paragraphs, as the Court will recall, that the General Assembly was unable to accede to the proposal for incorporation and that it recommended the placing of South West Africa under trusteeship.

In 1947 the resolution was 141 (II). This resolution, in its operative paragraphs, took note of the intention on the part of the South African Government not to proceed with its proposals for incorporation and again urged the conclusion of a trusteeship agreement. It also authorized the Trusteeship Council to examine the report that had been submitted. The Court will recall the circumstances under which that report was submitted.

In 1948 there was resolution 227 (III) which again urged that the Territory be placed under trusteeship and recommended that the submission of information be continued and be examined by the Trusteeship Council.

Then, Mr. President, the last resolution I wish to refer to is the one in 1949, which was of course the year immediately preceding the 1950 Opinion. There the relevant resolution was 337 (IV) and, with the Court's leave, I would read the operative paragraphs. After setting out the history and in particular the undertaking to submit the information by South Africa and the fact that the undertaking was subsequently withdrawn, the General Assembly continued:

> "*The General Assembly*
>
> 1. *Expresses regret* that the Government of the Union of South Africa has withdrawn its previous undertaking, referred to in resolution 141 (II) of 1 November 1947, to submit reports on its administration of the Territory of South West Africa for the information of the United Nations;
>
> 2. *Reiterates* in their entirety General Assembly resolutions 65 (I) of 14 December 1946, 141 (II) of 1 November 1947 and 227 (III) of 26 November 1948;
>
> 3. *Invites* the Government of the Union of South Africa to resume the submission of such reports to the General Assembly and to comply with the decisions of the General Assembly contained in the resolutions enumerated in the preceding paragraph."

I would emphasize that the language of this resolution is clearly not that which would be used by a body which has, or considers that it has, supervisory functions as against a State which refused to submit to such functions. The General Assembly merely expressed regret that the reports were discontinued. There was no element of reproach or condemnation and the type of reports to which it refers in its operative paragraphs are the type of reports to which I referred yesterday, namely reports for the information of the United Nations. The General Assembly clearly realized that these reports were merely of the nature of information supplied for the use of the United Nations, for the information of the United Nations and not a form of submitting to supervision.

The third operative paragraph uses the word "invites". There again, had the United Nations General Assembly been of the view that it had a right to demand reports, it would hardly have used the word "invites" in this context.

When regard is further had to the preamble setting out the history of the matter, it is, in my submission, quite clear that the General Assembly was merely urging the Government of the Union of South Africa to do two things which the General Assembly well realized that the Union was not obliged to do, namely firstly to submit a trusteeship agreement which was, by its nature, a voluntary act and, secondly, to submit this type of information in respect of which the Union of South Africa had given this voluntary undertaking. Moreover, it appears quite clearly, in my submission, that the General Assembly did not consider that it had any rights going beyond the receipt of such information of the type which the Union Government had intimated that it would submit. So there is no contemplation of any general right of supervision or anything of that sort, it is merely a matter that it wished South Africa to continue transmitting information of the type which it had transmitted and which it said it would transmit, that is, information of the type to which reference is made in Article 73 of the Charter.

This contemplation, Mr. President, I submitted yesterday, also appears clearly from the debates at the time. These are set out in full in our written statement and I do not wish to repeat them here, but my submission is that a reading of the relevant parts of the written statement will show that there was no contemplation amongst Members of the United Nations that the United Nations had succeeded as supervisory authority in the place of the League.

I also commenced my argument yesterday to show that the same comtemplation existed with respect to other mandates—it was not confined to South West Africa: Also in respect of other mandates there was no contemplation that the United Nations had succeeded to the powers of the League Council in respect of mandates and no contemplation that there would henceforth be an obligation on mandatories to submit reports to the United Nations.

I referred to the specific instances of Nauru and Western Samoa.

A third example is that of the Japanese mandated islands. On 2 April 1947 Mr. Gromyko of the USSR expressed the firm view that there was no continuity, legal or otherwise, between the mandates system and the trusteeship system and that the Security Council was not competent to decide to what extent Japan may have violated the conditions of the mandates system. We refer to that in paragraph 44 *(b)* of Chapter VIII of our written statement.

The whole history of these Japanese mandated islands supports the argument, in my submission, that I have advanced up to the present, that there was no contemplation of a succession of powers between the United Nations and the League. However, this history will be related by one of us at a later stage and therefore I do not want to deal with it now. I would merely ask the Court to bear this feature also in mind when the history is dealt with at a later stage.

A further matter I would refer to is that of Palestine which has, from time to time, been suggested as an example of the taking-over of the League's supervisory functions by the United Nations. See, for instance, in this connection the written statement of the United States of America (written statement, I, p. 861).

In our submission, the history of Palestine shows the very converse. This issue is also of some importance in respect of the powers of the United Nations under the Charter and it has been quoted in that regard. I am not concerned with that aspect at the moment, but because of its wider significance it might be convenient to give some attention to the whole history of events concerning Palestine.

Mr. President, the difficulties with Palestine of course, as we all know, commenced a long time ago.

In 1937 a Commission was appointed by the United Kingdom Government, the Peel Commission, which stated that the Mandate for Palestine could not be fully implemented unless by some means or another the national antagonism between the Arabs and the Jews could be composed. The Commission accordingly proposed that appropriate steps be taken for the termination of the Mandate on the basis of partition. My reference there is from the work by J. Marlowe, *The Seat of Pilate*, at pages 142-143. This is a work that is available in the Court's Library. This recommendation was, however, not accepted by the United Kingdom Government which issued a White Paper in 1939 in which was stated that within ten years the Mandate would be terminated and Palestine become an independent State. This proposal was strongly condemned by Jewish public opinion and was also officially rejected by the representatives of the Palestine Arab parties (*GA*, *OR*, Second Sess., Supplement 11, Vol. I, p. 26).

Towards the end of the Second World War Palestine erupted into violence against the British occupation, with increasing hostility between Jews and Arabs. Eventually the United Kingdom Government obtained the co-operation of the United States of America for a joint Anglo-American Committee of Enquiry. The report of this Committee was published on 1 May 1946. Its major proposals were that Palestine should be neither a Jewish State nor an Arab State but that it should ultimately become a State which would guard the rights and interests of Moslems, Jews and Christians alike, and that until Arab-Jewish hostility disappeared the Government of Palestine be continued under mandate pending the execution of a trusteeship agreement under the United Nations (*ibid.*, p. 27).

Following an examination of the Anglo-American Committee's report, the United Kingdom Government announced a new plan as a basis for discussion with Arab and Jewish representatives and those of the Arab States at a conference held in London in 1946. The plan provided, *inter alia*, for division of Palestine into four semi-autonomous areas, but it was unreservedly rejected by the Jewish agency and by the Arab delegates to the London conference *(ibid.)*.

Thereafter, on 7 February 1947, the British delegation at the Anglo-Arab conference submitted a new proposal for a five-year British trusteeship over Palestine as a preparation for independence. The trusteeship agreement was to provide for a wide measure of autonomy in Arab and Jewish areas; after four years an assembly was to be elected and if agreement could be reached between a majority of Arab and Jewish representatives, an independent State would be established immediately.

There had been a number of different proposals which were to a greater or lesser extent unacceptable to the various parties; and this proposal was also unacceptable to both the parties. The leaders of the Arab delegations stated

that no proposal which involved any form of partition would be acceptable to them, and the Jewish agency's statement declared that the proposals were incompatible with, *inter alia*, Jewish rights to ultimate statehood *(ibid.)*. This caused the conference to come to an abrupt end on 14 February with the announcement that the United Kingdom Government had decided to refer the whole problem to the United Nations (Marlowe, *op. cit.*, p. 218).

It has been necessary in my submission to set out this background in some detail in order to be able to understand why the matter was ultimately brought to the United Nations. It should, in my submission, be stressed that at no stage prior to 14 February 1947 was there any suggestion that Great Britain should submit reports on Palestine to the United Nations or should, in other ways, submit to supervision by the United Nations. There was, as far as we are aware, no suggestion inside or outside the United Nations that this was a matter which really pertained to them.

It is, accordingly, in my submission, abundantly clear that the British decision was motivated by the recognition that it was impossible to work out a compromise which would be acceptable to Arabs and Jews alike, and by a reluctance to enforce on its own a plan which was against the will of both parties. Thus, speaking in the First Committee, the United Kingdom representative said:

> "We have tried for years to solve the problem of Palestine. Having failed so far, we now bring it to the United Nations, in the hope that it can succeed where we have not. If the United Nations can find a just solution which will be accepted by both parties it could hardly be expected that we should not welcome such a solution. All we say . . . is that we should not have the sole responsibility for enforcing a solution which is not accepted by both parties and which we cannot reconcile with our conscience." (*GA, OR*, Second Sess., Supplement 11, Vol. I, p. 2.)

And, at a later stage, the United Kingdom representative said in the General Assembly:

> "It was on the initiative of His Majesty's Government in the United Kingdom that the General Assembly placed the problem of Palestine's future government on its agenda . . . In accepting the mandate for Palestine after the First World War, His Majesty's Government in the United Kingdom undertook to work for the establishment of a national home for the Jewish people on the understanding that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine. It was assumed at that time that the objects of the mandate could be carried out with the consent and co-operation of both peoples. Time has shown that this assumption was incorrect. After years of strenuous but unavailing effort, His Majesty's Government has reached the conclusion that it is not able to bring about a settlement in Palestine based upon the consent of both Arabs and Jews, and that the mandate is no longer workable. It is for this reason that it has brought the problem before the United Nations, hoping that the General Assembly would be more successful in the search for an acceptable settlement." (*Ibid.*, Plenary Meeting, Second Sess., Vol. II, p. 1323.)

The important point here is that the United Kingdom was not motivated by any contemplation that it was under an obligation to accept supervision by the United Nations. It was in a difficult situation, it had tried for years to solve this problem, all its efforts had proved unavailing and it was searching for

assistance from the Organization in order to reach some solution which would be acceptable. At any rate, if no solution would be acceptable to both parties, the United Kingdom would at least have the support of the Members of the United Nations for such solution as might be recommended.

By letter dated 2 April 1947, the United Kingdom delegation requested the Secretary-General of the United Nations to place the question of Palestine on the agenda of the General Assembly at its next regular annual session. It was stated that the United Kingdom would submit to the Assembly an account of its administration of the Mandate and ask the Assembly to make recommendations, under Article 10 of the Charter, concerning the future government of Palestine (*ibid.*, Second Sess., Supplement 11, Vol. II, p. 1).

I note at this stage that the General Assembly was merely asked to make recommendations, but that is an aspect with which we will deal later.

At its First Special Session in 1947, the General Assembly resolved to appoint a special committee consisting of representatives of Australia, Canada, Czechoslovakia, Guatemala, India, Iran, Netherlands, Peru, Sweden, Uruguay and Yugoslavia. I referred to this special committee yesterday and its function was, as the Court will recall, *inter alia*, to prepare a report to the General Assembly and to submit such proposals as it might consider appropriate for the solution of the problem of Palestine (*ibid.*, First Special Sess., resolution 106 (S. 1)).

In the Committee's report there was also, we submit, a clear contemplation that there was no duty of accountability towards the United Nations under the Mandate in respect of Palestine. I have already quoted the following paragraph, but because it also appears in context here I hope the Court will excuse me if I quote it again. There are certain further paragraphs which follow on that and which I have not yet quoted. So as not to break the context, I will, with the Court's leave, repeat it. It reads as follows:

> "Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had no international authority to which it might submit reports and generally account for the exercise of its responsibilities in accordance with the terms of the Mandate. Having this in mind, at the final session of the League Assembly, the United Kingdom representative declared that Palestine would be administered 'in accordance with the general principles' of the existing Mandate until 'fresh arrangements had been reached'."

Then, after recommending unanimously that the Mandate for Palestine shall be terminated at the earliest practicable date, the Committee commented as follows:

> "*(d)* It may be seriously questioned whether, in any event, the Mandate would now be possible of execution. The essential feature of the mandates system was that it gave an international status to the mandated territories. This involved a positive element of international responsibility for the mandated territories and an international accountability to the Council of the League of Nations on the part of each mandatory for the well-being and development of the peoples of those territories. The Permanent Mandates Commission was created for the specific purpose of assisting the Council of the League in this function. But the League of Nations and the Mandates Commission have been dissolved, and there is now no means

of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations."

I would stress those last words, Mr. President, the conception that because the League and the Mandates Commission had been dissolved, there was then no means of discharging the international obligation other than by placing the territory under trusteeship. The quotation then continues:

"*(e)* The International Trusteeship System, however, has not automatically taken over the functions of the mandates system with regard to mandated territories. Territories can be placed under Trusteeship only by means of individual Trusteeship Agreements approved by a two-thirds majority of the General Assembly.

(f) The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration, in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system. At the time of the termination of the Permanent Mandates Commission in April, 1946, the mandatory Power did, in fact, declare its intention to carry on the administration of Palestine, pending a new arrangement, in accordance with the general principles of the Mandate. The mandatory Power has itself now referred the matter to the United Nations."

Taking the quotation as a whole, there was a clear contemplation on the part of this Committee that the supervisory functions had fallen away and that the mandatory could then only continue administering the territory in the spirit of the mandate without any international supervision or, alternatively, place it under the trusteeship system. Those were the only two alternatives envisaged by the Committee.

The report also contained a special note by the representative of India, in which the following passage occurred:

"Moreover, the international machinery in the form of the Permanent Mandates Commission, which had been created for the purpose of scrutinizing the actions of the Mandatory Powers, and to which they were bound to submit annual reports, has, along with the League of Nations, ceased to exist. There are no means by which the international obligations in regard to mandates can be discharged by the United Nations.

The Mandate has in any case become infructuous, and must, in my opinion, go. Whether it could be superseded by any other system within the present Charter is a different matter, and will be dealt with when I consider the solution of the present problem."

So there again, Mr. President, was a specific recognition that there were no means by which the international obligation in regard to mandates could be discharged by the United Nations.

The next stage in this matter was that the report of the Special Committee was discussed by the General Assembly and referred to an *Ad Hoc* Committee on the Palestine question.

At its 19th meeting the *Ad Hoc* Committee decided to set up two subcommittees, the tasks of which would be to draw up detailed plans for the future government of Palestine in accordance with certain principles. The members of Sub-Committee 2 were Afghanistan, Colombia, Egypt, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria and Yemen. The Sub-Committee

elected the representative of Colombia, Mr. Gonzales Fernandes, as Chairman, but he subsequently resigned and, as you will recall Mr. President, you yourself, as representative of Pakistan, were then elected Chairman in his place. Chapter I of the Sub-Committee's report dealt with legal issues connected with the Palestine problem. The following extracts from this chapter are, in our submission, significant:

> "A study of Chapter XII of the United Nations Charter leaves no room for doubt that unless and until the Mandatory Power negotiates a trusteeship agreement in accordance with Article 79 and presents it to the General Assembly for approval, neither the General Assembly nor any other organ of the United Nations is competent to entertain, still less to recommend or enforce, any solution with regard to a mandated territory.
>
> This view is further confirmed by resolution 9 (I), adopted by the General Assembly on 9 February 1946, and by the fact that the General Assembly is not able to take any action or give any directions with regard to the Mandate for South West Africa unless and until the Government of the Union of South Africa submits a trusteeship agreement for that territory." (*GA, OR*, 2nd Sess., Summary Records of Meetings of the *Ad Hoc* Committee on the Palestinian Question, p. 276.)

So, Mr. President, this Sub-Committee of the *Ad Hoc* Committee stated explicitly that as regards mandates generally, and as regards the Mandate for South West Africa in particular, the General Assembly was not able to take any action or give any directions unless a trusteeship agreement were concluded.

I now continue with a further paragraph in the report of the Sub-Committee:

> "In the case of Palestine, the Mandatory Power has not negotiated or presented a trusteeship agreement for the approval of the General Assembly. The question, therefore, of replacing the Mandate by trusteeship does not arise, quite apart from the obvious fact alluded to above that the people of Palestine are ripe for self-government and that it has been agreed on all hands that they should be made independent at the earliest possible date. It also follows, from what has been said above, that the General Assembly is not competent to recommend, still less to enforce, any solution other than the recognition of the independence of Palestine . . ." (*Ibid.*, pp. 276-277.)

These various reports, in my submission, underline what I said yesterday, namely that the views that have been expressed in recent years to the effect that South Africa had undertaken an obligation towards the United Nations which the United Nations had accepted, are of very recent origin. At the time when these things happened, nobody saw the position that way. At that stage everybody accepted that there would be no reporting under the mandates, whether for Palestine or for South West Africa, unless and until a trusteeship agreement were concluded.

That, in my submission, appears very strongly from the reports of both these Committees; as a matter of fact, as I have pointed out, the Sub-Committee of the *Ad Hoc* Committee referred in express terms to South West Africa. And, Mr. President, these aspects also appear from debates on the Palestinian Question. There also, as we show in Chapter VIII, paragraph 44, of our written statement, there was a general contemplation that the United Nations did not succeed to the supervisory functions of the League. Thus, for instance, the United States said, in a passage quoted in paragraph 44, that "the record seems

to us entirely clear that the United Nations did not take over the League of Nations mandates system".

Having regard to all the subsequent events, the whole practice of States, I would submit that it is apparent that there existed in the years between the dissolution of the League and the 1950 Opinion, an almost universal contemplation that the United Nations would have no supervisory authority in respect of mandated territories not placed under trusteeship. This contemplation is, in my submission, relevant for two purposes; firstly, to show that no agreement was in fact concluded whereby the United Nations, or its Members, or the League and its Members, provided for a succession of supervisory functions. If there had been such an agreement then obviously the parties to the agreement would have known about it and they would have mentioned it at the time when these matters were actual and when they were regularly debated. But these events secondly show, Mr. President, in my submission, that there could not have been any estoppel, as has been contended here by the representative of Pakistan.

It shows that in two ways, *firstly* by negativing any suggestion that the South African representatives made a representation to the effect that they recognized the authority of the United Nations and, *secondly*, in that it shows that other persons were not influenced or actuated to act on any such representation as might have been made. If other people did not understand the South African representatives to make a representation to that effect, then obviously, in my submission, estoppel could not have operated.

The only pertinent attention given to the aspect of State practice in these proceedings was by the distinguished representative of Finland, who stated at page 77, *supra*, that "opinions expressed in the United Nations on this question were somewhat unclear", and that "statements by certain delegates might imply that the obligations of the Union of South Africa as mandatory had been modified or diminished . . . following the dissolution of the League of Nations . . . But if they are examined more closely it becomes apparent that they are often subject to qualifications, and their relevance was contested in the statements of other delegates."

It is very difficult to reply to a general statement like this, which contains no references and gives no details. So I am perforce obliged to reply to it also in a completely general way. I can only contend that if one reads the statements which we have set out in Chapter VIII of our written statement, it appears that they were not "somewhat unclear"—for the most part they were very explicit indeed.

Secondly, I do not know what qualifications are referred to, or what the distinguished representative meant when he said that their relevance was sometimes contested. I cannot really reply to that, all I could ask the Court is to read these statements and to decide for itself what significance they have.

In my submission, the significance they do have is that the overwhelming weight of these statements is in only one direction. These statements all go one way, with the one or two isolated exceptions which we mentioned, and all are to the effect that in the absence of a trusteeship agreement, South Africa would be under no obligation of supervision to the United Nations. And I might say, Mr. President, that our argument on this aspect has never been met by any person; it has never, in our submission, been shown to be incorrect in any way.

I come now to the 1950 Opinion. Mr. President, most of the participants who appeared before the Court relied in one way or another on the Court's Opinion in 1950. For the most part no argument was offered in support. Where argument was offered in support of the conclusion of the majority of the Court in 1950 on this aspect it frequently proceeded on a basis different

from that advanced in the Opinion itself, or it confined itself to some only of the grounds mentioned in the Opinion while conceding the possible irrelevancy of others. This is in accordance with the general picture which has, in our submission, emerged since 1950 and particularly during the course of the contentious proceedings between 1960 and 1966.

The 1950 Opinion has repeatedly been relied upon but, on the other hand, nobody has, in our submission, controverted our contentions to the effect that the majority decision was wrong and that the minority decision was correct in the respect in question. For the most part people merely say this was decided in 1950 and that is the end of the matter. On the other hand, some judges have considered the correctness of the Opinion and, with one exception with which I shall deal later, they have one and all stated expressly that this Opinion in this aspect thereof could not be justified according to accepted rules of law. This was stated by judges who upheld as well as judges who rejected the decision.

Those who upheld the decision and gave reasons did so, with one exception, on an avowed teleological basis. Those who rejected the Opinion did so because they did not accept the validity of the teleological approach and did not think that the Judgment could be justified on any other ground. There is one exception to this proposition that I have stated and that was the dissenting opinion of Judge Wellington Koo in 1966. He did, indeed, go into the facts and seek to show that the 1950 Opinion was correctly decided according to traditional concepts of international law. We have, however, I submit, demonstrated that his opinion is not logically sound and I propose dealing with it again.

That is the position as far as the judges are concerned. I must immediately add, as I stated at the beginning, that there were, of course, a number who merely relied on the Opinion without offering any argument in support of it, without considering in detail or at all the arguments advanced against its correctness.

The same picture emerges when one has regard to the publicists, to the writers on international law. There are, indeed, a number who merely refer to the Opinion but those who examine its correctness, those who consider the basis on which it was decided, either reject it as being incorrect or else justify it on a teleological basis. These various aspects will, Mr. President, be considered later.

This argument immediately raises the question: what weight should be attached to advisory opinions? Mr. President, no participant in these proceedings adverted specifically to this point but there is an apparent suggestion running through many of the statements that the 1950 majority Opinion must be regarded as decisive. I would refer the Court to the following examples. There was the oral statement by the representative of Finland at page 74, *supra*—it appears twice on that page—pages 75, 76 and 77-78, and the written statement of the United States of America at page 860 (written statements, I). These are merely examples, there are also others. The references to the distinguished representative of Finland are perhaps most significant, because he repeats so often that the Court has found that a succession took place as if that is the be-all and end-all of the matter. In my respectful submission, however, that, Mr. President, is not so. We have dealt with this matter in our written statement, Chapter IX, paragraphs 1 to 4.

The 1950 Opinion could in theory be binding on this Court in one of two ways, it seems to us. It could firstly be so because of the principle of *res judicata*. That obviously has no application to advisory opinions where there are no parties and no decision which could be binding on them. Alternatively, it

could notionally be final and conclusive on some principle of binding precedent. There also, Mr. President, my submission is that that clearly is not so. This Court has never accepted the proposition that it is bound by a previous decision of its own.

I have referred already to the passage from the dissenting opinion of Judge Jessup in 1966, where he pointed to the purpose served by a dissent in a court of final instance. Thereby he, of course, recognizes that a subsequent court might well come to a different conclusion on the same point.

I would also refer to a passage by Hambro quoted in Chapter IX, paragraph 2, of our written statement and which reads as follows:

> "Advisory Opinions, even more than the judgments of the Court, will be judged on their intrinsic merits. A judgment of the Court, even if it is not perfect and even if the reasoning can be criticised, can serve a useful purpose because it will put an end to a dispute between two or more States. An Advisory Opinion, on the other hand, does not serve this purpose. It stands or falls with the legal arguments that can be deduced from the reasoning of the majority . . ."

I would ask at the outset, does not this attitude of regarding the Opinion as decisive, regarding it as unimpaired and so on, really arise from a wishful approach on the part of the people who adopt it, and a realization of the difficulties which arise for anyone who attempts to put forward acceptable legal grounds in support thereof? Is this attitude not one which people adopt because they would like to see the result of the 1950 Opinion being maintained without really being able to justify it on legal grounds? In my submission, which I will develop, there are indeed no legal grounds, Mr. President, on which it might be justified, save for legal grounds such as the teleological basis which has been rejected in modern international law.

I turn first to the interpretation of the Opinion, to an ascertainment of the basis upon which it was decided. In Chapter IX, paragraphs 5 to 14, we summarized the 1950 majority Opinion and we concluded that the Court was apparently arguing from what it considered to be probabilities inherent in the objective situation that there was an alleged necessity for supervision in the mandates system, that the supervisory organs of the League had ceased to exist and that the United Nations had another international organ performing similar, though not identical, supervisory functions.

These general considerations were mentioned by the Court, and as we read the Opinion they really form the background from which there was deduced a general probability that those who were concerned with the matter would do something to avoid the falling away of supervision, and would provide for the substitution of the United Nations. We did not interpret these general considerations as having been intended to serve by themselves as full justification for the Court's finding. Indeed, Mr. President, we submit that they could not have been full justification for the Court's finding. In themselves they are purely considerations of what one might call a legislative nature, considerations which show that there is a desirability that something should happen rather than considerations which show that something has, in fact, happened. They merely indicate that there might have been a desire or a wish or a need for certain action. They do not show that that action was in fact taken.

We therefore accepted that the Court relied on these general considerations, as they were called, only as indicating a general likelihood that those dealing with the situation when the League was dissolved would have wanted to make

some arrangement about transfer of supervisory functions to the United Nations. And, indeed, Mr. President, the Court did not stop at these general considerations, it continued to refer to further elements which one must assume were also relevant in its reasoning.

The first additional element to which it referred was Article 80, paragraph 1, of the Charter, which the Court said could not effectively safeguard the rights of the peoples of mandated territories without international supervision or a duty to render reports to a supervisory organ.

The Court thereafter said that in its resolution of 18 April 1946 the Assembly of the League of Nations gave expression to a "corresponding view". The Court stated that "this resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations".

Then, finally, what was apparently the last element in the Court's reasoning was the Court's statement that the General Assembly of the United Nations was competent to exercise such supervision and to receive and examine such reports by virtue of Article 10 of the Charter.

The last feature mentioned—the competence of the General Assembly—could not, as we read the Opinion, have served by itself as justification for the Court's finding. That the General Assembly is competent under Article 10 to discuss and make recommendations on a wide variety of things is of course not disputed. On the other hand, if the Court were relying only on Article 10, then there would have been really no point in mentioning anything else. As we read the Opinion, the competence of the General Assembly was apparently mentioned only to indicate which organ of the United Nations would be authorized to undertake the supervision. In other words, in the previous reasoning the Court had, in its view, shown that the United Nations as an organization had succeeded to the supervisory functions previously exercised by the League, and in this final sentence it mentioned the particular organ within the organization which would perform the functions. The reference to Article 10, therefore, does not, in our submission, assist in showing that there is any duty on the part of mandatories to submit reports. All it shows is that if reports are submitted, then the General Assembly would be the organ which would examine them and which would make recommendations on them.

So that, Mr. President, it follows that a duty to submit reports must be sought in the earlier reasoning of the Court. As we interpreted the Opinion, therefore, the general likelihood, to which I have already referred, that arrangements would be made for transfer, which likelihood appeared from the general considerations, formed the background to a finding that a tacit agreement was in fact concluded between the founders of the United Nations and the Members of the League at its dissolution.

The inference of actual agreement evidenced by conduct was apparently made from two presuppositions. The first presupposition was implied by the Court from Article 80 (1) of the Charter, to the effect that the rights of States and peoples regarding mandates would not lapse automatically on dissolution of the League. The second presupposition related to the final League resolution concerning mandates, and there the presupposition on which the Court relied was said to be that the supervisory functions exercised by the League would be taken over by the United Nations.

On the whole we interpreted the Opinion as holding that a general tacit agreement had been concluded between the States present at the establishment of the United Nations and those present at the dissolution of the League to the effect that mandatories would undertake the new obligation of reporting to the General Assembly of the United Nations. If this interpretation were

correct, then this finding would, we submit, in essence, clearly have been one of fact. There would then have been a factual finding that in the circumstances prevailing in 1945-1946 one can infer a general agreement amongst all the interested parties.

This finding of fact, as we see it, amounted to an inference from the general likelihood that arrangements would be made, the presupposition which was considered to have lain at the basis of Article 80 (1), and the further presupposition which was said to be the reason for the final League resolution.

If, as we say, this is in its essence a factual finding, then of course *a fortiori* there can be no question of binding precedent or anything of that sort, because it is well established that whereas findings on points of law carry great weight in subsequent proceedings of courts where systems of precedents operate, a factual finding is always dependent on the evidence which is before the Court. A finding on a point of fact can always be impugned at a later stage in the light of the evidence which is then before the Court.

In my submission, the Court's task in the present case should accordingly be to examine all the evidence before it and to determine whether this finding in 1950 was a correct one or not.

In the preliminary objections proceedings in 1962, and also in the subsequent proceedings on the merits of the *South West Africa* cases, we contended that if the Court had in 1950 been aware of the full factual record it would not have come to this conclusion of tacit agreement.

I wish to make it quite clear that we did not advance this contention because we thought the contention was necessary for the purposes of revision of an opinion or something of that sort. Revision of a judgment is of course dealt with in Article 61 of the Statute, but we were not trying to apply that, by analogy, to advisory opinions. Indeed, we never thought it was necessary to do so. In this regard we have, however, apparently been misunderstood, amongst others by Judge Jessup in his separate opinion in 1966 (*I.C.J. Reports 1966*, pp. 339 ff.).

In truth, Mr. President, the only reason why we stressed the existence of facts which had not been brought to the attention of the Court in 1950 was out of respect for the Court itself. We did not wish to suggest that the Court in 1950 had come to an incorrect decision—a decision which we regard as incorrect—for any reason other than an incomplete presentation of the full factual record. We did not want to suggest that the Court had erred for any reason other than that the full facts had not been placed before it. But in adopting this attitude we certainly did not intend to assume any onus of establishing that that was the reason why the Court came to what we regard as an incorrect decision. As I said previously, it is, in our submission, sufficient for us to show that the Court did err in 1950. There is, as I have said, no principle of *res judicata* and no principle of binding precedent which would create any obstacle for us in showing that.

For that reason, because in my submission it is not necessary to show what facts were before the Court and what facts were not before the Court, what facts the Court was aware of in 1950 and what the Court might have been ignorant of, I do not propose traversing that field at all.

All I need say, in my submission, is that in the contentious proceedings between 1960 and 1966 a mass of new facts, documents and comment has been unearthed by further research and this has been added to in the present proceedings. So, Mr. President, in fact, the record today before this Court is very much fuller than it was in 1950. Today the record before this Court is the fullest on this point it has ever been, certainly in the formal presentations of

the parties. And the facts and data which have been added to since 1950 are by no means confined to the practice of States between 1946 and 1949, as was stated, we submit, incorrectly, by the distinguished representative of Finland at page 77, *supra*. He was also, in passing I may say, incorrect when he said that all the documents were in 1950 deposited in the Court's Library in the Peace Palace. In the previous contentious proceedings, we had to obtain a number of these documents from New York and submit them to the Court—but that is in passing and not of any great importance.

The point is that in the years since 1950 there has been made available, in an easily accessible form, a mass of information which was not put before the Court in 1950. These facts which were not put before the Court then include important aspects of the events concerning the Preparatory Commission and its proceedings; they include important aspects of the proceedings during the final session of the League Assembly, and in particular, the content of the first Chinese draft proposal which was not proceeded with; the report of the Board of Liquidation; the manner in which the transition between the League and the United Nations was dealt with in the *United Nations Treaty Series*; and then, of course, also the aspect adverted to by the representative of Finland, that is, the practice of States. To this latter aspect, we have again added, in these oral proceedings, various comments, including those I read this morning by the *Ad Hoc* Sub-Committee on the Palestinian matter, which showed a further contemplation at the time that there was no obligation of reporting to the United Nations, under the Mandate, on South Africa.

Mr. President, as the debate on this issue has proceeded over the years, more and more evidence has become available, sometimes quite by chance—when one is looking for something else, one comes upon something which is relevant—but more and more data, more and more information, more and more documents have become available, and the significant aspect is that all these point the same way. They all show that there was no agreement during the transitional years by which South Africa became obliged to report to the United Nations; they all show that there was also no contemplation on the part of others that South Africa had assumed such an obligation.

Indeed, I submit, with respect, that the evidence which I have briefly summarized here during the last two days shows a contrary contemplation. The evidence shows that no agreement was concluded, that it was by deliberate design that there was no agreement, and that everybody accepted that there was no agreement.

As I said, Mr. President, the record is now, in these proceedings, fuller than it has ever been before—fuller even than in 1962 or 1966. However, in both those years, the Court had available much more information than was placed before it in 1950. It is therefore of interest and, I would submit, of importance, to examine the factual findings which were made in 1962 and 1966 concerning the question whether the mandatories in general or South Africa in particular undertook an obligation to report to the United Nations. Let us have a look at what the judges who adverted to this aspect did say in those years.

I propose dealing first with those who adverted specifically to the question of reporting under the Mandate, and thereafter I propose dealing with those who did not deal specifically with this aspect, but who did discuss these events and whose findings and conclusions may therefore have some bearing on the argument which I am presenting.

I start with the Judgment and opinions in 1962. There the Court did not itself deal expressly with the question of the reporting requirements of the Mandate, as I propose showing shortly, but the matter was dealt with by some

of the judges who gave dissenting or separate opinions. I deal first with the separate opinion of Judge Bustamante—this we considered in Chapter IX, paragraph 32, of our written statement. Judge Bustamante held that the compromissory clause had survived the dissolution of the League. That was, of course, the issue which was before the Court in those proceedings—to what extent the compromissory clause was still applicable despite the dissolution of the League. However, after holding that there had been a survival of the clause, he added:

> "The above findings do not in any way imply an intention to establish or to regard as established the principle of automatic or *ex officio* succession of the United Nations to the League of Nations. It has been sufficiently clearly shown, in the course of the written and oral proceedings in this case, that the theory of automatic succession is inconsistent with the historical background of the discussions and resolutions of the two great bodies during the transitional period in 1945-1946." (*I.C.J. Reports 1962*, p. 364.)

Then, dealing specifically with the mandatory's obligations to report and account, he stated that these obligations should be given effect to by the conclusion of a trusteeship agreement. He gave several reasons for this view, but one of his reasons was that, in the absence of such an agreement, the mandated territories would have been left to the "unfettered discretion of the mandatory alone" (*I.C.J. Reports 1962*, p. 365).

So there, Mr. President, in a judgment which did not support South Africa, the learned judge clearly came to the conclusion, on the evidence of what had happened in these years, that there had been no succession in general, or as regards supervisory powers in particular, and that in the absence of a trusteeship agreement there would be no supervision by the United Nations.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Before the adjournment I was dealing with the pronouncements of judges in the proceedings since 1960 who adverted specifically to the question of succession of supervisory powers by the United Nations. I dealt first with Judge Bustamante and I was proposing to continue with the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice in 1962.

As the Court is aware, in their dissenting opinion these two Judges gave a detailed consideration of this aspect of the case. We deal with it in Chapter IX, paragraph 33, of our written statement.

In the course of the joint dissenting opinion they said, *inter alia*, and I quote first from a footnote at page 532 of the *I.C.J. Reports 1962*:

> ". . . we think that the view expressed by the Court in its 1950 Opinion, to the effect that the supervisory functions of the former League Council passed to the Assembly of the United Nations which was entitled to exercise them, was definitely wrong".

To similar effect was a footnote at page 535, where the learned judges stated:

> "The contrast between the original Chinese draft [that is of course in the final League Assembly] and the one eventually adopted constitutes an additional reason why we find it impossible to accept the view taken by the Court in 1950, that the functions of the League Council in respect of Mandates had passed to the United Nations; for this was the very thing which the original Chinese draft proposed but which was not adopted."

I may say in passing that the facts concerning the first Chinese draft were not placed before the Court in 1950, certainly by any of the participants.

Then, in a later passage the two learned judges summarized the relevant events in a rather long passage:

> "They [that is both the United Nations and the League Assemblies] refrained equally from any attempt to adapt the Mandates to the situation arising from the termination of the League and of League membership.
>
> They not only 'refrained', but at least twice (proposal of the Executive Committee of the Preparatory Commission of the United Nations ... and original Chinese resolution at Geneva) they *rejected* proposals for a transfer of League functions respecting Mandates to the United Nations... [T]he two Assemblies were (except for Article 73 of the Charter) unwilling to provide in *any* specific way for the consequences of the termination of the League and its membership, or for a possible eventual failure to bring a mandated territory into trusteeship. In this lies the key to the whole matter.
>
> It is the key to the whole matter because it is strikingly evident that the two Assemblies ... relied, and *preferred to rely*, on the hope or expectation that the mandated territories would eventually be brought into trusteeship. Whether this was a reasonable assumption in the case of South West Africa, considering the declarations that were made on behalf of the Union Government, is another matter. The fact remains that it *was* relied upon, in the full knowledge of facts from which it was manifest that the expectation might not be realized, and of the fact that the Mandatory was under no legal obligation in the matter.
>
> It seems to us fairly clear as a matter of reasonable inference, that an important part of the reason for this attitude was the desire to avoid even the suggestion that any mandated territory might not be brought into trusteeship; or, by providing for the situation that might arise if that was not done (and if the League had in the meantime been dissolved) to appear to be countenancing such ... grounds on the basis of which any Mandatory could contend that, express provision having been made for continuing the Mandates *as* Mandates, no further action was required.
>
> In short, given the view that they took of the whole matter, those concerned thought it unnecessary to provide for this situation and better policy not to. This course having been chosen, and the possible consequences it entailed accepted, there is no legal principle which would enable a Court of law to put the clock back and, by judicial action, make provision for a case which those concerned elected not to deal with, for reasons which appeared to them good and sufficient at the time." (*I.C.J. Reports 1962*, pp. 539-540.)

Mr. President, I would only add that further facts which we have brought to the attention of the Court, particularly also those concerning the proceedings of the Preparatory Commission, have only served to fortify the conclusions thus reached in 1962. The further facts show even more strongly that there was in the result a deliberate decision, in our contention, not to make provision for the continuation of mandates as mandates and for the supervision of mandates by the United Nations.

In the 1962 proceedings this aspect was also dealt with by Judge *ad hoc* van Wyk. We refer to that in Chapter IX, paragraph 35, of our written statement and it is not necessary for me to read the quotations which we set out there fully.

Those were then, Mr. President, the judges who adverted to this issue specifically in 1962 and, in our submission, they go only one way—they all negative the idea that any transfer of supervisory functions was effected.

I now come to the 1966 Judgment and opinions. Firstly, again, I shall deal with those judges who considered this aspect specifically.

First I would mention Judge Tanaka, whose opinion we deal with in Chapter IX, paragraph 63, of our written statement. Now Judge Tanaka gave a dissenting opinion in which he came to the conclusion that the United Nations had succeeded to the supervisory functions which had previously been exercised by the League of Nations. He consequently gave an opinion unfavourable to South Africa, in the conclusions which he arrived at.

However, it is important to consider on what basis he decided. I would quote the following passages which we set out in our written statement in which he describes the process whereby he came to his conclusion as follows:

> "This conclusion cannot be derived from the express or tacit intent of the parties to the mandate agreement and those concerned, because at the period of the inception of the Mandate an event such as the dissolution of the League surely could not be foreseen by them, and because the intention of the parties and those concerned, and the surrounding circumstances at the period of the dissolution of the League are susceptible of diverse interpretations. There was a lacuna in the mandate agreement which should be filled by the theoretical or logical interpretation by the Court." (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 275.)

At a later stage he said: "In this case, we cannot deny that the necessity created the law independently of the will of the parties and those concerned." (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 277.)

Mr. President, we rely on this strongly for the finding that there was no intent, either express or tacit, on the part of the parties at the time of the dissolution of the League to provide for further supervision by the United Nations in respect of the Mandate.

Judge Tanaka considered these events and came to the conclusion that no tacit or express intent could be deduced from them, and he said so. His ultimate finding was based on a purely teleological approach, which, as we have submitted before, is not acceptable in present-day international law as a matter of law. The important point for my purposes, however, is his appraisement of the facts during that period.

I would again also refer to the opinion of Judge van Wyk in 1966, with which we deal in Chapter IX, paragraph 60, of our written statement, and which again I do not have to repeat here.

As I said at the inception, the only judge who considered the facts and came to a conclusion on the facts adverse to our contention was Judge Wellington Koo in 1966. We deal with his opinion in Chapter IX, paragraphs 61-62. In our submission, his reasoning may be summed up as follows: the first proposition stated by him was that in terms of the Mandate, South Africa was, as Mandatory, subject to an "obligation of international accountability".

This basic premise on which Judge Wellington Koo's opinion rests was dealt with by my learned friend, Dr. van Heerden, and I do not wish to repeat what he said. However, I contend that even if one accepts that basic premise, the rest of the opinion is not supportable on the facts.

His second proposition was that the obligation of international accountability became latent after the disappearance of the Council of the League and the

Permanent Mandates Commission. In other words, as we read it, there was still this obligation, a general, theoretical obligation, but it was latent because there was no organ which could exercise the supervisory functions. And he also then said that to revive the obligation there was required "an arrangement as envisaged in the resolution on mandates unanimously adopted by the Assembly of the League of Nations at its last meeting on 18 April 1946, including the concurrence of the Respondent"—that is, South Africa (*I.C.J. Reports 1966*, p. 235).

In his view there was a latent obligation of international accountability for which further arrangements had to be made, and for which further arrangement the consent of South Africa was necessary. In his opinion, Judge Wellington Koo sought the concurrence of South Africa to such an arrangement in the reaction by South Africa after its incorporation proposals had been rejected in the United Nations. In this regard he said, and I quote the whole passage:

> "When this proposal was rejected, it [i.e., South Africa], while expressing regret and disappointment, announced that it would continue to submit reports on its administration of the mandated territory of South West Africa as it had done before vis-à-vis the League of Nations.
>
> Although the Respondent, in submitting the reports, stated that the action was voluntary on its part and for information only such as provided for by Article 73 *(e)* of the Charter of the United Nations regarding non-self-governing territories, the legal effect of its declaration and act acknowledging the General Assembly as the competent international organ in the matter of the Mandate for South West Africa, in view of its obligation of international accountability under Article 6 of the Mandate, obviously cannot be determined unilaterally by it alone (Article 7 (1)), just as the content and scope of its obligations under that instrument cannot be governed by its own interpretation of Article 7 (2) of the Mandate." (*I.C.J. Reports 1966*, p. 236.)

Mr. President, I would submit that this passage shows one or the other of two misapprehensions. Either, Mr. President, Judge Wellington Koo misconceived the original undertaking given by South Africa. That this might be a possible misconception on his part appears from the words which I have read, that South Africa had announced that it would continue to submit reports on its administration of the mandated territory of South West Africa "as it had done before vis-à-vis the League of Nations". Now that, Mr. President, with respect, we submit is not a correct statement of fact. The undertaking which South Africa had given I have dealt with in some detail. It was always limited to information of the sort provided in Article 73 or in accordance with Article 73, and was said to be on a voluntary basis—it was always qualified in some way by the statement that South Africa did not incur any obligations or did not intend to incur any obligations by giving this undertaking and it was also limited by the ambit of the information which was said would be transmitted.

If Judge Wellington Koo read a wider significance into the statement made by the South African representative on that occasion, then, in my submission, that amounted to a misapprehension as to what the factual position was, and that would then in my submission invalidate the rest of his reasoning, because the basic premise would then have been wrong—he would then have assumed that South Africa had undertaken to report to the United Nations as it had previously done vis-à-vis the League, whereas that was in fact not so. So it

might be that this was the misapprehension upon which Judge Wellington Koo's reasoning rested.

But, on an alternative reading of this passage one can read into it what I submit to be a logical error, and that is a conception on the part of the learned judge that South Africa could be taken as having acknowledged an obligation of accountability to the United Nations although expressly disavowing any intention of doing so.

This is a possible construction of the passage that I have read where Judge Wellington Koo states in express terms that although South Africa in submitting the reports stated that the action was voluntary on its part, and for information only, such as provided for by Article 73 *(e)* of the Charter, the legal effect of South Africa's declaration and act acknowledging the General Assembly, could not be determined unilaterally by it alone. If by that the learned judge meant to suggest that as soon as South Africa performed any act vis-à-vis the United Nations South Africa would thereupon automatically become subject to the entire reporting obligation, then that would, in my submission, have been an incorrect statement.

Obviously, with respect, Mr. President, if one assumes, as the learned Judge does, that some consent on the part of South Africa would be necessary for the new arrangement contemplated, then one must have regard to what exactly it was that South Africa had consented to. One cannot say that because South Africa had consented to a limited obligation or limited undertaking of providing information of the sort mentioned in Article 73, that thereby South Africa became obliged to a much more onerous obligation of reporting under the Mandate. In determining the effects of South Africa's consent, one would have to have regard to what the content of that consent was; one would have to have regard to what exactly South Africa consented to.

So, as I say, either Judge Wellington Koo did not realize that this qualification of voluntary action for information only, according to Article 73, was there from the beginning, or else he thought that, although it was there from the beginning, it could somehow have a wider effect than in terms it purported to have. But, in whichever way one reads this passage, in my submission it is unconvincing for one or other of these two reasons, depending on what interpretation one places on it.

Nevertheless, I would remark at this stage that Judge Wellington Koo was the only person of whom we are aware inside or outside the Court who has even tried to meet the argument that we put up on the facts of the transitional period, and who has tried to meet the reasoning which Judges Sir Percy Spender and Sir Gerald Fitzmaurice incorporated in their opinion in 1962.

Mr. President, there was ample opportunity for judges who had heard our arguments in this Court to have done so. For instance, in the 1966 proceedings there were long dissenting opinions, but on this point—apart from Judge Wellington Koo, as I have stated—not one of the dissenting judges attempted to controvert our argument. One may for instance take as an example the dissenting opinion of Judge Jessup, which was a very long one and went into a great number of the issues, both the main issues and some collateral ones. However, concerning this aspect, he contented himself with purely legalistic conclusions, we submit respectfully, about the fact that the 1950 Opinion had not been formally overruled by the Court in 1966. Apart from that, he did deal with the so-called new facts but as I have already pointed out, he dealt with them in a context in which they were not advanced.

To state merely that the 1950 Opinion had not been formally over-ruled by the 1966 Judgment, in my submission, takes the matter no further. It is indeed

with respect obvious that that is the position; the Judgment in 1966, for reasons explained in it, deliberately refrained from formally ruling on anything other than the preliminary aspects of legal rights and interests with which it dealt. The important point is that judges—of whom Judge Jessup is an example—knowing of the fundamental re-examination to which the 1950 Opinion had been subjected, did not attempt to put forward a single word of support for the 1950 Opinion on its merits.

I turn now to judicial statements concerning the historical record which are not directly relevant—in other words, pronouncements by this Court on the events during the transitional period, but which do not bear directly on the question of United Nations supervision. I start again with the 1962 proceedings, and in particular the Judgment of the Court. That we dealt with, Mr. President, in Chapter IX, paragraphs 36-43. As the Court will recall, the issue in those proceedings was whether the compromissory clause had survived the dissolution of the League. There were, in particular, two aspects which were raised; one was whether the expression "another member of the League of Nations" in Article 7 (2) of the Mandate could still have any meaning after the League of Nations had been dissolved, and the second aspect of importance for present purposes was the meaning and ambit of the expression "treaty or convention in force" which is used, of course, in Article 37 of the Court's Statute.

The Court had accordingly to decide whether, after dissolution of the League, there was still a treaty or convention in force, and also whether there still were States which could comply with the description of "another member of the League of Nations". In both these aspects an examination of the historical record was necessary. I have already pointed out that the Applicants in those proceedings had two alternative arguments. The first was that a succession had taken place in which the United Nations and its Members had succeeded to the powers and functions of the League of Nations and its Members. The alternative argument was that the rights of Members of the League were maintained in favour of the States which were Members at the time of the dissolution of the League.

Now, it will be immediately apparent that had the Court accepted the succession argument, then that would also have been of almost direct application to the present case. If the Court had found that there was a general succession of the rights and functions of the League by the United Nations and its Members, then that would presumably have applied also to the question of supervision by the League. However, the Court did not so decide. The Court decided in favour of the alternative argument; in other words, the Court found that the rights of the existing Members of the League were maintained, that the Mandate was still a treaty or convention in force between the States which were Members of the League at its dissolution and the Mandatory, and that the expression "another member of the League of Nations" would, after the dissolution of the League, apply to the individual States which had been Members at the time of dissolution.

We point out in our written statement that there is a logical inconsistency between such a finding and a finding that an agreement was concluded during the same period providing for succession of administrative supervision. We say this particularly because the Court, in its Judgment of 1962, apparently decided mainly on the basis of an agreement which was said to have been concluded in 1946, and whereby the mandates were continued as treaties between the States present at the dissolution of the League. If one examines such a conception, one comes to the conclusion, we submit, that that excludes, as a matter of logic,

any possibility that, at the same time, an agreement would have been come to whereby supervisory functions were transferred to the United Nations.

Look at it this way, Mr. President: these States were there together at the dissolution of the League, they had to make provision, on the one hand, for the continuation of the jurisdiction of the Court; on the other hand, they had to make provision, if they wished to do so, for the continuation of supervision of the Mandatory. And the jurisdiction of the Court, as was found in the 1962 Judgment was, in itself, also a measure of judicial protection of the Mandate. So, in fact, on the Court's argument in 1962, these two things were only different aspects of the same matter, namely international supervision. The Court regarded the compromissory clause and Article 6, dealing with supervision, as essentially being designed to serve the same purpose, namely supervision of the Mandate.

What earthly reason could there have been for the States together at the final Assembly of the League to make a different provision for the one than for the other, to provide that the judicial protection would in future be exercised by the States which were Members of the League at its dissolution—a comparatively small number of States—whereas, on the other hand, the administrative supervision would be carried out by the United Nations? Surely, Mr. President, no Assembly could come to such a conclusion; no Assembly would split the function of supervision between two quite different entities, having no relation to one another at all.

So, we submit there is a logical inconsistency between any finding of the type of agreement which the Court found in 1962 and an agreement at the same time providing for United Nations succession.

I might just state in passing that the representative of Finland does not agree that there is a logical inconsistency, that is at page 79, *supra*, but he gives no reasons and therefore I cannot reply to it specifically.

That, therefore, is as far as the finding of the Court is concerned. Also, in its reasoning, we submit, the Court made findings on facts or decisions on facts which support our contentions. Thus the Court relied largely, if not solely, on the agreement amongst Members of the League of Nations in April 1946. In this portion of its Judgment the Court pointed out that the Members of the League had full knowledge in April 1946 of the contents of the Charter, as also of the fact that the United Nations had already begun to operate. The purpose of the agreement that was concluded was therefore, in the words of the Court:

> ". . . to provide for the continuation of the mandates and the mandates system until other arrangements had been agreed between the United Nations and the respective mandatory powers".

The purpose of the agreement was to provide for continuation of the mandates system until other arrangements had been made. When defining the ambit of the agreement held to have been concluded in April 1946, the Court, we submit, rendered it clear that such agreement did not comprehend any obligation to report and account to the United Nations. Thus, the following language was used:

> "Obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different mandates as far as it was practically feasible or operable with reference to the obligations of the mandatory Powers and therefore to maintain the rights of the Members of the League notwithstanding the dissolution of the League itself."

The Judgment proceeded to state that discussions were held ". . . to find ways and means of meeting the difficulties and making up for the imperfections as far as was practicable". Later, the agreement was said ". . . to maintain the *status quo* as far as possible in regard to the mandates".

And then, at page 341, the agreement was stated to be as follows:

> "It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the meeting 'will necessarily preclude complete compliance with the letter of the mandate', i.e., notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words, the common understanding of the Member States in the Assembly, including the Mandatory Powers, in passing the said resolution, was to continue the mandates, however imperfect the whole system would be after the League's dissolution, and as such as it would be operable, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective mandates."

So, in seeing what sort of an agreement the Court held in 1962 was concluded, it becomes clear that the interim arrangement would enable the Mandate to operate only in an imperfect manner, by which the Court meant, *inter alia*, incomplete. It used the expression "as much as it would be operable". This element of incompleteness or imperfection was related directly to the disappearance of the organs exercising administrative supervision.

We submit that this could only have been the view of the Court if it had thought that there would no longer be any administrative supervision. If there would still have been administrative supervision through the United Nations, then one might well ask why is the Mandate now incomplete, why is it imperfect, why is it no longer fully operable?

The distinguished representative of Finland has suggested at page 79, *supra*, that these expressions of view of the Court only related to a change in the supervisory machinery and not to a falling away thereof. But surely, Mr. President, if it was the view of the Court that there had only been a change in the organs exercising supervision it would hardly have used language such as this, pointing to a lack of operability and imperfection in the system, and so on.

I might also here refer to a further argument mentioned by the Court, and that was the necessity for the judicial protection of the Mandate. Why would this necessity have continued if indeed other arrangements for administrative supervision had been made? The question of necessity for judicial protection and also certain other subsidiary contentions are discussed in paragraphs 40-41 of Chapter IX of our written statement and I do not need to refer to them at greater length here, save to say that they also show that the language of the Court indicates that there would no longer be administrative supervision.

Moreover, a second consequence flowing from the reasoning of the Court—concerning this agreement said to have been entered into, was that the agreement was said to have been in order to maintain the *status quo*, as far as possible. The Court did not conceive that an agreement was concluded, whereby additional obligations were imposed, further obligations of any sort; it was purely an interim arrangement to maintain the *status quo* whereby the existing States which were Members of the League would retain their rights to invoke Article 7, paragraph 2, and things generally would carry on on the same basis with the

same States having the same rights as they had before. There was no contemplation that a new organization, a new body, would be brought in.

As we point out in our written statement in the passages mentioned, the *status quo* could have been maintained on a parity of reasoning only if the existing Members of the League would in some way still be able to constitute an existing Council, and an existing Permanent Mandates Commission be established, or something of that sort, which obviously could not be so. But as regards the compromissory clause, the Court held that the clause was maintained in favour of the existing States—existing rights were maintained, not new ones created. And there is no method whereby the maintenance of existing rights could have resulted in a transfer of supervisory functions to a new organization with a different composition and procedures.

Mr. President, taking the Court's view of these events in the transitional years, we submit that it supports our contention that there could not have been any agreement for the transfer of supervisory functions. There is, on the other hand, a passage which we must admit we find rather obscure, at pages 333-334 of the Judgment, which might be said to go the other way. It might be said to be against us. We discuss it in paragraph 42 of Chapter IX of our written statement and submit that on balance, whatever weight this passage might have against us—it is by no means clear to us what is meant by it—on balance the Judgment supports the view propounded by us.

I would just in passing say that when people contend that the Judgment reaffirms the 1950 Opinion they usually refer to a passage at page 334, which reads as follows:

> "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950."

Now, this passage, which is often relied upon, relates of course only to the unanimous holding on the survival of the Mandate. In does not in terms relate to the majority view on the transfer of supervisory functions.

That then is what we say as far as the 1962 Judgment is concerned, Mr. President. We contend in our written statement that the separate opinions in 1962 of Judges Jessup and Sir Louis Mbanefo displayed the same features, the same logical inconsistency which I have mentioned and that there are also certain additional elements in their reasoning which we submit support us. We dealt with this matter in our written statement, Chapter IX, paragraphs 44 to 50, and I do not propose traversing this ground again here today.

I might just add that neither of these learned Judges in 1966 contested or disputed the interpretations we had placed on their 1962 Opinions.

I then come, Mr. President, to the 1966 Judgment, also as an example of a judicial pronouncement which did not deal explicitly with the matter under consideration but which nevertheless does cast some light on it. In our submission the reasoning and conclusions of the 1966 Judgment give a clear indication of what the Court would have decided if called upon to do so. We dealt with this topic in Chapter IX, paragraphs 54-59, of our written statement, where we showed the following:

Firstly, that the Court held that the nature and content of the mandate were governed by the intentions of its authors when the mandates system was being instituted and the instruments of mandate being framed—that is at paragraph 55 of Chapter IX.

Secondly, that supervisory functions in respect of mandates were vested only in the specific League organs to which reference was made in the relevant instruments—that is at paragraph 56. This finding would, in our submission, be contrary to the conception or the contention that there was some obligation to the organized international community as an entity separate from the League itself.

Then number three, the Court held that at the time of the dissolution of the League it was considered preferable to rely on the anticipation that mandated territories would be brought within the United Nations system—that is at paragraph 57 of Chapter IX. In that paragraph we contend that the word "preferable" in the context means preferable to making any specific arrangement that would have ensured continued supervision of mandates as mandates.

Fourthly, the Court held that the Court was not entitled to fill the gap which was thus caused—that is in paragraph 58 of Chapter IX.

It is our contention that the same view of the facts and applicable legal principles would inevitably lead to the conclusion that supervision fell away on the dissolution of the League, in other words, that on the dissolution of the League there was no obligation on the mandatories to report and account to any organ of any organization. This appears, in our submission, to have been implicitly accepted by the Court in a passage which we quote in Chapter IX, paragraph 59, of our written statement, as follows:

> "Another argument which requires consideration is that in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the Mandate, it must be unacceptable. Without attempting in any way to pronounce on the various implications involved in this argument, the Court thinks the inference sought to be drawn from it is inadmissible. If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law."

The only reference to the Judgment and the interpretation we placed on it was by the distinguished representative of Finland who conceded at page 79, *supra*, that there are certain passages in the reasoning of the Court's Judgment which would seem to support the contention advanced by us. He added, however, that in those passages the Court confined itself to studying the situation at the time of the League of Nations, when the question of transfer of supervisory functions had not arisen. But, from what I have said it will, I submit, be apparent that that is not strictly correct. Indeed, paragraph 57 of our written statement, to which the distinguished representative refers in express terms relates, as I have noted, to the period of dissolution of the League and to the intentions of the parties at that stage.

By reason of the foregoing, we contend that the overwhelming weight of judicial opinion since 1950 supports the proposition that the Opinion of that year cannot be supported on the basis that the mandatories in general or South Africa in particular consented to an obligation to report under the mandate to the United Nations. The question then arises on what other bases has the Opinion been defended. I propose dealing first with bases suggested in the present proceedings.

The distinguished representative of the Netherlands stated that the 1950 Advisory Opinion—

> ". . . could not be justified on the strength of a construction according to which the obligations of South Africa related to the exercise of its sovereignty and were contracted by it towards the League of Nations. In other words, it could not be justified on the strength of the normal application of the rules of international law concerning the effect of treaties between sovereign States." (*Supra*, p. 126.)

The distinguished representative of the Netherlands accordingly also agrees that the record is so clear that one cannot support the 1950 Opinion on the ordinary basis of treaty law. He continued by saying that the Opinion, "rightly approaches the question as one relating to the modalities of exercise of the powers of the organized community of States, modalities of which the rights and obligations of the mandatory State are an integral part".

Mr. President, this approach is, I submit, the same basically as that which had been followed by Judges Bustamante and Tanaka. The merits of the argument have been dealt with and I do not want to do so again. Whatever one might think of the teleological theory, we have already submitted that it does not represent prevailing law and that the Court should therefore not apply it. It is, however, significant that the representative of the Netherlands did not feel it open to him to support the 1950 Opinion on the basis of an actual agreement.

The distinguished representative of Finland was, in my submission, to much the same effect where he stated (*supra*, p. 78) that the Court adduced several reasons as the legal basis for its opinion, but in his view the first was decisive. In this regard he quoted the Court as follows:

> "It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions."

If I understood the distinguished representative of Finland correctly, he suggested or he contended that this by itself could serve as justification for the 1950 Opinion and he conceded that possibly some of the further reasoning of the Court was not entirely relevant. But, as I have already submitted, this is a purely legislative or teleological argument. It points to a general need for a certain situation rather than to the actual establishment of such a situation. It amounts really to the proposition that since the object and purpose of the mandate required supervision and there happened to be an organ which could exercise supervision, therefore the Court should place the new and existing organ in the place of the one that had fallen away. That, in our submission, is contrary to the generally accepted principles of international law as accepted at present.

I may just also mention a small point in passing. I do not understand what the learned representative meant when he stated that our summary of the Court's reasons was incomplete (*supra*, p. 78). A summary is, of course, by definition always incomplete and with respect we submit that we did not leave out any relevant part of the Court's reasoning. Mr. President, that then is as far as the representative of Finland is concerned.

I have already referred to the argument presented by the distinguished representative of Pakistan, to the effect that South Africa had become estopped

from challenging the authority of the United Nations (*supra*, p. 139). I do not propose repeating that argument.

I turn now to a basis which has been suggested in the past, although not in these proceedings, as being that upon which the 1950 Opinion rested, namely Article 80, paragraph 1, of the Charter. The Court will recall that when I dealt with the Opinion earlier today I said that I would discuss this Article at a later stage. As I then pointed out, we regard the Article as not having been invoked as such, but merely as showing a certain presupposition. If one reads the Court's Opinion, the Court does not say in so many words that Article 80, paragraph 1, makes any particular provision, it says that the Article presupposes that rights would not lapse. So we interpreted it merely as showing a general probability that provision would be made for succession of supervisory functions. However, greater weight has been attached to this Article in the *South West Africa* cases, for instance, at a certain stage. We refer to it in our written statement, Chapter VIII, paragraph 51. Certain authors have also suggested that the true basis of the 1950 Opinion is to be found in Article 80, paragraph 1. I would refer the Court, for instance, to Hudson whom we quote in Chapter IX, paragraph 21.

Article 80, paragraph 1, reads as follows:

> "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."

Mr. President, just reading the Article one finds difficulty in imagining how it could be contended that this Article might have the effect of altering the obligation of the mandatories so as to impose on them an obligation to submit reports in future to the United Nations. The Article is, in its terms, purely negative in that it seeks to prevent anything in the chapter in which it appears being construed in, or of itself, to alter rights then existing. It is there merely to provide that the chapter should not change by itself any rights.

Nevertheless, in the oral proceedings on the preliminary objections the then Applicants relied quite heavily on this Article in support of their succession argument, and they apparently regarded it as an essential link in the reasoning of the Court's 1950 Opinion. The reference is to the *I.C.J. Pleadings, South West Africa*, Volume VII, pages 304 to 308.

Not only did the Applicants rely on it, but they contended that it formed an important part of the Court's reasoning in 1950, in support of its conclusion that there had been a transfer of supervisory functions.

However, in its 1962 Judgment, the Court placed no reliance on this Article, and one must therefore assume that the Court did not accept the argument advanced by the Applicants. In fact, of course, the whole succession argument, as I have pointed out, was not accepted. Moreover it was clearly demonstrated by Judges Sir Percy Spender and Sir Gerald Fitzmaurice in a footnote to their joint dissenting opinion, which we quote in Chapter VIII, paragraph 51, of our written statement, that this Article could not in law have the effect sought to be attributed to it by the Applicants. Thereafter in the oral proceedings on the merits, the Applicants expressly associated themselves with the views of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, but they still attributed a different view to the Court in its 1950 Opinion. We deal with that in Chapter VIII, paragraph 51, of our written statement. Although they conceded that the inter-

pretation and effect placed upon the Article by Judges Sir Percy Spender and Sir Gerald Fitzmaurice was the correct one, they still stated that the Court apparently had thought differently in 1950.

I would just say that if the then Applicants, Ethiopia and Liberia, and if the commentators, whom I have mentioned, are correct in their view that Article 80 (1) was regarded by the Court in 1950 as directly relevant and important for the question before it, then that would, in my submission, by itself require a reconsideration *de novo* of the soundness of the Court's conclusion. The position would then be that there is this essential link in the Court's reasoning, which has subsequently been shown to be untenable.

I come now, Mr. President, to the views of publicists, which is the second last topic I have to deal with this morning. In Chapter IX, paragraph 4, of our written statement, we stated that the South African Government is not aware of any academic writing which contains a reasoned support of, or concurrence with, the 1950 majority finding otherwise than by applying a teleological principle of filling the gap. I would point out that no participant has attempted to draw our attention to a single such source, so that we are still not aware of any academic writing which has that effect.

The only comment on this statement which was made in the present proceedings before the Court was from the distinguished representative of Finland as follows:

> "The South African Government quotes, in paragraphs 20 to 27 of Chapter IX of its written statement, the opinions of eight writers who have criticized the conclusion arrived at by the Court in its Advisory Opinion of 1950 concerning the transfer of the supervisory powers. However, it concedes (in paragraph 4) that there are other well-known jurists who have approved that conclusion, although on grounds which the South African Government does not accept. It may be thought that if not all scholars, at least the great majority of them who have kept silent on this question, share the view of the Court." (*Supra*, p. 78.)

I would only make the following observations. Firstly, the teleological principle of filling the gap on which these authors rely is not unacceptable only to the South African Government, as the distinguished representative of Finland seems to suggest, but is contrary to the overwhelming weight of authority in modern international law, as we have shown in Chapter II of our written statement, with which I dealt last week.

Secondly, the distinguished representative of Finland does not himself quote a single authority in support of the 1950 Opinion. He relies only on our own statement for the proposition that other well-known jurists have approved the conclusion. In fact, we cited only one well-known jurist and that was Dahm. He stated, in the passage to which we referred, merely that the 1950 Opinion amounted "to an extension of the mandate law of the League of Nations by means of filling the gaps, and at the same time affords an interesting example of the notion that a succession of functions is, in certain circumstances, also applicable in international law"—that is our own translation.

Mr. President, I would submit that it is not even quite clear to me from this passage that Dahm himself supported this principle of filling the gaps, but if he did, then, eminent scholar that we accept he is, we do submit his views do not accord with that generally accepted today.

My third observation on this comment by the representative of Finland concerns his statement as to the probable views of the majority of scholars who have remained silent. I would merely say, Mr. President, that speculation on

this subject appears, in my respectful submission, to be singularly unrewarding. If the majority of scholars indeed supported the 1950 Opinion, one would have thought that at least some of them would have taken up the pen and written something for some legal journal in opposition to the number of scholars who have criticized the 1950 Opinion.

In contrast to the silent majority relied on by the distinguished representative of Finland, we have quoted eight reasoned criticisms of the Opinion, that is in Chapter IX, paragraphs 20 to 27. To that I could add a ninth, which has come to my notice more recently; that is Professor Leo Gross writing on "The International Court of Justice and the United Nations", *Recueil des Cours*, 1967 (I), Volume 120 at page 313. At pages 413 to 414 he states, concerning the 1950 Opinion:

> "However right the Court may have been in implementing certain values, the juridical basis on which the Court proceeded was open to question. There were gaps in the transition from the League to the United Nations, and those gaps were filled by the Court's making the most out of the legal materials available to it. Among these materials, however, the consent of South Africa was conspicuous by its absence."

It is often stated that the 1950 Opinion was confirmed or fortified by the 1955 and 1956 Opinions—see for instance the United States written statement, I, page 848; the oral statement by the representative of Finland, page 78, *supra*, and of Pakistan, at page 140, *supra*. In our submission, that is not so. The 1955 Opinion was requested by the General Assembly in resolution 904 (IX). This resolution declared, in the preamble, that the General Assembly had accepted the 1950 Opinion and had taken certain measures in implementing it. It continued to state that "considering that some elucidation of the advisory opinion is desirable" it requested a further opinion on the question whether its rule on the voting procedure was a "correct interpretation" of the 1950 Opinion, and if that "interpretation" were not correct, what procedure should be followed.

The same picture emerges from the events preceding the 1956 Opinion. There the Court was asked, in General Assembly resolution 942 A (X), whether the oral hearing of petitioners was "consistent" with the 1950 Opinion.

So, Mr. President, we submit that in neither case was the Court asked to re-examine the correctness of the 1950 Opinion. In fact we say that a reading of the Opinions shows that the Court did not purport to do so. The Court merely purported to interpret the 1950 Opinion. Indeed, it is noticeable that Judge Read, who had dissented in 1950, took part in the subsequent attempts to interpret the views of the majority.

But, we contend that, not only did these Opinions not confirm the 1950 Opinion, they in fact underlined the unsatisfactory nature of its reasoning. We deal with this in our written statement, Chapter IX, paragraphs 28 to 30.

After all, a cogent, well-reasoned opinion would hardly require two elucidating opinions within six years. Moreover, the difficulty encountered in 1956 to determine the true legal basis of the 1950 Opinion must surely be, I submit, without precedent. Even the remaining judges, who in 1950 had voted in the majority, were in 1956 divided as to the basis upon which their previous Opinion rested. And, as we show in our written statement, we submit the two bases which were suggested in 1956 were not only poles apart, they were both, in our view, equally untenable, either in fact or in law.

So, Mr. President, in conclusion, if one has regard to the weight of reasoned comment on the 1950 Opinion, if one has regard to the mass of evidence, data and comment now available, the judicial pronouncements since 1950 and also,

with respect, to the intrinsic weaknesses of the reasoning of the Court in 1950, there is, in my respectful submission, a strong element of unreality, almost of make-believe, in the blind acceptance which many people profess with regard to the majority Opinion of that year.

In our submission, that Opinion has been shown in the passage of years since then to have been incorrectly decided and the time has now arrived, in our submission, for the Court to state that categorically and to make pronouncement to that effect.

The Court rose at 1.01 p.m.

FIFTEENTH PUBLIC SITTING (3 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

REPLY BY MR. CASTRÉN TO THE QUESTION BY SIR GERALD FITZMAURICE

The PRESIDENT: It will be recalled that Sir Gerald Fitzmaurice had put a question[1] to the representative of Finland, the reply to which has been received, and I will request the Registrar to read out the question and the reply.

The REGISTRAR: This is a letter addressed by Mr. Castrén to the Registrar:

«Helsinki, le 23 février 1971.

Monsieur le Greffier,

Lors de l'audience tenue le 11 février 1971 dans l'affaire relative à l'avis consultatif demandé par le Conseil de sécurité des Nations Unies sur les conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie nonobstant la résolution 276 (1970) du Conseil de sécurité, le distingué Membre de la Cour internationale de Justice, Sir Gerald Fitzmaurice m'a posé la question suivante:

> «Monsieur Castrén, dans votre intervention de l'autre jour, vous avez soutenu (C.R. 71/2 p. 56) que la résolution 2145 (XXI) de l'Assemblée générale n'a pas directement mis fin au Mandat. Selon votre thèse, ce que l'Assemblée a fait en réalité, c'est déclarer que, par son comportement condamnable, le Mandataire avait lui-même mis fin au Mandat. Elle s'est bornée à constater ce fait . . . Etant donné que le Mandataire n'a jamais admis qu'il avait violé le Mandat, ne pensez-vous pas qu'une déclaration par laquelle l'Assemblée proclame que le Mandataire a lui-même mis fin au Mandat par les violations qu'il a commises, équivaut de la part de l'Assemblée à constater ou à juger que ces infractions ont eu lieu?»

Je me permets de vous prier de bien vouloir porter ma réponse à ladite question à la connaissance de Sir Gerald Fitzmaurice et des autres éminents Membres de la Cour.

Réponse: Dans mon exposé oral j'ai bien dit, après avoir cité le paragraphe 3 de ladite résolution de l'Assemblée où elle déclare entre autres que l'Afrique du Sud «a, en fait, dénoncé le Mandat», que *prise à la lettre*, il découle de cette disposition que l'Afrique du Sud, par son comportement condamnable, a terminé elle-même le Mandat. Il ressort de l'exposé écrit du Gouvernement sud-africain qu'il préfère lui-même une interprétation littérale. La disposition en question signifie donc que l'Assemblée considère, en effet, que l'Afrique du Sud a dénoncé le Mandat et que l'Assemblée s'est bornée à constater ce fait et les infractions commises par l'Afrique du Sud qui ont produit cet effet. J'ai aussi soutenu dans mon exposé oral que l'Assemblée est compétente à faire une telle constatation. Or, j'ai souligné

[1] See p. 121, *supra*.

en même temps que les constatations contenues dans ladite résolution de l'Assemblée ne sont pas obligatoires au sens strict, en ce qu'elles ne contiennent pas de sanctions prévues au chapitre VII de la Charte. Par ailleurs, il y a lieu de remarquer, que l'Assemblée générale des Nations Unies possède la compétence indisputable de constater la terminaison d'un Mandat qui a été maintenu contrairement à la lettre et l'esprit de l'Accord sur le Mandat, et que tous les Etats Membres doivent respecter la décision se fondant sur cette conclusion.

Veuillez agréer, Monsieur le Greffier, l'expression de mes sentiments les plus distingués.

(Signé) Erik CASTRÉN,
Représentant de la Finlande.»

ORAL STATEMENT BY MR. DE VILLIERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: Mr. President, honourable Members of the Court, we come now to the specific question whether the General Assembly had the power to make a decision with binding effect as it purported to do in operative paragraph 4 of resolution 2145 of 1966. Reference may be made to our scheme of the presentation of the argument as set out in the record, in this instance at page 172, *supra*—the particular item is introduced by the word "Fourthly". Then also, reference may be made to the brief statement of the main contentions of the South African Government, which is an annex to that record, and the reference is page 610, *infra*.

As we indicate in those sources, the matter is dealt with in our written statement, in the whole of Chapter X.

Now, Mr. President, in our submission, this question is in its essence a very simple one, and the answer indicated by the provisions of the Charter is an elementary one. It is the kind of question which one would deal with, shall we say, in a first-year class at university. It is a matter of first principle. The General Assembly, apart from specifically excepted cases pertaining to procedural and budgetary matters, was deliberately, in the Charter, given powers of discussion and recommendation only. It was given those powers in Article 10 of the Charter, generally, and in certain other Articles, to which my learned colleagues have referred, in regard to certain other specific matters. But the important point is that they were powers only of discussion and recommendation.

The relevant provisions of the Charter, and the clear language in which they are couched, are dealt with in our written statement, and no participant in these proceedings has in any way attempted to contradict what we have said. And, what is more important, no one has suggested that this is one of the exceptional cases dealt with in the Charter. On the contrary, everyone accepts, either explicitly or tacitly, that this is not so; this is not one of the excepted cases.

Apart from the clear provisions of the Charter on this point, the comment of both States who were involved in the framing of the Charter and authoritative commentators and publicists is equally emphatic. We refer in our written statement to a large number. I do not want to quote them all again—I refer to a few now by way of example. There is the Russian authority, Professor Tunkin, who says, "Resolutions of the United Nations General Assembly are, as a matter of principle, recommendations" (Tunkin, *Soviet Law and Government*, Vol. IV, No. 4 (1966), p. 5). Ross, in his *Constitution of the United Nations*, 1950, page 60, says, "The Assembly can never legislate, never order or command, but only submit, recommend, propose". Goodrich and Hambro say the Assembly is only a body to "discuss, to consider, to recommend, but not to take action" (Goodrich and Hambro, *Charter of the United Nations*, 2nd ed., p. 150). Dolivet, in his work on *The United Nations*, 1946, at page 28, states, "It is clearly the intention of the Charter to make the Assembly the great moral and political platform of the world, but not to let it take direct action".

On a previous occasion I gave the Court a reference to the report on the San

Francisco Conference by the representative of the United States to the President of the United States, much to the same effect.

Now, Mr. President, in the face of this absolutely clear, elementarily clear, position under the Charter, we find that operative paragraph 4 of General Assembly resolution 2145 states:

> "The General Assembly . . .
> *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 right to administer the* Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations."

There can surely be no question about it, no argument can be required to demonstrate that this is not recommendation, it goes well beyond the scope of recommendation.

The apparent conflict between this action of the Assembly and the clear provision under the Charter is so manifest that it would, in the circumstances, have been quite appropriate for the Court to have been asked for an advisory opinion on the question: what are the legal consequences for States of operative paragraph 4 of General Assembly resolution 2145 notwithstanding the provisions of the Charter of the United Nations?

Mr. President, no clearer case can surely be imagined of an organ which attempts or purports to do something which lies beyond its constitutional powers. The decision of the General Assembly purports to be binding not only on South Africa, without South Africa's consent, and notwithstanding South Africa's strong protests; it purports to be binding also upon other States Members of the United Nations, apparently including those which specifically reserved their position and indicated their doubts either about the validity of *the decision or about other aspects of it*—I say apparently, because the specific questions asked in that regard by Judge Gros have not yet been replied to. But it would seem, following logically on the contentions which gave rise to those questions, that the answers would have to be in the affirmative, that the contention on behalf of the Secretary-General is that this decision is binding not only on South Africa in its legal consequences but also upon these other States.

Now, this decision, not, I may point out, that the Mandate has terminated, but that the Mandate is terminated, it purports to render unlawful South Africa's continued presence and administration in South West Africa, and it purports to bring about a new régime, a new administrative authority for South West Africa. Yet, Mr. President, the decision is made in a sphere in which the Charter says clearly and unequivocally that the General Assembly may do no more than to discuss and to recommend.

Now, South Africa says the effect is plain and elementary. We contend the decision is invalid, and inasmuch as the decision is the central core of the whole resolution—everything in the resolution coming before or following on the decision turns around it—the whole of the resolution must be invalid. That for the moment is of no importance, the important question is whether that decision was a valid one or not. It is not surprising to find, as we indicate in our written statement, that of the few writers and publicists who deal with this specific question, as far as we know there is not a single one who has expressed the view that the decision was legally valid, whereas several have specifically either indicated doubts about its legal validity or stated outright that in their view it could not be regarded as legally valid—I refer to our written statement, Chapter X, paragraph 10.

We see now, after all the other written statements have come in and after all the oral presentations we have had from, I believe, seven participants before the Court, that there has been a suggestion that one publicist has indicated the contrary, Castañeda. We have looked at what he says and I will deal with it later. For the moment it suffices to say that it seems perfectly clear that he tentatively *suggests justification for the binding nature of this decision on a philosophical* and not a legal basis; at any rate, not on a conventional legal basis such as has ever been recognized in the jurisprudence of this Court.

So, Mr. President, that is how elementary the position really is. Yet we find in these proceedings, from the Secretary-General, from the Organization of African Unity and from the majority of the States who are participating in these proceedings, the most arduous attempts at arguing and contending to the contrary. One might say the situation is similar to what one finds in the field of medicine. One knows that for certain maladies there are well-established remedies. For malaria it is quinine, or preparations based on quinine. For a common cold we find there are hundreds, if not thousands, of medicaments on the market; each one is said to be just the thing, but we know that in truth that is just a symptom of the fact that there is no real cure. We have something similar in these proceedings. There is no shortage of suggestions and attitudes which are being put up for the Court's consideration. Rather significantly, some of these serve the sole purpose of trying to put blinkers on the Court. They say the Court should accept or take for granted the validity and the binding effect of what has been done and a variety of reasons is given for this contention. One is the suggestion that the question has been so framed as to exclude this fundamental aspect of the issue from the Court's consideration. Another suggestion is in effect that resolutions of organs of the United Nations are something like the legislative act of a sovereign legislature, in the sense that once they are officially published their validity must be assumed and cannot be questioned.

A third suggestion is that United Nations organs have powers of judicial determination of questions of fact and law, and that the General Assembly has exercised those powers in this case with binding effect even on this Court.

A fourth suggestion seems to be simply and bluntly that the Court would do well to confirm the validity and binding effect of what has been done and thus show the Court's solidarity with the political organs of the United Nations. That, more or less, is what I have referred to as the attempt at putting blinkers on the Court. When we get beyond that stage, when we do find substantive suggestions as to why the decision could nevertheless be regarded as valid and binding, we find no decrease in the variety of what is being put forward.

It is variously suggested that the General Assembly acted as a party to a treaty which has been violated. Secondly, that it acted as the organ of the international community responsible for the fulfilment of the sacred trust to the population of South West Africa.

Thirdly, that it acted as the organ primarily responsible for a non-self-governing and a trust territory. Fourthly, that it acted as the supervisory authority for the Mandate for South West Africa. In this last-mentioned capacity, as supervisory authority, it is suggested, or rather contended, that the General Assembly inherited a power which had previously vested in the Council of the League of Nations. Then various theories are propounded as to the origin of that alleged *power on the part of the Council of the League of Nations. They have been* dealt with by my learned friend, Dr. van Heerden, and I do not want to dwell upon them again. It suffices to say that in some cases it is suggested that the origin has an implication in the Covenant, in other cases the suggestion is that it arises automatically, that it is a consequence automatically to be imported by

reason of the analogy of the institutions of trust, tutelage and mandate in municipal law.

Then there is the suggestion, which applies apparently both to the Council of the League and to the General Assembly of the United Nations, that a power of cancellation must necessarily exist, otherwise there would be no sanctions against a delinquent mandatory. And then, Mr. President, when the propounders of these various theories really come to the end of their tether, when they have exhausted their ingenuity, they add something to the effect that if some doubt were still to remain about the competence of the General Assembly to do this, surely the strong arm of the Security Council has been added and that must be regarded as having cured everything.

We find significantly, too, that there is one participant who frankly admitted that the decision under discussion of the General Assembly could not be legally justified on the basis of conventional principles or classical rules of international law. He contended, he admitted in fact, that the decision could only be justified on the basis of a completely novel approach—an approach which somehow permits of the construction of new solutions when circumstances change; a construction, it would seem, in the sense of fabrication or making things, by a legislative act on the part of a political organ, or on the part of a court. This novel approach, incidentally, appears to be one which has either escaped this Court completely or which in any case runs directly counter to all its basic premises which it has applied in the attention which it has given in successive stages to the South West Africa case since 1950.

There is in all this variety one common element, one element common to this welter of legal ingenuity and that is that not a single one of the suggested solutions is based on a provision of the Charter of the United Nations.

We have now had written statements from 12 participants, apart from South Africa. Of those, 11 sought to support the actions of the United Nations organ. We have had oral presentations from 7 participants, if I am not mistaken. We have not heard a single suggestion from any one of them that there is a provision in the Charter which would support the validity or binding effect of this resolution of the General Assembly.

Now, surely, Mr. President, we come to a stage where a tale or a story is beginning to unfold. We are beginning to see signs that perhaps the 1966 decision of the General Assembly was taken on an overall basis of "the law be damned" and that now, in the aftermath, when the accounts have to be settled there is all this scurrying and all these desperate attempts at covering up in a legal way what has been done by a political organ in the heat of an emotional political moment. If we refer to the records of the events in the organs and committees of the United Nations we find that this is exactly what happened.

I want to stress in this respect that I used the words "overall approach" with reference to the time when the decision was taken. I used that deliberately because there were responsible Members of the United Nations, as one would expect, who were concerned about the legal and the constitutional implications of what was being done. But they were in the minority in the General Assembly and they were up against a storm of emotion which had arisen following on the 1966 Judgment of the Court. The result was, I regret to say, that most of them did not stand their ground on this aspect very firmly, at any rate in the open debates, as far as one can see, whatever their attitudes may have been in the private consultations—and there were many and prolonged private consultations.

What does emerge from the records of the debate is that amongst the representatives of some of these more responsible States there developed a more or less compromise line, not very well thought out in all its consequences, as one

might expect because, after all, it had to be evolved in these circumstances of stress and pressure, and not very consistent in all respects, but it seems to have amounted approximately to the concept which was presented to this Court by the distinguished representative of Finland, namely one whereby the General Assembly itself does not take the step of terminating or revoking the Mandate, but of merely recognizing that South Africa itself, by its own actions, by violations and by so-called disavowal, has already terminated the Mandate, or *South Africa's rights under the Mandate, which was the formulation which* was apparently favoured by some of the representatives.

So that was, as I say, a more or less compromise line which was suggested, as appears from the record. I am not, for the moment, conceding that even if that line had been adopted it would have succeeded in solving the legal difficulty, but it was, at least, an attempt at coming closer to solving it.

What is important, as emerges from the record, is that even this suggestion was very firmly rejected, and even trampled upon, by the rampant majority. That appears very clearly from the events which immediately preceded the adoption of resolution 2145. I will come to that later, I merely want to quote for the moment what was very pertinently said on this point by the eloquent representative of Tanzania, Mr. Malecela. This was while he was rejecting a last-minute attempt by the representative of the United States to introduce a sub-amendment to what was being considered. He stated:

> "Our contention is that we want the Mandate that has been exercised by South Africa in South West Africa, in whatever form, to be terminated . . . We want to terminate the Mandate." (A/PV 1453, pp. 3 and 8.)

Now that, Mr. President, is exactly what the decision in resolution 2145 purported to do. One finds that some of the objecting States in these circumstances maintained their objections. They indicated them in explanations of their vote, in abstentions or in reservations. Many of the others, perhaps the majority of those who had sounded the words of caution before, seem to have gone along with the stream.

It is in these circumstances that I would like, and I must ask the Court to bear with me, to look in some measure of detail into proceedings in the United Nations, with a view to seeing what kind of attention was given to this legal aspect of the matter. I so do particularly in the light of the contention, which is before the Court, that the action of the General Assembly is to be seen as that of a kind of court of law, one that has gone into this legal question and has given a decision which is to be regarded as binding by this Court itself.

Now, as a start, we have to go back to the year 1961, shortly after the Declaration on the Granting of Independence to Colonial Countries and Peoples. That declaration, the Court will recall, was contained in General Assembly resolution 1514 (XV) dated 14 December 1960.

The atmosphere at the time following this resolution, that is the end of 1960 running into 1961, was one of speeding up independence for all the remaining so-called colonial situations and South West Africa was, in this context, identified as being one of those. This led to the establishment of a committee which first consisted of 17 members, as decided in 1961, and later of 24 members, as decided in 1962, which was charged with this special task of decolonization.

In 1960 the General Assembly had also adopted a resolution specifically with reference to South West Africa—resolution 1568. In that resolution it requested the Committee on South West Africa to go to South West Africa and subsequently to report to the General Assembly on various things. Amongst others, to report on extending to the indigenous inhabitants ". . . a wide mea-

sure of internal self-government designed to lead them to complete independence as soon as possible".

The history is well known. This was the Committee referred to as the Fabregat Committee, after the name of its Chairman. The South African Government refused to let the Committee into South West Africa and there followed resolution 1596 of 7 April 1961 which condemned the attitude of the South African Government and which requested the Committee to carry on urgently with its tasks with the co-operation of the South African Government, if that could be obtained, and without it, if it could not be obtained.

Now, the Committee then proceeded to travel through various parts of Africa and to hear evidence and representations from various people, including a number of petitioners whose testimony and the weight one could attach to it, we dealt with rather exhaustively in the 1965 proceedings before this Court.

They then brought forth a report, which is undated, but it seems that it must have been in the early part of the second half of 1961 in time for the sixteenth session of the General Assembly. I should like to read to the Court three rather significant paragraphs from that report (*GA, OR*, Sixteenth Sess., Supplement No. 12A (A/4926), p. 18):

> "128. Representatives of the South West Africa Peoples Organization (SWAPO), and the South West Africa National Union (SWANU), as well as the representatives of all other African organizations appearing before the Committee in Accra, Dar es Salaam and Cairo appealed for immediate intervention by the United Nations to remove the South African Government from South West Africa and to protect the lives of South West Africans, without awaiting the outcome of the case pending before the International Court of Justice.
>
> 129. They considered the South African Government the instrument of the suppression and oppression of the indigenous population of the Territory and the principal hindrance to its development. They could foresee no possibility of a change of policy on the part of the South African Government.
>
> 130. The removal of the South African Government was therefore an essential prerequisite to the restoration of a climate of peace and security and to the initiation of any measure of self-determination."

One finds later in the report, under its conclusions and recommendation, that the Committee adopted in substance these contentions by the representatives of SWAPO, SWANU and others and, on that basis, they came up with certain recommendations. I quote two of them:

> "(2) The immediate institution of a United Nations presence in South West Africa;
>
> (3) Removal of the present Administration from the Territory of South West Africa, with effective and simultaneous transfer of power to the United Nations or to the indigenous inhabitants of the Territory" (*ibid.*, p. 22).

That, Mr. President, was the beginning of the story. The matter went from this Committee to the Fourth Committee where it was extensively debated during its sixteenth session in 1961.

We have prepared a document, Mr. President, and we have marked it "A"[1] with nothing more than these two recommendations which I have just read

[1] See p. 613, *infra*.

out and verbatim extracts from the records of the Fourth Committee debates. I would not like to weary the Court with reading all this into the record—it runs into some 12 pages. I would like to comment on it and, in passing, to quote brief passages from it here and there. I would suggest, subject to your approval Mr. President, that we hand this in so that it can become part of the record. So as not to make it too arduous for the Registrar and his personnel with translation and duplication, it would not be necessary to have it as an annex to today's record necessarily, it could follow in the course of time as an addendum to today's record. Would that meet with your approval? We have copies which we could make available to the other representatives.

Now the first contribution to that debate, to which I wish to refer, was that of Mr. Castañeda, the representative of Mexico, and I want to read the first paragraph of the extract in full, because that is significant. He said:

> "In general his delegation endorsed the conclusions and recommendations in the Committee's report. The Committee's basic recommendation was that the Mandate entrusted by the League of Nations to the Union of South Africa should be terminated, so that the administration of the Territory could be assumed directly by the United Nations for a period of time with a view to eventual independence. *As the Committee had not examined in detail the problem of the legal grounds for revoking the Mandate, and as that was no doubt a question which would give rise to some debate*, he wished to give his country's views on that subject." (Italics added.)

So here we have it pertinently from the representative of Mexico—that the legal grounds had not been considered; the legal basis for this kind of action, at any rate not in detail. As a matter of fact, looking through the deliberations of the Committee, it would be hard to say that it was examined at all. He said the Committee itself had not examined the legal grounds. I gave the Court the antecedents, the political background to the recommendations of the Committee, so we know under what circumstances they were made. So now, Mr. Castañeda says, in these circumstances, he wished to give his country's views on that subject. And Mr. Castañeda proceeded to deliver a well-reasoned, well-prepared, well-thought-out statement on the subject—a statement of high quality. The first portion of the next part of the extract is again significant and I would like to read this to the Court:

> "It was frequently thought in the United Nations that any solution which represented a real advance in dealing with a particular problem was of a political nature. It was said that lawyers were basically technicians whose principal mission was to elaborate legal arguments to justify already existing political positions, and that law was fundamentally conservative inasmuch as it tended to maintain the *status quo* and to prevent a radical change in the existing situation. For that reason most of the progress made in the protection of dependent peoples had been achieved through political action. In many cases the possibilities of legal action to change the existing situation had not been fully explored. Yet it was often possible to use legal machinery to alter situations which had become unsatisfactory, and it would certainly be worthwhile to explore the possibilities offered by international law to deal with the situation in South West Africa." (*GA, OR*, Sixteenth Sess., 4th Comm., 1226th Meeting, p. 436.)

Mr. President, he makes it so clear that he is operating in a general atmosphere where the urge is "let us do it by political action whether the law allows it or not and let the law follow", but he says it might yet be worthwhile to look

at the existing law in this instance. And then he proceeds to do so. He refers particularly to the principle which is being dealt with in this Court too, and which has been dealt with by some of my learned colleagues, i.e., the principle applicable to a case where a party to a synallagmatic contract, a bilateral agreement, violates or fails to fulfil its obligations. He puts the position, in my submission, very correctly:

> "When one party to a treaty did not comply with its obligations, the other party had two alternative courses: to demand the fulfilment of the obligation, or to demand the abrogation of the agreement on the basis of that non-fulfilment." *(Ibid.)*

In other words, he does not indicate that the non-fulfilment of violation automatically results in bringing the agreement to an end. He correctly says the other party has an election to make, and that election is a matter of decision. On that basis, he argues that there is now a possibility for the United Nations, as representing the organized international community, to bring about an end to the Mandate in South West Africa.

He skates thinly over certain difficulties, about, for instance, where the League of Nations would have got a power of this kind. He simply puts it on the basis that: "It would be absurd to claim that the League of Nations . . . had renounced the normal right of a party to a treaty to demand its revocation if the other party did not fulfil its obligation." He did not go into the constitutional difficulties in the case of the League Covenant in that respect. What is of the utmost importance is that he never considered the difficulty of the position of the General Assembly as the suggested supervisory organ, the difficulty to which I referred at the outset, that under the Charter it may, in this sphere, at any rate, make no more than recommendations. That is left wholly unconsidered in this otherwise very meritorious statement. We find that the other—or most of the other—participants in the debate are highly delighted. They congratulate the representative of Mexico on a brilliant analysis, and they seem to think that the path for legal action has now been indicated.

There were certain warning notes, too. But before I come to those, let me give the Court one or two instances of typical statements of the other kind—going the other way. Mr. Achkar of Guinea said:

> "The juridical arguments adduced by the Pretoria Government were acceptable only to its avowed accomplices, because that Government was completely indifferent to the findings of the Court when those findings were contrary to its own desires. The fact that the Governments of Liberia and Ethiopia had brought the question before the International Court of Justice could not be an obstacle to the liberation of the peoples concerned, since General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples must apply to them as well as to all others." (*Ibid.*, p. 456.)

Mr. Zikria of Afghanistan carried this line of thought a step further—much further. He said:

> "His delegation was not opposed to the idea of revoking the Mandate, but it considered that the United Nations, in adopting the Declaration on the granting of independence, had *ipso facto* revoked the Mandate under which South Africa was occupying the Territory in question." (*Ibid.*, 1229th Meeting, p. 458.)

Then we find that Mr. Taylhardat of Venezuela also dealt with it responsibly —but not in full. He raised certain queries. He said that the representative of Mexico had advanced cogent legal arguments, but at the same time he said in the existing state of affairs, however, the General Assembly should carefully examine the legal, political and other consequences of revoking the Mandate. This evoked rather strong protest from other participants in the debate. We find that Mr. Perris of Ceylon quoted out of context a statement of Field-Marshal Smuts, the same kind of quotation as we have had in these proceedings, and we find that Mr. Stoian of Romania very emphatically stated:

> "It was not a question of embarking now upon a study of the present situation in and the future of the Territory . . . The United Nations had to put an end to the South African Government's administration . . ." (*Ibid.*, 1233rd Meeting, p. 492.)

And so we find as we go along that various of the speakers stress the desirability, even the so-called necessity of taking this drastic step on the basis of decolonization or on the basis of protecting the people of South West Africa—even on the basis of protecting the prestige of the United Nations. But the legal aspect received very scant further attention, except from two speakers. Mr. Santiso Galvez of Guatemala also dealt at some length with the legal position, agreeing to a large extent with the exposition of the representative of Mexico, but with exactly the same hiatus in it—no reference whatsoever to the constitutional problem of the powers of the General Assembly. A typical statement of attitude came from the representative of the United Arab Republic, Mr. Abdel Wahab, who said:

> "Under resolution 1514 (XV), the General Assembly had proclaimed the immediate abolition of colonialism, and hence the recommendations of the Committee on South West Africa must be given effect." (*Ibid.*, 1234th Meeting, p. 502.)

Finally, a warning note came from Mr. Edmonds of New Zealand. I would like to quote a portion of that:

> "The 1950 advisory opinion did not make it clear whether the United Nations was itself competent unilaterally to alter that status. That was a most delicate question. Suggestions had been made that the General Assembly or the Security Council should revoke, suspend or transfer the Mandate, or even declare the Territory independent. The New Zealand delegation endorsed the objective of self-determination and the eventual assumption of separate national sovereignty by the people of South West Africa if that should be their wish, but it could not see how it would help for the Assembly simply to revoke or suspend the Mandate, even if that proved legally possible, which was extremely doubtful." (*Ibid.*, 1226th Meeting, p. 439.)

The distinguished representative proceeded to state his approach of policy, basically the idea that since the International Court was seised with the matter, it would, as a matter of law and a matter of policy, be better to await the outcome of their decision.

Then he closed off on this basis:

> "The matter bristled with both legal and practical problems. He felt sure that the representative of Mexico, whose valuable contribution to the debate would he hoped, be circulated in full, would readily admit that

there were weighty arguments against the termination of the Mandate." *(Ibid.)*

Now, Mr. President, that is where the matter rested for the moment as from 1961 onwards for a few years—well, I say "rested" more or less. It may well be that the idea of awaiting the outcome of the Court case gained ground—this is not so apparent from the debates, so much, it may have been a matter raised in consultations and which may have led to an adaptation of attitude.

We do find in the debates that the matter of prospective unilateral termination of the Mandate begins to raise its head again in discussions in the Fourth Committee in 1965, all in the context of considering the report of this Special Committee of Twenty-four on decolonization and in the context of bringing this so-called colonial situation to an end as soon as possible. I do not want to quote many of the statements that were made—just a few very brief ones by way of illustration.

Mr. Shrestha of Nepal said: "The United Nations should not allow legal technicalities to stand in the way of the Territory's attainment of self-government and independence" (*GA, OR*, 4th Comm., 1564th Meeting, p. 273).

Mrs. Mohammed (Nigeria) believed: "that the United Nations should intervene in South West Africa and enforce application of General Assembly Resolution 1415 (XV)" (*ibid.*, 4th Comm., 1567th Meeting, p. 298).

There were various other speakers—

Mr. Lamani (Albania): "The South African administration must be immediately removed from the Territory; the urgency of the situation made it impossible to wait for the decision of the International Court of Justice" (*ibid.*, 4th Comm., 1569th Meeting, p. 314).

Miss Smellie (Jamaica):

> "In the opinion of the Jamaican delegation, the International Court of Justice could not possibly find that South Africa had fulfilled its obligations under the Mandate. Pending the Court's decision, however, a way must be found to withdraw the Mandate for South West Africa from South Africa." (*Ibid.*, 4th Comm., 1570th Meeting, p. 328.)

And other speakers were to the same effect. But there was nothing like the avalanche which built up during the next year, 1966.

In that respect we have prepared a further document on the same basis as before, which we marked "B"[1], and which I would also like to hand in subject to your leave, Mr. President, and refer very briefly to some portions of it. The purpose of handing in the document is to enable the Court to check on the context and so forth.

Now this document contains extracts from discussions in a special committee —the Special Committee of Twenty-four. I would like to refer first of all to the statement of the Ivory Coast, which was made at the twentieth session, on an earlier occasion. Part of the statement reads:

> "To enable the people of South West Africa to obtain national independence, adequate measures must be enacted, such as the complete and early revocation of South Africa's Mandate and the immediate and effective establishment of either an emergency force or an international volunteer corps." (*GA, OR*, Twentieth Sess., doc. A/6000/Rev. 1, p. 139.)

Now, in the 1966 discussions the representative of Denmark sounded a warning note, which evoked strong reaction. He said:

[1] See p. 620, *infra*.

"In approaching the problem of how to secure rapid termination of the Mandate, however, care should be taken not to repulse those whose support was necessary. The General Assembly would of course be competent to cancel the Mandate if the claim that South Africa was violating it was validated. The question had, however, been brought before the International Court of Justice by Ethiopia and Liberia, and it would be contrary to the general principles of law for a political organ like the General Assembly to take a decision pending the Court's judgement, which was expected before the convening of the twenty-first session of the General Assembly." (*Ibid.*, Twenty-first Sess., doc. A/6300/Rev. 1, p. 273.)

I should make it clear that this discussion, although it took place in 1966, was before the Court's Judgment, as would appear from this very quotation.

And now we find strong reactions. I am not going to read them all—I will give a few as typical examples.

Iran:

"In accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United Nations should do its utmost to revoke the Mandate and thus secure the independence and freedom of the people of South West Africa." (*GA*, *OR*, Twenty-first Sess., doc. A/6300/Rev. 1, p. 274.)

Venezuela:

"Again, it had often been claimed that the problem was one of law. That was a pretext used by the administering Power to gain time and hold up such measures as the United Nations might take." (*Ibid.*, pp. 276-277.)

India, Poland and others stated that the Committee should not be deterred from its aim. The Ivory Coast came up with a very typical statement:

"Despite the fact that one aspect of the question was being examined by the International Court of Justice, he considered that General Assembly resolution 1514 (XV) should be applied to that Territory without delay. He agreed with the representatives of Denmark, Venezuela and Mali that the Mandate should be withdrawn from South Africa as soon as the International Court of Justice had handed down its judgment." (*Ibid.*, p. 280.)

So now, Mr. President, we find a combination of the two ideas. Some had been in a hurry—"Let's do it even before the Court gives its decision". Now we find this combination: "Let us be prepared so that we can do it as soon as the Court has given its decision", and so we find that on 9 June 1966 a sub-committee was appointed with the special task of investigating certain matters—amongst others to make a thorough study of the situation and to recommend an early date for independence of the Territory. That was the charge to the sub-committee.

And I wish to refer very briefly to the document "Addendum to Agenda Item 23 of the Twenty-first Session of the General Assembly" (A/6300, Rev. 1). From that record, at page 297, it appeared that the first meeting of the sub-committee was on 21 July 1966—three days after this Court had delivered its decision in the then *South West Africa* cases.

The Acting Chairman was Mr. Malecela of Tanzania, and he is reported to have—

"... stressed the determination of the African States to rid South West Africa of colonialism and apartheid. The failure of their efforts to solve the problem of South West Africa in a peaceful manner through recourse to the International Court of Justice confirmed not only that the problem was a political rather than a judicial one, but also that the composition of many organs of the United Nations needed reappraisal in the light of changed conditions. The problem of South West Africa, notwithstanding its complexities which were due in large measure to the support given to South Africa by colonial Powers having vested interests in the area, was in essence a simple one; it was a question of decolonizing the Territory."

So, not strangely, one finds that that is the atmosphere in which the matter is discussed and considered by the sub-committee, as appears from the following pages of this report. It is stated at the same page, paragraph 8, that members of the sub-committee expressed the opinion that the Court's Judgment of 18 July 1966 by ruling out the possibility of solving the problem of South West Africa by judicial means had placed upon the General Assembly a serious responsibility to achieve a solution through political action.

So, after further discussion comes the recommendations of the sub-committee at pages 298 to 299 of this report.

The first two paragraphs of the recommendations are to the effect that there should be reaffirmation of the declaration in resolution 1514 of 1960 and others which had followed upon it. In other words, the de-colonization resolutions, if I may call them that. And then paragraph *(c)* proceeds:

"The people of the territory should be given the opportunity to exercise their right to self-determination as early as possible, since only thus can their legitimate rights and interests be protected. For this purpose [that is for the purpose of giving them the opportunity of self-determination] the following steps are recommended:

1. The United Nations should recall that it has made all possible efforts to solve the problem by negotiations with South Africa.

2. The United Nations should again record the fact that South Africa has consistently refused to comply with the resolutions of the General Assembly in respect of South West Africa.

3. The United Nations should decide to exercise the right of reversion of the Mandate to itself.

4. The rights and responsibilities of South Africa as a mandatory Power in respect of South West Africa should be terminated, along with the assumption of responsibility by the United Nations for the direct administration of the territory, as well as the creation of appropriate machinery for the purpose."

Mr. President, at page 296 of the same report it appears that these recommendations were accepted by the Special Committee. They were, if you will recall, recommendations by a sub-committee reporting to the Committee of Twenty-four. The Committee of Twenty-four, by consensus, adopted the report.

On 15 September 1966, which was a few days before the opening of the Twenty-first Session of the General Assembly itself, the matter went from it directly into Plenary. It did not go to the Fourth Committee at all that time, and it is abundantly clear that no consideration was given at this stage—in these committee stages—to the legal question under discussion. The fact that that is so is underlined by a reservation made at the time of the adoption of

the sub-committee's recommendations by the representative of Denmark—that is at page 299 of this report. He stated that since the examination of the legal and political issues involved had not yet been completed by his Government, the Danish delegation had to enter a provisional reservation regarding sub-paragraph 3—that is the one about reversion of the right of mandate to the United Nations—and paragraph 32 *(c)* and paragraph 33, which concerned implementation under Chapter VII of the Charter by the Security Council.

At the adoption by consensus of the report it was stated that it was understood that the reservations expressed by the members would be reflected in the records. So those reservations still stood and that was the basis upon which the matter then went to the Plenary Session of the United Nations General Assembly.

Now, that brings me to a consideration of what happened during the debate. One finds, not surprisingly, that the accent fell repeatedly on the features to which I have referred in considering the prior stages of the matter: the need to take political action where the attempt at getting a decision from the Court on the merits of the matter by judicial action had failed.

The stock accusations against South Africa which had not been adjudicated upon by this Court were brought forth again. The need to have rapid decolonization in all remaining situations, including South West Africa, was stressed time after time. There were certain doubts expressed about the legal aspect by certain States, but these were on the whole simply brushed aside. But I may refer to statements made by Brazil—the reference is A/PV. 1427, pages 14, 15 and 16; France (A/PV. 1439, p. 16); Japan (A/PV. 1451, p. 2); the United Kingdom (A/PV. 1454, p. 6); Portugal (*ibid.*, p. 26); Italy (*ibid.*, p. 27) and Belgium (*ibid.*, p. 31).

These States did draw attention to the legal problem. As I have said, the warning notes they sounded were simply brushed aside. The representative of Brazil stated very flatly:

> "The General Assembly of the United Nations cannot deliberate in this context with mandatory authority, it being our function only to make recommendations to member States or to the Security Council (Article 10 of the Charter). It is the Security Council which can make decisions with cogent efficacy, for which the Charter established the appropriate and efficient means of implementation (Articles 41 to 50). It is not, therefore, legitimate for the General Assembly to decide to revoke the mandate and directly assume the administration of the mandated territory."

There were other warning notes of the same kind referring to the same matter by these other States to which I have referred. I do not think that I need quote any more to the Court. The one by Brazil puts it strongly, others put it in various other forms, but exactly the same point was raised by various of these States.

But the great majority of the members of the General Assembly preferred to ignore these warning notes. These were struck by South Africa, too, as we have stated before. South Africa clearly warned that quite apart from the absence of substantive justification for taking this resolution there was no legal basis on which the General Assembly could do it; and it stated this reason, amongst others—the fact that the General Assembly could not make a decision with binding effect.

One found that certain of the States did refer to legal aspects, but then again, in the same sense to which I have referred before, a suggested power on

the part of the League devolving on the United Nations by way of succession—no attention being paid to the problem of the General Assembly's power being confined to the making of recommendations.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

I was referring at the adjournment to the reaction of numerous States, by far the majority, in the debates in the plenary session of the General Assembly in 1966 to the warning notes about the legal position which had been sounded by France, Brazil, the United Kingdom and by certain other States. I would like to give references to the record and as examples I wish to quote only a few:

Sierra Leone (A/PV. 1419, p. 12):

> "The Court has thus left us with no alternative but to pursue political solutions in the proper forum, which cannot be the International Court, but the General Assembly. At this session our Assembly should not fail to take such a political action. It should clearly and unmistakably pronounce itself on the Mandate. Too much time has been wasted by vacillation."

Algeria (A/PV. 1429, p. 13):

> "The issue at hand clearly transcends its legal aspects to reveal its true political dimensions, which fall exclusively within the province of the General Assembly."

(A/PV. 1453, p. 6):

> "... the United Nations has chosen to deal with the problem of South West Africa on the political level alone".

Syria (A/PV. 1431, p. 12):

> "The problem has, of course, its legal aspects, but, as in the case of most other problems, it is mainly and basically political and it is as such that it can and must be effectively and vigorously tackled by this Assembly."

And finally, the statement on behalf of Israel (A/PV. 1439, p. 10), which is very significant and descriptive of the prevailing attitude:

> "In our view, the real effect of the Judgment of 1966 is that the political aspect of the question of South West Africa outweighs possible legal problems and that even the most scrupulous concern for legal niceties, may at this juncture cede its place to the political wisdom of the majority of the General Assembly."

That was the stance taken.

I can give the Court a list of further States which made statements to a similar effect: Pakistan (A/PV. 1414, pp. 37, 47, 48-50); India (A/PV. 1417, p. 15); Philippines (*ibid.*, p. 21); Sierra Leone (A/PV. 1419, pp. 11-12); Ghana (*ibid.*, p. 14); Zambia (A/PV. 1425, pp. 2 and 4); Libya (*ibid.*, pp. 7 and 8); Czechoslovakia (*ibid.*, p. 9); Poland (A/PV. 1427, p. 11); Mali (A/PV. 1433, p. 26); Yugoslavia (A/PV. 1439, p. 9); Israel (*ibid.*, pp. 9 and 11); Bulgaria (A/PV. 1449, pp. 4 and 5); Indonesia (*ibid.*, p. 14).

Now, Mr. President, I should like to revert to the aspect which I mentioned at the opening of this excursion into the records and annals of the United Nations, namely the suggestion that this matter was to be dealt with on a basis, not that the General Assembly itself takes revoking action, but that it

merely notes that something had already occurred as a result of South Africa's action.

The statements of the overwhelming majority of the participants in the debate were exactly to the opposite effect, i.e., that it was for the Assembly to perform the possible act of revoking the Mandate. I give the Court only a few very pertinent examples.

Guinea:

"The only manner in which we can live up to our responsibilities is to revoke the Mandate on South West Africa and to assume a direct responsibility for the administration of the Territory."

India (A/PV. 1417, p. 13):

". . . the only course of action left to the world community is to terminate South Africa's Mandate and to take upon itself the responsibility of administering the Territory . . ."

Tanzania (*ibid.*, p. 16):

"Let me make it clear that Tanzania firmly believes that the time has now been reached for terminating forthwith the Mandate entrusted to the Union of South Africa . . ."

Then Ghana, who introduced the main draft resolution, subsequently amended by the Latin American amendment.

Ghana (A/PV. 1419, p. 3):

"Secondly, the Mandate should be taken away from the Government of South Africa."

Then: Ceylon (A/PV. 1419, p. 6); United Arab Republic (*ibid.*, p. 9); Upper Volta (A/PV. 1425, p. 6); Hungary (A/PV. 1429, p. 12); Mongolia (*ibid.*, pp. 6-7); Algeria (*ibid.*, p. 14); Tunisia (A/PV. 1431, p. 5); Syria (*ibid.*, p. 12); Venezuela (*ibid.*, p. 13). In A/PV. 1431 two statements by the Congo (Brazzaville), page 2; Jamaica, page 7; Ukraine, page 9, Syria, page 11; Saudi Arabia, page 14; Ecuador in A/PV. 1433, pages 13 to 15; Uganda (*ibid.*, p. 41); Liberia (*ibid.*, pp. 94-95); Israel (A/PV. 1439, p. 11); Albania (A/PV. 1448, pp. 8-10); Uruguay (*ibid.*, pp. 57, 63, 68, 69, 70); Bulgaria (A/PV. 1449, p. 5); Cuba (*ibid.*, p. 6); Guyana (*ibid.*, p. 13); Indonesia (*ibid.*, p. 14); Ethiopia (A/PV. 1414, pp. 14-15, 18); Phillipines (A/PV. 1417, p. 21); Ireland (A/PV. 1427, p. 5); Sudan (*ibid.*, p. 6); Central African Republic (*ibid.*, p. 8) and Poland (*ibid.*, p. 10).

Mr. President, it was an overwhelming attitude and it was specifically put to the test by a sub-amendment proposed on behalf of the United States of America after the General Assembly convened again, having adjourned for purposes of consultation.

At an early stage in the debate the distinguished representative of the United States formulated his attitude as follows:

"By virtue of the breach of its obligations and its own disavowal of the Mandate, South Africa forfeits all right to continue to administer the territory of South West Africa. Indeed, it is because of South Africa's own action that it can no longer assert its rights under the Mandate, and, apart from the Mandate, South Africa has no right to administer the territory." (A/PV. 1439, p. 7.)

The Court will see the significance of this. This is an attempt, if I may say so, with respect, not to overcome the legal difficulty but to sidestep it if possi-

ble—take the attitude, or the position, that the General Assembly itself does not perform an act of revocation, that it takes note of something which has been done by South Africa already.

As I have said, this was still before it came to the stage of formally proposing amendments and so forth. Some support for this possible way of dealing with the matter was given by certain States, although not very consistently. An example of an attitude in this regard was the following statement of Denmark:

> "In the second place, we are of the firm opinion that South Africa has lost every right which it had in respect to South West Africa because of the countless and flagrant violations of its sacred trust under the Mandate." (A/PV. 1451, p. 6.)

I can refer also to statements by Finland (*ibid.*, p. 1), and Guinea (*ibid.*, p. 7). Sweden (*ibid.*, p. 4) made a statement which was less consistent:

> "As far as the Swedish Government is concerned, our starting point has been that South Africa is in continued breach of its obligations under the Mandate and that it has forfeited by its deeds every right to continue to administer the territory."

That is supporting the American line, in other words. But then the distinguished representative proceeded:

> "This situation should be formally and solemnly recognized and stated by the General Assembly. We feel that the General Assembly could and should go further and decide that the Mandate, as a consequence, is terminated . . ."

Thus Sweden jumped to the other approach in this part of the statement.

The Latin-American amendments which eventually resulted in the present operative paragraphs 3 and 4 of resolution 2145 were introduced at the 1451st meeting. Now, the significance is, of course, that, with respect, operative paragraph 4 in this wording contains the formulation that the General Assembly decides that the Mandate is therefore terminated.

At the 1453rd meeting, immediately after the informal consultations had terminated, the United States came with a proposed sub-amendment, the important wording of which read:

> "The General Assembly . . . decides that South Africa's mandate with a small 'm', . . . under the Mandate . . . has therefore terminated . . ." (A/PV. 1453, p. 2.)

After opposition to this formulation "under the Mandate", which was a continuation of the earlier idea, of course, of rights under the Mandate, the distinguished representative of the United States subsequently deleted the words "mandate under the", so that he still had the formula "decides that South Africa's Mandate has therefore terminated".

In his explanation, the distinguished representative stated:

> "Without going into legal technicalities, I believe it is the overwhelming desire of the Assembly to decide clearly that because of South Africa's continuing material breaches of its mandatory obligations and because of its disavowal of the mandate which South Africa has—and I emphasize that; the mandate which South Africa has, which is different from the Mandate, with a capital 'M', which it is an obligation of the international community to preserve until South West Africa reaches self-determination

and independence—has terminated; that South Africa has forfeited its mandate to administer South West Africa; and that its rights in the matter have come to an end." (A/PV. 1453, p. 1.)

Later, at page 9 of that document, the distinguished representative explained that the sub-amendment:

"... was designed to state that South Africa's Mandate was terminated, but that, as has been the overwhelming desire expressed in all texts that have been submitted, the international status of the Territory was preserved".

At this same meeting the distinguished representative of Norway stated some support for this approach, at page 4:

"After twenty years of futile discussion about the South African administration over South West Africa, the consensus has arisen in this session of the General Assembly that South Africa has lost its right to administer the Territory and that its Mandate is terminated."

Then there is also a similar statement by Austria in the same record, at page 5.

On the other hand, there came to the rostrum Mr. Malecela, the distinguished representative of Tanzania, with strong objection and repudiation of this line of approach and it became clear in due course that he was speaking on behalf of the overwhelming majority of members. I quote him at pages 2-3 of the General Assembly, *Official Records*, Twenty-first Session, A/PV. 1453:

"The only change has been a change in a few words which are indeed designed to deceive the Assembly. Instead of saying that South Africa has disavowed the Mandate, we are now being told today of a small m and a capital M. I do not think that it is really our business to come here and say whether the Mandate in South West Africa takes a small m or a capital M. Our contention is that we want the Mandate that has been exercised by South Africa in South West Africa, in whatever form, to be terminated."

And then at pages 7-8 of the record he explains that they have even had difficulties about accepting this formulation in the previous paragraph of disavowal of the Mandate at all, in addition to the statement that South Africa violated its obligation. He said:

"... in our original text what we really wanted to say was that because South Africa has failed—to do what? to administer the Mandate—we want to terminate the Mandate. The addition of the words 'and has, in fact, disavowed the Mandate', in our view, has certain connotations which my delegation does not accept. We do not accept the situation that because South Africa has disavowed the Mandate there is, therefore, no Mandate. What we have said is that, although South Africa says there was no Mandate, as far as we are concerned the Mandate was there, and that is why, in fact, we want to terminate it."

The matter became clearer still in the subsequent developments at the 1454th Plenary Meeting on 27 October 1966. Delegates had before them the original Afro-Asian draft resolution, the amendments proposed by the Latin American countries and the sub-amendments proposed by the United States.

A number of delegations explained their vote before the vote was taken. At

this stage almost the only statement indicating some support for the United States proposal came from the distinguished representative of the United Kingdom:

> "Secondly, it has throughout been our contention that the Assembly should not at this stage do more than state that the rights of the South African Government under the Mandate have terminated." (A/PV. 1454, p. 7.)

On the other hand, the expression of opposition to this concept by other States became more pointed and more clear and was reflected in the eventual voting. I quote the representative for Mali:

> "... we believe that the Mandate over South West Africa exercised by South Africa on behalf of the international community should be revoked and that efforts should be made during the current session to devise practical means to attain this goal" (*ibid.*, p. 4).

I quote the representative for Mauritania:

> "... the essential objective is the liberation of the fraternal people of South West Africa—in other words—the revocation of the Mandate now exercised by the *apartheid* régime over that area" (*ibid.*, pp. 4-5).

The representative for Ghana made a very significant statement:

> "In particular, we would have liked to see the United States sub-amendments formulated in such a way that the Mandate is terminated, and not merely comes to an end. We believe that, in this project, the United Nations must take positive action. The United States sub-amendments as they stand, merely describe a situation which is presumed to exist; we believe that the United Nations must take a positive step and that the Mandate must be terminated." (*Ibid.*, p. 11.)

I quote from the speech of the representative of Yugoslavia, and this is perhaps the most telling statement of all:

> "The first amendment [talking here of the Latin American amendment] proposes an addition which amounts to saying that the Mandate has already been terminated, that South Africa has, in fact, terminated it. That has two implications. One is that the Assembly is just taking note of a decision already taken by South Africa. But the plea of the representative of South Africa here that we should not take such an action proves that South Africa believes it has not so decided. South Africa even claims that it acts in South West Africa in accordance with the obligations of the Mandate." (*Ibid.*, p. 14.)

That is the basis given for saying that the United Nations must take positive action here. It must not rest on this fictional kind of suggestion that something has already happened of which it should merely take note.

Statements to a similar effect were made in the same record by Tunisia, page 5; Sierra Leone, page 10; India, page 11; Kenya, page 12; Burundi, page 15; and Congo (Brazzaville), page 20.

In the event, the proposed sub-amendment of the United States to operative paragraph 4 was rejected by 52 votes to 18 with 49 abstentions. After the vote the Soviet Union, Czechoslovakia and Poland all indicated their support for the need for the United Nations clearly and unambiguously to declare that it revoked the Mandate (*ibid.*, pp. 28, 29 and 31).

Mr. President, it becomes abundantly clear that, despite the warnings, the intention of the majority in the General Assembly was to take the positive action of itself purporting to revoke the Mandate. That that is so, is further confirmed by the subsequent references in resolutions of the General Assembly itself to what it had done in resolution 2145. I refer the Court first to resolution 2248 (S-V). There one finds this formula in preambular paragraph 3:

> "*Reaffirming* its resolution 2145 (XXI) of 27 October 1966, by which it terminated the Mandate conferred upon His Britannic Majesty . . ."

One finds the same thing in resolution 2324 of the Twenty-second Session, first preambular paragraph:

> "*The General Assembly*,
> *Recalling* its resolution 2145 (XXI) of 27 October 1966, by which it terminated the Mandate for South West Africa . . ."

Likewise in the third preambular paragraph of resolution 2325 of the Twenty-second Session:

> "*The General Assembly*,
> . . . . . .
> *Reaffirming* its resolution 2145 (XXI) of 27 October 1966, by which it terminated the Mandate for South West Africa . . ."

So in the General Assembly's own view there was no doubt whatsoever as to what it considered it had done, or purported to do, or intended to do in the decision contained in operative paragraph 4 of resolution 2145.

In other words, the contention by the distinguished representative of Finland in this Court really amounts to an attempt to resurrect something which was buried in New York in 1966, and the other feature which emerges very clearly is that the powers, who had warned about the legal implications, realized then very clearly what France today is still saying in its written statement to this Court, namely that the General Assembly in this respect manifestly exceeded its legal powers.

So, Mr. President, against this background we can now look at the nature and the contents of the arguments that have been presented to this Court in attempted support of the validity and binding effect of General Assembly resolution 2145.

I have referred to the general feature that not one of those arguments is based on the provisions of the Charter. One finds that the suggested source outside the Charter which is mostly relied upon is succession of powers from the Council of the League and, more particularly, succession in general of supervisory powers in respect of the mandate, which is said to include a power of unilateral termination. And it is then contended that by this process there was, as it were, an enlargement of the powers which the General Assembly obtained under the Charter.

The reasoning is more or less spelt out in this way in certain statements, in other cases it is more by way of suggestion that one infers that that is what is meant. I refer to the written statement by India at **I**, pages 839-840; the United States written statement, page 877; the Pakistan oral statement, pages 139-140, *supra*; and, by suggestion, the same line of argument seems to emerge from the oral statement on behalf of the Secretary-General, page 50, *supra*, and the written statement of Nigeria at **I**, page 893.

Now, Mr. President, it will be obvious that this whole line of reasoning would fall to the ground if the Court should uphold our contention that the supervisory

powers of the League Council did not pass to the General Assembly of the United Nations, and that the majority Opinion of the Court in this respect in 1950 must be considered to have been wrong. It therefore remains for us to consider the line of argument now under discussion on the assumption, which I make purely for purposes of argument, that the 1950 majority Opinion was correct in this respect, and that we have to argue the matter on that legal basis.

Now, that 1950 Opinion itself indicated the very well-known limitation:

> ". . . that the degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the mandates system".

So, it follows that if the Court should uphold our contention that the Council of the League itself did not have a power of unilateral revocation of a mandate, that also would be an insuperable obstacle to the line of argument now under consideration. Consequently, again for purposes of this argument, I make an assumption on that point against ourselves. I assume, for purposes of this argument, that that contention is decided against us. These were the same two assumptions on which we discussed that point in Chapter X of our written statement. And then it becomes necessary on this basis to examine more closely the notion that by a process of succession the General Assembly obtained powers in addition to those conferred upon it by the Charter of the United Nations.

My learned friend, Mr. Grosskopf, has already dealt briefly with this notion at pages 266, *supra*, and he has in my submission demonstrated that it is a fundamentally unsound notion. He indicated then that the matter would be dealt with further, and I propose to do so now.

Let us look at it in principle first. The obligation to report and account was imposed upon each mandatory directly in its mandate instrument, although those provisions of the mandate instrument respectively referred back to the provision in paragraph 7 of Article 22 of the League Covenant.

In the case of the Mandate for South West Africa, Article 6 provided:

> "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."

So that, Mr. President, is the legal origin of an obligation to report and account, and that is the basis upon which it is said then that the League Council obtained supervisory powers in respect of the Mandate. If one were to answer the questions what are the powers of the League Council in response to this obligation to report and account, what powers may be exercised by the Council in order to satisfy itself about the report and to do anything which may arise from the reports and the discussion of them in the Permanent Mandates Commission and in the Council, one does not find an answer to those questions in the mandate instrument. They are not dealt with there. They are dealt with in the Covenant, and one has to look at the provisions of the Covenant in order to see what powers could be exercised by the Council in this respect.

Now we may come to the notion of succession as expounded by the Court in 1950, and the two explanatory Opinions of 1955 and 1956. It really amounted to this: that the basic obligation of the mandatory to report and account to the Council of the League has now by some legal process or other become, or is to be seen as, an obligation to report and account to the General Assembly of the United Nations. This is still by reason of the origin of this obligation imposed in Article 6 of the Mandate and whatever other legal basis one adds to it in

order to arrive at the conclusion of succession. But then it follows that in order to see what powers in respect of supervision, correlate to the reporting and accounting, this new supervisory organ, the General Assembly, would be able to exercise, one again has to look at its Constitution. There is no other place where one can look for it. The Covenant of the League was not intended to apply to the General Assembly. Nowhere is any intention manifested to import into the possession of the General Assembly any of the powers, any of the provisions of the Covenant applicable to the Council of the League, so that the Charter is the only place where it is possible to see what kind of powers could be exercised by the General Assembly, assuming it to be the new supervisory organ. And what I have just stated finds emphatic recognition, strong emphasis, in the very advisory opinions upon which reliance is placed for the *proposition that there has been a succession.*

We begin with the 1950 majority Opinion:

> "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.)

This passage is quoted in the 1955 Opinion, which then proceeds to state:

> "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. While in exercising that supervision, the General Assembly should not deviate from the Mandate, its authority to make decisions in order to effect such supervision is derived from its own Constitution.
>
> Such being the case, if follows 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." (*I.C.J. Reports 1955*, p. 76.)

Nothing could, in my submission, be clearer than that, or more emphatic. Again, later at the same page:

> "It is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find the rules governing the making of its decisions in connection with those functions."

So, again the position could not have been stated more clearly. Those observations by the Court, those pronouncements, were applied in that particular Opinion, as the Court will recall, to the question whether in exercising supervisory functions the General Assembly was obliged to apply the unanimity rule which was applied in the League or could proceed under the provisions of the Charter, which would in this case, according to its view, mean a two-thirds majority decision.

It was on the basis of these pronouncements that the Court said that the General Assembly had no option in that regard. It had to act on the basis of its own Constitution, and not in accordance with a notion of unanimity rule which was entirely foreign to it. It said:

> "It would be legally impossible for the General Assembly, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa, and on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter." *(Ibid.)*

One might then ask, Mr. President, applying those same pronouncements to the question under consideration, would it not be just as legally impossible for the General Assembly to ascribe to its resolutions under Article 10 a binding force which is entirely alien to that prescribed by the Charter. I said "its resolutions under Article 10"—I meant any resolutions which it could take with reference to the exercising of its supervisory functions, which this Court itself said in 1950, and affirmed in 1955, were to be taken under Article 10.

The fact that this must follow is clear from the very language employed by the Court, particularly in 1955. The Court said: "The voting system is related to the composition and funtions of the organ. It forms one of the characteristics of the constitution of the organ." (*I.C.J. Reports 1955*, p. 75.) So it must follow, I submit, Mr. President, that the non-binding nature of decisions and resolutions must also be one of the characteristics of the organ, or of the Constitution of the organ, and that has indeed often been said by commentators with reference to the General Assembly. In the 1955 advisory proceedings, this aspect became an important matter for the purposes of the reasoning of at least two of the judges.

Judge Klaestad specifically stated and emphasized that one had these two counter-balancing features in the Constitution of the General Assembly, namely on the one hand, that it could reach resolutions by an ordinary or a two-thirds majority, as opposed to the unanimity rule in the Council, but that, on the other hand, its resolutions, with immaterial exceptions, had no binding effect but were only recommendatory. He stated, at page 88 of his separate opinion: "Recommendations adopted by virtue of Article 10 concerning reports and petitions relating to the Territory of South West Africa . . . are not legally binding on the Union of South Africa in its capacity as mandatory power."

And it was on this basis, Mr. President, that he then satisfied himself that he could come to the conclusion which he stated on the same page:

> "By the operation of the rules on voting procedure in the General Assembly, the Union Government cannot therefore become subjected against its will to other or more onerous legal obligations than it had under the supervision of the League."

Had it not been for this feature, also a characteristic of the constitution of the organ, then it seems that Judge Klaestad could not have concurred in the Opinion of the Court.

Judge Lauterpacht, the Court will recall, was to the same effect. He had a qualification to the non-binding effect of General Assembly resolutions when a number of them were taken on the same subject and ascribed to a situation which under certain circumstances could give rise to some legal binding effect, which is not relevant to the point under discussion at the moment.

What is important is that Judge Lauterpacht, too, regarded these two features: the facility to come to resolutions by an ordinary or a two-thirds majority and the feature of a legal effect which was certainly not as binding as those of the decisions of the Council of the League. He ascribed to those two features a counter-balancing effect.

So Mr. President, the Advisory Opinions of this Court itself, explaining the

conceptions of the succession in regard to supervisory functions, entirely refute this idea that such succession could have resulted in conferring upon the General Assembly any constitutional power not provided for in the Charter. This applies, par excellence, to the suggested power of making a binding decision, where the Court itself has indicated that the supervisory powers are to be exercised by the General Assembly under the competence conferred upon it by Article 10 of the Charter, relating only to the making of recommendations.

So, with respect and submission, my learned friend, Mr. Grosskopf, was perfectly right in contending that the General Assembly, in acting as successor to the supervisory functions of the Council of the League, would be subject to additional limitations upon its powers—additional, that is, to those imposed under the Charter—by reason of what the Court said in 1950, that it could not exceed the degree of supervision which had operated in the times of the League, but it could not, in acting as such a successor, be clothed with powers additional to those conferred by the Charter.

It is interesting and very significant to note that if this were otherwise there would be this strange anomaly, that the General Assembly, in exercising powers of supervision in respect of a mandate, which is a situation not provided for in the Charter, would have greater powers vis-à-vis the administering authority than it would have in exercising supervision under a trusteeship agreement, which is specifically provided for in the Charter. The Court will recall that one of the issues strenuously contested in the United Nations circles over a long period of years, and in this Court in 1950 in connection with its advisory opinion, was the question whether South Africa was under a legal obligation to enter into a trusteeship agreement. The Court decided by a majority in the negative.

The anomaly would result if this contention, if this line of argument with which I am dealing, were to be upheld. The anomaly would be that if the Court had decided the other way around, if the Court had decided that South Africa was under an obligation to enter into a trusteeship agreement and South Africa had then complied, then the powers of the General Assembly over it would have been less than they are now.

In order to substantiate what I have just said, I would like to refer to the record on this question of what the intentions were regarding powers relative to trusteeship agreements. In our submission, that record is entirely clear: that there was a strong philosophy about the voluntary basis of the whole trusteeship system, and that philosophy militated too strongly against any contemplation or any arrangement whereby a power would be conferred upon supervisory organs to take a binding decision against the will of the administering authority on anything, and in particular a unilateral decision in regard to revocation.

As the Court knows, Article 77 of the Charter makes provision for the territories to which the trusteeship system shall apply, and it stipulates that it will be a matter for subsequent agreement as to which territories in the categories set out will be brought under the trusteeship system and on what terms. Article 79 then provides that the terms of trusteeship for each territory to be placed under the trusteeship system—and this is important—including any alteration or amendment of those terms, shall be agreed upon by the States directly concerned including the mandatory powers in the case of territories held under mandate by a Member of the United Nations, and then they shall be approved as provided for in Articles 83 and 85. Well, one of course, applies to approval by the Security Council in the case of strategic areas, and the other approval by the General Assembly in the other cases; so the basic arrangement was one of terms being agreed upon, including the addition or alteration or amendment

of those terms, primarily by the States concerned, including the mandatory power, if there be such, and the function of the supervisory organ, be it Security Council or General Assembly, being one of approval.

Toussaint, *The Trusteeship System of the United Nations*, at pages 92 to 93 points out, in our submission correctly, that the main role of the United Nations in the bringing of a territory under trusteeship is its approval of the terms of the trusteeship agreement drawn up by the States directly concerned—whatever that might mean.

The Organization cannot take the initiative in the conclusion of an agreement, he says, other than to make recommendations in this regard to the States directly concerned. And in regard to the alteration of trusteeship agreements, he states at page 133:

> "Chapter XII of the Charter indicates that the initiative for the alteration of a trust agreement must come from the 'States directly concerned' since Article 79 gives the General Assembly power only to *approve* the alteration. It is relevant to take note of the report approved by the General Assembly's Fourth Committee, to the effect that the General Assembly should instruct the Trusteeship Council . . ."

Now this is the suggested instruction to the Trusteeship Council:

> ". . . if it is of the opinion that, in the light of changing circumstances and practical experience, some alteration or amendment of any such Trusteeship Agreement would promote the more rapid achievement of the basic objectives of the Trusteeship System, to submit such proposed alteration or amendment to the Administering Authority so that, if agreed on pursuant to Article 79, such alteration or amendment may then be submitted to the General Assembly for approval".

The Court would note the very far cry from the suggestions here made to it to the effect that the supervisory authorities have powers of issuing binding directives to the administering State.

The Charter is completely silent as regards termination or revocation of a *trusteeship agreement, excepting the provisions which I have just mentioned:* that in the ordinary course where this provision is made for how an amendment or alteration can be brought about, that would then normally apply in the absence of specific qualifications to that provision—that would be the operative rule applicable to any alteration, including that of a revocation or a termination, in the absence of stipulation to the contrary. It is, of course, feasible, possible, legally—it would have been possible practically—for trusteeship agreements to provide in their turn for particular modes of termination or revocation, and it is possible that qualified or limited wide or narrow powers of unilateral action may have been conferred upon a supervisory authority, but if that was done the power or the right of the supervisory authority to act in that way would flow on an ordinary treaty basis from the consent of the States directly concerned, including the administering authority, in conferring upon the supervisory authority this special right. It would then flow from that specific stipulation conferring the consent of the parties concerned. If there are no such express stipulations, there is nothing in the Charter which authorizes either the General Assembly or the Security Council, as the case might be, unilaterally to terminate or revoke an agreement. And when one has recourse to the history of the drawing-up of the Charter it becomes abundantly clear that this was deliberately done in this way. It was, in fact, the intention that the United Nations

organs would not have the power of unilateral termination or revocation of a trusteeship agreement.

Within the United States there were at an early stage draft proposals relative to provisions of the Charter concerning the trusteeship system, and some of these made provision for a power on the part of the General Assembly unilaterally to revoke or terminate a trusteeship agreement. One finds a proposal by the post-war Programmes Committee:

> "The General Assembly should be empowered . . . words:
> *(b)* To take action upon the recommendations of the Trusteeship Council concerning the initial territorial charters, alterations in such charters, designation of administering authorities, removal of such authorities for cause, and the conditions of termination and the act of termination of trusteeship in any territory." (Russell, *The History of the United Nations Charter*, p. 346.)

But such proposals ran into very strong objections within the United States, particularly from the representatives of the War and the Navy Departments, who felt that such proposals would not adequately protect United States security interests in the Pacific—that is stated in the same source at page 577.

In the final event, the official United States plan regarding trusteeship, as proposed at San Francisco, contained no provisions whatsoever regarding revocation or termination of the trusteeship agreement. That one finds also in the same source, at pages 589 and 1030-1031. In the Five-Power consultative group, China alone proposed to provide for action against violation of a trust agreement. Such violation, China argued, would be a matter of international concern and should be brought before the Assembly or the Security Council as the case might be. The implications of this suggestion were clearly unacceptable to the United States, and no reference to the possibility of violation of a trusteeship agreement was included in the working paper discussed by the United Nations Conference in San Francisco. This is again the same source at pages 836-837.

At that Conference, during the general discussions in Committee 2/IV, Ecuador suggested that the General Assembly should be empowered to declare a trust territory independent upon specified conditions. However, the working paper was also silent on the question of criteria or methods for terminating a trust or transferring it from one administering authority to another. With reference to the lack of such provisions, Russell comments:

> "The general provision that states directly concerned would have to agree, not only to the original trust arrangements, but also to 'any alteration or amendment' in them, meant of course that neither termination nor transfer could occur without the consent of the original administering authority. This situation was not overlooked in the committee discussions, where questions were raised about amendment and termination procedures.
>
> The United States explained that the states originally concerned would have to agree to any subsequent changes, which would then be submitted for approval by the Organization as in the case of the earlier agreement. Termination of a trust or a change in the administrator would constitute 'alterations' in this respect. The only compulsory transfer might be in consequence of a breach of the peace by an administering authority, when force would be required and the general powers of the Security Council could be invoked. To the question whether the Assembly could take action against an administering state that failed to carry out its obligation, only the weak answer was made that, in cases of negligence not

reaching the point of a breach of the peace, the peoples of the territory (if non strategic) would have the right of petition." (Russell, *A History of the United Nations Charter*, p. 837.)

I may point out in passing that according to the same source, in the Five-Power consultative group, the United States adopted a similar point of view with regard to mandates. It reaffirmed its understanding that a mandate could be altered only with the voluntary consent of the mandatory. It was probably because of these explanations by the United States that the delegate of Egypt was prompted to make a formal proposal at San Francisco regarding the termination of the trusteeship. He moved that provisions embodying the following principles should be included in the chapter on trusteeship:

"In all trust territories, within its competence, the General Assembly shall have the power to terminate the status of trusteeship and declare the territory to be fit for full independence, either at the instance of the Administering Authority, or upon the recommendation of any member of the Assembly. That whenever there is any violation of the terms of the trusteeship arrangements by the Administering Authority, or when the administering power has ceased to be a member of the United Nations, or has been suspended from membership, the Organization shall take the necessary steps for the transfer of the territory and the trusteeship to another administering authority, subject to the provisions of Articles 2 and 6 above." (UNCIO docs., Vol. X, p. 547.)

In favour of this motion, it was argued that it was intended to fill a gap in the Charter on trusteeship, which contained no provisions relating to the termination of trusteeship. The Egyptian delegate stated further that the Committee should draw conclusions from the experience of the League of Nations relative to the withdrawal of Japan from the League. He said that although Japan disregarded the obligations in respect of the Mandate which it had assumed, the League had taken no action because the Mandate had been allocated, not by the League but by the Allied and Associated Powers.

Mr. President, against this motion, both the United States and the United Kingdom argued that provisions for termination or transfer of the trusts without the consent of the administering authority would be contrary to the voluntary basis of the system (Russell, *op. cit.*, p. 838). It was also argued that in some cases details with regard to termination through independence might be included in the trusteeship agreement, and that with regard to the question of the transfer of the territory to another administering authority, as a penalty for maladministration, the Security Council was empowered to go into any dispute or situation brought to its attention by any State. I refer again to an UNCIO document, Volume X, pages 547-548. The result was that the Egyptian delegate withdrew his proposal, as appears from page 548.

So, it is clear, Mr. President, in our submission, that provisions empowering the General Assembly unilaterally to terminate or revoke the trusteeship agreement, were deliberately not included in the Charter. In other words, by the deliberate intent of the authors of the Charter, the General Assembly does not enjoy the power unilaterally to revoke or terminate the trusteeship agreement, whether on the basis of violation of obligations or at all. And even in regard to the position in the Security Council, the attitude adopted by States there, my learned friend, Dr. van Heerden, has already referred the Court to the attitude which was taken by the United States representative concerning the draft agreement in respect of Micronesia and the support which he received from the Council in that respect (*supra*, p. 328).

So, Mr. President, in concluding in respect of this line of argument to the effect that the General Assembly, by succession to supervisory powers, obtained powers of binding decision which were denied to it by the Charter, our contentions are, in the first place, that the whole line of argument rests on a misconception of the concept of succession as explained in the very advisory opinions of the Court which are relied upon for contending for such a succession, and secondly, it results in the anomaly that in respect of a mandated territory not placed under trusteeship, the General Assembly would have greater powers in this respect than concerning mandated territories that were placed under trusteeship.

The Court rose at 1 p.m.

SIXTEENTH PUBLIC SITTING (4 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

QUESTIONS BY THE PRESIDENT AND JUDGE JIMÉNEZ DE ARÉCHAGA

The PRESIDENT: I would like to address a question to the representative of South Africa, which, of course, as is the case with any questions put to the parties appearing before the Court, can be answered at their convenience.

The question is this. Kindly see page 16 of the *South West Africa* cases Judgment 1966, where it is submitted on behalf of the Government of South Africa:

> "1. 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."

In view of this submission, I would wish to be clear on the question: under what title does the Government of South Africa claim to carry on the administration of Namibia?

Judge Jiménez de Aréchaga also has two questions which he wishes to address to the representative of South Africa.

Judge JIMÉNEZ DE ARÉCHAGA: The first question is this.

In view of the importance assigned to Article 80, paragraph 1, of the United Nations Charter in the 1950 Advisory Opinion, I regret that the representatives of South Africa, in their thorough presentation of the case, have not examined the legislative history of this Article at the San Francisco Conference, in the same way as they have dealt with the proceedings of the 1919 Paris Peace Conference.

As the context of the Charter might also be helpful in determining the object and purpose of the above-referred provision, I would like to ask the representative of South Africa these two questions:

(a) What would be the meaning and effect, in the view of the Government of South Africa, of the proviso at the end of Article 76 of the Charter ("subject to the provisions of Article 80") if Article 80, paragraph 1, were to be interpreted as having the effect contended for by South Africa?

(b) What would be the meaning and purpose, according to the same interpretation, of Article 80, paragraph 2, of the Charter?

The second question: In the *South West Africa* cases, Judge Jessup asked the parties:

> "In the interpretation and application of Article 73 of the Charter of the United Nations, is South West Africa to be considered one of those 'territories whose peoples have not yet attained a full measure of self-government' as this phrase is used in that article?" (*I.C.J. Pleadings 1966*, Vol. VIII, pp. 16-18.)

The applicant States answered, *inter alia*, that:

> "The standards of administration of non-self-governing territories stipulated in the first four paragraphs of Article 73, that is paragraphs *(a)-(d)*, apply to South West Africa in the sense of providing a floor below which the treatment of the inhabitants of the Territory cannot be permitted to fall.
>
> The procedure of international accountability stipulated in paragraph *(e)* of Article 73 does not, however . . . apply to South West Africa . . ." (*I.C.J. Pleadings 1966*, Vol. IX, pp. 124-125.)

The Government of South Africa stated, *inter alia*:

> "The Applicants have not asked the Court to determine that Article 73 is applicable to the Territory, and in view of the provisions of Article 7, paragraph 2, of the Mandate, which are relied upon as the sole source of the jurisdiction of the Court in respect of this case, the Court would, in our respectful submission, possess no jurisdiction to make such a determination if it were formally asked to do so in these proceedings . . . In view of all these circumstances, we must regretfully, and with the greatest respect, decline to express a definite point of view on the question put by the honourable Judge Jessup." (*I.C.J. Pleadings 1966*, Vol. IX, p. 471.)

The question is: Since in advisory procedure the Court is not subject to the same limitations of a jurisdictional nature, I wish to ask the representatives of the Government of South Africa if they would be prepared to provide information as to whether, in the opinion of the Government of South Africa, paragraphs *(a)* to *(d)* of Article 73 of the Charter of the United Nations apply, or have applied at any time, since the entry into force of the Charter, to the Territory and people of Namibia (South West Africa)?

ORAL STATEMENT BY MR. DE VILLIERS (cont.)

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: We shall be pleased to reply to the questions in due course. I could indicate our attitudes about them now, but I think we could be more helpful to the Court if we take some time in giving a fully reasoned reply.

Mr. President, at the conclusion yesterday I had just finished our reply to the line of argument which attributed to the General Assembly, on a basis of succession, powers which were not granted to it under the Charter. And I submitted that the line of argument was without any substance.

It is not surprising, in our submission, to find that the distinguished representatives of Finland and the Netherlands did not find it possible to associate themselves with that line of argument, and each of them sought an independent way out of the predicament. I propose to deal now with their contentions, first with those of the distinguished representative of Finland.

As I indicated yesterday in a review of proceedings in the United Nations prior to and during 1966, this line of argument as presented by the distinguished representative could be described as an attempt—not in a derogatory sense, but nevertheless as an attempt—to sidestep the problem rather than to meet it head on. I referred broadly yesterday, to what that argument was. I should like to quote his own words today before dealing with his contention. The distinguished representative commences by admitting that, in general, resolutions of the General Assembly are not binding (*supra*, p. 85).

Now, the gist of the contention with which I wish to deal is to be found at page 86. *supra*. In reality paragraph 4 does not constitute a decision—paragraph 4, that is, of resolution 2145. The resolution in fact contains only one decision and that is paragraph 6, concerning the establishment of an *ad hoc* committee. All the other provisions consist of determinations, declarations, requests and similar expressions. Taken literally paragraph 4, read with paragraph 3, merely means that "South Africa itself ended the Mandate through its blameworthy conduct". Consequently, this was "no more than a fact determined by the Assembly".

One page earlier, at page 85, *supra*, the distinguished representative had indicated the following about such a determination:

> "Here it may be contended that all the Members, including those which voted against or abstained on the resolution, ought to accept this authoritative determination by the principal organ of the universal organization and act and adjust their conduct to accord with it. It may thus be claimed that such determinations have a certain binding force."

At the same page, however, he proceeds to state: "However, at the same time I recognize that all the General Assembly's resolutions lack sanctions."

Now, Mr. President, how are we to understand this argument? The basis is apparently that paragraph 4 of the resolution does not constitute a decision, but is a determination of fact. The so-called fact it that South Africa itself ended the Mandate through its blameworthy conduct, and, thirdly, the result which follows is, in his words, "a certain binding force", not an unqualifiedly binding effect but "a certain binding force", but one without sanctions.

Now, certain answers and comments on this line of reasoning offer themselves immediately. The first is the consideration with which I dealt yesterday, at some length, I am afraid, with reference to the proceedings in the United Nations, namely that this idea of approaching the matter in this particular way was specifically proposed in the General Assembly and rejected by the majority. This is indicated by all the factors that I mentioned yesterday—the wording, the history in dealing with the amendments and the sub-amendments, the voting on them, the comment in the debate, the subsequent description in later resolutions of the General Assembly, of what was done in resolution 2145—and to that I may add the same kind of description which one finds in the various resolutions of the Security Council, with which we deal in our oral statement (*supra*, pp. 230-231) and in our written statement, Part B of Chapter V, paragraphs 6-15, where the wording on this aspect is quoted of the various Security Council resolutions, referring to resolution 2145 of the General Assembly as having itself terminated the Mandate.

But I would not like to leave it with that comment which, in itself, in my submission, is really sufficient. The following aspect of comment which offers itself is that, as we have indicated before, conduct violating obligations under an agreement or a treaty, or some other legal relationship, does not automatically bring that treaty or relationship to an end. What arises—if it is, of course, conduct of a fundamentally violating nature—is a right of election for, usually, the other party to the contractual arrangement. And that election has to be exercised; the party has an option whether either to insist upon performance or to treat the non-performance or the violation as a ground for cancellation or revocation of the agreement or legal relationship. My learned friend, Mr. Grosskopf, dealt with this matter in his oral statement (*supra*, p. 265), and referred the Court to authorities.

It seems, Mr. President, that the representative of Finland is in agreement with these general principles, with this basic position that violating conduct does not itself terminate a contract or relationship, because if we refer to his oral statement at page 82, *supra*, we will see that he refers back with approval to the written statement of Finland, paragraph 5, which deals with the subject. I wish to quote to the Court two extracts from paragraph 5, indicating the way in which these principles are dealt with there.

> "It seems natural, as is obviously the case of South Africa, that if the mandatory continuously violates its obligations, the organization that supervises the administration may declare the Mandate forfeited."

"May declare"—it is a right; it is not an obligation or an absolute situation.

Later, in referring to the distinguished author, Casteñeda, the written statement says:

> "He refers to general principles of law, according to which treaty relations imply that if either party does not carry out its obligations, the other party may consider the treaty terminated. Consequently, the General Assembly had the right to cancel the South West Africa Mandate. This principle is also upheld by Article 60 of the Convention on the Law of Treaties, adopted in Vienna on 22 May 1969."

So much for the quotation from the written statement with which, as I have said, the distinguished representative identified himself in his oral statement. So that basis seems to be common cause and that, I submit Mr. President,

presents an insuperable difficulty for the line of argument presented by the distinguished representative.

I will deal with that further, but first I want to point out with reference to his use of the word "fact", a determination of "fact", that the question whether conduct has occurred which may on these principles justify a revocation or cancellation of an agreement or legal relationship, is not necessarily confined to fact, it could also include important questions about interpretation of the law and application of the law to the fact. So that is an over-simplification too.

Then finally, Mr. President, to speak of the result of the General Assembly's action as being "a certain binding force" and "without sanctions" again, I submit, particularly in the context of international law, is rather vague and unsatisfactory, with the greatest respect. In international law par excellence we know of so many situations in which there may be binding obligations but where sanctions, in the ordinary sense in which they are available in a municipal system may be lacking. The question with which we are dealing here is not whether there are sanctions. When the distinguished representative says "sanctions" he does so, apparently, in the same sense in which I have just been using the word, because he speaks of prospective action by the Security Council apparently under Chapter VII of the Charter. So it is really of no assistance, to come to a conclusion about the problem of the binding effect or otherwise of resolutions of the General Assembly, to use these terms about them.

The distinguished representative was asked by Sir Gerald Fitzmaurice, in the question to which he replied yesterday, to indicate more specifically what he meant by the actions of the General Assembly in this respect, particularly if it was contended that the General Assembly was acting as a kind of court of law in making determinations of fact and of law. The Court has seen the answer and, in my submission, the answer has left the matter just as ambiguous as before. Exactly the same expressions are used and nothing is stated, with respect in the answer which directs itself to the specific question which has been put.

But, Mr. President, I do not wish to leave the matter on this more or less dialectical basis. There are much more fundamental objections to the line of argument presented by the distinguished representative, even if one disregards the fact that the basis for it was already rejected in what the General Assembly majority did in 1966—even assuming that that has not happened and that it is still open to present this argument to the Court. Let us examine what are the possible alternatives, the possible variants, in the extent of powers which could theoretically, if so intended, be given to a supervisory organ in regard to revocation of a mandate or a trusteeship agreement on the ground of alleged fundamental violation of obligations by the mandatory or administering authority.

In other words, I am not postulating the case of a grant of absolute legislative sovereign-type of powers in this respect—that is one of the contentions, too, which has to be dealt with on its merits, but that is not the contention of the distinguished representative of Finland.

If we accept that this is a matter of suggested power to act on the basis of a fundamental violation of obligations, let us see what are the possible, theoretical variations in the scope of power which could be bestowed upon an organ in that respect.

In my respectful submission, there are only two basic patterns which offer themselves logically. There could of course be variations, minor details by stipulation which could introduce qualifications and variations, but basically the two patterns would be as follows.

The first one would be for the organ to be clothed with full power to effect

a revocation with final and binding effect. If one analyses that it would really mean a combination of two powers: the first power would be a quasi-judicial one—it would be a power to determine that a violation justifying a revocation has occurred, and it would have to be a power, then, to do that on an arbitrational or quasi-judicial basis so as to have binding effect on the interested parties; and the second would be the power of making the election, as a matter of policy, whether to act with a view to obtaining fulfilment of the obligations or to use the rights of terminating, or revoking, the relationhip. So that is the one type of authority which could, if so intended, be bestowed upon a supervisory authority.

The other basic pattern would be to put the organ more or less in the same position as would apply to an ordinary party to a contractual relationship in this respect.

According to our conception of the law, the position of the party in the reciprocal contractual relationship would be this: that if conduct occurs which to him appears to be a violation of obligation, he has to form an opinion and to make up his own mind whether he considers that to be a violation, in the first place, and in the second place one which is substantial enough to justify revocation or cancellation. In the second place, he must then decide, as a matter of policy, what election he is going to make—again, the election of claiming *performance, (insisting on performance) or cancelling. There is a difference* between his case and the first one with which I have dealt because, in making up his mind whether he considers that there has been such a violation, he is not performing a judicial, or a quasi-judicial or an arbitrational function, he is merely deciding now how he should act responsibly within the exercise of his rights, and if he errs in his conception of the situation he can be corrected on ordinary merit by a court of law.

The other party may say "I do not agree with you, I do not agree that there has been such a violation, I do not agree that there has been a violation at all, you have misconceived the facts or you have misconstrued the law and I claim that our contractual relationship or whatever other relationship it is, is still in existence in law." And that may be a dispute upon which the parties may go to court, and then when it comes to court the court does not sit as a court of review or appeal, the court goes into the merits of the dispute and the court decides it on fact and on law. When a court of competent jurisdiction has decided, then the effect of the decision is, in a certain sense, declaratory. It really declares whether, as from the moment when the election was made, this contract must be considered to have been terminated, or whether that was an ineffectual, purported act of revocation so that the contract is still in effect.

That, as we conceive it, is the ordinary position as between parties to a contractual relationship, including a treaty, and I am postulating for the moment the possibility that it may have been theroretically intended to bestow upon a *supervisory organ the power to act as if it were a party to a contract in this* sense.

So the difference in essence between these two alternative patterns would be this. In the first case the decision taken by the organ in which it determines that there has been a violation justifying revocation would be binding in law, at any rate in a prima facie sense. It would not be open to take that decision to a court (assuming competent jurisdiction) on the basis of asking that court to reconsider the merits of the decision and set it aside if it did not agree with the merits. There would be, depending on the particular stipulations and so forth, only a possibility of limited powers of review on the part of the court, review to the extent of acting on grounds such as no proper exercise of the

discretionary power, no proper application of the mind to the problem by the organ, improper motives, *mala fides* and so forth.

As I have said, depending on particular stipulations, the particular grounds available for a review of this kind may be wider or narrower, but all that would depend on what is stipulated in a particular case.

In the case of the second possibility I have mentioned, there the matter can go to court as an open one in which the court decides on merit whether it agrees or disagrees with the decision arrived at, or the opinion formed by, the organ in question. But what is common to both cases is the second step—the step of making a decision of policy whether to go in the direction of a revocation or in the direction of keeping the legal relationship alive and insisting on its performance.

Now, Mr. President, when we come back to the contention of the distinguished representative of Finland, it seems that he contends for something more or less along the lines of the second alternative I have mentioned, that the General Assembly is to be seen as having this power to make up its mind, subject to correction, as to whether a violation has occurred which might justify revocation and, then, to exercise the right of election. Consistently with this interpretation of his contention, one sees that in his conclusion No. 5 (*supra*, p. 87) he treats his question of the purported justification of the revocation as a matter upon which this Court is asked and required to pronounce on merit; in other words, he does not claim any special protection for it, he makes that one of his submissions to the Court, as it were, something on which the Court must pronounce itself: was this a justified or an unjustified act of revocation?

That appears, as I have said, from this submission No. 5. It also appears from the attention which he gives in his oral address at pages 79 to 80, *supra*, and the following pages in the record *(ibid.)* to the question which he words in this way: "... whether the General Assembly had sufficient reason on a basis of fact to terminate the Mandate, a point which has also been disputed by the South African Government on several occasions, and latterly in Chapter XI of its written statement".

The merit of what he says about this question is something with which we shall deal at a later stage, but the fact is that he treats this as being a question on which this Court is required to pronounce for the purposes of its advisory opinion, and he places his argument on this question before the Court.

So that seems to be what the distinguished representative is contending for, a power somewhat along the lines of the second of the alternatives I have mentioned. The factor of overriding importance, and the one on which his argument breaks down is exacly this: that whether one contends for something along the lines of the first pattern I have mentioned, or the second pattern, in each case there is required a power for the particular organ to act in a particular way which will be binding. It is so undoubtedly that if the first of the two postulates is the one we are dealing with, then the scope or the area over which the decision will be of binding quality will be much wider than in the case of the second. But even in the case of the second, there is an area in which it is then postulated that there is a power for a majority to bind a minority by decision in this organ, and that is at least on the question of the election which has to be made—assuming the justification for the moment, for the purposes of argument—of the election whereby this organ now determines a course which will be pursued: the course of treating the relationship as having been cancelled or revoked in future and taking all the consequences that come from it. There may be a possible dispute from the other party, possible litigation about it—but apart from that fact, assuming that it is found to be a valid act, then it has con-

sequences not only for the State directly affected, for the mandatory or administering State, it has consequences for all the other States members of that organization, and those consequences extend to the plane outside this organ and its proceedings, they extend to the realm of direct inter-State relationships outside the organization. So, no matter how it is phrased or put by the distinguished representative of Finland, what he is suggesting to the Court is something which still implies or connotes a power which has been bestowed upon an organ to do this thing with binding effect. That is a power which has to be found somewhere. It cannot just be taken from the air. It must be found within the Charter, either expressly or by necessary implication, and the distinguished representative of Finland makes no effort at demonstrating any basis for such a power. As a matter of fact, the whole way in which he presented his argument was such as to attempt to evade the necessity of demonstrating such a bestowal of power.

The practical importance of what I have said is further illustrated by reference to the survey which I gave yesterday about the position under the Charter concerning the trusteeship system. The history dealt with yesterday makes it perfectly clear that the intention of the authors of the Charter was that the supervisory organs were not to have any power of unilateral termination or revocation of trusteeship agreements, either in the first sense or the second sense with which I have dealt with that concept this morning.

It will further be apparent, Mr. President, from this discussion of the subject and, I submit, its inescapable conclusion, that if there is a conception on the part of framers of a constitution that such a power is to be bestowed upon an organ, then surely they would consider very carefully: Exactly how far do we go? How do we outline that power? How do we delimitate it? How far does it go? Is it one of the first kind I have mentioned or is it one of the second?

If it is basically one or the other, are there qualifications which we want to attach? Is it going to be completely binding? What kind of discretion are we going to concede to these organs? Will the Court be able to interfere on a review basis, merely because political considerations have come into it, or would we say it is perfectly in order for the organ to take into account the political considerations but there are still other criteria which it must obey in good faith, and if it does not, the court could set aside its determination even if a discretion has been bestowed upon it.

Those are matters which would, Mr. President, have to be very carefully considered by the framers of any constitution, and it is inconceivable, in my submission, that such an important matter would be left to implication. If it had been intended to bestow a power of this kind, then the natural expectation would be that it would be expressly provided for.

So, to summarize: in our submission, the contention on behalf of Finland breaks down on several grounds: in the first place, it is based on an interpretation of the 1966 decision of the General Assembly which is clearly wrong, which suggests something which was in fact deliberately rejected in 1966. Secondly, even if that interpretation had been correct, it would still mean that the General Assembly majority purported to bind all United Nations Members to a new legal situation, being at least one in which an election of revocation had been made. And, thirdly, the General Assembly would therefore require a grant of power for that purpose, and there is no express grant, nor can any be implied.

The significance of the Finnish contention is really that it constitutes, in effect, an admission that the General Assembly exceeded its powers.

That brings me, Mr. President, to the contentions by the distinguished representative of the Netherlands, Mr. Riphagen.

My learned friend, Dr. van Heerden, has very adequately analysed and answered this line of argument. He did that at pages 324-329, *supra*. There he dealt with Mr. Riphagen's arguments mostly in the context of his own argument concerning the League of Nations and its powers. His reply to Mr. Riphagen serves very much the same purpose with regard to the powers of the General Assembly. I therefore want to associate myself with the argument already presented by Dr. van Heerden, and I only want to add to it in some measure for the purposes of the present argument, specifically with reference to the position in the General Assembly.

Now, if one reads the argument by Mr. Riphagen—I did not have the privilege of listening to it—but reading it certainly is a very interesting and a pleasant experience; it is a highly intelligent composition, it makes very good reading. But, Mr. President, the question is, is it law? In my submission it clearly is not—at least on the crucial aspects which really matter. One finds that the distinguished representative of the Netherlands makes the significant admission that his contentions cannot be justified on the basis of "the classical rules of international law" (*supra*, p. 125). Then, secondly, he admits that the contentions cannot be justified on the basis of "the rules of general international law" *(ibid.)*; and, thirdly, nor on "the normal application of the rules of international law concerning the effect of treaties between sovereign States" (*ibid.*, p. 126).

The Court will see that there is still some qualification attached to the admissions, and for that reason they, in my submission, do not go far enough. *In truth, in our contention, the thesis of the learned representative of the Netherlands* cannot be justified at all on principles of international law in force at this present time. That is as plain and simple and unqualified as it sounds.

In essence, his thesis amounts to this: he says one should attach paramount importance to the object and purpose of the mandates system, which he calls the self-determination of peoples and the principle of no-annexation. And then he says these objects and purposes are to be given effect to by a rigorous functional approach, and that functional approach requires all of us—apparently including us lawyers—to do certain things of necessity when circumstances change. Those things which are to be done are threefold: the first is the construction of solutions; the second is, I quote him at page 124, *supra*: "some form of powers to be exercised in this respect by the organized community of States", the third is "an adaptation of the relationship between the powers of the organized community of States and those of the mandatory State . . . to give effect to the common purpose of these respective powers" (*supra*, p. 125)—that too is to be implied, or to be considered to be present with a view to giving effect to the basic purposes by the rigorous functional approach.

Now, Mr. President, surely if one is allowed to make one's own rules, it becomes very easy to arrive at the result at which one wants to arrive, and this must apply when we read these rules which are suggested to us. This applies both to the pleader—the man who is arguing this to the Court—and to the so-called organized community of States, because when we then start applying these rules, or when Mr. Riphagen starts applying these rules, he comes to the conclusion that there is a very happy ending for both—for his argument and for the organized international community.

For the organized international community, the end result is that the General Assembly sits very firmly in the saddle as the organ of the organized community. He admits (*supra*, p. 126) that on the basis of normal treaty law

and its application he could not construe an obligation on the part of South Africa as a mandatory to report and account to the General Assembly; but he says, on his functional approach, certainly there is such an obligation. He admits that on that basis of the normal application of treaty law relationships, the majority Opinion of the Court in 1950 could not be justified—he says that in so many words—but he says, on his functional approach that Opinion is correct; and, of course, that is the basis upon which I have indicated before that I am prepared to argue this particular part of the matter. But the matter, according to him, does not end with an obligation on the part of the mandatory to report and account to the General Assembly. We find that a startling revolution has come about as a result of the application of this functional approach. The mandates system started on a basis which was very fully dealt with by my learned friend, Dr. van Heerden and very fully and authoritatively and clearly dealt with by this Court in its 1966 Judgment. It is perfectly clear that that basis was *one by which mandates were to be held by States, not by the League itself or by* organized agencies. There had been earlier ideas of that kind in discussions leading up to the eventual establishment of the mandates system—that the League itself, or organized agencies, might possibly hold mandates—but in the final settlement those were rejected, and the system is one whereby the mandates would be exercised by States, and the primary responsibility would rest on the mandatory State to achieve the objectives of the mandates system, to pursue the sacred trust of civilization. But the mandatory State did bind itself to the League organization, and particularly bound itself to report and account to the Council—it did so on the basis of its own consent.

However, in that system, as fully and authoritatively explained by the Court, the Council exercised and was intended to exercise supervision in effect by persuasion. There was to be no imposition of the will of the Council on the mandatory, the system deliberately rendered that impossible.

And, Mr. President, coming to the trusteeship system, that too rested on a voluntary basis. I dealt with that history yesterday—the emphasis which was placed on this not only in the wording of the Charter, but also by the authors of the Charter during their deliberations prior to coming to their agreement about the trusteeship system, and there too the whole system was to operate on the basis that the supervisory organs could recommend, not dictate.

However, now flowing from this functional approach suggested by my learned friend, Mr. Riphagen—on the basis of the new rules which flow from this approach, he comes to the conclusion that the primary responsibility is now that of the organized community, no longer of the administering State.

The organized community in this instance is represented by the General Assembly, and the administering authority is a mere agent or a hireling of the General Assembly. If there develops even a serious difference of opinion, a difference of approach or conception regarding the attainment of self-determination or methods or modalities or time aspects involved and so forth, then the General Assembly may change the agent as it likes, whether the agent likes it or not. And he says this is not a matter of applying a sanction for the violation of obligations, it is merely a matter of serving the basic purposes of this whole system; and it is an internal, domestic kind of adjustment which is being made, like changing from one sub-committee to another. He says in this respect:

> "A comparison with the General Assembly's powers of decision under the Charter with respect to specific organizational matters would seem to be more legally appropriate."

In other words, the supervisory function in regard to mandates and trustee-

ships is now to be classified in the same category as budgets, rules of procedure and the appointment of committees. And so the wheel has, according to this contention, made a full turn—but by what process of law, I, with respect and with submission, certainly do not know.

Yet the distinguished representative says that his approach is not a teleological one. Perhaps we have to concede the point and call it unabashed legislation, because I do not, with respect, see any basis for this approach in principles of law as they are established, and as they have been recognized and pronounced upon and enunciated in the jurisprudence of this Court.

Mr. President, quite obviously in all these respects this power of, if I may use the expression, "hiring and firing" is not related to anything which is said in the Charter, except in this indirect way—of saying that it should now be regarded as being compared more appropriately with these organizational matters to which I have referred. But there is no suggestion that on any ordinary, normal interpretation of what the text of the Charter means, that is the conclusion at which one is to arrive.

Together with these arguments of the representative of the Netherlands I may group certain others which are based on similar concepts of so-called "necessity". Most of them have been applied equally *ex cathedra*, or shall I rather say, announced *ex cathedra*, without any attempt at justification on established legal foundations. I refer to the contention of the Secretary-General—perhaps I should say a "proposition"—that:

> ". . . in the absence of any intervening sovereign jurisdiction between the General Assembly and the people and territory of Namibia, no governmental authority exists other than the General Assembly, and the Security Council, having the competence to interpret and apply to Namibia the international obligations which are owing to the latter under the Charter of the United Nations and the former mandates system" (*supra*, pp. 50-51).

The next quotation:

> "The fact that, broadly speaking, the General Assembly's activities are mainly of a recommendatory character, does not 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)." (*Supra*, p. 51.)

In the written statement of India, we find this:

> "How can the General Assembly, the successor to the Council of the League, discharge this task without having the competence to take decisions binding on the Mandatory?" (Written statement, **I**, p. 839.)

In other words, again the type of argument: this is what it should necessarily have in order to discharge the task according to our conception of what that task is.

Now, this line of argument in the form in which I have now quoted it, that is, the form in which India raises it, is not new, nor is it in the form in which it has been raised in certain of the other passages. As I have said, no attempt is made at justification on any established legal basis. The formulation of the distinguished representative of the Netherlands is new in the way in which he has brought it all together, and that prompted the remark I made yesterday, that it is suggested apparently that this is something which either escaped this Court ever since it started giving attention to the *South West Africa* cases in 1950, or

which in any case runs counter to the whole basis of the Court's jurisprudence and the principles which it has applied to the situation.

The fact is that many of these so-called arguments of necessity and associated arguments were pressed upon the Court in the *South West Africa* cases, including arguments very similar to those of Mr. Riphagen, in which it was said that a particular concept or a particular humanitarian consideration, the sacred trust in itself, was to serve as the source of legal rights and obligations, and that one took that as one's source and one built on that when new situations arose.

The Court in its 1966 Judgment went very fully into these various contentions and suggestions and the Court dealt with it authoritatively in extensive passages in its Judgment, forming essential parts of its reasoning. I wish to refer to certain portions of the Judgment and commence with page 34, paragraph 49:

> "The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered." *(I.C.J. Reports 1966.)*

Again:

> "The sacred trust, it is said, is a 'sacred trust of civilization'. Hence all civilized nations have an interest in seeing that it is carried out. An interest, *no doubt;—but in order that this interest may take on a specifically legal* character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. One such form might be the United Nations trusteeship system,—another, as contained in Chapter XI of the Charter concerning non-self-governing territories, which makes express reference to 'a sacred trust'. In each case the legal rights and obligations are those, and only those, provided for by the relevant texts, whatever these may be." (*Ibid.*, para. 51.)

And, I may say, the pronouncement in this last sentence is one which is so obviously ignored in the lines of argument with which I have been dealing this morning.

Then, again:

> "To sum up, the principle of the sacred trust has no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole; and, within the system equally, such rights and obligations exist only in so far as there is actual provision for them. Once the expression to be given to an idea has been accepted in the form of a particular régime or system, its legal incidents are those of the régime or system. It is not permissible to import new ones by a process of appeal to the originating idea—a process that would, *ex hypothesi*, have no natural limit." (*Ibid.*, p. 35, para. 54.)

This is exactly, Mr. President, the process which is suggested in the lines of argument to which I have referred.

Then a further reference:

> "If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law." (*Ibid.*, p. 36, para. 57.)

I would, Mr. President, like to refer to one further aspect of the Judgment—that which deals with the so-called necessity argument:

> "The gist of the argument is that since the Council had no means of imposing its views on the mandatory, and since no advisory opinion it might obtain from the Court would be binding on the latter, the mandate could have been flouted at will. Hence, so the contention goes, it was essential, as an ultimate safeguard or security for the performance of the sacred trust, that each member of the League should be deemed to have a legal right or interest in that matter and, in the last resort, be able to take direct action relative to it.
>
> It is evident on the face of it how misconceived such an argument must be in the context of a system which was expressly designed to include all those elements which, according to the 'necessity' argument, it was essential to guard or provide securities against." (*Ibid.*, p. 46, paras. 85 and 86.)

I refer now to the beginning of paragraph 87:

> "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; and that the risk was remote, the event proved."

This referred to the circumstances at the time of the League, Mr. President.

Now it may be said: Yes, but completely new circumstances have arisen—a kind of deadlock in views, policies, approaches, as between a mandatory Power and a supervisory Power. The Court dealt with that aspect, too, as from page 47, paragraph 89, onwards, and I should like to read this in conclusion:

> "The Court feels obliged in conclusion to point out that the whole 'necessity' argument appears, in the final analysis, to be based on considerations of an extra-legal character, the product of a process of after-knowledge. Such a theory was never officially advanced during the period of the League, and probably never would have been but for the dissolution of that organization and the fact that it was then considered preferable to rely on the anticipation that mandated territories would be brought within the United Nations trusteeship system. It is these subsequent events alone, not anything inherent in the mandates system as it was originally conceived, and is correctly to be interpreted, that give rise to the alleged "necessity". But that necessity, if it exists, lies in the political field. It does not constitute necessity in the eyes of the law. If the Court, in order to parry the consequences of these events, were now to read into the mandates system, by way of, so to speak, remedial action, an element wholly foreign to its real character and structure as originally contemplated when the system was instituted, it would be engaging in an *ex post facto* process, exceeding its functions as a court of law. As is implied by the opening

phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.

It is always open to parties to a dispute, if they wish the Court to give a decision on a basis of ex aequo et bono, and are so agreed, to invoke the power which, in those circumstances, paragraph 2 of this same Article 38 confers on the Court to give a decision on that basis, notwithstanding the provisions of paragraph 1. Failing that, the duty of the Court is plain."

It may be urged that the Court is entitled to engage in a process of filling in the gaps—constructing solutions, Mr. President—filling in the gaps in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. This is exactly the argument we are dealing with here. The answer is, the Court need not here enquire into the scope of a principle, the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should. On a previous occasion which had certain affinities with the present one the Court declined to find an intended three-member commission could properly be constituted with two members only, despite, as the Court had held, illegal refusal of one of the parties to the jurisdictional clause to appoint its arbitrator, and although the whole purpose of this jurisdictional clause was thereby frustrated. In so doing, the Court said that it was its duty to interpret the treaties, not to revise them. It continued:

"The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit." (*I.C.J. Reports 1950*, p. 229.)

In other words, the Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action.

That is exactly what I contend it is being asked to do by these contentions.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

QUESTIONS BY JUDGES ONYEAMA AND DILLARD

The PRESIDENT: Judges Oneyama and Dillard wish to address some questions to the representative of South Africa.

Judge ONYEAMA: These questions are designed to probe the essential nature of the Mandate for South West Africa (Namibia) as opposed to what it may be called. They are also intended to seek guidance on the alternative implication of your approach to South Africa's responsibilities.

Specific reference is directed to your contention at pages 275 to 277, *supra*. You there state that your position with respect to the lapse of the Mandate has been misunderstood in that you do not now claim the Mandate lapsed with the dissolution of the League of Nations. What you claim, in keeping with the opinions of Judges McNair and Read in 1950, is that the lapse of the supervisory and accountability provisions of the Mandate (Article 6) possibly entailed a lapse of the Mandate itself. This appears to carry the natural implication that this provision is of the very essence of the Mandate, and that, while this provision might be temporarily suspended, as during the Second World War, it is yet (to repeat) so essential that its disappearance carries with it the possible implication that the Mandate itself has terminated. In light of this implication will you assist the Court by elaborating more fully on the following questions:

1. Is it your position that no legal restraints of any kind were imposed on South Africa subsequent to the dissolution of the League of Nations?

2. If your answer is that there remained legal restraints, will you specify their nature and areas of application?

3. If your answer is that there remained only a political or moral obligation to live up to the requirements of Article 22 of the Covenant, then is it your position that there are no legally operative provisions anywhere which would prevent South Africa from annexing South West Africa (Namibia)?

The three questions above may be supplemented by the following additional question, based on your statement at page 314, *supra*. You there state as an inference to be drawn from a passage in the 1966 Judgment that "the mandatory could act not only contrary to the wishes of the Council, but contrary to the mandate itself, and that the League and the Council would then be powerless".

Cast against this background:

Is it your position that, had South Africa during the existence of the League flatly refused to render any annual report, no legal remedies of any kind could be imposed on South Africa?

ORAL STATEMENT BY MR. DE VILLIERS (cont.)

Mr. de VILLIERS: Mr. President, I have quoted from the 1966 Judgment at length—some Members of the Court may think at excessive length. You might have told me, with respect, that you can read yourselves; but, kindly, you did not do so. The fact is that I quoted at length for a purpose: to demonstrate how the kind of arguments which are now being presented to this Court are met, considered, rejected in detail, point by point in this essential reasoning in the Judgment of 1966.

The Judgment needs no boosting: its quality, its authority speak for themselves, but the important question is this: do these participants who have put these lines of argument to the Court contend that this Court should overrule the 1966 Judgment? And if they do not, why do they come with contentions that are so directly conflicting with the conclusions arrived at in that Judgment, this emphatic reasoning and these findings to which I have referred? And, on the other hand, if it is their contention that the Court should depart from the Judgment, which is a clear statement of the basic jurisprudential principles which have always been applied by this Court and its predecessor—if they do want the Court to depart from that and overrule the 1966 Judgment, why do they not say so? Do we have to accept that we have the position of an aggressor who pretends not to make an attack but sends in his men anyway under cover of night to try to poison the water supplies? I do not know, I should like to have clarity about it, and I submit, with the greatest respect, that it is important for this Court to have clarity about the question whether it is being asked to overrule its 1966 Judgment and the jurisprudential principles enunciated therein; because that does appear to be a very important cross-road at which one must come on the basis of the contentions being presented in this Court.

My submission is that the arguments on behalf of the Netherlands, which are, in truth, teleological arguments, whether their author calls them that or not, and similar ones which I have referred to, have to be rejected. Their sole purpose is really to underscore the fact that there is an absence of a true legal and judicial basis for ascribing validity and binding effect to resolution 2145.

These considerations also dispose of suggestions which we find in some of the statements, for instance the written statement of Finland, which I want to read to the Court:

> "... the possibility to dismiss a mandatory and revoke a mandate is a necessary part of the supervision, since otherwise the necessary sanctions would be lacking. In case there is no such possibility, the provisions in the Covenant of the League of Nations and in the Mandate Agreement itself, dealing with the protection of the interests and development of the Territory and its population, lose their significance." (Written statement, I, p. 373.)

It is exactly the kind of necessity argument considered and rejected in the 1966 Judgment.

India, in its written statement:

> "To argue that, while the Council could take a binding decision with regard to the revocation of the Mandate, the General Assembly is empowered only to make a recommendation, not binding to the same extent

> as a decision of the Council of the League, runs counter to what the Court itself has stated in its Advisory Opinions. Besides, this argument leads one to the conclusion that there is no international organization which is competent ever to take a binding decision revoking the Mandate. This goes against the basic philosophy of the Mandate . . ." (*Ibid.*, I, pp. 838-839.)

That of course, Mr. President, with submission, is question begging. The question is exactly: what was the basic philosophy of the Mandate in this respect? In our submission, that philosophy is stated as clearly as it possibly could be in the 1966 Judgment, and it is certainly not that of enforcing solutions or points of view in the event of differences of opinion.

At this stage I wish to refer again to the situation in regard to publicists of repute who have commented on this very question with which I am dealing now, the validity and binding effect of resolution 2145. We refer to them in paragraph 10 of Chapter X of our written statement. It will be observed, Mr. President, that some of them are of very high repute. Rousseau, Madame Bastid. There is a reference to Rosalind Higgins, to two Indian jurists, Rahmatullah Khan and Satpal Kaur and to Professor Dugard, who is a South African, but I must say politically no friend of the present Government, as is indicated in his various writings. As a matter of fact, the representative of Pakistan referred (*supra*, p. 141) to the article by Professor Dugard on the point where he stated something which was favourable to the Pakistan argument, i.e., where he made the point that in his view the General Assembly did not act improperly in determining that South Africa had failed in its obligations, but the distinguished representative failed to refer to the further portion of what Professor Dugard wrote, to the effect that it was trite law that the General Assembly could not take a binding decision, and that in that respect its action was not legally effective.

So it is significant, Mr. President, that nobody could dispute what has been said about the publicists or could, in their presentations to this Court, written or oral, refer to any publicist which took the opposite point of view, except Castañeda. I dealt yesterday with the presentation of this very learned author to the United Nations in 1961, I think it was to the Fourth Committee; and we have referred to his work, in which occurs a passage relied upon in the written statement of Finland, paragraph 5, and again in the oral statement. At page 85, *supra*, the distinguished representative of Finland stated:

> "Members, including those which voted against or abstained on the resolution, ought to accept this authoritative determination by the principal organ of the universal organization and act and adjust their conduct to accord with it."

He then went on to refer to Castañeda, *Legal Effects of United Nations Resolutions*, page 128. I would like to read the relevant passage to the Court:

> "The determination by the General Assembly that South Africa has not complied with the obligations of the Mandate establishes the condition or hypothesis of a legal rule, which has the character of a 'general principle of law recognized by civilized nations': if one of the parties to a bilateral treaty does not comply with its obligations, the party that does observe its own obligations ceases to be bound by them and may consider the treaty terminated. By virtue of this rule, the General Assembly could, on the basis of its determination, revoke the Mandate; moreover, as the present representative or agent of the organized international community that

granted the Mandate, it could re-assume the titles, rights, and powers enjoyed over the Territory when the Mandate was conferred, and could thus proceed to achieve the objective of the Covenant as well as of the Charter—the self-government or independence of the people of the Territory."

There are various aspects of this statement which require consideration. Basically, it comes to this, that the learned author states the thesis of the possibility for the General Assembly to determine certain hypotheses or conditions precedent to the application of a legal rule or principle in a particular instance. In other words, if the law says, as the Charter does, that in the case of a procedural matter the Assembly may make a binding decision, then the Assembly itself must decide whether the particular matter coming before it then is procedural or not. It does so either explicitly or by implication. When it is a question of whether it is a budgetary matter, and so forth, the same kind of question may arise. But what is missed in this particular passage, Mr. President, is this: what circumstances could the determination of this condition precedent be regarded as legally binding, particularly legally binding upon non-consenting Members? It may well be that for the purposes of its internal organization, and in order to go ahead from one stage to another procedurally, these determinations have to be acted upon; and if it is decided that this is a budgetary matter, or a financial matter, then the actual proceedings in the General Assembly would proceed accordingly. It does not follow that if there is a real dispute about obligations following from, or said to follow from, such a determination, it would be binding upon the disputing parties. If that were so, if the General Assembly could decide, so as to exclude any other consideration of the matter, that a particular matter is budgetary and therefore it can make a binding decision upon that, then one does not know why the *Expenses* advisory proceedings were not simply decided upon that basis, and no other basis at all.

It is in each case, in our submission, a matter of determining what is the power, even if, for practical and procedural purposes, some determination has to be made in order to proceed. The question still is, in what circumstances would that determination, whether it relates to a condition or a hypothesis or something precedential or not, be binding or not. And that, with respect, is a point which is not met by the learned author in regard to resolution 2145. And that is really the crux of our comment upon this thesis by Professor Castañeda.

In his own comment on the case of the General Assembly resolutions concerning Palestine Professor Castañeda mentions some of these considerations which I have just mentioned, and which, in their application to resolution 2145 must necessarily lead to the conclusion that it cannot be valid or binding. He said in regard to the resolution on the partition Plan:

> ". . . resolutions of this type . . . may not legally create additional obligations or abolish existing rights.
>
> Resolution 181 exceeded these limitations. The resolution could not be justified by saying, as was maintained, that it filled a politico-legal vacuum." (Jorge Castañeda, *Legal Effects of United Nations Resolutions*, pp. 132-133.)

Whether he is right or wrong in his application to Palestine does not concern me. What is important is that if one applied these considerations that it may not legally create additional obligations or abolish existing rights, that is exactly what the General Assembly purported to do, even if it is said to be a determination of a condition or a hypothesis for a further resolution which it purported to take. In essence, this line of argument does not meet the legal problem concerning the provisions of the Charter at all.

Another interesting and significant feature of the statements before the Court has been the inability of their authors to find any satisfactory legal basis for the assumption of direct administrative powers in respect of South West Africa by the General Assembly.

The arguments in this respect have again been either question-begging or of the teleological, so-called "necessity" type, or a combination of these. I wish to quote certain examples.

The Secretary-General really evades the point. He merely says:

> "... the United Nations did not decide upon any unilateral action in Namibia until South Africa's former right to be present in the Territory had been legally forfeited, and the Mandate had been terminated" (*supra*, p. 52).

I do not think there was any other submission from him which bore upon the question of what power the General Assembly could have had to assume direct powers of administration in regard to South West Africa.

I refer to this because it is important not only in itself, but also because it bears in a very important sense upon the question whether it was possible to revoke the Mandate unilaterally, as I will demonstrate in a moment.

The representative of Finland also really evaded this matter:

> "Once it was established that South Africa no longer had the right to administer the Territory, it was necessary for some other entity to undertake this important task until such time as the Territory be ready to do it for itself. It could not be left without the necessary assistance at this critical juncture. What entitity could be more capable of replacing the Territory's former master than the United Nations which, in accordance with the Charter, also has specific functions and obligations in respect of non-self-governing territories, and which has for long exercised supervisory and control functions in respect of the Territory in question?" (*Supra*, p. 87.)

There is no indication, Mr. President, how any of these observations could bear upon the taking of a decision which is not only not consented to but objected to by the authority in control of South West Africa.

The United States said:

> "The decision by the Assembly that the United Nations should administer Namibia is consistent with the basic structure of the Mandates System and the International Trusteeship System and the practice of the United Nations. The Mandates System presupposes an administering authority." (Written statements, I, pp. 872-873.)

Now with practice I will deal subsequently. As far as the other considerations are concerned, they do not grapple with the problem: what constitutional power was there to take a binding decision in this sphere.

Mr. President, that brings me to the point I foreshadowed, namely that the absence of a legal basis for providing for a successor to South Africa as administering authority in South West Africa is really a very strong further indication that there can be no power of unilaterally revoking a mandate.

Let us look at the matter briefly on the basis of the mandates system and then of the trusteeship system. Under the mandates system, as I pointed out, the idea that the League itself could be a mandatory was dropped before it came to the final stages of agreeing on the Covenant. Nor was the League given a power to appoint mandatories. The appointment was, it will be recalled, made by the

Principal Allied and Associated Powers, and there is nothing in the Covenant which speaks about the appointment of a mandatory by the League.

Under the Charter again—the Charter is silent on the mandates system—there is no reference whatsoever to a power on the part of the General Assembly to appoint a mandatory or to be a mandatory itself. Under the trusteeship system there is a possibility that the General Assembly could be an administering authority under a trust agreement, if one reads Article 81 together with Article 85 of the Charter, but then that is only if a trusteeship agreement specifically so provides. And there is no provision anywhere in the Charter for the General Assembly or for any organ of the United Nations to appoint an administering authority. The Court will remember we dealt with that point yesterday. The emphasis is so strongly on the initiative coming from the other side. The initiative comes from the side of the parties directly affected, being in most cases the mandatory alone, or prospectively the administering authority, which makes a proposal on a voluntary basis for placing a territory under a *trusteeship agreement, which agreement* then has to be approved of or confirmed by the suggested supervisory organ, be it either the General Assembly or the Security Council.

So this idea of the General Assembly itself being an administering authority without any agreement providing for it is something foreign to the whole structure of both of the systems, the mandates system and the trusteeship system under the Charter. And that being so, it emphasises what we have been maintaining—that there was no contemplation, no intention that there could be a unilateral revocation of either a mandate or a trusteeship agreement by a supervisory authority.

This brings me to a further contention of the Secretary-General, one to which I referred in my opening statement on behalf of the South African Government:

> ". . . 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." (*Supra*, pp. 51-52.)

I indicated then what the enormous implications of this statement could be if accepted in this form and without qualification, and if applied in the sphere in which the Secretary-General apparently suggested it was to be applied, namely in the sphere of even enforcing the will of an organ upon a non-consenting State.

Now, apart from suggested precedent which I will deal with in due course, one finds that the Secretary-General offers no legal argument whatsoever in support of this statement. It is simply put to the Court as a proposition, nothing is offered in support of it. No reference to provisions of the Charter which lead to this conclusion—again, as I say, and I emphasize, in the context of taking a binding decision against the will of a non-consenting State. But nothing whatever is offered in support: the statement is simply made as if it were gospel. And the question is again: is it a teleological argument or is it just a non-sequitur? I do not know. The Secretary-General may make his election between those two. It is, in essence, really a suggestion to the Court—this suggested basis in favour of a binding quality for resolution 2145—to act on a legislative basis itself.

Now, we come to another argument regarding this point, which is really in essence an extra-judicial one but which in some ways tries to seek support from the 1966 Judgment of the Court. It is this kind of suggestion, that the Judgment of the Court in 1966 made it necessary that there should be political action to solve the impasse. One finds, for instance, that the Secretary-General states:

> ". . . inasmuch as the latest Judgment of the Court had indicated that the non-performance of these obligations would now be a matter for political rather than judicial process, the responsibility for remedial action thereupon devolved upon the General Assembly, and subsequently the Security Council." (Written statements, I, para. 76, p. 95.)

The distinguished representative of Pakistan, in his oral statement (*supra*, pp. 138-139), was to much the same effect. As the Court will recall, I read a statement by the representative of Israel in the General Assembly yesterday which seemed to indicate much the same thing.

Mr. President, on analysis, what portion of the Judgment of 1966 could these statements have in mind? Probably the basic finding and reasoning that in respect of the conduct clauses in the mandates, individual States had no direct rights or legal interests vis-à-vis the mandatory powers, and that the obligations owed in respect of those conduct clauses would have to find such measure of supervision or of sanction or of enforcement as might exist in the political supervisory organs of the League. I say sanction or enforcement, of course, in a qualified sense, because the Judgment made it perfectly clear that there could be no such thing as the forcing of its will by the supervisory organ upon the mandatory. That was the realm in which these obligations were to find their counterpart, if the counterpart be seen as rights.

Now, if that proposition were to be accepted by those who rely upon the 1966 Judgment in this respect, and if it were accepted in its entirety, then, of course, the full implications are to be accepted: this is certainly a matter which calls for proper consideration in the political organs, but those political organs must observe the legal limits which are imposed upon their power, and they are not intended to enforce their will on the mandatory, they are intended to exercise a persuasive kind of authority over it. That is in effect what the Court said and it provides no basis whatsoever for this kind of argument.

Nigeria (Written statements, I, p. 891) argues in favour of revocability on the lines of "an idea of delegation of powers by the United Nations to an administering authority". Again, I think we have said enough, my learned colleagues and I, to show, and the Court has stated it so plainly in 1966, that the boot was really on the other foot. It is not a matter of a delegation of powers from an international authority to a State, it is rather something coming from the other side, both in the mandates system and in the trusteeship system. Under the trusteeship system, it was the voluntary basis from the side of the administering authority, bringing the territory into the trusteeship system. In the case of mandates, too, it was a question of a voluntary undertaking by the mandatory powers of the obligations imposed by the mandates system; the position was accepted that the mandatories were primarily responsible for the administration of the territory, for the promotion of the sacred trust, but they voluntarily undertook, on a consent basis, obligations towards the supervisory authorities. So, that basis for arriving at a consequence of unilateral revocability cannot possibly succeed.

This brings me to the reliance which is being placed by some of the participants, particularly the Secretary-General and the United States in its written statement, upon precedents, both in regard to the question of a power of unilateral

revocation and in regard to the question of direct administrative powers.

May I say, right at the start, it is not perfectly clear on what legal basis these precedents are said to be offered; after all, we are not dealing with an ambiguous or an obscure text which has to be interpreted so that practice could tip the scales one way or the other in preferring one construction above the other. Nevertheless, whatever the legal basis may be—some suggested legal bases are indicated in the various statements and I will refer to them—our contention is that if one looks at what actually happened in these various cases, they provide authority or support for the contrary points of view, for the point of view that indeed there is an absence of a unilateral power of revocation and of a power to take direct administrative responsibility.

We refer, first, to the written statement of the United States (I, p. 860). There it is contended that the United Nations succeeded to the supervisory authority of the League regarding South West Africa, including the power to terminate the Mandate for the Territory. At the following page, the allegation is made that "the early practice of the United Nations supports the conclusion that it has the competence to terminate mandates established by the League of Nations". This is then followed by references to the role of United Nations organs in regard to the termination of the Mandates for Palestine and the former Japanese mandated islands (which could conveniently be referred to as Micronesia). Immediately before this second reference—the reference to Micronesia—there appears this sentence: "A second precedent supports the authority of the appropriate organ of the United Nations to terminate without the consent of the mandatory power a mandate granted by the League of Nations."

So, Mr. President, those words "a second precedent" and the words "without the consent of the mandatory power" indicate rather clearly what is being contended for here. What is being contended for is that the practice of the United Nations in regard to the termination of both these mandates supports the conclusion that the United Nations has the competence to terminate mandates unilaterally. And this is the exact context in which reliance is placed in the Statement upon these precedents.

I wish to deal first with the case of Palestine, and therefore I want to refer also to what the Secretary-General says about it at page 52, *supra*. He made reference to the termination of this Mandate in order to show that the adoption of resolution 2145 was not the first instance where the General Assembly had taken action to declare the termination of the Mandate. He made the allegation that there was unanimity among the members of the General Assembly; that it was within the Assembly's powers not only to decide that the Mandate should be terminated, but also to recommend a solution which was not acceptable to the mandatory power. He then pointed out that South Africa was among the Members of the United Nations which voted on 24 November 1947 for the plan of partition of Palestine with economic union.

Mr. President, we shall demonstrate that the record makes clear the opposite: that the action taken by the United Nations in regard to Palestine and Micronesia was not considered by anybody concerned to be based on a power of unilateral revocation of a mandate. Dealing first with Palestine, there the Court will recall that my learned friend, Mr. Grosskopf, dealt in some detail with the background to the submission of the Palestine question—the question of the prospective termination of the Mandate—to the General Assembly of the United Nations by the mandatory power. The reference is to pages 369-373, *supra*. And what appeared from his presentation, and what I want to stress in particular in further reference to the events, are two aspects: firstly the voluntary nature of the submission of the matter to the General Assembly by the United

Kingdom. That was stressed by the United Kingdom itself on several occasions and so accepted by all concerned. The background made it clear why it was that the United Kingdom was prompted to take this action eventually.

And, secondly, that submission in itself made it clear that the matter was being referred to the General Assembly for purposes of discussion and recommendation only, the Mandatory Power making it clear that it reserved to itself the right to accept or not to accept particular recommendations. That again was a matter which was abundantly clear, so understood and so acted upon.

My learned friend, Mr. Grosskopf, referred to the appointment of a Special Committee and to the report which it presented. He referred to aspects of the report which were important for the purposes of his argument, indicating the contemplation that there was no succession in regard to supervisory organs as far as the Mandate was concerned. I want to refer to the same documents, or the same discussions, with a view to the context which I have just indicated.

This Special Committee reported to the General Assembly and its report was referred subsequently to an *Ad Hoc* Committee on the Palestinian question. In this *Ad Hoc* Committee the representative of the United Kingdom stated that his government endorsed the view that the Mandate should be terminated. One of the reasons given by him was that the situation in Palestine necessitated such termination. At the same time he made it clear that his government was not willing to give effect to any plan on which agreement was not reached by the Arabs and the Jews. He stated that if the General Assembly were to recommend a policy which was not so acceptable, the United Kingdom Government would not feel able to implement it. This was, as I have said, already at the stage where there had been a report from the committee.

On the aspect of making it clear that the submission was voluntary there are certain passages from the debates which were quoted by my learned friend, Mr. Grosskopf, in the portion of the record to which I have referred, earlier in sequence and to which I wish to refer the Court, but I do not think I need read them out again. He read them to the Court the day before yesterday.

During the debates in the *Ad Hoc* Committee it was repeatedly emphasized that the General Assembly could merely recommend a solution. No suggestion was made that it could take a decision which was binding on the mandatory. As the representative of the United Kingdom is reported to have stated (*GA, OR*, Second Sess., Summary Records of Meetings of the *Ad Hoc* Committee on the Palestinian question, p. 3):

> "In the judgment of the United Kingdom, a mandatory power might voluntarily relinquish the administration of the mandate; general opinion in the committee had endorsed that view."

The representative of the United States said in this same debate in the *Ad Hoc* Committee that the urgency of the problem was that the General Assembly had to recommend a solution during its current session (p. 63). Then certain statements were made by Mr. Pruszynski, the distinguished representative of Poland, regarding the General Assembly's competence to examine the Palestinian question.

> "The United Kingdom, when it had approached the Assembly, had considered that that body could make recommendations on the future government of Palestine under Article 10 of the Charter according to which the Assembly could discuss any question within the scope of the Charter and make recommendations to Members of the United Nations or to the Security Council."

And then, later, at page 161—both of these quotations are at page 161—he stated:

> "To sum up, the problem of the future of Palestine was a question which came within the scope of the Charter; consequently the General Assembly, under Articles 10 and 14 of the Charter, could discuss that question and make such recommendations as it deemed suitable."

Now, the representative of the United States again made a relevant statement with reference to an earlier statement by the United Kingdom's representative that Britain would withdraw its forces from Palestine at an early date and also with reference to objections that the General Assembly was not legally competent even to discuss the Palestinian question. On these matters the representative of the United States said (*ibid.*, p. 169):

> "The mandatory power had requested the United Nations to make recommendations for the future government of Palestine and had unilaterally declared that it was relinquishing its responsibility. Hence any legal objections to the action of the General Assembly must be formal in character."

So it is, ironically, the representative of the United States at that stage which made it so perfectly clear that the contention now being advanced on behalf of the United States in this respect cannot be correct.

There is a reference, too, Mr. President, to what you said in this respect in your other capacity. That was also according to the summary record of the debates in the *Ad Hoc* Committee. The record indicates that Sir Zafrullah Khan, as a representative of Pakistan, stated that the General Assembly was not empowered to impose a solution, and that since the United Kingdom had expressed its desire to relinquish the mandate and had submitted the question to the General Assembly, this organ could merely make a recommendation to the United Kingdom (*ibid.*, p. 189).

As Mr. Grosskopf has already indicated, the *Ad Hoc* Committee at its 19th meeting decided to set up two sub-committees, the tasks of which would be to draw up detailed plans for the future government of Palestine in accordance with certain principles. He has already referred to the composition of sub-committee 2 and to extracts from its report. I do not want to read those again except to emphasize the aspect that "neither the General Assembly nor any other organ of the United Nations is competent to entertain, still less to recommend or enforce, any solution with regard to a mandated territory".

Then the paragraph in the report that stated that "this view is further confirmed by resolution 9, paragraph 1, adopted by the General Assembly on 9 February 1946, and by the fact the General Assembly is not able to take any action or give any directions with regard to the Mandate for South West Africa unless and until the Government of the Union of South Africa submits a trusteeship agreement for that territory".

An important portion of the report for my purposes is the portion which states (*ibid.*, p. 277):

> "The Palestine question was brought on the agenda of the General Assembly as a result of a reference from the Mandatory Power asking the Assembly to make recommendations, under Article 10 of the Charter, concerning the future government of Palestine . . . Mandated territories are within the scope of the Charter, but as explained above, the United Nations can assume jurisdiction with regard to them only when the pro-

> visions of Chapter XII of the Charter are applicable and the formalities laid down therein have been observed. These limitations apply to the powers of the Security Council as well as those of the General Assembly."

So it was quite clear that the whole basis of the discussion was that the General Assembly was not empowered to make any binding decision but that it was being voluntarily requested to make recommendations.

In view of a further contention in the United States written statement I would like to refer to the recommendations actually made by the General Assembly in its resolution 181 (II). The first operative paragraph of this resolution read as follows:

> "Recommends to the United Kingdom, as the mandatory power for Palestine, and to all other members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of a plan of partition with economic union set out below."

In other words, the operative paragraph 1 is a recommendation that a certain partition plan with economic union be adopted and implemented. The resolution further requested the Security Council to take the necessary measures as provided for in the plan for its implementation and also to determine as a threat to the peace, a breach of the peace or an act of aggression, any attempt to alter by force the settlement envisaged by the resolution.

When one turns to the plan of partition with economic union, one finds paragraph A (1) in it reads as follows: ". . . the mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948". It is to this that the United States written statement refers (written statement, I, p. 861) where it is said:

> ". . . the General Assembly . . . adopted resolution 181 (II) which included the language: 'TheMandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948'."

The impression created by this, of course, Mr. President, is an erroneous one. The impression created is that by the use of this language the General Assembly had purported to make a binding decision regarding the termination. From what I have just said it will be clear that that is not so. This was the plan which was being recommended for consideration, adoption and implementation in operative paragraph 1 of the resolution.

And then the other interesting feature of it is that in the event, in practice, the recommendations contained in the plan of partition with economic union were either not accepted at all or not fully accepted by the mandatory and by a number of other States. Immediately after the resolution was adopted, the representative of Saudi Arabia stated that his Government did not consider itself bound by the resolution (*GA*, *OR*, Second Sess., Plenary Meetings, Vol. II, p. 1425). The representative of Pakistan said his country desired to wash its hands of all responsibility for the decision that had been taken (*ibid.*, p. 1426), and the representatives of Iraq, Syria and Yemen stated that their countries would not consider themselves bound by the decision of the General Assembly and that they would reserve their freedom of action towards its implementation (*ibid.*, p. 1427).

The British reaction was significant too. On 11 December 1947 the Colonial Secretary announced in the House of Commons that the Mandate would end on 15 May 1948, that the evacuation of British forces would be completed by 1 August and that the United Nations Commission provided for in the General

Assembly's resolution would not be admitted to Palestine until 14 days before the termination of the Mandate (Marlowe, J., *The Seat of Pilate*, p. 242).

These announcements of intent of the British Government were not in conformity with the details of the plan of partition with economic union which had provided that the administration of Palestine should, as the mandatory power withdrew its armed forces, be progressively turned over to a United Nations Commission and that the mandatory power should not take any action to prevent, obstruct or delay the implementation by the Commission of the measures recommended by the General Assembly.

The British Government duly explained its attitude through its representative in the Security Council at the beginning of 1948 when the matter was discussed there. He said:

> "It is essentially because of the difficulties of security and the dangers of divided responsibility in Palestine in present conditions that the Mandatory Power, faced with specific threats by the Arabs, could not agree to open a port to Jewish immigration, to the progressive transfer of areas to the Commission's administration, or to the formation of a militia under the control of the Provisional Government of the future Jewish State. Nor could my Government safely extend the period of overlap during which the United Nations Commission would be present in Palestine while the responsibility for security and administration still rested with the Mandatory Power." (*SC, OR*, Third Sess., 253rd Meeting, p. 270.)

With reference to the implementation of the plan the same representative stated as follows:

> "Participation by the United Kingdom Government with others in the task of implementation would depend on its conception of the inherent justice of the plan adopted for Palestine by the General Assembly, and the degree of force required to give effect to it.
>
> As to enforcement, the United Kingdom delegation made it clear, long before the General Assembly's decision was taken or could even be accurately foreseen, that my Government was not prepared to accept any responsibility under the General Assembly's recommendations which would involve the use of United Kingdom troops as the means of enforcing a decision likely to be resisted by Jews or by Arabs." (*Ibid.*, p. 271.)

In regard to the recommendation that it should withdraw from Palestine, the United Kingdom representative said:

> "We had hoped by our withdrawal and relinquishment of authority that the naked realities of the situation would be better appreciated by all concerned, particularly the two communities in Palestine, and that some new attempt at conciliation might be made." (*Ibid.*, p. 272.)

Now my learned friend, Mr. Viall, has dealt, in passages of his argument in his oral statement with respect to the powers of the Security Council, with the statement and the attitude taken by the representative of the United States in these debates about the suggestion in the recommendation in the General Assembly's resolution that the Security Council was to take enforcement action, distinguishing in that regard between enforcement action for the purposes of dealing with a breach of the peace or an act of aggression or a similar occurrence, on the one hand, and on the other hand, with using force with a view to implementing or enforcing the partition. In this latter respect he considered that there was no such power on the part of the Security Council.

So I do not want to deal with that again and I merely want to refer to the fact that representatives of other States in this debate also drew attention to the recommendatory nature of the General Assembly's resolution. The representative of the Lebanon said: "The General Assembly's resolution of 28 November is a mere recommendation" (*SC, OR*, Third Sess., 267th Meeting, p. 80).

The Canadian representative said that it was clear that the co-operation of the United Kingdom in the execution of the partition plan of the General Assembly could not be expected "to go beyond accepting the recommendation that the mandate itself be laid down" (*ibid.*, 274th Meeting, p. 234).

At page 861 of the statement of the United States (written statements, **I**) reference is made to a statement by the representative of the United Kingdom in the Security Council on 24 February 1948 to the effect that his Government was bringing to an end the discharge of its responsibilities under the mandate and was leaving the future of that country to international authority. It is furthermore stated in this written statement of the United States that a few days later the same representative "recognized that it was for the United Nations to decide what procedure to adopt 'with a view to assuming responsibility for the government of Palestine on 15 May' " (**I**, pp. 861-862).

Mr. President that could also, in our submission, create a somewhat wrong impression. The words used by the representative of the United Kingdom Government were these, on this second occasion:

> "I must point out that, whatever the procedure the United Nations may decide to adopt with a view to assuming responsibility for the government of Palestine on 15 May, that country is likely to become disorganized, disintegrated and even more violently disrupted by that date." (*SC, OR*, Third Sess, 260th Meeting, p. 402.)

In other words, there was no recognition that it was for the United Nations to decide upon procedures regarding assumption of responsibilities. It was a phrase used in passing "whatever the procedure the United Nations may decide to adopt" after the withdrawal *(ibid.)*.

The statements were made by the representative of the United Kingdom when his Government had already announced its decision to voluntarily relinquish the Mandate. They were made in the course of debates in the Security Council regarding the question whether the Security Council should accede to the request of the General Assembly to implement the plan in certain respects. The representative of the United States had already made it clear that it, was not empowered to implement the political part of the settlement and it therefore, seems clear, Mr. President, that in the context there is nothing relevant in the statements of the representative of the United Kingdom to the assumption of any authority against the will of a mandatory.

One further feature in this respect, which is very important, is that the notion that the United Nations could after termination of the mandate assume responsibility for the administration of Palestine was not accepted by the Security Council. The representative of the United States was very emphatic about this. He said:

> "The assumption of administrative or governmental responsibility by the United Nations is another matter. If the United Nations is to act as a government, a large administrative task is involved. The Organization itself becomes directly responsible for all phases of the life of the people over whom such powers are exercised. It is a formidable responsibility, and a heavy financial commitment is incurred by all fifty-seven Members of the Organization.

> The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Power in respect of the Palestine Mandate. The record seems to us entirely clear that the United Nations did not take over the League of Nations Mandate system." (*Ibid.*, 271st Meeting, p. 164.)

Then there is a reference to the United Nations Charter, the voluntary basis of the trusteeship system and so forth, all of which I do not wish to read, but the general attitude was very strong. It was also stated by Syria, thereafter, that there was to be no assumption of direct administrative authority by the Security Council and that such a step was considered by it to be outside the powers of the Council (*ibid.*, 260th Meeting, p. 397).

Then, Mr. President, at page 862 of the United States written statement (written statements, I) reliance was placed on a statement by Judge Jessup in his dissenting opinion in 1966. In the written statement it is said:

> "Judge Jessup pointed out that in submitting the future of Palestine to the General Assembly, the United Kingdom 'recognized the authority of the United Nations to bring about a change in the status of a mandate'."

Judge Jessup's statement actually read like this:

> "It [that is the British Government] agreed to account to the United Nations for its administration of the Mandate and, by submitting the future of Palestine to the General Assembly, recognized the authority of the United Nations to bring about a change in the status of a mandate." (*I.C.J. Reports 1966*, p. 351.)

It will be seen, Mr. President, that there was nothing relevant here to any concept of doing something against the will, or without the consent of, a mandatory authority.

The Court rose at 1 p.m.

SEVENTEENTH PUBLIC SITTING (5 III 71, 10.05 a.m.)

Present: [See sitting of 8 II 71.]

QUESTIONS BY JUDGE LACHS

The PRESIDENT: Judge Lachs has some questions he wishes to address to the representative of South Africa.

Judge LACHS: In your written statement you discussed the *travaux préparatoires* relative to the elaboration of the mandates system. They were also referred to at length in the oral statement. I wish to put to you the following question:

You will recall that in their reply to the observations of the German delegation on the conditions of peace the Allied and Associated Powers stated, *inter alia*:

> "In requiring to renounce all her rights and claims to her overseas possession, the Allied and Associated Powers placed before every other consideration the interests of the native populations advocated by President Wilson . . ."

Moreover, on the question of the German debt the reply of the Allied and Associated Powers stated:

> ". . . that it would be unjust to burden the natives with expenditure which appears to have been incurred in Germany's own interest, and that it would be no less unjust to make this responsibility upon the Mandatory Powers which [and here is an important part of the statement] in so far as they may be appointed trustees by the League of Nations, will derive no benefit from such trusteeship." (Pp. 19 and 20 of the Reply published by HMSO, Misc. No. 4 (1919) *Command* 258.)

Furthermore Article 257 of the Versailles Treaty stated:

> "In the case of the former German territories, including colonies, protectorates or dependencies, administered by a mandatory under Article 22 of Part 1 (League of Nations) of the present treaty, neither the territory nor the Mandatory Power shall be charged with any portion of the debt of the German empire or State."

These Articles stand in contrast to Articles 254 and 256 of the treaty, Article 255 dealing with some exceptions. Now the question is as follows: in the light of the conclusions you arrived at on the *travaux préparatoires*, how do you interpret these statements and these provisions of the Versailles Treaty?

The second question is the following. I wish to refer to the interpretation of Article 80, paragraph 1, of the Charter presented at the sitting of the Court on 2 March. The question arises out of what probably is an inadequate understanding on my part of the views presented. And here it is:

What would you consider to constitute, within the meaning of Article 80, paragraph 1, an alteration in respect of a territory which has not been placed under the trusteeship system of the rights of a State or people, or the terms of an existing international instrument to which a Member of the United Nations is a party?

ORAL STATEMENT BY MR. DE VILLIERS (cont.)

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: At the adjournment yesterday I had concluded the presentation to the Court of information and references concerning the termination of the Mandate for Palestine—in the context of discussing that history with reference to the question whether the General Assembly, or for that matter the United Nations, has powers to terminate a mandate unilaterally. It remains only, Mr. President, for me to state very briefly, and by way of summary, the relevant conclusions which flow from these data.

Firstly, it is clear that the United Kingdom voluntarily referred the problem of Palestine to the United Nations in order that the General Assembly might make recommendations regarding the future of that country.

Secondly, the General Assembly at no stage purported to make more than a recommendation, and it was understood by all concerned that resolution 181 (II) had merely recommendatory effect. At no stage was it alleged that this resolution in itself could effectively terminate the Mandate.

Pursuant to the recommendations of the General Assembly, the United Kingdom, although not accepting all of the recommendations, voluntarily decided to relinquish the Mandate. That decision was interpreted and regarded as a unilateral termination of the Mandate by the United Kingdom.

And finally, the predominant view in the Security Council, when the matter went to it, was that it was not constitutionally entitled to implement the recommendations of the General Assembly by force, in so far as they related to the political aspect of the arrangement, and that the United Nations could not assume powers of administration in Palestine in the absence of a trusteeship agreement.

It is therefore clear, in our submission, that the practice of the United Nations with regard to the Palestine problem, lends no support whatsoever to a contention that the General Assembly has a power of unilateral termination of a mandate. On the contrary, it shows that Members of the United Nations fully understood and emphasized that the General Assembly could only make recommendations and that they could not take binding decisions as to the future of Palestine.

That brings me to the so-called termination of the Mandate for Micronesia. It will be noted that the United States in its written statement is, in this respect, relying upon actions in the Security Council and not in the General Assembly. But again, in so far as the events there are relevant to the question of United Nations powers generally, the precedent, in our submission, upon analysis, operates against the United States contention and not in its favour. At page 862 of its written statement, I, the United States refers to the fact that the Security Council unanimously approved a trusteeship agreement with the United States for the former Japanese mandated islands.

It is then stated that the right of the United Nations to take this action was based on its succession to the League. Reference is made to a speech of the representative of the United States at the 116th meeting of the Security Council explaining that it was the view of the United States that Japan never did have sovereignty over these islands and that the interest of the League of Nations in the Mandate had devolved upon the United Nations as the successor to the League.

By dealing with the matter in this manner, Mr. President, the written statement creates the impression that it was the unanimous opinion of the members of the Security Council not only that such an automatic succession had taken place but also that on that basis the Security Council was entitled to terminate the Mandate for Micronesia. By reference to the records I will endeavour to demonstrate that that is definitely not so, and that the very contrary appears.

When the discussion opened concerning the draft trusteeship agreement for Micronesia the representative of the United States in the Security Council stated:

> "As a result of the war, Japan has ceased to exercise, or to be entitled to exercise, any authority in these islands. These islands were entrusted to Japan under mandate of the League of Nations after the First World War. In utter disregard of the mandate, Japan, contrary to the law of nations, used the territories for aggressive warfare against the United States and other members of the United Nations. Japan, by her criminal acts of aggression, forfeited the right and capacity to be the Mandatory Power of the islands. The termination of Japan's status as the Mandatory Power over the islands has been frequently affirmed; in the Cairo declaration of 1943, subsequently reaffirmed in the Potsdam declaration and in the instrument of surrender accepted by the powers responsible for Japan's defeat.
>
> All authority in these islands is now exercised by the United States." (*SC*, *OR*, Second Sess., 113th Meeting, p. 413.)

Now, it will be observed that reliance was placed by the representative of the United States on a number of factors.

Firstly, on a loss of authority on the part of Japan, and even of a right to exercise authority, as a result of the war. Secondly, on a forfeiture of the Mandate by Japan by virtue of acts of aggression, apparently offered as violations of the Mandate. Thirdly, the reaffirmation of the forfeiture in the instrument of surrender which was accepted by Japan, and fourthly the *de facto* exercise of authority in the islands by the United States. There is no suggestion that the islands came into the authority of the United Nations, it is that "all authority [was] now exercised by the United States".

This was the basis offered by the representative of the United States why the Security Council need not be concerned about the title of Japan in this matter, where it was coming along now to offer a draft trusteeship agreement, with the United States as administering authority. But the other representatives were somewhat hard to please on these factors. They did not share this interpretation of the situation on the part of the representative of the United States.

The representative of the United Kingdom said:

> "It is true that the Japanese Government is at present under the control of the Allies, and particularly of the United States. But although this means that the United States carries out the functions of government in the islands, the fact remains that the mandatory power is *de jure* Japan and that this situation cannot, strictly speaking, be changed except by means of provisions in the final peace treaty.
>
> . . . . . .
>
> . . . there is no provision in the Charter whereby the Security Council is empowered to deprive even an enemy State of its mandate or to detach territories from enemy States." (*Ibid.*, 116th Meeting, p. 464.)

Then with reference to Article 79 of the Charter the representative of the United Kingdom continued:

> "It is true that this Article states only that the agreement of a mandatory Power is required in the case of territories held under mandate by a Member of the United Nations. The Article, therefore, does not in itself provide, either way, for the position of a territory held under mandate by a State which is not a Member of the United Nations. However, it does not necessarily follow that the consent of Japan as a mandatory Power or the relinquishment by Japan of her mandate, in this case, is not required." *(Ibid.)*

The representative of the United Kingdom went on to indicate that if the majority of his colleagues wished to proceed in the sense requested by the United States representative, then, in deference to their views and to the desire of the United States Government to have at once what all concerned agreed upon it should have eventually, he would not oppose the adoption of such a course (*ibid.*, p. 465).

The French representative stated that he considered it normal for reasons closely akin to those expressed by the United Kingdom representative that the fate of the former Japanese mandated territory should be settled by the working out of a peace treaty. However, he also indicated that the French delegation would raise no objection to the procedure submitted to the Security Council by the United States delegation (*ibid.*, p. 468).

At the same meeting of the Security Council the representative of the United States spoke again and he then made the statement relied upon in the United States written statement in these proceedings, which I read earlier, and he went on to say:

> "We do not need to dwell upon the question of title, that is to say, the underlying title to these islands. This question can be taken up and disposed of in a different tribunal, if the occasion should ever arise. For my part, I cannot foresee what condition of affairs would ever raise the question of whether there is such a residual title to be discussed and disposed of." (*Ibid.*, p. 472.)

He then again contended that as a result of Japan's disregard of the Mandate in using the islands for aggressive warfare, Japan had forfeited the right and capacity to be the mandatory of the islands and that such forfeiture had been recognized (*ibid.*, p. 472). In other words, Mr. President, it was clear that the representative of the United States himself relied not on a revocation or a suggested revocation of the Mandate by the Security Council but on what he contended for as a prior termination of that Mandate, outside of the United Nations.

But his colleagues were not yet satisfied. In reply, the Australian representative suggested that the representative of the United States had tended to over-simplify the whole question. He said:

> "... these islands did not come within the disposition of the United Nations because Japan committed a breach of the obligations under the League mandates system. These islands came into our disposition as the result of four of the bloodiest years of war that were ever fought anywhere on this globe. These islands came to us by conquest. These were islands wrested from Japan. Japan committed breaches of her obligations, it is true; Japan forfeited the islands; Japan should have lost all title to

the islands; but what took the title of the islands of Japan was the war . . ." (*Ibid.*, p. 478.)

Statements such as these were apparently the cause of some shift in the attitude then taken by the representative of the United States in regard to the legal aspect. At the 116th Meeting of the Security Council the Polish representative proposed an amendment to the preamble of the draft trusteeship agreement. The original draft, in its point 4 of the preamble, had read: "whereas Japan, as a result of the Second World War, has ceased to exercise any authority in these islands".

Now the proposal was that the following phrase should be added: "whereas Japan has violated the terms of the above Mandate of the League of Nations and has thus forfeited the Mandate". This proposal was referred to by the representative of the United States at the 119th Meeting of the Security Council, when he said:

> "Let us consider for a moment the position of Japan in this matter . . . first of all Japan has already been deprived both in fact and formally of all her rights as mandatory in these islands, by forfeiture. That is the subject of the amendment offered by Poland and already accepted by the United States. It is now a part of the instrument offered to the Security Council for consideration. Secondly, Japan has been deprived of her rights as mandatory, by reason of the United States occupation during the war. Thirdly, by reason of the surrender terms." (*Ibid.*, p. 526.)

Again, the whole accent on what has happened already.

The representatives of other States remained unpersuaded. The New Zealand representative, who had been invited to take part in the discussions of the Security Council, said that in the view of his Government any arrangements made with respect to Micronesia could not become final until the formal completion of a peace treaty in which Japan renounced her rights in those islands (*ibid.*, 122nd Meeting, p. 630), whilst the Canadian representative stated that as a consequence of the war Japan no longer exercised its mandatory authority and referred to the United States as the *de facto* administering power in the islands (*ibid.*, p. 632).

The proposal by the representative of Poland also met with opposition. The representatives of Australia and the Netherlands pointed out that legally there cannot be an automatic forfeiture of an agreement unless the agreement specifically so provides (*ibid.*, 124th Meeting, pp. 645-650). Such criticisms then caused the representative of Poland to change his legal stand in putting forth the following argument:

> "Japan, through her action of leaving the League of Nations, of starting a war of aggression against China, which in reality meant breaking the Covenant of the League, of which she was a Member, forfeited all rights as a Member of the League." (*Ibid.*, p. 647.)

In the end Poland withdrew its proposed amendment, as appears from page 656 *(ibid.)*.

Prior to the withdrawal of the Polish amendment, the representative of the Soviet Union stated:

> "It seems to me that there is no need for such an amendment. There is no continuity, either legal or otherwise, between the mandatory system of the League of Nations and the Trusteeship System laid down in the United Nations Charter. There is therefore nothing which might entitle

the Security Council to discuss this question, let alone take any decisions on it. The mandatory system of the League of Nations is distinct from the Trusteeship System which the United Nations is now trying to establish . . . For the reasons which I have just stated, the Security Council is not competent to decide to what extent Japan may have violated the conditions of the mandate system and the duties involved in the administration of mandated territories." (*Ibid.*, p. 648.)

The representative of Syria advanced yet another ground why the rights of Japan, if any, could not be considered. He emphasized the fact that Japan was not a member of the United Nations:

"The Syrian delegation had occasion, at the early meetings of this Council on the subject, to state clearly that inasmuch as Japan is not a Member either of the League of Nations or of the United Nations, no right may be mentioned or discussed and no reservation can be made concerning Japan pending its consent to the matter." (*Ibid.*, p. 652.)

Eventually, Mr. President, the United States representative submitted an amendment to the effect that the preambular phrase proposed by Poland should be deleted and that the following phrase should be substituted: "whereas the mandate held by Japan for these islands has come to an end" (*ibid.*, p. 656). This amendment was put to the vote and it was rejected on the basis that it did not obtain the requested number of votes. In the end therefore the original preamble was adopted which made no mention of a termination of the mandate but merely stated that "Japan, as a result of the second world war, has ceased to exercise any authority in these islands"—a mere statement of the factual position. In our submission, the record leaves no room for doubt that there was a wide divergence of views in the Security Council as to the legal basis of this whole matter of the title of Japan and the powers of the Security Council, if any. The general consensus seems to have been that the Security Council itself could certainly not take action (regarding a termination of title) and there is nothing to indicate that the majority of members was of the opinion either that the United Nations was the successor of the League of Nations in respect of mandates, or that the United Nations or any organ thereof was legally empowered to terminate the mandate. On the contrary, the opposite view emerges on both of these points.

In fact no representative took up the attitude that the Security Council itself could legally terminate the mandate. The contentions that Japan's title could be regarded as disposed of, rested on what was said to have happened previously; and even these, as I have demonstrated, were not accepted. So the Security Council's approval of the trusteeship agreement again affords no support at all for the contention of a unilateral power of termination on the part of any organ of the United Nations. As was stated by the representative of the United Kingdom in the Security Council:

". . . there is no provision in the Charter whereby the Security Council is empowered to deprive even an enemy State of its mandate" (*ibid.*, p. 464).

Mr. President, these two precedents, Palestine and Micronesia, concern terminations of mandates.

There were two cases relied upon concerning the assumption of administrative powers: West Irian by the United Nations General Assembly and the Saar by the League of Nations.

In this regard the United States says that "Article 81 of the Charter specifically provides that the United Nations may be an administering authority

of a trust territory" (written statement, I, p. 873). Having pointed out that the United Nations for a time administered the territory of West New Guinea on the basis of an agreement between the Republic of Indonesia and the Kingdom of the Netherlands, the United States statement concludes: "By analogy, the United Nations may assume responsibility for administering a territory under a mandate" *(ibid.)*.

Mr. President, in our submission, the conclusion misses the whole point. West New Guinea was administered by the United Nations precisely on the basis of an agreement by the States directly concerned. Whether one looks upon it formally as an agreement under the trusteeship system or not—Members of the Court will recall that it was a fairly brief matter of transition—it was based on an agreement between the States directly concerned and it therefore bears no relevance to a contention about a power of unilateral action in this respect without the consent and against the will of States directly concerned.

The history in this case is briefly that the General Assembly discussed the agreement between the Republic of Indonesia and the Netherlands concerning West New Guinea, now known as West Irian, during its Seventeenth Session in 1962. Up to that stage the territory had fallen under the sovereignty of the Netherlands, but for a decade or more Indonesia had contended that West Irian was an integral portion of its own territory. That was the dispute. There was a sharp conflict of opinion resulting in deterioration of relations between the two countries and what seemed to be the commencement of open conflict.

At this point the United States made a proposal for secret preliminary discussions between the parties in the presence of a third party, who was the United States Ambassador Ellsworth Bunker. As a result of these discussions the eventual agreement was reached.

The agreement was made subject to its acceptance by the General Assembly of the United Nations. It provided for the transfer via a United Nations temporary executive authority of the administration of West Irian from the Netherlands to Indonesia and for the exercising of a so-called act of free choice of the people of West Irian six years after the administration had been transferred to Indonesia. So there was to be an act of transfer via the temporary authority and then six years later an act of free choice. It furthermore provided, and this is where the United Nations came into the picture further, that at the time of the transfer of full administrative responsibility to Indonesia a number of United Nations experts would be designated to remain wherever their duties required their presence. Their duties, as was clearly defined, would be limited to advising on and assisting in preparations for carrying out the provisions for self-determination, except that they could be extended, in so far as Indonesia and the Secretary-General might agree, to the performance of other expert functions.

At the proper time, preparatory to the exercise of the right of self-determination, the Secretary-General would appoint a United Nations representative in order that he and his staff might assume duties in the territory one year prior to the date of self-determination.

Indonesia had to make arrangements, with the assistance and participation of such representative, and his staff to give the people of the territory the opportunity to exercise freedom of choice.

Now the agreement was discussed in the General Assembly Plenary Meetings on 21 September 1962. After the representatives of Indonesia and the Netherlands had addressed the Assembly, the draft resolution presented by the two countries was adopted by 89 votes to nil, with 14 abstentions. No other repre-

sentative spoke before the adoption of the resolution. Thereafter the acting Secretary-General made a statement in which he said:

> "I feel that this Agreement sets an epoch-making precedent. Under it, for the first time in its history, the United Nations will have temporary executive authority—established by and under the jurisdiction of the Secretary-General—over a vast territory.
>
> The Agreement is unique in another respect: although the United Nations has a vital role to play in implementing the Agreement, the general membership of the Organization will not be required to meet additional financial burdens, as the entire cost of the United Nations operation will be borne by Indonesia and the Netherlands in equal proportions.
>
> This novel settlement may well be a step in the gradual evolution of the United Nations as an increasingly effective instrument for carrying out policies agreed upon between Member Governments for the peaceful resolution of their differences, in line with the Charter. On this basis, and at the request of the two Governments, I have had to authorize certain steps in connexion with the implementation of the Agreement, in anticipation of its approval by the Assembly." (*GA, OR*, Seventeenth Sess., 1127th Meeting, p. 53.)

So the basis of specific consent was made absolutely perfectly clear, together with this further important factor, that when parties have consented to something being done by an organ acting under a constitution, there might still be questions under the constitution pertaining to the question whether, even with consent, such an organ was intended to perform such functions. Those questions could, in particular, pertain to financial implications, costs, time involved and cost to the members of that organization. That is why this factor in the agreement—the agreement by the two parties concerned to defray all the costs of the United Nations operation and participation in the matter—played such an important part.

In its report on the implementation of the agreement, the Indonesian Government emphasized these very factors which I have just mentioned; that was in 1966:

> "The Agreement was clearly a bilateral agreement between Indonesia and the Netherlands. It was not called upon by a resolution of the Question or by any other mandate of the United Nations General Assembly, which had always failed to produce any resolution for the solution of the dispute.
>
> The role of mediation or intermediary of the United Nations Secretary-General, U Thant, was called for by pressing international circumstances, and the further role of the United Nations Secretary-General in the agreement itself, as in the creation of the United Nations Temporary Executive Authority in West Irian and the dispatch of the Ortiz-Sanz Mission, was called for by the Agreement itself, that is to say by the two parties to the Agreement.
>
> This may explain why the United Nations General Assembly, on 21 September 1962, confined itself to only taking note of the Agreement and to congratulating the parties on their success in finding a peaceful solution to the long-standing dispute.
>
> With regard to the role or function of the United Nations Secretary-General to be performed as requested by the Agreement between two members of the United Nations, the United Nations General Assembly had, of

course, to permit and to authorize the Secretary-General to perform an extraneous function, as not belonging to his routine institutional function, as Secretary-General of the United Nations. That is why it was also provided in this Agreement that all financial expenses defrayed by Secretary-General U Thant, in complying with the duties called for by the Agreement, were to be borne by the two contracting parties themselves, by the Indonesian and the Netherlands Governments in equal shares. Nothing was to be paid by the United Nations." (*GA, OR*, doc. A/7723, pp. 9-10.)

The text of the resolution of the General Assembly relating to the initial agreement (resolution 1752 (XVII)) read as follows:

"*The General Assembly*,
Considering that the Government of Indonesia and the Netherlands have resolved their dispute concerning West New Guinea (West Irian),
Noting with appreciation the successful efforts of the Acting Secretary-General to bring about this peaceful settlement,
Having taken cognizance of the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian),

1. *Takes note* of the Agreement;
2. *Acknowledges* the role conferred upon the Secretary-General in the Agreement;
3. *Authorizes* the Secretary-General to carry out the tasks entrusted to him in the Agreement." (1127th Plenary Meeting, 21 September 1962.)

When the implementation of the Agreement was considered in 1969 in the General Assembly, Mr. Mohamed of Malaysia reiterated many of the points made in the Government's report of 1966 which I have just read out, so I do not intend to read again what he said. But I would emphasize these aspects: that it was a bilateral agreement—not originating from a United Nations source, the United Nations being only brought in by the agreement for a limited role and the parties paying all the expenses, nothing being paid by the United Nations itself (A/PV. 1812, pp. 32-33).

The representative of India found it necessary, for some reason, to emphasize that the General Assembly was merely being called upon to take note of the report of the Secretary-General in regard to the act of free choice which had been undertaken in West Irian, and he emphasized that that was all that was meant—it did not really mean the direct or indirect approval of the document (A/PV. 1813, p. 16). We have set out the text of resolution 2504 of the Twenty-fourth Session (19 November 1969) in a document which can be handed in—I do not want to read it, Mr. President. The important point is that after a preamble taking account of and recalling various things, the main operative paragraph simply states this: "*Takes note* of the report of the Secretary-General and acknowledges with appreciation the fulfilment by the Secretary-General and his representative of the tasks entrusted to them under the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)." For purposes of full context the document is available to be handed in.

So that makes it perfectly clear that this is no precedent at all for the assumption of administrative powers, otherwise than by the specific agreement of the particular parties directly involved. And then, even to guard against the possibility of there being a more technical infringement or, shall I say, transcending of the bounds of constitutional powers, and involving the organization in ex-

penditure which could not be said to be authorized by the constitution, there was the special arrangement about defraying of expenditure.

When we look at the position concerning the Saar in the time of the League of Nations, we find, as a matter of basic principle, exactly the same thing. Here the contention of the United States reads:

> "The decision by the Assembly that the United Nations should administer Namibia is consistent with the basic structure of the Mandates System and the International Trusteeship System and the practice of the United Nations. The Mandates System presupposes an administering authority. The League of Nations performed analogous functions in the case of the Saar through a Commission established pursuant to the Annex to Article 50 of the Treaty of Versailles." (*Written statement*, **I**, *p. 872.*)

The term used in this contention is "analogous functions" and in the context it seems as if the suggestion may be that this serves as an indication that the League could have performed direct administration of a mandated territory too. If that is the suggestion, then our contention is that it is clearly not well-founded. It is not well-founded for other reasons which we have given already, but what we are concerned with at the moment is that it is not even supported by this *precedent*.

The position in regard to the Saar was, as Members of the Court would know, that Germany, in the Peace Treaty of Versailles, renounced in favour of the League of Nations, in its capacity of trustee, the government of the Saar (Article 49 of the Peace Treaty of Versailles, 28 June 1919). It was added, in the same Article, that "at the end of fifteen years from the coming into force of the present Treaty the inhabitants of the said territory shall be called upon to indicate the sovereignty under which they desire to be placed". Accordingly, the Saar plebiscite took place in 1934.

In terms of Article 50 of the Peace Treaty, the Annex regarding the Saar was declared to be an integral part of the Treaty and Germany acknowledged her adherence to the Annex. Chapter II of the Annex contained provisions relating to the government of the Saar which was to be carried out by a governing commission appointed by the Council of the League.

An important aspect here, too, is that, according to the provisions of the Annex, it was clear this would not cost the league or its Members a penny. There was a specific chapter on financial arrangements and it was clear that the costs of administration would be covered by the tax revenues derived from the Saar itself.

So here again: specific agreement by the States directly concerned and this arrangement in connection with the financial aspect. Commentators have drawn attention to the difference between this instance of direct government and that which, under Article 22 of the Covenant, was performed by mandatories. For instance, Duncan Hall, in his *Mandates, Dependencies and Trusteeship*, 1948, in comparing the provisions of the Charter and of the Covenant, said at page 133:

> "Direct international administration, expressly provided for in the Charter, [that is probably under a trusteeship agreement] was perhaps not possible under Article 22 of the Covenant, though it existed in the Saar by virtue of another provision of the Treaty of Versailles. When the great powers offered the Council of the League a mandate for Armenia in 1920, the offer was rejected—in part because the legality of a direct League mandate was questioned."

And then, as regards this history of the suggested Armenian Mandate, Walters, in his *History of the League of Nations* (Vol. I, 1952, p. 109), has some comment. According to the author the existence of Armenia was threatened by Russia and Turkey:

> "The Allies were far away: they could not protect Armenia without making a military effort which was far beyond their will; yet they could not openly abandon her to her fate. In this dilemma the Supreme Council hit on the idea of treating her as a mandated territory and asking the League to act as trustee. But the Council was far too prudent to fall into such a trap. In a reply drafted by Balfour himself, it answered (April 11th, 1920) that under the mandate system the responsibility of trusteeship was accepted by individual States, not by the League as such; and that a direct League trusteeship could not be considered until the Allies had announced what military and financial resources they would provide for the purpose, since of itself the League possessed neither."

Again, the obvious emphasis of the distinction between a case like that of the Saar and a case of suggested direct assumption of administrative functions by either the League or the United Nations in regard to a mandated or trusteeship territory. So again, this is a precedent which tends to operate against rather than in favour of the contention which invoked it.

That brings us to the end of those precedents which were specifically invoked in this way. I would like to refer as an example to one of the list of cases given by the Secretary-General of actions by the General Assembly as if it were representing the United Nations, and which he in some way or other regards as precedents. In my submission, it is not clear at all on what basis he attempts to do this. The legal basis is not clear because after all, as I have said before, we are not concerned with a difficulty of resolving an ambiguity or something else which needs to be cleared up, and if we look at these examples they are certainly not unambiguously clear and pointing to one course of action adopted, or one view taken of a situation, on the part of the interested members of the United Nations.

The Suez Canal case is an excellent example of this. That was dealt with by the General Assembly in two resolutions at a Special Session (ESI) in 1956: resolution 997 and resolution 1000. Now referring first to resolution 1000, that provided for the establishment of a United Nations Command for an emergency international force to secure and supervise cessation of hostilities in accordance with the terms of resolution 997 of 2 November 1956. The resolution furthermore appointed the Chief of Staff of the United Nations Truce Supervision Organization as Chief of Command, and authorized him to recruit a number of officers.

In resolution 997 the General Assembly noted that armed forces of France and the United Kingdom were conducting military operations against Egyptian territory, and that the armed forces of Israel had penetrated deeply into Egyptian territory, and it urged (in this resolution 997) that all parties involved in hostilities agree to an immediate cease-fire, and that the parties to the armistice agreement promptly withdraw all forces behind the armistice lines.

Resolution 1000 was adopted by 65 votes to 1 with 10 abstentions (*GA, OR*, 1st Emergency Special Session, 567th Meeting, p. 127). The representative of the Soviet Union, in explaining his abstaining vote, objected that in the view of the Soviet delegation this force was being "created in violation of the United Nations Charter".

His argument proceeded along the lines that this was an encroachment by the General Assembly on the domain of the Security Council. But he concluded:

> "However, in view of the fact that in this instance the victim of aggression has been compelled to agree to the introduction of the international force, in the hope that may prevent any further extension of the aggression, the Soviet delegation did not vote against the draft resolution, but abstained." (*Ibid.*, p. 128).

This is significant, Mr. President: in regard to the actual physical act of placing this emergency force in Egypt, there was, as appears from this statement, the consent of the State concerned; and although the representative of the Soviet Union did not like the methods by which the consent had been obtained, he said that on that basis he would not vote against the resolution, he merely abstained. However, when it came to the financial implications the matter was not so simple, and one finds that in 1963 when the financial estimate of the Secretary-General for the United Nations Emergency Force was discussed in the Fifth Committee, the representative of the Soviet Union recalled what had taken place in 1956, and he recalled the attitude taken by his delegation then and reiterated the reasons why it was contended that this action was *ultra vires* and outside of the powers conferred by the Charter. The conclusion was stated consequently, that "the expenditures deriving from that illegal decision of 1956 were themselves illegal" (*GA, OR*, Eighteenth Sess., 5th Comm., 1052nd Meeting, p. 263).

I am not absolutely certain about this—no doubt Judge Morozov could correct me if I am wrong, Mr. President—but our impression is that up to this date the Soviet Union has resolutely refused to contribute to the finances of the 1956 operation.

On the occasion in 1963 to which I have referred, the attitude of the Soviet Union was supported by the representative of the Ukraine and of Bulgaria (*GA, OR*, Eighteenth Sess., 5th Committee, 1053rd Meeting, pp. 267 and 269 respectively).

So, Mr. President, I am not suggesting that it is now for the Court to determine who was right or who was wrong in the argument on that particular point. What I am pointing out is that there was in fact a controversy, and a very important one, which had important repercussions at a later stage. So in principle, the reliance upon this kind of precedent brings us nowhere—it is no precedent for anything except to indicate that when it comes to questionable action, when an organ of the United Nations tries to assume to itself questionable powers, where it even goes further and it takes action in the face of very strong warning of reponsible Members, that it is acting *ultra vires*, then there is no basis upon which one can say that by precedent or by any other process that is to be regarded as lawful and binding.

Still under the heading of precedent and practice, I want to revert very briefly to certain arguments with which I have dealt in another way—the various contentions to the effect that in regard to a mandatory State, i.e., a mandatory authority, or an administrative authority under trusteeship, the General Assembly, as supervisory authority, is empowered to make binding interpretations, binding directives, which then become an obligation on the part of the administering authority to comply with—by way of processes of interpretation of obligations and so forth. We have pointed out in other parts of our presentation that there is no legal basis whatsoever for these contentions and that they run counter to the clear jurisprudence of this Court in various of its decisions, and

also to the clear and manifest intent of the authors of the mandates system and of the trusteeship system, in the case of the United Nations.

I merely want to add one historical reference in that regard, which is, in our submission, a significant one, and that is the attempt which was made at San Francisco to include in the Charter provisions concerning authoritative interpretation of its provisions. There was a discussion on that matter and the outcome was that it was deliberately decided to have nothing of the kind in the Charter—the reference is to UNCIO document, Volume XIII, pages 709-710. The matter was discussed at considerable length and a significant statement was included in the final report of Committee IV. This statement was quoted to this Court in the proceedings preceding the Opinion regarding *Certain Expenses of the United Nations*, and it is to be found in the *Pleadings, Oral Arguments and Documents* of those proceedings, at page 221, in a footnote to the written statement of Canada:

> "If two member States are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty.
>
> It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment."

So that was the intention of the authors of the Charter. There was comment on this matter in the *British Year Book of International Law* for 1946, in an article, "The Interpretation of the Charter", the author writing under the pseudonym of Pollux. He made it clear that, in his view, a State would not be legally bound by an interpretation of the Charter by other States—an interpretation with which it did not agree. The author stated: "No State can reasonably be expected meekly to accept an interpretation of the Charter which it considers completely wrong, however large the majority in favour of such an interpretation may be." In a footnote to this passage the author added: "This remark does not apply to an interpretation given by the International Court of Justice or other bodies which may be authorized to give a binding interpretation" (p. 57); in other words, stressing the need for authorization in order to do such a thing. We have been emphasizing in our presentation to the Court the absolute absence of any such authorization or grant of power.

In the separate opinion of Sir Percy Spender in the *Certain Expenses of the United Nations* case he dealt with the suggestion that an interpretation of the Charter by a majority of States is to be accepted as the correct interpretation and he stated in this regard:

> ". . . it is not evident on what ground a practice consistently followed by a majority of Member States not in fact accepted by other Member States could provide any criterion of interpretation which the Court could properly take into consideration in the discharge of its judicial function. The conduct of the majority in following the practice may be evidence against them and against those who in fact accept the practice as correctly interpreting a Charter provision, but could not, it seems to me, afford any in their favour to support an interpretation which by majority they have been able to assert." (*I.C.J. Reports 1962*, p. 191.)

Now, Mr. President, there is one final aspect of practice and precedent that may interest the Court. That appears from the 1968 Report of the Committee of Twenty-four (*GA, OR*, Twenty-third Sess., Doc. A/7200, Part I, 5 Dec. 1968). Paragraph 11 of that report refers to the fact that at its 22nd Session, the General Assembly adopted resolution 2326 (XXII), of which operative paragraph 16 reads as follows:

> "*Requests* the Special Committee to examine the compliance of Member States with the Declaration on the Granting of Independence to Colonial Countries and Peoples and other relevant resolutions on the question of decolonization, particularly those relating to the Territories under Portuguese domination, Southern Rhodesia and South West Africa, and to report thereon to the General Assembly as its twenty-third session."

I wish to repeat, Mr. President, this was December 1967. At the same session, the report indicates that the General Assembly, in addition to this resolution, adopted a number of other resolutions on specific items relating to the question of decolonization which contain various requests addressed to all States and/or member States.

So circular notes were sent out and replies were received. I wish to refer only to two replies: one was by the United Kingdom and one by the United States of America. We have the documents in full, and they could be handed in. I wish to refer to a brief paragraph in each.

> "The United Kingdom Government attaches weight to the resolutions of the General Assembly but these have, of course, the force of recommendations only and it is open to member States to determine their action in accordance with their own view of the merits of each case." (10 July 1968.)

The United States reply was dated 16 August 1968. The passage I want to read is this:

> "At the outset, the United States Government would like to take this opportunity to reaffirm its dedication to the principle of self-determination. At the same time the United States Government wishes to point out that, in accordance with the Charter of the United Nations, General Assembly resolutions of the type referred to are recommendatory only and not mandatory."

On that happy note I think we could leave the subject of practice and precedent.

The PRESIDENT: Mr. de Villiers, before the Court takes its usual recess, I regret to have to observe that during the last few minutes of your presentation you let slip an invitation to a Member of the Court to correct you if you were wrong in making a factual statement. I am sure a moment's reflection will convince you that, to put it at its mildest, such an invitation was most inept. No Member of the Court represents any Government, any State, or any Member of the United Nations or any other organization.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

QUESTIONS DU VICE-PRÉSIDENT ET DE M. IGNACIO-PINTO, ET DE M. FORSTER

QUESTIONS BY JUDGE MOROZOV

The PRESIDENT: The Vice-President and Judge Ignacio-Pinto have a joint question to put to the representative of South Africa. Judge Forster has some questions to put to the representative of South Africa. Judge Morozov has a question to put to the representative of South Africa.

Le VICE-PRÉSIDENT: Vous avez discuté les circonstances dans lesquelles les Mandats sur la Palestine et les îles du Pacifique Nord ont pris fin, et ce en vue de démontrer qu'il n'a pas été mis fin à ces Mandats de façon unilatérale ou sans le consentement préalable des Puissances mandataires. Seriez-vous disposé à discuter également des circonstances dans lesquelles les Mandats sur la Syrie et le Liban ont été terminés, à l'effet de savoir s'ils l'ont été avec ou sans le consentement préalable de la Puissance mandataire?

M. FORSTER: Maître, je vous prie de vous référer aux pages 313 et 314, *supra*.

Le représentant de l'Afrique du Sud a dit, à la page 313, *supra*:

> "Dans l'ensemble du système, un élément très important ressort des dispositions du Pacte: c'est celui qui prévoit que toute décision du Conseil relative à un mandat donné exige l'accord du représentant de l'Etat mandataire entre autres. Il s'ensuit que la décision de révoquer un mandat n'aurait pu être prise si le mandataire s'y était opposé. Or, si l'on avait eu l'intention de donner à la Société des Nations la possibilité de révoquer les mandats, il est inconcevable que les fondateurs de la Société des Nations aient rendu l'exercice pratique de cette compétence mécaniquement impossible."

Il a dit à la même page:

> ". . . on peut maintenant considérer comme établi en droit qu'une décision de révocation du mandat n'aurait pu être prise contre la volonté du mandataire".

On lit aussi à la page 314:

> ". . . en d'autres termes, le Conseil n'aurait eu juridiquement aucun pouvoir, non seulement si un mandataire avait agi contrairement à ses avis, mais encore s'il avait agi contrairement aux termes du mandat".

Il est reconnu que, si ces déclarations étaient bien fondées, elles présenteraient de la pertinence dans le contexte de l'argument que l'on cherche à en tirer.

Il est également admis que la confiance dans la bonne volonté et la bonne foi du Conseil de la Société des Nations et des Puissances mandataires était à l'origine et à la source de la conception même des mandats. En pratique, donc, ainsi que la Cour l'a fait observer en son arrêt rendu dans les affaires du *Sud-Ouest africain* en 1966:

> ". . . il était fréquent que l'on n'insiste pas sur la règle de l'unanimité ou que l'on en atténue les effets au moyen de compromis et d'artifices de procédure auxquels le Conseil et le Mandataire se prêtaient. A la connaissance de la

Cour, aucun Mandataire n'a jamais opposé son veto à une décision éventuelle du Conseil. On a par ailleurs pris grand soin d'éviter de mettre les Mandataires dans l'obligation d'avoir à choisir entre l'adoption du point de vue des autres membres du Conseil et un vote contraire. En s'abstenant volontairement de siéger à telle ou telle séance, le Mandataire permettait au Conseil de prendre des décisions contre lesquelles il aurait cru devoir voter s'il avait été présent. Cela faisait partie des moyens d'aboutir à des conclusions généralement acceptables, qui viennent d'être mentionnés."

Pour qu'il soit possible d'apprécier la valeur juridique des déclarations ci-dessus, faites au nom de l'Afrique du Sud, le représentant de l'Afrique du Sud est invité à bien vouloir répondre aux questions suivantes:

Première question: Connaît-on des cas où une proposition du Conseil de la Société des Nations, appuyée par tous les Membres du Conseil de la Société des Nations, ait été repoussée en raison du vote négatif d'un Mandataire?

Deuxième question: Quelle conclusion est-il légitime de tirer du fait que le Mandataire était parfois absent d'une séance du Conseil de la Société des Nations dont l'objet était l'adoption de décisions contre lesquelles le Mandataire aurait peut-être dû voter s'il avait été présent?

Troisième question: Dans le cas d'un conflit entre l'opinion unanime et persistante du Conseil de la Société des Nations sur une certaine proposition, visant à mettre en œuvre une disposition du Pacte de la Société des Nations et l'opinion opposée et persistante du Mandataire à cet égard, y avait-il une disposition du Pacte que l'on pût faire jouer finalement et en dernier ressort pour résoudre le conflit? Ou bien l'Afrique du Sud soutient-elle qu'il n'y avait aucun moyen possible de surmonter l'opposition du Mandataire dans un cas de ce genre?

Quatrième question: Si la réponse à la première partie de la question précédente était négative et la réponse à la deuxième partie positive, le représentant de l'Afrique du Sud voudrait-il dire si l'application de l'article 16, paragraphe 4, du Pacte ne résoudrait pas le genre de conflit mentionné dans la question précédente et n'est-ce pas parce que l'on songeait à cette disposition que l'on a recouru à la pratique indiquée au paragraphe 82 (p. 44 et 45) de l'arrêt de la Cour (cité plus haut) pour remédier à un conflit entre le Conseil de la Société des Nations et un Mandataire sur des questions essentielles? Je vous remercie.

Judge MOROZOV: With your permission, Mr. President, I should like to put to the representative of the Government of South Africa the following two questions:

1. Has the Government of South Africa at any time asked the Security Council of the United Nations to permit its representative to participate in the discussions of the Security Council on the question of Namibia, and particularly to participate in the discussions of the Security Council leading to the adoption of resolution 276 (1970) and resolution 284 (1970)?

If so, what was the result of such request?

If not, can the South African representative be so kind as to explain why it did not do so, taking into account the fact that the agenda for all meetings of the Security Council are distributed in advance to all Permanent Representatives in New York?

2. Do the submissions made to the Court by the representatives of South Africa, if correctly understood, mean that it does not consider decisions of the Security Council taken in accordance with Article 24 of the Charter to be binding on all Members of the United Nations in accordance with Article 25 of the Charter of the United Nations?

ORAL STATEMENT OF MR. DE VILLIERS (cont.)

Mr. de VILLIERS: Mr. President, with reference to your observations immediately before the adjournment, I hasten at this first opportunity to assure the Court, and particularly Judge Morozov, that I intended no reflection or discourtesy in what I said. I merely had in mind that I was referring to a proposition of fact, which was to a considerable extent a matter of public knowledge, and that I was stating to the Court that I was not absolutely sure of the correctness of one aspect of the proposition I was making. I had in mind, further that Members of the Court, and in particular Judge Morozov, may, as a result of their knowledge and experience, have greater knowledge on the subject than I. I certainly did not suggest, or intend to suggest, that any judge is to be regarded as representing the government of his country. If my remarks created any other impression I hasten to assure the Court, and particularly Judge Morozov, of my sincere apologies.

The PRESIDENT: Mr. de Villiers, your observations are noted. I thank you for making them. You could certainly have put your remarks in the form, if you had so wished, that if I am not correct in this respect I speak subject to correction, without reference to any particular Member of the Court, because, apart from the aspect that I dwelt upon in my observation before the recess, on any question, whether of fact or of law, a Member of the Court cannot be sought to be converted into a witness, as it were. That also was the point, but thank you for the observations that you have submitted.

Mr. de VILLIERS: Mr. President, I have dealt, I hope adequately, with all the various lines of argument which have been advanced by, or on behalf of, various participants, with a view to establishing validity and binding effect for operative paragraph 4 of resolution 2145. Without necessarily reading out each one verbatim, I think the substance of all those contentions has been answered.

My submission in conclusion is that, in whatever way we look at it, the answer remains that that decision cannot be valid or binding. The contentions to the contrary cannot be supported in law on any of the numerous and the varied bases raised and considered, namely the meaning of the wording of that paragraph, its history in United Nations proceedings, the argument about succession of powers from the League of Nations, action taken on the basis of violation of obligations by the Mandatory, functional and teleological approaches, the jurisprudence of this Court, the comment of publicists and practice and precedent.

So, Mr. President, for this reason alone, we submit that the whole foundation on which the actions in the United Nations concerning South West Africa have been taken since 1966 falls to the ground, and those actions afford no ground for stating that South Africa's continued presence in South West Africa is illegal.

My submission is, with respect, that an advisory opinion which states this need not be a basis for further confrontation and strife. The task of the General Assembly remains that of discussion and recommendation. The duty of the South African Government remains that of giving serious consideration to such recommendations. The Security Council, as we, with submission, interpret its actions in the matter, has consistently treated South West African affairs under the heading of peaceful settlement.

Whatever one might think of details of South Africa's policies in the stages of transition and evolution in which they are at the present time, one fact does stand out and that is that South Africa is embarked on a general policy of granting self-determination to various peoples, not only within the Republic but also in South West Africa. In connection with these very proceedings, a plebiscite has been proposed for South West Africa with, we hope, the co-operation of the Court, to determine the desires of the various peoples of the Territory.

Now, Mr. President, if there is to be an orderly transition in evolutionary processes, an orderly transition to new arrangements, a moment's reflection will demonstrate that that would require participation and whole-hearted co-operation on the part of the existing administration in the Territory.

For those from outside who may also desire development towards self-determination for the peoples of South West Africa, it is unavoidable, in our submission, that they follow the course which was indicated in the mandates and the trusteeship systems—the course of discussion, of persuasion and of dialogue—because otherwise the well-being of the inhabitants must be in danger, particularly if the other course is to be adopted—the course of confrontation, conflict and attempted coercion.

This matter was given attention recently by a very eminent visitor to southern Africa—George F. Kennan, the former Ambassador of the United States to Moscow. He paid a visit—I think it was his second or third one—to southern Africa, and this visit included a visit to the Portuguese territories, to South West Africa and to the Republic. He wrote an article in the January issue this year of *Foreign Affairs*, the American quarterly review. The whole of the article, particularly that part dealing with South West Africa, is very well worth reading for its incisive analysis of the situation. The author is critical, very critical, of aspects of South Africa's policies as he finds them, but he appeals for perspective with reference to the realities of the situation.

Speaking about South West Africa, and particularly about this question of the interests of the inhabitants, having in mind the possibilities of development and of new arrangements, he mentions what could follow by way of negative consequences of this approach of coercion, the use of force in order to secure a South African withdrawal—what that could be expected to produce in terms of the interests of the population themselves. I refer to page 229 of that article, and I wish to read a brief portion of it to the Court:

> "In the event of a forced South African withdrawal, the overwhelming majority of the existing white population of the territory could be expected to withdraw together with the South African authorities. All existing administrative and social services would simply cease to exist. The railways are South African. Their rolling-stock, in its entirety the property of the South African State Railways, would assuredly be removed. Without the railways, the great non-ferrous and diamond mines, employment in which provides a large part of the income of the native population, would close down. In the case of the non-ferrous ones, their pumps would at once cease to function; it would be months before they could be reopened. Agriculture, too, would be largely paralyzed. The territory's only significant part, Walfish Bay, the status of which as a complete South African coastal enclave has never been questioned, would remain under South African administration.
>
> Worst of all, while it is possible to imagine certain of the remaining tribal elements, notably the Ovambos, administering themselves (albeit largely without money), it is not possible to imagine any of these elements

collaborating in the administration of any of the others. These tribal entities live, in many instances, hundreds of miles apart; there is no intimacy and little affection among them; none, one suspects, would respond favorably to the appearance in its midst, as would-be administrators, of officials of another tribal affiliation. The United Nations would, in other words, have to create a new administration, largely foreign to take the place of the South African one. It is easy to believe that such an administration would follow more liberal policies with respect to the status of the native than does the existing one. It is not easy to believe that it would be as efficient, or as well provided with funds; and it would almost certainly be years before it could expect to restore to this vast territory even a semblance of such good order and prosperity as it has now achieved.

One can understand the desire in UN circles to remove from South African control at least this one area which was once, and can still be construed to be, an international responsibility. But one wonders whether the practical consequences of such a step have been really thought through."

Mr. President, this is relevant even in this conclusion in regard to the legal argument which is being presented to the Court, because the legal argument has largely been concerned with these two approaches: the approach of accepting what was obviously the intention of the authors of the two systems, the approach of dialogue and persuasion, on the one hand, and as against that, the suggestion that come what may, and even though it is not there in the text, one should somehow, either by implication in the text or in some way *dehors* the text, come to a conclusion that there are powers of coercion which ought to be used in some way against South Africa in these circumstances.

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.

That concludes our presentation in regard to the scheme of the argument on the legal questions, as it was explained before to the Court by my learned colleague, Mr. Viall. It remains for us to deal with various other matters. There are a number of questions which have been put by Members of the Court with which we should like to deal as soon as we are in a postition to do so, which should not take us any inordinate amount of time.

Then the prospect may arise of a reply on legal argument or other argument still to be presented, particularly by the United States, and on answers to questions by the Court by other participants, and on the reaction, which is still to be forthcoming, to our plebiscite proposal, not only from the United States, but also from the Secretary-General himself.

Then there is the vast field in regard to issues of fact and related questions of law. These issues, Mr. President, bear in part upon the grounds on which the General Assembly purported to act in adopting resolution 2145 in 1966. In other words, they bear particularly on the alleged violation by South Africa, through its policies and administration, of its trust obligations under the Mandate. They are also relevant in another context, the context of the contention of the Secretary-General about the legal consequences of the continued presence of South Africa in South West Africa, of alleged continuing violations of international obligations, and of international liabilities being incurred by South Africa in that respect. The Court will recall that a considerable portion of the written presentation of the Secretary-General is directed to contentions of that nature.

The attitude of the South African Government and its representatives has consistently been, and it still is, that a factual enquiry is a basic and an integral portion of the task which has been assigned to the Court by request of the Security Council, unless, of course, the Court should dispose of the matter on some legal question, the answer to which makes it unnecessary to go into the factual issues. We are in the position, at the moment, that the Court has indicated to us, and that the proceedings have thus far proceeded on the basis, that there is to be no separation as to particular parts of the matter and other parts of it—in other words, preliminary issues on the one hand and merits issues on the other hand, or legal issues on the one hand and factual issues on the other—as far as the Court's procedure is concerned. That is how the matter has proceeded up to this stage.

That creates considerable practical difficulties at this particular stage in connection with the canvassing, or even preparation for the canvassing, of the issues of fact. I say at the present stage, meaning by that until we know what the Court's reaction is or may be in respect of our plebiscite proposal. The difficulties we experience do not relate to ourselves only; they relate in particular to the Court, to its convenience and also the convenience of other participants in the proceedings.

The main reason why we say this, Mr. President, is that the Court's decision on the plebiscite proposal could have a fundamental bearing both on the nature and on the ambit or scope of the presentation on mixed fact and law that may be found necessary in respect of the field I have just been referring to. If the Court were to accept the proposal, the outcome of the plebiscite may well be a very important feature of this presentation; and many of the factual allegations, as well as the need for controverting them—for instance the allegations of denial of self-determination, the allegations of oppression and repression, and so forth—could either fall away or be very substantially reduced in scope.

I say they "could": I may be able to put it higher. I do not think I have to for purposes of what I am stating to the Court at the moment. Any presentation additional to that concerning the result of the plebiscite, may well be of an explanatory or a supplementary nature only, and that, of course, would necessarily have to be made after completion of the pebiscite.

On the other hand, Mr. President, if the plebiscite proposal were refused, then naturally we would wish to canvass the issues of fact in a much more detailed manner by means of argument, or evidence, or both. The ambit of such an enquiry would be a vast one, as I propose to show shortly. And there is the further complication that if the Court were to say to us that the Court declines to give any ruling on this aspect prior to the conclusion of our case on the facts, then we would have no option but to proceed in the meantime on the

basis as if the proposal were refused. In other words, we would have to make the more extensive presentation to the Court because we could not take it for granted that the need for that would fall away. That is the reason why we considered it fair and proper to raise this matter pertinently at this stage for the consideration of the Court as a whole.

We pointed out in our letter of 14 January 1971 [1] what a vast and undefined field is covered by the allegations in this regard in the written statements.

As regards the element of lack of definition, it arises, I suppose, in part, necessarily from the fact that these are, in form at least, advisory proceedings and not contentious ones—there are no rules which require participants to state particularly what their submissions of fact and of law are, nor are there formal parties to the proceedings. So the situation arises from the fact that we have a decision of the General Assembly which purports to be founded on violations by South Africa of its trust obligations to the inhabitants of South West Africa, put broadly and roundly as a proposition like that, without specification of the respects in which those violations are alleged to have occurred. I am talking purely about the resolution at the moment.

On that basis, taking it as a round and a broad proposition that South Africa has not promoted to the utmost the material and moral well-being and the social progress of the inhabitants, South Africa has dealt with the matter in its factual presentation in its written statement. But South Africa could not, at that stage, partly for reasons of time and partly because of this aspect of the undefined nature of the issues, deal with specific allegations of fact.

If one refers to the United Nations records preceding General Assembly resolution 2145, one finds a vast field of assertions, qualifications, contradictions, inconsistencies and so forth, in this area. One finds a particular allegation being very popular at a particular stage and then disappearing from the records and minutes of the United Nations proceedings for quite a while, only to come up again at a later stage. Sometimes a particular allegation is specifically refuted by a presentation of fact which appears to be accepted by all, and then it comes up again at some later stage.

I could give the Court many examples. One that comes to mind is the allegation, which was a very popular one at the United Nations about the years 1961-1962 or thereabout that South Africa was embarked on a course of deliberate genocide of the indigenous population of South West Africa. This was coupled with allegations made at that time about a complete absence of hospitals, medical facilities, and so forth.

Then one finds that that disappears, or becomes subdued: save for a very few exceptions here and there, it disappears for some years. One even finds that the United Nations in these very same documents publishes statistics—and correct statistics obtained from South African sources—about the excellence of standards in the hospitalization and medical fields in South West Africa, indicating how incomparably better they are than one finds in virtually any other part of the continent of Africa.

In direct contradiction to the earlier allegations one finds acceptance of population figures showing growth in population which makes an absolute farce of the allegations of genocide. And then suddenly it comes up again somewhere. Do we seriously have to meet in this Court an allegation of genocide? That I mention merely as one example.

Another one which was very popular at that time was one concerning mili-

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[1] See **Correspondence**, No. 65, p. 659, *infra*.

tarization and terrorization in South West Africa. Now, the Members of the Court who sat in the *South West Africa* cases will recall what happened in regard to those allegations of militarization—that the allegations were first refuted by South Africa in the pleadings and that the South African exposition of the facts was eventually accepted by the representatives of Ethiopia and Liberia, formally in those Court proceedings. But South Africa nevertheless called General Marshall, an American military expert of high repute, who informed the Court of two specific inspections he had made thoroughly in South West Africa to investigate the allegations, and that he had found them to be absolutely without foundation. He said, if I remember correctly, that South West Africa was for its size less militarized and more under-armed that any other territory he had come across in the world.

Counsel for Ethiopia and Liberia informed the Court that he accepted this testimony and that he would see to it that it was transmitted to the United Nations. That was, if I remember correctly, in October 1965. In December of that same year the General Assembly again adopted a resolution, sponsored mainly by African States, including one of the two Applicant States—I think it was Ethiopia—in which South Africa was, amongst others, condemned for militarization of South West Africa and urged to remove its armaments and troops from the Territory, however much South Africa's representative at the United Nations pointed out that there was nothing to remove.

During the debates in 1966, in regard to what eventually became resolution 2145, this allegation still found its way into the preliminary documents, the committee reports and the initial speeches, until the matter was very fully and thoroughly dealt with by a South African representative and then it faded out of the debate—with a very few exceptions: one got the impression that those must have been speeches that had been prepared before, with approval, and that they could not be changed in time. But as an allegation it seemed to disappear at that stage, because it did not feature as an allegation in resolution 2145 itself. And then it cropped up again. Sometimes it was in very much the same form as it had been made before: some of the same details that had been refuted and the refutations accepted in this Court, cropped up again later in debates at the United Nations.

That demonstrates part of our difficulty about the lack of definition of the issues and about inconsistencies and contradictions.

I do not want to dwell upon that any further at this stage. Apart from these features, there has emerged from the statements which have been submitted to this Court an indication of the enormous potential area of dispute; and I emphasize "from the statements which have been submitted to this Court" because these are mainly the written statements, although they have been added to in some measure by the oral statements. Even the written statements reached us fairly late in some cases, towards the end of last year or the beginning of this year—in fact, very shortly before the South African legal team had to come from South Africa to The Hague to be present for the start of the proceedings, leaving the minimum amount of time for the preparation of specific answers to those statements in the form in which they have now been made.

I would like to give the Court some indication of the enormity of the scope involved. First of all, reference may be made to the index of Chapter XI of our written statement—just a glance will show which subjects were required to be dealt with even in meeting the globular allegation of a failure to promote well-being and progress. One can, in general, refer to the pleadings in the *South West Africa* cases, about 2,000 pages of which were devoted to the factual questions. One can refer specifically now in the context of this case to the documentation

referred to by the Secretary-General in footnote 116 of his written statement (written statement, **I**, p. 96), which is the documentation relied upon by him in making allegations of fact in paragraphs 58, 63 and 78 of his written statement and, apparently, also in paragraph 80. Then he further relies upon that documentation explicitly in paragraph 103, in his footnote 165 and, apparently, also in paragraph 109. I do not want to dwell on what the Secretary-General says in his statement, but the area, if it is referred to, will be seen to be an enormous one.

If one refers to that documentation—if one were to put it all together, one would find a pile of documents as high as this table next to me.

Then one finds in looking at them the elements of contradiction and inconsistency to which I have referred. One finds further that those are not, by any means, all the documents to which one would have to refer, because they, in turn, refer to other documents not specifically mentioned by the Secretary-General. A committee report, or a statement in a debate, may be based upon another committee's report which he does not specifically mention—for example, a sub-committee's report or other documentation which extends way beyond that which is directly referred to. Likewise, one finds much the same thing in the documentation which is referred to by the United States Government in its written statement (written statement, **I**, pp. 843-888).

Just to give the Court one illustration of the problem, the United States written statement at page 866 quotes from a study by the International Commission of Jurists and that quotation contains the following:

> "Africans [that is now in South West Africa] do not possess even the most rudimentary political power, and have no participation at all in the making of the laws which govern their lives completely, and which carry rigid sanctions. All independent attempts at political organization are forcibly suppressed, as are those involving trade union activities. No intention to change this situation has ever been manifested by the South African Government."

Now, Mr. President, from the South African point of view, these statements are not only slanted and warped, they are in most instances downright false and untrue. In order to meet them in an adequate presentation to this Court, let us see what would be involved—how one would like to do this (by way of illustration only). One would first have to examine all the laws concerning the political structure of South West Africa and the way in which they are applied. Then, one would have to have a factual account about political organization in South West Africa, because it does exist notwithstanding what the statement says. It exists to a considerable extent and an account would have to be given about political parties and their activities.

In regard to the trade union question, one would have to go into the relevant circumstances pertaining to South West Africa and compare the way in which the problem is accommodated there with the way in which it is accommodated in certain other African countries. One would have first to demonstrate what the peculiar problem is, for there is one. And then one would have to make comparisons with conditions in other African countries concerning the effective enjoyment of political rights generally.

Seeing that these statements emanate from the International Commission of Jurists, there is a rather extensive field which could profitably be canvassed about the motives of this body and the purposes of this particular study vis-à-vis South Africa, as well as the standing which it enjoys and its relationship with

certain other countries and the reaction of those countries to similar investigations by this Commission.

Mr. President, let us take another example at page 867 of the United States written statement:

> "The General Assembly in resolution 2439 (XXIII) endorsed the recommendations of the Special Rapporteur that South Africa be required to repeal, amend or replace laws cited in paragraph 1547 of the Report (E/CN.4/949/Add. 4)." (Written statement, **I**, p. 867.)

If one refers to that report and analyses what it is, the outcome of it would appear to be that some 80 different laws of South Africa and South West Africa are brought into issue. Their merits and their demerits would have to be considered and debated, if one wants to do this thoroughly.

So that gives an indication of the type of field one would have to go into if this is to be done in detail. And it underscores our submission to the Court that it may be of vital importance to consider at this stage what the reaction of the Court is, or ought to be, in regard to the plebiscite proposal and that the Court may possibly be able to give us an indication one way or the other, even if it is provisionally that it is prepared to do something about it or is not prepared to do something about it, before we take the next step in regard to our factual presentation.

We realize that the Court would probably not wish to decide on the plebiscite proposal before having heard the reactions of the representatives of the Secretary-General and of the United States in that regard. Our respectful suggestion is that these representatives could be heard next and that, after an opportunity has been given for us to reply, if necessary, to what they have said in regard to the plebiscite proposal, the Court first give its decision in regard to that proposal. That would put us in a position to formulate our contentions concerning the manner in which the factual issues are to be approached in a way which, we hope, may be of some assistance to the Court.

We considered it appropriate to make this proposal to the Court at this stage immediately after the conclusion of our legal argument and before the adjournment for the weekend, thereby giving the Court an opportunity to reflect upon the matter and to notify us in due course.

The Court rose at 12.43 p.m.

EIGHTEENTH PUBLIC SITTING (8 III 71, 3 p.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. VICKERS

REPRESENTATIVE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

The PRESIDENT: I call upon the distinguished representative of the Secretary-General of the United Nations to read out his answers to the questions put and to make any comments he wishes.

Mr. VICKERS: Mr. President and honourable Members of the Court,

1. When Mr. Constantin A. Stavropoulos, the representative of the Secretary-General of the United Nations, appeared before this Court on 8 February 1971, he undertook at the conclusion of his statement to convey to the Court in due course the Secretary-General's replies to certain important questions put by two Members of the Court. He also mentioned that the Secretary-General might wish to present some observations on points raised in the letter of 6 February 1971[1] to the Registrar of the Court from the Agent of the South African Government, in which a proposal for a plebiscite was made.

2. Mr. Stavropoulos has asked me to express his deepest regrets to the Court that his other responsibilities have precluded him from returning to The Hague at this stage personally to present the replies and observations just mentioned. In his absence, I have the privilege of conveying the Secretary-General's replies to the questions posed first by the Honourable Judge Gros and subsequently by the Honourable Judge Sir Gerald Fitzmaurice, as well as the Secretary-General's observations on the South African proposal for a plebiscite made in the letter of 6 February 1971.

Questions Posed by Judge Gros

(a) *First question*

3. Judge Gros put six questions to the representative of the Secretary-General. The first question was as follows:

> "In its two written statements filed with the Court on 7 and 24 December 1970, the Secretariat advances an interpretation of the Charter with regard to the powers of the General Assembly and the Security Council.
>
> Is this interpretation its own, or does it, according to the Secretariat, represent the General Assembly's interpretation of its own powers and the Security Council's interpretation of its powers? If the latter, can the Secretariat indicate when and how this interpretation was adopted by these organs of the United Nations?
>
> If the former is the case, what is the legal basis of the Secretariat's competence to interpret the Charter? See in this connection the document annexed to a letter of 26 July 1968 from the Secretary-General."

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[1] See **Correspondence**, No. 92, p. 673, *infra*.

4. Mr. President, in response to this question, it is of course correct that in the two written statements submitted by the Secretary-General, as well as in the oral statement made on his behalf on 8 February 1971, certain views were expressed concerning the effect of resolutions adopted by the General Assembly and by the Security Council. These views were based on the respective General Assembly and Security Council decisions themselves. By the very act of adopting the resolutions concerned, the two organs have indicated that they were of the opinion that they had the necessary powers so to do. It has rarely been the practice of either the General Assembly or the Security Council to make express interpretations of their powers, but their views may be discerned from the wording and content of the resolutions adopted in particular cases. The interpretation set out in the Secretary-General's statements therefore represents what in his opinion is the understanding of the General Assembly and of the Security Council concerning their powers, as well as his own views.

5. Examples of instances conveying both the views of the principal deliberative organs concerned and of the Secretary-General, are the observations made in the oral statement on such questions as the effect of voluntary abstentions by permanent members of the Security Council in decisions on non-procedural matters; the numerous precedents of the General Assembly or its subsidiary organs taking executive action; and the powers of the Security Council under the Charter and, more particularly, under Article 24 thereof.

6. To elaborate briefly in the present context on the last of these examples regarding the powers of the Security Council, the Secretary-General would first recall those portions of his oral statement which dealt with the question of the Free Territory of Trieste (*supra*, pp. 45-47). When this case was before the Security Council in 1947, the Secretary-General, on his own initiative, gave his interpretation of the powers of the Security Council under Article 24 of the Charter. Statements of members of the Council indicated that most members of the Council held a similar view of the Security Council's powers, and the decision of the Council, taken by ten votes to none with one abstention, to accept the responsibilities devolving upon it under annexes of the draft Peace Treaty with Italy, amounted to a tacit acceptance of this interpretation.

7. So far as the Secretary-General's competence to interpret the Charter is concerned, reference should also be made to the statement on interpretation of the Charter included in the report of Committee IV/2 of the San Francisco Conference, in which it was indicated that each organ of the Organization in the course of day-to-day operations would interpret such parts of the Charter as are applicable to its particular functions (UNCIO docs., Vol. XIII, p. 709). The Secretariat, being a principal organ with the Secretary-General as its head, is covered by this statement on interpretation. In accordance with this statement, it is of course primarily for the Security Council and the General Assembly, respectively, to interpret their own powers. The Secretary-General, however, himself offers interpretations of the powers of these organs when it becomes necessary to do so in the discharge of his own functions either as Chief Administrative Officer of the Organization, or as Secretary-General of the Security Council and of the General Assembly. Furthermore he also offers interpretations for the assistance of the organ concerned, either on his own initiative or at the request of that organ.

8. The note verbale dated 26 July 1968 from the Secretary-General addressed to the Permanent Representative of the USSR, to which Judge Gros has referred, and which appears in document A/7146, is an example of an interpretation given by the Secretary-General in the discharge of his functions as the Secretary-General of the General Assembly. The opinion given by the Secre-

tary-General in the Trieste case, to which reference was made a moment ago, is one volunteered for the assistance of an organ. Examples of opinions given by the Secretary-General at the request of an organ, which contained interpretations of the Charter, were the opinion given to the Second Committee of the General Assembly at its Twenty-Third Session in December 1968 in document A/C.2/L.1030, on South Africa's right to membership in the United Nations Conference on Trade and Development, and also the opinion given to the General Assembly at its Twenty-fifth Session, in document A/8160, on the credentials of South Africa. In his presentations to the Court in the present proceedings, the Secretary-General does not primarily interpret the Charter provisions relating to his own functions, but makes available to the Court materials emanating from principal organs of the United Nations other than the Secretariat and attempts to assist the Court in its evaluation of these materials. In this connection, the Secretariat has submitted its views on the various resolutions in the light of Article 65, paragraph 2, of the Statute of the Court, and in the spirit of Article 98 of the Charter under which the Secretary-General shall perform such functions as are entrusted to him by the General Assembly or by one of the Councils.

(b) *Second question*

9. The second question put by Judge Gros was as follows:

> "In the exercise of this capacity to interpret the relevant provisions of the Charter, how does the Secretariat reconcile the interpretation which it appears to uphold with what was said by the Court in its Opinion on *Reparation for Injuries Suffered* (*I.C.J. Reports 1949*, p. 179): 'Still less is it the same thing as saying that it [the Organization] is "a super-State", whatever that expression may mean'?"

10. At the outset, the Secretary-General wishes to confirm that he fully agrees with the statement in the Advisory Opinion just mentioned that the United Nations is not a "super-State". He does not consider, however, that this statement is in any way inconsistent with the practice of the General Assembly and the Security Council in the present case. Nor is it inconsistent with the interpretation which the Secretary-General has put forward in this regard. The fact that the organs of the United Nations can take decisions under the Charter which are binding on States, or otherwise have dispositive effect, does not make the Organization a "super-State". It is beyond dispute, for example, that the Security Council can take binding decisions under Chapter VII of the Charter. This has been expressly recognized by this Court in the case concerning *Certain Expenses of the United Nations* where the Court said:

> "To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII" (*I.C.J. Reports 1962*, p. 151 at p. 163).

The Court must therefore have concluded that such a power did not conflict with its opinion that the Organization was not a "super-State".

It is furthermore beyond dispute, from the wording of Article 2, paragraph 7, of the Charter, that even the principle of non-intervention in matters essentially within the domestic jurisdiction of a State does not prejudice the application of enforcement action. If the fact that the Security Council can take coercive action even affecting the domestic jurisdiction of a State does not make the

Organization a "super-State"—even less would the fact that the Organization takes action regarding a territory having an international status make it a "super-State". In the present case, none of the decisions of the General Assembly and of the Security Council which are now under consideration by the Court seek to intervene in matters which are essentially within the domestic jurisdiction of any State. Namibia is not, and never has been, under the sovereignty of South Africa. It is in fact a territory having an international status.

11. The Secretary-General believes that his approach to Charter interpretation, expounded in his statements to the Court in the present case, follows closely the practice of the General Assembly and the Security Council, as well as the jurisprudence of this Court. That approach is based upon the express text of the Charter and upon the powers arising by necessary implication therefrom. In the same case in which the Court noted that the United Nations was not a "super-State" it also enunciated the principle that:

> "Under international law, the Organization 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." (*I.C.J. Reports 1949*, p. 182.)

(c) *Third question*

12. I come now to the third question, which was as follows:

> "If this statement of the Court's views is no longer considered to be correct by the Secretariat [namely that the Organization is not a 'super-State'], what are the legal grounds for the opinion which it now holds of the extent of the powers of the General Assembly and the Security Council?
>
> What then, in the light of this new approach, is the effect of the reservations made by many States in respect of General Assembly resolution 2145; for example, the reservations made by the United Kingdom, France, the USSR (on a particular point in the resolution), and Canada, mentioned in paragraphs 120, 233, 30 and 50 of the Secretary-General's written statement of 24 December 1970? What is, in particular for all the States which expressly reserved their position, the effect of this resolution; does it, despite those reservations, have binding force for them, and on what grounds?"

13. As indicated in the reply just given to the second question, the Secretary-General does not disagree with the statement of the Court in the *Reparation* case that the United Nations is not a "super-State".

14. As regards the legal grounds for the Secretary-General's review of the powers of the General Assembly and the Security Council, which he believes is consistent with the views of the Court not only in the *Reparation* case but in the other cases in which it has interpreted the Charter, he would recall that these were set out in those parts of his oral statement dealing with the scope of those powers (*supra*, pp. 44-49).

15. The Secretary-General does not believe that the statements of representatives—which have been referred to as "reservations"—affect the obligations arising from General Assembly resolution 2145 (XXI) and subsequent Security Council resolutions. In the first place, the "reservations" themselves for the most part were not directed at the basic findings of fact and of law in resolution 2145 (XXI) and were essentially in the nature of explanations of vote or of the position of the delegations involved.

16. So far as two of the States mentioned were concerned, namely Canada and the USSR, they both voted for the resolution and made clear their agreement that the Mandate was terminated. They cannot therefore have considered that the observations which they advanced affected the fundamental provisions, or the validity, of the resolution.

17. The United Kingdom, while abstaining in the vote, agreed that South Africa had violated its obligations and forfeited the right to administer the Mandate. It further agreed that the General Assembly should state that the rights of South Africa under the Mandate had terminated. Commenting on the last paragraph of the preamble by which the General Assembly affirmed "its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory", the representative of the United Kingdom considered it unwise, at least at that stage, to reach the conclusion that the United Nations should revert to itself the administration of the Territory. (Review of Proceedings, paragraph 71, dossier item 146, 1454th meeting, para. 72.) He also believed (that is the United Kingdom representative) that the terms of reference of the *Ad Hoc* Committee set up to consider the implementation of resolution 2145 (XXI) should not have been as restricted as they were. Again, these observations, to the extent that they expressed disagreement with the General Assembly's action, did not affect the fundamental provisions, or the validity, of the resolution.

18. The representative of France, while also abstaining in the vote, expressly stated, during his explanation of vote, the agreement of his Government with paragraphs 2, 3 and 7 of the resolution. He therefore concurred in the conclusion of the General Assembly that South Africa had failed to fulfil its obligations with respect to 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 had, in fact, disavowed the Mandate. It may be noted that, during discussion of the same item at a previous meeting, the representative of France had stated that if, as South Africa claimed, the Mandate had ceased to exist, South Africa would be deprived of all legal foundation for exercising its authority, for it would have no justification for keeping its rights arising out of the Mandate while at the same time repudiating obligations deriving from the same source.

19. On the other hand, the representative of France stated in the General Assembly, at the time that resolution 2145 (XXI) was adopted, that the question as to which United Nations bodies would have competence to effect the revocation of the Mandate had not been sufficiently considered. His delegation did not see the justification for the United Nations itself assuming the administration of the Territory. Although the French delegation had stated that it did not exclude the withdrawal of the Mandate, it could not agree with the manner in which the withdrawal had been decided. It also recalled its disagreement with General Assembly resolution 1514 (XV) and considered that the very special case of South West Africa had nothing to be gained from being linked with this text. Speaking subsequently in the Security Council, at its 1464th meeting on 20 March 1969, the representative of France was doubtful whether the League of Nations could have unilaterally deprived South Africa of its Mandate over South West Africa. (Dossier document 31 at p. 51.)

20. From the point of view of content, it will be seen that the remarks characterized as "reservations", with the possible exception of those of the representative of France, were not directed at the most basic points in resolution 2145 (XXI), namely (1) that South Africa had violated its obligations and disavowed the Mandate, and (2) that the Mandate was therefore terminated.

They could not, therefore, be considered as even intending to limit the effect of the resolution on these basic points. So far as the first point is concerned, it is equally clear that it was fully accepted by France. On the second point—the termination of the Mandate—while certain doubts were expressed there was no clearly formulated reservation by France at the time of the adoption of the resolution.

21. Leaving aside the question of content, however, it is the Secretary-General's view that the statements which have been referred to as "reservations" have no bearing on the legal effect of resolution 2145 (XXI), for the following reasons. The term "reservation" has legal meaning when it relates to the acceptance by a party of new legal obligations, as in the case of a treaty. The form and content of these reservations are carefully circumscribed. In the Secretary-General's submission, however, the term "reservation" is not relevant to a resolution the effect of which was to establish a new factual and legal situation from which certain obligations flow automatically, as a matter both of law and of logic.

22. The termination of the Mandate by the General Assembly is a fact, in the same way as, for example, the cession of a territory by State A to State B is a fact which may affect, and therefore may have legal consequences, for third States. Such a territorial change may have an innocent character and be entirely legal so that, generally speaking, no problem for third States will arise. The cession may, on the other hand, be tainted by illegality because it was brought about as a consequence of the threat or use of force. The problem of how third States should react to facts of this type is by no means a new one. It arose in the time of the League of Nations in connection with what became known as the "Stimson doctrine". On 11 March 1932, the Special Assembly of the League of Nations adopted a resolution in which it declared that:

> ". . . it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris" (*Official Journal*, Special Supplement No. 101, p. 8; Documents 1932, p. 284).

Members of the League of Nations were expected not to recognize any situation brought about by means contrary to the Covenant of the League or to the Briand-Kellogg Pact. Similarly, Members of the United Nations are expected to recognize that the Mandate for Namibia has come to an end, and not to recognize the legality of the continued presence of South Africa in Namibia after the Mandate has been terminated.

(d) *Fourth question*

23. To turn now to the fourth question put by Judge Gros, this question read as follows:

> "Does the Secretariat consider that a State which made an express reservation to resolution 1514, cited as the basis for resolution 2145, and which renewed its reservation during the debate on resolution 2145, is bound by it despite this double reservation? What is the Secretariat's opinion with regard to the Opinion of the Court of 28 May 1948 on *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*:

'The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.'" (*I.C.J. Reports 1948*, p. 64.)

24. The Secretary-General replies as follows. For the reasons stated in the reply to the third question, the Secretary-General believes that this "double reservation", like the other "reservations", has no bearing on the legal effect of resolution 2145 (XXI) and on the obligations flowing therefrom.

25. *It should be added that resolution 1514 (XV) is only* one of many bases for resolution 2145 (XXI). The representative of France, at the 21st session of the General Assembly in recalling his disagreement with resolution 1514 (XV), recognized that Namibia was a very special case.

26. It might be of interest to recall that when, at the Fifteenth Session of the General Assembly, the draft of what became resolution 1514 (XV) was being considered by the Assembly, the representative of France said that his delegation particularly welcomed several of the paragraphs in the preamble of the draft Declaration and supported the right of every people to free determination. He observed that certain of the passages in the document merely reiterated commitments which are contained in the Charter. He added, however, that the draft contained certain contradictions and that he could not support it in the form in which it had been laid before the General Assembly. (*GA, OR*, Fifteenth Sess., Part I, Plenary Meetings, Vol. 1, 945th Meeting, paras. 141 and 142, p. 1259.)

27. The French reservation to resolution 1514 (XV) cannot have related to anything in it which is relevant to the present proceedings. The far-reaching statements of the preamble to the Declaration on the Granting of Independence to Colonial Countries and Peoples were, as already stated, expressly endorsed by the representative of France at the Fifteenth Session of the General Assembly. The principal operative paragraph of the Declaration, paragraph 2, according to which all peoples have the right to self-determination and by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, was taken verbatim from the text of the identical Articles 1 of the two draft International Covenants on Human Rights. At the Twenty-first Session—the same session at which the Mandate for South West Africa was declared terminated—the General Assembly adopted the two Human Rights Covenants, including the self-determination articles, unanimously, with 105 and 106 votes respectively, France voting for both draft Covenants. (GA resolution 2200 (XXI), 1496th Meeting of the General Assembly, 16 Dec. 1966.)

28. With regard to the final portion of the present question, the Court in its Advisory Opinion of 28 May 1948 on *Conditions of Admission of a State to Membership in the United Nations*, was interpreting a provision of the Charter (Article 4) which contains express criteria laid down in that Article as qualifications for admission of a State to membership in the United Nations. The Secretary-General is not aware of any comparable limitations laid down in the Charter which might be relevant to the General Assembly's or the Security Council's action in the present case. On the contrary, the Secretary-General believes that the General Assembly and the Security Council have applied Charter criteria in reaching their decisions with respect to Namibia.

(e) *Fifth question*

29. The fifth question of Judge Gros was to the following effect:

> "In paragraph 116 of its first written statement the Secretariat, in a few lines, considers that 'any relation purporting to be with or to involve Namibia, which has been entered into or maintained through the Government of South Africa or the illegal South African administration in Namibia since the termination of the Mandate, is void and without legal effect'.
>
> What would be the legal basis for this opinion in respect of a State which has, in the General Assembly and the Security Council, expressed explicit doubts as to the legal significance of resolution 2145 with regard to the ending of the Mandate?
>
> Considering for example the remarks made by the representative of the United States (S/PV. 1465 of 20 March 1969, pp. 8-10, and S/PV. 1496 of 11 August 1969, pp. 11-15) and the reservations made by the representative of France (S/PV. 1387 of 25 January 1968, p. 116, and S/PV. 1464 of 20 March 1969, pp. 51 and 52), what can be the effect for those two States of the doctrine of absolute nullity expounded in paragraph 116 of the Secretariat's written statement? On what rule of international law is the doctrine of absolute nullity based?"

30. For the reasons previously stated, it is the Secretary-General's view that the "reservations" mentioned have no bearing on the question. In this connection he would recall that the reservations of France have already been referred to in the answer to the third question. The statements of the United States representative, referred to in the present question, made it clear that his Government had no doubts concerning the legal effect of resolution 2145 (XXI) in terminating the Mandate. He emphasized that South Africa had no legal right in Namibia, and that it was an "illegal occupying authority in violation of the Charter, of General Assembly resolution 2145 (XXI) and the other relevant resolutions of the United Nations". He further stated that there should be unswerving insistence on the application to Namibia of the standards of the Charter concerning the right of independent territories to self-determination and independence. He added that all governments, moreover, are free to take whatever action is permitted by their constitutional processes to express their cognizance of the illegitimacy of the South African presence in Namibia and hence of the illegality of all actions and transactions carried out in Namibia under the authority, the laws and the regulations of South Africa. Although expressing a preference for voluntary steps by member States, he in no way indicated reservations as to the effect of resolution 2145 (XXI) (S/PV. 1465 and S/PV. 1496).

31. It is clear, moreover, that irrespective of any doubts which may have been expressed by certain States as to the procedure followed in the termination of the Mandate, there was virtually unanimous agreement that South Africa had forfeited her right to administer and be present in the Territory of Namibia by reason of her violations of the obligations she was under in this respect. It follows, therefore, that the illegality of the South African presence was, in any event, established by reason of this forfeiture.

32. Turning to other aspects of the present question, the Secretary-General had not considered that he was enunciating a doctrine of "absolute nullity". In paragraph 146 of his written statement, he pointed out that:

"It will be the prerogative of the future Legislative Assembly of Namibia (elected by the inhabitants of the Territory on the basis of universal adult suffrage) to decide whether, and to what extent, to recognize or validate any act undertaken under void laws during the illegal South African presence, or to grant retroactive validation to any such law having an otherwise acceptable content."

33. On the other hand, the Secretary-General's contention was based on the fact that there presently exists no lawful government within the Territory of Namibia. It seems axiomatic to him that a government cannot take valid action in a territory in which it has no right. South Africa, following the forfeiture of its right to presence in the Territory and the termination of the Mandate, has no right to be in Namibia as sovereign, mandatory, administrator or occupier. In the Secretary-General's submission, there is no basis on which it can take valid action in any of these capacities.

(f) *Sixth question*

34. The sixth and final question posed by Judge Gros reads as follows:

"In a general way, is the Secretariat in disagreement with the first paragraph on page 157 of the Court's Opinion of 20 July 1962 on *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, and in particular with the following passage:

'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'?"

35. As was indicated at the outset of the oral statement delivered on behalf of the Secretary-General on 8 February 1971 (*supra*, p. 31), the Secretary-General is not in disagreement with the passage quoted from the Court's Opinion in the case concerning *Certain Expenses of the United Nations*. Having that passage in mind, the representative of the Secretary-General dealt in his oral statement with certain questions and fact which, viewed strictly, he considered might go beyond the scope of the question which the Security Council intended to put to the Court.

36. The Secretary-General felt that it was his duty, in his written statement, to inform the Court of the scope of the question on which the Security Council wished clarification. It is clear that the Security Council, as well as the overwhelming majority of member States, have no doubts concerning the validity of the relevant General Assembly and Security Council decisions and therefore did not feel the need of clarification on this aspect. Since, however, the issue has been raised, it must be recognized that it is for the Court to decide to what extent it may wish to examine the relevance of these points to the question actually before it.

Questions Posed by Judge Sir Gerald Fitzmaurice

I come now, Mr. President, to the questions put by Judge Sir Gerald Fitzmaurice, of which there were four.

(a) *First question*

37. Judge Sir Gerald Fitzmaurice posed four questions to the representative of the Secretary-General at the Court sitting held on 9 February 1971. The first of these questions was as follows:

"What actual limits does the Secretary-General place on the powers of the General Assembly and the Security Council of the United Nations, respectively?"

The Secretary-General understands this question to elicit his views concerning limits of the powers of the General Assembly and the Security Council as they might relate to the present case. He would not wish, however, to take it upon himself to describe the ultimate limits of the powers of the General Assembly and the Security Council otherwise than in the terms of the Charter itself, by which these principal organs were established and their functions and powers defined.

38. As was indicated in the oral statement of the Secretary-General (*supra* p. 44), the Charter—like other constitutions—does not set out specific and detailed provisions dealing with each and every type of contingency which may arise. It is also subject to continuing interpretation. That the powers of the Organization and of its principal organs are not limited to those expressly described in particular articles of the Charter, is borne out not only by the practice of the United Nations but also, in the Secretary-General's submission, by the pronouncements of this Court.

As already noted in the reply to the second question put by Judge Gros, the Court, in the *Reparation* case, stated that:

"Under international law, the Organization 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." (*I.C.J. Reports 1947*, p. 182.)

In the *Effect of Awards of Compensation* case the Court found "that the power to establish a tribunal . . . was essential to ensure the efficient working of the Secretariat . . . Capacity to do this arises by necessary intendment out of the Charter" (*I.C.J. Reports 1954*, p. 57). These pronouncements related to two completely different situations and are cited not for a particular relevance to the present case, but for the general proposition that the powers of the Organization and its organs must be considered in the light of the Charter as a whole. They must also be considered in the light of the particular circumstances of each case. Specific and express bases for the powers exercised by the General Assembly and the Security Council in the present case have already been elaborated in the written and oral statements submitted on behalf of the Secretary-General.

39. The Secretary-General obviously does not espouse a doctrine of unlimited powers such as those attributed to him by South Africa in its oral statement, and he must therefore place on record that he has manifestly been misunderstood by South Africa in this context. The Secretary-General merely made the point that in the interpretation of the Charter, one should not go to extremes either in attributing powers or limitations. Likewise, one should not go to extremes in postulating theoretical examples of what might happen if a particular power existed, or a particular limitation did not exist. This holds true both for national constitutions—where the concept of the absolute sovereignty of a legislature may exist—and for the constituent instruments of inter-governmental organizations. Although asserting that they have carefully examined the Secretary-General's contentions "in their context", the illustrations given in the South African oral statement are in fact widely removed from the context of the Secretary-General's statement, and bear no relation to the examples of the types of action to which the Secretary-General referred, and which appear on pages 50-51 and 52, *supra*.

40. The limits of the powers of the General Assembly and of the Security Coucil, like the powers themselves, are those provided in the Charter, either expressly or by necessary implications, and must also be considered in the light of the circumstances in each case. First and foremost of these limitations is the requirement that organs in discharging their duties must act in accordance with the Purposes and Principles of the United Nations as set forth in Chapter I of the Charter. This is expressly provided with respect to the Security Council in Article 24, paragraph 2, of the Charter, and applies by necessary implication to all other organs of the United Nations, including the General Assembly.

41. With respect to the General Assembly, its powers are normally of a recommendatory character. This is by no means, however, an absolute limitation. As this Court 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. Article 18 deals with 'decisions' of the General Assembly 'on important questions'. These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect." (*I.C.J. Reports 1962*, p. 163.)

42. Turning to certain specific limitations set out in the Charter on the powers of the General Assembly and the Security Council, the Secretary-General would refer by way of example to paragraph 7 of Article 2, the last sentence of paragraph 2 of Article 11, and paragraphs 1 and 2 of Article 24, and would briefly examine each of these provisions in relation to the question before the Court.

43. Paragraph 7 of Article 2 provides that nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State, but that this principle shall not prejudice the application of enforcement measures under Chapter VII. As the Secretary-General has already pointed out in his reply to the second question put to him by Judge Gros, none of the decisions of the General Assembly and of the Security Council relating to Namibia have intervened in matters which are essentially within the domestic jurisdiction of any State, for the simple reason that Namibia is not and has never been under the sovereignty of South Africa, and is in fact a territory having an international status.

44. It might be added that while a situation, dispute, threat or breach of the peace is hardly conceivable in which the Security Council would be in a position to call upon a sovereign State to withdraw its administration from a part of its territory, the Security Council did have the power to call upon the Government of South Africa to withdraw its administration from Namibia, because Namibia is not, and never has been a part of the territory of the sovereign State of South Africa, but has been a territory which, even before the termination of the Mandate in 1966, was, in its relation to South Africa, *res aliena.*

45. According to the last sentence of paragraph 2 of Article 11 of the Charter, any question relating to the maintenance of international peace and security brought before the General Assembly on which "action" is necessary shall be referred to the Security Council by the General Assembly either before or after discussion. This limitation on the power of the General Assembly, vis-à-vis that of the Security Council, was examined by the Court in the case of *Certain Expenses of the United Nations.* The word "action", in the opinion of the Court, must mean such action as is solely within the province of the Security Council, namely that which is indicated by the title of Chapter VII of the Charter; it

could not mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases. The Court therefore concluded that "the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action" (*I.C.J. Reports 1962*, p. 151 at p. 165). It follows from this Opinion of the Court—which is also borne out by the practice of the United Nations—that the decisions relating to Namibia have been taken by the General Assembly in discharge of its functions, and do not run counter to the limitation imposed in paragraph 2 of Article 11.

46. Article 24, paragraph 1, of the Charter contains a limitation on those powers of the Security Council deriving from that Article, by defining those powers in terms of its "primary responsibility for the maintenance of international peace and security". While the Security Council is given certain specific functions and powers—for example, those in Articles 4, 6 and 94 of the Charter —not directly related to this primary responsibility, the exercise of its general powers deriving from Article 24 must be exercised in the context of the maintenance of international peace and security. The provisions of Security Council resolutions on Namibia, as well as the discussions in the Council, make it evident that the Security Council was acting within this context. Moreover, a large majority of the Members of the United Nations in voting for General Assembly resolution 2678 (XXV) have made it clear that they consider the deteriorating situation in Namibia, due to the continued illegal presence of South Africa in the Territory, threatens international peace and security. Indeed, such illegal occupation of territory *per se* comes within the ambit of the Security Council's primary responsibility.

47. Article 24, paragraph 2 of the Charter, as noted earlier, prescribes a further limitation on the powers of the Security Council. It states that in discharging its duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. To show that the decisions of the Security Council relating to Namibia are in conformity with this provision, it suffices to refer to those parts of the Secretary-General's written and oral statements which deal with the bases for those decisions.

48. Mr. President, the Charter of the United Nations is a treaty. It is also a constitution. Like all constitutions, it is interpreted from day to day by practice, and in the light of current norms and events. The Principles of the United Nations Charter, as such, may contain limitations on the powers of the Organization, but it is the duty of the Organization to seek within those limitations to give practical effect to the Purposes of the Charter, including one which has particular relevance in the present context, namely the principle of equal rights and self-determination of peoples.

(b) *Second question*

49. I come now, Mr. President, to the second question put by Judge Sir Gerald Fitzmaurice, which was to the following effect:

> "Is it his [the Secretary-General's] view that provisions of the Charter apparently, or ostensibly (whether directly or by necessary implication), involving limitations on those powers, can, if the occasion arises, legitimately be disregarded? If so, what would, in his view, be the, so to speak, applicable 'principles of disregard', or confines within which such disregard could be considered acceptable?"

50. It is not the Secretary-General's view that limitations provided in the United Nations Charter can legitimately be disregarded. He is not, therefore in

a position to formulate "principles of disregard". There may, however, be circumstances in which certain limitations are not applicable to a given factual situation. In reply to the first question posed by Judge Sir Gerald Fitzmaurice, a number of limitations on the powers of the General Assembly and the Security Council have been examined in the context of the present case and the reasons why they were not applicable have been explained. For example, as previously noted, the limitation of domestic jurisdiction has no application to the position of South Africa in the Territory, in view of the international status of the latter and the consequent rights of the inhabitants and of the United Nations as the supervisory authority.

51. Furthermore, the Secretary-General does not believe that constitutional practices of the Organization, such as the one relating to the effect of voluntary abstentions by permanent members of the Security Council, are in any sense "principles of disregard" of Charter provisions. As stated in the Secretary-General's oral statement, this is now a rule of customary law and a binding interpretation of the Charter. It therefore cannot be a disregard of a Charter limitation. Similarly, a determination by the Security Council whether a particular matter is a "situation" or a "dispute", with the consequences that flow therefrom, in no sense involves a "principle of disregard". It is merely a finding by the Council of the proper characterization of the matter before it under the Charter.

52. Accordingly, although the meaning and scope and application of such limitations may involve difficulties or differences of interpretation, the question of "acceptable principles of disregard" does not, in the opinion of the Secretary-General, arise.

(c) *Third question*

53. The third question with respect to which Judge Sir Gerald Fitzmaurice has requested the views of the Secretary-General reads as follows:

> "In particular what limits, if any, does the Secretary-General set on the type of case or subject-matter with reference to which the Security Council can emit a resolution binding on all Members of the United Nations in terms of Article 25 of the Charter?"

54. It is provided in Article 25 of the Charter that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The wording of this Article makes no reference to any particular type of case or subject-matter for the decisions which member States are thereby obligated to carry out, but requires only that they be taken "in accordance with the present Charter". As regards the limits within which decisions may be taken under relevant Charter provisions, the applicable limits are those set out in the Charter either expressly or by intendment. For the most part, however, the aggregate of these limitations cannot in our submission be defined in advance except in the broadest terms and subject to the nature of the actions required for the maintenance of international peace and security and the fulfilment of the Purposes and Principles of the United Nations Charter. In these broad terms the type of case or subject-matter must, with the exception of decisions under Article 94, come within the Security Council's primary responsibility for the maintenance of international peace and security. As was likewise indicated in the reply to Judge Sir Gerald Fitzmaurice's first question, decisions of the Security Council can be taken only in accordance with the Purposes and Principles of the United Nations. The type

of case or subject-matter must, therefore, come within these Purposes and Principles.

55. Subject to these limitations, any resolution adopted by the Security Council as a decision either under Article 24, or under specific powers, comes within the terms of Article 25. In this connection reference is made to the opinion given by the Secretary-General in 1947 to the Security Council in the *Trieste* case. Notwithstanding the comments of the distinguished representative of South Africa, which the Secretary-General finds lacking in persuasion, this case stands as a landmark for the interpretation of the powers of the Security Council. The Opinion dealt with two issues, the first—the "Authority of the Security Council"—has been referred to earlier. The second concerned the "Obligations of the Members to accept and carry out decisions of the Security Council"—which was dealt with in paragraph 96 of the Secretary-General's written statement. With respect to this issue the opinion stated:

> "The question has been raised as to 'what countries will be bound by the obligation to ensure the integrity and independence of the Free Territory'. The answer to this is clear. Article 24 provides that in carrying out its duties, the Security Council acts on behalf of Members of the United Nations. Moreover, Article 25 expressly provides that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council *in accordance with the present Charter*'.
>
> The record at San Francisco also demonstrates that this paragraph applies to all the decisions of the Security Council. As indicated above, there was a proposal in Committee III/I to limit this obligation solely to those decisions of the Council undertaken pursuant to the specific powers enumerated in Chapters VI, VII, VIII and XII of the Charter. This amendment was put to a vote in the Committee and rejected (document 597, III/1/30). The rejection of this amendment is clear evidence that the obligation of the *Members to carry out the decisions of the Security Council applies equally* to decisions made under Article 24 and to the decisions made under the grant of specific powers." (*SC, OR*, Second Year, No. 3, 91st Meeting, 10 January 1947.)

56. The Secretary-General realizes that the question still remains as to what resolutions are "decisions" within the meaning of Article 25. On this he must agree with the leading commentators on the Charter that the term as used in the various articles relating to the Security Council is not altogether free from ambiguity and may well leave something to be desired in clarity. It seems perfectly clear, however, from an analysis of the various articles of the Charter, from the San Francisco records and from the practice of the Security Council, that the binding character of decisions, in accordance with Article 25 of the Charter, is not confined to the coercive measures provided in Articles 41 and 42. For reasons stated in some detail in the written or oral statements presented on behalf of the Secretary-General, there can be no doubt that in the special circumstances of the Namibia case the Council has the authority to adopt decisions which are, in effect, binding, and has in fact done so.

(d) *Fourth question*

57. I come now, Mr. President, to the fourth and final question put by Judge Sir Gerald Fitzmaurice, which was as follows:

> "Assembly resolution 2145 appears to be based upon, and to embody, what is in effect a *judgment of law*, namely that fundamental breaches of

the Mandate for South West Africa have occurred, legally justifying its revocation or termination. Is it the Secretary-General's view that the Assembly has the power to make legal determinations of this kind—that is of a kind that would normally fall within the province of a court of law, such as this Court? If so, where, in his view, would the line of distinction come between the judicial functions of the Assembly, if it had such functions, and those of this Court which is equally a main organ of the United Nations, and its principal judicial organ?"

58. With respect to the first part of this question, namely whether the General Assembly has the power to make legal determinations of the kind which it made in resolution 2145 (XXI), it is first necessary to examine the provisions of the Charter, with a view to ascertaining whether such a power has been entrusted to the General Assembly. To take but one example, Article 6 of the Charter provides that a Member of the United Nations which has persistently violated the Principles contained in the Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council. This provision, while recognizing the concurrent role of the Security Council, empowers the General Assembly to make a legal evaluation regarding compliance with Principles contained in the Charter. The Secretary-General would observe that the power conferred by Article 6 on the General Assembly is particularly apposite in the present context, in that it is not dissimilar in nature to the legal determination made by the Assembly in its resolution 2145 (XXI).

59. A basis for the legal determination made by the General Assembly in resolution 2145 (XXI) may be found in its several distinct roles in regard to Namibia, under its express and implied powers, as explained in the Secretary-General's oral statement appearing on page 50, *supra*. In one of these roles, that is as a party to the contractual relationship arising from the Mandate, the General Assembly first found the facts, namely that material breaches of the Mandate had occurred. From these facts it drew one of the legal consequences open to the wronged party in such a relationship, that is, to declare that the contract was terminated. In many national jurisdictions, particularly the common law countries, contracts can be so terminated without the matter having been referred to a court of law, unless the other party chooses to bring the matter before a court. Similarly, in international law, the right has been recognized of a State to determine that a treaty relationship with another State is terminated by virtue of the latter's material breach of the obligations under the relationship. Whether or not this is subject to judicial review is a matter determined by the terms of the treaty relationship—namely, whether it provides for such a review—or by other undertakings between the States in question, which may or may not exist, for submitting their disputes to arbitration or to the court. It is, therefore, the view of the Secretary-General that in this case the General Assembly had the right to make the finding of fact which it made, and to draw therefrom one of the possible legal consequences.

60. In a second role, that of the supervisory authority of the Mandate for South West Africa, the General Assembly must clearly have had the right to make determinations both of fact and of law, as the absence of such a right would have rendered its authority nugatory.

61. It will be recalled that, in the past, the Assembly has sought guidance from this Court on the discharge of its responsibilities towards South West Africa through its various requests for advisory opinions. The Assembly also

drew the attention of member States to the possibility of their taking legal action under Article 7 of the Mandate, and it commended an endeavour to bring before the Court, in contentious proceedings, the question whether South Africa had committed fundamental breaches of the Mandate.

In that particular case, the Court found that the Applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of their claims. Only after this endeavour to have the question decided in contentious judicial proceedings proved to be unsuccessful did the General Assembly assert its own authority—which, as indicated above, it is submitted that it possesses—and proceed to adopt resolution 2145 (XXI).

The causal nexus between the lack of success of the attempt at having the question decided judicially in contentious proceedings on the one hand, and the General Assembly making the decision on the other, was repeatedly expressed in the debate which led to the adoption of resolution 2145 (XXI). Reference may be made, in particular, to the statements by the representatives of Austria, Norway, Sweden, Canada, Israel, New Zealand, Japan, Tunisia, and the United Kingdom, which appear in the Secretary-General's Review of Proceedings in paragraphs 39, 46, 48, 50, 51, 54, 57, 58, 69 and 70 respectively.

62. The Secretary-General wishes to refer in the present connection to the joint dissenting opinion of two Members of the Court in 1962 (*I.C.J. Reports 1962*, pp. 466 et seq.), without necessarily accepting the view expressed therein as his own. The authors of this opinion stated that what the Court would principally be asked to decide on the merits of the *South West Africa* cases was whether, in a number of different respects, South Africa, as a mandatory, was in breach of its obligation under Article 2 of the Mandate to promote to *its utmost the material and moral well-being and the social progress of the* inhabitants of the Territory.

They said that the proper forum for the appreciation and application of a provision of this kind was unquestionably a technical or a political one. They concluded that the fact that, in present circumstances, such technical or political control cannot in practice be exercised in respect of the Mandate for South West Africa was not a ground for asking a court of law to discharge a task which, in the final analysis, hardly appears to be a judicial one (*I.C.J. Reports 1962*, pp. 466-467).

63. In response to the present question, the Secretary-General has sought to demonstrate that the General Assembly does have the power, in certain cases, to make decisions on points of law—a power derived from the Charter directly or by necessary implication and also from other relevant legal texts.

64. As regards the question of where to draw the line of distinction between the competence of the Assembly and that of the Court in making legal evaluations, the Secretary-General does not believe that a categorical answer can be given at this stage of the development of international law which would be applicable to all cases or situations. In his opinion, this line of demarcation has to emerge in practice from the Charter, the Statute of the Court, as well as the respective proceedings and jurisprudence of the General Assembly and of the Court. The line of distinction can be, and often is, a matter of great complexity, involving not only questions of interpretation of relevant legal texts but also consideration of particular circumstances of individual cases.

65. It very often happens in international affairs that for action on a certain question both a political organ and an international tribunal may be competent. To use an example unconnected with the present case, reference may be made to the arrangements under the European Convention on Human

Rights of 1950, where the final decision on whether or not a violation of the Convention has occurred is made by the European Court of Human Rights, if it has jurisdiction and the matter is referred to it. If the qualifications just referred to are not met, jurisdiction to make a final decision is vested in a political organ—the Committee of Ministers of the Council of Europe. Similarly, under the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1965, disputes about its interpretation and application are to be referred to the International Court of Justice. However, in regard to States which have made a reservation to the jurisdiction clause of the Convention, only technical bodies, the Committee on the Elimination of Racial Discrimination and an *ad hoc* Conciliation Commission, can be seised of a complaint.

66. In the present case, the several distinct roles of the General Assembly relating to Namibia, and the failure of recourse to judicial proceedings of the Court to obtain a decision on the substantive merits in contentious proceedings, must be taken into account in any evaluation of the actions of the General Assembly. The Secretary-General trusts, however, that in the light of the present response, it will be seen that the General Assembly was not seeking in any way to usurp a judicial function, but had found it necessary to act pursuant to its own authority after it had proved impossible to obtain a judicial determination in contentious proceedings.

Mr. President, that concludes the replies to the ten questions addressed to the Secretary-General. We have some further observations to add.

The Court adjourned from 4.15 p.m. to 4.40 p.m.

Comments on the South African Proposal for a Plebiscite in Namibia

67. Mr President, honourable Members of the Court, I come now to the letter dated 6 February 1971 [1], from the Agent of the South African Government to the Registrar of the Court, concerning the so-called plebiscite proposal. Comments on this proposal were requested from participants in these oral proceedings and Mr. Stavropoulos, at the close of his oral statement presented on behalf of the Secretary-General, on 8 February, mentioned that the Secretary-General might wish to present some observations at a later stage in these proceedings.

68. The South African proposal as stated in their letter of 6 February is as follows:

> "*(a)* That a plebiscite of the inhabitants of South West Africa be held to determine whether it is their wish that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations.
>
> *(b)* That the plebiscite be jointly supervised by the International Court of Justice and the South African Government. It is suggested that the Court could appropriately act in this respect through a committee of independent experts appointed in accordance with its Statute.
>
> *(c)* That the detailed arrangements for the plebiscite, including the membership and terms of reference of any committee appointed by the Court, be agreed upon by the Court and the South African Government."

[1] See **Correspondence**, No. 92, p. 673, *infra*.

69. This proposal, it is claimed by South Africa, could have decisive significance for the solution of this case. The South African Government has suggested that there exists a relationship between the so-called "plebiscite proposal" and what are referred to as "factual allegations". It has been further suggested that the outcome of the proposed plebiscite would in some way be relevant to the question now before the Court.

70. In the submission of the Secretary-General, this proposal is not one which would be capable of establishing either the facts of the situation in Namibia or the genuine wishes of the inhabitants of the Territory. Moreover, although related in a number of respects, it would not appear that these two elements (namely the facts of the situation in Namibia and the wishes of the inhabitants), would, or even necessarily could be ascertained in the same manner.

71. For the present proceedings, namely for the question of the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970), the proposal for a plebiscite is manifestly irrelevant. A plebiscite conducted in 1971 or 1972, whatever its result, could not affect the legal consequences for States of the presence of South Africa in Namibia in the years since 1966. And even if the Court were to advise on the legal and factual bases of the General Assembly and Security Council resolutions on Namibia, and even if it were to enter, in the course of these advisory proceedings, into a review of the facts as found by the General Assembly, the plebiscite would not assist the Court in this pursuit.

72. The suggested plebiscite, whatever its result, could not refute the reaffirmation in paragraph 2 of resolution 2145 (XXI) "that South West Africa is a territory having international status"; the plebiscite could not rebut the declaration in paragraph 3 of resolution 2145 (XXI) 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; nor could the result of a plebiscite undo the undeniable fact set forth in resolution 2145 (XXI) that South Africa, since 1946 at least, has consistently disavowed the Mandate. It must be said that, under the circumstances of this case, a plebiscite is not, and cannot be, relevant evidence to be placed before the Court.

73. The proposal is not one which would be capable of establishing the facts of the situation in Namibia at the present time, and still less in the relevant time in 1966. Indeed, even a plebiscite in which the majority of the population would vote for the reinstatement of the South African administration of the Territory might be interpreted, in the light of the lack of political development of the population, not as evidence that South Africa had complied with its obligations under the Mandate but, on the contrary, as an indication of the fact that the Mandatory did not promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory.

74. As stated, a plebiscite could not rebut the evidence of South Africa's non-compliance which included, *inter alia*, prohibitions and requirements contained in published and undisputed South African legislation, as well as in the admitted practice of racial discrimination in the policies applied by South Africa in Namibia. For these established facts, therefore, no further investigation is required, and neither would a plebiscite be relevant in this regard.

75. It has been pointed out by previous speakers before this Court that, even regardless of any merit which this plebiscite proposal might otherwise have had, the Government of South Africa has no right or authority to undertake

or supervise any plebiscite or other activity in Namibia, by reason of the illegality of South Africa's presence in the Territory. The termination of the Mandate by General Assembly resolution 2145 (XXI) and the subsequent resolutions of the General Assembly and of the Security Council have brought about fundamental changes in the situation. These resolutions, which are in effect binding upon all concerned, including the Secretary-General, have established that the Mandate has terminated, that the presence of South Africa in Namibia is illegal and that the United Nations Council for Namibia is to administer Namibia until independence. General Assembly resolution 2248 (S-V) provides, *inter alia*, for the establishment in the Territory of a constituent assembly to draw up a constitution and for a legislative assembly following elections conducted on the basis of universal adult suffrage.

76. The proposal as formulated is incompatible with Security Council resolutions 269, paragraph 7; 276, paragraph 5; and 283, paragraph 1, in which the Council called upon States to refrain from any dealings with the Government of South Africa which would imply recognition of the authority of South Africa over the Territory. In the Secretary-General's opinion, an arrangement is not acceptable under which the plebiscite would be conducted and supervised by the Court jointly with South Africa, which is in illegal occupation of the Territory, and without the participation of the other parties in interest, including the United Nations itself, which since the termination of the Mandate is the lawful authority for Namibia. In particular, principal responsibility for the conduct of a plebiscite should rest with the United Nations Council for Namibia.

77. While the proposal, for all these reasons, is neither admissible nor relevant, I would now propose to make a few comments on the modalities and procedures which South Africa has suggested, in order that the nature of the proposal may be more clearly understood. The questions which South Africa proposes to put before the inhabitants of Namibia are misleading and inappropriate. In particular, the alternative, whether the inhabitants wish that the Territory "should henceforth be administered by the United Nations" does not correspond to the decisions taken by the General Assembly. By General Assembly resolutions 2145 (XXI) and 2248 (S-V), it is laid down that Namibia will be administered by the United Nations for an interim period until independence, and that it shall become independent on a date to be fixed in accordance with the wishes of the people, and that the Council for Namibia shall do all in its power to enable independence to be attained by June 1968.

78. If a plebiscite were held—a development which can take place only outside the present proceedings before this Court—the alternative to a return of the Territory to South African rule, to be presented to the people of Namibia, should not be administration by the United Nations, but independence after a short transitional period. No plebiscite could be of any value if the inhabitants were invited to choose between alternatives which do not exist.

79. There is no question of the Territory being "administered by the United Nations" except for the express purpose of bringing about the self-determination and independence of the Territory at the earliest possible date, and transferring all powers to the people of the Territory upon the declaration of independence. Thus, the political future for the Territory envisaged by the United Nations is that the people of Namibia should decide their own future, and it was for this purpose that the General Assembly, in its resolution 2248 (S-V), directed the United Nations Council for Namibia, *inter alia*, to—

> "... take ... all necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up

> a constitution on the basis of which elections will be held for the establishment of a legislative assembly and responsible government"

and ". . . to transfer all powers to the people of the Territory upon the declaration of independence". As already indicated, independence was originally contemplated to be reached in June 1968.

80. To suggest therefore that the people of Namibia have an option to be administered by the United Nations is to misrepresent the available alternatives, more particularly when juxtaposed with an option to continue to be administered by the South African Government. For the United Nations does not seek to maintain any administration of its own over Namibia, but only to enable the people of the Territory to exercise their right to self-determination and independence. It must logically follow therefore that the South African proposal would offer the inhabitants the alternative of not exercising this right.

81. Any plebiscite genuinely designed to ascertain the wishes of the inhabitants would have to be held under conditions which would ensure impartiality and freedom of choice. Such conditions do not exist at present because of the denial of freedom of movement, organization or political expression to the vast majority of the population. To achieve the necessary conditions for a free plebiscite, South Africa would first have to withdraw from the Territory to be replaced by an impartial authority, the United Nations Council for Namibia or some other organ agreed upon by the General Assembly or the Security Council; freedom of movement and political expression would have to be restored, political exiles would have to be permitted to return, political prisoners released, a register of voters would have to be established and necessary guarantees would have to be provided to remove all possibilities of intimidation or pressure, overt or covert, and to ensure that there would be no reprisals after the conclusion of the plebiscite.

82. The Secretary-General has noted a statement made by the representative for South Africa at the sitting of this Court held on 16 February 1971, in reply to a question by the representative of the Organization of African Unity concerning the report of the committee of experts to which South Africa proposes the supervision of the plebiscite should be entrusted, jointly with South Africa. He said that the—

> ". . . report will be made to this Court. And the Court . . . will then decide what significance it should attach to this report on the plebiscite, for the purposes of the Court's opinion in these proceedings and for no other purpose whatsoever" (*supra*, p. 168).

This clearly means that South Africa does not even propose to bind herself to accept the result of the plebiscite if she should not like it, or to accept the advisory opinion of this Court if it were based on the result of the proposed plebiscite unfavourable to South Africa. This statement reinforces South Africa's emphasis, in paragraph 2 of Chapter I of her written statement, that she will not be bound by the advisory opinion.

83. Mr. President, the Secretary-General has hesitated to make such observations on the substance of a proposal which is irrelevant to the question before the Court and is legally and practically incapable of implementation. However, in view of the misconceptions inherent in these proposals, and the mistaken conclusions which tend to ensue therefrom, the Secretary-General thought it useful to draw attention, through these observations, to the inherent inconsistencies between the proposal which was made and the purposes to which it purports to relate.

84. In particular, we have endeavoured to show why the South African proposal, apart from being excluded by factors of illegality, competence and relevance previously referred to, would in any event not give expression to the wishes of the inhabitants concerning their future, nor would it place any relevant evidence before the Court, nor would it have any relevance to the violations by South Africa of her obligations in respect of the people and territory of Namibia.

85. Elections and plebiscites, supervised by United Nations Commissioners, have in the past led to the attainment of independence by a number of trust territories, and the application of a similar procedure to Namibia might have solved the problem of Namibia which has been before United Nations bodies for so many years. Thus, even with the manifest defects in the proposed plebiscite, it is regrettable that it has come so late—only after the termination of the Mandate. While it would have been manifestly impossible to accept the terms of a plebiscite as set out in the present South African proposal, such a proposal might have formed a basis for negotiation had it been made to the General Assembly during the time that South Africa was still the lawful Mandatory. Negotiation of the modalities and procedures for the exercise of self-determination would have been an excellent method by which the question of Namibia might have been resolved had a genuine proposal for an internationally supervised plebiscite been forthcoming from South Africa prior to the termination of the Mandate.

The Court rose at 5 p.m.

NINETEENTH PUBLIC SITTING (9 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. STEVENSON

REPRESENTATIVE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. STEVENSON: Mr. President, Members of the Court. It is a high personal privilege and honour for me to make this oral statement before you on behalf of my Government. I am pleased to have with me as counsel Louis B. Sohn, Bemis Professor of International Law at Harvard Law School, who is this year serving as State Department Counselor on International Law, and Robert E. Dalton of the Office of the Legal Adviser. My Government appreciates the opportunity of participating in the oral phase of this case.

The written statements submitted by various governments and the remarks of the distinguished representatives who have preceded me in this case have strengthened our opinion as to the importance of the question before the Court.

In accordance with the wishes of the Court, Mr. President, I shall not repeat all the arguments made in the written statement submitted by the United States, or reiterate those made by the distinguished representatives who spoke before me. I shall concentrate on a limited number of questions which have been raised in the written and oral statements, and with respect to which, in our view, certain additional considerations should be taken into account.

The first of these issues is the challenge to the jurisdiction of the Court to render an advisory opinion, based on the alleged invalidity of the Security Council request for an advisory opinion. My Government believes that the Court has jurisdiction and that the Security Council request was valid.

The second issue is whether the Court should exercise its discretion to accede to or to decline the request of the Security Council for an advisory opinion. My Government believes that the Court should render an opinion.

The third topic which I shall address is the validity of General Assembly resolution 2145 (XXI). My Government believes that that resolution is valid and that it effectively terminated the administrative authority of South Africa under the Mandate of 17 December 1920.

I shall then discuss the Security Council resolutions in the case and the effects of those resolutions for States.

Next, I shall comment briefly on the proposal made by the representative of South Africa to furnish additional information as to conditions in Namibia. My Government would not favour a *de novo* examination of the facts.

Thereafter, I shall discuss the South African Government's proposal that a plebiscite be held in Namibia.

Finally, I shall sum up the conclusions which my Government submits for the consideration of the Court.

I

The first issue with which my Government wishes to deal is whether the question is properly before the Court. I do not consider it necessary to deal

with all the arguments raised by the distinguished counsel for South Africa against jurisdiction. They have been ably dealt with by the Legal Counsel of the United Nations.

I should like, however, to discuss an argument which South Africa has stressed—that Security Council resolution 284, which requests the advisory opinion, was not adopted in accordance with Article 27, paragraph 3, of the Charter. This paragraph, as amended, states that decisions of the Security Council on other than procedural matters "Shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". South Africa urges the Court to rule that since two permanent members of the Security Council, the USSR and the United Kingdom, abstained from voting on the resolution requesting the advisory opinion, the resolution is invalid.

There is an unvarying practice followed by the Security Council of adopting resolutions receiving the required number of affirmative votes despite the abstention of one or more permanent members from voting. That practice began almost immediately after the entry into force of the Charter. On 29 April 1946 the Council adopted resolution 4, despite the abstention of the USSR. The Security Council followed that practice in 37 other cases without any challenge. Thereafter, on 4 March 1949, when a challenge was made to that practice in connection with resolution 69, the President of the Council ruled that "abstention by a permanent member of the Council does not render the Council's decision invalid". Later, on 4 May 1949, the practice of the Council was explained in the Assembly and was accepted by it (*Official Records of the Third Session of the General Assembly, Part II*, Ad Hoc *Political Committee*, pp. 200-201).

On 17 December 1963 the General Assembly adopted the amendments to Articles 23 and 27 that enlarged the Security Council and specifically changed the number in the phrase under consideration from "seven" to "nine" so that the relevant part of Article 27 now reads "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". By that time there had been 71 instances in which the Security Council had adopted resolutions, despite the abstention of one or more of the permanent members. While the amendments were before governments for approval there were nine additional instances in which this practice was followed.

The fact that the Security Council has for 25 years functioned on the basis that resolutions adopted despite the abstention of one or more permanent members of the Council are binding and valid is conclusive evidence of the generally accepted understanding of the words "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". This conclusion is buttressed by the general acquiescence of the States Members of the organization, including, in particular, the clear agreement with this interpretation by the States most directly affected, namely the permanent members of the Security Council.

Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties sets forth the generally accepted rule that "subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" must be taken into account in determining the meaning of that treaty. A thoroughly consistent practice of the United Nations regarding a matter peculiarly within its competence, the proper voting procedure to be followed in one of its principal organs, which has been accepted almost unanimously by the member States, is to be given the greatest weight in interpreting the pertinent Charter provision.

This rule in the Convention on the Law of Treaties, which of course is not yet in force but reflects in many respects generally accepted law, regarding the relation between practice and interpretation had been developed by the Court itself in previous opinions. Thus, in its Advisory Opinion relating to the *International Status of South West Africa* (*I.C.J. Reports 1950*, p. 135), the Court stated:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."

In a series of its advisory opinions, especially in the Advisory Opinion relating to *Certain Expenses of the United Nations*, the Court accepted the interpretative value of a consistent, generally accepted practice of the competent organs of the United Nations (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at 157 ff.; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at 8-9).

Moreover, the interpretation of Article 27, paragraph 3, as reflected in the practice of States and of the Security Council, is consistent with an interpretation based on the object and purpose of that paragraph. The purpose of Article 27, paragraph 3, was to ensure that substantive decisions of the Security Council would not be adopted over the objection of a permanent member. As a practical matter, members can indicate their lack of objection to a proposition by abstaining on it. The adoption of a resolution with the abstention of permanent members of the Council is thus consistent with the object and purpose of Article 27.

There is an additional and vital piece of evidence that supports the interpretation adopted by the United Nations. At the time the amendment to Article 27 was adopted, the practice in the Security Council had already been followed for 17 years. We have looked at the information supplied by the depositary in order to determine whether there was any evidence that States understood the phrase "shall be made by an affirmative vote of seven members including the concurring votes of the permanent members" to have a meaning different from that which was generally accepted in the 1963-1965 period and previously. No ratifying State informed the Secretary-General that it interpreted the text in any way differing from the practice followed in the Security Council. In light of this history it is reasonable to hold that the special meaning of these words was incorporated in the Charter amendment.

In summary, the United States believes the Court should reject the South African interpretation and hold that the Security Council validly adopted resolution 284 requesting the advisory opinion in this case. It follows, as well, that the validity of the other Security Council resolutions involved in the case cannot be challenged on this ground.

II

Let me turn now to the second question I wish to address. Article 65, paragraph 1, of the Statute of the Court makes it clear that the Court has discretion to decline to answer a legal question referred to it for an advisory opinion in accordance with the Charter. The question of discretion was not addressed in the prior advisory proceedings relating to Namibia. It was, however, raised in the *Peace Treaties* case (1950), the *Reservations* case (1951), the *Judgments of the*

Administrative Tribunal case (1956) and the most recent advisory proceeding, the *Certain Expenses of the United Nations* case (1962). These cases establish a pattern of accepting requests for advisory opinions. In the *Peace Treaties* case the Court stated that "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" (*Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65 at 71). In its most recent advisory opinion in the *Expenses* case, it repeated an earlier pronouncement to the effect that "only 'compelling reasons' should lead it to refuse to give a requested advisory opinion". In that case it was argued by some participating States that the determination of whether certain expenses of the United Nations in the Middle East and the Congo constituted "expenses of the organization" in the sense of Article 17 (2) of the Charter was a matter intertwined with political questions. In its opinion the Court adverted to the fact that most interpretations of the Charter have political significance. It nevertheless rendered an advisory opinion (*Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 151, at 155).

South Africa argues, however, that the present case involves a "dispute" between States and is, therefore, not properly a subject for an advisory opinion. The simple answer to this argument is that the Security Council is empowered under Article 96 of the Charter to request an advisory opinion "on any legal question", and obviously such a legal question may involve differences of views. Indeed, most often the reason an organ of the United Nations requests an advisory opinion is precisely because there are differences among member States on the legal aspects of matters pending before that organ. In connection with some of the previous advisory opinions, the records show that these differences were both substantial and sharp.

The cases of *Eastern Carelia* and of the *Peace Treaties* cited by South Africa for the proposition that no State can, without its consent be compelled to submit to a pacific settlement procedure, are irrelevant as the question involved in those cases was whether a matter could be submitted to the Court for an advisory opinion when it involved a State which was not a Member of the League of Nations, in the first case, and of the United Nations, in the second case. South Africa, however, is a Member of the United Nations, and has agreed to Article 96 of the Charter authorizing the Security Council to request advisory opinions.

It might be also pointed out that the dispute relating to the performance by South Africa of its obligations under the Mandate, out of which the *South West Africa* cases arose, was finally decided by resolution 2145 (XXI). Thereafter, the Security Council was faced with a new situation, namely the continued presence of South Africa in Namibia notwithstanding the termination of its administrative authority. The question before the Court relates to this new situation.

My Government believes that the Court should give an opinion on the important legal question submitted to it by the Security Council.

III

I turn now to the third question, the validity of General Assembly resolution 2145 (XXI). Given the possibility that the Court may wish to consider this question, I wish to take a few moments to summarize the attitude of my Government thereon.

The United States and 114 other Members of the United Nations voted for

resolution 2145. In the debate on resolution 2145, the United States representative stated:

> "As the mandatory power, South Africa incurred certain obligations toward the people of the territory—including the promotion of their social progress. It has not fulfilled these obligations.
>
> . . . . . .
>
> As the mandatory power, South Africa incurred certain obligations to the international community, for which the General Assembly has supervisory responsibilities. Among these are obligations to report annually on its administration of the territory and to transmit petitions from the inhabitants. South Africa has repeatedly refused to carry out these obligations. We are thus confronted with a continuing material breach of obligations incumbent upon the mandatory power.
>
> . . . . . .
>
> By virtue of the breach of its obligations and its disavowal of the Mandate, South Africa forfeits all right to continue to administer the Territory of South West Africa. Indeed, it is because of South Africa's own actions that it can no longer assert its right under the Mandate; and apart from the Mandate, South Africa has no right to administer the Territory." (*GA, OR*, Twenty-first Sess., Plenary Meetings, 1439th meeting.)

In preparing our written statement in this proceeding we re-examined the premises upon which our Government's 1966 statement was based. We reaffirmed our conclusion that the General Assembly validly terminated South Africa's right to administer the Mandate. In particular, we regard the Mandate of 17 December 1920 to have been a treaty in force between South Africa and the League of Nations with the United Nations succeeding the League as a party in 1946. Accordingly, we regard the treaty principles relating to *pacta sunt servanda* and to material breach as applicable to the mandate agreement. Under these principles, South Africa's long-standing material breaches of its obligations under the Mandate, which it was legally required to carry out in good faith, clearly justified, in my Government's view, the action of the General Assembly in terminating South Africa's rights. In this regard it should be noted that South Africa does not deny that she failed for more than two decades to furnish the General Assembly with the annual report required under the Mandate or to transmit petitions as she had been required to do during the League period.

Now, even if the Court were not to accept the argument that termination of South Africa's rights under the Mandate by the General Assembly was justified by the treaty doctrine of material breach, it is my government's view that the General Assembly had the right to terminate South Africa's rights in the General Assembly's capacity as successor to the League of Nations' supervisory responsibility. The General Assembly has accepted the 1950 Advisory Opinion in which this Court stated that the supervisory authority under the Mandate of the League of Nations had passed to the United Nations. On the basis of an exhaustive study of the power of the League to terminate rights under a mandate, my Government has concluded that this supervisory authority which passed to the United Nations clearly included the authority to terminate rights under a mandate.

Given the seriousness of South Africa's failure to carry out its obligations under the Mandate and the failure of South Africa to comply with a series of lesser supervisory measures adopted during that period, the United States considered that the Assembly might reasonably resort to termination, the

ultimate supervisory measure. While the Assembly might have appointed a Member of the United Nations to administer the Territory, there was precedent for the United Nations itself to assume direct responsibility for the Territory.

The Charter basis for the General Assembly's decision is, in our view, the same as the Court held existed for the United Nations' exercise of supervisory functions, namely Article 80, paragraph 1 (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at 133-134, 136-137). Under that Article and under the Mandate, the General Assembly was entitled to take such action as was necessary to ensure that the rights of the people of Namibia were not altered in any manner in disregard of the Mandate. As the Court stated in 1950 (pp. 136-137), the purpose of this provision was "to provide a real protection for those rights". The action taken by the General Assembly was a reasonable exercise of this authority to protect the people of Namibia and to safeguard the "sacred trust of civilization" and "the material and moral well-being and the social progress of the inhabitants".

It is the view of the United States that the Assembly's action was legally sufficient to terminate the Mandate without any action by the Security Council. Should the Court, however, have any doubt as to the sufficiency of the General Assembly's independent authority where the United Nations is acting as successor to the League with respect to the Namibian Mandate, this doubt surely must be satisfied when, as is presently the case, the Security Council has expressly affirmed the General Assembly's action.

The Security Council's affirmation of the General Assembly's resolution in any event serves as the point of departure for the Council's further resolutions with respect to Namibia.

IV

In its written statement South Africa has contended that none of the relevant provisions of the Charter could serve as a basis for the Security Council resolutions with respect to Namibia.

In the view of the United States the Security Council action on the Namibia question could have been taken either under Chapter VI or in the event the Security Council is regarded as sharing with the General Assembly the United Nations' responsibility as successor to the League in supervising Namibia, under Article 80, paragraph 1, or under both. It is common practice for the Council not to specify that provision of the Charter under which it is acting. The United States has taken the view that in the Namibia case the Council was dealing with a situation under Chapter VI the continuation of which it believed was "likely to endanger the maintenance of international peace and security". There have been many cases before the Security Council in which the Council has taken action under Chapter VI without a finding that the continuance of a dispute or situation is likely to endanger the maintenance of international peace and security.

It is abundantly clear in my Government's view, from the records of the Council, that the measures taken were not based on Chapter VII and do not obligate States to take action under that Chapter. I would respectfully draw the attention of the Court to the fact that any action under Chapter VII as distinguished from Chapter VI requires a preliminary finding under Article 39 of the Charter that a particular situation constitutes a threat to the peace, breach of the peace or act of aggression. There was no such finding with respect to the situation in Namibia. Consequently, there could have been no action or measures, whether recommendatory or obligatory, under Articles 40, 41 or 42.

The question presented to the Court relates only to consequences for States of the continued presence of South Africa in Namibia. Care should be taken in defining the legal consequences flowing from the relevant Security Council resolutions so as to protect individual rights of the inhabitants of Namibia or of citizens of other States, leaving these to be determined in the light of the circumstances surrounding each case. In many cases it will be for the courts of member States to determine, in accordance with recognized principles of private and public international law, the effect on private relationships and transactions of acts taken by the Government of South Africa on behalf of, or concerning, Namibia after the adoption of resolution 2145 (XXI). It would, for example, be a violation of the rights of individuals if a foreign State should refuse to recognize the right of Namibians to marry in accordance with the laws in force in Namibia, or refuse to accept their marriage certificate on the ground that it was issued by the illegal South African authorities in Namibia, or would consider their children to be illegitimate. A contract for the sale of goods also should not be declared invalid merely because it was entered into in accordance with ordinary commercial laws applied to Namibia by South Africa. These would not be proper consequences of the United Nations actions on Namibia.

On the other hand, as a matter of present and future policy, it would be proper for States to try to limit future investments in Namibia by all legitimate means at their disposal. The United States announced in May 1970 that its policy with respect to Namibia will be as follows:

> "1. The United States will henceforth officially discourage investment by US nationals in Namibia.
>
> 2. Export-Import Bank credit guarantees will not be made available for trade with Namibia.
>
> 3. US nationals who invest in Namibia on the basis of rights acquired through the South African Government since adoption of General Assembly Resolution 2145 (27 October, 1966) will not receive US Government assistance in protection of such investments against claims of a future lawful government of Namibia." (62 *Department of State Bulletin* (8 June 1970), p. 709.)

The United States hopes that others will take similar steps, and that an accumulation of such measures may cause the South African Government to accept a peaceful resolution of the international issue of Namibia.

V

Mr. President, I should like to comment briefly on the offer by the representative of South Africa to furnish additional information as to conditions in Namibia.

In so far as the present proceedings are concerned, the most relevant information regarding Namibia would be that which established the conduct of the Mandatory with regard to the performance of its obligations under the Mandate prior to 27 October 1966, the date on which the General Assembly adopted resolution 2145 (XXI). Two of the elements of material breach referred to in that resolution are failure to submit reports and to transmit petitions. South Africa does not claim performance of either of these obligations.

The third element of breach specified in General Assembly resolution 2145 (XXI) is failure to ensure the moral and material well-being and security of the indigenous inhabitants of the Territory. Many States have, in the course of the

General Assembly debate, found that failure evidenced by South Africa's application of apartheid to the Territory.

Regarding the general question of evidence, my Government would not incline favourably to any *de novo* examination of the facts. We do not believe, Mr. President, that the Court need establish for itself the facts upon which the General Assembly relied.

General Assembly resolution 2145 recites that before adopting the resolution the Assembly had 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 Territory. At all relevant times those committees had endeavoured to obtain the views of South Africa, which consistently refused to participate in the work of the committees or to assist them in establishing the facts.

Should the Court consider it necessary, despite the considerations which I have just described, to confirm the factual basis on which the Assembly's resolutions were grounded, the best contemporaneous evidence would seem to be that presented to the Court in the *South West Africa* cases. Some 2,000 pages of the pleadings in those cases were devoted to factual questions, and much of the information presented to the Court at that time was adduced by South Africa.

In its written statement South Africa has also offered to produce evidence as to the "latest progress" in Namibia. In the view of my Government, such evidence would not be relevant to the question before the Court.

VI

In the course of these proceedings, the South African Government has also proposed that a plebiscite be held in Namibia under the joint supervision of the International Court of Justice and the Government of South Africa. The proposal for a plebiscite is not, in the view of the United States Government, material to the question put to the Court by the Security Council. Therefore, we do not believe that this proposal should in any way be viewed as a basis for the Court's postponing the rendering of its opinion.

The United States does believe that the question of holding a fair and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a free 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. Should these political organs of the United Nations request the Court to play a role in any plebiscite arrangements, the Court could then consider whether it can appropriately participate in such arrangements. It might be recalled that the officers of the Court, though not the Court itself, have appointed observers to attend the plebiscites in Tenda-Briga in 1947 and in the French Settlements in India in 1949.

VII

Mr. President, in accordance with the wishes of the Court, I have refrained from repeating the arguments in my Government's written statement. I would like, at this point, to summarize the conclusions which the Government of the United States submitted in that document.

First, the United Nations validly terminated the rights and authority granted to South Africa under the Mandate of 17 December 1920.

Second, South Africa no longer has any rights in Namibia under the Mandate and there is no other legal basis for its continued presence in the Territory. South Africa is, therefore, obligated to terminate its occupation of Namibia and to transfer administration of the Territory to the United Nations. This is its over-riding obligation and I respectfully urge that this is the most important conclusion that the Court can reach.

Third, a number of important legal consequences flow from South Africa's continued illegal presence in Namibia. These consequences are of two general kinds. South Africa has certain legal duties which, because of its *de facto* occupation, it must observe so long as it remains in Namibia. Other States also have certain duties under international law with respect to Namibia. Let me turn first to the consequences for other States: they have the duty to respect the direct responsibility of the United Nations for Namibia and to assist it in exercising those responsbilities and to apply certain specified rules to treaties affecting Namibia.

South Africa's duties include obligations to promote the well-being and development of the inhabitants; to act in conformity with Chapter XI of the United Nations Charter concerning non-self-governing territories; to act in conformity with Chapter IX and certain other provisions of the Charter; and under general international law, to adhere to certain standards in the administration of Namibia. However, it should be made clear that compliance with these obligations in no respect relieves South Africa of its primary responsibility—to terminate its illegal presence in Namibia.

QUESTIONS BY JUDGES SIR GERALD FITZMAURICE, DILLARD, JIMÉNEZ DE ARÉCHAGA AND MOROZOV

The PRESIDENT: Mr. Stevenson, Judge Sir Gerald Fitzmaurice, Judge Dillard and Judge Jiménez de Aréchaga have some questions which they wish to address to you; these questions will be read out to you. You can answer them at your convenience and, if you prefer, you can remit your answers in writing to the Court.

Judge Sir Gerald FITZMAURICE: Mr. Stevenson, my first question is this: it has been maintained on behalf of the United States that fundamental breaches of a contract by one party entitle the other to put an end to it. I would like to know how, in your view, exactly this would work in practice. For instance, it is evident that if a party could put an end to a contract merely by alleging fundamental breaches of it, and despite the denials of the other party, whether on the facts or as regards the existence of the obligation, there would always be an obvious and easy way out of contracts which one of the parties found onerous or inconvenient. What safeguards would you institute in order to prevent this, and how would or should such safeguards apply in the international field, in the relations between States or between States and international organizations?

My second question is this. I would be glad to know whether, after hearing or reading what has been said on behalf of South Africa at *supra*, pages 367 to 372, 445 to 451, and 453, it is still maintained on behalf of the United States that the former Mandate for Palestine was unilaterally terminated by the Assembly without the consent of the mandatory power and, if not, what precisely is supposed to be the relevance of the Palestine case to the present one?

My third and last question is as follows: 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 tort-feasor 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?

Judge DILLARD: Mr. President, I had framed on the basis of the written statement of the United States two groups of basic questions which I thought needed additional elaboration. I think these questions have been answered or, at least, the distinguished representative of the United States has addressed himself to them during the oral proceedings.

For the record I may say that the first of the first group of questions had to do with the identification of the parties to the treaty and when they became parties to it. On the theory of a material breach of treaty, this seemed to me a desirable addition to the written statement.

The second of the first group related to the point that questions of material breach of a treaty involve mixed questions of law and fact, and was designed to determine whether you assume the facts to have been established and thus not subject to further investigation and, if so, on what grounds, i.e., by virtue of a conclusive determination by the political organs of the United Nations, or by judicial notice or on some other grounds. I would have gone on to ask whether, if your answer to that question was that the Court should not simply assume the establishment of the facts, you thought the Court should hear testimony on

the factual issues asserted to have constituted a breach. Now, in my opinion, Mr. President, the United States representative has addressed himself to these questions.

My second group of questions had reference to the specific Charter authority on which General Assembly resolution 2145 was based. This related more specifically to the general statement on page 877, I, of the United States written statement, which did not identify any particular Charter article on which the validity of General Assembly resolution 2145 was based. I wanted to clarify that point. I understand that you have now located this Charter basis in Article 80 and that this question has also been alluded to.

Therefore, Mr. President, I would not wish to put the questions in the way originally framed, but if the representative of the United States would be disposed to elaborate further on them it might be helpful.

Judge JIMÉNEZ DE ARÉCHAGA: Mr. Stevenson, I refer to your discussion of the Court's jurisdiction and the question of voluntary abstention. Does your statement imply that the position of your Government is to ask the Court to determine, by implication, that paragraph 3 of Article 27 of the Charter, and not paragraph 2, applies to any decision of the Security Council requesting an advisory opinion?

The PRESIDENT: I understand that it is the wish of the representative of South Africa to address the Court tomorrow morning on the question of the plebiscite in answer to the observations that have been made with regard to it by the representative of the Secretary-General and the representative of the United States of America.

The Court rose at 11 a.m.

TWENTIETH PUBLIC SITTING (10 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

The PRESIDENT: In the context of the question addressed to the representative of the United States of America by Judge Jiménez de Aréchaga yesterday, Judge Morozov desires to address a question to the representative of the United States of America also.

Judge MOROZOV: I would like to put a question which arises out of the question which was put to the representative of the United States of America at the end of the public sitting of the Court yesterday, 9 March. My question is:

Does the representative of the United States of America not think that it is clear from Security Council resolution 284 (1970) that in the process of adoption of that resolution the Security Council was guided by the provisions of paragraph 3 of Article 27 of the Charter of the United Nations?

Would it be right to conclude from the statement made on behalf of the United States of America that the application of Article 27, paragraph 3, of the United Nations Charter in the case of requests made by the Security Council for advisory opinions of the International Court of Justice is based on the Charter itself, and coincides with the uncontested interpretation contained in the following well-known documents:

1. Record of the third Plenary Meeting of the Yalta Conference, of 6 February 1945, at which the United States Secretary of State, Mr. Stettinius, said that:

> "The following decisions relating to peaceful settlement of disputes would also require the affirmative votes of seven Members of the Security Council including the votes of all the permanent members . . .
>
> IV. Whether the legal aspects of the matter before it should be referred by the Council for advice to the International Court of Justice;" (*Foreign Relations of the United States, Diplomatic Papers, The Conferences at Malta and Yalta*, 1945, p. 663.)

2. Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council, of 7 June 1945, devoted to the questionnaire attached to Memorandum of Sub-Committee III/1/B, Security Council, of the San Francisco Conference (particularly Question 13), which confirmed that at the Yalta Conference the Heads of Government participating accepted the suggestion of the United States of America just quoted, which suggestion later is reflected also in the Statement by the Delegations of the Four Sponsoring Governments, Part II (see UNCIO docs., Vol. II, pp. 704 and 713); see also the Report to the President on the results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, page 71 onwards.

ORAL STATEMENT BY MR. DE VILLIERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: Mr. President, honourable Members of the Court, towards the end of the session last Friday (17th Public Sitting) we submitted to the Court that an early decision on the South African proposal concerning a plebiscite was desirable. We particularly stressed what an effect such a decision could, in our submission, have on the nature and the scope of an investigation into relevant questions of fact.

In the meantime, representatives of the United States and of the Secretary-General have addressed the Court and they have included in their addresses comments on the plebiscite proposal.

We propose, at this session, to reply immediately to the reactions of these distinguished representatives on this subject. That would enable the Court, should it so wish, to come to an early decision on the principle of the proposal; the proposal itself envisages that matters of detail would require attention once the Court has indicated that it is amenable to the idea as such.

There was, in these two reactions to which I have referred, rather a marked difference in tone. That of the United States reaction was subdued. It recognized responsibly that:

> ". . . the question of holding a fair 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" (*supra*, p. 504).

As I said, with respect, that is a responsible approach recognizing the potential value of a plebiscite in this context, provided that the conditions and other arrangements are such as to ensure a fair and informed expression of the will of the people.

At the same time, the distinguished representative argued that in the context of these advisory proceedings in this Court the proposal was "not . . . material to the question put to the Court by the Security Council". We submit that that contention is not well-founded and I shall deal with it in due course.

I wish to refer first, by way of contrast, Mr. President, to the Secretary-General's reaction, which was, as the Court would have noticed—an agitated one—even bitter and resentful, it seemed. It connotes, in effect, that, to the long list of sins for which South Africa has been condemned at the United Nations, there has now been added the most deadly sin of all, namely the suggestion, which South Africa has made, that perhaps the justification or otherwise of the actions in the United Nations organs may relevantly be tested with reference to the views and wishes of the inhabitants of South West Africa.

The attitude which came from the part of the Secretary-General was therefore a categorical rejection of the whole proposal, flatly and unconditionally. The distinguished representative stated that, at any time, ". . . it would have been manifestly impossible to accept the terms of a plebiscite as set out in the present South African proposal" (*supra*, p. 496).

At a later stage, he indicated, "such a proposal might have formed a basis for negotiation had it been made to the General Assembly during the time that South Africa was still the lawful Mandatory" *(ibid.)*. But now South Africa

is in "illegal occupation of the Territory" (*supra*, p. 494), and, in the result, the proposal is "legally and practically incapable of implementation" (*supra*, p. 495).

Apart from this absolute rejection, Mr. President, the statement of the Secretary-General goes out of its way to try to subject the proposal to ridicule and even scorn. The proposal is said to be, in his words, "manifestly irrelevant", and, again quoting his words "not one which is capable of establishing the facts of the situation in Namibia at the present time, and still less in the relevant time in 1966" (*supra*, p. 492). The proposal was said to contain elements which were "misleading and inappropriate" (*supra*, p. 494). And it was further said to suffer from "inherent inconsistencies between the proposal which was made and the purposes to which it purports to relate" (*supra*, p. 495).

Mr. President, I propose to deal first with the attitude of the Secretary-General and then I will revert to that of the United States.

It will be evident that we have had from the Secretary-General much the same kind of approach as in the case of the Organization of African Unity and certain other States, with which approaches I dealt on 16 February, namely an approach of looking very closely and very hard for technical hitches, technicalities however minute and small, not with a view to seeing whether they could be overcome by constructive suggestion as to conditions and methods and modalities, but for the other purpose of seeing how big they can be blown up to serve as objections which can be raised to the idea of a plebiscite being held at all.

The corner-stone for this attitude is given exactly in the phrase which I have quoted before, namely that the proposal is "manifestly irrelevant" and "not one which would be capable of establishing the facts of the situation in Namibia at the present time, and still less in the relevant time in 1966". The argument on this point of relevancy goes so far as to state this, Mr. President:

> "... the plebiscite could not rebut the declaration in paragraph 3 of resolution 2145 (XXI) 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..." (*supra*, p. 493).

And it is even suggested that the facts of the situation in South West Africa and the wishes of the inhabitants are two distinct things which cannot be ascertained in the same manner. That is also at page 493, *supra*.

Mr. President, the question that immediately comes to mind is why is this suggested? It is very strange to hear this from a United Nations source. Has the United Nations majority line against South Africa not consistently been that there is one integrated situation in South West Africa, whereby the inhabitants are suffering untold misery under the yoke of a tyrannous oppressor, and are consequently crying out for liberation? That has, as far as we understand it, always been the manner in which the majority has presented its case of fact in regard to this situation in South West Africa; one of a tyrannous yoke which results in an attitude on the part of the population of clamouring for liberation.

In the South African written statement—I want to give the Court only a few examples of the way in which this attitude has been stated on previous occasions—in Chapter XI, paragraph 53, we quote certain of the expressions which were used by representatives of States in the very debates in 1966 which led to resolution 2145, statements made by them as being the factual basis upon which it was said that the resolution was to be adopted. I do not want to quote all of them, I take out only a few which are relevant to this particular point. I quote:

"the shameful and discredited system of the exploitation of man by man"; "the inhuman treatment by the South African Government"; "a brutal policy of iron and blood"; "the untold tyranny imposed on the Africans"; "a peculiar mixture of the most retrograde features of all systems of exploitation and social and political oppression".

Mr. President, does it not stand to reason that if these descriptions were correct, it would follow that a population so treated would jump at any opportunity of expressing their will in favour of being rid of this yoke and this oppression? Yet, we are told that the proposal is manifestly irrelevant.

The Security Council resolution 269 (1969), which is one of those featuring in these proceedings, states in its operative paragraph 4: "*Recognizes* the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in the territory." And in operative paragraph 8: "*Requests* all States to increase their moral and material assistance to the people of Namibia in their struggle against foreign occupation."

I ask again, Mr. President, with submission, would a question posed directly by way of a plebiscite to that population: "do you want to carry on under South African administration or some other administration?", would that not be extremely relevant to testing whether there is, in fact, such a struggle of the people of Namibia against its present administration? That was 1969.

Now I come to a publication by the United Nations, an official publication dated 1971. It bears the inscription of the Office of Public Information, its title is *A Principle in Torment*. I should like to read to the Court the opening words of the introduction, page 1:

> " 'We are Namibians and not South Africans. We do not now, and will not in the future recognize your right to govern us; to make laws for us in which we had no say; to treat our country as if it were your property and us as if you were our masters. We have always regarded South Africa as an intruder in our country.'
>
> In these words addressed to his South African captors, a Namibian liberation leader spoke for a people in a state of bondage. For more than half a century, the Africans of Namibia—outnumbering the whites of the country by seven to one—have been under the domination of South Africa and its policies of *apartheid* and white supremacy. Deprived of any role in government and barred from exercising their basic human rights, the 500,000 Namibians await the day when they will be free and equal in their own land."

So this is the date of 1971. That is the theme on which this official United Nations publication starts, it is the theme which runs like a thread throughout the publication. The publication, incidentally, contains some of the worst pieces of distortion that I have ever seen about facts, but it is not my purpose to deal with that now.

That is what is presented on behalf of the United Nations in 1971, about the facts of the situation in Namibia.

On the other hand, another representative of the United Nations states to this Court that a plebiscite to test the wishes of the people of Namibia as to whether they want to carry on under the present administration is manifestly irrelevant, and he goes so far as to say that this is a proposal which would be incapable of establishing the facts of the situation in Namibia at the present time and still less in the relevant time in 1966.

Would it not be extremely relevant to see whether persons who speak as this

particular man spoke, are in fact speaking on behalf of the people of Namibia? Would not the plebiscite be the best test of all for that question?

Now, Mr. President, later on in the book referred to, at page 25, we find a reference to the visit of Ambassadors Carpio and Martinez de Alva to South West Africa and South Africa in 1962. I believe the actual date was 1961, but the date is given in the publication as being 1962. There follows this passage, which incidentally does not refer at all to the joint communiqué in which these two ambassadors agreed that they could find no signs of genocide or a threat to the peace or militarization in South West Africa—there is no reference to that, but there is this passage, the correctness of which I have not fully checked, but presented in this United Nations publication as follows:

> "After visiting the Territory in May, the two officers reported that the administration of South West Africa was pervaded by the rigorous application of apartheid in all aspects of the lives of Africans, resulting in the complete subordination of their interests to those of the European minority—in contradiction with the principles of the Mandate, the United Nations Charter, and the Universal Declaration of Human Rights. It was the overwhelming desire of the Africans, they said, that the United Nations should assume direct administration and take steps to grant freedom to the indigenous population."

That is another example giving exactly this integrated majority United Nations attitude about the facts of the situation in South West Africa.

So we have seen it now, Mr. President, at these various points of time—1961 or 1962; 1966, immediately before the purported termination of the Mandate; 1969, in the Security Council resolution to which I have referred; and 1971, in this publication. Yet the contention is that a test by way of a plebiscite, absolutely and in principle, is "manifestly irrelevant". That line, Mr. President, I submit, very clearly falls to the ground.

If one looks more closely at the statement on behalf of the Secretary-General what does one find is offered in support of this over-all contention about irrelevancy? On analysis one finds that the material offered as being supporting material is not directed at relevancy, in a logical sense, but at a contention that the result would not be reliable evidence—not evidence upon which this Court could rely. Several reasons are given for this contention.

First, we are told that if in this year—1971 or 1972, the distinguished representative stated—a plebiscite were to be held and if a majority were to vote in South Africa's favour, that could still be interpreted against South Africa: it could still be interpreted as indicating a lack of political development for which South Africa as mandatory or administering authority is to be blamed. It is like the old saying of "Heads I win, tails you lose"—the coin has to stand on its edge before something favourable to South Africa comes out of a test of the *situation*.

This is a suggestion made with reference to 1971 or 1972 and yet in almost the same breath we are told that the General Assembly had decided as far back as in 1966, and again somewhat later, on June 1968 as a target date for independence for this very self-same population of South West Africa (*supra*, p. 494). We are told that it was decided in principle already that upon attainment of independence there would be established a legislative assembly for the whole territory which would be elected by the whole population on the basis of universal adult suffrage *(ibid.)* So this same population which could, if they were so stupid as to vote in South Africa's favour in 1971 or 1972, be said to be wholly lacking in political development, so wholly lacking that they

cannot identify a tyrannous oppressor and make use of an opportunity offered to them to say we do not want this bondage any more, has been offered independence from the General Assembly side at as early a date as 1968: and not only independence, but self-government on the basis of universal adult suffrage for the whole of the population.

Then it is said, secondly, Mr. President, that the questions proposed to be put are misleading and inappropriate. This condemnation emanates from the description in our letter in which the proposal was conveyed to the Court of the two alternatives between which there would be voting in such a plebiscite: these, according to the proposals, would be, on the one hand, continued administration of the Territory by South Africa and, on the other hand, the words were that it "should henceforth be administered by the United Nations" (*ibid.*, p. 494). The protest lodged runs something like this, that in fact this is misleading, because on the United Nations side administration is not proposed for any length of time: what is envisaged is only a short period of transition to independence. That is obviously so, Mr. President, with respect: but why does the Secretary-General accuse the South African proposal of being misleading and inappropriate on this point? What gives him any justification for assuming that this important factor, to which he draws attention in his statement, would not be drawn to the attention of the population of Namibia, or that it is not the exact intention of the proposal that it is to be drawn to their attention?

The proposal nowhere indicates that it is now suggesting the *ipsissima verba* of questions to be put in this plebiscite. Surely the task of deciding upon *ipsissima verba* would be one exactly for the committee of experts in co-operation with the South African Government. It would be a most important aspect of determining whether the conditions under which the plebiscite could be held would be fair and reasonable.

In essence one finds much the same thing on both sides. The United Nations has indicated that if it were to take over the administration of the territory it would accord self-determination to the population according to certain United Nations concepts, including this one which I have mentioned before of one legislative assembly for the whole territory in which the whole population would be represented on a basis of universal adult suffrage; that is certainly one of the most important things to be brought to the notice of the population so that they would know what it is that they are voting about, and what the implications are.

On the other hand, the South African policies have made it clear that they envisage self-determination according to somewhat different concepts for the population of South West Africa, and those concepts have been explained to the population from time to time. They know what they are.

Now, surely it would be part of the whole supervisory process in regard to a plebiscite to make perfectly sure that these implications are brought to the notice of the population so that they know exactly what it is they are voting about. Whether it is to be done by the form of words in the questions to be put themselves, or whether by other means, would be a matter of practicality, a matter of detail which would again have to be considered by this committee of experts.

Yet this is grasped, Mr. President, as a basis upon which to launch this attack against the South African Government of making a proposal that is misleading and inappropriate.

Then we find, thirdly, that the suggestion is that it would not be possible to ascertain the wishes of the inhabitants under conditions which would ensure impartiality and freedom of choice. Certain allegations are made as to conditions

which would stand in the way of such impartiality and freedom of choice. But, Mr. President, is the Secretary-General not prejudging exactly that which the Court and the committee of experts to assist it would have to investigate for the purposes of this plebiscite, and for the purposes of this case? The Secretary-General is in effect asking this Court to accept in advance some of his accusations against South Africa, and to say that that is a reason why there should be no plebiscite to test whether those accusations are well-founded.

In our letter of 6 February [1], my learned friend, the representative of South Africa, states in paragraph *(c)* of the proposal:

> "That the detailed arrangements for the plebiscite, including the membership and terms of reference of any committee appointed by the Court, be agreed upon by the Court and the South African Government."

Then, further in the letter:

> "The detailed procedures are to be a matter for discussion and agreement between the Court and the South African Government. I must emphasize that these matters are still entirely open as far as the South African Government is concerned. It is not opposed in principle to any method which could be fairly and practically employed to ascertain the wishes of the inhabitants of the Territory."

In my statement to the Court on 16 February I said that an opportunity was being offered for the peoples concerned to be consulted on the shaping of their future destiny, and further:

> "... under circumstances where the Court will be able, through a committee of independent experts, to inform itself about the fairness and the adequacy of the procedures adopted, and where it can and is invited to do so, to go into a discussion and investigation into appropriate and fair conditions under which a plebiscite could be held" (*supra*, p. 169).

The question arises, Mr. President, does the Secretary-General not understand what we are saying or does he prefer to ignore it? Surely if the Court, directly or through being advised by the committee of experts, comes to the conclusion that the circumstances are such as to make fair and appropriate conditions for a free and impartial expression of view impossible, then the Court would have no further part in the project. Attention to this aspect is exactly part of what, as is envisaged, would be the function of the Court and its committee of experts. Yet, as I say, this is prejudged and on that basis an objection raised against the plebiscite proposal.

Next, we find that a statement which I made in the same record at page 168, *supra*, is used to a rather strange effect. It was a statement in answer to a question put by the representative of the Organization of African Unity, if I remember correctly, as to who the committee would report to and who will judge on the report. My reply was that it will naturally report to the Court and the Court will judge on the report; and I made it clear that the Court would do so for the purposes of its opinion in these advisory proceedings. It would be important evidence which comes to the Court and as far as the Court was concerned that would be the purpose of evaluating the result of the plebiscite and no other purpose.

Now from that natural statement, the strange inference is drawn that this means that the South African Government does not propose to hold herself

[1] See **Correspondence**, No. 92, p. 673, *infra*.

bound to an unfavourable result—I really do not know how it followed, Mr. President. Nevertheless, having indulged in this exercise, what point is it that the Secretary-General wishes to make in this regard? It must be obvious that the whole concept of a plebiscite, as distinct from a referendum in particular constitutional circumstances, is one of consultation of a population, it is not one which automatically has a binding effect in law—that is clear from the whole concept of the subject-matter of the proposal. But, at the same time, the concept in circumstances such as the present holds within itself enormously important practical consequences, which will be so obvious. In the event of an overwhelming vote by the population one way or the other the practical consequences will be of very great significance. It needs very little imagination to predict what weight the United Nations majorities would attach to an overwhelming vote in favour of a take-over by the United Nations: and yet that is the basis, the basis of that risk, upon which the South African Government is making this proposal. But apparently the risk of getting a result to the opposite effect is too much for the Secretary-General, because that is on what he seems to harp. The only possible basis upon which a binding effect could emanate from such a plebiscite would be a special agreement between specially interested parties to attach certain binding consequences to that result. It would be possible in law for the Secretary-General to offer that the United Nations would regard itself bound to the result of the plebiscite —this plebiscite which is being proposed. If he should do that, then I am sure that very serious consideration will be given by the South African Government to entering into a mutual agreement whereby it undertakes the same from its side.

So, Mr. President, this attempt at discrediting the proposal by such a tortuous process of reasoning to come to the conclusion, which is evident in any event from the whole concept of the plebiscite, that it is to be non-binding, but a very important exercise in ascertaining the weight of opinion in the country, with enormous potential consequences in the practical sphere, does not seem to take the matter any further, in my submission.

The Secretary-General makes a big point of the alleged unlawfulness of South Africa's presence in South West Africa, and a big point of the obligation which has been put upon other States and upon him, he says, by United Nations resolutions, to refrain from dealings which would imply recognition of the authority of South Africa over the Territory. That line of argument is presented at page 494, *supra*.

Now, Mr. President, surely the Secretary-General is capable of understanding the without-prejudice basis upon which the proposal was made by the South African Government, a basis which has twice been stressed—first in the original proposing letter of 6 February and then again in my statement of 16 February —making it so clear that the whole basis of the proposal is that nobody prejudices his position in law or in fact by taking part in a plebiscite or by supporting the idea, the whole object being to test rival attitudes for the purposes of a decision, or rather an advisory opinion, in this case.

On this point, too, the Secretary-General is implicitly asking the Court either to decide or to assume in favour of his contention on a contested proposition which is before the Court for decision, and then he uses that as a basis for rejecting the plebiscite proposal.

Finally, the Secretary-General says that the United Nations must, on the one hand, be recognized as one of the "parties in interest" *(ibid.)*. That is a very interesting expression, coming from the self-same Secretary-General who contended that what came before the Security Council in respect

of South West Africa was a situation and not a dispute. He mentions the United Nations as being only one of the parties in interest in this matter. Be that as it may, that is one way in which he refers to the United Nations. Then he goes on to state that "responsibility for the conduct of the plebiscite should rest with the United Nations Council for Namibia" *(ibid.)*. On the next page (*ibid.*, p. 495) he even calls that Council an "impartial organ" and he demands, Mr. President, as a basis before any plebiscite could appropriately be held—although I should not say he demands because he rejects the whole idea out of hand, but he postulates, if a plebiscite were to be held appropriately at all —that there would have to be a prior withdrawal from the Territory by South Africa; not only certain officials, as there are precedents for in the case of the Saar for instance, but apparently the whole South African administration is to withdraw and leave a vacuum. One wonders whether in United Nations circles attention has been given to what the consequences in a practical and realistic way would be. One wonders whether attention has been given to the question of who will face the bill and whether any binding decisions have been taken about that.

I referred last Friday to an article by George Kennan which is relevant to this topic. I wish to refer now to an article by Dean Acheson in the *Washington Post* of Saturday, 2 January 1971. Again it is an article which, in its whole, is well worth reading. The heading given to it in the newspaper is "Acheson on US involvement in South West Africa". He discusses the matter particularly from the point of view of the United States' interests in the matter and he makes this point:

> "I can only comment that this Government and any government of goodwill would have been utterly horrified if South Africa, likewise abandoning practical reason, had undertaken to comply [that is to comply with the United Nations resolutions] for the United Nations lacked resources, in material or talent, for taking over South Africa's responsibilities."

So, Mr. President, those are the features of the comment delivered to this Court on behalf of the Secretary-General. If the statement had come not from the Secretary-General but from a partisan government emotionally involved in the so-called anti-colonial campaign, one could have understood, if not justified, the antics on which I have just dwelt.

Mr. President, coming from an organization which was formed for the maintenance of international peace and security, for the peaceful settlement of disputes and for the furtherance of friendly relations, it is less easy to understand; and from the Chief Executive of the Organization, who is supposed to be impartial, it rather surpasses belief. I do not wish to dwell on that, as this is not the forum for it. I may be excused for asking whether the Secretary-General persists in his final submission in his oral statement (*supra*, p. 62) to the effect that South Africa has deprived the inhabitants of South West Africa, *inter alia*, of "their right to self-determination" and that "the law cannot be indifferent to a matter so basic to international order and morality". I may suggest, with respect, that the Secretary-General could profitably reflect on the meaning of those words.

The analysis which I have just offered concerning the Secretary-General's reaction to the plebiscite proposal will immediately indicate, Mr. President, that while such an attitude persists there can be little hope or prospect for the suggestion made yesterday on behalf of the United States that the question of holding a fair and proper plebiscite might be properly submitted to the com-

petent political organs of the United Nations. That suggestion is to be found at page 504, *supra*.

It remains for me to deal with the contention offered by the distinguished representative of the United States that the plebiscite proposal is not material to the question before the Court. That contention seemed to rest on a prior contention that an enquiry of fact is not called for or relevant and, therefore, seeing the plebiscite proposal as being part of a prospective enquiry of fact, that, too, becomes irrelevant. That is how I understood the contention. This prior contention was at pages 503-504 of the same record.

Now, Mr. President, that prior contention, that a *de novo* enquiry into facts is not called for or relevant, rests partly on a statement which is made by the distinguished representative at page 503 of that record to the effect that two of the elements of material breach relied on in resolution 2145 were failure on South Africa's part to submit reports and failure to submit petitions to the United Nations, and that the facts in that regard are not in dispute. Now that part of the contention necessitates some analysis of the resolution 2145 and its history.

I will endeavour to show that in the adoption of that resolution the refusal to report and to forward petitions played no part at all and that the so-called disavowal of the Mandate played an insignificant role and was not accorded material weight. Resolution 2145—I do not want to read its wording again to the Court—is set out in full in the written statements. If one looks at the wording one sees that it was based almost exclusively on two lines of argument or allegation, the first one being that the inhabitants of the Territory were entitled to freedom and independence in accordance with the principles contained in the Charter, as amplified by resolution 1514 (XV)—the, shall I say, anti-colonial line, or decolonization line. The other one was that the administration of the Territory had been conducted in a manner oppressive to the inhabitants or otherwise contrary to the obligations of the South African Government under the Mandate and the Charter.

It is not always possible in the wording of the resolution to distinguish these two lines absolutely or to separate them absolutely—sometimes they overlap. But under the first heading, the decolonization heading, would fall preambular paragraphs 1 and 7 and also operative paragraphs 1 and 2 of the resolution. Under the second heading, the allegation of violation of obligations towards the inhabitants, would fall preambular paragraph 3, then preambular paragraph 5, which expressed a conviction that the administration of the Territory has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights. It is to be seen also in preambular paragraph 6, which reaffirmed a previous resolution 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; then also paragraph 8 of the preamble which considered 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 Territory and to ensure the well-being and security of the indigenous inhabitants had been of no avail; preambular paragraph 9 which was mindful of the obligations of the United Nations towards the people of South West Africa; and then preambular paragraph 10, which noted with deep concern the explosive situation which existed in the southern region of Africa.

Now, in this same category—still that of alleged violation of trust obligations—falls operative paragraph 3 which:

"*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."

Then followed operative paragraph 4 which purported to contain the decision to terminate the Mandate.

Now this analysis, Mr. President, with respect to the preambular and operative paragraphs, serves to demonstrate two facts. One is the positive fact that the overwhelming emphasis fell on the so-called right to freedom and independence and on the alleged violations of substantive obligations under the Mandate and the Charter. The second is the negative fact that no reliance was sought to be placed on the failure or refusal on South Africa's part to report and to submit petitions.

The second feature is a very remarkable one because it is one to which attention had been drawn in the proceedings leading up to the adoption of the resolution. It was mentioned in the sub-committee report which I quoted to the Court last Friday, at page 297 of that report, paragraph 16 (doc. A/6300, Rev. 1). Then it was mentioned by various States—we did not look them all up again, but as examples I could refer the Court to statements made on behalf of the Philippines at the 1417th meeting of the General Assembly, page 20, and, Peru on the same page of the same record. And arguments were raised to the effect that these in themselves were violations of the Mandate, apart from the alleged violation of the substantive obligations towards the inhabitants.

That makes it the more remarkable that when one refers to resolution 2145 one finds no reference at all to this alleged violation as being a basis for the purposes of termination or revocation of the Mandate. The supervisory functions of the General Assembly, as contended for, were referred to only in two preambular paragraphs, and in neither of those is any mention made of a failure to report or a failure to transmit petitions. The second preambular paragraph merely recalled the Advisory Opinions of 1950, 1955 and 1956 and the Judgment of 1962, and then gave what was considered to be the effect of those Opinions and the Judgment. The fourth preambular paragraph stated that the report of the various committees which had been established to exercise the supervisory functions of the United Nations over the Territory had been studied. There was not a word of reference to a failure or refusal on South Africa's part to report or to transmit petitions.

On reflection there may have been various reasons for this omission. One important reason may have been that it was realized that the General Assembly —or the majority—could hardly rely on a failure to report as a basis for revoking the Mandate or rights under the Mandate unless the General Assembly had actually been prejudiced by it—unless it was a serious matter from that point of view. But on the other hand, it would not do to create the impression that the General Assembly lacked information on the substantive aspects of the facts. On the contrary, the General Assembly majority purported to be sufficiently informed about the Territory to enable it to make the extremely dogmatic judgments which I have mentioned.

Of possibly equal significance is the fact that the correctness of the 1950 majority Opinion on the obligation to submit reports and to transmit petitions remained a matter of genuine controversy, not only between South Africa and the majority in the United Nations who had accepted the 1950 majority Opinion on the point, but also between lawyers, publicists, judges and others. As this field was dealt with earlier by my learned friend, Mr. Grosskopf, I do not want to traverse it again.

Because of the fact that it did remain a matter, putting it at its lowest, of genuine controversy, it was one of the points specifically submitted to the Court again for a decision in the *South West Africa* contentious cases. In the end that remained one of the matters which was not formally disposed of; but as my learned friend, Mr. Grosskopf, indicated in his argument, in the course of the case legal and judicial support for the South African point of view on this issue grew. This was intimated very pointedly on behalf of South Africa in the debates in 1966 to the General Assembly of the United Nations. So, clearly, it could not be said that there was in this respect on the part of South Africa a deliberate disregard of an obligation which it knew or acknowledged to exist; and that again may have been a vital reason which caused the General Assembly to desist from offering this as one of the bases upon which it purported to revoke the Mandate.

However, I am offering these as probable and, I submit, quite practicably feasible reasons why this may have been so. I do not know that it was in fact so; what I am contending to the Court is that it is very clear that in fact that basis was not relied upon in the resolution 2145.

Then, Mr. President, there remains the words in operative paragraph 4: "and has in fact disavowed the Mandate." In this regard, I wish to refer back to what we stated in our written statement, Chapter XI, paragraph 2, and as a basis I want to make this exception of reading a brief passage:

> "It is not clear what was meant by the phrase 'has . . . disavowed the Mandate'. Presumably the authors of the resolution had in mind assertions on the part of South Africa to the effect that the Mandate had lapsed. Whilst it is true that the South African Government contends that the Mandate did lapse on the dissolution of the League of Nations, it has consistently expressed an intention to administer the Territory in the spirit of the Mandate: in other words, to carry out, as a moral duty, its erstwhile substantive obligations as if the Mandate still existed. The resolution under consideration did not purport to rely on the 'disavowal' of the Mandate as a separate ground for revocation thereof, and, in the light of South Africa's declared intent, its legal contentions regarding the lapse of the Mandate cannot, it is submitted, constitute such a separate ground."

Breaking into the quotation for a moment—I will refer later to the debate which bears out exactly what is said—that this was not viewed by the sponsors of the motion as a separate ground. I will continue with the quotation:

> "As has been demonstrated above, the revocation of the Mandate cannot be justified on the basis of a breach of a treaty or agreement existing between the United Nations and South Africa, and, indeed, in adopting resolution 2145 (XXI) the General Assembly purported to act *qua* supervisory organ not *qua* contractual party. And as a purported supervisory organ, the United Nations must surely have been concerned with the manner in which South Africa administered the Territory, rather than with views expressed by South Africa as to the legal position."

I would also refer the Court to a very pertinent statement made on this subject by Dr. Muller, the South African Foreign Minister, in the General Assembly debates preceding the adoption of resolution 2145. He said:

> "My Government has frequently expressed the view that as a matter of law the Mandate lapsed on dissolution of the League. On being asked to explain on what basis its right of administration would, in that event, rest,

it has also explicitly stated its view in that respect. But it has never suggested that if its view of the lapse of the Mandate should be wrong it nevertheless wished to be divested of the Mandate. On the contrary, it has consistently stated its intention to continue to administer South West Africa in the spirit of the principles laid down in the Mandate. In other words, it would continue to pursue its sacred trust obligations, whether they were now to be seen as legal or moral.

My Government has also repeatedly made clear that its view as to absence of supervisory power on the part of the United Nations stands independently of the question whether the Mandate has lapsed or is still legally in force. There is consequently no justification for the assertion that South Africa has in fact disavowed the Mandate, in the sense which is apparently being suggested—namely of terminating by its own action a legal institution which would otherwise still be in force." (*GA, OR*, 21st Session, 1451st Plenary Meeting, p. 3.)

So, Mr. President, these are two matters to which my learned friend, Mr. Grosskopf has also referred—the South African contention stated on various occasions—firstly, that as a matter of law, the Mandate came to an end with the dissolution of the League of Nations, and secondly, that the obligation to submit to supervisory powers fell away on the dissolution of the League, whether the Mandate was in other respects in existence or not.

Those two contentions were contentions of law.

Taking the first one—and that is the importance of the distinction drawn by Dr. Muller in his statement—that the Mandate had lapsed on the dissolution of the League, it was a contention as to how the legal situation was to be viewed. It was not a deliberate act of choosing to do something by voluntary act on the part of the South African Government in order to bring about a result of terminating an institution—if the Court was correct in its 1950 Opinion that the Mandate still existed, it was a position that would have to be accepted. There is no action on the part of South Africa which could be interpreted as being a voluntary action of trying to do that (i.e., to terminate) and that was the only relevant sense in which one could understand this suggestion or contention about a disavowal. That in fact never happened, and that is why the South African Government insisted, every time it made a statement in an international context about the Mandate having lapsed, in its contention, on adding that as a matter of policy that would not affect its actions: its actions would be conducted on the basis as if its sacred trust obligations under the Mandate, as distinct from its obligations to report and account, were still in existence. And therefore in the course of time virtually no importance from a practical point of view attached to this question of whether it was correct or wrong in law to regard the Mandate as having lapsed.

The one to which practical importance did attach was the contention that whatever might be the position about the rest of the Mandate, the obligations to report and account had lapsed, because that was the legal basis upon which South Africa did not submit reports or transmit petitions to the General Assembly of the United Nations.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. President, when one refers to the proceedings in the General Assembly preceding the adoption of resolution 2145, one also finds that the so-called disavowal aspect played an insignificant role in the final result. The idea was

quite obviously an afterthought; it did not feature in the earlier parts of the drive towards terminating the Mandate. I do not know exactly where it originated but, just looking at it as a matter of use of the English language, it rather sounds as if it did not come from this side of the Atlantic. But I really do not know. What is clear from the records is that this idea does not even feature in the report of the Sub-Committee for South West Africa, which recommended the termination. The Court will remember I referred to that Sub-Committee report at pages 407-408, *supra*. It did not feature in the short debate of the Committee of 24 on that report before it adopted the report by consensus (doc. A/6300, Rev. 1, pp. 292-296).

Incidentally, I did not mention this last Wednesday, in referring to the short debate in the Committee of 24 on the report: it was again emphasized by the representative of Uruguay that it was a matter for regret that the conclusions of the Sub-Committee's report "were not backed by a solid juridical argument" (*ibid.*, p. 296).

That adoption of the report by the Committee of 24 was on 15 September, as I indicated, and the plenary session of the General Assembly on this particular item commenced very shortly afterwards. It seems evident that the idea of suggesting this disavowal as a basis for the General Assembly's action must have arisen just about at the start of the proceedings in the plenary session of the General Assembly itself. It seems, from the very review that I gave last week, that there was a suggestion to make this—the disavowal aspect—a dominating feature, in an attempt to overcome or to cover up the legal difficulty about the powers of the General Assembly to make recommendations only. But this attempt was rejected by the Afro-Asian States particularly, as I demonstrated at pages 410-414, *supra*. In the end this phrase "and has in fact disavowed the Mandate" was merely something added to the basic proposition 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".

Even as such an addition, it was still resented by some States, for example, Tanzania (*supra*, p. 413). I want to refer now to what the representative of the USSR said on this point in his explanation of vote after the adoption of the resolution:

> "We also felt doubtful about paragraph 3 of the wording proposed by the Latin American countries. [The Court will recall that the wording about disavowel was added to the paragraph as originally proposed on behalf of the Afro-Asian countries, by the Latin American amendment.] This wording adduces as a reason for depriving the Republic of South Africa of the Mandate for South West Africa the argument that the Republic has itself disavowed the Mandate. That is not the reason why the Republic of South Africa has today been deprived of the Mandate for South West Africa; the reason is that the people of South West Africa must be emancipated from South African racist oppression and be given independence." (*GA, OR*, 1454th Meeting, p. 29, para. 318.)

The representative of the Sudan made a significant statement. He said:

> "The first amendment, which seeks to add the phrase 'and has, in fact, disavowed the Mandate', does not, in the opinion of the delegation of the Sudan, add much to the original draft resolution, if taken by itself, South

> Africa has, in fact, declared many times its disavowal of the Mandate. Are we endorsing this position? I rather doubt this because the delegations which drafted these amendments did not intend this one to be taken by itself. It is with this understanding and on the assumption that this disavowal does not refer to any statement of its position by South Africa, but rather to the fact of the forfeiture of the powers enjoyed by South Africa, as, indeed, is apparent from reading the preceding sentence relating to the failure of South Africa to fulfil its obligations—in other words, disavowal in the sense of forfeiture—that we have no objection to this amendment to operative paragraph 3 of the draft resolution." (*Ibid.*, p. 1, para. 8.)

In this respect, a statement by Mr. Cuevas Cancino, the distinguished representative of Mexico, who spoke on behalf of the 21 Latin American States which sponsored the amendment, is significant. He was speaking in the context of explaining why those States would abstain from voting on the United States sub-amendment:

> "In dealing with this matter, which goes to the very heart of the great international problem of the independence of Trust Territories, the Latin American Governments have endeavoured to emphasize the unanimity of purpose that inspires the great majority of Member States—the desire to bring to an end a Mandate that has been transformed into a tyranny." (*Ibid.*, p. 1, para. 4.)

That is the basis stated by the representative of Mexico on behalf of the sponsoring States themselves.

One could demonstrate in another way, with submission, the unimportance of the aspect of alleged "disavowal" and of the failure to report and submit petitions.

Mr. President, let us assume for the moment that somebody had come, or a number of responsible States had come, to the General Assembly in 1966 and had said: we have studied the record closely, or we have caused experts to study the record closely, the record in the *South West Africa* cases, and we have come to the conclusion that the General Assembly should re-assess its view that South Africa is, through its policies, violating its substantive trust obligations under the Mandate. In the meantime we suggest that we act, while we are investigating that matter further, on the basis as if South Africa is in every way complying with its substantive obligations, until we have, by investigation, satisfied ourselves to the contrary.

Is it imaginable that, under those circumstances, a State could have got up and said: very well, we accept that basis of dealing with the matter. We accept that, we assume for purposes of argument that South Africa is fully complying with all its substantive obligations as best as can be. But, yet, we must point out that South Africa has, as a matter of law, taken up the attitude that the Mandate is no longer in operation as an institution in law, and secondly, that South Africa does not admit that it has an obligation to report to us and to transmit petitions. It is true that South Africa does act on the basis of a policy of complying with its sacred trust obligations, whether they are legal or moral, and as far as information is concerned, South Africa states to us [as it did in fact at that particular session of the General Assembly] that it is in its own interests voluntarily to supply information. And indeed the petitions do come to us whether South Africa forwards them or not.

Is it then feasible that anybody would have said: on that basis we must still adjudge South Africa to be in substantial violation of its obligations to the

Organization, sufficient to justify a termination of the Mandate, without any enquiry further into the questions of fact.

I submit, Mr. President, it would be flying in the face of reality to suggest anything of the kind.

Our conclusion is, with submission, that the failure to report and to send petitions played no role at all in General Assembly resolution 2145. In regard to the aspect of alleged disavowal, it was not intended to play an independent role nor could it, for the reasons I have given, with submission, in law have played an independent role. Therefore the emphasis comes back on the factual basis upon which the Assembly purported to act in resolution 2145, the basis of the proposition that South Africa was not promoting the well-being and progress of the inhabitants, but violating its obligations in that respect.

Now, Mr. President, in the legal arguments which we have already addressed to the Court, my learned colleagues and I have, with submission, demonstrated that there is no legal basis upon which the Assembly, in adjudging these facts, could take decisions or make determinations which would be binding upon this Court. The distinguished representative for the United States has not tried to meet any of our arguments in that respect and he has not contributed new arguments on this particular point; so we proceed to view his argument on the basis upon which he did address an alternative argument to the Court, namely that one accepts that the Court must enquire into the facts itself. He then seems to suggest, on that basis, that the Court should confine itself in the first place to evidence of events prior to 27 October 1966, being the date of purported termination of the Mandate, and secondly, to the facts as emanating from the pleadings and evidence in the *South West Africa* cases.

I submit, Mr. President, that on the basis on which we are talking now, that the Court does itself enquire into the facts, neither of these contentions is sound. In regard to the first one, that the Court should confine itself to evidence dating back to before 27 October 1966, we pointed out repeatedly in the *South West Africa cases, in our presentation, that policies concerning, and develop*ment of, under-developed territories are not static concepts; there is no particular point of time at which one can say we must adjudge the matter in a static way, as one finds it now. One must look at the line of what is being done, what is the policy, what is being aimed at, how is it moving, from where to where, because that is the whole idea of the development of under-developed areas and the promotion of the well-being of the inhabitants of such areas.

In 1964, because that was the point of time at which the written pleadings in the *South West Africa* case were finalized, one could point to the fact that there was planning in many respects which had, in part, been brought to fruition; other parts had not been put into actual practice, one would only see the results later. And, I submit, from all those points of view it is very relevant indeed to see in concrete terms what has been achieved and what has evolved and developed in South West Africa since October 1966, in a continuing line with policies and with plans which were already in existence at that particular stage. That is true in regard to governmental institutions, institutions for self-rule. We could point out in the *South West Africa* cases that there was the Odendaal *Commission plan and the White Paper of the Government in regard to that* plan, concerning certain forms of projected political development for various peoples. Several of those have made marked progress in the meantime, and it would be very relevant to see what has been achieved, especially in the light of the type of counter-argument which one met with so frequently in those days, namely that these blue-prints and these plans and policies were just to be seen as a smoke-screen, that the South African Government really intended to apply

a policy of oppression and repression but that these were fancy schemes with which to fool the rest of the world.

There are similar examples in the fields of education, health, economics, hydro-electric schemes, and so forth, where what happened subsequently can be most pertinently brought into line with what had already been planned and what was inherent in policies at that point in time.

Then the second suggestion, that the Court should confine itself to the pleadings and evidence in the *South West Africa* cases: as I have said, in the first place, the pleadings were finalized with our Rejoinder, which was completed towards the end of 1964, in other words, the latest data contained in it was derived from the year 1964. And then, as was indicated in the written pleadings and in correspondence to the Court, we intended to follow that up with a further refutation in detail of certain aspects of the charges made against South Africa, by calling some 38 witnesses and experts to testify before this Court. We also invited the Court to come on an inspection of the Territory as part of its enquiry into the facts.

Now, in the course of the oral proceedings, the Applicants changed their case. They amended the formal Submissions which they made to the Court so as to omit the previous allegations of oppression and repression and to rely entirely on a so-called norm or standards of non-discrimination and non-separation. I do not want to go into the technical details of that change at this stage except to point out that, rightly or wrongly, we conceived the change to be of such a nature that it rendered irrelevant the calling of much of the evidence which we intended to present in answer to the charges of oppression and repression which originally brought us into the Court. The Court gave no reasons for its fairly close decision of 8 votes to 6 by which it eventually rejected the proposal for an inspection, but it seems logical to assume that this change in the nature of the case presented to the Court may well have played a part in that decision too.

So, Mr. President, those are just illustrations of aspects in which the record was indeed not completed in the *South West Africa* case, apart from what has happened in the meantime, and apart from this further factor that in that context South Africa was replying to charges as they had been selected by the particular Applicants and their legal advisers. It did not purport to answer all charges made from time to time in United Nations circles.

Now, if the Court should, after consideration, indicate to us either that it declines our plebiscite proposal, or that it declines to make any decision about it at this stage, then we shall have to come to the further presentation of facts. If the Court decides, and informs us shortly, that it accedes to the plebiscite proposal, then of course there would be a new situation to which we would give attention straight away. If it decides the other way round, we should like to indicate to the Court, after completion of our argument on the remaining legal aspects and our replies to the questions put to us by the Court, our attitude about three matters.

Firstly, to what extent it is possible for us on the record as it stands to argue or indicate the South African attitude in the factual field. When I say "in the factual field" I mean it in a broader context, which is a twofold one. First of all, there is the legal basis upon which alleged violations of substantive obligations would have to be viewed, because that is in itself an intricate field to be considered. It requires consideration of suggested norms, standards, interpretations and so forth which have come into existence and which may play a part—consideration of concepts such as self-determination, human rights, norms of non-discrimination and so forth. In other words, what is the state of inter-

national law at this particular time in these various fields, and on what legal basis is one to adjudge alleged violations of obligations through policies and factual conduct? That would be one aspect of it. The other aspect of it would, of course, be the relevant facts in the field as a whole. So the first step would be to indicate on both aspects to what extent it will be possible for us to argue the South African attitude on the record as it stands.

Secondly, we should like to indicate in what respects we find it necessary to supplement the record of fact for purposes of findings thereon by the Court. Thirdly, we should like to indicate why it would, in our submission, not be fair to make findings of fact on the record as it stands, particularly findings of fact unfavourable to South Africa, without giving to it an opportunity for amplification of the record of the nature which we submit to be necessary. But I will not elaborate on those matters at this stage.

In the main, we will want to refer to specific allegations on factual aspects which have recently been introduced into these proceedings, and which we could not have met in advance. Many of those have specifically been brought in by the written statement of the United States itself, and I made reference to some examples at pages 473-474, *supra*. On the basis that the need to enter into the factual field does not fall away, either as a result of a decision of the Court in regard to the plebiscite proposal or as a result of a conclusion on a legal aspect which renders all consideration of factual issues unnecessary, we shall indicate that as far as these new aspects which have been introduced into the record are concerned, if we have to meet them, we shall require time. But I need not elaborate on that at this stage; we can deal with the matter if and when we come to it.

In conclusion, in regard to the comment that has been offered to the Court as reactions to the plebiscite proposal, we submit that no valid objection has been raised. The proposal serves the very important purpose of bringing the matter of South West Africa from the sphere of dogmatic attitudes and technical disputation in international bodies to the practical sphere of the human beings whose well-being and progress are at stake. And the plebiscite may be of inestimable value, primarily for the purposes of these proceedings, but ultimately also for developing towards peaceful and constructive solutions in respect of the Territory and its peoples and the whole of the sub-continent of Southern Africa in which they are situated.

The PRESIDENT: The Court understands that the representative of South Africa would be ready to deal with the two matters that he has indicated, that is to say, answers to the questions that have been addressed to him, and further comments on the oral statements that have been made, after the last statement of the representative of South Africa on Monday afternoon. That being so, the Court will now rise and will resume at 3 p.m. on Monday afternoon to hear the representative of South Africa.

The Court rose at 12.15 p.m.

TWENTY-FIRST PUBLIC SITTING (15 III 71, 3 p.m.)

Present: [See sitting of 8 II 71.]

ORAL STATEMENT BY MR. GROSSKOPF

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. GROSSKOPF: Mr. President, honourable Members of the Court. The first aspect of this remaining part of our argument is the reply to any new points raised by the representative of the Secretary-General and that of the United States of America since last we spoke. In addition we have certain questions from Members of the Court still to answer. We propose taking all points dealing with the same subject-matter together and dealing with them on that basis rather than replying to each participant or judge in turn. The result will then be that the questions of some of the judges will be split up between two or more subjects but we think it would be more convenient to deal with the matter in this way rather than jump from subject to subject.

We propose dealing first with the nature and content of the Mandate, then with questions relating to the suggested transfer of functions to the United Nations and in that regard, in particular, the provisions of Article 80 of the Charter. Thereafter we shall deal with the consequences of the lapse of the Mandate and then with the procedures and powers of the General Assembly and the Security Council. Thereafter we propose dealing with the legal basis upon which any factual enquiry should, in our submission, proceed, in the course of which we shall advert to the questions which were asked concerning the effects of Article 73 of the Charter.

The first topic, as I have indicated, is then the nature and content of the Mandate. Under this heading I propose dealing with questions put by Judge Lachs, Judge Forster, Judges Onyeama and Dillard and the Vice-President and Judge Ignacio-Pinto in that order.

I first come to the question put by Judge Lachs. On 5 March Judge Lachs referred to our discussion of the *travaux préparatoires* relative to the intention of the authors of the mandates system. In that regard he referred to the reply of the Allied and Associated Powers to the observations of the German delegation on the conditions of peace, in which it was stated that in requiring Germany to renounce any claims to her overseas possessions the Allied and Associated Powers placed before every other consideration the interests of the native population, as advocated by President Wilson, and that it would have been unjust to burden the natives of those territories with expenditure incurred in Germany's own interest, and no less unjust to place this responsibility upon the mandatory Powers which "in so far as they may be appointed trustee by the League of Nations, will derive no benefit from such trusteeship".

Judge Lachs also referred to Article 257 of the Treaty of Versailles which provided that in the case of the former German territories administered by a mandatory under Article 22 of the Covenant neither the territory nor the mandatory Power should be charged with any portion of the debt of the German Empire or State. The question was then posed how, in the light of the conclusions we arrived at in our written statement and in our oral address, we interpret these statements and these treaty provisions (*supra*, p. 452.)

Now, Mr. President, we had referred to the *travaux préparatoires* with a view to demonstrating *(a)* that there cannot be implied in the Covenant or the mandate instruments a term by virtue of which a mandatory would be accountable to, *inter alia*, a possible successor of the League of Nations, and *(b)* that it was not the intention of the authors of the mandates system that mandates should be revocable. Judge Lachs' question therefore invites us to state whether these contentions and the reasoning we advanced in support of them are in harmony with the statements and the provisions of the Versailles Treaty referred to by him.

In our respectful submission, there is nothing in the statements and provisions referred to by Judge Lachs which in any way contradicts or is in conflict with the contentions and arguments advanced by us. As regards the first portion of the reply of the Allied and Associated Powers quoted by Judge Lachs, it should be observed that this reply was made in defence of a decision that Germany should not retain her overseas possessions. In their reply the Allied and Associated Powers stated:

> "In requiring Germany to renounce all her rights and claims to her overseas possessions, the Allied and Associated Powers placed before every other consideration the interests of the native populations advocated by President Wilson in the fifth point of his Fourteen Points mentioned in his address on 8 January 1918. Reference to the evidence from German sources ... and to the formal charges made in the Reichstag ... will suffice to throw full light on the German colonial administration, upon the cruel methods of repression, the arbitrary requisition, and the various forms of forced labour which resulted in the depopulation of vast expanses of territory in German East Africa and the Cameroons, not to mention the tragic fate of the Hereros in South West Africa, which is well known to all.
>
> Germany's dereliction in the sphere of colonial civilization has been revealed too completely to admit of the Allied and Associated Powers consenting to make a second experiment and of their assuming the responsibility of again abandoning thirteen or fourteen millions of natives to a fate from which the war has delivered them." (HMSO, Miscellaneous No. 4, 1919, *Cmnd.* 258, p. 19.)

It will be seen, Mr. President, that the consideration advanced as to why the Allied and Associated Powers were not willing to let Germany retain her overseas possessions was the methods of repression and oppression said to have been employed by Germany in those territories. This was the reason why it was stated that in requiring Germany to renounce all her rights and claims to her overseas possessions, the Powers placed before any other consideration the interests of the native populations advocated by President Wilson in his fifth point. In other words, the interests of the native population required that Germany should renounce her rights and claims to her overseas possessions.

The fifth point of President Wilson's Fourteen Points to which reference was made was as follows:

> "A free, open-minded and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined." (Temperley, *A History of the Peace Conference of Paris*, Vol. I, p. 434.)

Now, Mr. President, it will be immediately observed, with respect, that like the other 13 points, this point was expressed in very general terms. As was said by Walters, *A History of the League of Nations*, Volume I, page 30:

> "Victors and vanquished alike had accepted Wilson's Fourteen Points as the basis of the future peace. But the Fourteen Points were for the most part expressed in general terms; their application left countless decisions still to be taken, not only of detail, but often involving issues of the greatest importance."

Mr. President, the letter of the Allied and Associated Powers which was dated 16 June 1919 was at a stage when President Wilson's fifth point had, in so far as is relevant for present purposes, it is submitted, already been implemented *de facto* in the informal compromise concerning mandates and, in particular "C" mandates. So, in so far as this fifth point of President Wilson weighed with the Allied Powers, it had already been given effect to in the arrangement that had been reached concerning mandates. And, Mr. President, it will be recalled that the formula which was ultimately devised for mandates, and particularly "C" mandates, was one whereby the interests of the populations and the equitable claims of the Dominions had been equally recognized, so that it was in that way that this fifth point had been implemented.

Then, Mr. President, I come to the reply relative to the expenditure which had been incurred by Germany.

Now, Mr. President, in our submission, the statement by the Allied and Associated Powers in this respect was clearly not intended to be anything else but a motivation for their point of view that the cession of the German colonies should not be coupled with the imposition of an obligation on the peoples of the territories concerned or the mandatory Powers to bear any portion of the German debt. As far as the mandatory Powers were concerned, the motivation was that they would not derive benefit from their "trusteeship". But, Mr. President, it is our respectful submission that the benefit to which reference is made there is clearly, in the context, financial benefit. It is not, in our submission, suggested that there was to be no benefit of any sort whatsoever for mandatory Powers.

We accept that it was never the intention that a mandatory should enrich itself as a result of its administration of a mandated territory. Therefore, it would have been unjust if a mandatory had to take over the whole or part of Germany's debt in respect of the territory concerned and, in our submission, that was why it was provided in Article 257 of the Treaty of Versailles, as contrasted with Articles 254 and 256, that in the case of the former German territories administered by a mandatory neither the territory nor the mandatory Power should be charged with any portion of the debt of the German State.

In our submission, Mr. President, it does not, however, follow that the mandatories had no interest in obtaining or retaining control over the territories, or that the Allied and Associated Powers intended to convey this in their reply to the German delegation. We accept that there was no intention of financial enrichment, but, as I say, that does not mean that there were no other benefits and no other interests. The nature of the interest, particularly of the "C" mandatories, was repeatedly stressed during the Paris Peace Conference, as we have shown in Chapter VII of our written statement. It included matters such as the strategic importance of exercising control over an adjacent territory without natural boundaries and it included matters such as the advantages of common customs and fiscal policies. These matters, as the Court will recall, were repeatedly stressed during the Paris Peace Conference as reasons why the

Dominions wanted annexation and as reasons why, in the ultimate analysis, there were only certain States which could have been the "C" mandatories—the "C" mandates could only have been granted to the adjacent States.

It was these considerations, Mr. President, which, in our submission, led to the formulation of the compromise that was ultimately reached as being to the effect that President Wilson had succeeded in preventing annexation, whereas the conquerors had succeeded in retaining their conquests. The Court will recall that was stated by Mr. Rappard—we quote it in Chapter VIII, paragraph 23, first footnote, of our written statement.

It is accordingly, Mr. President, our respectful submission that the statements and provisions to which Judge Lachs has referred us do not in any way affect our contentions or arguments on the intentions of the authors of the mandates system regarding the issues relevant in these proceedings.

I come now, Mr. President, to the questions put by Judge Forster.

On 5 March Judge Forster referred to pages 313 and 314, *supra*, where we dealt with the requirement of unanimity in the Council of the League in the context of the question whether the League was legally empowered to revoke a mandate. Judge Forster pertinently referred to passages in which we stated that a decision to revoke a mandate could not have been taken had the mandatory opposed such a course, and that, had it been the intention that the mandate should be revocable at the instance of the League, it is inconceivable that the founders of the League would have made it mechanically impossible for this competence to be exercised in practice. We also contended that it can be regarded as settled law that a decision to revoke the mandate could not have been taken against the will of the mandatory concerned and that the Council would have been legally powerless not only if a mandatory had acted in conflict with the views of the Council, but also if it had acted contrary to the terms of the mandate itself.

Judge Forster then stated that it is appreciated that the whole concept of mandates was inspired and sustained by confidence in the goodwill and good faith of the Council of the League and the mandatory Powers, and in that regard he quoted an excerpt from the Court's 1966 Judgment. Thereafter he posed four questions at page 467, *supra*. The first question reads as follows:

> "1. Is there any case on record where a proposal of the Council of the League, supported by all the Members of the Council, was defeated by an adverse vote of the mandatory?"

Now, Mr. President, our reply to that question is that we are not aware of any specific instance in which a proposal of the Council was defeated by an adverse vote of the mandatory. But that does not, in our view, lead to any other inference than that there never was a proposal which was so totally unacceptable to a mandatory that it felt obliged to defeat the proposal by its adverse vote.

The second question reads:

> "2. What conclusion may legitimately be drawn from the occasional absence of the mandatory from a meeting of the Council of the League which was designed to enable decisions to be taken that the mandatory might have found obliged to vote against if it had been present?"

Mr. President, in our view the conclusion to be drawn from the occasional absence of a mandatory from a meeting of the Council of the League which was designed to enable decisions to be taken that the mandatory might have

been found obliged to vote against, if it had been present, has already been stated by the Court in its 1966 Judgment, in the excerpt quoted by Judge Forster. The Court said that the unanimity rule was frequently not insisted upon or its impact was mitigated by a process of give and take, and that it was part of the process for arriving at generally acceptable conclusions that 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.

In our submission, Mr. President, it is highly probable that as part and parcel of the process of give and take, there occurred instances in which proposals which would have enjoyed the support of the members of the Council were not formally put forward because it was known that they would be so unacceptable to a particular mandatory that it would have been obliged to exercise what amounted to a veto. That would, of course, not appear from the official records.

Having regard, Mr. President, to the spirit of goodwill in which the Council of the League and the mandatories functioned, it is hardly likely, in our submission, that a member of the Council would have formally made proposals concerning the administration of mandated territories without having some informal or private consultation with the mandatory concerned.

I come now to the third question, Mr. President, which reads:

> "3. In case of a conflict between the unanimous view of the Council of the League on a particular proposal, designed to make effective a provision of the Covenant of the League upon which it insisted and the opposition to the proposal on the part of the mandatory in which it persisted, was there any provision in the Covenant which could ultimately and in the last resort be brought into play to resolve the conflict? Or is it the case of South Africa that the opposition of the mandatory could not by any possible means be overcome in such a case?"

As regards this question it is our contention that within the framework of the League there was no procedure whereby a conflict between the otherwise unanimous Council of the League and the mandatory might be resolved. In other words, as was said by the Court, both in its 1962 and 1966 Judgments, the Council of the League could not have imposed its will upon a mandatory. I refer the Court to page 313, *supra*.

The fourth question reads:

> "4. If the answer to the first part of the preceding question should be in the negative and the answer to the last part should be in the affirmative, would the representative of South Africa state whether paragraph 4 of Article 16 of the Covenant brought into play would not resolve the kind of conflict mentioned in the preceding question and was it not the consciousness of that provision which enabled recourse to the kind of practice mentioned in paragraph 82 of the Judgment of the Court set out above (pp. 44 and 45), to obviate a conflict between the Council of the League and a mandatory on crucial matters?"

Now, Mr. President, paragraph 4 of Article 16 provided as follows:

> "Any Member of the League which has violated any covenant of the League may be declared 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."

It appears that what Judge Forster has in mind is 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.

Now, with respect, Mr. President, we agree that by expelling a mandatory the Council could have overcome the practical or mechanical difficulties created by the unanimity requirement. However, there is certainly, in our submission, nothing to indicate that it was the consciousness of the possibility of expulsion which brought about the kind of practice mentioned in the excerpt from the 1966 Judgment quoted by Judge Forster. We have no indication that the occasional deliberate absence of a mandatory was caused by any apprehension that a vote by it in conflict with the rest of the Council would lead to its expulsion. We are not aware of a single occasion on which the Council or any individual member thereof ever threatened a mandatory with expulsion should it oppose a proposal considered or to be considered by the Council. If one has regard to the fact that three of the permanent Members of the Council were themselves mandatories, it is, in our submission, highly unlikely that there would have existed any notion that a mandatory might be expelled from the League if it vetoed a decision of the Council.

In this regard, Mr. President, we submit that it is of some significance that after the Assembly of the League, on 24 February 1933, had adopted a statement which left no doubt as to Japan's violation of the Covenant, and Japan had walked out of the Assembly meeting, no attempt was made to expel Japan from the League—in fact, the initiative came from Japan when a month later it announced its decision to withdraw from the League (Walters, *A History of the League of Nations*, Vol. II, pp. 494 to 495). And, Mr. President, at no stage thereafter was an attempt made to revoke Japan's mandate for the Northern Pacific Islands.

In conclusion, Mr. President, we submit we should put Judge Forster's questions and our answers thereto into perspective with relation to the rest of our contentions. We relied on the unanimity requirement as one of the factors strongly militating against the notion that it could have been the intention of the authors of the mandates system that mandates would be revocable. That is why, Mr. President, we said that had their intention been that the League should enjoy a power of revocation, it is inconceivable that they would have made it mechanically impossible for this competence to be exercised in practice. In other words, Mr. President, this was an additional reason why we stated, or contended, that there could not be an implication of any right of revocation of a mandate in the Covenant or other mandate documents. This was one of the features which, in our submission, militated against any such implication. Of course, Mr. President, had a mandatory been expelled from the League, this competence, if it existed in law, could have been exercised. So if one were to come to a conclusion by other means that there was such a competence, then it might conceivably have been exercised in this fashion. But surely, Mr. President, it would be far-fetched to suggest that the authors of the mandates system and the Covenant introduced Article 16, paragraph 4, into the Covenant with the intention, *inter alia*, that it could be utilized by the Council should it become necessary to revoke a mandate. It is hardly likely that had they had

an intention that a mandate should be revocable that they would have provided only this rather inappropriate machinery for doing it.

In our submission it cannot be contended that had it been the intention of the authors of the mandates system that mandates should be revocable they would have made it possible to do so only by the expulsion of the mandatory concerned from the League. After all, Mr. President, the requirements one would expect from a League Member and those that one would expect from a mandatory might not necessarily coincide. The mandatory might be quite an acceptable Member of the League but might have some ideas about the conduct of a mandate which were not in accordance with those held by other Members. He might, for instance, not have agreed with the provision in the mandate that no liquor was to be provided. There might have been a difference of philosophy on a point such as that which might have caused the League to doubt whether he was a suitable mandatory but would certainly not have led them to the belief that he should not be a Member of the League at all. And in this regard again, Mr. President, we would wish to emphasize that three of the permanent Members of the Council were themselves mandatories. We are consequently in respectful agreement with the following statement of the Court's Judgment in 1966 which we have already quoted earlier:

> "The plain fact is that, 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—the system adopted was one which deliberately rendered this impossible." (*I.C.J. Reports 1966*, p. 46.)

This brings me to a question put on this subject by Judges Onyeama and Dillard. On 4 March (*supra*, p. 438) these Judges referred to an inference drawn by us from the 1966 Judgment to the effect that "the mandatory could act not only contrary to the wishes of the Council, but contrary to the Mandate itself, and that the League and the Council would then be powerless".

Cast against this background, the following question was asked:

> "Is it your position that, had South Africa during the existence of the League flatly refused to render any annual report, no legal remedies of any kind could be imposed on South Africa?"

Now, Mr. President, from what we have already said, it will have been appreciated that our answer is in the affirmative—we do contend that no legal remedies could have been imposed. Whilst, as I have said, expulsion from the League might have been possible, it would not, in our view, have been a remedy for failing to report. Expulsion would hardly, in our submission, have induced a mandatory to submit reports. Even if the mandatory had been expelled from the League he would still have been a mandatory, as was the position with Japan, which was no longer a Member of the League but was still a mandatory.

We would, however, respectfully suggest that in the context of the activities of the League the question is an extremely theoretical one. As I have pointed out, the mandatories were strongly represented on the League Council, the Council acted on the basis of unanimity and one knows that the general approach was a very moderate one. The mandatories had agreed to the system and, in fact, they all did submit reports. So in that context, Mr. President, it would hardly have arisen, I submit, in the thoughts of anybody, that such a circumstance would arise, that there would be a refusal to report and, in fact, it never did arise.

I now turn to our reply to a question by the Vice-President and Judge Ignacio-Pinto.

On 5 March, the Vice-President and Judge Ignacio-Pinto asked the following question:

> "You have discussed the circumstances in which the Mandates for Palestine and the North Pacific Islands came to an end, with a view to showing that these Mandates were not terminated unilaterally or without the prior consent of the mandatory Power.
>
> Would you be prepared also to discuss the circumstances in which the Mandates for Syria and the Lebanon were terminated, so as to ascertain whether they were terminated with or without the prior consent of the mandatory Power?" (*Supra*, p. 466.)

May we say at the outset that we dealt with the circumstances in which the Mandates for Palestine and the North Pacific Islands were terminated in answer to certain specific contentions in the written statement of the United States of America. These contentions were to the effect that the practice of the United Nations in regard to the termination of these Mandates strengthened the conclusion that the supervisory authority was legally entitled to revoke a mandate. In other words, we dealt with these contentions in the context of the powers of the supervisory authority vis-à-vis the mandatory and, in our submission, we showed that these contentions were unfounded. We dealt with them at pages 445 to 451 and at pages 453 to 457, *supra*. So the reason why we concentrated on those two instances was because they were specifically raised against us—or sought to be raised against us—in the statement of the United States.

However, Mr. President, it can, in our submission, likewise be stated immediately that the circumstances attending the termination of the Mandates for Syria and the Lebanon also did not involve the assertion of the powers by the League or the United Nations to terminate mandates without the consent of the mandatory Power. The Mandates for Syria and the Lebanon were class "A" mandates to which paragraph 4 of Article 22 of the Covenant was applicable. This paragraph read as follows:

> "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such times as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."

So, Mr. President, it will be seen that in the Covenant the existence of Syria and the Lebanon as an independent nation or nations was already provisionally recognized.

In the autumn of 1936 the French Government, which was the Mandatory in respect of Syria and the Lebanon, reached an agreement with the governments of these two territories in terms of which the Mandate was to last for three more years. Thereafter two new independent States would come into existence. So, at that stage, Mr. President, it was envisaged that the Mandate would only last until 1939, when there would be two new independent States (Walters, *A History of the League of Nations*, Vol. II, pp. 742-743).

However, before the agreement was implemented the war intervened, and in June 1941 an Allied Force consisting of Free French and British Commonwealth troops entered Syria and the Lebanon and took over the territory

from the Vichy French forces after a campaign lasting a month. In simultaneous Free French and British proclamations the peoples of Syria and the Lebanon were declared "from henceforth sovereign and independent peoples" (Hall, *Mandates, Dependencies and Trusteeship*, p. 265).

On 24 June General de Gaulle issued two decrees: the one nominating General Catroux Commander-in-Chief of the troops of the Levant, and the other appointing him "delegate-general and plenipotentiary" of the Chief of the Free French for the States of the Levant (Hourany, *Syria and Lebanon*, p. 243).

General Catroux proclaimed the independence of Syria as a sovereign State on 28 September and of the Lebanon on 26 November 1941, and British recognition was accorded to Syria on 27 October and to the Lebanon on 26 December 1941 (Hall, *Mandates, Dependencies and Trusteeship*, p. 265). The proclamation applicable to Syria, in so far as it is relevant, read as follows:

> "On June 8th last, at the time of the entry into the Levant of the Allied Armies, in a manifesto which I addressed to you in the name of Free France and of her Chief, General de Gaulle, I recognized Syria as a sovereign and independent State, under the promise of a treaty guaranteeing our reciprocal relations.
>
> The British Government, the Ally of Free France, acting in accord with her, associated itself by a simultaneous declaration with this important political act. On the 16th of this month, I put my declaration of June 8th into effect by translating into established fact the principle there enunciated.
>
> Thus the era is begun in which independent and sovereign Syria will herself control her destinies.
>
> . . . . . .
>
> The Syrian State will enjoy from now onwards the rights and prerogatives of an independent and sovereign State. These will be subject only to the restrictions imposed by the present state of war and the security of the territory." (Hourany, *Syria and Lebanon*, pp. 247-248.)

The proclamation relating to the Lebanon contained similar terms (*ibid.*, pp. 250-252).

However, notwithstanding these proclamations, the French view was that legally the Mandate still held and that it could be terminated by a legal process through the League of Nations only. The view of Syria and Lebanon was that the Mandate had already ceased to exist—at least *de facto*—and in October 1943 the Lebanese Government and Parliament eliminated all references to the mandatory Power and the League of Nations from the Constitution. As from 1943 to 1944 the new States were recognized by a number of Powers: first by the Arab States, then by the USSR and then by the United States of America. After signing the declaration of the United Nations Syria and the Lebanon were invited on 29 March 1945, by the United States and the other sponsor Powers, to the San Francisco Conference.

The termination of the Syrian Mandate is summarized as follows by Hall:

> "Thus, the Syrian mandate may be said to have been terminated without any formal action on the part of the League or its successor. The mandate was terminated by the declaration of the mandatory power, and of the new states themselves, of their independence, followed by a process of piecemeal unconditional recognition by the other powers, culminating in formal admission to the United Nations. Article 78 of the Charter ended the status of tutelage for any member state: 'The trusteeship system shall

not apply to territories which have become Members of the United Nations . . .'." (Hall, *Mandates, Dependencies and Trusteeship*, p. 266.)

In the resolution on mandates adopted at the final meeting of the Assembly of the League of Nations on 18 April 1946, the Assembly "welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community" (League of Nations, doc. A. 33. 1946, pp. 5-6).

This resolution, which welcomed the termination of the mandated status, was supported also by the French Government, which voted in favour of the resolution.

To summarize, Mr. President, it seems, in our submission, clear that Syria and the Lebanon attained *de facto* independence in 1941. Whether they attained it *de jure* as a result of the Free French proclamation or of recognition by a number of Powers or by virtue of the resolution of the League to which I have just referred is, in my submission, immaterial for present purposes. What is important, in our submission, is that the mandatory Power did not oppose the attainment of independence by these two States and that there was no question of the supervisory power of the so-called organized world community, whether in the form of the League or of the United Nations terminating the Mandates against the will of the mandatory Power. It was not something that was done by either of these two international organizations against the will of the mandatory Power, being France in that case.

Now, Mr. President, that concludes the part of our replies dealing with the nature and content of the Mandate and I now turn to the questions relating to the transfer of supervisory powers, and in particular to the provisions of Article 80 (1) of the Charter.

This Article was mentioned not only in the oral statement by the United States of America, but also in certain questions by honourable Members of the Court. In the oral statement of the United States of America (*supra*, p. 502) the following contentions were advanced concerning the power of the General Assembly to make a binding decision in resolution 2145:

> "The Charter basis for the General Assembly's decision is, in our view, the same as the Court held existed for the United Nations' exercise of supervisory functions, namely Article 80, paragraph 1. (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at 133-134, 136-137.) Under that Article and under the Mandate, the General Assembly was entitled to take such action as was necessary to ensure that the rights of the people of Namibia were not altered in any manner in disregard of the Mandate. As the Court stated in 1950 (pp. 136-137), the purpose of this provision was 'to provide a real protection for those rights'. The action taken by the General Assembly was a reasonable exercise of this authority to protect the people of Namibia and to safeguard the 'sacred trust of civilization' and 'the material and moral well-being and the social progress of the inhabitants'."

That was the argument on behalf of the United States Government: that resolution 2145 could be justified on the basis of the provisions of Article 80 (1) of the Charter. Also, the Security Council action on the South West Africa issue could, in the United States' view, have been taken under Article 80 (1), "in the event the Security Council is regarded as sharing with the General Assembly the United Nations responsibility as successor to the League in supervising Namibia" (*supra*, p. 502).

Article 80 has also been the subject of questions by Judges Lachs and Jiménez de Aréchaga.

It is accordingly, Mr. President, in our submission, necessary to give some further attention to this Article. In doing so, I propose dealing first with the interpretation of the text of the Article read in the context of the Charter (and with the Judges' questions relating thereto) and thereafter proceeding to consider what further light, if any, is cast thereon by its legislative history.

Article 80 (1) reads as follows:

> "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."

I emphasized when last I dealt with this, Mr. President, the wording of this Article—that it is limited to stating that "nothing in this Chapter shall be construed, in or of itself, to alter in any manner the [various] rights" that are mentioned. That is all that the Article, in its express terms, in my submission, seeks to do.

In the contentious proceedings in the *South West Africa* cases, much the same type of argument was advanced as is now advanced by the United States of America on the strength of Article 80. The Court did not however accept the contention based upon the Article, that is, the succession argument, to which I have referred already in previous appearances, and it is our submission, therefore, that the Court must be taken to have rejected it. This argument, in 1962, was however specifically dealt with by Judges Sir Percy Spender and Sir Gerald Fitzmaurice, who said the following, which we quote in our written statement. It is a longish quotation, but, with the Court's leave, I will read it because, in my submission, it is particularly pertinent not only to the interpretation of the Article in general, but also to the arguments advanced by the United States and to the questions asked by the Judges. The quotation is as follows:

> "It has however been sought to call it [i.e., Article 80 (1)] in aid as follows: the Article, it is said, 'conserved' the rights of States: one of these rights was that stated in Article 7 of the Mandate instrument; therefore the rights survived the League dissolution until the mandated territory was brought under trusteeship."

I would pause there merely to point out that the argument by the United States of America in the present proceedings is to much the same effect—again a contention that Article 80 conserved certain rights and therefore these rights must be effectively maintained even by providing certain powers for United Nations organs which are not to be found in other parts of the Charter. I then return to the quotation from the joint opinion in 1962 which continues as follows:

> "*The argument is not only inherently unsound, it ignores the words* of Article 80 (1). This Article is clearly an interpretation clause, commonly called a saving clause, of a type frequently to be found in legislative or treaty instruments, designed to prevent Statute or Treaty provisions being *interpreted* so as to operate beyond their intendment.
>
> Such a clause does not, except in a loose and quite indefinite sense,

'conserve' any rights. It prevents the operation of the Statute or Treaty from affecting them (whatever they are and whatever their content) except as provided by the Statute or Treaty. Article 80 (1) does not maintain or stabilize rights as they existed at the date of the Charter coming into operation, nor does it insure the continuance of those rights or increase or diminish them. It leaves them unaffected by Chapter XII of the Charter.

What Article 80 (1) does not say is as important as what it does say. It does not say that rights shall continue. It does not provide that these rights shall not thereafter, until trusteeship agreements have been concluded, be subject to the operation of law, or that they shall not terminate or be extinguished by effluxion of time, failure of purpose, impossibility of performance or for any other reason. It does not say these rights shall not be altered or be subject to alteration even by normal legal processes.

It is evident that the purpose of Article 80 (1) was quite different to what has been contended and does not lend itself by any rational method of interpretation to support the contention advanced. The sole purpose of the Article was to prevent any provision of Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event." (South African written statement, I, Chapter VIII, para. 51.)

Mr. President, with the greatest respect, this passage is, in our submission, clearly a correct interpretation of the Article. I might say it certainly persuaded the Applicants in the contentious cases; during the hearing on the merits their counsel expressly associated himself with the views expressed by Judges Sir Percy Spender and Sir Gerald Fitzmaurice and expressed his regret at his previous "incompleteness of presentation on this question" which might have given a different impression. That is in the *I.C.J. Pleadings, South West Africa*, Volume VIII, page 223.

The important points for our purposes in the statement made by the learned judges are those to the effect that Article 80 (1) does not ensure the continuance of any rights, it does not increase or diminish any rights, it just leaves them unaffected by Chapter XII of the Charter.

Before adverting specifically to the questions put by Members of the Court, I would first wish to deal with the contentions of the United States Government. In my respectful submission their contentions suffer from a number of logical inconsistencies.

Firstly, let us look at the position under the Mandate. Under Article 22 of the Covenant and Article 6 of the Mandate, South Africa was obliged to report to the Council of the League of Nations. According to the United States contention, this obligation became owing to the General Assembly of the United Nations by virtue of the operation of Article 80. In other words, if that contention is correct, then these instruments I have mentioned, namely Article 22 of the Covenant and Article 6 of the mandate instrument, must be read as if amended by providing a new supervisory authority. Yet, Mr. President, the United States seeks to justify this conclusion by relying on Article 80, which expressly provides that nothing in Chapter XII, in which Article 80 itself appears, shall be construed to alter existing international instruments. So one reaches the situation that a provision which says that it shall not be construed to alter existing international instruments is, in fact, invoked in order to do just that—in order to have the practical effect of altering existing international instruments.

Moreover, the complete illogicality to which this contention leads, is, in my submission, shown by the argument concerning revocation of a mandate. If one were to assume, for the purposes of argument, that the Council of the

League could have revoked the mandate, that is, that it did have the power or the competence to do so, it clearly could do so only on the basis of unanimity. Even if one disregards the veto of the mandatory Power itself, the mandatory Power's interests were protected in that its title could not be terminated as long as it had the support of only one Council Member.

Mr. President, on any practical basis, that is of course an important safeguard. If the Council had the power to revoke, then even if one leaves aside the vote of the mandatory itself, all the mandatory would need in order to defeat such a motion would be the support of one member.

Now the United States contention is that the mandatory's title may be revoked by a two-thirds majority of the General Assembly. In my submission this is clearly, from any point of view, a vital diminution in the rights of the mandatory. Nevertheless, this change, this diminution in the rights of the mandatory is sought to be justified on the basis of an article which provides that it and the chapter in which it appears should not be construed to alter in any manner the rights whatsoever of any States. With respect Mr. President, it is a complete inversion of logic—an article which is intended to ensure that there should be no change of rights is invoked for the purpose of attempting to effect a positive alteration in the rights of the parties.

The third logical inconsistency, in my respectful submission, which I would emphasize relates to the powers of the organs of the United Nations.

Now, Mr. President, the Charter of the United Nations contains a definition of the powers of its organs. Concerning the General Assembly in particular, it was a matter of fundamental importance that its decisions should, in general, be recommendatory only. My learned friend and colleague, Mr. de Villiers, has dealt with that and I don't want to repeat it, but this feature of the General Assembly was at all times a matter of substantial importance for everybody.

Now, Mr. President, the United States Government is seeking to add to these recommendatory powers certain powers of binding decision and they seek to do that again by invoking this article which expressly states that it should not be construed as altering the terms of instruments or rights under instruments.

Again, with respect, Mr. President, a complete inversion of logic—the argument seeks to change an instrument, the Charter, by invoking an article in the Charter that says that that article is not to be construed as altering the terms of any instrument or any right.

In passing I may just add that the Charter basis for the General Assembly's power of supervision was stated by the Court in 1950, in our submission, to be Article 10, and not Article 80, paragraph 1, as contended by the United States. Article 80, paragraph 1, was invoked by the Court in 1950 as an element which the Court considered relevant to the transfer of supervisory functions. However, when it came to ascertaining under what provision the powers of the General Assembly would be exercised, the Court stated, quite explicitly in our submission, at page 137:

> "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."

I would refer the Court also to pages 416-419, *supra*, where my learned friend, Mr. de Villiers, dealt with this aspect.

For the above-mentioned reasons I submit that the contentions of the United States Government are logically inconsistent with the provision on which they rely, but I would also advert to certain of the implications which

are inherent in the argument advanced by the United States. It will be recalled, Mr. President, that Article 80 came into force with the rest of the Charter on 24 October 1945 when the League of Nations was still in existence. So, Mr. President, when the Charter, and Article 80 in particular, became effective, the League was still legally in existence although its dissolution was expected.

It is not clear to me whether the United States representatives suggested that the supervisory powers passed immediately, that is already in October 1945. They did not in their argument advert to the point of time at which the supervisory powers would in their submission have passed by reason of Article 80, paragraph 1. If, however, their contentions are to be understood as being that the supervisory powers already passed in October 1945, then the consequence would of course be that Article 80, paragraph 1, would not only have altered the rights of the mandatory but also that of the League. Then one would have had the position that Article 80, paragraph 1, which in terms states that it would not affect rights, would also have affected the rights even of the League of Nations itself, because it would then in some way have effected a transfer of supervisory functions from the League to the United Nations while the League was still in existence.

On the other hand, if that is not their argument, if their argument is that the League retained its powers of supervision until the League was dissolved, then the effect of the dissolution of the League would presumably have been to activate Article 80, paragraph 1, in some way. The position would then presumably have been that the League continued as supervisory authority, at least in theory, until April 1946 and that when the League then became dissolved, in some way or another Article 80, paragraph 1, caused the supervisory powers to pass over to the United Nations.

If that is so, Mr. President, then the principle of Article 80, paragraph 1, would presumably be, on this interpretation that all rights which existed at the time of the coming into force of the Charter would be protected by Article 80, paragraph 1, against subsequent lapse for any reason at any future time. Moreover, Mr. President, the consequence would then presumably be that Article 80, paragraph 1, would serve to invest the organs of the United Nations with all powers necessary to make such protection effective at any future time when any of these rights were to require protection. No criteria are suggested according to which the United Nations should be invested with such powers.

In my submission, Mr. President, it is an important aspect of the case that the suggested effect of Article 80 is not limited only to rights which existed or which ceased to exist on the coming into force of the Charter, but that if this contention is correct then Article 80 would serve also in some way to protect rights which continued after the Charter came into existence and which might still be today fully effective but would then be protected against lapse even in the future.

In my submission, Mr. President, the lack of logic of this line of argument becomes even more apparent when it is borne in mind that Article 80, paragraph 1, is not limited to mandates only. It applies to 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. It is completely wide and general in its terms. It is not limited to mandates or similar instruments, it extends to all instruments and all rights whatsoever to which Members of the United Nations may be parties. So on this line of argument Article 80 could for instance be invoked in an attempt to revitalize the minority provisions made at the end of the First World War, and to provide the necessary organs and powers under the auspices of the United Nations to make these provisions effec-

tive. One could, Mr. President, on the same basis, the same argument and the same logic, work out some sort of a line of reasoning by which one could say that these minorities provisions which were contained in the Peace Treaties at the end of the First World War must now still be protected. They fall under the rights of peoples which were protected by Article 80, paragraph 1, and one must therefore now create some United Nations power even though it does not appear in the Charter and some United Nations organization to protect these rights. In fact, Mr. President, there must be large numbers of instruments or rights which have lapsed or altered since 1945 or which might still do so in the future. There must be many pre-existing rights which are still in existence. I would pose the question: is it suggested that Article 80, paragraph 1, provides the machinery to protect all of these rights, if needs be by adding to the powers of the organs of the United Nations? Mr. President, this whole edifice of the protection of rights, the adding to the powers of the United Nations to make this suggested protection effective, is sought to be built on a provision worded as Article 80 is, which states in express terms that it is not to be construed as altering any rights. In my submission the argument is inherently unsound.

The Court adjourned from 4.20 p.m. to 4.50 p.m.

Before the adjournment I was dealing with the contentions advanced on behalf of the United States Government concerning the effects of Article 80, paragraph 1, of the Charter. Before leaving that argument I would make one further observation.

It has been our contention in these proceedings that there is a general admission implicit in all the presentations that have been made to the Court that there is really no Charter basis for the purported binding decision which the General Assembly sought to take in resolution 2145. We submit, Mr. President, that the United States argument, which is based on Article 80, paragraph 1, has fortified rather than contradicted our contention in this regard. Article 80, paragraph 1, was, for the reasons I have given, not, and did not even purport to be, a grant of powers to any organ. There is nothing in the Article which suggests that it was meant to give any definition of or even to advert to the powers of any organ of the United Nations. In other words, if an organ did not have a power from a source outside of Article 80, paragraph 1, that provision makes it very clear, in our submission, that it does not itself confer such a power on the organ.

So, Mr. President, with respect, our submission is that the fact that this Article has been sought in aid fortifies rather than weakens our contention that there is no Charter basis which would justify resolution 2145.

I turn now to the questions by Honourable Judges on the interpretation of Article 80.

On 4 March Judge Jiménez de Aréchaga asked the following:

> "*(a)* What would be the meaning and effect, in the view of the Government of South Africa, of the proviso at the end of Article 76 of the Charter ('subject to the provisions of Article 80') if Article 80, paragraph 1, were to be interpreted as having the effect contended for by South Africa?
>
> *(b)* What would be the meaning and purpose, according to the same interpretation, of Article 80, paragraph 2, of the Charter?" (*Supra*, p. 424.)

On 5 March Judge Lachs asked the following question:

"What would you consider to constitute, within the meaning of Article 80, paragraph 1, an alteration in respect of a territory which has not been placed under the trusteeship system of the rights of a State or people, or the terms of an existing international instrument to which a Member of the United Nations is a party?" (*Supra*, p. 452.)

I propose dealing first with the questions put by Judge Jiménez de Aréchaga.

Article 76 provides that the basic objectives of the trusteeship system in accordance with the purpose of the United Nations shall be:

"*(d)* to ensure equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80."

It is to this last proviso to the paragraph that Judge Jiménez de Aréchaga has referred us.

In my respectful submission, the meaning and effect of this proviso are clear. The proviso serves to emphasize, in my submission, that the equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals would not be introduced by the mere coming into force of Chapter XII, or even by the conclusion of a trusteeship agreement, save in so far as the trusteeship agreement made provision therefor. In other words, the reference to Article 80 is the reference to the Article in the interpretation which we have placed upon it, that nothing in Chapter XII of the Charter should be construed in and of itself to effect any alteration in rights. So that also this provision in Article 76 *(d)* would not in or of itself effect any alteration of rights until and to the extent to which a trusteeship agreement may effect such an alteration.

In my submission, that is the sole purpose of the proviso—to emphasize again that these economic and other rights would not be altered by the mere coming into force of the Charter and not even by the conclusion of a trusteeship agreement, save to the extent to which the trusteeship agreement made express provision therefor.

As will be seen when I examine the legislative history of Article 80, the open-door provisions of the "A" and "B" mandates and their absence in "C" mandates were much in the minds of the framers of the Charter. It was indeed in order to emphasize that the open-door provisions would not be introduced in territories under "C" mandates, otherwise than by the terms of the relevant trusteeship agreements, that the forerunner of Article 80, paragraph 1, was initially inserted. But I shall come to that later when I deal with the legislative history.

As regards the general effects of the proviso to Article 76, paragraph *(d)*, I would refer the Court to Kelsen, *The Law of the United Nations*, page 576; Goodrich, Hambro and Simons, *Charter of the United Nations*, third edition, pages 476-477, second edition, pages 426-427.

Mr. President, in my submission, the meaning and purpose of Article 80, paragraph 2, are equally clear. The paragraph reads:

"Paragraph 1 of the 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."

It must first be emphasized that the paragraph is not confined to mandated territories—it also mentions the other territories which Article 77 contemplates might be placed under the trusteeship system. Now, Mr. President, as we all know, it was decided by the Court in 1950 that the placing of mandated territories under trusteeship is voluntary, and that this is the position has never been doubted in respect of the other territories mentioned in Article 77 as suitable for inclusion in the system. So, even though there might at one stage have been a doubt as to whether there was an obligation to place mandated territories under trusteeship, that was not the position, in our submission, with respect to the other territories mentioned in Article 77. Article 80, paragraph 2, refers to all these territories. It accordingly, in my submission, clearly refers to territories in respect of which there was no obligation to negotiate or conclude trusteeship agreements at all. Accordingly, when Article 80, paragraph 2, refers to these mandated and other territories, it does so in the full awareness that there is no obligation on the States in control of those territories to place them under trusteeship at all. *A fortiori* it follows that there is no obligation to negotiate or conclude trusteeship agreements expeditiously. If you do not have to do it at all, then obviously you do not have to do it speedily.

At the same time, Mr. President, the Charter did not by itself terminate or alter the rights of mandatories and others who, it was hoped, would place territories under the system. So, on the one hand there was no obligation to conclude an agreement, on the other there was no termination of the existing title. The position could, therefore, arise that a particular governing authority might quite lawfully delay, postpone or even refuse to place a territory under trusteeship. To prevent these eventualities, to prevent delay, postponement or refusal to place a territory under trusteeship, it would have been necessary either to make the speedy conclusion of trusteeship agreements obligatory, either generally or with respect to certain territories, or to provide that the rights of the administering authority would cease on the coming into force of the Charter, or some similar arrangement. But that was not done. In fact the framers of the Charter did nothing to prevent, in law, the delay, postponement or refusal to conclude a trusteeship agreement. In our submission, there is nothing in the Charter which would, in law, have prevented an administering authority either delaying, postponing or refusing to conclude a trusteeship agreement.

As was held in the 1950 Opinion, Article 80, paragraph 2, did not impose any obligation to conclude or even to negotiate a trusteeship agreement. So, Mr. President, the effect of Article 80, paragraph 2, must be seen in the realm of something which does not impose a legal obligation. In our submission, it operated only as a form of persuasion or encouragement to administering authorities to do speedily that which they were not obliged in law to do at all—they were being encouraged to be speedy about the conclusion of trusteeship agreements, although the framers were aware that there was no obligation on them to conclude them at all.

I would refer the Court, as regards the effect of Article 80, paragraph 2, to Kelsen, *The Law of the United Nations*, at pages 576 to 578. The circumstances leading to the insertion of this exhortation, if I may call it that, will be dealt with when I consider the legislative history of the Article.

I turn now to the specific question put by Judge Lachs. In reply thereto, I would say that we would interpret the word "alteration" in its ordinary sense as connoting any change in the rights of States or peoples. The important point for our purposes is, however, that Article 80, paragraph 1, does not purport to prevent in general any alteration of rights, it does not purport to

prevent any alteration of rights save in respect of a particular instrument. It merely emphasizes that the coming into force of Chapter XII would not *per se* effect any such alteration. It leaves unaffected all other methods whereby rights might be altered.

With reference specifically to the mandates system, Article 80, paragraph 1, would, in our submission, have rendered it clear that the coming into force of Chapter XII did not affect, for instance, the title of the mandatories, the open-door principle applicable to "A" and "B" mandates, the obligations to submit reports—the League was then of course still in existence—or any of the other rights established under the mandates system. At that stage Article 80, paragraph 1, would have made it quite clear and emphasized that the Charter does not affect any of these rights. However, none of these rights were preserved against alteration by legal processes other than the coming into force of Chapter XII, and that is really the significant point from our point of view. The Article did not purport to preserve or maintain any rights against anything other than alteration by Chapter XII itself. If, for instance, a State were to have resigned from the League immediately after the commencement of the Charter, say in November 1945, that State would, in our submission, clearly have lost its rights in terms of open-door principles or any other rights it may have had as a Member of the League.

Article 80, paragraph 1, would not have preserved the rights of a Member of the League, even where such a Member resigned its membership. Its resignation would then have been the cause of the alteration of its rights. And Article 80, in our submission, would not have done anything to preserve its rights.

I come now to the legislative history of Article 80 which Judge Jiménez de Aréchaga invited us to examine (*supra*, p. 424). It is our contention that this history confirms the interpretation which we have placed upon the Article. The legislative history is conveniently set out in Russell, *A History of the United Nations Charter*, Chapter XXXI, and save where otherwise indicated, we have drawn from that source.

The provisions concerning trusteeship were first discussed at San Francisco by the Five Power Consultative Group. Their hope was to work out a joint proposal to form a basis of discussion in Committee II/4 in the same way as the Dumbarton Oaks proposals formed the basis of work in other technical committees. Events did not, however, work out that way. In particular the Consultative Group proved unable to agree on a joint plan within a reasonable period.

Finally the Five Powers presented the Committee with a working paper which was described as tentative and not binding on either the Five Powers or any other delegation. They found it, in the event, impossible to have a joint plan on which they were all agreed. This had the consequence that all new questions of importance had to be debated by the Five Power Consultative Group before the Committee could proceed with them. As Russell states:

> "Moreover, under the increasing pressure of time as the Conference progressed, the American chairman of the Consultative Group sought to facilitate committee proceedings through informal negotiations outside the regular meetings of both the Consultative Group and the committee. This method proved to be an effective device for getting agreement among the States most concerned with particular points and it became a regular and approved part of the committee process. Such negotiations, however, complicated the official records which conse-

quently tend to be as confusing as the procedure followed." (*A History of the United Nations Charter*, p. 810.)

I mention this, because one does, with respect, find some of these records a bit confusing and this is the explanation which Russell gives for this phenomenon. In my submission, it is against this background that the legislative history of Article 80 (1) must be seen.

When the Five Power Consultative Group was considering the objectives of the trust system the United States suggested that general non-discriminatory policies should be established in trust areas in regard to economic and other civil activities of the nationals of all member States. This was regarded as in the interest of the United States since the "C" Mandates did not contain the open-door provisions, and that had been a matter which had been an issue between the United States and some of the mandatories so that the United States wanted this general objective of the open-door to be included in the trust system.

The French Government, however, argued, *inter alia*, that a general commitment on non-discriminatory policies would, in effect, alter the terms of the "C" Mandates without the consent of the mandatories. To meet this point a new provision was proposed reserving all rights, including those of the mandatory States, pending completion of the subsequent trust agreements. As debated in the Technical Committee, the paragraph read:

> "Except as may be agreed upon in individual trusteeship arrangements made under paragraphs 4 and 6, placing each territory under the trusteeship system, nothing in this chapter should be construed in and of itself to alter in any manner the rights of any State or any peoples in any territory, or the terms of any mandate." (*Ibid.*, pp. 827-828.)

The Egyptian representative then proposed that the paragraph should read as follows:

> "Nothing in this chapter should be construed in and of itself to alter in any manner the rights of the people of any territory or the terms of any mandate." (UNCIO docs., Vol. X, p. 477.)

The effect of this proposal would have been to omit the reference to rights of States and also to omit the reference to the possible change of rights by the conclusion of trusteeship agreements. As stated by Russell, this proposal can be understood only in the light of the situation in Palestine. The Arab States wanted at least to freeze the status of Palestine so that it could not be placed under trusteeship on terms they might have considered less advantageous to the Palestinian Arabs (Russell, *op. cit.*, p. 828). Since most of the factors in this complicated situation concerning Palestine had to remain unspoken, there was a "good deal of discursive indirection in the committee discussions" *(ibid.)*.

Against the Egyptian amendment, it was argued that it would defeat its own purpose by freezing existing situations and making it impossible to enlarge the rights of peoples in mandated territories when placed under trusteeship (UNCIO docs., Vol. X, p. 477). The reason for this argument was, of course, as I have indicated, that the Egyptian amendment would have omitted the possibility of a change in the rights of peoples by the conclusion of trusteeship arrangements.

Egypt and the United States thereupon consulted together in private but apparently could not reach an agreement. Thereafter the United States stated in Committee Four that the paragraph as proposed by the United States was

intended as "a conservatory or safeguarding clause", and it was willing that the minutes of the Committee should show that it was intended to mean that "all rights whatever they may be, remain exactly the same as they exist—that *they are neither increased nor diminished by the adoption of this* Charter. Any change is left as a matter for subsequent agreements. The clause should neither add nor detract, but safeguard all existing rights, whatever they may be" (*ibid.*, p. 486).

It will be observed, Mr. President, that according to the United States representative, the paragraph which eventually became Article 80 (1) of the Charter was intended to convey that existing rights would not be changed by the adoption of the Charter.

Hereafter the Egyptian amendment was put to a vote and defeated. Immediately thereafter the representative of Syria proposed a similar amendment, in terms of which the paragraph under consideration would have read as follows:

> "Except as may be agreed upon in individual trusteeship agreements made under paragraphs 4 and 6 placing each territory under the trusteeship system, nothing in this chapter should be construed in and of itself to alter in any manner the rights of any state or any peoples *of the territory concerned*, or the terms of any mandate." (Italics added.)

I emphasize the words "of the territory concerned" because those were the important ones for the purpose of the amendment.

In favour of the amendment, it was said that it would exclude claims to rights on the part of the peoples outside the territory concerned. If such peoples had rights, these rights would be presented by the States to which such peoples belong, not by the peoples themselves. This was clearly a reference to any claims which Jewish people might have had. Against the motion, it was said that the effect would be seriously to weaken the conservatory or safeguarding clause by failing to preserve certain rights, namely the rights of peoples outside the territories. In the event this amendment was also defeated (*ibid.*, p. 487).

From the rather cryptic report of the discussions in the Committee which one finds in the UNCIO documents, it is difficult to understand how the Syrian motion could have seriously weakened the so-called conservatory clause by failing to preserve rights for peoples outside the territory. Possibly there was some of the "indirection" which Miss Russell mentioned in some of these arguments. In any event, Mr. President, the important point, from our aspect, is that there is no indication of any intention to protect rights *against anything other than the coming into force of the Charter itself.* There is a lot of argument about what rights should be protected but there is nothing to suggest an intention to protect rights against anything other than the coming into force of the Charter.

Five days later the Soviet representative received instructions from Moscow and proposed to eliminate paragraph 5 altogether on the grounds that it could be interpreted to keep existing mandatories indefinitely in control. The United States, China and France argued that the provision was essential and made nothing permanent, it merely maintained existing rights until subsequent agreement did, or did not, change them. The Arab delegates remained dissatisfied with the lack of special provision for Palestine. The United Kingdom suggested that their fears might be quieted by indirect reference to Article 22 of the Covenant relating to former Turkish territories, which provided that the wishes of these communities must be a principal consideration in the selection of the mandatory. However, Mr. President, the United States dele-

gation felt that the mention of this Article would rouse Zionist opposition, and further informal consultations, which were not recorded, were held by its political advisers with Arab representatives to try to find a satisfactory formulation (Russell, *op. cit.*, p. 829).

Agreement was finally reached upon some changes in the text in an attempt to meet Arab concern. A new final sentence was also suggested to meet the earlier Soviet objection, and this new final sentence ultimately became Article 80 (2). The provision was reconsidered and it was approved by the consultative group in the following form:

> "Except as may be agreed upon in individual trusteeship arrangements, made under paragraphs 3, 4 and 6, 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 member States may respectively be parties. This paragraph should not be interpreted as giving grounds for delay or postponement of the negotiations and conclusion of agreements for placing mandated and other territories, as provided for in paragraph 3, under the trusteeship system."

When this text was presented the United States delegate added that he would enter an official statement in the record to the effect that among "rights whatsoever" were included any rights in Article 22 (4) of the Covenant (UNCIO docs., Vol. X, p. 515).

The delegate for Iraq thereupon moved an amendment, the effect of which would have been that trusteeship agreements in respect of territories falling under Article 22, paragraph 4, of the Covenant, could not be concluded "save within the limits and for the purposes" laid down in that paragraph (*ibid.*, pp. 515-516).

So, Mr. President, here for the first time was an amendment which would have provided that trusteeship agreements should incorporate certain rights which had existed under the Covenant. This amendment would also have provided that nothing in the Charter "should be construed in and of itself to alter in any manner the rights of any State in any territory, or to diminish the rights of the people [singular] of that territory".

In support of the motion, it was said that the United States proposal would leave peoples coming under the trusteeship system at the mercy of those making the trusteeship arrangements, for no provision was included for consulting the desires of the peoples concerned. There should be a guarantee that their rights should not in any way be reduced, and that in particular there should be no doubt that the rights set forth in Article 22, paragraph 4, of the Covenant were included in the paragraph.

So, Mr. President, as I say, here was a specific proposal to ensure that certain rights which had existed under the mandates system would be maintained in an altered form under the trusteeship system. However, the opposition to the amendment proposed by Iraq was based on the ground that its effect would be to cut off the rights of some peoples in some territories, as the text of the amendment used the word "people" in the singular, "whereas the paragraph would safeguard all rights". This was probably again a reference to the Palestinian question.

Then a further argument used in opposition to the amendment was that not all of the United Nations were parties to the same international instruments, and in particular some were not bound by the Covenant. "Account should

be taken of the respective positions of all the United Nations in this respect." (*Ibid.*, p. 522.)

Now, Mr. President, if I understand this argument correctly—and I would immediately say that these UNCIO documents are very brief—there was an objection to the imposition on non-members of the League of obligations under Article 22 of the Covenant. The very basis of the objection was that some Members of the United Nations were not bound by the Covenant and, therefore, there should not be a provision which would ensure that any provisions of the Covenant would necessarily be included in trusteeship agreements.

That, in my submission, is a further indication that Article 80 was not intended to impose any new obligations on anybody, even if such imposition was necessary to protect existing rights. So, even if it was necessary to protect existing rights of peoples falling under Article 22, paragraph 4, of the Covenant, to make this provision, there was opposition thereto on the basis that it would have imposed obligations on non-members of the League.

In the result, Mr. President, the United States proposal was accepted and that of Iraq rejected.

The next reference we could find was in the Co-ordination Committee, where the Article was again discussed. What happened there is reflected as follows in the UNCIO documents, Volume XVII, page 312:

> "The Committee discussed at some length the clause 'alter in any manner the rights whatsoever, of any States or any peoples'. . . . Messrs. Golunsky (USSR) and Robertson (Canada) insisted the text had been laboriously negotiated. The Chairman proposed to read 'in any manner whatsoever', but Mr. Robertson was confirmed by Mr. Gerig (technical adviser) in saying that the intention of Committee II/4 was 'to freeze the present position: bona fide rights, doubtful rights, rights that are pure figments' after the Charter just as they were before it. No change was made."

The paragraph thereupon was included in the Charter as Article 80.

I would, Mr. President, emphasize the explanation given here that the intention was "to freeze the present position: bona fide rights, doubtful rights, rights that are pure figments, after the Charter just as they were before it". And that, in my submission, was the sole purpose as appears both from the wording and from the drafting history—that rights were not to be altered by the coming into force of the Charter.

In conclusion, therefore, we submit that in the light of the legislative history of Article 80 the following conclusions seem justified:

(a) The purpose of including the provision which later became Article 80, paragraph 1, was originally to protect the "C" Mandates from automatically becoming subject to the open-door provisions by reason of the introduction of Chapter XII, and particularly the provision which later became Article 76, paragraph *(d)*.

(b) During the debates, the Arab States made various attempts to change the wording so as to advance the cause of the Arab population in Palestine. This history is rather confusing but on the whole it appears that these attempts were unsuccessful.

(c) Ultimately the Article was intended to serve only the purpose which appears from the clear wording, namely to ensure that the coming into force of Chapter XII would not *per se* effect any change in the rights, real or imaginary, of anybody.

It is rather a case of coming out by the same door as one went in. One starts off with a text, and, in my submission, after discussion of the legislative history one finds that the clear wording of the text corresponds with what appears to have been the actual intention of the framers of the Charter.

That then brings me, Mr. President, to the reply to questions put by yourself and by Judges Onyeama and Dillard concerning the consequences of the lapse of the Mandate.

I would commence by making a few observations on the introduction to the questions put by Judges Onyeama and Dillard (*supra*, p. 438). At the outset I would confirm that we are in respectful agreement with the proposition stated by the learned Judges that the supervisory and accountability provisions of the Mandate (Article 6) were of such importance that their lapse might have caused the termination of the Mandate itself. Indeed, we would stress that, if the Mandate lapsed *in toto* it did so for that very reason, in our submission, i.e., because of the falling away of the supervisory and accountability provisions. On the other hand, if the Mandate still existed after 1946 we contend it could have done so only without supervisory and accountability provisions.

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. That is in Chapter I, paragraph 10, of our written statement; at pages 275 and 277, *supra*; and Chapter IX, paragraph 66, of our written statement which we dealt with orally at pages 276-277 *supra*.

However, Mr. President, on either hypothesis we contend that after dissolution of the League there no longer was any obligation to report and account under the Mandate. This was also our attitude in the previous contentious proceedings, as we have indicated in the passages that I have just cited to the Court, although in those proceedings we did present argument on the second alternative part of our contention, namely that the Mandate as a whole had lapsed. We did so in reply to a specific submission to the contrary by the Applicants.

The questions put by the Members of the Court flow, with respect, logically from the contention advanced by us in the alternative, namely that the Mandate as a whole had lapsed on dissolution of the League. We had, in any event, intended dealing with the consequences of the postulated lapse of the Mandate, but we welcome the opportunity of doing so more pertinently with reference to the questions put by the learned Judges. We must, however, emphasize our contention that the outcome of this case should be substantially the same whether or not the Mandate as a whole lapsed in 1946. We have proceeded for purposes of argument on the assumption that it did not lapse, that it continued, and I need not repeat the contentions advanced by us on that hypothesis.

On the alternative hypothesis, namely on the hypothesis that the Mandate did lapse in 1946, we submit that all subsequent United Nations action would have been misconceived. In particular, General Assembly resolution 2145 (XXI) would have been of no force and effect, as would have been the position concerning subsequent Security Council resolutions. We have dealt with this matter,

Mr. President, in our written statement, I, Chapter 1, paragraph 10, and in our oral statement at page 277, *supra.*

Against this background, we reply to the questions as follows, and I deal firstly with the question put by the honourable President at page 424, *supra.* There the honourable President asked the following question: "under what title does the Government of South Africa claim to carry on the administration of Namibia?". Our answer is as follows.

The PRESIDENT: Will you kindly read out the whole of the question.

Mr. GROSSKOPF: I beg your pardon, Mr. President, I was under the impression that was the whole of the question.

The PRESIDENT: It starts with saying "Kindly see . . ."

Mr. GROSSKOPF: Yes, well this is the whole of the question. With respect, you referred back to our contention that the mandate had lapsed. That is, of course, the background which I have just dealt with against which this question is to be answered. With respect . . .

The PRESIDENT: Have you any particular objection to complying with my request?

Mr. GROSSKOPF: No, save the practical one that, Mr. President, I don't have it with me at the moment.

The PRESIDENT: Kindly do that.

Mr. GROSSKOPF: But the question which the honourable President put was after referring to the submission which we have made in the previous . . .

The PRESIDENT: Kindly read out what I said, not your interpretation.

Mr. GROSSKOPF: I am very sorry, Mr. President, I don't have it with me at this moment.

The PRESIDENT: Very well—proceed.

Mr. GROSSKOPF: 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.

It was generally accepted at the time that in the event of an Allied victory, South West Africa necessarily had to become an integral part of the Union. This was dictated not by any territorial ambitions on the part of South Africa, but by the purely practical and realistic consideration that the Territory could not be properly administered or developed divorced from South Africa. This consideration was given effect to, first by the decision of the British Imperial War Cabinet in 1917 to award full sovereignty over the Territory to South Africa, and later by its inclusion in a separate class of mandates which was designed largely to suit the circumstances of South West Africa and which required it to be administered under the laws of the Mandatory as an integral portion of its own territory. This arrangement required the consent of South Africa, which was given because the mandates system recognized the special relationship between South Africa and South West Africa.

In the years since 1915, South West Africa has inevitably been integrated even more closely with the Republic. The development of the Territory in all

fields has been stimulated largely by experience, knowledge and capital derived from South Africa. Its present high level of economic progress, administrative efficiency, and social, medical and educational advancement are dependent on the continuation of its links with South Africa.

When the League was dissolved (and the Mandate lapsed, on the hypothesis on which this question rests) it was contemplated in the declarations made by the mandatories as well as by the League and other States generally that the mandatories would have a title to administer the territories and to make arrangements concerning their future—indeed, that this would be a consequence of the sacred trust which had originally been assumed. So it was, for instance, stated in the report of the United Nations Special Committee on Palestine that, in circumstances in which the Committee was doubtful whether the mandate still existed, the mandatory could, in the absence of trusteeship, do no more than to carry out its administration of the territory in the spirit of the mandate (written statements, **I**, Chap. VIII, para. 44). And, Mr. President, this has indeed been the avowed policy of the South African Government.

In the political field South Africa has accepted that the ultimate aim of its administration must be to advance the peoples of the Territory to self-determination. In this process, political institutions based on the will of the people have been established for population groups comprising a substantial majority of all the inhabitants of the Territory.

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.

I then turn to the questions put by Judges Onyeama and Dillard (*supra*, p. 438). There also, Mr. President, I have with me only the questions—I have not got the introductory part on which I have already delivered comments although I have not quoted it, but for the sake of brevity I would only put the specific questions, if I may. They read as follows:

(1) Is it your position that no legal restraints of any kind were imposed on South Africa subsequent to the dissolution of the League of Nations?
(2) If your answer is that there remained legal restraints, will you specify their nature and areas of application?
(3) If your answer is that there remained only a political or moral obligation to live up to the requirements of Article 22 of the Covenant then is it your position that there are no legally operative provisions anywhere which would prevent South Africa from annexing South West Africa (Namibia)?

Now, Mr. President, reading the questions together, it seems to us that the word "imposed" in Question 1 is limited, or is intended to be limited, to restraints imposed in terms of Article 22 of the Covenant and of the mandate instruments, and would therefore not include legal restraints which might have been imposed by other conventions, instruments or rules of customary law. We read it in this way mainly because Question 2 refers to remaining legal restraints—"If your answer is that there remained legal restraints", and therefore we accept that the learned Judges had in mind legal restraints emanating from the mandate documents as such, and not legal restraints which might have been

imposed in any other fashion. On the other hand, if we construed Question 1 too narrowly, we would appreciate it if the learned Judges could indicate that to us, and we would then deal with it on a wider basis.

However, on that reading, our answer to Question 1 is in the affirmative. It is our position that no legal restraints imposed by the Mandate remained after dissolution of the League. Consequently, of course, Question 2 falls away.

In reply to Question 3, we state that in our view there would be no legally operative provisions anywhere which would prevent South Africa from annexing South West Africa. This was, incidentally, also the view of Kelsen (*The Law of the United Nations*, pp. 592 et seq.), where he dealt with the transition between the mandates system and the trusteeship system. He was of the view that the Covenant and the mandates system were no longer in force after dissolution of the League. He stated categorically:

> "The trusteeship system did not automatically replace the mandate system, and the UN did not succeed to the rights of the League of Nations as to the former mandated territories. There is no legal continuity in the relation of these two systems. The one ceased to exist long before the other came into existence." (Kelsen, *The Law of the United Nations*, pp. 596-597.)

He came to the clear conclusion that neither the Covenant nor the Charter would be violated by an act of annexation by the former mandatory Power, and that the United Nations, under the Charter, has no competence to consent or to refuse to consent to the annexation of a formerly mandated territory by the Power actually exercising the administration.

So, Mr. President, his attitude was that neither the Covenant nor the Charter would be violated by such an annexation and that the United Nations as such had no role to play in any purported annexation by the Power exercising administration. In particular, he also emphasized that the sacred trust principles embodied both in the Covenant and in Article 73 of the Charter would not be in conflict with annexation or with the exercise of sovereignty. Indeed he makes the point that Article 73 applies mainly, if not solely, to territories which fall under the sovereignty of some State (*ibid.*, pp. 598-599, footnote 4).

I must add at this stage, Mr. President, that Kelsen seems to have had some reservations about the possible rights of the Principal Allied and Associated Powers, but he was nevertheless of the opinion that the disposal of formerly mandated territories by placing them under trusteeship at the instance of the former mandatory Powers could be legally justified only on the assumption that on dissolution of the League the territories came under the sovereignty of the former mandatories (*ibid.*, p. 603). He discusses the legal basis on which the former mandatory Powers had *locus standi* to enter into trusteeship agreements and his conclusion is that the fact that they were the parties to the trusteeship agreement could be explained only on the basis that the territories had come under their sovereignty and that they were therefore entitled to dispose of them in this particular way.

I may also in passing note Kelsen's discussion of the South African incorporation proposal in 1946, in which he again underlined that the matter was brought before the General Assembly rather for political than for legal reasons (*ibid.*, p. 598, footnote 4).

So, after this long story, Mr. President, to repeat: it is the view of the South African Government that no legal provisions prevent its annexing South West Africa. However, as the South African Government has repeatedly

intimated, it has no intention of doing so and is indeed at present engaged on the development of political institutions in the Territory which are designed to lead the peoples of the Territory towards self-determination. So that, in our submission, from a practical point of view, the possibility of annexation is not of any importance and is, in our submission, only of academic interest at this stage because of the policies to which I have adverted.

ORAL STATEMENT BY MR. DE VILLIERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

The PRESIDENT: Mr. de Villiers, can you give the Court an estimate of the time needed by you for concluding your observations on the two presentations that were made after you spoke last?

Mr. de VILLIERS: In reply to your question, Mr. President, I propose to deal with certain remaining questions of law. There are still one or two questions put by Judges to us which have to be replied to. There are also certain matters of comment which have been presented by the representatives of the Secretary-General and by the representative of the United States in their oral statements concerning legal arguments which we had presented to the Court with which I should like to deal. That would bring me into a sphere which we consider to be important also and the nature of which I indicated to the Court a few days ago, namely that although at this stage we do not know what the Court's decision will be on what we have suggested in regard to the plebiscite proposal, namely that there should be an early decision on that matter, we are ready to comment at this stage very briefly on certain introductory aspects concerning what I might call the factual field. It would concern two aspects and some of them have a bearing too on questions which have been put by learned Members of the Court, for instance concerning the applicability or otherwise of portions of Article 73 of the Charter of the United Nations.

I want to direct attention, briefly, to South Africa's attitude, as distinct from a detailed argument at this stage, about the legal principles and norms in current international law upon which its conduct in South West Africa is to be adjudged. That is one aspect, and then, secondly, I would like to indicate to the Court to what extent we consider that if the Court should come to the conclusion that it is necessary or desirable to go into the factual field at all, to what extent we consider that even in that respect we should like to be enabled to amplify the record. A similar presentation is proposed by my learned colleague, Mr. Botha, on the factual field as such—South Africa's attitude, again as distinct from detailed argument, about its record of fact in South West Africa seen against the background of what I have just mentioned as that of the legal principles and norms in current international law against which it is to be adjudged. A brief statement on that and a brief indication of the type of further material which it would be necessary to place before the Court in the event it may become necessary to have a full investigation of the matter.

South Africa's contentions about this—perhaps this may be a convenient point at which to put that clearly—are these. We have contended to the Court, and I wish to repeat for emphasis that, in our submission, a consideration and an investigation into the factual field is an integral part and a necessary part of the task which has been placed upon the Court by the request of the Security Council. In this sense we can see that it may be possible for the Court by coming to conclusions favourable to South Africa's contentions on certain legal issues to make it unnecessary to go into the factual field. It may well be possible for the Court to decide that on the conclusions at which it arrives concerning the powers of the General Assembly or of the Security Council or of both, the action taken within the United Nations to terminate South Africa's title in respect of South West Africa was an invalid action, and having come to that

conclusion on a purely legal basis it may become unnecessary at all to enter into the factual field. That is a possibility: we do not, with respect and with submission, see a possibility the other way round. We do not see a possibility that the Court could on a legal basis declare that the actions taken within the United Nations were valid actions, without going fully into the question of the factual justification or otherwise for those actions. That is why we submit very strongly that that is a matter which, unless the Court disposes of it on a legal basis favourable to South Africa's contentions, it is absolutely essential in our submission to be properly investigated, at a time and in a manner convenient to the Court.

That will give the Court an indication of what we intend to present at this stage. My estimate would be that it should conclude by Thursday.

The PRESIDENT: When we had the opportunity of the consultation over the procedure and the time-table last I was given an impression, generally, to which I do not restrict you and your colleagues, and I am hoping that more or less so far as the time-table is concerned that could be adhered to. I would further wish to observe that with regard to the first part of your presentation, after you have dealt with the remaining questions to which the answers are still due, according to you, you will kindly restrict your comments on the statements of the representatives of the Secretary-General and the representative of the United States to matters which are altogether new, and in your reply would confine yourself also to any new presentation on those points. I have no doubt whatsoever, from an estimate of the ability and skill with which you have presented and continue to present the case of South Africa, that you will not find it necessary to repeat an answer which may already be contained in your written statement or in your oral statement though, of course, you will be at liberty to give the references to the Court.

To enable you both to do this and, if you so wish and consider it necessary to make any addition to it, the Court will now, on your estimate, have to sit tomorrow afternoon also, in addition to the morning sitting, because of certain considerations that the Court has in mind with regard to its own time-table. At this stage I will say no more than that I hope very much that you may be able to conclude by tomorrow evening.

Mr. de VILLIERS: We shall certainly see what we can do about it, Mr. President. I am sorry if there was any misunderstanding.

The PRESIDENT: There was no misunderstanding. You were not bound by any estimate and that was made quite clear. There is no misunderstanding at all. If you will do your best I am sure you will succeed also.

Mr. de VILLIERS: Certainly, Mr. President.

The Court rose at 6.15 p.m.

TWENTY-SECOND PUBLIC SITTING (16 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

Mr. de VILLIERS: I should like to refer first of all to certain responses given on behalf of the Secretary-General to questions that were put to him by Judges Gros and Sir Gerald Fitzmaurice on the question of the relevant powers of the General Assembly and the Security Council. I do so because, in a large measure, the answers directed to those questions were also directed to arguments which had been presented on behalf of South Africa; sometimes they were explicitly so directed to our arguments and sometimes implicitly. But I will confine myself, Mr. President, in view of your request yesterday, to matters that are new, which is in any event, with respect what one would do for purposes of a reply. I will also confine myself to main elements of this comment and will not try to pursue it into all the nooks and crannies of detail.

First I should like to deal with certain elements pertaining to the question of the power of the General Assembly to make a binding decision in the case under consideration.

In that respect, we submit that what is new and remarkable is that when one analyses the Secretary-General's statement, one finds that it emphasizes his complete inability to point to any legal basis for the existence of such a power. His contention on that aspect is still that the decision—in resolution 2145—to terminate the Mandate and to assume direct responsibility for the administration of the Territory, was a valid one. His replies to the questions by Judge Gros made it clear that he contended that this decision consequently created or resulted in new and legally binding obligations, not only for the State most directly concerned, being South Africa, which had opposed the decision very strongly, but also for all other States Members of the United Nations, including those who did not support the decision and who had expressed reservations or doubts concerning its validity or its wisdom. In his own words, in this respect, the effect was "to establish a new factual and legal situation from which certain obligations flow automatically, as a matter both of law and of logic" (*supra*, p. 481). And it followed that in his contention no reservations, qualifications, doubts or statements of disagreement could be relevant to such a resolution or its consequences (*supra*, pp. 483-484). There was a dialectical question about whether the word "reservation" was a proper or appropriate one to use in this context. That, in my submission, is of little or no significance. What is important is that he made it clear that, whether one could properly speak of reservations in this context or whether one spoke of doubts or statements of disagreement, his contentions applied to all of them. All of those would be to no avail, and the States concerned would still be bound to the obligations flowing automatically from the new factual and legal situation which had been created.

He did try to minimize the extent to which these other States did, in fact, express disagreement. In my submission, he somewhat overdid that; but that is not important for my purposes and I will not pursue the point, because, in my submission, in principle that is totally irrelevant. As a matter of legal principle, whether the disagreement indicated was of a minor scope or major

scope, the position remains exactly the same. The contention of the Secretary-General must go so far as to mean that this decision would have been valid and binding, so as to create these new legal obligations for all United Nations Members, even if it had been vehemently opposed by just less than one-third of the total membership of the United Nations. At that time, Mr. President, it would have meant with a total United Nations membership of 121, that the protesting minority could have been as large as 40, or if one takes the number that actually participated in the voting, 119, then the protesting minority could have been as large as 39. In other words if one takes either figure, it is one which is a great deal larger, almost double the size, of what is known in United Nations circles as the group of Western European States and others. It is almost the size of that group plus the Latin American group, and it represents very nearly 80 per cent. of the original membership of the United Nations when it was founded in 1945.

The protesting minority could have expressed their disagreement and opposition on various grounds, i.e., on one or more of such various grounds. Th could have taken the attitude that in their view there was a lack of power on the part of the General Assembly to take the step. Secondly, they could have based themselves on the lack of substantive grounds for such a decision. Thirdly, their attitude could have been that the termination of the Mandate would as a matter of policy be unwise, even if it could be justified in law. And, fourthly, their attitude might simply have been that such a decision, or a purported decision, would be a matter of major controversy, it would give rise to such uncertainty and further controversy that that state could not be beneficial to anybody concerned. Those are various possible grounds upon which, as I have said, such a protesting minority might base itself.

Yet the Secretary-General's contention must mean, in law, that such a protesting minority would be bound by the votes of the other two-thirds of the membership. He does not suggest any basis in law which would distinguish such a situation from one of near-unanimity, nor is it conceivable that there could, in law, be any such distinction.

So, Mr. President, the question, in its legal essence, is where does he find the power for the General Assembly to do this?

When we pursue that question we find that the next important feature of the statement on behalf of the Secretary-General was that he now explicitly agreed that it was by the Charter that the principal organs of the United Nations were "established and their functions and powers defined" (*supra*, p. 485). In other words, he had to admit that he had to find a Charter basis for this suggested power. He made the admission in various words at pages 479 and 490, *supra*, and he had to admit that it was to the Charter that one had to refer for the relevant limits to the power (*supra*, pp. 479 and 485). For both of those purposes —in other words, both concerning the grant of power and the limitation of power—he professed to base himself on the express text of the Charter, together with necessary implication or intendment arising from it *(ibid.)*.

So, Mr. President, there is now in this respect, common cause between the Secretary-General and us. That was made clear in this replying statement, although it took very pertinent questioning to bring him so far as to state this explicitly.

The Secretary-General in his statement did attempt to leave open a little back-door by saying that the Charter "is . . . subject to continuing interpretation" (*supra*, p. 485), or that "like all constitutions, it is interpreted from day to day by practice, and in the light of current norms and events" (*supra*, p. 487). However, I shall deal with that aspect later, Mr. President.

I wish to take him up first on the Charter basis to which he himself subscribed. The questions put to him by the learned Members of the Court searchingly required him to elucidate his contentions with reference to a relevant grant of power and relevant limitations on powers. Yet he completely failed to indicate how the General Assembly could be said to derive the power of binding decision, for which he contends, either from any express provision of the Charter or from any necessary implication or intendment arising from it. He singularly refrained from discussing this matter at all with reference to the probable intent of the authors of the Charter. So one does not see how far any basis of necessary implication or intendment could bring him.

He repeated a vague generality in this respect, namely that "the Charter—like other constitutions—does not set out specific and detailed provisions dealing with each and every type of contingency which may arise" (*supra*, p. 485). Now, Mr. President, that is true enough, it is so. It is true of probably every constitution, but it does not let the Secretary-General off the hook as far as this case is concerned. Surely, in order to make his contention even plausible, he must be able to point to some provision, however broad and sweeping it might be, which can be said to include either in its formulation or in its necessary intendment a power on the part of the General Assembly to act as it has purported to do. He must find something in the Charter which can be said to include such a power—as the Court indeed did in the *Effects of Awards of Compensation* case to which the Secretary-General referred *(ibid.)* in support of his general contention. Now, in that case, Mr. President, it concerns, in this portion of the Judgment, the power to establish a tribunal which could adjudicate on staff disputes, shall we say—disputes between staff members of the Organization and the Organization itself. There was no provision in the Charter explicitly worded with reference to the creation of such a tribunal. But the Court had regard (*I.C.J. Reports 1954*, pp. 57-58) to various provisions of the Charter which could be said to give rise by their necessary intendment to such a power. The Court referred specifically (*ibid.*, p. 58) to the power of the General Assembly under Article 22 to establish such subsidiary organs as it deems necessary for the performance of its functions, and the Court laid particular stress on the power of the General Assembly contemplated under Article 101, paragraph 1, to establish staff regulations, which themselves were described by the Court as a complex code of law and which were to govern the regulations between the staff and the Organization and under which the Secretary-General would make appointments to the staff. From a combination of those powers and the logic of the situation as it seemed to the Court, it derived by necessary intendment a power to establish a tribunal which could adjudicate on staff disputes which might arise from the application of that code of discipline.

But my point is that in the present case the Secretary-General fails completely to point to any provision of a comparable kind from which such inferences could be drawn.

The extent of his evasion is most noticeable in his answer to the first of the questions put by Sir Gerald Fitzmaurice concerning limits on the powers of the General Assembly. He commences his answer on the basis that he understands the question to be confined to limits "as they might relate to the present case" (*supra*, p. 485). Whether the question was in fact so intended or not I would not know. I know that we directed our argument to a question going much further than that, testing his original contentions in another way, saying that if this is the extent to which the Court is asked to go by way of implications in the Charter in order to justify a finding adverse to South Africa, where does it end and what consequences could it have to other States.

Nevertheless, that is the basis on which he professed to answer this question—limits as they might relate to the present case. But then we find that when he proceeds (*supra*, pp. 486-487) to discuss examples of limitations, he raises several which have no relevance at all to the present case, and about which nobody has ever suggested that they may have any relevance. In particular, he referred to the limitation concerning domestic jurisdiction in Article 2, paragraph 7, of the Charter. Nobody has ever suggested that that is of any relevance in this case. Yet he put up this ninepin about three times in order to knock it down again (*supra*, pp. 478-479, 486 and 487).

Then he also referred to another limitation which is quite irrelevant and which has never been relied upon, namely that concerning enforcement action in Article 11, paragraph 2, of the Charter. Yet, and this is the important point, the real and pertinent limitation on which South Africa forcibly relies and to which attention was pertinently drawn in the debates in the United Nations, by France in these proceedings, and by other States in this context, the relevant limitation that the General Assembly's powers under the Charter are, with immaterial exceptions, recommendatory only, that received from him only a very cursory and a very passing mention. We find it is all dealt with in one very brief paragraph (*supra*, p. 486, para. 41).

The paragraph consists of two lines of text plus a quotation of a passage from the Judgment in the *Certain Expenses* case. The two lines of text say this, firstly that the powers of the General Assembly are "normally of a recommendatory character" and then go on: "This is by no means, however, an absolute limitation." That is all; there is no explanation of where the Secretary-General says that the dividing line is to be drawn between the normal case and the exceptional cases. There is no attempt to show that a case like the present would fall on the side of the exceptional cases and not on the side of the normal one. It is perfectly obvious, with submission and respect, Mr. President, that the Secretary-General could not have contended that a case like the present would have fallen under the exceptional cases. He must have realized that such a demonstration with reference to the provisions of the Charter or its necessary intendment would have been impossible.

That is all that he says in the text of that paragraph. He proceeds to quote from the *Certain Expenses* case, and that does not help him in the least. The quotation states, correctly, in our submission and with respect that:

> ". . . 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).

And so, the passage proceeds, decisions of the General Assembly, as contemplated under Article 18, "do indeed include certain recommendations, but others have dispositive force and effect" *(ibid.)*.

That is the quotation as given by the Secretary-General in his statement. He leaves the matter there. He does not mention that the Court went further and that the Court did what he did not do, namely to indicate exactly what line of demarcation it had in mind. It made it perfectly clear that the line of demarcation it had in mind was that which was drawn by the express provisions of the Charter itself. That emerges from the very next sentence following on the passage quoted by the Secretary-General. That sentence in the Judgment reads:

> "Among these latter decisions [in other words, those having dispositive force and effect] Article 18 includes suspension of rights and privileges of membership, expulsion of members 'and budgetary questions'." *(Ibid.)*

The Judgment then proceeds to point out that in so far as powers of suspension and expulsion under Articles 5 and 6 were concerned, they were conditional upon prior recommendation by the Security Council.

In other words, the Judgment makes it perfectly clear that these matters which are explicitly mentioned in the Charter as being ones upon which the General Assembly may make binding decisions, are the ones which it contemplated in indicating this dividing line. So, clearly, the Secretary-General derives no support whatsoever from that Judgment. He does not contend that the termination of a State's title to administer a territory is to be seen as resorting under budgetary or procedural matters, nor surely could he seriously put any such contention to the Court.

Similar evasions were evident in the Secretary-General's reply to the fourth question of Sir Gerald Fitzmaurice. That is the question which referred to the suggested power of the General Assembly to make a judgment of law; and on that basis the question proceeded to enquire what the line of distinction would be between the judicial functions of the General Assembly and those of the Court.

In his reply to this question the Secretary-General, in the first place, made no distinction whatsoever between a determination, whether of fact or of law, on the part of the General Assembly, that would be binding and one that would be non-binding in law. I have conceded in earlier portions of our argument that it would be perfectly in order for the General Assembly to make determinations of a non-binding nature as a basis for itself to proceed in terms of its own procedure. In contrast to that would stand a determination which purports to be binding upon non-consenting Members of the United Nations, either provisionally or absolutely; provisionally meaning subject to correction by a court of law on merit, and absolutely being not so subject to correction by a court of law.

As I said, the Secretary-General pointedly avoids indicating for which of these various possible kinds of powers of determination he is contending—non-binding, provisionally binding or absolutely binding.

In the second place, the Secretary-General explicitly acknowledges that, with a view to answering the question, "it is first necessary to examine the provisions of the Charter, with a view to ascertaining whether such a power has been entrusted to the General Assembly" (*ibid.*, p. 490). But having stated this, the Secretary-General then in fact, in his statement, examines only one provision of the Charter. That provision is Article 6, which deals with a totally different situation, namely that of expelling a member from the Organization upon the recommendation of the Security Council. He does not even indicate whether, in his submission, the legal evaluation which the General Assembly is called upon to make for purposes of Article 6 was intended to be provisionally binding or absolutely binding. And he does not indicate what bearing this provision could possibly have on a suggested power of legal evaluation in a totally different situation with reference to a totally different subject-matter than that referred to in Article 6. One should say that the logical indications, in so far as they could be said to appear at all from Article 6, would tend to run against the Secretary-General's contention rather than in favour of it—on the basis that Article 6 is an indication that where powers of making binding determinations are contemplated, they are in fact mentioned and specifically conferred and conditioned in the Charter—conditioned in this instance with a very important prerequisite of a recommendation by the Security Council.

So, Mr. President, the need to find a Charter basis for the suggested power

of making a binding determination, whether of law or of fact or of both, is, in reality, totally evaded by the Secretary-General.

In the result it is not surprising to find that he is evasive too on the question posed by Sir Gerald Fitzmaurice concerning the line of demarcation to be drawn between the powers of the General Assembly and those of the Court. He says that he "does not believe that a categorical answer can be given at this stage of the development of international law which would be applicable to all cases or situations. In his opinion, this line of demarcation has to emerge in practice from the Charter, the Statute of the Court, as well as the respective proceedings and jurisprudence of the General Assembly and of the Court" (*supra*, p. 491). But surely, if a power of making a determination, or any power, in principle, is conferred explicitly by the provisions of the Charter, then it should not be difficult, and should present no problem for anybody, to indicate what are the limits of the power as they emerge from the Charter. And similarly, if a power emerges by necessary implication or necessary intendment from the provisions of the Charter, it must again be possible to indicate with reasonable clarity what the limits of such a power would be, because otherwise it would not be legally or logically permissible to imply such a power at all. That is one of the basic principles of law and of logic dealt with earlier by my learned friend, Mr. Grosskopf, in regard to implication of provisions in an instrument, viz. that if you are not able to indicate the content and the limits of the suggested implied term with reasonable clarity, that is already an indication that it is impossible to say that such a term was so clear to the parties that it went without saying. So, by this evasion, the Secretary-General reaffirms his inability to find a Charter basis for the suggested power.

Moreover, in my respectful submission, he seeks to confuse the issue when he brings into his answer to the question the factor whether in a particular instance there may or may not have been a submission to the jurisdiction of a court (*supra*, pp. 490 and 491); there is a complete confusion between concepts in the way in which he introduces this and takes this as being the indicator whether a decision was to be reviewable or non-reviewable by a court on merit. A moment's reflection would show that this is so, and particularly strongly so in international law. Judicial review on merit can, in a substantive sense, be said to be excluded only in a situation where an organ or a body has been given a power to make a determination which will be final and binding—like that of an arbitral tribunal, for instance, which is intended to be a final and a binding one and not subject, in a substantive sense, to review or correction on merit by a court of law. It is only then that judicial review on merit can be said to be excluded. If the power is merely that of making a legal or a factual determination which is provisionally binding, in other words which is conditional upon its being based on a correct appreciation of the fact and the law, then that determination, in principle, remains subject to judicial correction or review, quite independently of whether the necessary jurisdictional provision has been made in the particular instance. For jurisdictional provision could always be made later by special agreement, or the possibility of judicial review, in the special sense in which it is applicable to advisory proceedings of this Court, may arise exactly in advisory proceedings, where the court afterwards could express itself on the merits of what has been done in the case of the particular determination. So, bringing the aspect of submission to jurisdiction into it does not help, it seeks to confuse the issue.

Finally, in regard to the fourth question by Sir Gerald Fitzmaurice, the Secretary-General emphasizes "the causal nexus between the lack of success of the attempt at having the question decided judicially in contentious pro-

ceedings on the one hand, and the General Assembly making the decision on the other" (*supra*, pp. 491 ff.). Now it will be obvious to the Court that this causal nexus—I say obvious with submission, Mr. President—could be anything but a legal basis, let alone a Charter basis, for the suggested power. This is no way of finding a basis in the Charter, by express provision or necessary intendment, for the power for which he contends. He is referring now to extra-judicial considerations. Surely what he is referring to provides no justification for reading into the Charter a grant of power which the Charter does not contain. Nor was there, in my submission, in any legal or even practical sense, a necessity for the General Assembly to act as it did. On the failure of the contentious proceedings, there was nothing which prevented the General Assembly from—before taking action in the matter—then referring the case to the Court for an advisory opinion, specifically on the question of the General Assembly's powers with reference to alleged violations of the Mandate and with reference to possible steps with a view to revocation or termination of the Mandate. Nothing in that form had been presented to the Court in the *South West Africa* cases, and those would *par excellence* have been fit matters on which the General Assembly could have asked the Court for an advisory opinion before acting.

So the statement on behalf of the Secretary-General has, in our submission, made it perfectly clear that there is a total inability on his part to find a Charter basis for the suggested power on the part of the General Assembly.

He tried, apart from the one I have just mentioned, two further bases outside of the Charter. One of those was the assertion, which he repeated three times, that South Africa has no sovereignty over the Territory of Namibia or South West Africa, that it is in relation to South Africa *res aliena*—as if that were a relevant consideration, if it is correctly put, i.e., assuming that for the purposes of the argument. What flows from it? How is this relevant, Mr. President, with submission? Would that give the General Assembly a power not conferred by the Charter? And yet this is stated with so much emphasis as if it is the key to the whole situation. Let us take an example divorced from the United Nations context. Let us assume that three States, together, in particular circumstances, by force of arms, conquer a territory which has previously been ruled by another State, and in the peace treaty they agree amongst themselves and with the other State that no one of them is going to assume sovereignty over that territory; for the time being sovereignty will remain in suspense. But, by agreement between all of them, that is by international treaty, one, State A, will rule that territory. State A will rule it with a view to its eventual self-determination, when the time comes. So that is the arrangement made in terms of a treaty. And then at a particular stage, States B and C say to A "we do not recognize the validity of your occupation or administration of this territory at all any more". And then State A says "why not" and they say "because you have no sovereignty over it". But he would say "but that is our agreement—I would have no sovereignty but I still have a treaty, a binding treaty relationship with you in terms of which I am administering that territory; so, how could the absence of sovereignty on my part have any bearing on the situation. That treaty was surely entered into with me in my capacity as a sovereign State, and it involves rights and obligations *inter se* between you and me."

So, Mr. President, I do not understand why this repeated insistence comes into the record on the situation that South Africa has no sovereignty over the Territory, as if that solves the whole problem.

The other basis which the Secretary-General tried, outside of the Charter,

was the one to which I referred earlier as a "back-door"—namely his point that the Charter is subject to interpretation by practice from day to day.

Now our submission in law about this matter was given to the Court earlier and argued by my learned friend, Mr. Grosskopf, about the basic principles of law applicable to such a contention. The Court will find that at pages 202-213 *supra*, and I do not want to repeat in the least what Mr. Grosskopf said. Our contention is basically that it is not legally possible for practice to supply a power to an organ of the United Nations where there is no Charter basis at all for such a power. But in any event, if the Secretary-General wishes to rely on the contrary contention, surely he would at least have to go so far as to say that there has been a practice which has hardened into something like a rule of customary international law. Does he suggest anything of the kind in the present instance? In our submission, the answer is a plain "no"—whatever impressions to the contrary he may have created in his first oral presentation. The Court will recall that in his first oral presentation (First Public Sitting) there were certain impressions created of a practice with reference to a long list of examples of resolutions in which he said the General Assembly had acted on behalf of the United Nations (*supra*, pp. 50-52).

But if that created the impression that he was relying on a relevent practice which has hardened into something like a rule of customary international law, he now explicitly disclaims that (*supra*, p. 485).

The Court will recall, just for identification, what that initial contention was. It was that the General Assembly was the competent organ to act in the name of the United Nations in a wide range of matters, especially economic, social and trusteeship matters, non-self-governing territories, administration and finance, and action required under the Charter not coming within the special competence of the Security Council.

We dealt with that contention in our opening statement, in what seemed to us to be the context in which it was advanced. We understood that context as being the power, or the absence of power, on the part of the General Assembly to take decisions that would be binding upon a non-consenting State, and we made that clear in dealing with the contentions in this way (*supra*, pp. 152-153).

The Secretary-General now says we attributed to him "a doctrine of unlimited powers". Mr. President, we did nothing of the kind, with submission. We merely gave examples within his limits of what kind of actions would be possible in this context for the General Assembly if his contention was right; and when I say "within his limits", I mean within the categories indicated by him himself, namely economic, social, and so forth.

So we did not attribute to him a "doctrine of unlimited powers"—we merely tested him in the context which we understood to be the relevant one. Now he says (Eighteenth Public Sitting) that he "must therefore place on record that he has manifestly been misunderstood by South Africa"; and he says that the illustrations which we gave of what it might be possible for the General Assembly to do if his contention were correct "are in fact widely removed from the context of the Secretary-General's statement and bear no relation to the examples of the types of action to which the Secretary-General referred".

Now, Mr. President, I repeat, we understood the context to be that of a power of General Assembly majorities to bind non-consenting minorities. And later, when we dealt with the examples themselves we submitted that those examples could not indeed in this context provide precedents for the Secretary-General's contention (*supra*, p. 463). They do not provide precedents for acting in a binding way against the opposition of non-consenting States.

The Secretary-General now really confirms this last submission which we

made. In other words he admits that this whole long list of precedents which he submitted to the Court do not demonstrate powers of General Assembly majorities to bind non-consenting minorities. So on this crucially relevant issue, the Secretary-General therefore admits that there is no relevant practice or precedent to support his contention. It is of course very useful to have this admission from the Secretary-General on record, even although it did take very incisive questioning and elaborate argument to elicit that admission from him.

But the questions then remain: In the first place, why did the Secretary-General introduce this list of examples into his statement at all? What was his contention based upon them intended to signify? Because this was the only relevant context that arose for purposes of the issues in this case. Was it not, I ask with submission, Mr. President, a dangerously misleading way for the Secretary-General to fulfil his functions of assisting the Court in advisory proceedings by making relevant materials available to it and attempting to assist it "in its evaluation of these materials" (*supra*, p. 478).

So, I submit, there has been a clear demonstration that there is no basis in the Charter, or any legal basis at all, including a basis of precedent or practice, on which the Secretary-General could rely for a power on the part of the General Assembly to bind non-consenting States in its purported revocation of the Mandate in resolution 2145.

Before leaving the subject of the powers of the General Assembly, I may just in passing recall that the United States, in its oral statement, placed reliance only on Article 80 (1) as being a Charter basis for the action taken by the General Assembly. That contention has already been adequately dealt with and refuted by my learned friend, Mr. Grosskopf, in my submission, and I will not refer to it again.

This brings me then to the sphere of the powers of the Security Council, and in that context there is not only the comment of the Secretary-General and of the United States, but there are also two relevant questions by Judge Morozov which still have to be replied to.

In order to link up with the line of dealing with the comment of the Secretary-General in his last statement, I propose, with respect, to deal first with the second question put to us by the honourable Judge Morozov. That question reads as follows:

> "Do the submissions made to the Court by the representative of South Africa, if correctly understood, mean that he does not consider decisions of the Security Council, taken in accordance with Article 24 of the Charter, to be binding on all Members of the United Nations in accordance with Article 25 of the Charter of the United Nations?"

Mr. President, in reply to that question I would emphasize at the outset that the basic contention of the South African Government is that Article 24 *per se* confers no power of decision on the Security Council at all.

We demonstrated this, Mr. President, at some length in our oral statement—the statement by my learned friend, Mr. Viall (*supra*, pp. 242-249)—and part D, of Chapter V, of our written statement. In answering the present question, we would like for the sake of convenience at the same time to deal with the reply of the representative of the Secretary-General in so far as it is relevant to this Question 2. In reply to the first question put to him by the honourable Sir Gerald Fitzmaurice, he stated that in Article 24 there are limitations upon the powers of the Security Council. This, in my submission, is very significant.

He in effect admitted the whole of the interpretation which we place on Article 24, without the ultimate conclusion.

He admits that paragraph 1 of the Article imposes a limitation in referring to the primary responsibility of the Security Council in respect of international peace and security. He admits that that is of the nature of imposing a limitation upon power. He admits that the first sentence of paragraph 2 of the Article does the same in referring to the purposes and principles of the United Nations. He admits that that is limitative too.

So, Mr. President, the question arises how does he in that portion of the Article find any suggestion of a grant of power at all? That is the difficulty which I have and I submit that is the significant feature which emerges from his dealing with this matter in this last statement of his at pages 486 and 487, *supra*.

The last sentence of Article 24 is the only one which refers to powers, and then it refers to powers which are conferred upon the Security Council in another portion of the Charter.

So in our submission, by dealing with the matter in this way the learned representative of the Secretary-General has really confirmed that there could in logic be no grant of power to be found anywhere in Article 24.

The learned representative proceeded to refer further to the opinion which had been given by the Secretary-General in 1947 to the Security Council in the *Trieste* case (*supra*, p. 489). Now in our oral statement, Mr. President, we dealt with the then Secretary-General's opinion in the *Trieste* case, in which he invoked the legislative history of Article 24 in support of his contentions that that Article contained a reserve of powers and that these powers are binding in terms of Article 25.

Our arguments on this matter are set out at pages 243 to 246 and at pages 258 to 260, *supra*. Now what reaction do we find to these arguments on the part of the representative of the Secretary-General? He simply says he finds them lacking in persuasion and he does not deal with them at all any further. But, Mr. President, seeing that he has again brought up this question of the legislative history of Article 24, and in the light of the question put by Judge Morozov in regard to Article 24, we have gone further into the legislative history of that Article and we have found certain additional material which we submit to be very relevant and to confirm our contentions in regard to the Article. It is new material, but even so I do not propose to deal with it very fully by way of quotation. I would rather give the Court exact references to the records and then a short indication of what we submit to be the salient features.

We refer to the part of the history after consideration in Committee III/1 of what eventually became Article 24. We refer to the legislative history in the Co-ordination Committee. At the sixth meeting of the Co-ordination Committee it had before it a text as adopted by Committee III/1. That text is to be found at pages 36 and 37 of Volume 18 of the UNCIO documents. The third paragraph of that draft Article read as follows: "For the purpose of discharging these duties the Security Council shall have the specific powers set out in Chapters VI, VII, and VIII."

After a first reading of the draft in this Co-ordination Committee, it was decided, amongst other things, to ask the Technical Committee to consider a possible addition of the words "and elsewhere in the Charter". In other words, then it would read "specific powers set out in Chapters VI, VII and VIII and elsewhere in the Charter". That one finds in the same record, Volume 17, at page 26.

At the 11th meeting of the Co-ordination Committee it considered the text

of Article 24 as tentatively approved by it at its sixth meeting and as it had been revised in the meantime by the Advisory Committee of Jurists. As a result of these processes, the phrase "and elsewhere in the Charter" had been added at the end of paragraph 3 of the Article. That we find in the same source, Volume 18, page 197.

And, finally, when the committee considered the Article at its 25th meeting the phrase still featured in the text as it had meanwhile been revised by the Secretariat of the Conference (*ibid.*, p. 198). In this context the discussions at the 11th and the 25th meetings of the Council are significant. They are to be found in Volume 17, pages 61 to 62 and 171 to 172.

It was apparent from those discussions that the phrase "and elsewhere in the Charter" was introduced in order to include a reference in Article 24 to powers of the Council in connection with the maintenance of peace and security other than such powers as specifically provided for in Chapters VI, VII and VIII. There was in the discussion some difference of opinion whether the elective and the suspensive powers of the Council fell within the category of powers for the maintenance of peace and security. There was an argument about that aspect. Moreover, some Members felt that inclusion of the phrase "and elsewhere in the Charter" would imply an enlargement of the Council's power, whereas, they said, the intent of the Committee was to restrict the Council's power. In response to this, the representative of Australia pointed out—and this is significant and therefore I want to quote it—"The reference in the Article to other powers was only a cross-reference; it neither conferred nor limited the powers of the Council". In his opinion, it had no place in the Charter but was simply a useful memorandum for reference purposes—that is in Volume 17, page 172. In our submission, that is exactly what the wording of the Article means and this is what was emphasized by the representative of Australia.

In the event, the Committee decided that the phrase "elsewhere in the Charter" should be omitted.

What is a very significant feature of these discussions, Mr. President, in our submission, is that only the last sentence of paragraph 2 was referred to as possibly having a bearing on the question of grant of powers, and then only in this context which I have mentioned. The previous portions of the Article were nowhere referred to as being concerned at all with any possible grant of power. And even in regard to the last sentence of paragraph 2 it was raised only in this context: that some had suggested it might have a bearing on enlarging or diminishing powers, whereas the explanation by the representative of Australia that it was merely a cross-reference to grants in other parts of the Chapter appears to have prevailed—although that is not absolutely clear from the summary record. But, as I have said, that is, in our submission, an obviously correct interpretation of what the words themselves say. And so here too the result is that having looked very closely at what one might call the legislative history of the Article, that confirms exactly what our contention is about, its plain and ordinary meaning.

It is not without significance, in our submission, that the distinguished representative of the United States in his oral statement did not attempt to rely on Article 24 as a source of the Council's power in the present case. He sees that source in Chapter VI of the Charter (p. 502, *supra*), and as we have pointed out, that Chapter confers no power of binding decision.

So, Mr. President, in our submission, the legislative history of Article 24 supports our contention that Article 24 *per se* confers no powers and more especially no powers of decision on the Security Council. And that being so the question of whether such decisions of the Council would be binding in

terms of Article 25 falls away. But even making the assumption against ourselves, as we did in our statement (*supra*, pp. 259-260), making the assumption that the Council is empowered to take decisions under Article 24, it is our submission, in further reply to the honourable Judge Morozov's question, that such decisions would not be binding on Members of the United Nations in accordance with Article 25 of the Charter. We set out our reasons for this contention at some length in our oral statement (*supra*, pp. 259-261), where we also pointed out that contentions to the contrary by various participants in these proceedings remain wholly unsubstantiated and amounted to bare assertion.

So there would seem to be nothing further to add with respect to the arguments which we have already adduced in this connection. However, and assuming for the purposes of the question a power on the part of the Council to take decisions in terms of Article 24, I would again refer to what the distinguished representative of the Secretary-General had to say in this connection in reply to the third question put to him by Sir Gerald Fitzmaurice. After stating that the decision of the Council under Article 24 "comes within the terms of Article 25", and after quoting in support the opinion of the then Secretary-General in the *Trieste* case, without even attempting to meet our arguments in this connection, he agreed with leading commentators on the Charter that the term "decisions" in Article 25 was ambiguous. Then he says he founds his case on "an analysis of the various articles of the Charter", but in fact we find that he attempts no such analysis; and he says further that he founds it on "the San Francisco records" and "the practice of the Security Council" and again he does not advert to our arguments in this connection. Then he states that the binding character of "decisions" in accordance with Article 25 is not confined to coercive measures under Articles 41 and 42. This again, in our submission, is bare assertion: he does not try to justify that with reference to the provisions of the Charter. And finally, again ignoring our arguments, he concludes that "in the special circumstances of the Namibia case the Council has the authority to adopt decisions which are, in effect, binding, and has done so". Again, Mr. President, he has not tried to explain what these special circumstances of the Namibia case were and how they could succeed in providing the Council with a power on which the provisions of the Charter themselves are lacking.

So the Secretary-General in effect *raises* the problem of what resolutions of the Council are decisions within the meaning of Article 25, but he does not attempt to *meet* that problem at all except by assertion; and as I have said, he takes refuge in what he calls "the special circumstances of the Namibia case".

Our answer to the second question put by the honourable Judge Morozov is therefore that, in the submission of the Government of South Africa, the Security Council cannot take decisions in terms of Article 24, but that even if it could, such decisions would not be binding in accordance with Article 25 of the Charter of the United Nations.

At this stage it may be convenient also to reply to the first question of Judge Morozov: it is a fairly brief reply which I could give straight away. This question reads as follows:

> "Has the Government of South Africa at any time asked the Security Council of the United Nations to permit its representative to participate in the discussions of the Security Council on the question of Namibia, and particularly to participate in the discussions of the Security Council leading to the adoption of resolution 276 (1970) and resolution 284 (1970)? If so, what was the result of such request?

> If not, can the South African representative be so kind as to explain why it did not do so, taking into account the fact that the Agenda for all meetings of the Security Council are distributed in advance to all Permanent Representatives in New York?"

Mr. President, our answer to the first and second part of this question is that the Government of South Africa has not at any time asked the Council to permit it to participate in the relevant discussions of the Security Council.

In regard to the third part of the question, concerning reasons, the reason why it did not do so was because in terms of the Charter it was not for South Africa to request an invitation, but for the Security Council to issue one. And, I may add Mr. President, merely as a practical matter, that the experience of the South African Government in the past has not been such as to induce it to request invitations to participate in activities of United Nations bodies where it does not receive an invitation to which it is entitled. Upon several occasions the South African Government has actually been denied its undoubted rights under the Charter to participate in those activities; it has had statements of its representatives in committees of the General Assembly expunged from the record; it has been illegally expelled from certain of the specialized agencies of the United Nations; representatives of certain States have walked out, or broken into a chant, when South African representatives began to speak, and so forth. But be that as it may, the fact remains, in our submission, that Article 32 imposed upon the Council a mandatory duty to issue an invitation to South Africa to participate in the discussions in question, whether South Africa requested such an invitation or not.

The mandatory character of the Article has not been contested in the proceedings, in fact it was explicitly conceded by the Secretary-General (*supra*, p. 41). And that is really the answer to the whole question—if, of course, it be accepted that the present situation constitutes a dispute, which we have already submitted that it does.

Full argument concerning Article 32 and its application was presented in Part F of Chapter III of our written statement and again in our oral statement of 22 February (*supra*, pp. 219 ff.). Our oral statement in that record stands uncontradicted and, indeed, was not even referred to by the representative of the Secretary-General in his second oral statement or by the representative of the United States in his oral statement. In our submission, these arguments show overwhelmingly that the Council had no choice in the matter—that it was bound in the circumstances to issue an invitation to South Africa, and I therefore, do no more here than repeat what Judge Jiménez de Aréchaga wrote at page 58 of his work *Voting and the Handling of Disputes in the Security Council*, published in 1950:

> "... an invitation under Article 32 need not be requested; it must be issued by the Council even if not requested by the State party to the dispute".

That is the conclusion of our answer to that question, Mr. President.

The Court adjourned from 11.20 a.m. to 11.50 a.m.

Mr. President, it now remains for us to deal with the question put by Judge Jiménez de Aréchaga on 4 March 1971 (*supra*, pp. 424-425) concerning the applicability or otherwise of paragraphs *(a)* to *(d)* of Article 73 of the Charter of the United Nations to the Territory and people of Namibia (South West Africa).

This question forms part of a wider subject of the norms, principles and rules according to which South Africa's conduct in South West Africa falls to be considered, and on which I indicated yesterday that we should like to make a brief statement.

First, I should like to reply to the questions put by Judge Jiménez de Aréchaga. The question, to which I have referred the Court, commences at page 424, *supra*, where there is an introductory portion which, to save time, I do not propose to read. The introduction refers to questions put by Judge Jessup in the *South West Africa* cases, to the reply by the then Applicants and to the reply by the Government of South Africa, which in effect declined to answer the question. The question put by the learned Judge is:

> "Since in advisory procedure the Court is not subject to the same limitations of a jurisdictional nature, I wish to ask the representatives of the Government of South Africa if they would be prepared to provide information as to whether, in the opinion of the Government of South Africa, paragraphs *(a)* to *(d)* of Article 73 of the Charter of the United Nations apply, or have applied at any time, since the entry into force of the Charter, to the territory and people of Namibia (South West Africa)?" (*Supra*, p. 425.)

The question whether Article 73 technically, and as a matter of law, applied to South West Africa has been a controversial one for a long time, as indeed has the question whether Article 73 was intended to apply to mandated territories at all, as distinct from colonial territories properly so-called.

The attitude of the South African Government on the matter was, at the time, that technically and as a matter of law Article 73 did not apply to the case of South West Africa. The importance of the matter from a practical point of view is much like that concerning the question whether the Mandate, as a matter of law, lapsed or did not lapse on the dissolution of the League of Nations; because when it comes to the practical, substantive aspect of the matter, the substantive criteria prescribed in paragraphs *(a)* to *(d)* of Article 73, the technical legal position makes no difference at all to the attitude of the South African Government.

Let me put it this way, from a practical point of view it never had any difficulty at all with what is prescribed in paragraphs *(a)* to *(d)*. Its practical difficulty in the United Nations context arose from sub-paragraph *(e)*, from the part of giving regular information. The Court will recall that my learned friend, Mr. Grosskopf, dealt with the history of the offer by the South African Government, in the very early stages of the United Nations, which was once complied with from its side, to submit reports containing the type of information contemplated in that paragraph, although it did so with a reservation of its legal position and without admitting any obligation to do so, and, at the same time, stipulating that the matter was to be treated within the context of what was contemplated in Article 73 and not from a point of view as if South West Africa was actually under the trusteeship system.

The history of how those stipulations were ignored in regard to the one report which was indeed furnished by South Africa on that basis, and how the South African Government then decided to submit no further reports, was also dealt with.

That was a major, practical difficulty with regard to its attitude concerning Article 73, militating against a continued offer to act under that Article in its relationship with the United Nations despite the absence, in its conception, of a legal obligation to do so.

What further strengthened that difficulty was what could be seen to happen in the case of various colonial powers and the treatment, if I may call it that, which they received at the hands of various committees which were appointed within the United Nations context to deal with reports under Article 73 *(e)*— where gradually the treatment of those reports developed from what was originally contemplated in the Article to something which really amounted to supervision, as if those territories were also under trusteeship. We dealt with the whole history in that regard rather fully in Volume IX of the *Pleadings, Oral Arguments, Documents, South West Africa* cases, 1966, pages 470 to 476.

I am not aware of any recent pronouncement of the South African Government specifically on this particular question; but its attitude, as we conceive it, is that, though it is technically and as a matter of law not bound to the provisions of Article 73, those provisions prescribe the very criteria which it is, as a matter of policy, applying in the pursuit of the sacred trust in regard to South West Africa, whether as a matter of law or as a matter of morals.

The legislative history of Article 73 was referred to in nine points which were formulated for the consideration of the parties by the President of the Court in the *South West Africa* cases, and the Court will find that in Volume VIII of the *Pleadings, Oral Arguments*, etc., at pages 38-40. The wording of the Article, read in conjunction with the legislative history, made it clear that the general purpose was to extend the main principles of trusteeship or guardianship to colonial territories generally. However, it did not automatically follow that they were also intended to apply to mandated territories. The intention may well have been to limit Article 73 to colonial territories and to provide for former mandated territories only within the context of the trusteeship system.

As a matter of textual interpretation alone, there was much to be said for a contention to that effect; and at the San Francisco Conference there also existed considerable support for the attitude that territories then held under mandates did not fall within the terms of Article 73. In that respect an argument was addressed to this Court by the distinguished representative of South Africa, now Chief Justice Steyn (1950 Advisory Proceedings, *Pleadings, Oral Arguments and Documents*, pp. 304-312).

Mr. President, the Article itself, furthermore, did not provide that any organ of the United Nations would have the competence to decide which territories would fall within its ambit, i.e., which were to be regarded as non-self-governing territories for the purposes of the application of the Article; and initially the General Assembly left it to Members concerned to determine which territories fell within the category of non-self-governing territories. Not only did member States initially in fact decide for themselves in respect of which territories information was to be transmitted, but they also decided when it was no longer deemed necessary to transmit such information, in other words, when they would no longer consider those territories to be non-self-governing.

To mention only a few examples, the United States ceased to transmit information on the Panama Canal zone, the United Kingdom ceased to transmit information on Malta, and France ceased to transmit information on a number of territories after 1947, including French Guyana, Guadeloupe, Martinique, Réunion, New Caledonia, French Oceania and others (UN doc. A/915, pp. 7-8).

By 1960 the situation had changed completely. When the General Assembly adopted resolution 1514 (XV) the principles contained in this resolution were in fact applied to a number of Portuguese territories, despite Portugal's protest. In the very next resolution, 1542 (XV), the General Assembly declared that:

"... an obligation exists on the part of the government of Portugal to transmit information under Chapter XI of the Charter concerning these territories ...".

So that is part of what developed, as I have said, into something really amounting to supervision, as if these territories were under trusteeship.

In regard to the present proceedings, we submit again, with the greatest respect, that the question of the technical application or otherwise of Article 73 as a matter of law is not relevant. The General Assembly could not have revoked, and did not purport to revoke, the Mandate because of the applicability of this Article; and if we may be wrong in thinking that,—if the criteria set in Article 73 were indeed part of those which the General Assembly may have had in mind in talking about a violation of obligations on the part of South Africa, then we do not balk at South Africa's record and policies being put to the test with reference to the criteria stated in Article 73. South Africa has always declared its willingness to pursue, whether as a legal duty or as a moral duty, the obligation to promote to the utmost the well-being of the inhabitants of South West Africa. Consequently, whether Article 73 is or is not legally applicable to South West Africa, South Africa has been and is willing to comply with the substantive criteria in its provisions in regard to the administration of the Territory, and particularly in regard to paragraphs *(a)* to *(d)* of Article 73, as well as the sacred trust concept set out in the introductory portion of the Article. The objectives formulated in them are part of the objectives pursued by South Africa in its policy of continuing the administration of the Territory in the spirit of the Mandate. As I said, if the factual field is to be properly investigated in this case, South Africa agrees to the testing of its record of fact, amongst others, against these criteria.

This brings me, Mr. President, to the wider field of applicable norms and principles, against which South Africa's record of fact requires to be adjudged. I indicated yesterday why we submit it to be relevant and desirable to present, at this stage, a brief statement, as opposed to a fully reasoned argument, about this matter to the Court. Without making such a statement now, even if it is a fairly broad statement, many allegations and assertions which are presently on the record from other participants would stand unanswered. Moreover, we submit that such a statement is highly desirable from the Court's own point of view, inasmuch as it would enable the Court, at a later stage, to decide to what extent it might require further assistance, further investigation into the field of fact and further investigation into this field of norms, principles and rules which come into operation in that respect.

In particular, I want to emphasize that one should, with respect, guard against considering the record which is now before the Court as being complete, either with reference to this subject of norms, standards and principles, or the subject of the facts themselves.

Now, as regards the field of norms and principles, it concerns chiefly concepts of human rights and dignities in general—human rights, dignities and freedoms—and then, in particular, in that broad field, concepts of non-discrimination and of self-determination. But before dealing in turn with each one of these concepts, I propose to devote some brief attention to the general question of the attainment of legal force by norms and principles.

When we speak of norms and principles in this field they may be of a very varied content and nature. They may exist in a wholly idealistic sense only, as a philosophical concept or as a politically desirable concept, and as such there may be much support for them by various States in the sense of declaring those

to be desirable objectives to pursue. But, having said all that, there would still be nothing of a legal right or a legal obligation in the situation. On the other hand, such concepts, philosophical or politically desirable, or whatever their origin may be, may at a particular point of time be wholly or partly translated into legal rights and obligations. Those could, broadly speaking, again be of a twofold nature. They could be of a nature of prescribing action aimed at the furtherance or the promotion of the objectives—in other words, States could bind themselves in law to do certain things with a view to the promotion of the particular objective—or they could be of the nature of defining the principle itself into some fiat of behaviour.

One could give examples of both kinds. Of the first kind I have mentioned—action aimed at furtherance or promotion of an objective—one could cite the example of Article 2 of the Mandate for South West Africa, "the mandatory shall promote to the utmost the moral and material well-being and the social progress of the inhabitants of the Territory". That is an obligation aimed at furtherance or promotion of an objective, the objective being the sacred trust of civilization and what it was described as containing in those relevant instruments.

Then, another example that may be mentioned is that of Article 56 of the Charter of the United Nations in which States bind themselves to further the objectives set out in Article 55 of the Charter. I will refer later to the contents of those Articles and I do not propose to read them now.

Examples of the second kind which I have mentioned—the transforming of a principle, or philosophy, or policy into a fiat of behaviour in a legal sense—would be prohibitions of genocide, prohibitions of slavery, and so forth.

What is important, Mr. President, in our submission, is that there are for all practical purposes only two ways in which norms and principles may, wholly or partly in the sense which I have just described, be translated into legal rights and obligations. They are, firstly, treaty and, secondly, custom, where the test, of course, is that of performance and compliance. A norm or a principle, even one which has received fairly general recognition as an objective or an ideal, if it has not been embodied as a rule in a treaty naturally does not form part of treaty law. If there is no consistent, actual compliance with it in the practice of States, it does not become a rule of customary international law. And the same would apply, of course, to suggested rules of promotion or implementation of the ideal.

Those are the two primary sources of obligation in international law; suggested norms and principles would, in a legal context, have to comply with the one or the other, and they would be part of international law only to the extent that they do comply.

An aspect which follows, in an important sense, from what I have just stated, is that it is necessary to distinguish between the norm or the principle, on the one hand, and methods or rules of implementation, on the other hand. A norm or a principle may very often in its abstract form be such that it can be universally subscribed to. But then, when it comes to methods of implementation, the difficulty about suggested universality begins to arise. It may then, in respect of the methods, become necessary to distinguish very carefully between situations in various parts of the world and to decide whether a particular method aimed at achieving a common ideal is appropriate here and, in addition, appropriate in totally different practical circumstances in another part of the world.

That is so exactly because of the fact that an infinite variety of circumstances may be encountered all over the world. So it follows that when we find in a

particular declaration or other document an embodiment of sentiments on, shall I say, a human rights subject, and where that document does not confine itself to statement of the principle or the ideal but enters into the field of methods of implementation with a view to the standardization or general prescription of such methods, then States can, and they do very easily, find themselves in the position that they cannot subscribe to the document as such, while they do subscribe to the principle itself. This has, in fact, been one of South Africa's major difficulties with attitudes of United Nations majorities in the field under discussion.

The difficulty has not affected South Africa alone. It has manifested itself in many other ways. One often would find that a particular non-binding declaration may have tremendous support to start off with, when it takes on the form of a non-binding declaration and nothing else. It may be subscribed to at that stage by a very large number of States. When it comes, however, to the next stage of embodying the contents, or even part of the contents, of the declaration in a document that would be a binding convention, then one finds, in the first place, a sharp diminution in the number of signatures to the draft convention as compared to the number of votes for the original declaration, or even to the votes for the draft convention. Eventually, when it comes to ratifications of the convention, the actual number would be much more sharply reduced than even the signatures. This, Mr. President, is apart from the enormous length of time which it has taken to get any conventions in operation at all in the field of human rights—despite the enormous amount of effort that has gone into it—conventions to whatever limited an extent in the geographical sense, in the sense of the number of participating States, or in the sense of the subject-matters covered by those conventions.

Another manifestation of this same problem has been this, that when the test of performance or compliance in the actual practice of States has been applied to a suggested norm or principle which has been fairly generally accepted as an ideal, though not embodied in a convention, one finds that the result is very often substantially different from declarations of support that have been given in international bodies.

So those are aspects of the matter which are very relevant, we submit, in the field with which we are dealing in its application to South African policy, and in particular to South West Africa.

There is another important aspect to all of this. There are portions of the presentations of the Secretary-General and of other participants and participating States in these proceedings which create the impression that they ascribe to so-called principles and norms concerning human rights and freedoms a general application in international law—an application, as they say, *erga omnes*, binding against all concerned. That, the suggestion seems to be, is an application which arises independently of a treaty basis or of general acceptance as rules of law.

In support, reference is often made to a well-known passage in the Judgment in the *Barcelona Traction* case. It is cited, for instance, by the Secretary-General in paragraph 9 of his written statement. In our submission, that passage does not support this kind of approach. The Court spoke specifically in that statement of principles and rules which are derived from normally accepted sources of obligation in international law, i.e., from general acceptance in the body of international law, or from instruments of a universal or quasi-universal character.

Nevertheless, one finds these attempts at ascribing an independent legal force to such norms and principles, so as even to over-ride the Charter. I sub-

mit, Mr. President, on analysis those will be found to be of a subtly revolutionary nature. They are really seeking at inverting the order of precedence of the three legal sources which Article 38 of the Statute of this Court prescribed, for the Court to apply as sources of international law. Those three sources are very well known to the Court, but for the purposes of this demonstration I would like to refer to the wording of the Statute and to the order of precedence of the three:

> "*(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> *(b) international custom, as evidence of a general practice accepted as law;*
> *(c)* the general principles of law recognized by civilized nations."

There is now an attempt, Mr. President, in effect to take this third one and to place it first, but not without some prior mutilation. This third one—the general principles of law recognized by civilized nations—is first to be divested of its auxiliary and supplementary nature and to be converted into a primary source of obligation. The words "of law" really become redundant, because it does not really matter whether these general principles are philosophical or political or legal—they are to have pre-eminence even in the legal field. And the element of "recognized by civilized nations" is really given very little if any weight. This is part of the tendency of that type of argument, to which I have thought it very relevant to draw the Court's attention.

South Africa's general attitude about these matters is not difficult to state—as a general attitude or approach. Firstly, the South African Government for the most part has no problem with general ideals and objectives in the field of human rights and freedom.

Secondly, the South African Government does not believe in rigid, standardized rules pertaining to methods of promotion and implementation, as if they were to be valid all over the globe.

Thirdly, South Africa has often had to abstain from supporting instruments drawn up in international bodies because of the incorporation of such methods which it considered to be inappropriate to circumstances in its part of the world, despite the fact that it does support the ideals and the objectives to which those documents are directed.

Having done this, South Africa was repeatedly accused of repudiation and even of violation of the general principles and ideals themselves—accusations which, of course, South Africa has rejected and still rejects. And then, because specific formulations in instruments have sought to be invoked against South Africa in support of allegations of violation of legal obligations, South Africa has had to insist in its debates with the outside world, and in particular with international organizations about this matter, on the application of established criteria of international law in order to ascertain whether those formulations which are invoked against South Africa indeed contained legal obligations binding upon South Africa. And that is very much the approach which applies in the field now for consideration before the Court.

Let us now proceed from this general approach to the first one of the topics named specifically—namely, the general field of human rights and freedoms. The Court will recall that the Charter of the United Nations contains relevant provisions concerning human rights, but they are broadly speaking what one might call of skeleton nature only. In Article 1 (3) it is stated that one of the purposes of the Organization is to promote and to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex,

language or religion. The Organization would be the centre for harmonizing the actions of nations in the attainment of these ends—that is provided for in Article 1 (4).

Then there is Article 55 *(c)* in which it is stated that the United Nations, in its creation of conditions of stability and well-being, which are necessary for the peaceful and friendly relations among nations, shall promote "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Under Article 56, "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". It is clear, in passing, that according to the Charter, the Organization was contemplated as a centre for harmonizing the actions of nations for the promotion of human rights. It could hardly have been foreseen that the United Nations would develop into a field of strife and dispute in this respect, but that is what unfortunately happened to a large extent.

On 1 December 1948 the General Assembly adopted the Universal Declaration of Human Rights, with a very large majority vote considering its membership at the time—48 votes in support. This Declaration fell within the purview of the recommendatory powers of the General Assembly, and it did not pretend to be more than that which its name implied—namely a recommendation, which according to the views of the majority of the Members of the General Assembly, should have general application.

It contained no provisions for its implementation and enforcement, and it in no way tried to lay down binding directives; but exactly for these reasons, the whole human rights movement, as I may call it, was directed as from that time towards the achievement of binding conventions in this field. And in the 1965 oral proceedings we gave illustrations of various committees that particularly made that their task. At one stage one of the committees was presided over, I recall, by the distinguished representative of the Soviet Union, Mr. Malik, and from time to time these committees expressed disappointment at the slow rate of progress, emphasizing some of the general difficulties which I have mentioned.

As late as 16 December 1966, after effort lasting some 18 years since 1948, there were presented to the General Assembly, and accepted by the General Assembly by a large majority vote, two draft covenants and an optional protocol in this field—the International Covenant on Economic, Social and Cultural Rights and then, secondly, the International Covenant on Civil and Political Rights, to which there was attached an optional protocol dealing with the rights of individual petition.

These draft instruments took the matters dealt with in the Universal Declaration a step further: in some cases there were refinements and elaboration, in some cases modification of the nature of compromise possibly, and they were drafted in the form of multilateral conventions. Their approval by the General Assembly in resolution 2200 (XXI) of 16 December 1966 meant, of course, nothing more than they were accepted as non-binding recommendations by the General Assembly. But there was a further aspect attached to it—they were accepted as potential conventions and States were invited to sign, to ratify or to accede to these convenants. They were open for such signature, ratification of accession as from the date of adoption—16 December 1966—and it was provided that in the case of the covenants they would enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession—only 35 required, when the United Nations membership was well over 100 by that

time—and, in the case of the protocol, after the tenth instrument of ratification or accession.

Now, according to a United Nations publication, one of the Economic and Social Committee (E/C.N. 4/907, Revised 7, of 23 December 1970), the position is given, as in December 1970—that is very close to today's date—in respect of these signatures and ratifications.

Now, in the case of the Covenant on Economic, Social and Cultural Rights, the vote in the General Assembly when it was still in its non-binding form was 106 in favour; by December 1970, 39 States had signed and only 9 had ratified. In the case of the second one, the Covenant on Civil and Political Rights, 107 had voted in favour in the General Assembly; by the end of 1970, 38 States had signed and only 9 had ratified. The States in the two cases were exactly the same with the difference that Malta signed the first covenant but not the second—that is why there is the difference between the 39 and the 38.

Then, in the case of the optional protocol, in the General Assembly 66 had voted in favour, 2 against, with 39 abstentions; by the date under discussion—December of last year—there were 13 signatures from States and only 4 ratifications. Accordingly, it is clear that as yet not one of these covenants has come into force.

The nature of the reasons why this phenomenon manifests itself has been indicated—I have tried to indicate it broadly before. Some interesting further light on those reasons was thrown by discussion at a Seminar on Human Rights in Developing Countries which was held at Dakar in Senegal on 8 to 22 February 1966, a seminar organized by the United Nations. Various of the speakers, particularly dealing with situations on the continent of Africa, made the point that the Universal Declaration was non-binding in its legal effect. One example of that is at page 22 of the document, the official reference to which is ST/TAO/HR/25. What is of more importance is what various speakers had to say about the substance of the Universal Declaration. Its substance was challenged in various important respects. Speakers wondered whether the Declaration corresponded with the present state of society in the Third World.

After raising doubts about this, one speaker expressed the view that the economic and political requirements of Africa could not be met within the framework of the Declaration. Another participant pointed out that as the Universal Declaration dated from 1948 it did not therefore take into account the problems raised by the independence of the African countries. Furthermore, it had been drawn up on the basis of the ideas and needs of States whose economic and social structures were radically different from those of the African countries.

Yet another participant proposed that in view of the obstacles to development which might arise from the principles of the Universal Declaration relating to properties, the seminar should call for a revision of the 1948 Declaration in order to adapt it to African realities. These views will be found at pages 21 and 22 of the record to which I have just referred.

These, Mr. President, were not representatives of the Government of South Africa speaking—they were representatives of independent African States pointing to the difficulties which one has about applying preconceived ideas, not only of ideals but also of methods of implementation, in circumstances for which they were not devised, and particularly those which apply on the Continent of Africa.

So, Mr. President, South Africa's attitude is that in this field of human rights, it is not so much out of step as it is made out to be by its accusers, provided

that its attitude is correctly understood: and its attitude is one concerned mainly with the question of method and not with the question of ideal.

May I refer the Court to the wording of other aspects of Article 55 of the Charter, just with a view to demonstrating this point. In conjunction with paragraph *(c)* which I have already read to the Court, one finds certain other objectives which it is said that the United Nations should promote. They are raised in the context of the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples. It is then undertaken that the United Nations shall promote:

> "*(a)* higher standards of living, full employment, and conditions of economic and social progress and development."

These are given at least an equal priority with the general principle of the observance of human rights and freedoms. It is stated in the first place in this context and it is given that emphasis.

Secondly,

> "*(b)* solutions of international economic, social, health and related problems; and international cultural and educational co-operation."

Now the South African Government says, and my learned friend, Mr. Botha will deal with this, that in these very matters there is the record of the South African Government in South West Africa. Those are parts of the field of the practical endeavour in the furtherance of human rights and freedoms in the context in which it was contemplated from the start in the Charter. But when it does come to a stage where the South African Government, shall we say, in consultation and in co-operation with the Ovambo people of South West Africa arrange for organs of self-government for that people and they then hear from United Nations sources: "No, you cannot do that because that is in conflict with rules which we have laid down about territorial integrity", then it no longer makes sense to the South African Government, with respect and with submission.

That brings me to the second of the three subjects to which I referred at the outset, namely principles and norms of non-discrimination. Now, Mr. President, when it is said that South Africa is violating legal obligations by practising policies of racial discrimination, what is exactly meant by that? What principle or rule of law binding on South Africa is said to be violated, and what is meant by racial discrimination? The two questions, of course, have a direct interrelationship. When you have the content of the concept of racial discrimination you usually also have the content of the rule or the norm for which the accuser is contending; and that presents problems, particularly to the accuser. We in the South African circumstances know this so well, we have been confronted with it over such a long time that we have had to think it out quite fundamentally, and I think, with respect and with submission, that the results can be put fairly simply to the Court. It is simply a matter of choosing between two things: one is that of saying that South Africa is discriminating in a pejorative sense, in the sense of preferring one race or ethnic group above the other, which is the counterpart or another way of saying that it is oppressing or suppressing one for the benefit of the other. That is one form in which the accusation could be made and is, in fact, made.

The other form of accusation is this: that South Africa is distinguishing between people in its rules and practices and official conduct; it is distinguishing between people because of their ethnic relationships, because of their mem-

bership of a particular racial or ethnic group, and it prescribes distinctive, differential rights and obligations on that criterion for various people. And it is then said that that in itself, whether it is done for good or for bad, is in conflict with some norm or principle or obligation which is legally binding upon South Africa in this modern world. Those are basically the two alternatives. In logic and with reference to basic legal principles, there could really be none other.

Let us discuss first the implications of these two. Take the first one which I have mentioned—that South Africa is discriminating in the pejorative sense of suppressing or repressing one for the benefit of another—that that is what is meant by racial discrimination. It must be conceded immediately that if South Africa were to be doing that in fact, then it would be acting in violation of the sacred trust which it undertook in the Mandate. It would be acting in violation of the obligation to promote to the utmost the material and moral well-being of the population, and it would be acting in conflict with the substantive criteria prescribed in Article 73, paragraphs *(a)* to *(d)*, of the Charter.

In both cases therefore, if one accepts, as I do for purposes of this argument, that those obligations be seen not only as moral, but as legal, then it would mean a violation of law by South Africa if it did act in this way. But, Mr. President, the difficulty from the point of view of the accuser is this, that if that is his accusation he must prove it with reference to fact. He must relate his accusation to a total view of the policy and the conduct of the South African Government in this field of inter-group relations, and he must then draw from that the inference that this is the object and effect of the policy.

In the logic of this particular situation—we have dealt with it frequently before—not so much in terms of general principles of law or general possibilities pertaining to similar situations, but because of the particular situation under the Mandate for South West Africa—the accusation would have to be one of deliberate violation. I say it is so under this particular situation, because it is one whereby South Africa as a government is given a governmental function, it is given the power in the Mandate to legislate for and to administer South West Africa. Those powers are, in accordance with the Mandate, to be directed at the sacred trust objective, the objective of promoting well-being and progress to the utmost. If they are directed to that objective then they are in compliance with the Mandate; if they are directed to some other objective then they are not. The South African Government could hardly direct its powers at some other objective without knowing that it is doing that.

What is more, basically, a function to legislate and to administer is a discretionary function, it is a function of government; it carries within it discretion. In this instance it carries within it the discretion to determine the method by which the sacred trust objective is to be pursued. It is qualified in the League context only with reference to the persuasive effect of the supervisory machinery; but in the legal context it is qualified by the ultimate purpose which it must serve. It is a violation of obligation if it is not directed at the serving of that purpose, but if it is, and if one merely differs on matters of detail, on matters of judgment, on matters of whether this particular one is reasonable or unreasonable, that is not a basis upon which a court of law could adjudicate and could declare the validity or invalidity of the actions of a government. That has been recognized in jurisprudence all over the world and in this particular context of the mandates system too.

There is logically and in law no basis upon which the Court could apply a test of say, reasonableness in this context. Reasonableness, if it is to be applied by a court of law, must relate to a prescribed criterion, e.g., the old criterion

of Roman law of the *bonus paterfamilias*, i.e., the test whether, in a given situation relating to a tort or a delict, somebody acted as the reasonable, prudent man would have acted in the circumstances. It is the setting of a standard which is supplied by this test of the reasonable man—a standard in law. When it is said that one must look at the acts of a government in a particular field to see whether they are reasonable or unreasonable, then talking about reasonable or unreasonable does not refer to a standard in law, it means a standard in political conception, in political, moral or similar non-legal conception, and that makes the difference.

One could look at other alternatives. Could one test it with reference to the effects of the policy or of the actions of a particular government? Are those effects and results such that one can say it is promoting to the utmost? But there again a court of law, if it is to apply a judicial test to that question, finds itself in the difficulty that no criterion is prescribed in any legal instrument or in any legal principle. There is nothing which says that in the year 1950 or 1960 or 1966 the stage of progress ought to have been here and not there. Again, to make a total judgment in that field, whether progress should have been further advanced than it is at a particular stage, involves essentially a political and a non-legal judgment which it is not appropriate for a court of law to make in the absence of some instrument or other basis which firmly prescribes a legal criterion which it can apply.

So, by a process of basic analysis, logic and elimination, one finds there are only these two basic alternatives. The one is to accuse South Africa of a deliberate violation of the sacred trust by oppressing one for the benefit of the other: that of course has been the general line at the United Nations. And the alternative is to say, there is now a rule of international law binding upon South Africa which makes it unnecessary for me to show the pejorative intent or the pejorative effect of its policy, but I can take merely its admitted conduct that it is distinguishing on an ethnic basis and I say that, *per se*, is a violation of this norm of international law. The Court will know that the Applicants in the *South West Africa* contentious cases struggled with these two alternatives. They began with number one, with the accusation of deliberate oppression, and they ran into difficulty because of difficulties of proof. After South Africa had set out its side of the case fully on the pleadings, the Applicants began to see the difficulty, and apart from this one line which they took in the original Memorials, the one of deliberate oppression, they came in the Reply with the alternative to say that, apart from that accusation, they also relied on a so-called norm of non-discrimination. And when we came to the oral proceedings, when South Africa offered further oral testimony, inspection and so forth in further answer to and refutation of the charges of deliberate oppression, and when the Applicants found they could not offer testimony in support, that they could not even rely, as they had to admit, on what the various petitioners had said at the United Nations, then they came and dropped the line of accusation of a deliberately oppressive policy and relied entirely on the alternative line, the one which was an alternative in their Reply in the pleadings stage, of saying that there was a norm which absolutely prohibited discrimination or distinction on the basis of membership in a race, class or group. And that was then the case to which we had to direct the further part of our attention by way of expert testimony and by way of argument.

Mr. President, we refuted the case of the Applicants as far as that aspect was concerned, in various ways. We demonstrated that there was no source in law, for a norm such as they contended for. We dealt with that proposition specifically with reference to the three sources of law, with a fourth auxiliary one, in

Article 38 of the Statute of the Court, i.e., with reference to the basis of treaty, to the basis of custom, and to the general principles of law accepted by civilized nations. And we dealt with their contentions with reference to the effects of fact, the effects in the factual field which the application of such a rigid, absolute norm would have, not only in the circumstances of South West Africa, but in many other situations in the world; and on that basis we demonstrated various things. In the first place, that the provisions of the Charter referring to human rights, the ones to which I have referred this morning, do not in themselves mechanically prohibit distinctions. They are concerned with a much more important objective than that: they are concerned with the promotion of certain substantive matters for the benefit of the peoples concerned and they say in effect that that promotion is to be an obligation of Members of the United Nations which is undertaken without any distinction in the concern which will be shown to various people belonging to various groups. And we pointed out that South Africa was certainly not a party to any treaty in which it accepted such an absolute principle or norm as binding.

And then we tested it (the suggested norm) with reference to custom, two aspects of custom or practice. One aspect specifically relied upon by the Applicants was that of the actions and the opinions voiced by United Nations majorities. We pointed out, with submission, that that was in law not a sufficient basis, but, further that in any case, when those attitudes were analysed, it was found that they rested not on a conception of such an absolute, colourless norm, but on a conception that South Africa was, in fact, deliberately oppressing.

Then finally, we demonstrated, through the evidence mainly of Professor Possony, that with reference to the acid test of custom, practice and compliance, there were no fewer than 50 States and territories in the world in which exactly by law, official practice and custom distinctions were still in operation as between various people, exactly on the basis of their membership of a race, an ethnic group or a class. And, what is more, 40 of those at the time, including the Applicants Ethiopia and Liberia, were Members of the United Nations.

Furthermore, we demonstrated, through the evidence of Professor Possony, and through other evidence, much of which was specifically directed to South West Africa, that the application of such a rigid approach in the world would be a disastrous one as far as the factual aspect of the benefit to mankind was concerned.

I would like to conclude this portion by just reading this quotation from the conclusion stated by Professor Possony in his evidence. He was asked in general whether it would be practicable or just to apply a norm of the kind which the Applicants contended for, under all circumstances and at all times, and his answer was:

> "My answer to this question is no. Mankind with all its diversities has never accepted a single unit. To impose a single formula would be ideological imperialism. The best principle, it seems to me, is to tailor the methods or responses to specific challenges. An optimal solution can be optimal only in terms of a concrete situation, a solution can be viable only if it respects the history of an area and is implemented in the same rhythm as the society living in that area is evolving."

Expert witnesses dealing with the facts of South West Africa demonstrated how absolutely disastrous it would be in the context of the well-being and progress of, particularly, the indigenous peoples of South West Africa, if this rigid approach were to be introduced there.

The PRESIDENT: The Court understands that it would not be convenient for the distinguished representative of South Africa to continue his address to the Court this afternoon, as the Court had contemplated yesterday. The Court will therefore resume tomorrow morning at 10 a.m. The Court understood yesterday afternoon that the representative of South Africa will try his best to condense his further submission to the Court within the period of one sitting, yet if he is unable to carry that out by the time that the Court has adjourned tomorrow at 1 o'clock, the Court will be prepared to sit in the afternoon for such a period as may enable him to conclude the address.

Mr. de VILLIERS: Thank you Mr. President. May I say, with respect, before the Court rises, that after the adjournment yesterday we went very carefully into the matter to see how co-operative we could be in trying to comply with the Court's request; but we found that it would be absolutely impossible for us to attempt to carry on this afternoon. As far as the further time to be taken is concerned it seems clear to us that we will not be able to finish in one session, but we ought to be able to finish within the compass of two.

The Court rose at 1.08 p.m.

TWENTY-THIRD PUBLIC SITTING (17 III 71, 10 a.m.)

Present: [See sitting of 8 II 71.]

Mr. de VILLIERS: Mr. President, Members of the Court, I had concluded at the adjournment yesterday a very brief and broad review of South Africa's case in 1965, in answer to the contention by counsel of Ethiopia and Liberia as to the existence in international law of an absolute, binding norm of non-discrimination, prohibiting, as it was contended, all forms of distinction by law and official government practice between people on the basis of their membership in a race or class or group—whether that distinction, or discrimination, is intended and does, in fact, operate for good or for bad. The effect of our demonstration was, with submission, that no such norm exists in international law—that it was a non-starter, if I may use that word, with respect, not only for legal reasons but also for practical reasons: exactly for the reason that "mankind in all its diversity", if I may borrow that phrase from Professor Possony, did not find such a norm acceptable; and further, because application of such a norm or rule, in that rigid sense, in certain parts of the world, with the conditions operating there, would have and could have only disastrous consequences in terms of the well-being and progress of the peoples concerned.

For that reason our contention, in effect, meant this: that if one said in an international law context that a State has discriminated or is discriminating on a racial or an ethnic basis, that in itself does not impute to the State unlawful conduct. The imputation would have to go further, it would have to take into account the object, purpose and effect of such discrimination. The discrimination, in our submission, is to be seen in itself, logically and philosophically, as something neutral, which could be applied to a good or a bad end, like a knife which could be applied to surgery or to murder. And, the enquiry into an allegation of unlawful conduct through discrimination, on a racial or ethnic basis, would have to go further than the allegation of a discrimination *per se*, it would have to take into account the object, purposes and effect.

In that sense, South Africa's contention has received remarkable support since 1965 in the international context. In order to demonstrate that to the Court I should like to refer first to the United Nations Declaration on the Elimination of All Forms of Racial Discrimination adopted on 20 November 1963 by General Assembly resolution 1904 (XVIII).

That Declaration was an extreme one in the sense under discussion. It was, to a large extent, almost a bill of attainder against South Africa. Apartheid, without any definition and just by that name, was specifically referred to and condemned in the eighth preambular paragraph and in operative paragraph 5. But that is not the important point for my purposes.

The basic prohibition as contained in Article 1 of that Declaration was in terms an absolute one, according very closely to the contention by counsel for Ethiopia and Liberia in this Court in 1965. I read the wording of that Article:

> "Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a viola-

tion of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples."

So the Court will see the absolute terms in which this was put. What was proscribed there was "discrimination between human beings on the ground of race, colour or ethnic origin".

In the meantime there has been development in this sphere, too, in the direction of a convention. After discussion, further debate and consideration of the problem there was adopted, as a basis for a convention, General Assembly resolution 2106A (XX) of 21 December 1965. It was called the International Convention on the Elimination of All Forms of Racial Discrimination. Here too it took the form of being adopted by a General Assembly resolution first, and then to be open for ratification and accession before it could enter into force as a convention.

Here we find that this matter had apparently, in the meantime, received further attention, and I would like to refer the Court to the wording of Article 1, paragraphs 1 and 4.

Article 1, paragraph 1, states:

"1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

In other words, Mr. President, no longer a proscription of the distinction on a race or ethnic basis in itself, but only when it has a certain purpose or effect.

And then, paragraph 4 states:

"4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

So there too special attention to the case of particular racial or ethnic groups or individuals which may require protection and for the purposes of such protection may need differential measures based on the fact of their membership in that ethnic or racial group.

In other words, in broad principle, as distinct from detailed formulation which does not concern me for the moment, the South African attitude was vindicated by the attitude taken in the adoption of this draft convention, that it is not sufficient to enquire into the mechanical act of discrimination, that the purpose and effect must be the determining features to determine its legality or illegality.

This draft convention, in passing, took up to 4 January 1969 to secure the 27 ratifications which were necessary to bring it into force. It is as yet far from

being a universally accepted document; even as at 18 December 1970, which was the operative date of the document to which I referred yesterday, only 45 States had signified ratification or accession. The reference is to document E/CN. 4/907/Rev. 7, UN ECOSOC.

So, Mr. President, that brings me to the conclusion of the broad survey of the position in respect of suggested norms of non-discrimination. In the particular context of South Africa continuing under the basis of trust as conferred upon it in the Mandate, under the powers and with the duties and the objectives as there imposed upon it, 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, to suppress or oppress some for the benefit 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.

That brings me to the last one of the categories which I foreshadowed I would deal with briefly. That is the category of self-determination. The concept of self-determination, as the Court would know, Mr. President, has a very long history. I do not intend to trace that in any detail at this stage. It is well known that this concept was in a large measure a dominating principle during the peace negotiations and the treaties of 1919. One of the main criticisms subsequently directed at the treaties—perhaps one should say at their application—was based on the allegation that the principle of self-determination had not been properly and sufficiently observed and that it was violated in too many instances, and these alleged or real violations are regarded by many as amongst the important causes of the Second World War.

It is therefore, somewhat surprising, in any event remarkable, that the concept of self-determination did not receive more prominence than it in fact did in the Charter of the United Nations. It is in terms mentioned in two places only, namely in Article 2, paragraph 1, and in Article 55. It is, one could say, contemplated in Article 73 and in Chapter XII dealing with the trusteeship system, but it is nowhere mentioned as a concept by that name even in those portions of the Charter.

Article 1, paragraph 2, uses the expression within the context of this phrase, "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"; and in Article 55 the context and indeed the words, the exact phrase as I have read it out now, are exactly the same. One could say that there is here a distinct lack of emphasis on the concept of self-determination. That arises from the fact that nothing more was said about it than what I have just read out to the Court. Secondly, that one would see that the context is one of "respect for" self-determination of peoples, it is not even an obligation to promote; and one will further note that the concept is referred to as a principle, it is not referred to as being in the context of a right, on the one hand, or duties on the other hand.

This, Mr. President, contrasts very strongly with contentions which have been addressed to this Court in writing and orally by various participants in these proceedings, speaking of a right of self-determination and a corresponding duty to ensure self-determination primarily on South Africa, and, because South Africa did not act in accordance with the wishes of the majority of the United Nations, the United Nations took upon itself that duty as a basis which it said necessitated it to act when South Africa violated its duty.

I do not propose to give any review at this stage of authorities, of publicists, who have dealt with this question in international law. I would like to give the Court one reference only, which is to a German writer who has made a careful

survey, and which is an interesting one: it is J. Delbrück, "Selbstbestimmung und Völkerrecht", *Jahrbuch für Internationales Recht*, Volume 13, 1967, page 180 at page 197. He there presents a careful survey of British, American, European, South American and socialist authors on this question, and he indicates that the overwhelming majority, the weight of authority amongst them, is in favour of the view that self-determination is not a norm of international law.

On this basis South Africa accepts, in the first place, that self-determination is an appropriate outcome for its sacred trust administration of South West Africa. It is an objective at which it aims. Therefore, it should be aimed at for attainment at such a time or times, and in such a manner as would be most conducive to the objects of the sacred trust, in other words, to the well-being and the progress of the inhabitants—and when I say "of the inhabitants", that means all of the inhabitants, not some to the exclusion of a real right of self-determination for others.

Thirdly, South Africa accepts, in practice, that there is a need to consult with the peoples directly concerned as they come nearer to the appropriate stage of development which makes the act of self-determination appropriate for them.

South Africa does not accept that there are binding rules in international law which prescribe hard-and-fast methods and procedures and time-tables in this sphere, although it is aware of the fact, only too aware, that by General Assembly majorities, attempts have been made to dictate in this context.

Then we come to another notable feature of the provisions of the Charter. In the words which I have read out to the Court, there will be observed a distinction between the two concepts of "nations" and "peoples"—friendly relations among "nations" based on respect for the principle of equal rights and self-determination of "peoples". Now, usage of distinction between the two concepts of a nation and a people is not always consistent, but a fairly generally accepted usage is that of regarding a nation as being the national population of a State, and peoples as being smaller ethnic units of which there could be more than one within a State or territorial unit. As I say, that is not invariably so, but that is a very common basis of distinction. And there are indications in the Charter that that is the distinction which its authors probably had in mind. The strongest indication to that effect is to be found in Article 73 of the Charter. Paragraph *(b)* uses this phrase, "according to the particular circumstances of each territory [in the singular] and its peoples [in the plural] and their varying stages of advancement". That is to be read in the context exactly of developing self-government, which is what paragraph *(b)* of Article 73 is about. It sets the object, "to develop self-government", "to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions according to the particular circumstances of each territory and its peoples and their varying stages of advancement". It is further notable that this comes in the context following immediately on paragraph *(a)*, which emphasizes "due respect for the culture of the peoples concerned". So, it would seem to be a very strong indication that this was the contemplated distinction between nations and peoples which the authors of the Charter had in mind. And if that is so, it follows that both of these Articles, which explicitly mention the principle of self-determination, related that principle to the ethnic unit, the "peoples" of which there may be more than one within a colonial or mandated or trust territory, as we know was so often the fact in regard to exactly those territories, particularly in Africa.

It is true that the Charter did not prescribe that each State was to be a nation-State in the sense of being a one-nation State, that the boundaries were to be

redrawn so that there would be only one ethnic unit within each State: because if that were so, it would of course have necessitated the break-up of a number of existing States, and if this were to be pursued with any vigour and with any enforcement, it would hardly be compatible with the goals of peace and security. But, Mr. President, as little as that was the general prescription of the Charter, as little was it a prescription, on the other hand, that in cases of multi-ethnic States or territories where the peoples have not in fact merged into one nation, self-determination must be accorded only to a non-existent nation, being the total population, and not to properly identifiable peoples within the territorial unit.

The Charter did not deign to prescribe one way or the other, but it did recognize that self-determination could attach to the smaller, the ethnic unit and need not necessarily attach to the whole territorial population.

The Charter therefore left these questions of modality open and it left open questions which then arise such as: is there a limit at the lower end and, if so, where is that limit? Would this concept of self-determination as applying to ethnic units apply only to larger groups like, for instance, the Ovambo nation of a quarter of a million people in South West Africa, or would it apply also to small groups and even to pre-tribal societies like the Bushmen in South West Africa? Those, too, are questions which were left open by the Charter.

If one approaches those questions as a matter of logic, it follows that there could be a considerable difference in practical meaning and in potential scope of self-determination depending on what type of group professes to exercise it, or to what kind of group the right is to be accorded. Logically the practical scope of what could be attained by self-determination must be affected by factors such as the state of development of the particular group, its particular situation, where it is located, and its size. These factors in combination would then in a practical sense determine to what extent self-government or autonomy would be, in the first place, feasible for such a group, and in the second place, desirable in relation to other goals which are being set for the group—goals such as well-being, economic growth, and so forth. As I have said, those are practical factors; they do not attach to legal prescription as at the Charter stage with which we are dealing at the moment.

In principle, Mr. President, in our submission, there is no reason why any group should be denied this right of self-determination, as long as we accept that at the lower end it could often, in a practical sense, not extend to real international independence, for the practical type of reasons which I have mentioned. Often, too, although freely exercising its will in that regard, as a matter of principle, the group may find itself restricted in its choice of alternatives of what would be feasible for itself.

In that sense, self-determination may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation. The practice of States in this sphere differs and seems to be affected strongly by geographical considerations. In the case of the Union of Soviet Socialist Republics one finds that in practice, as we understand the situation, autonomy has been granted to very small ethnic groups, but autonomy has been denied to larger groups which live in dispersal, in other words, groups which lack a distinct territory as a group home. The People's Republic of China is committed to a similar interpretation of self-determination, it would appear, but its practice has not been quite consistent in that respect. In the United States and Canada one finds the arrangement whereby tribal self-government of Indian groups is protected and the same applies in several States in Latin

America. It is admittedly a limited concept of self-determination, but it operates to that limited extent and within that limited sphere.

The South African practice has been a similar one except that it has gone further in protecting the identity of groups which desired it, whether those groups were large or small.

So, Mr. President, in brief, there is nowhere a typical situation to which the principle of self-determination can logically be applied in a mechanical way. Virtually every situation is, for that purpose, a unique one, which requires special attention and special adaptation. Generally speaking, it would seem that the principle is intended to apply to stable ethnic groups. When I say "stable" I mean those of which the members are identified clearly with the group. Whether they are originally and purely of the same ethnic origin would not matter as long as at the particular stage they do, in fact, by their will, identify themselves as a distinct group. The principle applies to the concept of a group becoming totally independent, or linking up with another country, making some new arrangement about the future of that group as a whole. It applies also, in the lesser sense, to possibilities of such groups coming together, co-ordinating and working together within the framework of one larger political unit according to such methods as they may have agreed upon amongst themselves, be those methods federal, confederal, of the nature of a common market, whatever the arrangement may be.

The important point which I have been stressing is that the Charter left all these matters unregulated. The Charter left them to be dealt with in good sense by those who may be directly concerned at the appropriate times.

So, Mr. President, in the not so distant past, after the coming into operation of the United Nations, there have been practices in regard to various situations which illustrate the diversity of what may be decided upon as a practical solution in the particular case, and in some of these situations there was co-operation from the United Nations side. There was the case of Palestine, the partition solution; there was the case of India and Pakistan, again partition; there was Rwanda and Burundi, the old Ruanda-Urundi being divided so as to accord with the ethnic situation to a greater extent than before; there was the arrangement in Togoland and in the Cameroons where borders were adjusted, in some cases linking up with neighbouring territories; there was the special kind of arrangement in Cyprus to cope with the situation of two groups which could not come to terms about merging in their governmental system.

But there have, on the other hand, been attempts, particularly in later United Nations history, by majorities to introduce rigidity in this sphere, where none was intended or provided for in the Charter.

It was the same resolution 1514 (XV), the decolonization resolution, which first spoke of a so-called "right" to self-determination, thus going beyond the Charter formulation of principle, and then for "all peoples", in Article 2. It went further in Article 3 to provide that: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

So by a combination of these features the attempt is now made to move towards a right to immediate self-determination for all colonial countries and peoples—a right to immediate self-determination and a corresponding obligation on those concerned to give effect to such a right.

In Articles 4 and 6 of that same resolution expression was given to a concept of a principle of so-called territorial integrity of a country: in other words, in the processes of decolonization, the territorial integrity of the particular territory is to be respected. That is then to be dealt with as a unit—as a whole. So

that sought to introduce this further rigidity, that it was not possible any more to accord, according to this conception, self-determination to clearly distinguishable groups within a territory; the territory had to be dealt with as a whole.

That kind of approach later led to the somewhat absurd statements—absurd, that is, to people who know the circumstances of Africa, and particularly the circumstances of southern Africa—to the effect that there is to be discerned a people (in the singular) of Namibia. Those who know the facts know, Mr. President, with submission, that there is no such thing.

The whole concept of a people of Namibia is a fiction; and it seems also that the idea expressed in Article 2 that such peoples may "freely determine their political status and freely pursue their economic, social and cultural development" has largely become fictional in the practice of the United Nations, because very often the right to self-determination is asserted not by the peoples themselves but by the majority in the General Assembly, according to its conceptions of what the people might like. Some of that is evident again in these proceedings in connection with the plebiscite proposal, on which I do not wish to dwell now.

The latest development in this field was a Declaration accepted by a General Assembly resolution on 4 November 1970 (A/RES/2625 (XXV)). It was called the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The Declaration is a formidable document; it requires thorough analysis. It is one step in what is described as "the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States". More particularly this Declaration is devoted to the elaboration of seven principles which the Declaration describes as "basic principles of international law". In the light, Mr. President, of the kind of submissions that have been addressed to this Court on behalf of the Secretary-General and other participants, one wonders if the contention will now be that these formulations in this General Assembly resolution, though they appear to be somewhat confused and involved, are to be regarded as binding upon all Members of the United Nations as an authoritative determination of law made by the General Assembly, and as such binding on this Court too. I am merely posing the question: one would have to see what the reaction to that would be.

I will not review the provisions of this Declaration in detail now. I wish to refer only to a few features. There is a portion which is headed and which deals with "the principle of equal rights and self-determination of peoples". Now, in that portion, the idea of territorial integrity as it emerged already in resolution 1514 is maintained. On the other hand, the Declaration recognizes explicitly that there are different modes of "implementing the right of self-determination", and they give as examples sovereign and independent statehood, free association or integration with an independent State, or "the emergence into any other political status freely determined by the people".

The Declaration does not prescribe any procedures for the peaceful attainment of self-determination. And it fails completely, Mr. President, to direct its attention to the special problems that arise in regard to the application of the principle in multi-ethnic societies; that leads again to this concealment of the fact that a society is a multi-ethnic one, e.g., by using a description such as "the people of the territory of Namibia". In our submission, such an approach must have the effect of denying self-determination and ethnic identity to clearly discernible peoples, which could be of a considerable size, but who could find themselves in the minority in a particular territorial situation, very often a

territorial situation created in a manner which was totally artificial from the point of view of those peoples—created by the drawing of lines on a map by negotiating powers in the colonial times, lines which, as we know, very often cut through the very area occupied by a distinct people. This happened in the case of the Ovambo, so that part of the Ovambo people are situated in Angola and part in South West Africa. And, on the other hand, it resulted in bringing within the same territorial area a number of distinct national units, ethnic units, "peoples" in the contemplation of the Charter of the United Nations as I have dealt with it, in situations such as Nigeria and—we know—in South West Africa.

As I have said, the Declaration fails to deal with these matters and by failing to do so, and by seeking to maintain this element of rigidity that one may proceed on a basis only of the total population of a territory having to determine by a majority vote what is to happen by way of self-determination for that territory, it could, in effect, deny self-determination completely to minority groups within such a territory. For that reason the Declaration, I submit, has as little intellectual relevance to the issues of South West Africa as it has legal binding force.

One of the few people who have given really serious attention to the question of self-determination in ethnically non-homogeneous societies has been a Turkish professor by the name of Tahsin Bekir Balta (Kurt Rahl, editor, *Ausgewählte Gegenwartsfragen zum Problem der Verwirklichung des Selbstbestimmungrecht der Völker*, Vol. II, München, Lerche, 1965, pp. 13-26). He pointed out in this study of the problem that in such areas votes by a majority would mean that the majority decides for the minority and thus would deprive the minority of its rights. And he reasoned that the argument according to which such a voting procedure is said to be democratic is unsound, amongst others, because the ethnic minority could not, like a minority political party, ever become a majority and reach power; it would be confined to a status of being numerically in the minority by reason of being an ethnic group in the minority. That is one factor in his reasoning. Another important factor is because a self-determining decision cannot easily be changed and usually has effects for a very long period. And the third is because in the absence of an ethnic numerical majority two or three groups could compromise to the detriment of other groups. They could combine so as to form a majority for purposes of rendering the others in the minority and then imposing their will upon the rest of the population. Instead of a majority vote, he argues in such instances for what might be called co-determination or—if one translates it more clumsily—correlated self-determination, self-determination for all by virtue of correlated action in which each has a part.

But how that is to take place so as to be fair to all concerned, as nearly as possible, certainly requires very careful thought which, in our submission, has not been given to the problem in United Nations circles, certainly not in the context of South West Africa.

The approach of the Professor, to which I have just referred, is a logical and a reasonable one, and I should be very much surprised to hear that he has ever heard about the problems of South West Africa. So it is not so difficult to understand the problem and to understand the principle.

The problem, in our submission, in territories such as South West Africa, is not the principle of self-determination; it is a problem of how to give practical effect to it without creating new dominations. And in essence, if one accepts that from a practical point of view it would not be feasible for each ethnic group to become a sovereign nation-State, the problem becomes one of proper

representation for each group. When I say that I mean, in the first place, proper representation in self-expressing organs of government, which will be trusted and will be really representative of the people concerned so that those representing the people in this manner—really representing their views and being trusted by them with the organs of government within the particular ethnic group—can then take up the negotiation on a footing of equality with the others, in a similar representative capacity, and in that co-ordinating and co-operative manner forge a future for all of them and not only for some.

In our submission, the United Nations proposals for South West Africa are not progressive or democratic, they really imply oppression through pseudo-democracy. South Africa therefore cannot accept them as either legally or morally binding in this context. She cannot adopt an attitude of, right or wrong, one man one vote for the whole population of South West Africa and damn the consequences. That South Africa cannot do, because she would, by doing so, violate her sacred trust.

Mr. President, that covers my brief statement on this field which I have delineated as being concerned with relevant norms and principles. As will have been clear to the Court, I did not expand or go into great detail, or take up possible contested lines, or take up arguments to the contrary that have been offered by participants in these proceedings.

In order to deal with this matter fully in regard to all issues that could arise in regard to it, a good deal of further expansion and research would be required, as I indicated before. But this, in broad outline, is our attitude on this subject, the attitude of the South African Government on behalf of which I have made this statement.

ORAL STATEMENT BY MR. BOTHA

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. BOTHA: Mr. President, honourable Members of the Court, my learned friend and senior, Mr. de Villiers, has indicated what our general approach is to the questions of international standards of administration and norms of human rights, with particular reference to self-determination and non-discrimination.

It remains for me to sketch in broad outline what is the potential field of controversy concerning the application of these standards and norms to the circumstances of South West Africa. In this respect also, as with respect to the matters dealt with by my learned friend, Mr. de Villiers, I do not propose dealing exhaustively with the problems involved. Indeed, I shall attempt merely to delineate the nature of the task that would have to be essayed if the facts of the present matter were to be canvassed with any degree of thoroughness.

Before commencing on any examination of the merits of the system of administration in South West Africa, one would have to pay due regard to the fundamental problems which would confront any administering authority in the Territory. The basic facts are so well known that I do not propose quoting any authority for them—if verification or details are required, reference may be made to Chapter XI of our written statement and the annexes thereto.

South West Africa is a vast and under-inhabited territory. Its total area is over 800,000 square kilometres whereas it has a population of only approximately 750,000 people, that is, three quarters of a million people. In the result, its population density is less than 1 person per square kilometre, as compared, for instance, with 12 in Liberia, 20 in the United States of America and 346 in the Netherlands. Its climate is on the whole unsuitable for man's purposes. The greater part of the Territory is desert area and it is only in the northern part of the Territory, along the Okavango River and in the Caprivi Strip where conditions may be regarded as favourable for the denser type of human occupation and fairly intensive agricultural exploitation. It is only in those areas that the rainfall is high and consistent enough to be suitable for such purposes. The rest of the Territory not only suffers from a low average rainfall, but it is also subject to cruel and recurrent droughts of great severity.

The diversity of geographic features is equalled by the great differences in the inhabitants of the Territory. The largest single population group is the Ovambo. They live in the northern parts of the Territory, Ovamboland, and they are themselves divided into a number of peoples.

Then there are the peoples of the Kavango, who inhabit the well-watered regions on the banks of the Kavango River. A third population group is found in the eastern Caprivi Zipfel, which is a curious appendage to the Territory of South West Africa extending to the east into the area between Zambia and Botswana. In the southern part of the Territory there are other population groups—the Nama, who are of the Khoisan group of peoples, who are not related to the Bantu peoples like the Ovambo at all. Then there are the Bushmen, who were originally a nomadic people living entirely from hunting and gathering wild fruits of the veld.

Also in the southern part of the Territory are found the Herero, a Bantu people, though distinct from the other Bantu tribes of northern and eastern

South West Africa, and then the Damara, who are a Negroid people with many distinctive characteristics.

In addition, Mr. President, a substantial number of White and Coloured people have settled in the southern part of the Territory. Amongst them are the Rehoboth Basters, who have been living in their own territory since the last quarter of the previous century and have a certain degree of autonomy.

These various population groups differ substantially in their ethnic origins, in their languages, customs and cultures. In the early days before South Africa's administration had commenced there was a state of almost perpetual warfare amongst various of these peoples. Although the ancient hostilities have been reduced in intensity, it would be totally wrong to suppose that any of these population groups would at the present moment be prepared to integrate with any of the others.

The circumstances which I have mentioned have necessarily had an adverse effect on development of the Territory. The low population density has not only limited the market for agricultural and industrial products, but has resulted in high transport costs and in the necessity of importing almost all the needs of the modern sector of the economy. This applies, for instance, to all fuel for power and transport, machinery equipment, many types of building materials, most consumer goods and even a great deal of food.

Despite the difficult human and physical problems, there has been substantial development in South West Africa. The population growth rate in the Territory is 3.7 per cent. per annum, a figure which in the whole of Africa is equalled only by Libya, and which elsewhere is from 1.3 per cent. to 3.3 per cent. The real income per head of the population grew by no less than 53 per cent. during the years between 1960 and 1969. Indeed, Mr. President, with the exception of Libya, the *per capita* income of South West Africa was the highest in Africa in 1966. Education is flourishing—the total number of pupils of all groups in primary and secondary schools has more than doubled in the decade between 1960 and 1970, and as far as the indigenous peoples are concerned it is at a very high level, comparing more than favourably with standards achieved in comparable countries. Health services receive a per capita expenditure that exceeds that of any other country in Africa.

What is perhaps even more important is that in South West Africa there is a general atmosphere of goodwill and friendship amongst the different groups—in contradistinction to what the situation was in years gone by.

In the light of what I have just said, the question arises: what are the factual complaints which are made against the South African administration? In view of the high standard of well-being and progress in the Territory, it is a matter for comment that the South African Government has been the subject of so much attack in respect of its administration there.

As we have shown in Chapter XI of our written statement, the reason for the hostility is not to be found in the merits or demerits of the South African administration as such, but in a general emotional campaign which regards South West Africa as a manifestation of colonialism which should be terminated. It was this campaign which led to the contentious *South West Africa* cases, as well as to General Assembly resolution 2145 (XXI) and subsequent United Nations action. In particular, our opponents often contend that the South African Government fails to live up to the principles of self-determination, and moreover pursues a policy of discrimination on a racial basis—that is, discrimination in the pejorative sense of the word.

On the part of the South African Government, these contentions have been

and are vigorously denied. It is true that the South African Government does differentiate between various population groups—that we admit. But this is not from any desire or intention to oppress or repress any of the peoples for the benefit of any others. Measures of differentiation are dictated not by any philosophy or dogmatic views about race, as is sometimes contended, but by the objective circumstances of the Territory and in particular by the great diversity of its peoples.

This diversity has necessitated differential measures, *inter alia*, in education, economic development, and also in political organization. In the last-mentioned regard, political institutions have been established for various population groups in South West Africa. It is the policy of the South African Government to develop these institutions to the stage where they will be capable of taking part in a dialogue about the future organization of the Territory, and indeed of the whole sub-continent of southern Africa.

The problem, as my learned colleague, Mr. de Villiers, indicated, is not one of the *principle* of self-determination, but of its *application* in a multi-national society in such a manner as to promote well-being and progress to the utmost. To that end the major requirement is the building up of effective and meaningful forms of representation for the various peoples through which they can shape their future. In this respect, major progress has been made.

In our written statement we set out the general circumstances in South West Africa and the broad lines of the policies adopted there, and we provided some information on the progress that had been achieved. This elicited a very limited reaction from other participants—in fact only the distinguished representative of Finland made any express reference to our exposition. I refer the Court to pages 80-81, *supra*. However, as will be seen by referring to the record just mentioned, this representative did not deal in any systematic way with our contentions but only stated a couple of general criticisms. As far as the other participants were concerned, they contented themselves on the whole with wild sweeping allegations of oppression and denial of human rights and with references to United Nations and other sources as supposedly containing the true facts of the situation in South West Africa. When dealing with the application for a plebiscite, we indicated what problems we have in replying to this type of allegation. We do not want to repeat what we said at that stage but it might be convenient to refer to a few illustrations.

Thus, for instance, some participants merely alleged that South Africa has violated its obligations, without making any attempt to indicate the factual basis of such allegation. In the written statement of Nigeria (**I**, p. 892) it was merely said that the General Assembly had decided to terminate South Africa's "trusteeship" in view of the persistent breaches of the Mandate, and that the vast majority of the Members of the United Nations no longer have any confidence in the ability of South Africa to fulfil the role envisaged under the mandates system as well as the relevant provisions of the Charter, since South Africa's record of breaches of treaty obligations does not entitle it to continue its presence in South West Africa (*ibid.*, p. 893).

Now, our problems in replying to allegations of this kind must immediately be apparent. One looks in vain to the written statement of Nigeria in an attempt to establish which acts or ommissions of South Africa are being relied upon as constituting breaches of its obligations under the Mandate, or for any details of the so-called breaches of treaty obligations. How can one possibly answer allegations relating to breaches of obligations if one does not know the conduct which is said to constitute such breaches?

Similar problems are encountered as a result of the approach adopted, for

example, by the distinguished representative of Finland. With reference to our written statement, he said (*supra*, p. 81) that the real facts are well known to all and that it is only necessary to examine South African legislation, of which only one specific example is given, and administrative regulations, which are alleged to be arbitrary, unreasonable and unjust. We are not, however, told which specific acts or administrative regulations are in their terms or their application arbitrary, unreasonable and unjust. How does one, Mr. President, deal with such an allegation?

Another example of the kind of vague and general allegations made against South Africa concerns the Terrorism Act of 1967, which was characterized by the representative of Finland in his oral statement *(ibid.)* as an apartheid measure designed to suppress the rights and liberties of the inhabitants of South West Africa and, as such, an instance of how South Africa has failed to fulfil her obligations under the Mandate.

In the first place, the application of this Act to South West Africa can clearly not be invoked as a ground for the purported revocation of the Mandate by the General Assembly, since it was applied to the Territory subsequent to that purported revocation. And, in the second place, the Act cannot be an apartheid measure because it in no way discriminates between different races or groups of peoples.

Furthermore, in order to go into the merits of this specific allegation it would be necessary to know in what respects the Act is considered objectionable. But this the representative of Finland does not tell us, other than to imply that it suppresses rights and liberties of the inhabitants of the Territory. But how does it do this? It can clearly not be objectionable upon the ground that it is designed to combat terrorism because that is a duty implied in the undertaking of South Africa to promote the welfare of the peoples of South West Africa. So we have only the bare and general allegation.

In order to go into the merits of the allegation we would need to know, therefore, not only what particular aspects of the Act are objected to, but also whether or not the Act is justifiable in the circumstances of South West Africa. And in this connection it would be necessary to test the provisions of the Act against those of similar legislation elsewhere in the world. Thus a very wide field of enquiry is involved.

It may be that the effect of the Act is too severe for the evil it is designed to combat. That, Mr. President, cannot be ascertained without a full enquiry into all the circumstances, but unless that enquiry is undertaken the Act certainly cannot be condemned out of hand. And it may be added that this Act is but one of the many which have been cited against us as examples of repressive legislation.

A good example of the type of allegation one has to meet is also found in the United States written statement (I, p. 865) where there appears a quotation from the *South West Africa Survey 1967* to the effect that South Africa—

> ". . . rejected 'every policy which suggested the giving of limited rights to the various groups inside one political structure' since such policy 'had the prospect of one man one vote as an unavoidable end result, with its easily predictable consequences' [the end of minority control]".

Although the words in square brackets are indicated as not forming part of the quotation, the impression is created that they represent what is contained in the publication itself. That, Mr. President, is clearly misleading. The easily predictable consequences were explicitly stated to be "rising tensions between

the groups and a struggle for supremacy" (*South West Africa Survey 1967*, p. 47).

A further example of the far-reaching nature of the accusations against South Africa is to be found in charges concerning freedom of movement. In his oral address, the distinguished representative of the Organization of African Unity alleged that South Africa had acted in breach of its obligations by, *inter alia*, denying to the inhabitants of South West Africa their rights to freedom of movement. In commenting on our plebiscite proposal, the distinguished representative of the Secretary-General even went so far as to say that a plebiscite generally designed to ascertain the wishes of the inhabitants of South West Africa could not be held under conditions which would ensure impartiality and freedom of choice, since such conditions do not exist at present because of, for example, the denial of freedom of movement to the vast majority of the population.

In our written statement we did not deal specifically with this topic, for the simple reason that at that stage no specific charges had been formulated which called for a reply on our part. However, the alleged denial of a right of freedom of movement is a charge which has often been made against South Africa's administration of the Territory. We do not for a moment dispute that the freedom of movement of the inhabitants of South West Africa, whether White or non-White, is to a certain extent restricted. We do not dispute that. But this is not a phenomenon peculiar to South West Africa. In many countries it has been found necessary, and for various reasons, to restrict in one way or another an absolute freedom of movement of the inhabitants concerned. This has been done mostly for economical, planning, health and sanitary reasons—for instance, the prevention of slum areas in the vicinity of cities.

Consequently, if it were necessary to refute the charges relating to freedom of movement in South West Africa, it would be necessary to present the Court with details of the circumstances in South West Africa which made it necessary to introduce such restrictions on this freedom, and also, by way of comparison, to deal with analogous situations elsewhere in the world where similar measures are or have been in operation. In particular, we would wish to demonstrate that the inhabitants of South West Africa are not subjected to restrictions on their freedom of movement in excess of what is essential from the point of view of "securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". These words come from the Universal Declaration of Human Rights.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. President, in its written statement the United States, in support of its allegation that South Africa had acted in conflict with its obligations under the Mandate, relied on a number of statutory measures applying in South West Africa and also on a study of the International Commission of Jurists, the report of the Special Rapporteur of the Commission on Human Rights (E/CN. 4/949), and the dissenting opinions of some judges in 1966. On page 867, I, of the written statements, the United States said that the General Assembly, in resolution 2439 (XXII), endorsed the recommendations of the Special Rapporteur of the Commission on Human Rights that South Africa be required to repeal, amend or replace laws cited in paragraph 1547 of the Report. In this paragraph some 80 laws of South Africa and South West Africa were listed. Accordingly, the written statement of the United States appears to invite a debate on the merits and demerits of all these laws, apart from all the other

material contained in the report of the Special Rapporteur and the said study of the International Commission of Jurists.

However, from the point of view of the sheer volume of work involved, the greatest difficulties are presented by the documents filed in these proceedings by the Secretary-General of the United Nations. In his written statement he said:

> "The facts of the violations by South Africa of her international obligations in respect of Namibia were set out, *inter alia*, in the reports submitted by successive committees to which special responsibilities in respect of Namibia were assigned by the General Assembly." (Written statement, I, para. 78, footnote 116, p. 96.)

The Secretary-General then proceeded to list more than 30 different documents. In these documents references are to be found to numerous other documents and sources. It will also be observed that according to the Secretary-General the violations are set out, *inter alia*, in these documents. It will presumably therefore be necessary to deal with all United Nations documents in which allegations were made to the effect that South Africa had violated its obligations under the Mandate.

In the early 1950s a Special Committee on South West Africa was appointed, the tasks of which were later taken over by the so-called Committee of 24, that is, the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. These committees received written petitions and granted oral hearings to petitioners, they conducted certain investigations and they extensively debated the issue of South West Africa. Thereafter a report would be forwarded to the Fourth Committee which would discuss it and at times grant additional hearings to oral petitioners. Draft resolutions adopted by the Fourth Committee were then forwarded to the plenary session of the General Assembly where at times further discussions took place. It will accordingly be necessary to read through all these debates, reports, testimony and other relevant documents in order to establish which acts or omissions of South Africa were relied upon as breaches of its obligations, and thereafter to refute them one by one. The fact that thousands and thousands of pages of documents are involved is itself sufficient to demonstrate the enormity of the task involved.

A preliminary copy of the dossier submitted by the Secretary-General containing documents likely to throw light upon the question on which an advisory opinion has been requested, was received by us on or about 13 January 1971, when, Mr. President, we were on the point of departing for The Hague. After arrival here we received, on 20 January 1971, the official Court version of the dossier together with an introductory note of 20 pages. The dossier itself runs into 33 pages listing a vast number of documents including, but also additional to those relied upon in the Secretary-General's written statement. The dossier consists of 10 folders collectively measuring some 60 cm. high. These folders contain 382 items, many of which are themselves sub-divided into a number of documents. Thus, for example, item 267, which contains the annexes to agenda item 64 at the General Assembly's 23rd Session in 1968, incorporates eight separate documents. In his introductory note the Secretary-General points out that only the documents relevant to the question submitted to the Court and which were issued in 1966 and thereafter, were included, but even so, this documentation comprises a formidable collection of factual allegations of almost every type and description.

Included in the dossier are records or extracts of records of 232 meetings of

United Nations bodies ranging from the Security Council, the Committee on Colonialism, the Fourth Committee to the plenary meetings of the General Assembly itself. Then there is a total of 49 resolutions adopted by United Nations bodies during the period since 1966. There are also a number of reports submitted by the Secretary-General, the Committee on Colonialism, the Fourth Committee, the Council for South West Africa as well as reports prepared under the auspices of the Human Rights Commission and the Economic and Social Council. Likewise, there are a number of reports of sub-committees, of working papers prepared by the Secretariat and of extracts of statements made by petitioners.

As already stated, these documents contain a vast number of factual allegations. Many of those, although they are contained in documents issued in 1966 and thereafter, appear to us to be applicable also to the alleged violations of the obligations by South Africa during earlier years. It will consequently also be necessary to deal with allegations contained in all these documents.

Soon after receipt of the written statements of the other participants in December 1970, a main committee was actually formed in South Africa, consisting of senior officials, to assist with the task of gathering the facts necessary to refute the charges of violations of South Africa's obligations. Each of the committee members was made responsible for a group of allegations, at least such as could be identified at that stage. In turn, each of them sub-divided his task into more detailed subjects assigning individual sub-divisions to experts in the subjects concerned. Thus, one major area, social and welfare matters, has been sub-divided into civil pensions and gratuities, housing, disability allowances, old-age pensions, caring for the old, crèches and childcare, sport and recreation, cultural activities, education and health services. Social and welfare matters constitute but one of a number of major areas. The official responsible for a major area is the person who, in consultation with the Government's legal representatives, allocates the charges, according to their nature and scope, to the officials responsible for the sub-divisions.

The establishment of this committee in South Africa entailed also the creation of an organizational structure with headquarters in Cape Town and sub-divisions in Pretoria, Windhoek and Oshakati, the capital of Ovamboland. Administrative and secretarial support had to be supplied and arrangements were made for regular despatches of special airmail bags containing background material and volumes and volumes of records between these centres which are separated by vast distances. One of the first tasks was of course to duplicate thousands of pages of United Nations documentation for use by the main committee, that is, the South African committee, and its numerous sub-sections and sub-departments.

However, notwithstanding the early steps taken, which I have sketched, it has as yet been impossible to analyse all the charges contained in the documents already referred to, let alone to gather all the facts and formulate replies. It will be impossible to do so for quite some time to come.

Of course we cannot say that we have no knowledge of the type of allegations contained in the documentation referred to or that some of them are not easy to refute. Indeed, in paragraphs 14 to 31 of Chapter XI of our written statement we dealt with the quality and sources of the attacks in the United Nations and we demonstrated that they were mostly derived from wild assertions made by petitioners. By way of illustration we dealt with certain categories of allegations made by petitioners and echoed in United Nations debates, namely: allegations of genocide, of herding the non-white population of South West Africa into concentration camps, of depriving the indigenous inhabitants of the richest

part of the territory and confining them to desert-like or unhealthy areas to make way for White settlers, and of militarization of the Territory.

We showed that such allegations were completely untrue, but the categories of allegation with which we dealt are only a small portion of those to be found in the various reports and debates to which reference has been made.

I wish to offer a few more examples to illustrate the problem. One category of accusations which is to be found quite often in the documentation relied upon by the Secretary-General is the absence or the inadequacy of medical facilities for the indigenous inhabitants of South West Africa. According to witnesses interviewed by the Committee on South West Africa in 1961 "the poorly maintained medical and health services were far too inadequate to save the indigenous population from gradual extinction in the foreseeable future". This comes from UN document A/4926, paragraph 112, page 16, one of the documents relied upon by the Secretary-General.

A petitioner, Mr. Ngavirue, stated that there was a great shortage of medical facilities in the territory. In some regions there were virtually no hospitals. *Hospitals were always understaffed, overcrowded and generally had poor* sanitary conditions. There was neither a neurologist nor a psychiatrist at the Windhoek Native Hospital, but African mental patients drawn from all parts were herded into a camp where they were left to decay. There were hardly any specialized medical services for either Africans or Europeans. However, if a European patient needed a specialist, provision was made for his transfer to a better hospital in South Africa, whereas an African was rarely sent elsewhere for medical treatment. This also comes from UN document A/4926, at paragraph 113, page 16, and, as I have indicated, this is one of the documents relied upon by the Secretary-General.

In 1965 the representative of the USSR explained his delegation's position on a draft resolution on South West Africa, introduced at the 367th meeting of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. He stated that he was explaining his delegation's position on the draft resolution in the light of the statements made by the petitioners and the Special Committee's deliberations on South West Africa. In South West Africa, he said, "the only law was the violation of the dignity and of the rights of man. The people of South West Africa were reduced to slavery denied all education and medical assistance". This comes from UN document A/600/Rev. 1, para. 219, page 141, another document relied upon by the Secretary-General of the United Nations.

Ironically, Mr. President, the utter falsity of these charges is demonstrated in another document on which reliance is placed in these proceedings to substantiate the facts of South Africa's so-called violations of her trust obligations. I refer to the Report of the Special Rapporteur of the Commission on Human Rights entitled "Study of Apartheid and Racial Discrimination in Southern Africa", UN document E/CN.4/949/Add. 1. In paragraphs 793 to 815 of this report, submitted by the Secretary-General of the United Nations, information is furnished which completely contradicts the charges which I have just read and which were part of those charges on which reliance was placed when resolutions condemning South Africa were passed by the General Assembly.

So here we now have two documents, both submitted by the Secretary-General, one accusing us and the other one contradicting those very accusations.

We have furnished extensive information on health services. I can refer to the *South West Africa Survey 1967*, pages 121 to 132 and to the letter dated 26 September 1969 from the South African Foreign Minister to the Secretary-

General of the United Nations, pages 98 to 105. Despite all this, the Secretary-General in effect still maintains that lack of hospital and medical facilities is one of the facts of South Africa's violations of her trust obligations. He maintains this because allegations to that effect are contained in the documentation to which he has referred this Court, and he has not deigned to say that this part of the charge no longer stands. Must we meet it?

Mr. President, in the financial year 1969/1970, current expenditure on health services in South West Africa amounted to R5.84 million, of which 74, almost 75 per cent. was expended on behalf of the indigenous peoples as against 25 per cent. for the White group. Capital expenditure in 1969/1970 amounted to R1,116 million, of which 87 per cent. was devoted to facilities for the indigenous groups alone.

There are 1,049 beds available for White patients and 5,602 beds for the other population groups, giving a ratio of almost nine beds per thousand of all population groups. A few years ago the comparable figures for some other African countries were less than two and even less than one bed per thousand of the population.

In 1970, new services or improvements to existing services to a total value of R40.77 million were being actively planned or were about to be initiated. This is almost one-third of the United Nations' budget. Of the total figure, R8.82 million were for services to Whites, almost R20 million in respect of the indigenous peoples, while the remainder concerned projects serving all population groups.

There are 146 medical practitioners, dentists and specialists in the Territory (excluding the Eastern Caprivi). This gives a figure of one doctor to about 5,000 inhabitants. There are probably no countries in the African continent south of the Sahara with a more favourable distribution of physicians to population, except South Africa herself, where the figure is one doctor to 1,900 people. Recently the distribution of physicians in, for instance, Burundi was 1 : 61,000; Ethiopia—1 : 65,000; Nigeria—1 : 31,000; Rwanda—1: 57,000; Senegal—1 : 17,000; Liberia—1 : 11,000 and Mali—1 : 51,000 (*United Nations Statistical Yearbook*, 1969, table 198, pp. 673-677). Again, how does this compare with South West Africa?

In regard to nurses and their training, control of diseases, subsidies to mission hospitals, medical research, laboratory services, blood transfusion services, the position is more than favourable. I will not go into details, Mr. President—I merely refer the Court to our written statement, Chapter XI, section F, paragraphs 151-158, where all these details appear. For earlier data I refer the Court to Annexes A, I, pages 121-132, [1] and C, pages 98-105, [1] to Chapter XI of our written statement.

But, Mr. President, because the charge is still on record in the documentation relied upon by the Secretary-General, let us look at the additional work involved in preparing a proper reply on a subject which we would have thought to have been thoroughly canvassed. We are faced with numerous individual accusations which might not be adequately met by the data which we have made available, and to which I have referred.

These accusations one finds interwoven with other accusations in statements by petitioners and representatives of countries participating in debates over almost 20 years in various bodies of the United Nations. It is a considerable task to read through the thousands of pages of record in order to ensure that our list of particular charges on the subject of medical services is complete.

[1] Not reproduced.

Only thereafter can a start be made to determine which accusations can be met from available material, and which accusations will require additional enquiries with a view to obtaining factual material in order to canvass those accusations.

Let me illustrate this with a practical example. In the statement of Mr. Ngavirue, which I have read a little while ago, it is alleged that "hospitals were always understaffed, overcrowded and generally had poor sanitary conditions". Now let us look at this allegation. First of all it had to be found in the record, and in this specific case the reader would have come across it after having gone through more than ten years of United Nations records. He would by then have come across many others, but none based on these specific facts as I have just read them. This one is then added to the long list which has to be forwarded to the head of the health authorities with the request to cause proper enquiries to be made and to furnish full details as to the facts pertaining to this charge.

The head of the health authorities would then have to call in the heads of the various sections administering health matters and he would have to brief them as to what would be required. Presumably, the personnel section would be given the task to investigate the charge that "hospitals were always understaffed". That is the first part of the charge.

Another section responsible for planning hospital capacities would be given the task of replying to the accusation that "hospitals were always overcrowded". A third section, responsible for the physical planning of the buildings and the maintenance of the prescribed standards of hygiene would have to reply to the charge that the hospitals "generally had poor sanitary conditions".

Mr. President, at the time of the purported revocation of South Africa's Mandate, there were 130 hospitals and clinics in the Territory. Some of these are situated at vast distances from one another. For example, the hospital at Oranjemund in the south is about 650 kilometres from Windhoek by direct air route. Oranjemund, again by direct air route via Rundu in the Kavango, is situated at a distance of almost 1,800 kilometres from the central hospital in the eastern Caprivi. It is consequently hardly necessary to say that the consultations involved in adequately answering the charge under consideration will involve a considerable amount of time and effort.

I intend to conclude, Mr. President. I wish to advert to a remark made by the distinguished representative of the Organization of African Unity—a remark he made in his oral statement on 10 February 1971 (*supra*, p. 104). He said: "*Men* in Namibia are decaying morally and spiritually because of the policies carried out in that part of the world."

We believe that this brief remark goes to the very heart of the whole South West Africa issue.

The distinguished representative of the OAU believes that men are decaying in South West Africa because of South Africa's policies.

If South Africa were indeed pursuing a policy of genocide and racial extermination in South West Africa, and treading under her feet the self-determination and human rights of the black peoples of the Territory; if the black peoples were herded in concentration camps, treated like animals, reduced to slavery and forced to live in conditions of naked terror; if South Africa's policies were rooted in racial hatred and animosity and in a doctrine of white superiority and black inferiority; if, Mr. President, South Africa were in fact depriving the non-white peoples of their land, and confining them to desert areas; if the education system of the indigenous peoples were designed to prepare them for an inferior position in life; if the health services provided for the indigenous

peoples were far too inadequate to save them from gradual extinction—if all this were true, then, *men* would indeed be *decaying*, and the deep emotional involvement of the African countries would *then* be understandable.

On the other hand, Mr. President, if these allegations were *untrue* we would be entitled to expect that the African States would feel relieved that men are not decaying in that part of our continent. South Africa is confident that given the time and opportunity, she will be able to demonstrate that not only are men not decaying in South West Africa but that all men, irrespective of their colour, are developing and advancing in a way and at a rate of which the rest of Africa would be proud.

Being an African-rooted country, South Africa is deeply aware of the problems of our continent. We realize that there is hard work ahead for all of us. But we believe that we can overcome our obstacles in a spirit of co-operation based on respect for the self-determination of all our peoples—black and white.

We appreciate that the prosperity of our neighbours is also in our interests. Their security is our security. No other country is better equipped to assist actively and directly in the development of our African sub-continent. We have the will and the desire to play our role to the full in this great adventure. South Africa looks forward to the day that the sincerity of her purpose will be accepted by all African States. She looks forward to the opportunity in these proceedings to have that sincerity tested against the results achieved in every essential sphere of life of the peoples of South West Africa.

ORAL STATEMENT BY MR. DE VILLIERS

REPRESENTATIVE OF THE GOVERNMENT OF SOUTH AFRICA

Mr. de VILLIERS: Mr. President, Counsel's estimates of time are notoriously inaccurate and again we have been proved wrong. We are going to finish during this session after all. I wish to make only a very brief concluding statement to the Court.

I want to state briefly in conclusion certain themes which have been running through our presentation. I wish to stress three of those themes. They are not intended to be exhaustive. The first one is that neither individual States nor the international order can live with General Assembly resolutions elevated to the status of binding legislation, more especially if such legislative acts are sought to be applied arbitrarily to some States and not to others. Even so, despite all the attempts in this Court to represent the acts of the Assembly and the Court's consequent pronouncement upon them as being confined to an issue of a so-called delinquent South Africa with reference to South West Africa, once such a concept prevails in international law, an authoritative precedent will have been set, and no one can tell this Court, with respect, where it will stop.

Secondly, the mandates system and the trusteeship system were designed to operate on a basis of dialogue and peaceful development. This is basic, in law and in fact. The sacred trust requires to be honoured not only by South Africa but also by the United Nations. The United Nations would be betraying its mission if it seeks enforcement action for its majority views, a course which, as we have demonstrated, must inevitably lead to untold harm for the very peoples whose cause those majorities profess to espouse.

Thirdly, Mr. President, if disputes are to be settled by law rather than by power and force, a judiciary in the position of this Court must be willing to oppose political pressures and temporary majorities. That is frequently the only protection for a wronged minority.

We have come to a conclusion which is not an end, Mr. President. We have now fully presented our oral statements on the legal issues bearing on the powers of the organs of the United Nations with reference to their relevant resolutions. However, the factual issues underlying those decisions have not been fully dealt with, as we tried to explain in some detail to the Court today.

South Africa contends that if it is necessary to go into the factual field at all, then a very substantial further canvassing of the factual field will be necessary. When I say "if it is necessary to go into the factual field at all" I have in mind the two qualifications which we have indicated before. The first one is that it is conceivable that as a result of the view or conclusion arrived at by the Court on the legal issues, the Court might find that the actions taken in the organs of the United Nations were invalid on legal grounds, making it unnecessary to enter into the factual field at all. That is one possibility.

We do not see the converse as being possible, with submission. We do not see a possibility of a conclusion upholding the validity of the action of revocation without fully considering the question of factual justification for it.

The other possibility was that raised by South Africa's plebiscite proposal. We have indicated our reasons for submitting to the Court that if that proposal

is acceded to, it could have a vital bearing on the nature and on the scope of such further investigation into the facts.

Those are the two qualifications which I had in mind when I said "if further consideration of the factual field should prove necessary".

The Court has not responded to our plebiscite proposal, nor to our suggestion that it should indicate to us at an early stage what its attitude or decision on the matter might be. So our position at this stage is this. I think we have made it clear that even if it had not been for the two factors which I have mentioned, South Africa would more or less at this stage of the proceedings have been in the position of having to apply for a postponement with a view to further investigation into the factual field and the presentation thereof to the Court, for the reasons which we have made clear today and which were specifically dealt with by my learned friend, Mr. Botha.

But we are not formally in the position now of having to make that application, as we see the position. As soon as the Court has communicated to us the Court's attitude or view in connection with the plebiscite proposal we shall, with respect and with submission, be in a position to know whether it is necessary to make such a formal application. In the meantime, I do wish to state to the Court formally, firstly, that unless the need for a factual enquiry falls away, wholly or in part, for one or both of the reasons which I have mentioned, South Africa submits that an extensive further enquiry into the facts is essential and that without it great injustice could be done to South Africa's position.

Secondly, we therefore wait to hear from the Court and we hold ourselves at its disposal for such a further investigation.

ORAL STATEMENT BY MR. VICKERS

REPRESENTATIVE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

Mr. VICKERS: Mr. President, honourable Members of the Court. The Secretary-General would respectfully request that the fact of not replying to any of the points which have been presented to the Court in the course of these proceedings will not be construed as any admission on his part of their correctness, or completeness, or relevance. Subject to this reservation, the Secretary-General does not wish to detain the Court at this time with further rebuttals or elaborations, especially since, in his view, many of the differences between his position and that taken by South Africa result in effect from differences in their respective conceptions as to the legal and factual nature of the situation of Namibia.

In conclusion, therefore, the Secretary-General has directed me to reiterate his confidence that the United Nations will receive from the Court the guidance which it is seeking.

CLOSING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 [1] 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 pronounce 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.

Having arrived at the end of this phase of oral hearings, the Court desires me to express its appreciation of the valuable assistance it has received from the States and Organizations which have submitted written statements and have participated in the oral hearings.

The Court rose at 12.30 p.m.

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[1] **See Correspondence**, No. 92, p. 673, *infra*.

TWENTY-FOURTH PUBLIC SITTING (21 VI 71, 10 a.m.)

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

Also present:

For Finland:
Mr. P. Gustafsson, Ambassador to the Netherlands.

For India:
Mr. T. S. Ramamurti, Secretary of Embassy.

For the Netherlands:
Dr. C. W. van Santen, Deputy Legal Adviser, Ministry of Foreign Affairs.

For Nigeria:
Mr. I. J. D. Durlong, Ambassador to the Netherlands.

For Pakistan:
Mr. R. S. Chhatari, Ambassador to the Netherlands.

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. J. D. Tothill, Member of the Department of Foreign Affairs.

READING OF THE ADVISORY OPINION

The PRESIDENT: The Court meets today to deliver in open court, in accordance with Article 67 of the Court's Statute, the Advisory Opinion requested by the Security Council of the United Nations on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

Much to the regret of the Members of the Court, Judge Padilla Nervo is unable to be here today. Shortly before the Court had completed the substance of its work on the present case, he was taken ill. After medical consultations in The Hague it was thought best for him to return to Mexico for consultation with his own doctors and he accordingly did so. He has since been undergoing treatment which is proceeding satisfactorily but which, under medical advice, has not allowed him to return to The Hague.

The relevant clauses of the Court's Resolution concerning its Internal Judicial Practice provide that a judge who has participated substantially in the proceedings of a case but who, because of illness or physical incapacity, is unable to attend in person on the occasion of the Court's final adoption of its Judgment or Opinion may nevertheless record his vote in such manner as the Court may decide to be compatible with its Statute, any doubt being settled by the Court itself.

Judge Padilla Nervo was present throughout the oral proceedings in this case and also throughout the Court's private deliberations up to a point at

which it had reached the substance of its decision,—a decision on which Judge Padilla Nervo was able to make his opinion known.

Accordingly, and in the circumstances just described, the Court decided that Judge Padilla Nervo should be allowed to record his final vote in writing. This having been done, that vote duly figures amongst those recorded in the Opinion of the Court.

I shall now read the English text of the Opinion.

The President read the Opinion [1].

I call upon the Registrar to read the operative part of the Advisory Opinion in French.

The Registrar read the operative part of the Opinion [2].

Appended to the Opinion of the Court is a declaration by myself. Vice-President Ammoun and Judges Padilla Nervo, Petrén, Onyeama, Dillard and de Castro append separate opinions; Judges Sir Gerald Fitzmaurice and Gros append dissenting opinions.

In view of the fact that the Security Council requested the Opinion of the Court to be made available at an early date, and in order to avoid the delay involved in printing the Opinion, it has been decided to read the Opinion today from a roneoed text. The normal printed edition will be available in about a week's time.

The Court rose at 11.50 a.m.

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

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[1] *I.C.J. Reports 1971*, pp. 21-58.
[2] *I.C.J. Reports 1971*, p. 58.

ANNEXES TO ORAL STATEMENTS

ANNEXES AUX EXPOSÉS ORAUX

BRIEF STATEMENT OF THE MAIN CONTENTIONS OF THE SOUTH AFRICAN GOVERNMENT [1]

Preliminary

A. The Composition of the Court

	Source
(1) In the light of the general principles relating to recusation of judicial officers, three individual Judges (Sir Muhammad Zafrulla Khan, Judge Padilla Nervo and Judge Morozov) should not take part in the proceedings.	Letter, dated 13 November 1970[2], to the Registrar, read with written statement, Chapter IV, paras. 22-29.
(2) There exists within the meaning of Article 83 of the Rules of Court, a "legal question actually pending" between South Africa and other States, and South Africa is consequently entitled to the appointment of an *ad hoc* Judge.	Letter, dated 13 November 1970[2], to the Registrar, read with written statement, Chapter IV, paras. 31-43.

B. The Jurisdiction of the Court

(1) The Court lacks jurisdiction because of—	Written statement, Chapter III, paras. 1-40 and 42-56.
(a) the invalidity of Security Council resolution 284 (1970) embodying the request for an advisory opinion, the grounds of invalidity being as follows:	
(i) the resolution, being a decision on a non-procedural matter, was not supported by the *concurring votes* of all the permanent members of the Security Council;	Written statement, Chapter III, paras. 1-5, 12-40 and 42-50.
(ii) South Africa was not invited in terms of Article 32 of the Charter to participate in the discussions preceding the adoption of the resolution;	Written statement, Chapter III, paras. 51-55.
(b) the existence of extensive, unresolved factual issues underlying the question posed which takes it out of the category of a "legal question" as envisaged in Article 96 of the Charter.	Written statement, Chapter IV, paras. 44-48.
(2) In any event, as regards its jurisdiction the Court needs to consider whether the Republic of China was at all material times a member of	Written statement, Chapter III, paras. 6-11.

[1] See p. 172, *supra*.
[2] See p. 641, *infra*.

Source

the Security Council as required by Article 23 (1) of the Charter.

(3) In the alternative, the Court should as a matter of judicial propriety decline to accede to the request because of—

(a) the political background to the question in which the Court itself has become involved and the potential damage to the status and standing of the Court and its members; — Written statement, Chapter IV, paras. 4-30.

(b) the direct bearing of the question on an actual dispute between South Africa and other States; — Written statement, Chapter IV, paras. 31-43.

(c) the existence of the above-mentioned extensive factual issues, for the investigation and decision of which the advisory process is not appropriate. — Written statement, Chapter IV, paras. 44-48.

The Merits

A. The Scope and Structure of the Question

All relevant Security Council resolutions leading up to and including resolution 276 of 1970 (referred to in the question) rested upon an assumption of the validity of the action taken by the General Assembly in resolution 2145 (1966) which purported to terminate South Africa's title to administer South West Africa: the fundamental issues therefore concern the validity of that action. — Written statement, Chapter V, paras. 6-15.

B. The Purported Termination of the Mandate

The purported termination of the Mandate by General Assembly resolution 2145 (1966) was invalid for the following reasons:

(a) Save in exceptional cases of a domestic nature and not relevant here, the General Assembly has no power under the Charter to make binding decisions, as it purported to do in deciding to terminate the Mandate. — Written statement, Chapter X, paras. 1-11.

(b) (i) In any event, the General Assembly purported to act as successor to the supervisory functions previously exercised by the Council of the League of Nations; — Written statement, Chapter VI, paras. 1-16.

but

(ii) in law and in fact it did not succeed to those supervisory functions; — Written statement, Chapter VII, paras. 43-64 and Chapter VIII, paras. 1-78, read with Chapter IX.

and

		Source
	(iii) moreover, even the Council of the League of Nations did not have the power of unilateral termination of the Mandate.	Written statement, Chapter VII, paras. 65-97.
(c)	(i) Furthermore, the General Assembly purported to act on the basis of a violation by South Africa of its obligations in respect of the mandated *territory and its inhabitants,*	Written statement, Chapter XI, paras. 1-3, read with Chapter VI, paras. 1-16.
	but	
	(ii) in fact and in law there was no justification for the assertion that such a violation had occurred,	Written statement, Chapter XI, paras. 4-161.
	and	
	(iii) no attempt was made at a fair and proper investigation of this assertion.	*Ibid.*

C. The Validity and Effect of the Relevant Security Council Resolutions

(1)	The resolutions are invalid:	
	(a) since they were based on General Assembly resolution 2145 (XXI) which in itself has no binding force;	Written statement, Chapter V, paras. 6-15.
	(b) since they were not supported by the *concurring votes* of all the permanent members of the Security Council;	Written statement, Chapter III, paras. 12-40.
	(c) since South Africa was not invited in terms of Article 32 of the Charter to participate in the discussions preceding their adoption.	Written statement, Chapter III, paras. 51-55.
(2)	In any event the Court needs to consider whether the Republic of China was at all material times a member of the Security Council as required by Article 23 (1) of the Charter.	Written statement, Chapter III, paras. 6-11.
(3)	Resolution 276 (1970) is furthermore invalid—	Written statement, Chapter III, para. 41.
	(a) since certain members of the Council should have abstained from voting;	
	(b) it was not adopted in conformity with the provisions of the Charter and consequently is *ultra vires* the Security Council, in particular:	
	(i) since for purposes of action in terms of Chapter VII of the Charter, no determination was made that there existed in relation to South West Africa "any threat to the peace, breach of the peace or act of aggression";	Written statement, Chapter V, paras. 16-20.

	Source
(ii) since, as far as the powers under Chapter VI of the Charter are concerned, the Council did not act for the purpose of maintaining international peace and security, nor was any impartial and objective investigation conducted in order to determine whether the dispute or situation was likely to endanger international peace and security.	Written statement, Chapter V, paras. 32-45.
(4) In the alternative, and even if resolution 276 (1970) is not invalid, its terms have no legally binding consequences for States but are at the most recommendatory in their effect.	Written statement, Chapter V, paras. 46-60.

EXTRACT FROM THE REPORT CONCERNING THE IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTIONS 1578 (XV) AND 1596 (XV), BY THE COMMITTEE ON SOUTH WEST AFRICA (1961)[1]

Recommendations:

. . . . . .

"(2) The immediate institution of the United Nations' presence in South West Africa;

(3) Removal of the present Administration from the Territory of South West Africa, with effective and simultaneous transfer of power to the United Nations or to the indigenous inhabitants of the Territory." (*GA, OR*, Sixteenth Sess., Supplement No. 12 (A/4926).)

Extracts from Debates in the Fourth Committee during its 16th Session (1961):

Mr. Castañeda (Mexico):

"In general his delegation endorsed the conclusions and recommendations in the Committee's report. The Committee's basic recommendation was that the Mandate entrusted by the League of Nations to the Union of South Africa should be terminated, so that the administration of the Territory could be assumed directly by the United Nations for a period of time with a view to eventual independence. *As the Committee had not examined in detail the problem of the legal grounds for revoking the Mandate, and as that was no doubt a question which would give rise to some debate*, he wished to give his country's views on that subject." (*GA, OR*, Sixteenth Sess., 4th Comm., 1226th Meeting, p. 436.)

"It was frequently thought in the United Nations that any solution which represented a real advance in dealing with a particular problem was of a political nature. It was said that lawyers were basically technicians whose principal mission was to elaborate legal arguments to justify already existing political positions and that law was fundamentally conservative inasmuch as it tended to maintain the *status quo* and to prevent a radical change in the existing situation. For that reason most of the progress made in the protection of dependent peoples had been achieved through political action and in many cases the possibilities of legal action to change the existing situation had not been fully explored. Yet it was often possible to use legal machinery to alter situations which had become unsatisfactory and it would certainly be worth while to explore the possibilities offered by international law to deal with the situation in South West Africa.

So far all efforts had been confined to persuading the South African Government to comply with its obligations under the Mandate, which from the point of view of international law was a treaty. When one party to a treaty did not comply with its obligations, the other party had two alternative courses: to demand the fulfilment of the obligation, or to

[1] See p. 402, *supra*.

demand the abrogation of the agreement on the basis of that non-fulfilment. The ability to revoke obligations under a bilateral or synallagmatic treaty was implicit where one of the parties did not fulfil its obligations; in other words the obligation of one party was subject to the condition that the other party fulfilled its obligations. The same rule was to be found in most of the legal systems of the world and could be regarded as one of the 'general principles of law recognized by civilized nations' mentioned in Article 38 of the Statute of the International Court of Justice. Furthermore, it was a basic principle of international law and should be regarded as a binding rule of international law concerning the fulfilment of treaties.

The Mandate which the League of Nations had given to the Union of South Africa to administer the Territory of South West Africa constituted an international treaty and, like any other international treaty, it was subject to the usual rules with regard to its fulfilment. The fact that there was no express provision in the text of the Mandate for action in the event of the Mandatory Power failing to fulfil its obligations faithfully did not mean that such failure did not entail the normal legal consequences. Indeed, scarcely any international treaties included a specific clause providing for rescission on the grounds of non-fulfilment. It would be absurd to claim that the League of Nations, in granting a mandate, had renounced the right to supervise the activities of the Mandatory and had left it free to fulfil its obligations or not, at its discretion, or that it had denounced the normal right of a party to a treaty to demand its revocation if the other party did not fulfil its obligation. The very nature of the Mandate, under which the Mandatory Power accepted the 'sacred trust' of promoting the well-being of the dependent people of the Territory, reinforced the argument that the League could not have renounced the normal legal methods for controlling the fulfilment of the treaty.

In order to prove that the Mandate over South West Africa should be terminated, it was first necessary to show that South Africa had not fulfilled its obligations. There was no difficulty in that respect: the case submitted by Liberia and Ethiopia to the International Court of Justice gave a full account of the many instances of South Africa's violation of the Mandate, and the debates in the General Assembly, year after year, had confirmed the numerous cases in which South Africa had not complied with the terms of the Mandate and of the corresponding article of the League Covenant." (*Ibid.*, pp. 436-437.)

Mr. Hu Nim (Cambodia):

"The representative of Mexico, in a brilliant analysis, had rightly interpreted the Mandate as a treaty binding the United Kingdom and the Union of South Africa, on the one hand, and the indigenous inhabitants of South West Africa and the international community, on the other hand. In the circumstances, the Cambodian delegation considered that the revocation of the Mandate was the only just and peaceful way for restoring peace and order in that region and for accomplishing the sacred task of the United Nations in liberating the peoples of South West Africa." (*Ibid.*, 1208th Meeting, p. 453.)

Mr. Achkar (Guinea):

"The Committee had likewise concluded that steps must be taken to safeguard the legitimate rights and aspirations of the people of South West Africa. Those aspirations had been expounded by all the petitioners,

and it was obvious that if the South African Government continued to administer South West Africa, there would be no political, economic, social or cultural progress in that international Territory. The juridical arguments adduced by the Pretoria Government were acceptable only to its avowed accomplices, because that Government was completely indifferent to the findings of the Court when those findings were contrary to its own desires. The fact that the Governments of Liberia and Ethiopia had brought the question before the International Court of Justice could not be an obstacle to the liberation of the peoples concerned, since General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples must apply to them as well as to all others. In any event, the Court could do no more than indicate what régime should be introduced in South West Africa in accordance with the Mandate and reaffirm the illegality of the attitude of the South African Government. That would not be a substitute for the political decision which the General Assembly was entitled to take to save the people of South West Africa from oppression, degradation and systematic extinction. The South African Government's defiance would only be encouraged by weakness on the part of the United Nations." (*Ibid.*, p. 465.)

Mr. Zikria (Afghanistan):

"His delegation was not opposed to the idea of revoking the Mandate, but it considered that the United Nations, in adopting the Declaration on the granting of independence, had *ipso facto* revoked the Mandate under which South Africa was occupying the Territory in question." (*Ibid.*, 1229th Meeting, p. 458.)

Mr. Taylhardat (Venezuela):

"His delegation agreed with the Committee on South West Africa that the South African Government was unfit further to administer the Territory and that the General Assembly should, as a matter of urgency, undertake a study of the ways and means by which to terminate South African administration over the mandated Territory. In his statement at the 1226th meeting, the representative of Mexico had advanced cogent legal arguments on that point which would be useful to the Fourth Committee in reaching a decision on the revocation of the Mandate. Since the Mandatory Power had failed to comply with its obligations, the international community could unilaterally revoke the Mandate and assume all the rights and titles to the Territory at present held by the Republic of South Africa. In the existing state of affairs, however, the General Assembly should carefully examine the legal, political and other consequences of revoking the Mandate." (*Ibid.*, 1231st Meeting, p. 472.)

Mr. Perris (Ceylon):

"Considering the question from the legal point of view, while he would not presume to add anything to the statement of the Mexican representative, he recalled the terms of the advisory opinion which the International Court of Justice had delivered on 11 July 1950. The question arose whether the United Nations, as the legal successor to the League of Nations, was competent to change the international status of the Territory unilaterally. In regard to that point, the advisory opinion had made it clear beyond doubt that in law the United Nations was the residuary legatee of the rights and obligations of the League of Nations, a status

which was confirmed by Articles 79 and 80 of the Charter." (*Ibid.*, p. 472.)

"According to the statements of Field Marshal Smuts, one of the chief architects of the Mandates System, if a Mandatory Power abused the trust reposed in it the League of Nations should be able to revoke the Mandate. It had been clear to the Committee on South West Africa that the South African Government should no longer continue to exercise the Mandate because it had proved to be unfit to do so." (*Ibid.*, p. 473.)

Mr. Antonowicz (Poland):

"For the United Nations to continue voicing its concern about the fact that the South African Government refused to discharge its duties in the Territory would be tantamount to agreeing to tolerate the existing state of affairs. The obvious course to follow was to deprive the South African Government of its authority in South West Africa. The General Assembly should therefore decide that further administration of the Territory by South Africa was illegal; the United Nations would retain its responsibility for the Territory pending the establishment of an independent State of South West Africa." (*Ibid.*, 1231st Meeting, p. 474.)

Mr. Stoian (Romania):

"It was not a question of embarking now upon a study of the present situation in and the future of the Territory. That future had already been determined by its legal status and by the Charter. The course to be followed was that set forth in General Assembly resolutions 1514 (XV) and 1654 (XVI). The extraordinary state of tension in the Territory made it incumbent upon the United Nations to do something immediately.

The United Nations had to put an end to the South African Government's administration, which had become illegal with South Africa's refusal to place the Territory under trusteeship, as required by the Charter. The first step to be taken was that recommended by the Committee in paragraph 164 of the report (A/4926), namely the immediate establishment of a United Nations presence in the Territory, which in concrete terms meant withdrawing the Mandate from South Africa." (*Ibid.*, 1233rd Meeting, p. 492.)

Mr. Gassou (Togo):

"In the opinion of the Togolese delegation, the South African Government had betrayed the Mandate that has been entrusted to it: it was exploiting the Territory instead of administering it on the principle that the interests of the inhabitants were paramount; it was making the inhabitants its slaves instead of promoting their economic, social, educational and political welfare; it was practising apartheid where freedom should reign and its objective was the annexation of the Territory rather than the latter's accession to independence. The Togolese delegation endorsed the conclusion contained in paragraph 159 of the report of the Committee on South West Africa (A/4926) that the Mandatory Power, unresponsive to the appeals of the Native population, the African community and the international community as a whole, had followed a course of international illegality which required that corrective measures should be instituted with a view to protecting the lives and the legitimate rights and aspirations of the peoples of South West Africa. The Togolese delegation endorsed the recommendations which the Committee on South West Africa had accordingly put forward in paragraphs 162 to 164 of the same report,

and it was prepared to examine any proposal calculated to produce an appropriate solution to the problem." (*Ibid.*, p. 495.)

Mr. Santiso Galvez (Guatemala):

"The legal problem involved in terminating the Mandate had been ably analysed by the representative of Mexico at the 1226th meeting. The Guatemalan delegation, which had also studied the legal aspect of the question, had reached the same conclusions as the representative of Mexico and had gone even farther. In its opinion, it must be possible to use legal means to change political situations which had become dangerous. In the case of South West Africa, not only would a political situation have to be changed, but a legal relationship would have to be terminated for the reason that one of the parties was not complying with its obligations. In effect, the Mandate for South West Africa was an international agreement concluded between the international community, acting through the League of Nations, on the one hand, and South Africa, on the other. Moreover, it was a synallagmatic contract and therefore created obligations which were binding on the parties in virtue of the paramount rule of international law: *pacta sunt servanda.*

Jurists of various countries had expressed the view that failure by one party to comply with its obligations justified the voiding of a treaty by the other party. But jurists did not always agree on the practical application of the principle. Some took the view that a treaty was abrogated by the mere fact of one party's failure to comply with its obligations. Others held that non-compliance by one party authorized the other to apply to an international body for the termination of the treaty. Finally, there were some who thought that the injured party could unilaterally regard the treaty as null and void. The Guatemalan delegation believed that the last interpretation should be accepted as a general rule, particularly if the injured party was a weak country which could not resort to force in order to compel the other party to respect its undertakings. The principle should be established that every international agreement should contain tacit provision for termination and would lapse if the obligations it imposed were not fulfilled by any party. The decision to terminate the agreement should be taken by the competent body of the country which, having faithfully performed its obligations had been prejudiced by the failure of the other party to comply with its commitments.

The United Nations was competent to declare that the Mandate held by South Africa for the Territory of South West Africa had lapsed. Elementary justice required the United Nations to redress the wrongs resulting from non-compliance with an international treaty in cases where the injured party was a weak social entity. That would be feasible if the United Nations terminated the Mandate, directly or indirectly assumed responsibility for the administration of South West Africa and, in accordance with the sacred principles of the Charter, promoted the development of the indigenous inhabitants towards freedom and independence." (*Ibid.*, 1234th Meeting, p. 500.)

Mr. Abdel Wahab (United Arab Republic):

"The United Nations must take urgent and effective measures to put an end to the explosive situation prevailing in South West Africa. The Committee on South West Africa had concluded that the South African Government was unfit to administer the Mandated Territory and had

recommended the immediate removal of the present administration and the transfer of all powers to the people of the Territory, with the assistance of the United Nations. The people of South West Africa had expressed their wishes concerning independence, which they hoped would be safeguarded by the United Nations. Under resolution 1514 (XV), the General Assembly had proclaimed the immediate abolition of colonialism, and hence the recommendations of the Committee on South West Africa must be given effect. To that end, the Assembly must declare the South African Government unfit to administer the Territory and proclaim that South West Africa would be an independent and sovereign State as soon as a constitution had been drafted and democratic institutions established. Lastly, the General Assembly should set up a committee of five or seven members to ensure the implementation of the recommendations of the Committee on South West Africa." (*Ibid.*, 1234th Meeting, p. 502.)

Mr. Brykin (USSR):

"In the view of the USSR delegation, the Committee should strongly support the recommendations made by the Committee on South West Africa, particularly those appearing in paragraph 164 *(a)* (2), (3), (5) and (6) of its report (A/4926). It was convinced that, in accordance with the Declaration on the granting of independence to colonial countries and peoples and pursuant to the previous decisions of the United Nations on the question of South West Africa, it was necessary: firstly, to terminate South Africa's Mandate over South West Africa immediately; and secondly, to entrust the administration of South West Africa to a special commission composed of representatives of independent African States, so as to ensure the application during the coming year of the measures proposed by the Committee on South West Africa, with a view to the Territory attaining complete independence before the end of 1962." (*Ibid.*, 1235th Meeting, p. 511.)

Mr. Edmonds (New Zealand):

"The 1950 Advisory Opinion did not make it clear whether the United Nations was itself competent unilaterally to alter that status. That was a most delicate question. Suggestions had been made that the General Assembly or the Security Council should revoke, suspend or transfer the Mandate, or even declare the Territory independent. The New Zealand delegation endorsed the objective of self-determination and the eventual assumption of separate national sovereignty by the people of South West Africa if that should be their wish, but it could not see how it would help for the Assembly simply to revoke or suspend the Mandate, even if that proved legally possible, which was extremely doubtful. The practical difficulties would become even greater and the legal situation even less satisfactory, for it was the Mandate that gave the United Nations the solid legal basis for its supervision of the Territory. It had also provided the basis for the Court action which Ethiopia and Liberia were at present actively prosecuting against South Africa. If as a result of that legal action judgment were given against South Africa, and South Africa accepted it, that would inevitably have profound effects on the policies followed by that Government in the Republic itself as well as in the Mandated Territory. If, on the other hand, South Africa failed to comply with an adverse decision in the International Court, the position would be different. Ethiopia and Liberia would then have the right, under Article 94 of the

Charter, to have recourse to the Security Council. At that stage, no doubt, the Council would find it most helpful to know its precise powers with regard to the transfer or revocation of the Mandate and there seemed therefore to be sound sense in the recommendation of the Committee on South West Africa that the General Assembly should now arrange for a study of the ways and means by which South Africa's administration of the Mandated Territory might be terminated.

The matter bristled with both legal and practical problems. He felt sure that the representative of Mexico, whose valuable contribution to the debate would, he hoped, be circulated in full, would readily admit that there were weighty arguments against the termination of the Mandate." (*Ibid.*, 1226th Meeting, p. 439.)

PROPOSALS RELATING TO THE REVOCATION OF THE MANDATE IN THE SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES[1]

Ivory Coast:

"In the view of his delegation, the problem of South West Africa was not only a juridical one; it was also a colonial problem, which the Special Committee was qualified to consider. The Africans were fully aware of the course which events were taking in that area, of the factors determining those events and of their implications for and repercussions on the African continent as a whole. The time had come to take more effective action than in the past. The United Nations should no longer be content to seek to put an end to conflicts once they had broken out, but should strive to prevent them, particularly when it knew the origin of the danger. The origin of the Second World War was still fresh in the minds of all. To prevent the recurrence of such a tragedy, South West Africa must be removed from South Africa's control. To enable the people of South West Africa to obtain national independence, adequate measures must be enacted, such as the complete and early revocation of South Africa's Mandate and the immediate and effective establishment of either an emergency force or an international volunteer corps. Those measures were all the more essential in that they would have the effect of preventing the racist South African Government from occupying South West Africa as it intended to do even if the decision of the International Court of Justice was unfavourable to it." (*GA, OR*, Twentieth Sess., doc. A/6000/Rev. 1, p. 139.)

Denmark:

"In approaching the problem of how to secure rapid termination of the Mandate, however, care should be taken not to repulse those whose support was necessary. The General Assembly would of course be competent to cancel the Mandate if the claim that South Africa was violating it was validated. The question had, however, been brought before the International Court of Justice by Ethiopia and Liberia, and it would be contrary to the general principles of law for a political organ like the General Assembly to take a decision pending the Court's judgment, which was expected before the convening of the twenty-first session of the General Assembly." (*Ibid.*, Twenty-first Sess., doc. A/6300/Rev. 1, p. 273.)

Iran:

"In accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United Nations should do its utmost to revoke the Mandate and thus secure the independence and freedom of the people of South West Africa." (*Ibid.*, p. 274.)

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[1] See p. 406, *supra*.

USSR:

"His Government was anxiously awaiting the decision of the International Court of Justice on the question, but the legal aspect was one of secondary importance. The main issue was political: the termination of the Mandate and the accession of South West Africa to independence, in accordance with the provisions of General Assembly resolution 1514 (XV)." (*Ibid.*, p. 276.)

Venezuela:

"Again, it had often been claimed that the problem was one of law. That was a pretext used by the administering Power to gain time and hold up such measures as the United Nations might take.

As the Venezuelan delegation had already stated at the General Assembly's twentieth session, it was the duty of the Special Committee to recommend to the General Assembly means and procedures calculated to put an end to the abnormal situation prevailing in the Territory and to give effect to General Assembly resolution 1514 (XV)." (*Ibid.*, pp. 276-277.)

India:

"Some members had considered that it was not proper for the Special Committee or for the United Nations to discuss the question of South West Africa because it was being considered by the International Court of Justice. Such an argument was intended to divert attention from the support given by the trading partners of South Africa. The International Court of Justice was dealing only with certain legal aspects of the problem, not with the social, political and economic aspects; it was not expected to rule on the Territory's political future. The United Nations was entitled, and indeed morally obliged, to examine the situation and to study ways of transferring power to the indigenous people. The Special Committee's own task was to ensure speedy implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and his delegation hoped that it would not be deterred from its aim." (*Ibid.*, p. 278.)

Poland:

"The South West African question was a challenge to the conscience of mankind. In his delegation's opinion, there could be no exception regarding the implementation of General Assembly resolution 1514 (XV) and the United Nations should not allow legal technicalities to prevent the people of South West Africa from attaining independence. The Special Committee should realize that South Africa and its allies were doing their utmost to consolidate their industrial and military empire in the southern part of Africa and to perpetuate the exploitation of Africans. His delegation therefore considered that the General Assembly and the Special Committee should agree upon concrete measures to divest South Africa of its Mandate and should demand the withdrawal of all military bases and personnel from South West Africa. It would support any resolution calling for the transfer of power to the people of South West Africa, in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples. He therefore suggested that the Special Committee should recommend that the General Assembly take the necessary measures to divest South Africa of its Mandate over South West Africa and call upon the Security Council to consider the steps to be taken in order to effect the transfer of power to a representative Government established as a result of general elections held under the supervision of the United Nations." (*Ibid.*, p. 279.)

Tunisia:

"The representative of Tunisia emphasized that the question of South West Africa was a specifically colonial problem which came within the purview of the Special Committee and the General Assembly. The people of that Territory had to be freed from the grasp of a State which, although a Member of the United Nations, continued to oppress them politically, as well as economically and socially, despite all the recommendations of the United Nations. The situation prevailing in South West Africa was unworthy of modern times and all men had a duty to put an end to it. The legal arguments adduced by certain delegations, which had taken refuge behind the final decision to be taken by the International Court of Justice, should not stand in the way of the recommendations made by the majority of States Members of the United Nations that the Mandate for South West Africa should be withdrawn from South Africa." (*Ibid.*, p. 279.)

Bulgaria:

"He considered that the judgment of the International Court of Justice related to only one aspect of the question and that it was now time to decide on the substance of the matter, namely, the question of releasing the people of South West Africa from colonial domination once and for all by ending South Africa's Mandate for that Territory." (*Ibid.*, p. 280.)

Ivory Coast:

"Despite the fact that one aspect of the question was being examined by the International Court of Justice he considered that General Assembly resolution 1514 (XV) should be applied to that Territory without delay. He agreed with the representatives of Denmark, Venezuela and Mali that the Mandate should be withdrawn from South Africa as soon as the International Court of Justice had handed down its judgment." (*Ibid.*, p. 280.)

See also pages 745 to 746 of Chapter XI of our written statement (I).

REPLY BY MR. STEVENSON TO QUESTIONS BY JUDGES SIR GERALD FITZMAURICE, JIMÉNEZ DE ARÉCHAGA AND MOZOROV[1]

First Question of Judge Sir Gerald Fitzmaurice[2]

Question: "It has been maintained on behalf of the United States that fundamental breaches of a contract by one party entitle the other to put an end to it. I would like to know how, in your view, exactly this would work in practice. For instance, it is evident that if a party could put an end to a contract merely by alleging fundamental breaches of it, and despite the denials of the other party, whether on the facts or as regards the existence of the obligation, there would always be an obvious and easy way out of contracts which one of the parties found onerous or inconvenient. What safeguards would you institute in order to prevent this, and how would or should such safeguards apply in the international field, in the relations between States or between States and international organizations?"

Reply: The doctrine of material breach as a basis of terminating a contract is a doctrine of municipal contract law which has been reflected in international treaty law. Obviously not every breach of a contract would justify the other party in terminating the contract but only a breach of such significance as, in the words of Article 60 (3) of the Vienna Convention on the Law of Treaties, would constitute a "violation of a provision essential to the accomplishment of the object or purpose of the treaty". If the party alleging breach were held by an international tribunal not to have established the material breach, the termination would not be legally justified and a party which had terminated the treaty on the basis of an alleged breach would be liable for an unjustified repudiation of a contract. 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. The best safeguard against misuse of the doctrine of material breach would be through the extension of the compulsory jurisdiction of the International Court of Justice or other appropriate international tribunals over legal disputes arising between States or between States and international organizations, at least with respect to those disputes which relate to the interpretation, application and termination of international agreements.

Second Question of Judge Sir Gerald Fitzmaurice[2]

Question: "I would be glad to know whether, after hearing or reading what has been said on behalf of South Africa at *supra*, pages 367-372, 445-451, and 453, it is still maintained on behalf of the United States that the former Mandate for Palestine was unilaterally terminated by the Assembly without the consent of the mandatory power and, if not, what precisely is supposed to be the relevance of the Palestine case to the present one?"

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[1] See p. 506, *supra*, and **Correspondence**, No. 99, p. 679, *infra*.
[2] See p. 506, *supra*.

Reply: We wish to point out that the Palestine case is referred to in that section of our written statement (Part II, Chapter I, Section VI, pp. 860 through 863 (I)) which shows that the United Nations succeeded to the League of Nations supervisory powers including the right to terminate a mandate. That the League of Nations had the power to terminate the rights of a mandatory is established, we submit, in the preceding Section of our written statement (Section V, pp. 857 through 860 (I)).

The Court will see that principal authority cited in Section VI of our written statement in support of the proposition that the United Nations succeeded to the powers of the League is the advisory opinions of this Court concerning the *International Status of South West Africa*, *Voting Procedure* and the *Hearings of Petitioners*. However, those opinions were not rendered until 1950, 1955 and 1956 respectively.

The practice of the United Nations in the Palestine case, before the International Court of Justice had firmly established the proposition that the General Assembly had succeeded to the responsibilities of the League for mandates, is early evidence that the General Assembly considered itself competent to deal with the mandate system formerly supervised by the League of Nations. In the Palestine case, certain members of the United Nations, both before and after the adoption of resolution 181 (II), challenged the competence of the General Assembly to adopt a resolution regarding the disposition of the mandated territory. However, the overwhelming majority, in adopting resolution 181 (II), supported the view that the General Assembly had that competence. We believe, therefore, that the Palestine case is relevant to the Namibia case as an early manifestation of the General Assembly's exercise of the supervisory authority over mandates formerly lodged in the League of Nations. As the mandatory power relinquished the mandate before the date specified in paragraph 1 of the plan for partition recommended in the resolution, the issue of non-compliance did not arise.

Third Question of Judge Sir Gerald Fitzmaurice [1]

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 tort-feasor 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.

[1] See p. 506, *supra*.

Questions of Judges Jiménez de Aréchaga and Morozov [1]

Question of Judge Jiménez de Aréchaga: "I refer to your discussion of the Court's jurisdiction and the question of voluntary abstention. Does your statement imply that the position of your Government is to ask the Court to determine, by implication, that paragraph 3 of Article 27 of the Charter, and not paragraph 2, applies to any decision of the Security Council requesting an advisory opinion?"

Question of Judge Morozov: "Does the representative of the United States of America not think that it is clear from Security Council resolution 284 (1970) that in the process of adoption of that resolution the Security Council was guided by the provisions of paragraph 3 of Article 27 of the Charter of the United Nations?

Would it be right to conclude from the statement made on behalf of the United States of America that the application of Article 27, paragraph 3, of the United Nations Charter in the case of requests made by the Security Council for advisory opinions of the International Court of Justice is based on the Charter itself, and coincides with the uncontested interpretation contained in the following well-known documents:

1. Record of the third Plenary Meeting of the Yalta Conference, of 6 February 1945, at which the United States Secretary of State, Mr. Stettinius, said that:

   "The following decisions relating to peaceful settlement of disputes would also require the affirmative votes of seven Members of the Security Council including the votes of all the permanent members . . .

   IV. Whether the legal aspects of the matter before it should be referred by the Council for advice to the International Court of Justice; . . ." (*Foreign Relations of the United States, Diplomatic Papers, The Conferences at Malta and Yalta*, 1945, p. 663).

2. Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council, of 7 June 1945, devoted to the questionnaire attached to Memorandum of Sub-Committee III/1/B, Security Council, of the San Francisco Conference (particularly Question 13), which confirmed that at the Yalta Conference the Heads of Government participating accepted the suggestion of the United States of America just quoted, which suggestion later is reflected also in the Statement by the Delegations of the Four Sponsoring Governments, Part II (see UNCIO docs., Vol. II, pp. 704 and 713); see also the Report to the President on the results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, page 71 onwards.

Reply to Questions of Judges Jiménez de Aréchaga and Morozov

These questions raise the issue whether a decision by the Security Council to request an advisory opinion is a procedural matter governed by Article 27 (2) or a matter governed by Article 27 (3). The oral statement, which I made on behalf of the United States (*supra*, pp. 497-500), was merely intended to rebut an interpretation of Article 27 (3) advanced by the Government of South Africa, which was completely opposed to a generally accepted United Nations practice. Our statement was not intended to imply any view as to which paragraph

[1] See pp. 507 and 508, *supra*.

of Article 27 is controlling, or to suggest that this is a question with which the Court should concern itself in this case. Indeed, we believe that our statement establishes that the Security Council's request for an advisory opinion would be *equally valid no matter which paragraph of Article 27 were deemed to apply.* There is accordingly no reason for the Court to undertake to answer this long-standing and complex question.