SEPARATE OPINION OF JUDGE PADILLA NERVO

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

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

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

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

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

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

PRELIMINARY

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

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

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

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

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

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

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

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

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

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

> "That interrelation explains the keenness with which elections of members of the Court are conducted . . . But that interrelation goes further. It explains the conflict of ideologies prevalent today regarding the Court." (Rosenne, *The Law and Practice of the International Court*, Vol. I, p. 4.)
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> "The Charter of the United Nations and the urgency of current international problems and aspirations have turned the course of the organized international society into new directions . . . The intellectual atmosphere in which the application today of international law is called has changed, and with it the character of the Court, as the organ for applying international law, is changing too." (*Ibid.*, pp. 5-6.)

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

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

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

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

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

The Issues to Be Examined

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

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

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

MERITS

Scope of the Question Submitted

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

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

The Covenant

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

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

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

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

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

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

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

Concept of Mandates—Rights and Obligations of Mandatory

The Court has given the following account of this question:

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

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

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

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

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

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

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

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

Power of Revocation

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

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

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

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

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

Consequences of Dissolution of the League

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Principle of Non-Discrimination

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

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

Significance of the Recommendations of the General Assembly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Neither South Africa nor the United Nations has possessed rights in

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

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

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

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

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

and consequently appealed to all States—

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

Validity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL CONSEQUENCES FOR SOUTH AFRICA, FOR OTHER MEMBER STATES OF THE UNITED NATIONS AND FOR NON-MEMBER STATES

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

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

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

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

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

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

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

to recognize the authority of the United Nations to administer the Territory of Namibia;
to recognize the inalienable right of the people of Namibia to self-determination and independence;
to take joint and separate action in co-operation with the United Nations (Art. 56) for the achievement of the purposes set forth in Article 55 of the Charter;
to accept and carry out the decisions of the Security Council which it has taken or which it may take from time to time in accordance with the Charter (Art. 25), such as the steps mentioned in resolution 283 (1970).

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

Plebiscite

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

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

> "By now [1946], South West Africa was so thoroughly integrated with the Union that its *formal incorporation* was mainly required to remove doubts, and thereby to attract capital and encourage individual initiative, and to render unnecessary a separate fiscal system. Incorporation would thus admit the inhabitants to the full benefits enjoyed by the population of the Union.
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> . . . .
>
> The *integration* of South West Africa with the Union might be a process lasting over many years, but it would be as inevitable as the union of Wales and Scotland with England, of Texas and Louisiana with the American Union, and of Eastern Siberia with the Russian Union. At present [1946], South West Africa was a geographic, ethnic, strategic and economic *part* of the Union of South Africa.
>
> The integration of South West Africa with the Union would be mainly a formal recognition of a *unity that already existed*." (*GA*, *OR*, Fourth Committee, 14th Meeting, 4 November 1946; italics added.)

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

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

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

> "Against the background of the submission which we had made in the previous proceedings to the effect that the Mandate, as a whole, had lapsed, together with all obligations thereunder, the honourable President asked the question 'Under what title does the Government of South Africa claim to carry on the administration of Namibia?' Our answer is as follows:
>
> South Africa *conquered* the Territory by force of arms in 1915, and administered it under military rule until the end of the war.
>
> . . . .

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

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

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

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

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

PRINCIPLE OF NON-ANNEXATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) Luis PADILLA NERVO.