SEPARATE OPINION OF JUDGE PETRÉN

[Translation]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) S. PETRÉN.