SEPARATE OPINION OF JUDGE ONYEAMA

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

* * *

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

The representative of Syria said:

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

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

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

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

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

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

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

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

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

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

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

The Secretary-General in his written statement said:

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

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

In dealing with this matter the Court said:

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

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

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

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

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

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

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

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

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

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

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

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

conceivably, false assumptions or incomplete data.

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

(Signed) Charles D. ONYEAMA.