SEPARATE OPINION OF JUDGE DILLARD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"The authority which the Union Government exercises over the

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

[2] The leading cases in England are: *The British Waggon Co., etc.* v. *Lea and Co.*, 5 Q.B.D. 149 (1880) and *Tollhurst* v *Associated Portland Cement Co.* (1903) A.C. (H.L.) 414. In each case the obligor claimed that the transfer terminated the contract. In each case the contention was denied because no undue burden was imposed. Similar results have been reached in the United States. See *Meyer* v. *Washington Times Co.* 76 F (2d) 988 (1935). The point is that "consent" is not the central issue.

> Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified."

Yet in the present proceedings South Africa contended that: "... it is the view of the South African Government that no legal provision prevents its annexing South West Africa" (C.R. 71/21, p. 59).

The Court in 1950 not only said that submitting to the United Nations General Assembly imposed no greater burden on South Africa, it also offered South Africa a milder alternative than the one she proposed and one which was highly qualified in her favour.

I refer to the conclusion (despite six dissents including the logically persuasive opinion of Judge De Visscher) that "the Charter does not impose on the Union an obligation to place South-West Africa under the Trusteeship System". Furthermore, the Court stated that it could not deduce from the various general considerations any legal obligation for mandatory States to negotiate such agreements. (*I.C.J. Reports 1950*, p. 140.)

It had previously indicated that:

> "The degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." (*Ibid.*, p. 138.)

The dilemma this posed was perhaps insufficiently aired in the present proceedings.

The dilemma is focussed on the *negotiating process* consequent upon the dissolution of the League of Nations. Although South Africa was under no duty to submit to the trusteeship system or to negotiate a specific trusteeship agreement, yet, as a Member of the United Nations, she was surely under a duty to negotiate in good faith and even, reasonably, with the United Nations concerning a viable alternative either within the trusteeship system or outside it. The source of this duty derived from her combined obligations under the Covenant, the Mandate and the United Nations Charter in light of the object and purpose of the Mandate and the requirements of Article 2 (2) of the Charter [1].

[1] Judge Klaestad in his separate opinion in the *Voting Procedure* case (*I.C.J. Reports 1955*, p. 88) stated that as a Member of the United Nations South Africa "is in duty bound to consider in good faith" a recommendation by the General Assembly, but concluded that however serious it may be it does not involve a "true legal obligation". I cannot agree with this conclusion. The use of discretion and freedom to bargain which the system may confer does not imply the right to exercise an attitude of uninhibited freedom of action which would be tantamount to operating

It is apparent that no negotiating process can be successful if the parties are at odds as to the fundamental basis on which the process rests. The records reveal that the basis chosen by the General Assembly and its various Committees was that it had been sufficiently endowed with supervisory authority. It was fortified in this conclusion by the broad doctrinal jurisprudence of this Court not only by virtue of the 1950 Opinion but by the implications flowing from those in 1955 and 1956 and the Judgment in 1962 [1]. In short, its negotiating posture was not only based on a good faith assessment of its supervisory authority but a reasonable one as well.

While the attitude of South Africa appeared to agree with the legitimacy of this assumption in the period 1946-1947, its attitude changed thereafter.

Basing itself on the premise that advisory opinions of this Court are not binding (which is true) and that the Judgment of 1962 was only on a preliminary issue (which is also true), it appeared to take as a beginning premise for negotiating that the General Assembly had no power of supervision whatever. Quite obviously negotiations based on those conflicting premises qualify, at best, as an empty time-consuming pageant and at worst as a mere dialogue of the deaf.

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outside the system. (See *I.C.J. Reports 1955*, p. 120.) Surely the implication of the *North Sea Continental Shelf* cases was that the three Governments were under a *legal* duty to negotiate in good faith along the lines indicated in the Judgment. (*I.C.J. Reports 1969*, p. 47.)

[1] It is worth recalling that the 1962 Judgment represents the latest authoritative doctrinal statement of the dual point that the obligation to submit to international supervision survived the dissolution of the League and that "... to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate". (*I.C.J. Reports 1962*, pp. 333, 334.)

I associate myself entirely with the interpretation placed on the 1966 Judgment by Judge Jessup when he said, in his carefully reasoned dissenting opinion fortified by a comprehensive analysis of historical data, that:

> "In the course of three Advisory Opinions rendered in 1950, 1955 and 1956, and in its Judgment of 21 December 1962, the Court never deviated from its conclusion that the Mandate survived the dissolution of the League of Nations and that South West Africa is still a territory subject to the Mandate." (*I.C.J. Reports 1966*, p. 327.)

And later, in discussing the implication of the Judgment in 1966:

> "Further, the Court has *not* decided ... that the Mandatory's former obligations to report, to account and to submit to supervision had lapsed upon the dissolution of the League of Nations." (*Ibid.*, p. 331.)

Nor can I see that to identify international supervision with supervision by the *United Nations* involves a logical *non sequitur* in light of the expectations reasonably aroused upon the dissolution of the League and the available alternatives. Logical problems, including empiric assumptions latent in the choice of premises are beyond the reach of this opinion.

In my submission, South Africa, in light of her obligations under the Covenant, Mandate and Charter (as analysed in the Opinion) was not legally entitled to assume that negotiating posture any more than, to repeat, she was legally entitled to claim that "... it is the view of the South African Government that no legal provision prevents its annexing South West Africa" (C.R. 71/21, p. 59).

To assert that the advisory opinions of this Court are not technically binding is one thing. To assert that they have no bearing on the legal status of the Mandate and the General Assembly's supervisory power is quite another thing.

An analysis of the many abortive efforts to induce South Africa to negotiate under the aegis of the United Nations, even including alternatives to submitting to the trusteeship system, are indicated briefly in the Opinion and need no rehearsal in this statement. Suffice it to suggest that, without impugning the good faith of South Africa, its reiterated insistence on negotiating from a position that denied the reasonable basis on which the General Assembly's negotiating posture rested added weight to the General Assembly's determination that South Africa had, in fact, disavowed the Mandate and especially so since supervision and reporting were admittedly essential features of the entire system.

Indeed the insistent and reiterated efforts of the United Nations to negotiate with South Africa represented something more than the expression of General Assembly political action. It represented a sense of continuity in the international community's concept of South Africa's obligations and the responsibilities incumbent on the United Nations. No doubt considerations of this kind led Lord Caradon (United Kingdom), in an address of special significance and in carefully measured terms, to declare:

> "For over fifteen years we have waited for the South African Government to comply with its clear obligations. It has failed to do so. It has denied this obligation as it has denied the existence of all other obligations incumbent upon it by virtue of the Mandate. It has opposed the essential requirement of international responsibility.
>
> What are we to do in the face of this refusal? *Repeated attempts by the General Assembly to persuade South Africa to adopt a policy of co-operation have been unsuccessful.* And not only has the South African Government refused to submit to United Nations supervision but it continues to deny, despite the repeated pronouncements of the International Court, that the Mandate is still in force.
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> What conclusions should we draw from this history of South African intransigence? By word and by action the South African Government *has clearly demonstrated its undeviating determination to deny and repudiate* essential obligations, incumbent upon it under the

Mandate. By repudiating those obligations, so clearly affirmed by the International Court, *it has in effect, forfeited its title to administer the Mandate* [1]."

The fact that this specific negotiating issue was not analysed in depth is not, however, sufficient in my opinion to weaken the conclusion reached in operative clause 1 since the facts are not basically controverted [2].

The reasons supporting the conclusion reached in operative clause 1 can, in my opinion, be fortified by data of an historical, legal and logical character in addition to that supplied in the Opinion. The records tracing the history of the mandates system are comprehensive and have been the subject of elaborate analysis in the three previous Advisory Opinions and the two Judgments rendered throughout the long history of the controversy over South Africa's administration of the Mandate. Much depends on the way these records and events are viewed. My own reading leads me to believe that the legal power to "revoke" the Mandate for a material breach was inherent in the system; that the unanimity rule in the League Council was not absolute; that no significance can be attached to the rejection of the so-called Chinese proposal and that a restrictive interpretation of Article 80 of the United Nations Charter is not justified. These matters are covered in the Opinion and it would be tedious to elaborate upon them [3].

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[1] United Nations General Assembly, 1448th Plenary Meeting, 19 October 1966, Agenda Item 65, pp. 4, 5. It should be added that the statements above only support the notion of breach. Lord Caradon questioned the wisdom and certain legal aspects of the then proposed termination of the Mandate. It will be recalled that General Assembly resolution 2145 (XXI) was carried by a vote of 114 to 2 with 3 abstentions. Botswana and Lesotho were absent. Portugal and South Africa dissented and the United Kingdom, France and Malawi abstained.

[2] There is something almost prophetic in the pronouncement made by Judge Lauterpacht 11 years before General Assembly resolution 2145 (XXI) was adopted. In a much-quoted passage in his separate opinion in the *Voting Procedure* case, he suggested, in dealing with the discretionary power exercised under the trusteeship system and assimilated territories:

> "Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction." (*I.C.J. Reports 1955*, p. 120.)

[3] Evidence that the supervisory role of the Mandates Commission was intended to be an "effective and genuine, not a purely theoretical or formal, supervision" is

The conclusion that the General Assembly in resolution 2145 (XXI) validly terminated the Mandate may be supported by two separate approaches and since they are grounded on different processes of reasoning I shall briefly indicate the scope of each.

The first approach asserts that, conceding that the powers exercised by the General Assembly are *grosso modo* of a recommendatory character only, it is yet clear that in certain *limited* areas it has decision-making power. As stated in the *Certain Expenses* case:

> "Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies, and the making of recommendations; they are not merely hortatory." (*I.C.J. Reports 1962*, p. 163.)

The termination of the Mandate reposes in one of those limited areas. It is an area that is *sui generis*. And the exercise of the power involved no invasion of national sovereignty since it was focussed on a territory and a régime with an international status. The power was conferred on the General Assembly *aliunde* the Charter through the unique situation posed by the Mandate coupled with authority granted under Article 80 of the Charter, which constituted a bridge between the League of Nations and the United Nations in so far as mandates were concerned.

Precedents exist for the exercise of such power as the decisions taken under Annex XI of the Peace Treaty with Italy and General Assembly action with respect to the Palestine Mandate attest, and other examples could be cited.

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revealed in the League of Nations publication, *The Mandates System; Origin, Principles, Application* quoted *in extenso* in *I.C.J. Pleadings, Admissibility of Hearings of Petitioners*, pp. 28-35.

Clearly no-one contemplated in 1920 that a mandatory would commit a material breach and it would have been unusual to have specifically provided for "revocation" in light of that non-contemplated contingency. Indeed, this is true of most long-term engagements. There is, however, support for the proposition that the right of revocation was considered to be *inherent*, in the view of the Mandates Commission and leading jurists (*I.C.J. Pleadings, International Status of South-West Africa, 1950*, p. 230). To the authorities in support of this proposition, marshalled by the representative of the United States, which included the views of the authoritative Institute of International Law and its rapporteur Professor Rolin (United States written statement, Part II, Section V), may be added the high authority of Bonfils-Fauchille, *Traité de droit international public*, I (1925), which, after a thorough examination, states at p. 887:

> "... un mandat international est susceptible d'être révoqué lorsque le mandataire se rend coupable d'un manquement grave à ses obligations, et c'est le Conseil qui ... prendra à cet égard une décision".

Nor is this conclusion necessarily incompatible with the implications of the *Voting Procedure* case (*I.C.J. Reports 1955*, p. 67). That Opinion was concerned with voting procedures to be employed in the assumed normal course of supervision. The Court stated that "the General Assembly, in adopting a method of reaching decisions in respect of the annual reports and petitions concerning South-West Africa should base itself exclusively on the Charter" (*ibid.*, p. 76). The Court was not concerned in 1955 with the ultimate issue of material breach which lies outside the normal course of performance and which, by definition, is a denial of the permitted exercise of discretionary power by the mandatory State.

In voting that South Africa had in fact disavowed the Mandate the General Assembly was, to repeat, exercising power inherited from the Council and it did so strictly within its own Charter-authorized rules of procedure. And, as indicated above, it was not limited to its recommendatory power under Article 10 since it was concerned with a matter of material breach lying outside the normal scope of performance.

Under this approach the special powers granted under the Mandate are stressed rather than the general powers under the Charter, including especially the powers of the Security Council under Articles 24 and 25.

* * *

The alternative approach accents the obligations undertaken under the Charter. While asserting that General Assembly resolution 2145 (XXI) was "binding" in the sense in which it registered the collective will of all who voted for the resolution in terminating the Mandate, it yet insists that the powers of the General Assembly vis-à-vis non-consenting States fall in the category of recommendations. Acting under its supervisory authority and in accordance with its voting procedures it could end the Mandate but it could not generate an obligation on South Africa to withdraw or engage the responsibility of member States to co-operate in effecting a withdrawal.

It is for this reason that it called upon the Security Council. While Security Council resolution 276 (1970), as with its antecedent resolutions 264 (1969) and 269 (1969), endorsed General Assembly resolution 2145 (XXI), it did not "validate" it since it was already valid. It served to convert a recommendation into a binding decision operative as against non-consenting States.

The reasoning of the Court is mainly based on the theory sketched above. I favoured the former approach but under either approach the Mandate was validly terminated so as to justify the conclusion reached in

operative clause 1. In light of the object, purpose and history of the mandates system and the unique problems it posed, the conclusion is, in my opinion, well founded.

* * *

Turning to operative clause 2, I shall confine myself to a few comments mainly of a cautionary nature.

Operative clause 2 of the Opinion is based on the pronouncements of the General Assembly and the Security Council, reinforced by the provisions of Article 25 of the Charter. In part, it is also a reflection of general principles of international law arising from the obligations of States to refuse official recognition to a government *illegally* in control of a territory.

General Assembly resolution 2145 (XXI), coupled with subsequent Security Council resolutions, culminating in Security Council resolution 276 (1970), together with the Opinion of this Court, have settled the issue of "legality".

The "legal consequences" flowing from that determination must not be confused with specific enforcement measures under Article 41 of the Charter. Not only did the Security Council fail to invoke the provisions of Chapter VII of the Charter, it studiously avoided doing so.

It is well known that the exact nature and scope of the obligations incurred by Members of the United Nations under Article 25 of the Charter have never been determined by the Security Council (*Repertory of United Nations Practice*, 1955, pp. 37-51; 1958, pp. 257-265; 1964, pp. 295-304).

Paragraph 113 of the Opinion announces that, in the view of the Court, Article 25 is not confined to "decisions in regard to enforcement action" but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Paragraph 114 sounds the cautionary note that the question of the exercise of power under Article 25 must be determined in any particular instance by the "terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council".

It is to be observed that Security Council resolution 276 (1970) is not action oriented. It speaks principally of a negative duty of restraint, not a positive duty of action. Thus operative paragraph 5 calls upon all States "to *refrain* from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2" (emphasis added). This

paragraph declares that "the continued presence of the South African authorities in Namibia is illegal".

The Opinion of the Court in operative clause 2, as suggested earlier, appears to be grounded at least in large part on principles of non-recognition under international law, and is thus in harmony with Security Council resolution 276. But a strong *caveat* is needed to avoid any misunderstanding.

I refer to the fact that the references in operative clause 2 to "*any* acts" and "*any* dealings" are to be read subject to the critically significant qualifying phrase "*implying recognition of the legality*" of South Africa's presence in Namibia (emphasis added). This announces, to repeat, the doctrine of non-recognition.

It is important to understand that this doctrine is not so rigid as to preclude *all* intergovernmental dealings under all circumstances. Even as applied to non-recognized governments and States, in which the administrative control of the government over the territory is conceded, the doctrine permits of flexibility in application at such governmental levels as do not imply recognition of legitimacy.

Under particular circumstances a limited measure of intercourse is essential as customary international law, derived from the practice of States, abundantly reveals. (Hackworth, *Digest of International Law*, Vol. I, pp. 327-364 (1940); Whiteman, *Digest of International Law*, Vol. 2, pp. 524-604 (1963); Oppenheim, *International Law*, pp. 146-148 (8th ed., 1955).) As Lauterpacht has stated:

> "... in normal circumstances there is nothing in the attitude of non-recognition which *necessarily* constitutes an obstacle in the way of a measure of intercourse *so long as the State against which it is directed does not insist on full and formal recognition of the results of the illegal act*" (*Recognition in International Law* (1947), p. 432 (emphasis added)).

If this limitation applies in the context of non-recognized governments and States, it surely applies even more to a complex situation in which a government such as South Africa is required to withdraw from a territory over which it has long exercised administrative control. Considerations of a practical and humanitarian nature are clearly involved in light of the economic interdependence of the two areas and their interlocking administrative structures.

Examples can be easily suggested to support this view. Thus if a famine or a cholera epidemic were to break out in Namibia prior to the effective exercise of control by the United Nations a measure of intergovernmental co-operation between South Africa and other States might well be

required. Likewise if an official plane were grounded (as happened in Albania when it was not recognized by the United States) direct dealings would be needed between the government officials of both States. No implication of recognition flows from such dealing (Whiteman, *Digest of International Law*, p. 530 (1963)). It is needless to add examples which cover a wide spectrum of relations. A similar note of caution needs to be sounded with respect to the first part of operative clause 2.

It will be observed that the statement that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and "the invalidity of its *acts* on behalf of or concerning Namibia" is a less comprehensive formulation than the specific language of Security Council resolution 276 (1970) which speaks of *all* acts.

This is consistent with the reasoning of the Court in paragraphs 122 and 125.

But in my opinion the matter does not stop there. The legal consequences flowing from a determination of the illegal occupation of Namibia do not necessarily entail the automatic application of a doctrine of nullity.

As Lauterpacht has indicated the maxim *ex injuria jus non oritur* is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith [1]. Were it otherwise the general interest in the security of transactions would be too greatly invaded and the cause of minimizing needless hardship and friction would be hindered rather than helped.

This was in fact conceded by the representative of the Secretary-General when, in answer to a question put by a judge, he declared that the Secretary-General "had not considered that he was enunciating a doctrine of 'absolute nullity' " (C.R. 71/18, p. 20).

A detailed specification of the particular acts which may or may not be compatible with South Africa's illegal presence in Namibia cannot be determined in advance since they depend on numerous factors including not only the interests of contracting parties who acted in good faith but the immediate and future welfare of the inhabitants of Namibia.

* * *

I shall conclude on another note. It is true, of course, that prior to the termination of the Mandate by the General Assembly there had never been a judicial determination that this was legally permissible. Further-

[1] Lauterpacht, *Recognition in International Law* (1947), p. 420.

more, it is accurate to say the General Assembly in the exercise of its supervisory powers did not calmly and rationally analyse the extent of those powers under the grant of authority accorded by the San Francisco formula (a point made by Professor Katz in his characteristically thoughtful book on the *Relevance of International Adjudication* (1968), pp. 69-123). The point is troublesome but it is not conclusive.

Law and what is legally permitted may be determined by what a court decides, but they are not only what a court decides. Law "goes on" every day without adjudication of any kind. In answer to a question put by a judge in the oral proceedings (C.R. 71/19, p. 23), Counsel for the United States, in a written reply received in the Registry on 18 March 1971, declared:

> "The fact that in the international as opposed to a municipal legal system the other party cannot be assured of bringing a case involving material breach before an international tribunal except where both parties have accepted the compulsory jurisdiction of an international tribunal is a problem relating to the efficacy of international law and institutions generally and not especially to the problem of the material breach doctrine."

It is part of the weakness of the international legal order that compulsory jurisdiction to decide legal issues is not part of the system. To say this is not to say that decisions taken by States in conformity with their good faith understanding of what international law either requires or permits are outside a legal frame of reference even if another State objects and despite the absence of adjudication.

General Assembly resolution 2145 (XXI) was a political decision with far reaching practical implications. But it was not an arbitrary exercise of political power outside a legal frame of reference. Its endowment of supervisory power over the Mandate had been confirmed by the jurisprudence of this Court and the scope of that power, as indicated in the Opinion, included the power ultimately to terminate for material breach.

The legal issues involved in this proceeding were not simple or easily resolved. Indeed they were resolved only after hearings and deliberations extending over a period of many months. It should be added that the great learning and consummate skill brought to bear on the issues by the representatives of South Africa were in the highest tradition of the legal profession.

It may be hoped and expected that South Africa, as a great nation, will respect the judicial pronouncement of this Court and the almost unanimously held view in the United Nations that its administration of

Namibia must come to an end. It may be hoped, also, that in the delicate and difficult era that lies ahead, especially in the period of transition, a spirit of mutual good will may, in time, displace one based on mutual misunderstanding.

(Signed) Hardy C. DILLARD.
