SEPARATE OPINION OF JUDGE DE CASTRO

[Translation]

While I fully concur in the operative part of the Advisory Opinion and in the reasoning upon which it is based, I venture to exercise the faculty conferred by Article 57 of the Statute in order to set forth in greater detail the legal reasons which decided my vote.

I. PRELIMINARY ISSUE: THE COMPETENCE OF THE COURT

A. Does the Request for an Opinion Relate to a Legal Question?

Article 65 of the Statute states that "the Court may give an advisory opinion on any legal question . . .". Consequently, the Court may not give an opinion on a non-legal question, and should decline to give one on a purely political question.

On the other hand, the Court cannot arbitrarily refuse to give an opinion; it can only do so if "the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*I.C.J. Reports 1950*, p. 72). It should be borne in mind that when the Court is requested to give an opinion "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*ibid.*, p. 71).

Refusal to give an opinion is admissible only if the question addressed to the Court is essentially political or non-legal, for it would seem that the determining factor is the positive one of "legal-ness", and not the negative one of political motivation. It would be difficult for requests emanating from the General Assembly or the Security Council, in view of the nature of those organs of the United Nations, not to relate to political questions: that is "in the nature of things" (*I.C.J. Reports 1962*, p. 155).

The present request for an advisory opinion (Security Council resolution 284 of 29 July 1970) lays before the Court the question of the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970). The Court is thus faced with a question of a purely legal nature and does not have to take into account the possible underlying political motivations (*I.C.J. Reports 1947-1948*, p. 61). It is true that the question put relates

to a particular issue, but it must not be forgotten that the General Assembly and the Security Council can request an opinion "on any legal question", including therefore matters which concern the interests of particular States or certain concrete situations. (This was so in the case not only of the three Opinions relating to South West Africa, but also of the Opinions relating to *Interpretation of Peace Treaties*, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, and even that relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.)

The fact that the subject-matter of the question is the legal consequences for States does not deprive the request of its legal nature or make it any less the business of the United Nations. It relates to the conduct which may be expected of States in law, or which the Security Council may if need be require.

B. *Does the Question Relate to a Dispute Between States?*

(a) *The Jurisdiction of the Court*

1. The *competence of the Court* has been denied because of the alleged existence of a dispute between States, and it has been asserted that a preliminary question exists.

In this connection it may be as well to recall a few elementary notions.

The Court is here confronted with two problems—a *preliminary* one as to its competence and another, *in limine*, concerning the procedure to be followed—which have a point in common: the existence or non-existence of a dispute or legal question pending between States. Neither arises *if there is no* dispute or pending question.

2. In its Advisory Opinion on the *Status of Eastern Carelia* (*P.C.I.J., Series B, No. 5*, p. 29) the Permanent Court of International Justice declared itself incompetent, as the question put to it concerned a dispute between States, this being properly a matter for contentious proceedings.

This decision can be explained by the circumstances of the case, which are well known.

The Court was faced with an insuperable difficulty. To give its opinion it needed to know the truth about the facts contested, which was not possible in the absence of one of the parties.

Another difficulty, of a general nature, lay in the rules of procedure in force at the time. On the date of the Advisory Opinion (23 July 1923) the Rules of Court did not offer States adequate safeguards in the event of a request for an advisory opinion on an existing dispute between two or more States. It was not until a paragraph had been added in 1927 to what was then Article 71 of the Rules that the appointment of judges

ad hoc was permitted when an advisory opinion had been sought on a question relating to an existing dispute between two or more States. And only in 1929, when the Statute was amended, was the further step taken of adopting Article 68, still in force, whereby the Court may in advisory proceedings be guided by the provisions of the Statute which apply in contentious cases.

These rules opened the way to the giving of advisory opinions on quasi-contentious matters. After the Opinion on the *Status of Eastern Carelia*, the Permanent Court did indeed give several on legal questions pending between States [1].

The abandonment of the precedent comprised in the Opinion on the *Status of Eastern Carelia* has been confirmed by the International Court of Justice, for two reasons:

In the first place, the constitutional or organic position of the Court has changed. Technically speaking, the Permanent Court was not a part of the League of Nations. But the International Court of Justice is both a creation of the Charter and an organ of the United Nations (Art. 92 of the Charter; Art. 1 of the Statute) [2]. The Court has the duty to co-operate with the General Assembly and the Security Council, as organs of the same Organization:

> "It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take." (*I.C.J. Reports 1950*, p. 71.)

As in *Interpretation of Peace Treaties*, the Court can now say: "In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten [an organ of the United Nations] (*ibid.*, p. 72.) Hence it is also because the Court's decision, being of a purely advisory nature, has a very different force from that of a judgment disposing of a contentious case that the 1923 precedent has been disregarded (*ibid.*, p. 71).

Above all, the doctrine of the Advisory Opinion on the *Status of Eastern Carelia* can be considered as outworn in view of the terms of Articles 82 and 83 of the Rules of Court. The Court has to consider whether the request for advisory opinion relates to a legal question actually pending between two or more States (Art. 82), and this it has to do, not in case it should declare its lack of jurisdiction, but in order to take that

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[1] See Hudson, *The Permanent Court of International Justice (1920-1942)*, p. 496.

[2] Cf. the excellent treatment of these questions in the oral statement made on behalf of the British Government on 2 March 1950 (*I.C.J. Pleadings, Interpretation of Peace Treaties*, pp. 305 f.). See also the statement on behalf of the United States, in which attention is drawn to the new phrase inserted in the Statute of the International Court: "and all matters specially provided for in the Charter of the United Nations" (*ibid.*, p. 276).

factor into account in the procedure to be followed and with respect to the applicability of the rules concerning judges *ad hoc* (Art. 83). There could thus be no clearer indication that the Court is competent to deal with a request for advisory opinion relating to a question actually pending between States ("You could hardly have put it more strongly than that"—statement on behalf of the British Government, *I.C.J. Pleadings, Interpretation of Peace Treaties*, p. 308).

It is easy to comprehend the concern felt by zealous defenders of untouchable State sovereignty at the abandonment of the doctrine enunciated in the Advisory Opinion on the *Status of Eastern Carelia*. But, as Judge Azevedo recognized in a separate opinion, the present Rules in force admit of no other solution, which is why he asked for the abrogation of Articles 82 and 83 (*I.C.J. Reports 1950*, pp. 86 f.).

3. The Court *may* give an opinion (Statute, Art. 65), therefore it *may* decline to give one. But, as an organ of the United Nations (Charter, Art. 92), it has a *duty* to collaborate with the other organs of the United Nations. In what circumstances is the Court incompetent to give an opinion? It would seem that it is in the case of a question not meriting the description of "legal question".

The Security Council has requested an opinion because it "would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking" (resolution 284 (1970)). The Court, as a judicial organ of the United Nations, should therefore not refuse its collaboration.

4. The position of the Court, as the principal *judicial* organ of the United Nations, may have led to misunderstanding and given rise to the belief that all its functions are of a purely judicative or contentious nature. But in advisory proceedings, even when they relate to questions pending between States, there are no 'parties—there are States or organizations which provide the Court with information, by means of written or oral communications (Statute, Art. 66). Moreover, advisory opinions are not endowed with binding force, either for the requesting organ or organization, or for the States and organizations which provide information.

An organ may have functions of different kinds, both advisory and contentious; such, for example, is the case of a Council of State, a court of arbitration or a tribunal.

But in all circumstances the Court retains the elevated dignity deriving from its constitutional status and independence, and its authority may never be compared to that of a legal consultant or advisor; it must remain faithful to its judicial character.

Its advisory opinions do not carry less authority than its judgments. There is, to be sure, a difference, stemming from the *vis re judicata* of the judgments, but this is limited to the parties to the dispute (*vis relativa*: Statute, Art. 59).

On the other hand, the reasons on which judgments are based (Statute, Art. 56) are considered to constitute *dicta prudentium*, and their force as a

source of law (Statute, Art. 38) derives *not* from any hierarchic power *(tantum valet auctoritas quantum valet ratio)* but from the validity of the reasoning *(non ratione imperio, sed rationis imperio)*.

The essential differences between judgments and advisory opinions lies in the binding force of the former (Charter, Art. 94) and it is on that account that the Court's jurisdiction was established on a voluntary basis (Statute, Art. 36) and the effect of judgments limited to the parties and the particular case (Statute, Art. 59). However, like the reasons on which a judgment is based, the reasoning and operative part of an advisory opinion are, at least potentially, clothed with a general authority, even vis-à-vis States which have not participated in the proceedings, and may therefore contribute to the formation of new rules of international law (Statute, Art. 38, para. 1 *(d)*).

For these reasons, the voluntary nature of the Court's jurisdiction does not operate where advisory opinions are concerned.

5. A request having been made for an advisory opinion, does it relate to a dispute or legal question pending between States?

It is important to settle this point, in order to be in a position to settle others.

(a) If there is no question pending, all doubt as to the Court's competence on the basis of the *Status of Eastern Carelia* case is removed.

(b) The existence or non-existence of a question pending between States has to be considered first and foremost in order that, in the affirmative, it may be possible to determine the rules of contentious procedure applicable, and more particularly those providing for the application of Article 31 of the Statute.

For there is a very close relation between the Court's task of determining the nature of the question put by the request for advisory opinion, and the task of deciding whether any request for the appointment of a judge *ad hoc* shall be granted.

It is evident that no decision as to the applicability of Article 31 of the Statute can be taken before it has been ascertained whether the request for an opinion relates to a legal question pending between States. That is what the letter of Article 82 of the Rules requires, and also common sense: it would be most incongruous for the position of any judge to be subject to a built-in risk of invalidation.

6. For there to exist a dispute or legal question between States with the effect of causing the Court either to declare itself incompetent (Statute, Art. 65; *Status of Eastern Carelia* doctrine) or to apply by analogy the provisions which apply to contentious proceedings (Rules, Arts. 82 and 83; Statute, Art. 68), the question or dispute must be of a potentially contentious nature and inherently amenable to the Court's jurisdiction, so that it could have Chapter II of the Statute applied to it and be decided by a judgment.

(b) *Procedure to Be Followed*

The Court "shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States" (Rules, Art. 82) in order to determine the procedure to be followed (Rules, Art. 83; Statute, Art. 68).

For the request to relate to a legal question pending between States, or to a pending dispute, there must be identity of subject-matter between the question and the request for opinion; there must be States in the position of parties, and the question must be actually pending.

1. South Africa has defined the subject-matter of the question pending in several ways. It has been said that it is that to which the Judgments of 1962 and 1966 were directed (question of *apartheid*, and the existence of norms and standards whereby that policy would stand condemned). It has also been said that in order to reply to the request for advisory opinion the Court must pronounce on the validity and interpretation of these resolutions concerning which there is a divergence of views between South Africa and other States. Finally it has been pointed out that there exists a dispute as to South Africa's accession to the International Convention on Telecommunications adopted at Montreux in 1965.

A certain effort of the imagination is necessary to see any resemblance between these questions and that which is the subject of the request for advisory opinion, which relates only to the legal consequences for States of Security Council resolution 276 (1970).

2. A further legal obstacle to the contentions of South Africa lies in the difficulty of particularizing the other States and the fact that they are not in the position of parties.

Between South Africa and whom is a question pending? The answer runs, according to the occasion: Liberia and Ethiopia, the Organization of African Unity, the States which voted in favour of certain resolutions, or the United Nations.

How can it be argued that there is here a question of a quasi-contentious nature, to which Article 83 of the Rules could apply? How can it be argued that these States or Organizations are in the position of opposing parties with regard to South Africa? In its observations South Africa endeavoured to do so by relying on the doctrine of the 1962 Judgment in the *South West Africa* cases (discussions and negotiations in the United Nations), but it should be observed that the standing of Ethiopia and Liberia as parties was based upon the special provision of Article 7 of the Mandate, and that this jurisdictional clause operated in favour of Members of the League of Nations. Above all, the doctrine of the 1966 Judgment in the *South West Africa* cases should be taken into account. To be a party to a dispute, each State must have a legal right or interest in the subject-matter of the claim "which is a different thing from a political interest" (*I.C.J. Reports 1966*, p. 22). In the separate opinion of Judge Morelli it is explained that: ". . . standing . . . means the possession by one person rather than another of the substantive right relied on in the proceedings" (*ibid.*, p. 65).

As will be apparent, there is no other State in the legal position of a party, as between which State and South Africa there might be a legal question pending within the meaning of Article 82 of the Rules of Court.

Again, it is inconceivable that there could be a question or dispute between those States which have voted for a resolution and a State which denies validity thereof. In public and in private law, a resolution adopted by the majority of the members of an organization is regarded as a resolution of the organization, and if a member seeks to dispute its validity, it is the organization that he must approach, and he cannot approach the other members for that purpose. In the present case, if there were a pending question, it would be between South Africa and the United Nations—in other words, there would be no question between States.

Thus a difference of views between States at the United Nations, a division of opinion, or opposition between a majority and a minority, does not constitute a dispute or legal question pending between States, within the meaning of Articles 82 and 83 of the Rules of Court. The organs of the United Nations request advisory opinions when there is a diversity of views, and the main function of advisory opinions is to clarify the questions argued over and to dispel the doubts raised by the opposition of a minority [1].

A difference of views between a State and the United Nations is not a dispute or legal question *between States*, the only kind contemplated by the applicable legal texts (Statute, Art. 34; Rules, Arts. 82 and 83).

3. The qualification "pending" applied to a question makes it requisite that the already existing question should be *the same* as the question which is the subject of the request for an opinion—a necessary identity which means that, if the question had been decided by a judgment, an objection of *res judicata* could be raised against any new application by way of request.

Are the questions between Ethiopia and Liberia, on the one hand, and South Africa, on the other, identical with that raised by the request for an advisory opinion? To establish such identity, there would have to be an identity of claim, the same basis of application, and the same parties acting in the same capacity (cf. Art. 1351 of the French Civil Code), i.e., in the classic formula: *eadem persona, eadem res, eadem causa petendi*.

In the contentious cases concerning *South West Africa*, the parties opposing South Africa were two States, former Members of the League of Nations, acting in pursuance of Article 7 of the Mandate on account of the infringement of obligations under that instrument which the introduction of *apartheid* into South West Africa represented.

The request for an advisory opinion has been made by the Security

[1] Such was the case in *Certain Expenses of the United Nations (I.C.J. Reports 1962)*; the Court gave its Opinion on a question concerning which there was bitter controversy within the Organization.

Council in its capacity as an organ of the international community, and it has asked the Court what are the legal consequences for States of South Africa's conduct (its continued presence in Namibia) contrary to one of its resolutions: resolution 276 (1970).

This lack of identity is also apparent with respect to the preliminary questions raised by South Africa regarding the request for advisory opinion.

4. While there is no identity between the question which was the subject of the 1962 and 1966 Judgments and that concerned in the present request, there can be no denying that the latter is of the same nature as the question answered by the 1950 Advisory Opinion and partly coincides with it in subject-matter.

Invited to give an opinion on the legal status of South West Africa, the Court found it necessary to make pronouncements on the legal title of South Africa and that of the United Nations in respect of the Territory, and also on the legal consequences for States of the existence of those titles, because a legal status—like the *iura in re* with which it is sometimes confused—is effective *inter omnes* and *erga omnes*.

To request an advisory opinion on the consequences for States of the presence of South Africa in Namibia (South West Africa) is another way of asking what the legal status of South West Africa is here and now, i.e., in the situation prevailing since the adoption of resolution 276 (1970). It is from that Territory's legal status, and from it alone, that the legal consequences for States flow.

The implication of this coincidence of underlying subject-matter is that the competence of the Court has at present the same basis as in the 1950 proceedings.

C. The Factual Issues

South Africa's proposition that the Court should examine factual issues requires some reflection as to the Court's competence in this connection and on the pertinance of the suggestion.

(a) *The Competence of the Court to enter into factual issues*

(i) In view of the terms of the request for advisory opinion is South Africa's proposition a matter *ultra vires*? The request for advisory opinion takes as point of departure a particular fact—resolution 276 (1970) of the Security Council—and seeks the Court's opinion on the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding that resolution. The South African proposition seeks the admission by the Court of evidence regarding *a different fact*, or *a different question*, namely whether or not South Africa has failed to fulfil its obligations to promote the moral and material well-being of South West Africa.

It would therefore seem that the South African proposition, if accepted, would *alter the very subject-matter* of the request for advisory opinion; it would amount to asking the Court to give its opinion on a subject quite *different* from that on which the Security Council seeks guidance; in other words, there would be a danger of recognizing something in the nature of a counter-claim or a request for a "counter-opinion".

It may be doubted that the Court would be entitled to allow any such proposition, when it comes not from an organ or agency authorized by the Charter to request an opinion, but from one of the States permitted to furnish information. In such a case, would the Court be acting in conformity with the letter and spirit of Article 96 of the Charter and Article 65 of the Statute? Could the Court disregard those provisions by giving effect to Article 68 of the Statute? With all respect, I would find that difficult to accept.

(ii) Taking into account the arguments of South Africa, has the Court jurisdiction to proceed to examine factual issues?

It is well known, and South Africa reminds us of it, that, in the words of the Permanent Court, "under ordinary circumstances it is . . . expedient that the facts upon which the opinion of the Court is desired should not be in controversy" (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28). Furthermore, advisory opinions have as their subject-matter legal questions (Art. 96 of the Charter, Art. 65 of the Statute) and not questions concerning facts *of primary importance*—such as those which South Africa wishes to have established.

(b) *Pertinence of the proposition that the Court should enter into factual issues*

(i) The argument of South Africa on the need to go into factual issues, and thus, it would maintain, the duty of the Court to declare its own lack of jurisdiction if it considers that an examination of the facts is indispensable, runs as follows: Security Council resolution 276 (1970) and General Assembly resolution 2145 (XXI) are based on the postulate that South Africa has not ensured the moral and material well-being of the natives of South West Africa. South Africa denies and offers to disprove this, the implication being that, if it be established that South Africa has ensured such well-being, the two resolutions would lack any basis, and would for that reason be invalid and void.

This reasoning would be valid if the sole basis for the resolutions were the conduct of South Africa with regard to the well-being of the natives; but such is not the case. There are other bases, equally important or more important than the question of well-being, which may be said to underlie the declaration of termination of the Mandate.

General Assembly resolution 2145 (XXI) stressed that South Africa had refused to continue fulfilling its obligations under the Mandate or to recognize that the United Nations had powers of supervision over South West Africa, and also referred to the fact that South Africa had carried on a policy of *apartheid* despite the condemnation thereof. These are well-known and uncontroverted facts. Security Council resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI), and its factual basis is the same.

It is a matter of established general teaching that for an act or grant to be declared void, or for it to be declared terminated, only one cause is necessary and that single cause sufficient *(ex una causa, nullitas)*; there is no need to establish all or even a multiplicity of the causes adduced.

It follows that, if the Court decides to consider the contentions of South Africa as to the invalidity of the resolutions, it will give due weight to the existence of uncontroverted facts which may serve as a basis for those resolutions.

(ii) The observations already made regarding the non-existence of a question pending between States and the subject-matter of the request for advisory opinion also argue the exclusion of factual issues: for it is the existence of a pending question which could justify the opening of a quasi-contentious procedure, including the production of evidence. But even in such a context it is hard to see how the absence of an opposing party and a *juge instructeur* could be made good, if the procedure for taking evidence is to feature the necessary safeguards.

D. The Question of a Plebiscite

The Court should not concern itself with considerations as to the object, the practical possibilities, and the outcome of such a plebiscite; these are political aspects of the matter which fall outside the competence of the Court.

But it could have drawn immediate attention to the procedural impossibility, in advisory proceedings, of its participating in a plebiscite in which South Africa was also to take part.

It is furthermore apparent that such a plebiscite or its outcome would lack all legal relevance to the Court's reply to the request for an advisory opinion. For the purpose of answering the question put by that request it makes no difference whether the population would vote in favour of administration by South Africa or by the United Nations [1], nor would it possess any significance in the treatment of the problems raised by South Africa in its written and oral statements.

[1] The plebiscite envisaged is not one which would posit the independence of Namibia or a change of administration; it would only be held for the purpose of obtaining information.

II. Antecedents: Questions concerning the Validity of Resolutions

A. Competence of the Court

Does the Court have the power to pronounce as to the invalidity or nullity of resolutions of the General Assembly and Security Council?

It is difficult to answer yes or no to this question. The interplay of two principles, which one might have thought contradictory, must be taken into account.

1. The principle of division of powers—the Charter set up three organs, each having sovereign powers in the sphere of its own competence: the General Assembly, the Security Council, and the International Court of Justice. The first two have powers analogous to those of legislative chambers, and the third has judicial powers.

Each of these has the power to interpret the provisions of the Charter *verbis et factis*. Such interpretation must be respected by the other organs providing it does not encroach upon their own jurisdiction. Any other solution would be inconsistent with the independence or sovereignty of each organ. On this view of the matter, the Court does not have the powers of a constitutional court to pass judgment on the validity or the resolutions of the General Assembly and Security Council [1].

Naturally, it could do so if the General Assembly or Security Council were to ask, expressly or impliedly *(Certain Expenses of the United Nations)*, for an opinion on the interpretation of the Charter, and on the consistency of the resolutions with the Charter.

As a result of this mutual respect, neither the General Assembly nor the Council can declare a judgment of the Court to be invalid, even if it be contrary to the wishes of the majority in those organs.

2. The principle of "legal-ness"—the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law [2].

Furthermore, the Court must act as a judicial organ, so that no limitations can be placed upon it as regards the logical processes to be followed in answering the question put to it (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, p. 217).

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[1] It has been said that everything "makes it necessary to put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined and hence to regard to a large extent the non-conformity of the act with a legal rule as a mere irregularity", and also that "each organ of the United Nations is the judge of its own competence" (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, pp. 223, 224).

[2] "Examples might be a resolution which had not obtained the required majority, or a resolution initiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization)": separate opinion of Judge Morelli, *I.C.J. Reports 1962*, p. 223.

3. Before ordinary municipal courts, the result of the interplay of these two principles is that such courts refrain from passing judgment on the validity of laws, with the sole exception of cases in which it is clear and indisputable that the alleged law does not in fact rank as a law, in which there is only an apparent law. In any other case, in general, either the courts refrain from considering the question of the validity of laws, or they consider that they must indicate the reasons for their validity; there is always a presumption in favour of the validity of laws.

The Court may derive inspiration from this example. Should it decline to give an opinion on the validity of the resolutions? The Court is not, in the structure of the United Nations, a super-organ, and it is not entitled to give any sort of "counter-opinion".

4. The Opinion relating to *Certain Expenses of the United Nations* may have given the impression that the Court has the power to pass judgment, in all cases and without any limitation, upon the validity of the resolutions of the General Assembly and Security Council. But the Court was on that occasion asked to give its opinion on the question whether the expenditures authorized by a series of General Assembly resolutions were "'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations" (*I.C.J. Reports 1962*, p. 152), that is, to say whether those expenditures had been validly authorized. It was possible to observe in that case with perfect correctness that there cannot be placed "any limitations on the Court as regards the logical processes to be followed in answering the question", even when it related to the validity of the said resolutions. This statement was qualified as follows:

> "This freedom [i.e., the Court's freedom] can however be understood only as subordinated both to the rules of law and logic by which the Court is bound and also to the objective which the Court must pursue, which is the solution of the question submitted to it" (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, pp. 217-218).

The Court stated, in the Opinion referred to, that "each organ [of the United Nations] must, in the first place at least, determine its own jurisdiction" (*ibid.*, p. 168).

In its resolution 284 of 29 July 1970, the Security Council does not call in question, either implicitly or explicitly, the validity of resolution 276 (1970), and no rule of logic makes it necessary to consider such validity in order to answer the question put to the Court.

It was because of other considerations that the Court dealt with the validity of Security Council resolution 276 (1970) and General Assembly resolution 2145 (XXI). The Court has the duty to co-operate in the efficient functioning of the other organs of the United Nations. The opinion has been sought because it would be useful for the Security Council "in its further consideration of the question of Namibia and in

furtherance of the objectives the Council is seeking". For such consideration, and for such objectives to be attained, it will be as well to dissipate the doubts which have accumulated in the course of many years on a whole series of legal questions, which are preliminary to the question which is the subject-matter of the Opinion. These doubts emerged in the course of the discussions of the Security Council and the Assembly, and their importance is clear from the attention paid to the question of the validity of the resolutions, not only by the representative of South Africa but also by the representative of the Secretary-General, the representatives of the States which furnished information, in the form of written or oral statements, and the representative of the Organization of African Unity.

In any event, the place for considerations of the validity of the resolutions is in the reasoning of the Opinion and not in its operative clause (separate opinion of Judge Morelli, *I.C.J. Reports 1962*, pp. 216-217; dissenting opinion of Judge Bustamante, *ibid.*, p. 288; this was also the solution adopted by the Court in its Opinion on *Certain Expenses of the United Nations*, *ibid.*, pp. 155-181).

B. Interpretative Method

In its written contentions and its oral statement, South Africa has expounded at length its theory as to the interpretation of legal texts, and rightly so, because the method chosen by it is the basis of the solutions it puts forward. It defends the technique of literal interpretation of texts, restrictive interpretation of powers conferred on international organizations, and it vigorously condemns teleological methods.

Without indulging here in an academic study of interpretation, it would nevertheless appear useful to make certain observations on the question, since it will thus be possible to avoid repetitions.

1. It would seem that a distinction should first of all be made between the various types of legal texts. For our purposes, it will be useful to take into account the particular characteristics of: *(a)* treaties dominated by bargaining, each party seeking its own advantage, to obtain the maximum and give the minimum; *(b)* agreements by which an organization grants certain powers or privileges to a State, which the latter accepts; *(c)* treaties by which an international organization is set up, and the resolutions of such an organization.

2. The prudent rule of considering prima facie the letter of conventions and treaties has been distorted into the literalistic interpretation which condemns any element not to be found in the text *(quod non est in codice non est in mundo)*.

As early a writer as Grotius pointed out that this was a vain tendency, as is also the so-called principle of contemporaneity. He showed that in addition to what is said, there is the force of the development of the convention (*potentia moraliter considerata: De jure belli as pacis*, II, 16, 25).

While it is true that the common intention of the parties must be taken into account, it is also true that in all systems of law it has been necessary to provide for the possibility of lacunæ; there are rules for filling out the parties' expressions of their will, and for this purpose the case law of municipal courts takes into account what the parties may reasonably have intended; it is in this way that endeavours have been made to fill the gaps in texts.

For this purpose the subject and purpose of the convention is to be taken into account. The rule *in claris non fit interpretatio* has been well commented on by Anzilotti, who pointed out that it is not possible to say that an article is clear so long as one is unaware of its subject; one only knows the will of the parties when one knows what the aim intended was (dissenting opinion, *P.C.I.J., Series A/B, No. 50*, p. 383; an idea accepted by the American Law Institute, *Restatement* 1965, para. 147, p. 455). Much earlier, Vattel had drawn attention to the importance of the reason for an act: "when once the purpose which has led the speaker to act is clearly known his words must be interpreted and applied in the light of that purpose only" (*The Law of Nations*, Book 2, Chap. 17, para. 287, Fenwick's translation). Finally, it has been possible to assert that it is thanks to the aim indicated by the expressions of will that the convention as a whole acquires an objective unity of meaning *(objektive Sinneinheit)* (Dahm, *Völkerrecht*, Vol. III, p. 50).

It is of interest for the question now under study to observe that in all internal systems of legislation, in order to reach this result, the nature of contracts and agreements is taken into account. "Contracts bind not only to what is expressly stated therein, but in addition to all consequences attached to the obligation according to its nature by equity, custom, or law" (French Civil Code, Article 1135; for the Common Law see *Windfield on Contracts*, p. 38). It should also be remarked that technical terms. like "mandate" or "trust", should be interpreted in accordance with their technical meaning (Lauterpacht, *The Development of International Law by the International Court*, p. 60). The necessary conclusion is that even a clause which is reasonably clear cannot be interpreted literally if by so doing one reaches a result which is contrary to the purpose of the treaty (*P.C.I.J., Series A/B, No. 64*, p. 19; *contra*, see dissenting opinion of three judges, *ibid.*, p. 26). If, in the case just referred to, the Court had proceeded in accordance with the majority view, it would have lent its sanction to the *fraus legis* proposed by the Albanian Government. *Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit* (*Digest*, 1, 3, 29). All treaties must be interpreted so as to exclude fraud and so as to make their operation consistent with good faith (Oppenheim-Lauterpacht, Vol. I, Sec. 544, para. 13).

Finally, it may be observed that a modern author, and one made much of in the arguments of South Africa, states and emphasizes the need to use the teleological method (Dahm, *Völkerrecht*, Vol. III, pp. 43 ff.).

3. Multilateral treaties, conventions establishing an international organization and above all the Charter, are subject to particular rules of interpretation.

The Charter would appear not to fall within the framework of the Convention on the Law of Treaties. To interpret it, one should not apply by analogy the rules of municipal law on contracts, but rather rules for the interpretation of laws and statutes (*Restatement*, *loc. cit.*, para. 146, p. 1965; Dahm, *loc. cit.*, Vol. III, p. 55).

It should not be forgotten that the General Assembly and Security Council have the responsibility of promoting the purposes laid down in the Charter. They cannot remain bound by the possible intentions of the draftsmen, not only because it is difficult to know what those intentions were (while the intentions of those who speak are known, the intentions of those who give their vote in silence are not), but also because interpretation necessarily undergoes a process of development, and, as in municipal law, must adapt itself to the circumstance of the time and to the requirements, so far as they are foreseeable, of the future. The text breaks away from its authors and lives a life of its own (dissenting opinions of Judge Alvarez, *I.C.J. Reports 1950*, p. 18, and *I.C.J. Reports 1951*, p. 53; Dahm, *loc. cit.*, Vol. III, p. 55).

In the United Nations, "each organ must, in the first place, at least, determine its own jurisdiction" (*I.C.J. Reports 1962*, p. 168). When an organ adopts a resolution, "there must arise at the least a strong *prima facie* presumption" of validity and propriety (separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, p. 204). It has even been considered that the resolutions of the Assembly and the Council, the practice of those organs, *facta concludentia*, could be considered as constituting an official interpretation *(interprétation authentique)* (cf. Dahm, *loc. cit.*, p. 50), involving in any case a duty to carry them out so far as questions which relate to "peace-keeping, dispute-settling and, indeed, most of the political activities of the Organization" are concerned (separate opinion of Judge Sir Gerald Fitzmaurice, *I.C.J. Reports 1962*, p. 213).

Concerning the United Nations Organization, the Court has said:

> "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged" (*I.C.J. Reports 1949*, p. 179);

> ". . . the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" (*I.C.J. Reports 1949*, p. 180).

On the interpretation of the Charter it has been said that:

> "It may with confidence be asserted that its particular provisions

should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter, something to compel a narrower and restricted interpretation" (separate opinion of Judge Sir Percy Spender, *I.C.J. Reports 1962*, p. 185).

The teaching of the Court is, in fact, that for the interpretation of the Charter account must be taken of its fundamental purposes, and it must be recognized that it has the powers which are necessary to achieve them "by necessary implication" (*I.C.J. Reports 1949*, p. 182; separate opinion of Judge Sir Gerald Fitzmaurice, *I.C.J. Reports 1962*, pp. 208-215); "when the Organization takes action which . . . [is] appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization" (*I.C.J. Reports 1962*, p. 168). One may therefore regard as an authoritative criterion the following conclusion: "The meaning of the text will be illuminated by the stated purposes to achieve which the terms of the Charter were drafted" (separate opinion of Judge Sir Percy Spender, *ibid.*, p. 187).

III. The Validity of the Resolutions

A. General Observation

In view of the nature of the Charter and the powers of the principal organs of the United Nations, the presumption in favour of the validity of the resolutions of those organs must be taken to be based upon their power to interpret the Charter, and to do so *ex factis*, that is to say by the very fact that they have adopted a resolution.

To challenge the validity of a resolution, it is not sufficient merely to allege that it is possible to find a better interpretation; a resolution can only be criticized if it is demonstrably absolutely impossible to find any reason whatsoever, even a debatable one, upon which an interpretation favourable to the validity of the resolution may be based.

B. The Abstention of the Permanent Members

It has been said that:

> "It is already well known that an unwritten amendment to the Charter has taken place in the practice of the Security Council, namely, to the effect that the abstention of a permanent member present at a meeting is not assimilated to the exercise of the right to veto" (dissenting opinion of Judge Bustamante, *I.C.J. Reports 1962*, p. 291; see also *I.C.J. Reports 1962*, pp. 172, 175 and 176, and with certain reservations, separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, p. 210).

In fact this interpretation of abstentions is not merely based upon an undisputed practice [1], it also necessarily follows from the nature of silence, and from the purpose of the right of veto [2].

Silence must be interpreted according to the situation and the circumstances, it may indicate a negation, but it may also mean an acceptance. In the voting of the Security Council, according to the customary interpretation, the abstention of a member may mean that that member has some doubt as to the validity of the resolution, but does not wish to prevent it being adopted. It is not a matter of mere silence, but of an abstention which, it is known, will be taken as an intention not to prevent the adoption of the resolution.

Furthermore, the condition of the "affirmative vote", required by Article 27 of the Charter, may just as well apply to the content of the resolution as to the adoption of the resolution. At the last moment, subject to the possibility of an express reservation by one member, an affirmative vote takes place on the validity of the resolution. The permanent members are not obliged to vote in any particular way, and they may express their position by abstaining.

Nor can it be overlooked that the right of veto is a privilege, and that therefore it can be renounced and can be modified *in meius*; and in any case that it should not be interpreted extensively *(privilegia restringenda sunt)*.

The 1965 amendment of the Charter confirms this interpretation. The practice of the Council regarding abstentions was known to the draftsmen, and if the text was not altered on this point, it would appear that it was because it was not intended to change the previous practice.

C. The Resolutions of the Security Council

(a) *Article 24 of the Charter*

The restrictive interpretation proposed by South Africa cannot be accepted.

The Council has "primary responsibility for the maintenance of... peace". It seems undeniable that the illegal occupation of a territory with

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[1] Stavropoulos, "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations", *The American Journal of International Law*, Vol. 61, No. 3, July 1967, pp. 737-752.

[2] In the time of the League of Nations, Art. 19, para. 5, of the Rules of Procedure of the Assembly provided that representatives who abstained from voting were to be considered as not present. Rolin explains this by saying that it is undesirable that the indifference or doubts felt by certain Members on a question on which it is certain that the other Members will be unanimous should be able to prevent it being voted; if one Member does not consider itself justified in using its right of opposition when unanimity is required, it may abstain without rendering the vote invalid. This is an interpretation, according to Riches, by which those who abstain are regarded as having given tacit approval to the action of the Assembly: *The Unanimity Rule and the League of Nations*, Baltimore, 1933, p. 43.

regard to which the United Nations has accepted "a sacred trust" is an act contrary to the maintenance of peace.

The Court has said that it must be acknowledged that the Charter, by entrusting certain functions to an organ, with the attendant duties and responsibilities, has conferred upon that organ the competence required duly to discharge them (*I.C.J. Reports 1949*, pp. 179 and 182; *I.C.J. Reports 1954*, p. 57).

Paragraph 2 of Article 24 does not make a restrictive interpretation inevitable [1]. The reference to the "specific powers granted to the Security Council" by Chapters VI, VII, VIII and XII does not mean that it has only those powers. Not merely may it have those provided for in other provisions of the Charter, but in addition it must have those which are necessary to it for the fulfilment of its duties. The words "the specific powers granted . . ." simply mean that in the Chapters referred to, these powers are regulated in a particular way for the fulfilment of the duties and responsibilities in question.

For the purpose of examining the jurisdiction of the Security Council with regard to mandates, the mention of Chapter XII in Article 24 of the Charter is of great importance.

The principal purpose of Article 80, as we shall have to demonstrate, is to avoid any alteration of the rights of peoples subject to mandate, directly or indirectly, in any manner whatsoever. When the League of Nations came to an end, the United Nations took over the responsibility of the League towards those peoples. The mention of Chapter XII in Article 24 leads to the view that the Council has the specific powers necessary for the fulfilment of its duties toward the peoples under mandate.

It is very possible that those who drafted Article 24 were not thinking of Article 80, but it is also probable that those who drafted Article 80, or the majority of them, would have accepted this interpretation, in view of their interest in the conservation of the rights of the peoples subject to mandate.

However that may be, the wording of Article 24 does not permit of Article 80 of Chapter XII being excluded without special reason; the purpose of Article 24, which is to maintain international peace and security, through respect for the purposes and principles of the United Nations, calls for Article 80 to be taken into account. The object of Article 80 with regard to the conservation of the rights of the peoples subject to mandate can only be achieved if the Security Council possesses the necessary competence.

This being so, if there is no convincing reason why Article 24 should be given an interpretation which is restrictive and contrary to its clear

[1] The principal responsibility entrusted to the Council requires that it be regarded as having a residual competence: Castañeda, *Legal Effects of United Nations Resolutions*, 1969, p. 72.

terms, Article 24 must be interpreted as meaning that the Organization has entrusted to the Council powers which are sufficient for the United Nations to perform its duties, in accordance with Article 80.

(b) *The Non-Abstention of the Members Parties to a Dispute (Art. 27, para. 3, of the Charter)*

The argument based on this observation by South Africa loses its force once it is clear that it is impossible to describe its refusal to fulfil its obligations as Mandatory as a "dispute", as has just been observed.

(c) *South Africa Was not Invited to Participate in the Discussions of the Security Council (Art. 32 of the Charter)*

This argument falls away if there is no dispute. South Africa had an interest in the discussions; but not merely was it not a party to a dispute, but also it did not take the trouble to see that it was invited, which is an indication that it did not, at that time, consider that it was a party to a dispute in the legal sense.

D. General Assembly Resolution 2145 (XXI)

Doubt has been cast on the validity of this Assembly resolution, on the ground that the competence of the Assembly is confined to making recommendations (Art. 10 and Art. 11, para. 2, of the Charter). The Court has already endeavoured to resolve this doubt. "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, the making of recommendations; they are not merely hortatory" (*I.C.J. Reports 1962*, p. 163). "The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action" (*ibid.*, p. 164).

It should not be forgotten that Article 18 refers without distinction to recommendations and to decisions of the Assembly. Among the recommendations on "important questions", there are some which "have dispositive . . . effect" (*ibid.*, p. 163).

Among these "important questions", mention is made of "questions relating to the operation of the trusteeship system", that is to say, questions relating to Chapter XII of the Charter ("international trusteeship system"). One of the rules in question is Article 80, which settled what the position of mandates would be up to the time when the mandated territories would be placed under the trusteeship system [1].

[1] At the 37th meeting of the Coordination Committee it was said that "Discussion of the new phrase from Committee II/1 'questions relating to the operations of the trusteeship system' brought an understanding that the questions embraced trust agreements, decisions on reports, and everything else relating to the system"(UNCIO docs., Vol. XVII, p. 324, quoted in *I.C.J. Pleadings*, *Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South West Africa*, p. 49).

If it is recognized that the United Nations accepted the transfer from the League of Nations of the "sacred trust" of guarding against any modification of the rights of any people under mandate, and if it is recognized that this is one of the purposes of the Charter, it must also be admitted that the Assembly has the powers necessary for the fulfilment of its duties (see separate opinion of Sir Percy Spender, *ibid.*, pp. 186-187).

The terms of the resolution, which declares that South Africa "has failed to fulfil its obligations in respect of the administration of the mandated territory", and that it "has, in fact, disavowed the Mandate", and that the Mandate is "terminated", clearly show the nature and the purpose of the resolution.

The resolution does not of itself lay any special obligation on States other than South Africa. It confines itself to noting and declaring the forfeiture of the Mandate [1]. Since the resolution was passed, the Mandate, the only title justifying possession of the Territory of South West Africa, has lost any appearance of continued existence. This is a new situation and one which must be respected by all, in view of the competence of the United Nations in this regard.

Resolution 2145 (XXI) is certainly not judicial in nature, it does not encroach, and does not involve any encroachment, on the competence of the Court. The United Nations believed that the time had come to fulfil its duties towards the people of Namibia by solemnly withdrawing any semblance of legality from South Africa's occupation of the Territory.

The resolution "calls the attention of the Security Council to the present resolution". This shows that the Assembly is confining itself to its declaratory function, in accordance with Articles 80 and 18 of the Charter, and that it is requesting the co-operation of the Security Council so that the latter may determine the kind of action appropriate to the situation.

The Security Council has reaffirmed the special responsibility of the United Nations with regard to the people of Namibia (resolution 264 (1969)), called upon South Africa to withdraw its administration from the Territory of Namibia (resolution 269 (1969)) and reaffirmed resolution 2145 (XXI). In other words it has adopted the resolutions of the Assembly, affirmed them afresh, and taken a step towards coercive measures.

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[1] Resolution 2145 (XXI) is the manifestation of the exercise of a power coupled with a duty *(officium)* of the Assembly, with a view to the fulfilment of the "sacred trust" entrusted to it by the Organization. Through this, the Assembly has the faculty and the duty to declare terminated the administration which had been entrusted by the international community to the Mandatory, to be exercised on its behalf, when the Mandatory has shown itself unworthy of that confidence. By resolution 2145 (XXI), the General Assembly modified the legal situation of the mandated territory, and with that resolution the legal title of the former Mandatory to possession of the Territory of South West Africa or Namibia disappeared: this is a change in the status of the Territory which must be respected by all.

Examples might be given of earlier resolutions which change a legal situation, and also give rise to legal consequences (obligations, rights) on the basis of other provisions of the Charter or other resolutions (for example of the Council); see Castañeda, *loc. cit.*, p. 121.

IV. Transmission of Powers of the League of Nations to the United Nations

A. Article 80 of the Charter

1. South Africa is the only mandatory State ever to have raised this question. According to its contention, the Mandate for South West Africa came to an end with the dissolution of the League of Nations or, at any event, the obligation to make annual reports concerning the Territory came to an end. In its 1950 Advisory Opinion the Court affirmed that the Territory was still under mandate and that South Africa still had the obligations flowing from the Mandate, the supervisory functions being exercised by the United Nations.

Judges McNair and Read expressed a contrary view. They considered that the League of Nations' supervision of the Mandatory had come to an end, because, the organs designated to receive the reports no longer existing, it had become impossible to perform this obligation (*I.C.J. Reports 1950*, pp. 159 and 169; dissenting opinion of Judge van Wyk, *I.C.J. Reports 1962*, p. 648)[1].

This narrow interpretation has been clearly discarded by the Court. In *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections*, the Court had to decide whether it had jurisdiction on the basis of a treaty containing a clause conferring jurisdiction on the Permanent Court. It was argued that the dissolution of the Permanent Court made it impossible to apply that provision (dissenting opinion of Judge Morelli, *I.C.J. Reports 1964*, pp. 95 f.). But the Court found on the contrary that the Permanent Court "was merely a means for achieving that object", namely "judicial settlement"; while it was true that the former Court no longer existed, the obligation remained "substantively in existence, though not functionally capable of being implemented", and if another tribunal were "supplied by the automatic operation of some other instrument by which both parties are bound", the clause again came into force (*ibid.*, pp. 38 f.). The important thing was the purpose and not the instrument. Consent to the transfer of powers resulted from membership of the United Nations (*ibid.*, p. 35).

The authority of the 1950 Opinion has been firmly established. It was confirmed not only by the 1955 and 1956 Opinions, but also by the 1962 Judgment in the *South West Africa* cases (*I.C.J. Reports 1962*, pp. 333 f.). Moreover the Court has clearly rejected the arguments of Judges McNair and Read (*Barcelona Traction* case).

The joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice in the *South West Africa* cases reverted to the prob-

[1] Judges McNair and Read did not consider that South Africa had been relieved of its obligations as the Mandatory, but that their performance could be demanded only by former Members of the League and by application to the International Court of Justice.

lem of the transmission of powers, rejecting the 1950 Opinion as "definitely wrong" (*I.C.J. Reports 1962*, p. 532, note 2). As this criticism relates to the interpretation of Article 80 and to its background, careful study of these matters would seem to be called for (*ibid.*, p. 516, note 1), particularly as the Court stated in 1966 that it did not wish to prejudice the question (*I.C.J. Reports 1966*, p. 19).

Article 80 cannot be properly interpreted without considering its purposes and the historical context of the time when it was drafted. The framers of the Charter were determined not only to maintain the progress made in the protection of indigenous peoples by the League of Nations under the mandates system, but also to intensify it through the trusteeship system.

The Charter, including Article 80, was signed on 26 June 1945. The League of Nations still existed. Before its dissolution, the trusteeship system and Article 80 *could not* be implemented. As the States and experts involved in the creation of the United Nations and the liquidation of the League of Nations were practically the same, it was possible to frame the Charter with the forthcoming liquidation of the League of Nations in mind.

Article 80 could not be applied at once. It had no function until the League of Nations was liquidated. The mandates were still exercised on behalf of the League of Nations, and until its liquidation they could not be converted into trusteeships or come under the supervision of the United Nations. The operation of Article 80 was subject to a suspensive condition. It was with a view to the time when it would come into operation that the provision which has been called a "conservatory" clause was included. This clause stipulates that the provisions of Chapter XII (particularly Arts. 75 and 77) would not alter the existing mandates régime. But in addition provision was made for a transitional régime, for the period which must elapse between the liquidation of the League of Nations and the conclusion of trusteeship agreements. This transitional régime related only to the territories administered under the mandates system, namely "territories now held under mandate", because there was no possibility of placing the other territories listed in Article 77 under the transitional régime by the mere application of the provisions of the Charter.

For the territories still held under mandate, it was provided that none of the new provisions of the Charter would "in or of itself . . . alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties". These territories therefore remained, until the conclusion of trusteeship agreements, "held under mandate" (Art. 80; Art. 77).

2. The interpretation proposed seems closely in accordance with the Advisory Opinion of 1950. But one may not overlook the fact that that Opinion has been criticized by certain authorities. It has been main-

tained that Article 80 is no more than a "saving clause" designed to prevent the provisions of Chapter XII from "being *interpreted* so as to operate beyond their intendment" and that its "sole purpose" is to prevent them from "being construed so as to alter existing rights prior to a certain event" (joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, *I.C.J. Reports 1962*, p. 516, note).

These assertions are based on a phrase in the Article ("nothing . . . shall be construed . . . to alter . . ."), but they fail to give any explanation as to the purpose of the Article or the rights it is meant to conserve. Now it is impossible to admit without any explanation that the sole function of Article 80 can have been that of an interpretation clause in the technical sense.

Certain explanations have therefore been put forward. Article 80 has been said to relate to the rights conferred by mandates, but only for the period intervening between the entry into force of the Charter and the liquidation of the League of Nations. It has also been regarded as concerning the rights derived from trusteeship agreements.

But these efforts have been of no avail. They do not take account of the fact that the rule embodied in Article 80 is applicable only "until such [trusteeship] agreements have been concluded". Thus it is applicable *after the liquidation* of the League of Nations *and until* the conclusion of such agreements, and it is *not* applicable *after the conclusion of the agreements.*

The interpretation put forward by the 1950 Advisory Opinion would therefore appear to be the only one in conformity with the purpose and the letter of Article 80. It is true that the wording of that clause is not very clear, but a reading of the *travaux préparatoires* gives the impression that it is the result of the draftsmen's concern to take several purposes into account and to harmonize them in the Article.

Nor should the desiderata of the international trusteeship system be forgotten. Its establishment depended on the trusteeship agreements, and it was desired to maintain the status quo until they had been concluded. The Charter declares, in Article 76, that the basic objectives of the trusteeship system are in accordance with the purposes of the United Nations laid down in Article 1. The question was whether that declaration affected the rights of the mandatory Powers. To remove doubt on that score, it was decided to provide that nothing in Chapter XII should be construed to alter the rights whatsoever of any State (the reservation at the end of Art. 76 *(d)* was inserted with the same end in view). To keep the mandates system as such intact, it was also thought necessary to provide that nothing in the Chapter concerning the end of mandates could be construed to alter the rights of peoples. Finally, to avoid any form of words capable of suggesting a prolonged survival of mandates, they were not referred to, except by way of a reminder that they should be replaced by trusteeship agreements. Using the term "interpret" in the somewhat non-technical sense in which "*interpréter*" is employed in the French

text (the English text has "construe"), paragraph 2 of Article 80 states that paragraph 1 should not be "interpreted" as giving grounds for delay or postponement of the negotiation and conclusion of trusteeship agreements.

There are also other reasons for considering that the interpretation given by the 1950 Advisory Opinion was correct.

Interpreted as a mere "saving clause", Article 80 is really reduced to nothing, to total pointlessness. If the view is taken that the liquidation of the League of Nations put an end to the mandates or to the obligations of the mandatories, the Article is deprived of all practical meaning. In this sense Judge MacNair was right in saying "that it is difficult to see the relevance of this Article" (*I.C.J. Reports 1950*, p. 160). But can a method of interpretation be a good one if it leads to the absurd conclusion that an Article of the Charter is totally pointless?

3. The history of Article 80 has been thoroughly studied, as is apparent in the Court's publications in the *South West Africa* cases. To examine it afresh would be unnecessarily to burden this opinion; but it may be of use to reproduce a few texts with which the Court was already acquainted in 1950.

On 14 May 1945 at San Francisco, in Committee II/4, the delegate of South Africa said that "the terms of existing mandates could not be altered without the consent of the mandatory Power". It was his concern to protect the rights of States in the period preceding the conclusion of trusteeship agreements, whereas the delegate of Egypt expressed concern for the preservation of the rights of peoples administered under mandate. This led to the proposition of the United States delegate, to the effect that: "all rights, whatever they may be, remain exactly the same as they exist—that they are neither increased nor diminished ..." (UNCIO docs., Vol. X, pp. 439 and 486, quoted in *I.C.J. Pleadings, International Status of South West Africa*, p. 98). In the same sense, Mr. Stassen said that the purpose was "to preserve the rights during that in-between period from the time this Charter is adopted and the time that the new agreements are negotiated and completed" (8 June 1945: running numbers 24, 25. UN Archives, Vol. 70, quoted in *I.C.J. Pleadings*, *ibid.*, p. 217).

In Commission II of the San Francisco Conference, Mr. Fraser (Prime Minister of New Zealand), the president of the Trusteeship Committee, said with regard to the report of that Committee: "The Mandate does not belong to my country or any other country. It is held in trust for the world." He also stated that:

> "The work immediately ahead is how those mandates that were previously supervised by the Mandate Commission of the League of Nations can now be supervised by the Trusteehip Council."

Mr. Fraser was the last speaker on the report, and when he had finished,

Field Marshal Smuts, presiding, declared it adopted in full (UNCIO docs., 1144 (21 June 1945) and 1208 (27 June 1945), quoted in *I.C.J. Pleadings, ibid.*, p. 108).

Field Marshal Smuts, the Prime Minister of the Union of South Africa, replied to a question put to him on the meaning of paragraph 2 of Article 80 by saying:

> "That was to prevent a situation where the mandatory says: 'I do not want to make an agreement at all'. He takes this position, that the League of Nations having disappeared we are now free, that we can do what we like" (Union of South Africa, Debates of the House of Assembly, 13 March 1946, quoted in the statement by Mr. Ingles (Philippines), *I.C.J. Pleadings, ibid.*, p. 242).

4. Article 80 is also the basis of reference or support for the League of Nations resolution of 18 April 1946 [1]. The dying League of Nations could be easy in its mind because the principles of the Charter were the same as those of Article 22 of the Covenant, the principle of the well-being and development of peoples not yet able to stand by themselves being preserved. Having by their signature of the Charter endorsed Article 80, the mandatories manifested their intention to continue to administer the territories in accordance with Article 22 of the Covenant and the mandate instruments.

The conclusion that South Africa remained subject to the international obligations contained in Article 22 of the Covenant and that the supervisory functions with regard to their performance were to be carried out by the United Nations is thus based on the acceptance by the mandatory of Article 80 (because it signed the Charter), the resolution of 18 April 1946 (which declared the functions of the League of Nations to be at an end and stated its agreement with the provisions of the Charter) and the statements whereby the mandatories announced their intention of continuing to administer the mandated territories in accordance with the obligations set out in the various mandates.

5. These conclusions have been severely criticized and doubt has been cast on the authority of the 1950 Opinion on the basis of what has been called the "new facts"—facts which it is claimed were unknown to the Court in 1950. But the study of the background, looked at with an open mind, would seem to lead to a contrary result [2]. The basic concern of most of the framers of the Charter and of the liquidators of the League of

[1] On the subject of the understanding that the United Nations was to continue the work of the League, see the preamble to the League Assembly's resolution of 19 April 1946 and the observations of the Rapporteur and Chairman of the First Committee (cited in *I.C.J. Pleadings, International Status of South West Africa*, pp. 209 f.).

[2] See the excellent account of the matter given by Judge Jessup in a dissenting opinion: *I.C.J. Reports 1966*, pp. 339-351.

Nations was to preserve the rights of peoples and the safeguards for those rights, and only secondarily the rights of States (the open-door question).

From the information provided by South Africa itself at the hearing of 15 March 1971 concerning the background to the drafting of Article 80, it appears that, in the text proposed by the Technical Committee, it was provided that nothing should in and of itself alter the rights of any States or any peoples "or the terms of any mandate". An Egyptian proposal also referred to "the terms of any mandate". The United States spoke of "a conservatory or safeguarding clause", whereby all rights would remain the same and be "neither increased nor diminished". The Syrian proposal also referred to "the terms of any mandate". The Consultative Group proposed that what should be specified as not being altered were the rights whatsoever . . . "or the terms of existing international instruments". The United States asked that it should be placed on record that among "rights whatsoever" were included any rights provided by Article 22, paragraph 4, of the Covenant. The Coordination Committee indicated that the intention of Committee II/4 was "to freeze the present position".

In these discussions the Soviet Union said it feared that the preservation of the former mandate régime unchanged might be used as a pretext to delay the conclusion of trusteeship agreements and indefinitely perpetuate the mandates.

Once the Charter had been signed [1], the League of Nations concerned *itself with ensuring the continuation* of its work with a view to the protection of the peoples under mandate. Dr. Liang proposed in the First Committee, which was discussing the transmission of the League of Nations' functions, a draft recommending that the mandatory Powers should submit annual reports to the United Nations until the Trusteeship Council had been constituted. This draft was not accepted, as it was outside the Committee's terms of reference. Later, when the time came to discuss the mandates, Dr. Liang submitted another draft in which no reference was made to annual reports, and which was to provide the basis for the resolution of 18 April 1946. The withdrawal of Dr. Liang's first draft, and the wording of the new draft, have been regarded as providing a reason for rejecting the view of the 1950 Advisory Opinion that the League's functions passed to the United Nations (separate opinion of Judge van Wyk, citing the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, *I.C.J. Reports 1966*, p. 112). But if the Liang draft was abandoned, it was not because it provided for the transmission of functions; it was because it was unrealistic in the sense that reports could not simply be sent to the General Assembly. Some

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[1] It is noteworthy that during the ten meetings held by Committee II/4 Argentina, Ethiopia and Guatemala expressed reservations in respect of Article 80, but South Africa did not.

specialized machinery was necessary and that, in the view of the Soviet Union, could be a pretext for delaying the institution of the Trusteeship system.

There was also concern in the United Nations with regard to the need for some organized machinery to supervise the administration of the mandatories, hence the idea of a temporary trusteeship committee as proposed by the United States. If this met with no success it was because of the opposition of the Soviet Union, which regarded all these proposals as a way of prolonging the mandates system and staving off the trusteeship system.

There is no reference to non-transmission of functions to the United Nations, or to the extinction of the mandatories' obligations.

On the contrary, States affirmed their readiness to discharge their obligations as mandatories in accordance with the spirit of the mandates. The general interest appeared to be to seek to ensure the transfer to the United Nations of the functions and responsibilities of the mandates system (South African written statement, Chap. VIII, para. 13).

For its part, Belgium stated (11 April 1946) that it was "fully alive to all the obligations devolving on Members of the United Nations under Article 80 of the Charter".

South Africa stated that it was prepared to apply the principles laid down in the Charter (23 December 1945), that it was conscious of its obligations and responsibilities as a signatory of the Charter (17 January 1946), and that "according to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded" (22 January 1946). South Africa also recognized the transmission to the United Nations of the powers concerning the mandates, since it requested the General Assembly to agree to the annexation of South West Africa. Finally, in the letter of 23 July 1947, there was a reference to the continuation of the submission of reports.

The Assembly's resolution of 18 April 1946 is of great importance. It is based on Dr. Liang's draft. In proposing the new draft, Dr. Liang indicated that the functions of the League of Nations were not transferred automatically to the United Nations. The appropriate administrative organ was lacking. The League of Nations should take steps to secure "the continued application of the principles of the mandates system". He quoted Professor Bailey to the effect that "the League would wish to be assured as to the future of mandated territories". In supporting Dr. Liang's proposal, France stated that the dissolution of the League was not to be regarded as weakening the obligations of the mandatory States.

6. The resolution of 18 April 1946 recalled the basic principle of the mandates system, which was to ensure the well-being and the protection of the peoples under mandate (Art. 22 of the Covenant). It recognized the ending of the functions of the League of Nations while accepting its replacement by the United Nations (the Charter containing provisions

which could be implemented on the dissolution of the League of Nations), and *noting* that the principles of Article 22 had been embodied in Chapters XI, XII and XIII of the Charter. The concordance with Article 80 will be noted. The League of Nations was satisfied that the protection of the peoples under mandate would be ensured by the United Nations, as it had been under Article 22 of the Covenant.

To make doubly sure, the resolution solemnly placed on record the statements whereby the Members of the League administering territories under mandate expressed their intention of continuing to administer them in accordance with the obligations contained in the respective mandates.

Once the League of Nations had been dissolved, the concern of all States except South Africa was the rapid conclusion of trusteeship agreements. The lack of any body to which reports could be submitted is attributable to the fear of delaying the conclusion of trusteeship agreements. However there is no evidence that there was any doubt as to the transmission to the United Nations of the powers regarding mandates. On the contrary, the decision of the Organization was awaited (even by South Africa) before declaring that the mandates had come to an end.

7. To dispel misunderstanding, it would be as well to clarify the significance of Chapter XI of the Charter and of Article 73, which forms part of it.

To consider the declaration regarding non-self-governing territories as applying only to territories under neither mandate nor trusteeship is to obscure the sense of it. Both the wording and the history of Article 73 show that *it is of general application*.

In the course of the first stages of drafting the Charter, the provisions of Chapter XI were in the same chapter as the articles of what is now Chapter XII. If Section A became a separate chapter (now Chap. XI), it was because it was thought inappropriate to include a general declaration in the chapter governing the trusteeship system. But this has not diminished the general nature of Article 73.

When presenting the report of Committee II/4 to Commission II, Field Marshal Smuts explained the scope of Section A (which became Chap. XI) by saying that Section A applied the trustee principle to all dependent territories, whether they were mandated, territories taken from defeated countries, or existing colonies of Powers. That covered the whole field of non-self-governing territories. (UNCIO docs., Vol. VIII, p. 127.) Mr. van der Plas pointed out that the declaration in Article 73 applied to all non-self-governing territories, to those of colonial status on a voluntary basis and to those of a trust status, among the obligations assumed for them, on a contractual basis (Coordination Committee, summary record of 37th Meeting, quoted in *I.C.J. Pleadings*, *International Status of South West Africa*, p. 39).

The text of Article 73 shows that the declaration regarding non-self-governing territories applies to "territories whose peoples have not yet

attained a full measure of self-government", without mention of any exception. It does not appear that anyone interpreting the text is entitled to exclude non-self-governing territories such as mandated or trusteeship territories.

Of course the obligations imposed upon the States administering mandated or trusteeship territories are wider than those provided in the case of other non-self-governing territories, but the declaration in Article 73, being general and supplementary, is applicable to all non-self-governing territories.

Article 73 took over from Article 22 of the Covenant the principle of the "sacred trust" and of the temporary nature of the administration of the territories ("territories whose peoples have *not yet* attained a full measure of self-government"). This explains the reference made by the League of Nations resolution of 18 April 1946 to Chapter XI of the Charter.

During the first few years South Africa submitted reports to the United Nations. It stated at times that it was a matter of supplying information in accordance with Article 73. But the fact that South Africa vouchsafed certain interpretations *a posteriori* and referred expressly to Article 73 does not imply that it had thereby cast off its position and obligations as a mandatory; it was carrying out the duties generally laid upon mandatories.

8. An additional argument against the transmission of powers has been sought in resolution XIV of 12 February 1946 concerning the transfer of certain functions and activities. It contains no reference to the mandates, and the conclusion has been drawn from this omission that there was no transmission. This is an inexplicable argument, as the Sub-Committee of the Executive Committee which dealt with the possible transfer of League of Nations functions and activities expressly stated that the question of the mandates was outside its terms of reference. This is natural, for the question had already been settled by Article 80 of the Charter on the United Nations' part and by the resolution of 18 April 1946 on the League of Nations' part [1].

9. There is also powerful support for the 1950 Advisory Opinion in the principles of municipal law.

Lauterpacht recalls that the essence of the mandates system was the administration of the territory in the interests of the indigenous peoples; to hold that this could be secured without supervision would have been to reduce to a form of words the decision of the Court. He adds that seldom was there a more compelling occasion for applying—as the Court did in

[1] It should not be forgotten that the caesura between the League and the United Nations is political, not functional; see the observations of Bailey and Bourquin and the preamble of the League resolution of 18 April 1946, in *I.C.J. Pleadings, International Status of South West Africa*, p. 209 and note 1.

fact—the *cy-près* doctrine (*The Development of International Law by the International Court*, p. 279).

Under that doctrine, which applies specifically in the case of charitable trusts, a court must decide "as near as possible", by changing the trustee or the method of administration in the interests of the beneficiary when this is necessary in view of the circumstances (Bogert, *Handbook of the Law of Trusts*, 1952, p. 568; Keeton, *Law of Trusts*, 1939, pp. 148 f.; Hanbury, *Modern Equity*, 1946, p. 227; Keeton, *Social Change in the Law of Trusts*, 1958, p. 96).

In other systems of law there is no doubt that if the existing supervisory organ in a tutelage situation is abolished and another is established (if for example a *conseil de famille* is replaced by judicial supervision) the guardian becomes accountable to the new organ.

10. In reality the interpretation of Article 80 by the Court in 1950 has the virtue of preventing the mandate being used to create a title for annexation; it has the virtue of preventing *fraus legis*.

B. The Unanimity Rule in the Covenant of the League of Nations

1. An indirect but effective way of arguing against any transmission of powers to the United Nations in respect of the mandates is to point to its practical impossibility, because the unanimity rule operated in respect of decisions by the League Council, and because the mandatory was present at the meetings of the Council either as a member or on the invitation of the Council owing to its interests being specially affected (Covenant, Art. 5, para. 1, and Art. 4, para. 5). A right of veto was thus conferred on the mandatory, emptying the League's supervisory rights and duties of any substance and making it impossible for the League to transmit them; no power or practical function could have passed to the United Nations.

2. It is therefore necessary to study the unanimity rule and the possibility of its application to a Member of the League of Nations which was a mandatory.

At the time of the Opinion requested of the Court on the *International Status of South West Africa*, South Africa argued energetically and forcibly that the Mandate had lapsed, but did not mention the unanimity rule. It was only after the 1950 Opinion and the setting up of the Committee on South West Africa, in the discussions of the Committee and of the Assembly devoted to the implementation of the Opinion, that the Government of the Union of South Africa opposed the proposals of the Committee, claiming that they "would not, *inter alia*, safeguard the rule of unanimity which was provided for in the Covenant of the League of Nations [1]".

[1] Letter of 25 March 1954 from Permanent Representative of South Africa to

This argument impressed the Committee, whose members were divided in their views. The General Assembly found itself faced with two proposals. Under one of them, resolutions were to be taken "subject to the concurring vote of the Union of South Africa"; this proposal did not obtain the necessary majority. The other culminated in resolution 844 (IX) of 11 October 1954, by which the Court was asked to give an opinion on the voting procedure on questions relating to South West Africa, in particular on the question whether the application of Article 18, paragraph 2, of the Charter was in conformity with the 1950 Opinion, and in the affirmative, as to the voting procedure which the General Assembly should follow. (See the Dossier transmitted by the Secretary-General of the United Nations, *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, pp. 21 ff.) The Government of South Africa did not take part in the proceedings, but in the Additional Notes in the Dossier transmitted by the Secretary-General (*ibid.*, pp. 38-48) and in the written statement of the United States (*ibid.*, pp. 57-60), the question of unanimity was studied.

In the 1955 Opinion, the Court considered that despite the arguments on the unanimity rule advanced before the General Assembly and the United Nations Committees, it was unnecessary "to deal with the issues raised by these contentions or to examine the extent and scope of the operation of the rule of unanimity under the Covenant of the League of Nations", because the question of the degree of supervision did not include or relate to the system of voting (*I.C.J. Reports 1955*, p. 74). The Opinion states that:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations." (*I.C.J. Reports 1955*, p. 75.)

Consequently, the Court rejected the contention of South Africa that there was incompatibility between the voting procedure contemplated by the General Assembly and the unanimity rule.

The 1950 Opinion had recognized that the General Assembly had the right to exercise the supervisory functions. The 1955 Opinion recognized that it had the power to take decisions regarding the Mandate by a two-thirds majority of Members present and voting. Judge Lauterpacht would have wished the Court to examine the problem of the unanimity rule in

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Chairman of Committee on South West Africa, Annex I to Report to the Committee on South West Africa, *GA, OR*, Ninth Session, Supplement No. 14, A/2666.

all its aspects (*I.C.J. Reports 1955*, p. 98). The Court did not do so and the question of the application to mandates of the unanimity rule, provided for in the Covenant, remains open.

The Court has nonetheless held, in two successive Judgments that, according to the Covenant and within the framework of the League of Nations, the unanimity rule was applicable to mandates, without having subjected the question to special study.

The 1962 Judgment endeavours to show that the system of judicial protection of the sacred trust contained in each mandate was an essential feature of the mandates system; it stressed the *raison d'être* and the necessity of this evident security, because without it the supervision by the League, and the steps to be taken by the Council, could not be effective, "in either case the approval meant the unanimous agreement of all the representatives including that of the mandatory" (*I.C.J. Reports 1962*, p. 336).

Later the Court based an argument on the unanimity rule, but in order to contradict the necessity argument. The functioning of the mandates system was otherwise, given the unanimity rule (*I.C.J. Reports 1966*, pp. 44-47); "the Council had no means of imposing its views on the mandatory", "in relation to the 'conduct' provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories". "As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the mandate itself, the risk of this was evidently taken with open eyes" (*ibid.*, p. 46).

The authority of the 1962 and 1966 Judgments seems rather weak. They are in clear contradiction with each other and the references to the unanimity rule are *obiter dicta*, intended to reinforce the argument, but which are not the outcome of a special and thorough study of the question [1].

Nonetheless one cannot ignore them. The 1966 Judgment amounts to saying that the unanimity rule laid down in the Covenant is not merely a rule of voting procedure, but it also touches the very essence of the mandates. As a result one must question whether mandates are not thus disguised cessions. Do mandatories have no legal obligations, but only moral obligations? Could the Council of the League of Nations do nothing to check the annexation of a mandated territory?

It therefore seems that the counsel of Sir Hersch Lauterpacht should be followed, and that the question of the unanimity rule should be examined in all its aspects.

[1] There were not taken into consideration the arguments and facts based on practice indicated in *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, pp. 38-48 and 57-60; *I.C.J. Reports 1955*, pp. 98-106, and by legal writers, J. F. Williams, "The League of Nations and Unanimity", *American Journal of International Law*, Vol. 19, 1925, p. 475; C. A. Riches, *The Unanimity Rule and the League of Nations*, Baltimore, 1933.

3. If the unanimity rule gives rise to difficulties for anyone who seeks to understand the mandates system, this results in the first place from an error of perspective. Should the question be seen from the point of view of Article 22? It is that Article which we are attempting to interpret. According to its provisions, the purpose of the mandate is the sacred trust towards the natives; the mandatory is the instrument by which the League of Nations effects its civilising task, the admitted consequence being the exclusion of any possibility of open or disguised annexation on the part of the mandatory.

To appreciate the significance of Article 22, its origin must be recalled. Mandates were founded on the Treaty of Versailles. Germany ceded its African colonies on condition that they became mandated territories. The Allied Powers and the League of Nations accepted the territories subject to the duty to ensure that the mandatories to which the territories were entrusted duly accomplished their sacred trust of civilization.

Germany, as a party to the Treaty of Versailles, had a legal interest in the observance by the League of Nations of Article 22. Germany had no right to supervise the administration of the territories [1], but it could complain if the mandates system were transformed into another régime, if a mandated territory became a colony or were annexed.

Article 22 plays a very special part in the Covenant. It created a situation or institution which was independent of the will of the Members of the League. The provisions of the Covenant could be altered by majority vote (Art. 26); the Mandate for South West Africa could be modified with the consent of the Council (Art. 7 of the Mandate). But Article 22 could not be abrogated or modified. The regime was set up for the benefit of the peoples of the territories, and these territories were assigned subject to the obligation to respect Article 22.

This special status of Article 22 is apparent if one considers the structure of the Covenant. This Article is an independent normative entity, foreign even to the remainder of the provisions of the Covenant. Those who drafted it had in fact contemplated that agreements for mandates could be inserted into the Peace Treaty (Hymans Report, quoted in the separate opinion of Judge Jessup, *I.C.J. Reports 1962*, p. 391).

4. The relation between a mandatory and the Council is not the same as that between a Member of the League and the Council. According to the mandate instrument for South West Africa, the Mandatory exercises administration on behalf of the League of Nations (Preamble to the Mandate); it may apply its own legislation to the Territory (Art. 2); it undertakes a series of obligations (Arts. 2-5); it is to make to the Council an annual report to the satisfaction of the Council with full

[1] It is for this reason that Germany's protest against Belgium with regard to Ruanda-Urundi was rejected.

information with regard to the Territory and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5 (Art. 6).

The mandatory therefore comes down from the "platform" of sovereignty. The administration of a mandated territory is not something which falls, either essentially or fortuitously, within the national competence proper to States. The relationship between the Mandator (League of Nations) and Mandatory (South Africa) or, if preferred, between the guardian *(tuteur)* and the authority called upon to supervise its management, is not a relation of equality *inter aequales*, but one of subordination in the field of mandates. A mandatory does not have to administer nor present reports to the satisfaction of the Council as a Member, with the conditions and prerogatives involved in that relationship; it does so as a mandatory which has to give an account of its mandate.

The mandatory cannot play two different and inconsistent parts. It cannot enjoy the advantages connected with the administration of the territory in the robe of a mandatory, and then, after having doffed that, put on the robe of Member of the League of Nations, make use of its right of veto, and evade its obligations as mandatory.

5. Article 5, paragraph 1, of the Covenant lays down the unanimity rule as general "except where otherwise expressly provided in this Covenant". A decisive provision, which appears to exclude the possibility of any implied derogation, or derogation by analogy, if there is no provision expressly contrary to the rule.

But interpretation does not deserve to be so called if it sticks in the bark of the words, superstitiously sacrificing the other rules of law, in the present case, by neglecting Article 22 of the Covenant and the principles inspiring it.

(a) To ascertain the significance of Articles 4 and 5 of the Covenant, it is necessary first of all to study their particular purpose.

At the time of the drafting of the Covenant, the unanimity rule was fundamental as an expression and a safeguard of the sovereignty and independence of States. On the birth of the League of Nations, the need was felt to reassure governments. It was said that "no nation, whether small or great, need fear oppression from the organs of the League" (Lord Cecil, quoted by Riches, *loc. cit.*, p. 22); and it was also said that any scheme would be avoided "under which our own country [the United Kingdom] should be rendered liable to have a recommendation passed against it by a majority vote in a matter vitally affecting the national interests". (Interim Report of the Phillimore Committee, 1918, Riches, *loc. cit.*, p. 3.)

Since such was the purpose, and the sole purpose, of the rule, it was logical for the First Committee of the Second Assembly to

accept the report of the London Committee, which after having explained that the unanimity rule served to safeguard the sovereignty of States, deduced therefrom that unanimity could not be necessary except in cases in which the sovereignty of States was in jeopardy (Riches, *loc. cit.*, p. 98). The Second Assembly "again explained the adoption of the unanimity rule in the first place as a means of protecting 'the rights of State sovereignty', and they further stated that it only needed to be maintained where it served that end (Riches, *loc. cit.*, p. 117).

This unanimity rule protected not only the Members of the League, but all States. In the practice of the Council, it was customary to consider that the right to sit as a member, implying the right to vote, must be applicable also by analogy to countries which were not members of the League.

In addition to this, the reason is well known why there was a divergence between the absolute form of the rule and the limited nature of its object and purpose.

Two of the draftsmen of the Covenant, Lord Cecil of Chelwood and Mr. Scialoja, suggested in 1930, when amendment to Article 13 of the Covenant was under consideration, that it was only by inadvertence that a provision on qualified unanimity had been inserted in some of the articles concerning disputes and omitted from others [1].

(b) The Permanent Court has stated that:

> "It follows from the foregoing that, according to the Covenant itself, in certain cases and more particularly in the case of the settlement of a dispute, the rule of unanimity is applicable, subject to the limitation that the votes cast by representatives of the interested Parties do not affect the required unanimity.
>
> . . . .
>
> The well-known rule that no-one can be judge in his own suit holds good.
>
> From a practical standpoint, to require that the representatives of the Parties should accept the Council's decision would be tantamount to giving them the right of veto enabling them to prevent any decision being reached . . ." (*P.C.I.J., Series B, No. 12*, pp. 31-32).

[1] Lord Cecil: "had always held that it must have been by some accident that the rule in the Covenant providing that unanimity should not comprise the parties to the dispute had only been enacted in certain cases. Obviously if it were the right rule it should be applied to all cases of dispute."

Mr. Scialoja: "There was no doubt that . . . it had been simply by an oversight that it had not been said that the votes of the interested parties should not figure in calculating unanimity." (Dossier transmitted by the Secretary-General of the United Nations, *I.C.J. Pleadings, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, p. 41.)

Consequently, it has been possible to observe that:

> "The requirement of unanimity, however expressly stated, is implicitly qualified by the latter principle [the principle that a party may not be judge in its own suit]; and . . . nothing short of its express exclusion is sufficient to justify a State in insisting that it should, by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed." (Separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 104.)

(c) In a study of the unanimity rule, it has been said that "law is the expression of the will of a living organism", and that "the permanency of the organism requires that its constitution should be subject to readjustment to the conditions of its life" (Williams, *loc. cit.*, pp. 475, 485). This is what the League of Nations did.

As early as 1921 it was recommended in a resolution that "pending the ratification of the amendment [of Article 16], the votes of the parties be excluded in determining whether unanimity had in fact been achieved" (Riches, *loc. cit.*, p. 141).

In the same way, and also to avoid the absurd result whereby unanimity rule might prevent the application of Article 26 of the Covenant, it was considered that for the proposal of amendments to the Covenant, unanimity was not necessary and the majority required for amendments was sufficient (Riches, *loc. cit.*, pp. 109, 115).

For disputes might also be cited in which the Council considered its resolutions to be binding despite the contrary vote of one of the parties (see separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 101; Riches, *loc. cit.*, p. 145) [1]. Finally one might quote all the resolutions on questions in which the League had to carry out administrative functions (Riches, *loc. cit.*, pp. 161, 166).

(d) After a thorough examination of the practice of the League, it has been possible to conclude that "it shows a decided disposition on the part of the Members not to allow the unanimity rule to make the League impotent, and this in spite of the explicit provisions of the legal instrument which forms its fundamental law" (Riches, *loc. cit.*, p. 117).

(e) The apparent contradiction between Article 22 and Articles 4 and 5 of the Covenant is to be overcome by taking into account the relative value of those provisions.

Articles 4 and 5 are rules of an abstract and general nature; their purpose lies outside the relationship of the mandatory with

[1] Naturally, for political reason, the Council could regard as not binding resolutions opposed by one of the parties—cases of Lithuania and Japan (Riches, *loc. cit.*, pp. 148-152).

the mandator on behalf of which it exercises its administration. Thus, the non-application of the unanimity rule to the Council's functions regarding the mandate does not contradict the object and purpose of Articles 4 and 5, namely respect for the exclusive jurisdiction of States. Article 22 on the other hand, gave birth to an institution the nature of which is incompatible with the possibility of the exercise of a veto by the mandatory.

It is so contrary to the concepts of mandate and of tutelage, and to good faith, to set up and regulate supervision of the mandatory while rendering "that supervision nominal and ineffective", while leaving it to the good will of the mandatory to fulfil his obligations, that this "cannot be conclusively inferred from the mere fact that the basic instrument provides for the rule of unanimity" (see separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 99).

Furthermore, the principle *nemo-judex in re sua* prohibits an administrator, guardian *(tuteur)* or mandatory from being the person who decides or judges whether or not he has fulfilled his obligations as such—"there is no valid reason for distinguishing, in connection with the applicability of the principle that no-one is judge in his own cause, between the judicial and the supervisory organs" (separate opinion of Judge Lauterpacht, *ibid.*, p. 100).

The question raised by the unanimity rule is the same as that which arises in practice in municipal law, where it is answered by an appeal to the concept of *fraus legis*. The mark of this concept is the fact that the protection of an abstract general rule is sought in order to avoid the application of another rule intended to settle a concrete point. In cases where the purpose of the abstract rule is not to settle the concrete point, the rule which directly contemplates that point is to be applied.

South Africa's claim for the application of the unanimity rule can therefore be classified as *agere in fraudem legis*. An interpretation of Articles 22, 4 and 5 of the Covenant which would justify the refusal of the mandatory to fulfil the obligations which it has accepted by the mandate instrument and by the signature of the Covenant, could be classified as *interpretatio in fraudem legis*.

To the same effect it should be added that the idea of the application the unanimity rule to mandates was not generally accepted by writers the time of the League. Wright rejected it decisively on the basis of e Opinion given in the so-called *Mosul* case, and of Articles 15 and 16 the Covenant (*Mandates Under the League of Nations*, pp. 132 and 2). At the 1931 session of the Institut de Droit International held at mbridge, which discussed international mandates, Borel raised the estion of the unanimity rule in connection with the revocation of andates. Seferiades then argued that although the Council's decisions re taken unanimously, the mandatory's vote was disregarded. Rolin

stated that unanimity was not necessary but that discussion of the question was untimely. The discussion was not pursued, but the vote in favour of revocation implied rejection of the application of the unanimity rule to mandates (*Annuaire de l'Institut de droit international*, Vol. II, p. 58). The many writers who assert that the League was entitled to revoke the mandates appear by implication to share the same view. Quite recently Dugard has maintained that the unanimity rule was not applicable to mandates ("The Revocation of the Mandate for South West Africa", *A.J.I.L.*, 1968, pp. 89 ff.).

V. Possibility of Forfeiture by the Mandatory—the Nature of the Mandate

It is necessary to recall the characteristics of the mandate régime, for only in the light of its nature will it be possible to say what powers were possessed by the League of Nations and are now possessed by the United Nations in its place.

The mandates are not a simple concession granted by the Principal Allied and Associated Powers to the mandatory States. The mandate is a very complex institution.

It was based on the cession by Germany of its colonies in Africa (Arts. 118 and 119 of the Treaty of Peace). This cession was not pure and simple, but *sub modo*. The territories concerned did not pass under the sovereignty of the mandatory States. In the Treaty, the mandatory States were designated as the "governments exercising authority over those territories" (Art. 127); the territories were transferred "to the Mandatory Power in its capacity as such"; the territories were to be "administered by a Mandatory under Article 22 of Part I (League of Nations) of the present Treaty" (Art. 257); reference was also made to any Power "administering former German territory as a mandatory under Article 22, Part I (League of Nations)" (Art. 312). It was this Article 22 which laid down the principles of the new institution.

The League of Nations assumed the responsibility for a "sacred trust of civilization"[1], "in the interests of the indigenous population", until such time as the peoples in question should be "able to stand by themselves". It was in this way that the Covenant pointed to the temporary nature of mandates; they were to come to an end when the indigenous populations were capable of governing themselves. General Smuts tried to get this reference to the chronologically finite nature of mandates

[1] Mr. Fraser (New Zealand), the then chairman of Committee II/4, concluded his report to the Second Committee with the following words: "The mandate does not belong to my country or any other country. It is held in trust for the world." (21 June 1945, UNCIO doc. 1144, Vol. VIII, p. 154; cited in *I.C.J. Pleadings, International Status of South West Africa*, p. 222.

deleted, and for this purpose proposed the removal of the word "yet" in the phrase "not yet able to stand by themselves"; but this amendment was rejected.

The League of Nations entrusted "the tutelage of such peoples . . . to advanced nations" the method being that "this tutelage should be exercised by them as Mandatories on behalf of the League"[1]. Powers of administration were entrusted to the mandatories by the League "subject to the safeguards above mentioned in the interests of the indigenous population". More particularly, there was constituted a Permanent Commission to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates. In the Mandate for South West Africa, in addition to the reference to Article 22 of the Covenant, it was provided that the Mandatory should make to the Council of the League of Nations annual reports to the satisfaction of the Council, containing full information with regard to the Territory, and indicating the measures taken to carry out certain specified obligations (Art. 6).

Supervision by the organ of the international community is a distinctive feature of the mandate (Wright, *Mandates under the League of Nations*, 1930, p. 64) and is in conformity with its very nature (*I.C.J. Reports 1950*, pp. 133 and 136). "Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate" (*I.C.J. Reports 1962*, p. 334)[2]. The "sacred trust" in respect of the indigenous peoples was a grave responsibility for the League of Nations and now for the United Nations, and one which can only be discharged through the modality of supervision and the possibilities which it provides[3].

The task which the mandatory States have to perform "on behalf" of the League is qualified as a "mandatory" function and consists in the exercise of "tutelage". It is characterized, as the same terms imply in municipal law, by absence of self-interest. This was solemnly proclaimed by the Allied Powers (16 June 1919) in reply to a protest by the German

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[1] The New Zealand Government said in 1926: "Western Samoa is not an integral part of the British Empire, but a child of which we have assumed the guardianship" (Minutes of the Tenth Session of the Permanent Mandates Commission, 1926, p. 24: cited in *I.C.J. Pleadings, International Status of South-West Africa*, p. 203).

[2] "The international supervision provided for in paragraphs 7 and 9 of Article 22 of the Covenant is the cornerstone of the whole mandates system"; "It clearly emerges . . . from . . . the decisions of the Council that what is intended is an effective and genuine, not a purely theoretical or formal, supervision." (*The Mandates System. Origin—Principles—Application*, p. 33; cited in *I.C.J. Pleadings, Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, p. 28.)

[3] "With regard to the responsibility of the League for securing the observance of the terms of the mandates, the Council interprets its duties in this connection in the widest manner." (*Op. cit.*, p. 34, quoting a report presented by the Council to the Assembly on 6 December 1920, League Assembly Doc. 20/48/161; cited in *I.C.J. Pleadings, ibid.*, p. 29.)

Government at the Peace Conference: "The Mandatory Powers which, in so far as they may be appointed Trustees by the League of Nations, will derive no benefit from such Trusteeship . . ." This conception is reflected in Article 257 of the Treaty of Peace, the effect of which is that the value of the German possessions thus transferred was not taken into account in calculating the reparations to be paid by Germany (van Rees, *Les mandats internationaux*, 1927, pp. 18 f.). The same argument of absence of interest was used by the Principal Allied and Associated Powers when Italy claimed territorial compensation on the basis of promises made by France and Great Britain:

> "The territories entrusted to them under mandate do not represent any increase in their colonial possessions; the territories in question can only belong, under the mandates system, to the peoples inhabiting them" (Stoyanovski, *La théorie générale des mandats internationaux*, 1925, p. 18).

Consequently the rights of the mandatory "are, so to speak, mere tools given to enable it to fulfil its obligations" (*I.C.J. Reports 1962*, p. 329).

This conception has important practical consequences. The mandatory has no power to cede or lease any part of the mandated territory (Sjöberg report, quoted by Wright, *op. cit.*, p. 122). The Permanent Mandates Commission protested against the statement by South Africa in the 1926 boundary agreement between South Africa and Portugal that South Africa "possesses sovereignty" in the mandated area (Wright, *op. cit.*, pp. 121, 201 f., 446)[1]. The Commission insisted that "as a direct corollary to the lack of sovereignty . . . the mandatory make no direct profit from the territory" (*ibid.*, p. 214), and that "even in C territories economic discriminations are scrutinized to see that they are not against the interests of the inhabitants of the area" (*ibid.*, p. 215).

Van Rees finds that the mandated territories have a distinct individuality; the mandatory Powers are managers under an obligation of strict respect for the integrity of the territories; unoccupied or ownerless land is part of the property of the territory (*Les mandats internationaux*, p. 22). The Permanent Mandates Commission also stated in 1925 that contributions or gifts made by the mandated territories to the mandatory Power were only admissible if they concerned institutions or works which could be said to benefit the mandated territory materially or morally

[1] On that occasion the representative of South Africa, Mr. Smit, said "the Government of the Union of South Africa exercised and possessed that sovereignty [over the Territory of South-West Africa] on behalf of a third party undefined. That was his position: there could be no question of annexation." (Minutes of the Eleventh Session of the Permanent Mandates Commission, 1927, p. 92; cited in *I.C.J. Pleadings, International Status of South-West Africa*, p. 197.)

(Bentwich, *The Mandates System*, pp. 106 f.). In 1927 the Commission stated that the railways and harbours built by the Germans in South West Africa could not be regarded as having passed to the *dominium* of South Africa; it urged that they should be declared to belong to the territory administered by the Union; in 1929 South Africa gave explanations in accordance with the request made to it (*ibid.*, p. 96).

The instrument embodying the Mandate for German South West Africa, dated 17 December 1920, took the form of a declaration made by the Council of the League of Nations. Its nature has been discussed by jurists, who have been unable to classify it as belonging to any one of the known legal categories. It was brought into being, like the other mandates, as follows. Germany ceded German South West Africa to the Principal Allied and Associated Powers, to be administered by the mandatory in accordance with Article 22 of the Covenant. The Principal Powers agreed that a mandate should be conferred on His Britannic Majesty to be exercised on his behalf by the Union of South Africa, in accordance with Article 22 of the Covenant. His Britannic Majesty, acting for South Africa, undertook to accept the Mandate and exercise it on behalf of the League of Nations. The Council of the League of Nations, having regard to Article 22, paragraph 8, took a decision on the points referred to in that provision, and confirmed the Mandate.

This was a complicated process, in which the contributions of the different participants varied in significance. South Africa's was the most passive: His Britannic Majesty made the undertaking to accept the Mandate on its behalf. In this way was born an international institution the essence of which is in Article 22 of the Covenant—as is moreover apparent from the continuous references to this Article in the Versailles Treaty and in the mandate instrument. It was really also to the basic principles of Article 22 that the resolution of 18 April 1946 constituting the final will and testament of the League of Nations referred back; it is those principles which give meaning to the mandates system.

The sacred trust in respect of the indigenous people of the mandated territories is a direct responsibility of the organized international community. The League of Nations and, since 18 April 1946, the United Nations, is in duty bound to guarantee those peoples that this trust will not be betrayed by the conduct of the mandatories acting, as they do, on its behalf. It is those principles which give rise to well-defined obligations for the United Nations and the mandatories.

VI. Possibility of Withdrawal of the Mandate

A. Revocability of Mandates

Taking into account what has gone before, the key prior question for the response to be given to the request for opinion is whether the General

Assembly took a decision *ultra vires* when it declared that the Mandate entrusted to South Africa was terminated. Even if it is admitted that the United Nations succeeded to the supervisory powers of the League of Nations, it is clear that if the League of Nations could not withdraw the mandate from South Africa, the United Nations could not have received powers which the League did not have. It is necessary therefore to consider whether the League of Nations had the power to put an end to mandates.

The struggle between the colonialists and progressives did not end with the signature of the Covenant. It is understandable that colonialists consider and aver that the mandates system is a veiled form of annexation, that sovereignty over the mandated territories belongs to the mandatories, and that the grant of a mandate is definitive and irrevocable. In order to defend the colonial interest, its partisans have to overcome the obstacle of the expression of the purposes of the mandates system to be found in Article 22 of the Covenant. In order to achieve this, they put forward the following arguments: Article 22 does not mention any right of revocation; but if it had been intended to confer such a right on the League of Nations, it would have been expressly provided for in the Covenant. The mandatory States, or the majority of them, frankly revealed, in the course of the discussions preceding the drawing-up of Article 22, their desire to obtain annexation pure and simple. Mandates were granted to States by the Principal Allied and Associated Powers, and not by the League of Nations; and since the Principal Powers had acquired those territories by conquest, they alone, and not the League, could have retained the power to revoke a mandate.

These arguments seem somewhat weak. The rule *inclusio unius exclusio alterius* may not be applied when the purpose of a norm shows that an interpretation in harmony with the *ratio iuris* is necessary if effect is to be given to it. There is no ground for taking into account the desires and hopes of certain parties to the Covenant, any more than any mental reservation, if they were disregarded by the other parties at the time of signature, even if South Africa now relies on them. The Principal Powers did not acquire the territories by way of conquest (there was no *debellatio*), and if Germany ceded those territories in the Treaty of Versailles, it was so that they might be placed under mandate, in accordance with Article 22 of the Covenant.

In view of the weakness of the arguments just discussed, it is the contrary position, favouring the right of the League of Nations to put an end to a mandate, which must prevail. But those who hold this view are themselves divided as to the basis of the right.

It is clear that the original idea of the mandates system involved the possibility of revocation. For General Smuts, who put it into words, the allocation of a mandate was a mark of great trust and an honour, and a mandate should not be a source of profit or private advantage for the nationals of the mandatory (*The League of Nations: A Practical Sugges-*

tion, 1918, pp. 21 f.); he goes on to say that the League should reserve to itself "complete power to ultimate control and supervision, as well as the right of appeal to it from the territory or people affected against any gross breach of the mandate by the mandatory State" (*ibid.*, p. 23). But it was European territories which General Smuts was thinking of as possible mandates, and it was he who later was to call for annexation for the African territories. It was Wilson who was to have the mandates system extended to the African territories, while retaining the principles formulated by General Smuts.

The silence of Article 22 on the question of revocation can be explained by the circumstances under which it was drawn up. Unlike the other Articles of the Covenant, it was not drawn up by experts acquainted with the finer points of legal interpretation: it is well known that it was worked out by politicians, without being revised by experts. International society of the *belle époque* did not like to mention disagreeable matters and preferred to leave them to be understood. It would have been in bad taste to refer to the possibility that one of the Principal Powers might betray the sacred trust conferred upon it. This remote risk was, however, covered, thanks to the terms used.

That such was the situation at that time seems to be confirmed by what is known of the preliminary discussions preceding the drafting of the Covenant, and what is known of the opinion of the members of the Permanent Mandates Commission.

In the preliminary meetings prior to the drafting of the Covenant, certain governments showed concern as to the conditions which were to be applicable to mandates; there might be no interest in having a mandate if it were revocable at any moment. These doubts were put at rest by the statement that such a revocation was practically impossible. The legal possibility of revocation was not denied, but an attempt was made to calm their fears by explaining that such a possibility was not to be foreseen, taking into account which Powers it had been agreed to grant mandates to, and which Powers made up the Council of the League of Nations.

The members of the Permanent Mandates Commission had to discuss the question of revocability. They were under a duty to favour the economic development of the mandated territories. But some of them had expressed fears that the possibility of revocation might scare off investors. What could be done to assuage these fears? From the reports of the discussions one gets the impression that it was desired not to give a definite negative answer, but that no effort was spared to strengthen the assurance that a revocation was inconceivable in practice. Only van Rees considers that he has found legal support for his view in that of Rolin; but it may be said in reply that the latter author considers revocation to be possible in the case of serious abuse of a mandate [1]. The opinion of those

[1] After having said that a mandate is an irrevocable alienation, he goes on: "It would not be subject to revocation as against the latter [the mandatory] except for a

best acquainted with the mandated territories, and of the colonial administrators, seems somewhat unfavourable to irrevocability. Van Rees, who is so much concerned to reassure investors, mentions among the questions which the article leaves unanswered: are mandates revocable, and if so what is the authority competent to take such a decision? He gives no reply to the question (*Les mandats internationaux*, 1927, p. 14). Sir Frederick Lugard, who before the Commission had stressed the inconceivability of the hypothesis of revocation, admits the possibility of revocation without any doubt whatsoever in his fundamental book. He does so when he is dealing with the legal situation of persons under mandate: "the person 'protected under mandate' shares with the owner of an estate 'un titre précaire' subject to the contingencies of revocation, rendition, or resignation of the mandate" (*The Dual Mandate in British Tropical Africa*, 2nd ed., 1923, p. 56; 5th ed., 1965, p. 56) [1].

Those writers who uphold revocability support their view with various arguments adducing: the basically temporary nature of the Mandates; the need for them to come to an end in the case of a people ripe for independence; the sovereignty of the League of Nations; sanctions following from a breach of duty; general principles governing mandates, trusts and tutelage; manifestation of powers of supervision and control; impossibility of co-operation, and the need to protect the peoples. This abundance of grounds does not prove the weakness of the argument, but is the consequence of the variety of aspects of the mandate as an institution, and the possibility of envisaging various causes for termination.

It is not, legally speaking, entirely correct to say that the powers of the League of Nations corresponded to the exercise of *exceptio non adimpleti*. That is one of the characteristics of bilateral contracts, but it is also the manifestation of a general principle. In the case of contracts, if one party defaults it is open to the other, who is honouring his own basic contractual obligations, not only to declare the contract terminated but to claim damages and the restitution of the thing received under the contract (an example lies in the grant of military bases: if the treaty is terminated for breach on the part of the grantee State, that State must make restitution). But there are other relationships which feature an especially stringent

breach of the conditions of the grant so serious as to show the basic unfitness of the mandatory to administer the territory in accordance with the Covenant" ("Le système des mandats coloniaux", *Revue de droit international et de législation comparée*, 1920, pp. 352 f.)

[1] Rappard, having observed before the Permanent Mandates Commission that the revocability of mandates was in conformity with general principles, added: "To state that, however unworthy in theory a mandatory Power might be, its misdeed could never in any conceivable circumstances lead to revocation, would be to weaken, before public opinion, that sentiment which gives its special value to the institution of which we are the recognized defenders" (Minutes of Sixth Session, 1925, p. 157; cited in *I.C.J. Pleadings, International Status of South-West Africa*, p. 230, note 3).

power to put an end to the contractual bond and claim restitution. In the case of mandates, tutelage and trusts, a particular power to put an end to the situation is vested in one party or in an authority. The party granting powers to administer in his name or on his behalf may withdraw them (and must withdraw them if conferred for the discharge of his own duties to a third party) in the event that their recipient fails to discharge the obligations assumed, expresses unwillingness to discharge them or denies their existence. The particular legal nature of international mandates is such that these considerations must be taken into account.

It does seem that in the drafting of Article 22 an effort was made to lay stress on the fundamental purposes of the mandate. The terms employed—mandate, trust, tutelage—evidence each in their own way the common character of the committal of a trust *(fides facta)* protective functions exercised for the international organization and on its behalf by the mandatory. The latter is bound by the mandate, like the organization, with power of *officium*. It is for this reason, it would seem, that the term "tutelage" was chosen. One of the expressions to be found in paragraph 1 of Article 22 is practically the same as the standard definition of tutelage (*qui propter aetatem suam sponte se defendere nequit*; *Digest*, 26, 1, 1, pr.). This accords also with the nature of a trust, which mandates are also regarded as having. A guardian under the Common-Law system is in the position of a trustee ("the relation of guardian and ward is strictly that of trustee and *cestui que trust*"). As these legal concepts essentially contemplate the protection of persons (in this case, peoples) who cannot govern themselves, the necessary consequence is the exercise of supervision over the person entrusted with guardianship, "supervision of the guardian", and in case of serious breaches of his duties *(fides fracta)* the loss or forfeiture of guardianship.

It will thus be observed that in view of the wording of Article 22 and the terms used therein there was no need to mention revocation of the mandates. The essential nature of this concept implies, clearly and evidently, the possibility of putting an end to the mandate, and even the duty laid upon the organization to do so in the case of serious breaches of obligations on the part of the mandatory. A mandate which could not be revoked in such a case would not be a mandate, but a cession of territory or a disguised annexation.

It is difficult to believe that, on the one hand, the working of the mandates system was organized to include a Permanent Commission to control the mandatory's administration and that, on the other hand, the mandatory was left free to do what he thought fit, even if it were to run counter to the very nature of the mandate, that one should put him in possession of the territory without any obligation on his part (*sub hac conditione: si volam, nulla fit obligatio*; *Digest*, 44, 7, 8). It would really be too much if the mandatory were permitted to do what he wished, to commit, on behalf of the organization, acts contrary to the purposes of

Article 22. Any interpretation which denied the possibility of putting an end to the mandate in the case of flagrant violation by a mandatory of its obligations would reduce Article 22 to a *flatus vocis*, or rather to a "damnable mockery", by giving some colour of legality to the annexation of mandated territories.

These considerations explain why the *communis opinio* is favourable to the power of revocation. At the Cambridge session of the Institut de droit international (July 1931), a resolution was adopted on "International Mandates". Article VII reads: "The functions of the mandatory State come to an end on the resignation or removal *(révocation)* of the mandatory . . ." The removal of the mandatory State and the abrogation of the mandate are to be decided on by the Council of the League of Nations; such abrogation may also result from admission of the entity under mandate as a Member of the League of Nations. The word *révocation* was included by a vote of 27 to 15 (*Annuaire de l'Institut*, 1931, Vol. II, p. 60: for the text of the resolution see *ibid.*, pp. 233 f.). The objections raised against this expression fall into different categories. Wehberg thought that the League could unilaterally withdraw a mandate, even in the absence of serious fault by the mandatory, since the League had sovereignty over the territory. Verdross stressed that termination of the mandate should be based on the principles of law which permit of forfeiture for non-observation of obligations. Gidel quoted the *exceptio non adimpleti contractus*. But the Rapporteur, Rolin, defended the term *révocation* by saying that it was of the essence of control to involve adequate sanctions: "by agreeing to administer a territory under the control of the League of Nations, the mandatory State had implicitly accepted the sanction of revocation of its trust" (for the discussion see *ibid.*, pp. 54-59).

It has been pointed out that the function of the *Institut* is only *de lege ferenda*, and that consequently one cannot seek support from this quarter for interpretation of Article 22 of the Covenant. This argument seems to overlook that, on the final vote on this occasion, several members abstained and explained their abstention by saying that the resolution related to the interpretation of the Covenant (thus James Brown Scott, Huber, Fischer Williams, and probably Diéna: *ibid.*, pp. 66 f.). [1]

More recently, since the dissolution of the League of Nations, independent writers have argued for the temporary nature of mandates and the possibility of their revocation (Crawford, "South West Africa: Mandate Termination in Historical Perspective", *The Columbia Journal of International Law*, Vol. VI, No. 1, 1967, pp. 95, 100, 107, 109, 119; Dugard, "The Revocation of the Mandate for South West Africa", *American Journal of International Law*, *in toto* and particularly pp. 85 ff.).

It has been argued that the silence of the Charter on the possibility

[1] There were 18 abstentions, 38 votes for and none against the resolution.

of revoking trusteeships is conclusive in the sense that it establishes the irrevocability thereof. This therefore, the argument continues, is an additional argument in favour of the irrevocability of mandates, in view of the analogy between the two concepts. But the lack of any provision for revocation of trusteeships does not mean that such is excluded; on the contrary, the purpose of the institution would appear to require the possibility of revocation. An express declaration would have been necessary to bring about irrevocability. The Charter does not seem to have intended to leave the administration of territories under trusteeship to the unfettered will of the administrators, in such a way that the Organization would be deprived of any authority to impose sanctions for violation of their obligations. South Africa does not appear to have differed from this view when it brushed aside all requests by the United Nations concerning the signature of a trusteeship agreement.

In a study of the question of trusteeships, it has been mentioned that by virtue of Article 85, paragraph 1, of the Charter, and in accordance with the procedure laid down by Article 18, paragraph 2, thereof, a trusteeship may be terminated for substantial violation thereof (Marston, "Termination of Trusteeship", *International and Comparative Law Quarterly*, XVIII, 1969, p. 18).

B. The Facts Which Led to the Withdrawal of the Mandate

With reference to the considerable amount of information presented in the written and oral statements of South Africa, an offer has been made by the South African Government to produce evidence to refute the accusations made against it of breaches of its duties as Mandatory. But there is nonetheless one fact as to which South Africa does not seek to adduce evidence, a fact which it concedes, the existence of which it proclaims. This is its refusal to fulfil its obligations as Mandatory towards the organization on behalf of which it has to carry on its administration, and upon which depends its legal title to occupy and administer Namibia (South West Africa).

This contravention of the Mandate is the most serious of all from the formal legal point of view. In its submissions, South Africa denies the continued existence of the Mandate, which it considers to have lapsed, or, in the alternative, it claims that the essential obligations of the Mandate have disappeared. In this way, South Africa is preventing the United Nations from fulfilling its "sacred trust" towards the people of Namibia.

South Africa has failed in its duties as Mandatory and it has solemnly and repeatedly declared its decision not to fulfil them; it has denied their existence. The Court, for its part, has declared, in its Opinions of 1950, 1955 and 1956, and in the 1962 Judgment, that South Africa is subject to the international obligations resulting from its Mandate for South West Africa, and that the functions of the League of Nations are now exercised by the United Nations. South Africa cannot allege that it is unaware of

the existence of its duties, nor can litigious cavils bring to nought the authority of the Court.

In fact, we are dealing with a case of violation of obligations, and it can be said, as was said by Rolin in his early study of mandates, with reference to the conditions for revocation, that this breach indicates the "basic unfitness of the mandatory to administer the territory in accordance with the Covenant" ("Le Système des mandats coloniaux", *Revue de droit international et de législation comparée*, 1920, p. 353).

Furthermore, in applying the laws of *apartheid* in South West Africa (Namibia), South Africa is in breach of its duties as the mandatory Power; it is not permissible to administer an entrusted territory in a manner contrary to the purposes and principles of the Charter (Art. 1, para. 3; Art. 76 *(c)*).

VII. Reply to the Request for Advisory Opinion

A. Legal Consequences

It would seem that, before anything else, the scope of the question should be clearly defined. For this purpose the terms thereof must be considered. It has been asked what are "the legal consequences": therefore everything relating to economic, social, practical and political consequences should be left aside. For this reason, it would seem that the Court should not concern itself with what States are to do within the framework of the United Nations organs in order to put an end to the abnormal situation in Namibia and thus enable the United Nations to discharge its duties towards the people of Namibia in accordance with the "sacred trust" confided to it. The mention of consequences "for States" implies that the Court will not have to examine the consequences of resolution 276 (1970) for international organizations, not even for the United Nations, so far as responsibility to the Namibian people is concerned. Finally, the fact that resolution 276 (1970) is specifically cited prompts the supposition that the Court does not have to consider the legal consequences of the other resolutions of the Security Council.

The Court's reply should, it seems, be drawn up in general terms for the guidance of the United Nations, and should not go into details which might give rise to confusion.

B. Consequences for South Africa

The immediate and fundamental consequence is the loss of the legal title which might, up to the present, have justified the possession of the Territory of South West Africa by South Africa. Of course it may be considered that, ever since it declared that it was not bound by the obligations deriving from the Mandate, it has forfeited its position as Manda-

tory. But until resolution 2145 (XXI), no solemn declaration of the cessation of the Mandate had been made, and it was conceivable to hold that the Mandatory still had a title.

The declaration to the effect that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by South Africa was "terminated" (resolution 2145 (XXI)) involved the consequence that, from that time on, the occupation of the Territory of Namibia was devoid of any legal justification. The same resolution provides for South West Africa to come under the direct responsibility of the United Nations, so that the presence of South Africa is somewhat in the nature of usurpation and an occupation *mala fide*. These consequences have acquired executory force by virtue of Security Council resolution 276 (1970).

The immediate consequence for South Africa is that it is under obligation to withdraw its administration from the Territory of Namibia and take all necessary steps to put the United Nations administration into possession.

The Government of South Africa, as a possessor in bad faith, is responsible to the people of Namibia for the restitution of property, assets and the fruits thereof.

It should not be forgotten that, as the Permanent Mandates Commission had declared, the assets transferred by Germany (railways, tramways, ports, etc.) and public assets of all kinds (mines, *bona vacantia*, non-private waterways, etc.) have remained the exclusive property of the Namibian people and, since these are assets in the public domain, there can be no bar of limitation to their restitution.

This being the case, the South African Government is under an obligation to indemnify the people of Namibia for damage suffered. An account should be struck in respect of the administration of the Mandatory, in which investments made for the benefit of the Namibian people by South Africa should be taken into consideration.

C. The Consequences for Member States of the United Nations

The Security Council, by giving its support to resolution 2145 (XXI) in its resolution 276 (1970), lays upon the Members of the Organization the obligation to accept and apply what is laid down in those resolutions, and to co-operate to ensure the fullest possible implementation thereof.

In the present case, the acts of the occupying authorities cannot be considered as those of a legitimate government, but must be likened to those of a *de facto* and usurping government.

A distinction must be made between the private and the public sector. It would seem that the acts of the *de facto* authorities relating to the acts and rights of private persons should be regarded as valid (validity of entries in the civil registers and in the Land Registry, validity of marriages, validity of judgments of the civil courts, etc.). On the other hand, other States should not regard as valid any acts and transactions of the autho-

rities in Namibia relating to public property, concessions, etc. States will thus not be able to exercise protection of their nationals with regard to any acquisitions of this kind.

In the field of international relations, the duty of co-operation of States implies that they must refrain from all diplomatic, consular and other relations with South Africa which might indicate that they recognize the authority of the South African Government over the Territory of Namibia—and more particularly they must not have consuls, agents, etc., in Namibia, except for such as are of a nature appropriate to territories which are under *de facto* occupation (in the sense of resolution 283 (1970)).

States should regard as ineffective clauses in any treaty which recognize the authority of South Africa in the Territory of South West Africa. New treaties with South Africa may not contain such clauses.

In treaties for avoidance of double taxation, no account may be taken of taxes paid in Namibia. Extradition treaties may not have effect with regard to Namibians, because they cannot be handed over to illegal authorities, etc.

D. Consequences for States not Members of the United Nations

These States have no obligations under the Charter. Nonetheless they should respect a declaration of the forfeiture of the legal title to possess the Territory, pronounced by a legitimate authority, against a State which received the territory in order to administer it in the name of the international organization. Such declaration should, it appears, be respected in the same way as that of an owner of property who withdraws the mandate given by him to administer his property.

(Signed) F. DE CASTRO.