DISSENTING OPINION OF JUDGE SIR GERALD FITZMAURICE

[A summary of main conclusions is given in paragraph 10 of this Opinion; and a synoptical table of contents appears at the end, after the Annex.]

PART I

INTRODUCTORY CONSIDERATIONS

1. The real issues in the case

1. Although I respect the humanitarian sentiments and the avowed concern for the welfare of the peoples of SW. Africa which so clearly underlie the Opinion of the Court in this case, I cannot as a jurist accept the reasoning on which it is based. Moreover, the Opinion seems to me insufficiently directed to those aspects of the matter which really require to be established in order to warrant the conclusion that South Africa's mandate in respect of SW. Africa stands validly revoked. Much of the substance of the Opinion (i.e., that part of it which does not deal with formal, preliminary or incidental matters) is taken up with demonstrating that League of Nations mandates, as an international institution, survived the dissolution of the League—whereas what is really in issue in this case is not the survival of the Mandate for SW. Africa but its purported revocation. Whether or not South Africa still disputes the survival of the Mandate, it certainly disputes its survival in the form of an obligation *owed to the United Nations* (this is the basic issue in the case); and denies that the organs of the United Nations have any competence or power to revoke it.

2. As regards the Court's conclusion that the Mandate has been validly revoked, this can be seen to rest almost exclusively on two assumptions—or rather, in the final analysis, on one only. I speak of assumptions advisedly,—and indeed, concerning the second and more far-reaching of the two (which in one form or another really underlies and entirely motivates the whole Opinion of the Court), there is an open admission that nothing more is needed—the matter being "self-

evident". These two assumptions are *first* that there was, or there must have been, an inherent right, vested in the United Nations, unilaterally to revoke the Mandate in the event of fundamental breaches of it (unilaterally determined to exist),—and *secondly*, that there have in fact been such breaches. Since it is clear that the supposed inherent right of revocation, even if it exists, could never be invoked *except* on a basis of fundamental breaches (several passages in the Opinion specifically recognize that only a material breach could justify revocation), it follows that the whole Opinion, or at least its central conclusion, depends on the existence of such breaches. How then does the Opinion deal with this essential matter?—essential because, if there is insufficient justification *in law* for the assumption, the whole Opinion must fall to the ground, as also (though not only for that reason) must the General Assembly's Resolution 2145 of 1966 purporting to revoke, or declare the termination of the Mandate, which was predicated on a similar assumption [1].

3. The charges of breaches of the Mandate are of two main kinds. The first relates to the failure to carry out, *in relation to the United Nations* an obligation which, in the relevant provision of the Mandate itself (Article 6), is described as an obligation to make an annual report "to the Council of the League of Nations". At the critical date however, at which the legal situation has to be assessed, namely in October 1966 when the Assembly's resolution 2145 purporting to revoke the Mandate, or declare its termination, was adopted, the view that the failure to report to the Assembly of the United Nations constituted a breach of it—let alone a fundamental one—rested basically (not on a judgment [2] but) on an Advisory Opinion given by this Court in 1950 which, being advisory only,

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[1] Since it is important that the true character and purport of this Resolution—(not reproduced in the Opinion of the Court)—should be understood, especially as regards its tone and real motivation, I set it out *verbatim* and *in extenso* in the Annex hereto (section 3, paragraph *15*). There is hardly a clause in it which is not open to challenge on grounds of law or fact;—but considerations of space forbid a detailed analysis of it on the present occasion.

[2] *(a)* So far as the reporting obligation is concerned, which is a distinct issue from that of the survival of the Mandate *in se*, the 1955, 1956 and 1962 pronouncements of the Court merely referred to the 1950 Opinion and added no new reasoning. In its 1962 Judgment in the preliminary (jurisdictional) phase of the then *SW. Africa* cases (Ethiopia and Liberia *v.* South Africa) in which the issue was not Article 6 but Article 7 of the Mandate, the Court, as an *obiter dictum*, simply recited with approval the Court's 1950 Opinion about the reporting obligation and did not further deal with the matter, which therefore still rests essentially on the 1950 Opinion. Neither in the main conclusion, nor in the operative part of the 1962 Judgment, both of which appear on p. 347 of the Court's 1962 Volume of Reports, is there any mention of or pronouncement on it. The 1955 and 1956 Opinions given in the *Voting Procedure* and *Right of Petitions* cases were equally consequential upon and based on, the original 1950 Opinion.

(b) It is not without significance perhaps, that the failure to render reports to the Assembly—so heavily relied on in the Opinion of the Court—is not *specifically*

and rendered to the United Nations, not South Africa, *was not binding on the latter* and, as regards this particular matter, was highly controversial in character, attracted important dissents, and was the subject of much subsequent serious professional criticism. This could not be considered an adequate basis in law for the exercise of a power of unilateral revocation, even if such a power existed. There cannot be a fundamental breach of something that has never—*in a manner binding upon the entity supposed to be subject to it*—been established as being an obligation at all,—which has indeed always been, as it still is, the subject of genuine legal contestation. That South Africa denied the existence of the obligation is of course quite a different matter, and in no way a sufficient ground for predicating a breach of it.

4. The second category of charges relates to conduct, said to be detrimental to "the material and moral well-being and the social progress" of the inhabitants of the mandated territory, and thus contrary to Article 2 of the Mandate. *These charges had never, at the critical date of the adoption of Assembly resolution 2145, been the subject of any judicial determination at all,*—and in the present proceedings the Court has specifically refused to investigate them, having rejected the South African application to be allowed to present further [3] factual evidence and connected argument on the matter. The justification for this rejection is said to be that practices of "apartheid", or separate development, are self-evidently detrimental to the welfare of the inhabitants of the mandated territory, and that since these practices are evidenced by laws and decrees of the Mandatory which are matters of public record there is no need for any proof of them. This is an easy line to take, and clearly saves much trouble. But is it becoming to a court of law?—for the ellipsis in the reasoning is manifest. Certainly the authenticity of the laws and decrees themselves does not need to be established, and can be regarded as a matter of which, to use the common law phrase, "judicial notice" would be taken without specific proof. But the *deductions* to be drawn from such laws and decrees, as to the effect they would produce in the particular local circumstances, must obviously be at least *open* to argument,—and there are few, if any, mature systems of private law, the courts of which, whatever conclusions they might ultimately come to, would refuse to hear it. Yet it was on the very

mentioned (though presumably intended to be implicitly covered) in Assembly resolution 2145, amongst the reasons for purporting to terminate the Mandate. Much more prominence is given to the attainment of independence by the mandated territory, which could not by any process of reasoning be a valid *legal* ground of *unilateral* revocation.

[3] Much evidence both written and oral was of course laid before the Court in the 1965-1966 proceedings. But only four judges out of those who then composed the Court now remain,—and in any case the Court, as such, has not made any collective study of that evidence at all in the course of the present proceedings.

question of the alleged self-evidently detrimental effect of its policies of apartheid *in SW. Africa*, that the Mandatory wanted to adduce further factual evidence. Thus the Court, while availing itself of principles of contractual law when it is a question of seeking to establish a right of unilateral revocation for fundamental breaches, fails to apply those corresponding safeguards which private law itself institutes, directed to ensuring that there have indeed *been* such breaches. It is not by postulations that this can be done.

5. In consequence, since the whole Opinion of the Court turns, in the final analysis, on the view that fundamental breaches of the Mandate have occurred, it must (regrettably) be concluded that, in the circumstances above described, this finding has been reached on a basis that must endanger its authority on account of failure to conduct any adequate investigation into the ultimate foundation on which it professes to rest.

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6. What, in truth, the present proceedings are or should properly speaking, and primarily, be concerned with, is not any of this, but issues of competence and powers,—for unless the necessary competence and power to revoke South Africa's mandate duly resided in the organs of the United Nations,—unless the Mandatory, upon the dissolution of the League of Nations, became accountable to such an organ,—no infringements of the Mandate, however serious, could operate in law to validate an act of revocation by the United Nations, or impart to it any legal effect. Here the fallacy, based on yet another unsubstantiated assumption underlying the whole Opinion of the Court, namely that the survival of the Mandate *necessarily* entailed the supervisory role of the United Nations, becomes prominent.

7. As to unilateral revocability itself, the Opinion proceeds according to a conception of the position of the various League of Nations mandatories, in relation to their mandates, which would have been considered unrecognizable in the time of the League, and unacceptable if recognized. My reading of the situation is based—in orthodox fashion—on what appears to have been the intentions of those concerned at the time. The Court's view, the outcome of a different, and to me alien philosophy, is based on what has become the intentions of new and different entities and organs fifty years later. This is not a legally valid criterion, and those thinking of having recourse to the international judicial process at the present time must pay close attention to the elaborate explanation of its attitude on this kind of matter which the Court itself gives in its Opinion.

8. Under both heads,—the competence of the United Nations to supervise, and the liability of the Mandate to (unilateral) revocation,—the findings of the Court involve formidable legal difficulties which the

Opinion turns rather than meets, and sometimes hardly seems to notice at all. Inferences based on the desirability or, as the case may be, the undesirability, of certain results or consequences, do not, as my colleague Judge Gros points out, form a satisfactory foundation for legal conclusions,—no more than would such an over-simplification of the issue as that involved in the assertion that South Africa administered its mandate on behalf of the United Nations which, therefore, had the right to revoke it,—a view which quietly begs virtually every question in the case. Here again, statements to the effect that certain results cannot be accepted because this would be tantamount to admitting that given rights were in their nature imperfect and unenforceable, do not carry conviction as a matter of international law since, at the present stage of its development, this is precisely what that system itself in large measure is, and will, pending changes not at present foreseeable, continue to be. It is not by ignoring this situation that the law will be advanced.

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9. Given the Court's refusal to allow the appointment of a South African judge *ad hoc* in the present case, in spite of its clearly very contentious character (as to this, see section 4 of the Annex hereto), it is especially necessary that the difficulties I refer to should be stated, and fully gone into. This must be my excuse for the length of an Opinion which the nature of the case makes it impossible to reduce, except at the risk of important omissions.

2. Arrangement and statement of main conclusions

10. The substance of my view is contained in the four sections A-D of Part II hereof (paragraphs 11-124). A postscriptum on certain related political aspects of the whole matter is added (paragraph 125). As regards the various preliminary issues that have arisen, these—or such of them as I have felt it necessary to consider—are, together with one or two other matters that can more conveniently be treated of there, dealt with in the Annex that follows paragraph 125. On the substantive issues in the case my principal conclusions, stated without their supporting reasoning, are as follows:

(i) Although the various mandates comprising the League of Nations mandates system survived the dissolution of that entity in 1946, neither then nor subsequently did the United Nations, *which was not the League's successor in law*, become invested with the supervisory function previously exercised by the Council of the League, as the corollary or counterpart of the mandatories' obligation to render reports to it. It was only if a mandated territory was placed under the United Nations trusteeship

system (but there was no obligation to do this) that the supervisory relationship arose. No mandates at all (and not merely South Africa's) were ever, *as* such, administered on behalf of the United Nations [4].

(ii) The reporting obligation also survived the dissolution of the League, but became dormant until such time as arrangements for reactivating it, comparable to those which existed under the League, and acceptable to the Mandatory, could be made [5]. It was not automatically transformed into, nor ever became, an obligation owed to the United Nations, such as to invest the latter with a supervisory function. The Mandatory's consent to what would, in effect, have been a *novation* of the obligation was never given.

(iii) Even if the United Nations did become invested with a supervisory function in respect of mandates not converted into trusteeships, this function, as it was originally conceived on a League basis, did not include any power of unilateral revocation. Consequently no such power could have passed to the United Nations.

(iv) Even if such a power was possessed by the Council of the League, the Assembly of the United Nations was not competent to exercise it, because of the constitutional limitations to which its action as a United Nations organ was inherently subject having regard both to the basic structure and specific language of the Charter.

(v) Except as expressly provided in certain articles of the Charter not material in the present context, the Assembly's powers are limited to discussion and making recommendations. It cannot bind the Mandatory any more than the Council of the League could do.

(vi) Having regard to conclusions (i)-(iii) above, which relate to the United Nations as a whole, the Security Council did not, on a *mandates* basis, have any other or greater powers than the Assembly. Its action could not therefore, *on* that basis, replace or validate defective Assembly

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[4] With the exception of SW. Africa, all the various mandated territories—apart of course from those that had become, or became, sovereign independent States—were placed under United Nations trusteeship. This did not by any means take place all at once,—but eventually SW. Africa was the only one to retain mandated status. However, as the Court found in its Advisory Opinion of 1950 concerning the *International Status of South West Africa* (*I.C.J. Reports 1950*, at p. 144), the mandatories were not under any legal obligation to place mandated territories under the trusteeship system.

[5] It appears that none of the mandatories rendered reports to the United Nations in the interval (which could be as much as about two years) before the mandated territory was converted into a trust territory or, in some cases, became independent.

action. The Security Council equally had no power to revoke the Mandate.

(vii) The Security Council cannot, in the guise of peace-keeping, validly bring about a result the true character of which consists of the exercise of a purported supervisory function relative to mandates.

(viii) Even where the Security Council is acting genuinely for the preservation or restoration of peace and security, it has no competence as part of that process to effect definitive and permanent changes in territorial rights, whether of sovereignty or administration,—and a mandate involves, necessarily, a territorial right of administration, without which it could not be operated.

(ix) The "Legal consequences for States" of the foregoing conclusions are that the Mandate was not validly revoked by United Nations action in 1966 or thereafter, and still subsists;—that the Mandatory is still subject to all the obligations of the Mandate, whatever these may be and has no right to annex the mandated territory or otherwise unilaterally alter its status;—but that nor has the United Nations,—and that its member States are bound to recognize and respect this position unless and until it is changed by lawful means.

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In Part II of this opinion, which comes next, the reasoning in support of these conclusions is distributed in the following way: as to conclusions (i) and (ii), in Section A, paragraphs 11-64; as to conclusion (iii), in, Section B, paragraphs 65-89; as to conclusions (iv)-(viii), in Section C, paragraphs 90-116; and as to conclusion (ix), in Section D, paragraphs 117-124. The postscriptum (paragraph 125) follows. The Annex is separately paragraphed and footnoted.

PART II

SUBSTANCE

SECTION A

THE UNITED NATIONS NEVER BECAME INVESTED WITH ANY SUPERVISORY FUNCTION IN RESPECT OF MANDATES AS SUCH

1. Absence of any legal successorship as between the United Nations and the League of Nations

11. There being no general rule of international law which would involve a process of automatic successorship on the part of such an entity as the United Nations to the functions and activities of a former entity such as the League of Nations, there are only three ways in which the United Nations could, upon the dissolution of the League, have become invested with the latter's powers in respect of mandates as such: namely, *(a)* if specific arrangement to that effect had been made,—*(b)* if such a succession must be implied in some way,—or *(c)* if the mandatory concerned—in this case South Africa—could be shown to have consented to what would in effect have been a *novation* of the reporting obligation, in the sense of agreeing to accept the supervision of, and to be accountable to, a new and different entity, the United Nations, or some particular organ of it.

12. It is my view that the United Nations did not in any of these three ways become clothed with the mantle of the League in respect of mandates;—but as regards the first of them, it is necessary to make it clear at the outset that the matter went far beyond the field of mandates. There was in fact a deliberate, *general*, politically and psychologically motivated, rejection of any legal or political continuity at all between the United Nations and the League (see paragraphs 35 and 36 below). Since mandates were regarded as one of the League's political activities, this raises a presumption that there was not any takeover by the United Nations of the League mandates system *as such*,—a view fully borne out by the creation of the parallel United Nations trusteeship system, and the fact that the mandatories were invited to convert their mandates into trusteeships, though without obligation to do so. These matters will however more conveniently be considered later, in their historical context;—and the same applies to the question of whether South Africa, as Mandatory, ever consented to the transfer to the United Nations of obligations which,

at the date of the entry into force of the Charter, were owed to the League *which was then still in existence*, and remained so for some time after.

13. Meanwhile I turn to the second of the three possibilities mentioned in the preceding paragraph,—namely that there was an *implied* succession by the United Nations to League functions in respect of mandates, and correspondingly an *implied* transfer to the United Nations of the obligations owed by the Mandatory to the League. It is easy to assume that because the United Nations had certain resemblances to the League and might have been regarded as its "natural" successor, therefore it was the legal successor;—but this was not the case. It is no less easy to assume, as the Opinion of the Court clearly does—virtually without arguing the point—that if, and because, the various mandates survived the dissolution of the League, *therefore* the United Nations must necessarily and *ipso facto* have become entitled to exercise a supervisory role in respect of them, although they were a League, not a United Nations institution, and are mentioned in the Charter only as territories that can, but do not have to be, placed under United Nations trusteeship. The fallacy in this kind of reasoning—or rather, presupposition, is evident. Even the argument that only the United Nations *could* play such a part is, as will be seen, erroneous.

2. *No automatic or implied succession*

(i) *Origin and nature of the supervisory function*

14. The Council of the League of Nations (of which three of the principal mandatories were permanent members) was never itself in terms invested *eo nomine* with what has become known as the supervisory function relative to the conduct of the various mandates [6]. The very term "supervisory" is moreover misleading in the light of the League voting rule of unanimity including the vote of the member State affected,—that is to say, when mandates were in question, the mandatory. The so-called supervisory function was in reality predicated upon and derived from the obligation of the mandatories [6a] to furnish an annual report to the Coun-

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[6], [6a], [6b] The plural, or the indefinite article, and small letter "m" is used in the present opinion whenever the context does not require the sense to be confined to the Mandate for SW. Africa or South Africa as Mandatory. Failure to do this must result in a distortion of perspective;—for, subject to the differences between "A", "B" and "C" mandates, as adumbrated in paragraphs 4, 5 and 6 of Article 22 of the League Covenant, and as resulting from the texts of the various categories of mandates, the position in most of the connections with which this case is concerned was the same for all the mandates and mandatories—not peculiar to SW. Africa. In particular, none of the mandates conferred any specific supervisory function on the League Council, and none went further in this respect than to include the reporting obligation in substantially the same terms.

cil, through the then Permanent Mandate Commission,—as a sort of inference, corollary or counterpart of that obligation. It was in that way and no other that what has been called the accountability of the mandatories arose. This point, which is of primary importance when it comes to determining what was the real nature of the supervisory function as exercisable by the League Council, and whether it included the power to revoke a mandatory's [6b] mandate, is developed in full in Section B below. Its relevance here is that it was this reporting obligation, and such "accountability" as an obligation of that order may imply [7], that gave rise to the *specific* function of supervision, not vice versa;—and what is incontestably clear is that the whole question of who, or what entity, was entitled to supervise, was bound up with and depended on the prior question of who, or what entity, mandatories were obliged to report to and, to that extent, become accountable to (but accountability did not in any event—see footnote 7—imply *control*).

(ii) Distinction between the reporting obligation in se and the question of what entity can claim performance of it

15. It follows that in order to determine what entity, if any, became invested with the supervisory function after the disappearance of the League and its Council, it is necessary to ascertain what entity, if any, the mandatories then became obliged to report to, if they continued to be subject *as* mandatories to the reporting obligation at all—(see footnote 5, paragraph 10 above). More specifically, in the context of the present case, in order to answer the question whether the *United Nations*, in particular, became invested with any supervisory function, it will be necessary to determine whether, in respect of any mandated territory not placed under the United Nations trusteeship system, the mandatory concerned became obliged to report to some organ of the United Nations (and notably to its General Assembly, found by the Court in its 1950 Opinion to be the most appropriate such organ for the purpose). The underlying issue is whether the United Nations could claim not merely *a* right to be reported to, but an *exclusive* right, in the sense that the obligation arose in relation to it and it alone, and no other entity. In different terms: *first*,

[7] As will be seen later, reporting in the context of mandates had none of the implications that are involved when, for instance, it is said that "X" reports to "Y" (a superior), which implies that "X" takes his *orders* from "Y". This was not the position as between the League Council and the mandatories, any more than it is as between the competent organs of the United Nations and member States administering trust territories (see below, paragraphs 77 and 104, and also footnote 66, paragraphs *(b)* and *(c)*).

given, as is generally accepted [8], that the various mandates survived the dissolution of the League, then did the reporting obligation, the situation of accountability considered in the abstract so to speak, equally survive that dissolution as part of the concept of mandates;—and *secondly*, if so, did it survive in the form of, or become converted into, an obligation to report, to be accountable not just to *some* organ, but to that particular organ which was and is the Assembly of the United Nations?

(iii) The reporting obligation, if it survived, was capable of implementation otherwise than by reporting to a United Nations organ

16. It is of course evident that if a reporting obligation survived the dissolution of the League, the furnishing of reports to an organ of the United Nations, in particular the General Assembly, was not the only possible way in which that obligation could be discharged; nor was a United Nations organ, specifically as such, in any way indispensable as a recipient, and commentator on or critic of such reports. There were at the time, and there are now, several international bodies in existence, much more comparable in character to the League Council, or at least to the former Permanent Mandates Commission, than the United Nations Assembly, to which any mandatory preferring that course could have arranged to report, and with which it could have carried on the sort of dialogue that was carried on with the League organs;—*and here it is of primary importance to bear in mind that the absence of any compulsory powers vested in such a body would have had no bearing on the situation, since neither the League Council nor the Assembly of the United Nations had any such powers in this matter* [9]. Alternatively, if no appropriate body could be found willing to act, it would have been open to any mandatory, perhaps acting in conjunction with others, to set one up,

[8] So far as this aspect of the subject is concerned, the South African contention that the Mandate is at an end is both conditioned and indirect. It is maintained on the one hand that the reporting obligation lapsed in its entirety on the dissolution of the League because it then became impossible to perform it according to its actual terms,—but also that it was not an essential part of the Mandate which could continue without it. At the same time it is maintained that if the obligation is non-severable—if it *is* an essential part of the Mandate—then its lapse entails the lapse of the Mandate as a whole. These are alternative positions and there is no contradiction between them as the Opinion of the Court seeks to claim.

[9] This point, which goes to the root of much of the case, is more fully developed in Section B below. According to League procedure the Council's decisions were not binding on the mandatory concerned unless the latter concurred in them, at least tacitly; while the resolutions of the United Nations Assembly—except in certain specific cases not material in this context—only have the status of recommendations and have no binding effect except, at most (and even that is open to argument) for those who have affirmatively voted in favour of them.

to which the necessary reporting undertakings would be given,—the ensuing reports, and comments thereon, being made public [10].

(iv) There was no survival of the reporting obligation in the form of an automatic obligation to report to a United Nations organ—Basic differences between the League Council and the United Nations Assembly as a supervisory body

17. For present purposes it is unnecessary to express any final view as to whether the reporting obligation did or did not, in the abstract, or as a concept, survive the dissolution of the League, because in any event I do not consider that it survived in the form of an automatic self-operating obligation to report to and accept the supervision, specifically, of the United Nations, and in particular of its General Assembly. *The unconscious assumption* (or has it been deliberate?) which has dogged the SW. Africa question for so many years, *that it was all the same thing for a mandatory whether it reported to the League Council or to the United Nations Assembly*, so why should it not do so, *is of course quite illusory, because the character of the supervisory organ affects the character and weight of the obligation.* Taking this view does not necessarily mean accepting the South African contention that the reporting obligation was so intimately bound up with the character of the entity to be reported to that, upon the extinction of that entity, it must lapse entirely [11]. But I do accept the view that in no circumstances could an obligation to report to and accept supervision at the hands of one organ—the League Council—become converted automatically and *ipso facto*, and without the consent of the mandatory (indeed against its will), into an obligation relative to another organ, very differently composed, huge in numbers compared with the League Council, functioning differently, by different methods and procedures, on the basis of a different voting rule, and

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[10] In fact, none of the mandatories did this,—*nor did any of them report to the United Nations*,—but, apart from South Africa, they did eventually convert their mandates into trusteeships.

[11] See further as to this in Section D below, paragraphs 119-120. The matter turns on:

(i) whether, as the Court found in 1950 (*I.C.J. Reports 1950*, pp. 136-137), the reporting obligation, in so far as it implied supervision, was so important a part of a mandate that if the latter survived, the former must too,—or whether, as Judge Read thought (*ibid.*, p. 165), the absence of reporting, etc., might "weaken the mandate" but not otherwise affect it;

(ii) the effect, if the situation is a contractual or quasi-contractual one, of the extinction of one of the parties,—in this case of the League of Nations; and

(iii) if the situation is not of that kind, the legal status of a provision that can no longer be carried out according to its actual terms but can perhaps be implemented in some equivalent way.

against the background of a totally different climate of opinion, philosophy and aim, unsympathetic by nature to the mandatory [12]. Indeed the very fact that the supervision of a *mandate* would have become exercisable by an organ which disapproved in principle of mandates that remained mandates, and held it from the start almost as an article of faith (this will be reverted to later, for it is a cardinal point) that all mandated territories should be placed under its own trusteeship system,—and whose primary aim moreover, in all its dealings whether with trust territories, mandated territories, or non-self-governing territories under Article 73 of the Charter, was to call into existence as speedily as possible a series of new

[12] The following table makes this clear:

I. International Organization:—	League of Nations.	United Nations.
II. Report receiving or supervisory body:—	League Council.	General Assembly.
III. Numbers of same:—	Small (varied through 9-11-13) and included the then permanent members of which three were mandatories.	Potentially unlimited. 50/60 even in 1946—now 130-140 and still growing.
IV. Voting rule:—	Unanimity, including vote of Mandatory.	Two-thirds majority; sometimes possibly a bare majority.
V. Advisory sub-organ:—	Permanent Mandates Commission.	Trusteeship Council; Committee of the Assembly; or "subsidiary organ" set up under Art. 22 of the Charter.
VI. Composition of sub-organ:—	Experts acting in their personal capacity, not as representatives of governments.	Representatives of governments.
VII. Attitude and approach of supervisory body:—	Sympathetic to the mandatories—not over-political.	Unsympathetic to mandatories,—highly political.
VIII. Aim:—	Good administration of the mandated territory.	Earliest possible bringing about of the independence of the territory.

sovereign independent States;—all this alone would have been sufficient to create, and perpetuate, a permanent state of tension between the United Nations Assembly as a supervisory organ and any mandatory held accountable to it. None of this existed under the régime of the League.

18. Exactly the same considerations apply to any Committee or sub-Committee of the Assembly which might be set up to deal with mandates, and which, however it might be dressed up to look like the former League Council or Permanent Mandates Commission (see the proposal made in Assembly resolution 449 (V) of 13 December 1950) would remain fully under the Assembly's control, and reflect its tendencies and aims. Indeed this has been only too self-evidently the case as regards those Committees that have been (at later stages) set up with reference to the SW. Africa question.

(v) Conclusion as to implied succession

19. For these reasons it seems to me to be juridically impossible to postulate such a metamorphosis as taking place automatically or unless by consent. *To do so would not merely be to change the indentity of the organ entitled to supervise the implementation of the obligation but, by reason of this change, to change also the nature of the obligation itself.* Given the different character and methods of that organ, it would be to create a new and more onerous obligation (it is of course, *inter alia*, precisely because of the possibility of this, that novations require consent). I must therefore hold that no such transformation ever took place of itself so that, if consent was lacking, the United Nations never became invested with any supervisory function at all. This view will now be developed, first by way of answer to various counter-arguments that have been or may be advanced,—secondly on the basis of certain positive and concrete considerations which have never been given their true weight, but are to my mind decisive.

3. Counter-contentions as to implied succession

(a) *The Advisory Opinion of the Court of 11 July 1950*

20. In the 1950 advisory proceedings there was a striking, though quite differently orientated parallelism between the South African arguments on this matter and the views expressed by the Court, due to a mutual but divergently directed confusion or telescoping of the two separate questions already noticed, of the survival of the reporting obligation as such,

and the form of its survival, if survival there was. Contending that this obligation had never been contemplated except as an obligation relative to the Council of the League, and could not therefore, upon the dissolution of the latter and the establishment of the United Nations, become automatically transformed into an obligation owed to that Organization, South Africa argued that *because* this was so, therefore *all* obligations of accountability had disappeared. This deduction may have been natural, but clearly lacked logical rigour and necessity,—for the *obligation* as such could survive, even though becoming dormant for the time being.

21. The same process of ellipsis, though with quite another outcome, characterized the reasoning of the Court in 1950. Holding that the reporting obligation was an essential part of the mandates system, and must survive if the system itself survived, the Court went on to hold that *therefore* it survived as an obligation to report specifically to the Assembly of the United Nations. This last leg of the argument not only lacked all logical rigour and necessity but involved an obvious fallacy,—which was the reason for the dissenting views expressed by Judges Sir Arnold McNair (as he then was) and Read—dissenting views with which I agree. It obviously could not follow, as the Court in effect found, that *because* the United Nations happened to be there, so to speak, and, in the shape of the trusteeship system, had set up something rather similar to the mandates system, *therefore* not merely trusteeships but mandates also were subject to United Nations supervision. This again was a *non sequitur* [13]. It was tantamount to saying that although (as the Court found later in the same Opinion—*I.C.J. Reports 1950*, pp. 138-140) mandatories were not obliged to place their mandated territories under trusteeship, yet for all practical purposes they had to accept United Nations supervision just the same whether or not they had placed the territories under trusteeship. This does not make sense. The result was that in effect the Court cancelled out its own finding that trusteeship was not obligatory—and made it a case of "Heads I win: tails you lose"! It is not too much to say that the

[13] The following passage from the Court's Opinion (*I.C.J. Reports 1950*, p. 136) exhibits very graphically the telescoping of the (valid) premiss that accountability in principle had not necessarily disappeared with the League, with the (invalid) deduction that mandatories were thereby necessarily obliged to hold themselves accountable *to the United Nations*:

> "It cannot be admitted that the obligation to submit to supervision had disappeared merely because the supervisory organ has ceased to exist, when the United Nations has *another* [precisely!] international organ *performing similar, though not identical supervisory functions*"—(my italics).

The *non sequitur* is clearly apparent. The Court did not seem to see that the transition to a new and different party could not occur of itself or simply be *presumed* to have taken place;—and the present Opinion of the Court compounds the fallacy.

absence of any legal obligation to place mandated territories under trusteeship implied *a fortiori*, as a necessary deduction, the absence of any legal obligation to accept United Nations supervision in respect of mandates, or the one would be defeated by the other.

22. Clearly the existence of the United Nations, and its superficial resemblances to the League, had absolutely nothing to do in logic with the survival of the reporting obligation, except in so far as it provided a convenient (but not obligatory) method of discharging that obligation if it did survive. This was Judge Read's view in 1950. Having found that there had been no consent on the part of the Mandatory to the exercise of United Nations supervision, in the absence of which the only possible basis for such an obligation would be "succession by the United Nations", he continued (*I.C.J. Reports 1950*, p. 172):

> "Such a succession could not be based upon the provisions of the Charter, because . . . no provisions of the Charter could legally affect an institution founded upon the Covenant or impair or extinguish [the] Legal rights and interests of those Members of the League which are not members of the United Nations[14]. It could not be based on implications or inferences drawn from the nature of the League and the United Nations *or from any similarity in the functions of the organizations*. Such a succession could not be implied, either in fact or in law, in the absence of consent, express or implied by the League, the United Nations and the Mandatory Power. There was no such consent"—(my italics).

(b) *Did the Charter imply accountability obligations for mandatories?*

(i) In general

23. The Charter makes no specific mention of mandated territories at all, except in the two Articles (77, and 80, paragraph 2) where it refers to them, along with other types of territories, as candidates for being placed under trusteeship but without creating any obligation in that regard. It says nothing at all either about supervision or accountability. The contention that the Charter is to be read as if in fact it did so, is therefore founded entirely on a process of implication,—a process sought to be

[14] It was and is conveniently forgotten—though not by Judge Read—that at the time when the Charter came into force (October 1945), and until April 1946, the League was still in being.

founded on two particular provisions, Articles 10, and 80, paragraph 1. These must now be considered.

(ii) Article 10 of the Charter

24. For Article 10 to suffice in itself, it would be necessary to find in it not only a competence conferred on the Assembly to exercise a supervisory role in respect of mandates, but also an obligation for mandatories to accept that supervision and be accountable to the Assembly. Since the Article makes no mention of mandates as such, the argument would have to be that the faculty given to the Assembly by that provision "to discuss [and 'make recommendations . . . as to'] any questions or any matters within the scope of the present Charter", not only invested the Assembly with a supervisory function in respect of mandates, but also obliged mandatories to *accept* the Assembly in that role and regard themselves as accountable to it. Quite apart from the fact that a faculty merely to "discuss . . . and . . . make [non-binding] recommendations" could not possibly extend to or include so drastic a power as a right unilaterally to revoke a mandate, it is evident that a *faculty* conferred on "A" cannot, in and of itself—even in relation to the same subject-matter—automatically and *ipso facto* create an *obligation* for "B" [15]. The *non sequitur*—the absence of any *nexus* is apparent, and the gap cannot be bridged in the way the Court seeks to do (see footnote 16 below). Furthermore, since one of the basic questions at issue is, precisely, whether mandates *as such*—as opposed to trusteeships and mandated territories *placed under trusteeship* —*are* "within the scope of the Charter", the whole argument founded on Article 10 of the Charter is essentially circular and question-begging.

25. Article 10 was, and is, a provision which, without in terms mentioning mandates, or indeed anything specific at all, ranges over the vast field implied by the words "any questions or any matters within the scope

[15] For instance the setting up of an authority empowered to conduct and collect information in view of a census, does not of itself oblige the population to co-operate. Census laws, in addition to the obligation imposed on the census authority, impose a separate obligation on all members of the population to co-operate, with penalties for any default. Otherwise the latter obligation would not exist,—and the former would in consequence be vain.

[16] As in 1950, the Court, while finding in Article 10 the competence of the Assembly to supervise, professes to find the obligation of the mandatory to be accountable to the Assembly *(a)* in Article 80 of the Charter, *(b)* in an alleged recognition of accountability to the United Nations, supposed to have been given by all the mandatories when they voted in favour of the final League of Nations resolution on mandates of 18 April 1946. As will be seen (paragraphs 26-32 and 54-55 below) such an obligation cannot be derived from either source.

of the present Charter". This could cover almost anything [17]. Yet could it reasonably be contended that in relation to anything the Assembly might choose to discuss under this provision, and which could fairly be regarded as included in it, authorities and bodies in all member States of the United Nations thereby, and without anything more, would become obliged at the request of the Assembly to submit reports to it, and accept its supervision concerning their activities? The question has only to be put, for its absurdity to be manifest. Nothing short of express words in Article 10 could produce such an effect. Upon what juridical basis therefore, can an obligation to report and accept supervision in respect of mandates be predicated upon this provision? It was precisely this absence of logical necessity, or even connexion, that motivated Lord McNair's dissent in 1950. After saying that he could not find any legal ground upon which the former League Council could be regarded as being replaced by the United Nations for the purpose of being reported to and exercising supervision, which "would amount to imposing a new obligation [18] upon the [mandatory] and would be a piece of judicial legislation", he continued (*I.C.J. Reports 1950*, p. 162):

> "In saying this, I do not overlook the competence of the . . . Assembly . . . under Article 10 of the Charter, to discuss the Mandate . . . and to make recommendations concerning it, but that competence depends not on any theory of implied succession but upon the provisions of the Charter."

In other words, even if the provisions of the Charter might be sufficient to found the competence of the Assembly—(even so, only to discuss and recommend)—they must also be shown to establish the obligation of the mandatory, since no theory of implied succession could be prayed in aid [19];—and in so far as it is sought to rely on the terms of Article 10 for

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[17] It suffices to look at the Preamble to the Charter, and Article 1 and the provisions of Chapters IX and X, in order to see how great the range is, even omitting things like peace-keeping and sundry miscellanea.

[18] "New" because, since the League clearly had not *assigned* its supervisory rights to the United Nations (see further as to this, paragraph 42 below), only a *novation* could have produced the effect that the Court found in favour of in 1950. But a novation would have required the mandatory's consent, which Lord McNair did not think had been given. Speaking of the various contemporary statements made on behalf of South Africa, he said (*I.C.J. Reports 1950*, p. 161) that he did not find in them "adequate evidence" that the mandatory had "either assented to an implied succession by the United Nations . . ., or . . . entered into a new obligation towards [it] to revive the pre-war system of supervision".

[19] Lord McNair had already held (*I.C.J. Reports 1950*, p. 159) that it was a "pure inference" [i.e., in the context a mere supposition] "that there [had] been an automatic succession by the United Nations to the rights and functions of the

this purpose, it is clear that they will not bear the weight that would thereby be put upon them.

(iii) Article 80 of the Charter

26. This is another provision (its terms are set out below[20]) to which it has been sought to give an exaggerated and misplaced effect, and which equally cannot bear the weight thus put upon it. (It is true that the second paragraph manifests an expectation that mandated territories would be placed under the trusteeship system,—but expressions of expectation do not create obligations, as the Court found in 1950, specifically in relation to this provision—*I.C.J. Reports 1950*, p. 140).) As for the first paragraph, the changes which it rules out are clearly those, and only those, that might result from Chapter XII (the trusteeship chapter) of the Charter ("nothing in this Chapter [i.e., XII] shall be construed . . . to alter . . . etc.),—and, as Lord McNair pertinently observed in 1950, "the cause of the lapse of the supervision of the League and of Article 6 of the Mandate[21] is not anything contained in Chapter XII of the Charter, but is the dissolution of the League, so that it is difficult to see the relevance of this Article". It is of course possible to hold on other grounds that the principle of accountability, as expressed in the form of the *reporting* obligation, though becoming dormant, did not lapse with the dissolution of the League (paragraphs 17 and 20 above). What cannot legitimately be held is that if it did so lapse—or would otherwise have done so—it was preserved or revived by reason of Article 80,—for that provision's sole field of preservation was from extinction due to the effects of Chapter XII, not from extinction resulting from the operation of causes lying wholly outside that Chapter.

Council of the League in this respect; . . . as the Charter contained no provision for [such] a succession . . . [which] could have been expressly preserved and vested in the United Nations . . . but this was not done".

[20] Article 80 of the Charter reads as follows:

"1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing *in this Chapter* shall be construed in or of itself to 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—(my italics).

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

[21] Article 6 of the Mandate for SW. Africa embodies the reporting obligation.

27. Still less can it be legitimate to hold that the reporting obligation was not only preserved as a concept, but became, by some sort of silent alchemy, actually *converted* by Article 80 into an obligation to report to an (unspecified) organ of the United Nations. The impossibility of attributing this last effect to Article 80 becomes manifest if it be recalled that at the date (24 October 1945) when the Charter, including Article 80, came into force, *the League of Nations was still in existence* (and continued so to be until 18 April 1946)[22], so that the reporting obligation was still owed to the Council of the League. If therefore Article 80 could have operated at all to save this obligation from causes of lapse lying outside Chapter XII of the Charter, it is in *that* form that it must have preserved it—i.e., as an obligation in relation to the League Council;—and there is no known principle of legal construction that could, simply on the basis of a provision such as Article 80, cause an obligation preserved in that form, to become automatically and *ipso facto* converted six months later into an obligation *relative to a different entity of which no mention had been made*. If, to cite Article 80, Chapter XII was not to be "construed" as altering, "the terms of existing international instruments", then what was not to be altered were those provisions of the mandates and of Article 22 of the League Covenant (then still in force) for reporting to the League Council (then still in being). How then is it possible to read Article 80, not as preserving *that* obligation but (as if at the wave of the magician's wand) creating a new and different obligation to report to a new and very different kind of organ—the United Nations Assembly?—a change which could not have been a matter of indifference to the mandatories.

28. It comes to this therefore, that there is absolutely nothing in Article 80 to enable it to be read as if it said "The League is still in being, but if and when it becomes extinct, all mandatories who are Members of the United Nations will thereupon owe to the latter Organization their obligations in respect of mandated territories". *That* of course (see *per* Lord McNair in footnote 19 above) is precisely what (or something like it) the Charter ought to have stated, in order to bring about the results which—(once it had become clear that SW. Africa was not going to be placed under the United Nations trusteeship system)—it was then attempted to deduce from such provisions as Articles 10 and 80. But the Charter said no such thing, and these Articles, neither singly nor together, will bear the weight of such a deduction.

29. The truth about Article 80 can in fact be stated in one sentence: either the mandates, with their reporting obligations, would in any event

[22] Although it was known *de facto* that the League would be dissolved, there was nothing in the Charter to compel those Members of the United Nations who were also Members of the League to take this step, still less to take it by any particular date.

have survived the dissolution of the League on a basis of general legal principle or, as some contend, of treaty law, and there would have been no need of Article 80 for that particular purpose [23];—or else, if survival had to depend on the insertion of an express provision in the Charter, Article 80 was not effectual for the purpose—guarding as it did only against possible causes of lapse arising out of Chapter XII itself, which was not the cause of the dissolution of the League. In consequence, quite a different type of provision would have been required in order to produce the results now claimed for Article 80.

30. It is argued that the foregoing interpretation deprives Article 80 of all meaning, since (so it is contended) there is nothing in Chapter XII of the Charter that *could* alter or impair existing rights, etc. Even if this were the case, it would not be a valid juridical reason for reading into this provision what *on any view* is not there, namely a self-operating United Nations successorship to League functions,—the automatic conversion of an obligation of accountability to the League Council (still extant when Article 80 came into force) into an obligation towards the Assembly of the United Nations. But in any event this argument is not correct. Article 80 remains fully meaningful,—and its intended meaning and effect, so far as mandates were concerned, was to guard against the possibility that the setting-up of the trusteeship system might be regarded as an excuse for not continuing to observe mandates obligations, *whatever these were*, and continued to be. *But it did not define what these were, or say whether they continued to be.* Furthermore it was only "in and of itself" (words all too frequently overlooked) that the creation of the trusteeship system was not to affect mandates. But if these lapsed from some other (valid) cause, Article 80 did not, and was never intended to operate to prevent it. In short, Article 80 did not *cause* them to survive,—but if they did (otherwise) survive, then the setting-up of the trusteeship system could not be invoked as rendering them obsolete.

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[23] This was the view taken by Ambassador Joseph Nisot, the former Belgian delegate and jurisconsult whose knowledge of the United Nations dates from the San Francisco Conference. Writing in the *South African Law Journal*, Vol. 68, Part III (August 1951), pp. 278-279, he said:

> "The only purpose of the Article is to prevent Chapter XII of the Charter from being construed as in any manner affecting or altering the rights whatsoever of States and peoples, as they stand pending the conclusion of trusteeship agreements. Such rights draw their judicial life from the instruments which created them; they remain valid in so far as the latter are themselves still valid. If they are maintained, it is by virtue of those instruments, not by virtue of Article 80, which confines itself to providing that the rights of States and peoples—whatever they may be and to whatever extent may subsist—are left untouched by Chapter XII."

For a similar view by a former judge of the Permanent Court (also a delegate at

31. The argument founded upon the reference to Article 80 contained in Article 76 *(d)* of the Charter is equally misplaced and turns in the same circle. Without doubt the effect of this reference was that *in so far as* any preferential economic or other rights were preserved by reason of Article 80, they formed exceptions to the régime of equal treatment provided for by Article 76 *(d)*. But this left it completely open what preferential rights were thus preserved. They were of course only those preserved from extinction because of the operation of Chapter XII of the Charter, not those that might be extinguished from other causes. The point is exactly the same as before.

32. If neither Article 10 nor 80, taken singly, created an obligation to report to the United Nations Assembly, it is evident that, taken together, they cannot do so either. If anything, the reverse is the effect,—two blanks only create a bigger blank.

(c) *The Organized World (or "International") Community Argument*

33. This argument, not previously prominent, the essence of which is to postulate an *inherent* continuity between the League of Nations and the United Nations, as being only different expressions of the same overriding idea, emerged in the course of the *South West Africa* cases (Ethiopia and Liberia *v.* South Africa, 1960-1966). It is obviously directed to supplying a possibly plausible foundation for something that has no basis in concrete international law. It has no such basis because the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to find actual expression. In the days of the League there was not *(a)* the organized world community, *(b)* the League. There was simply the League, apart from which no *organized* world community would have existed. The notion therefore of such a community as a sort of permanent separate residual source or repository of powers and functions, which are re-absorbed on the extinction of one international organization, and then automatically and without special arrangement, given out to, or taken over by a new one, is quite illusory [24].

San Francisco) see Manley Hudson in *American Journal of International Law*, Vol. 45 (1951), at p. 14.

[24] Nor does international law know anything comparable to such principles of private law as those for instance which, in the event of a failure of all heirs to given property, cause it to pass as *bona vacantia* to the State, the fisc, the Crown, etc.; so that although there is no "inheritance" as such, there is a successorship in law. Moreover, what is in question in the present case is not property but the exercise

34. It is evident therefore that, in the instant case, this theory is put forward with a view to circumventing, *ex post facto*, what would otherwise be—what *is*—an insuperable juridical obstacle,—namely the lack of any true successorship in law between the League of Nations and the United Nations. In the absence of such successorship, the "organized world [or 'international'] community" argument can be seen for what it is—an expedient;—for it is quite certain that none of the States that, as mandatories, assumed obligations to report to the League Council could for one moment have supposed that they were *thereby* assuming an open-ended obligation to report for all time to whatever organ should be deemed, at any given moment, to represent a notional and hypothetical organized world community, and regardless of how such a community might be constituted or might function.

4. Political rejection in the United Nations of any continuity with the League of Nations

(a) *In general and in principle*

(i) Attitude towards the League

35. In the foregoing sub-sections various theories of implied succession as between the United Nations and the League in the field of mandates have been considered and shown to be fallacious. The real truth is however, that they all fly in the face of some of the most important facts concerning the founding of the United Nations;—for the idea of taking over from the League, of re-starting where it left off, was considered and rejected—expectedly so. The United States had never been a member of the League for reasons that were still remembered [25]. The Soviet Union had been expelled in 1939. The "Axis" Powers, on the other hand, under their then fascist régimes, *had* been members, and so on. The League had a bad name politically. It had failed in the period 1931-1939 to prevent at least three very serious outbreaks of hostilities, and it had of course been powerless to prevent World War II. It was regarded in many quarters as something which—so far from being an "organised world com-

of a function, and there is no principle of international law which would make it possible to say that, if an international organization becomes extinct, its functions automatically pass to another without special arrangements to that effect. The position was correctly stated by Judge Read in 1950, in the passage quoted in paragraph 22 above.

[25] It will be recalled that although President Wilson was one of the principal architects of the League Covenant,—and although the Covenant, instead of being a separate instrument had been made formally part of the Treaty of Versailles in the belief that the United States must ratify the latter, and thereby automatically become a member of the League,—this expectation was defeated by the action of the United States Senate in declining to ratify the Treaty, despite the fact that the United States was one of the "Principal Allied and Associated Powers" in whose name it was made. A separate Peace Treaty with Germany was concluded by the United States in 1921.

munity"—was a paramountly European institution dominated by "colonialist" influences. The United Nations, so it was felt, must represent an entirely fresh initiative. Although it could hardly fail in certain ways to *resemble* the League, there must be no formal link, no juridical continuity. The League had failed and the United Nations must not start under the shadow of a failure.

36. *This* is why absolutely *no mention of the League is to be found in any part of the Charter.* (Even in connection with mandates, formerly generally known as "League of Nations mandates", the Charter makes no mention of the League. In Article 77, paragraph 1, and Article 80, paragraph 2—the only provisions in which mandates as such are mentioned—they are referred to as "territories now held under mandate" and "mandated ... territories".) *This again* is why the Charter was brought into force without any prior action to wind up the League, and regardless of the fact that it was still, and continued to be, in existence. It is not too much to say therefore that, in colloquial terms, the founders of the United Nations bent over backwards to avoid the supposed taint of any League connexion.

(ii) Assembly Resolution XIV of 12 February 1946

37. The same attitude of regarding the League as a quasi-untouchable was kept up when, after the Charter had come into force and the United Nations was definitely established, action was taken to put an end to the League and take over its physical and financial assets,—and to reach a final decision regarding its political and technical activities [26]. This was done by the now well-known General Assembly Resolution XIV of 12 February 1946, the whole text of which will repay study and will, with one (non-pertinent) omission, be found set out verbatim on pages 625-626 of the 1962 volume of the Court's Reports. The parts relevant to mandates (though not mentioning them by name) were as follows:

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[26] A start had of course been made in the Preparatory Commission of the United Nations set up after the San Francisco Conference. To cite the joint dissenting Opinion written by Sir Percy Spender and myself in the 1962 phase of the *South West Africa* cases (*I.C.J. Reports 1962*, p. 532), the Summary Records of the Commission, in particular UNPC Committee 7, pp. 2-3 and 10-11, indicated that "the whole approach of the United Nations to the question of the activities of the League of Nations was one of great caution and indeed of reluctance ... there was a definite rejection of any idea of ... a general take-over or absorption of League functions and activities".

"3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations and adopts the following decisions set forth in A, B and C below."

Decisions A ("Functions pertaining to a secretariat") and B ("Functions and powers of a technical and non-political character") are irrelevant in the present connexion; but decision C, under which the question of mandates was regarded as coming, read as follows:

"C. *Functions and Powers under Treaties, International Conventions, Agreements and other Instruments Having a Political Character* [27].

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character [27a]."

Commenting on this in 1950 (*I.C.J. Reports 1950*, p. 172), Judge Read, whose views I share, said, speaking of the Mandate for SW. Africa, that it involved "functions and powers of a political character" and that in substance decision C provided that the General Assembly would examine a request "that the United Nations should assume League functions as regards report, accountability and supervision over the South-West African Mandate". He then continued:

"No such request has been forthcoming, and the General Assembly has not had occasion to act under decision C. *The very existence of this express provision, however, makes it impossible to justify succession based upon implication*"—(my italics).

38. Nor was the Assembly's Resolution XIV of 12 February 1946 in any way the outcome of a hasty or insufficiently considered decision. It had been carefully worked out in the Preparatory Commission, and its committees and sub-committees, and it represented the culmination of a settled policy. The story is summarized on pages 536-538 of the 1962 joint dissenting Opinion already referred to (footnote 26 above) and a fuller version is given at pages 619-624 of the same volume of the Court's Reports. In the discussion in the Preparatory Commission of the drafts prepared by its Executive Committee, of what eventually became Reso-

[27], [27a] It was of course under the head of "Other instruments having a political character" that mandates were deemed to come.

lution XIV, the use of the word "transfer" [of League functions and activities], which nowhere appears in that resolution, was specifically objected to, and dropped, on the ground that it would seem to apply a "legal continuity *that would not in fact exist*"—my italics—(see UN docts. PC/LN/2, pp. 2-3, and PC/LN/10, pp. 10-11).

(b) *In particular as regards mandates*

(i) Settled policy of preference for and reliance upon the trusteeship system

39. As regards mandates, no fewer than three proposals were made in the Preparatory Commission for the setting up of what would have been an interim régime for *mandates* under the United Nations. In the first place the Executive Committee recommended the creation of a "Temporary Trusteeship Committee" to deal with various interim matters until the trusteeship system was fully working, and amongst them "any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System"—(references will be found in the footnotes to pp. 536 and 537 of the *I.C.J. Reports 1962*). Had this proposal been proceeded with, it would have resulted in the creation of some sort of interim régime in respect of mandates, pending their being placed, *or if they were not placed*, under trusteeship. But in the Preparatory Commission itself, the idea of a temporary trusteeship committee met with various objections, mainly from the Soviet Union, and was not proceeded with. Instead, the Commission made quite a different kind of recommendation to the General Assembly, looking to the conversion of the mandates into trusteeships. This recommendation eventually emerged as Assembly Resolution XI of 9 February 1946, which will be considered in a moment.

40. Even more effective would have been the two United States proposals made in the Executive Committee on 14 October and 4 December 1945 respectively, which, had they been adopted, would have done precisely and expressly what it is now claimed was (by implication) done, even though these proposals were not proceeded with. Subject to differences of wording they were to the same effect, and their character can be seen from the following passage recommending that one of the functions of a temporary trusteeship committee should be (UN doct. PC/EX/92/Add. 1):

> ". . . to undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, the functions

previously performed by the Mandates Commission in connection with receiving and examining reports submitted by Mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function".

But after tabling these proposals the United States delegation did not further proceed with them. Instead, the Preparatory Commission recommended, and the Assembly adopted, Resolution XI mentioned at the end of the preceding numbered paragraph above. The full text of the relevant parts of this Resolution will be found on page 624 of *I.C.J. Reports 1962*. It was addressed to "States administering territories now held under mandate"; but all it did was to welcome the declarations made by "certain" of them as to placing mandated territories under trusteeship, and to "invite" all of them to negotiate trusteeship agreements for that purpose under Article 79 of the Charter;—not a word about the interim position,—not a word about the situation regarding any mandated territories in respect of which this invitation was not, and continued not to be, accepted. This piece of history confirms the existence of a settled policy of avoidance of mandates as such.

(ii) The final League of Nations Resolution of 18 April 1946

41. Precisely the same attitude characterized the behaviour of those Members of the United Nations who were also Members of the League when, in their latter capacity, they attended the final Geneva meeting for the winding up of the League. Here again was an opportunity of doing something definite about mandates,—for (with the exception of Japan, necessarily absent) all the mandatories were present, and would be bound by any decisions taken,—since, according to the League voting rule, these had to be taken by unanimity. The terms of the resulting Resolution of 18 April 1946 will be considered in greater detail later, in connexion with the question whether they implied for the mandatories any *undertaking* of accountability *to the United Nations* in respect of their mandates as such. Suffice it for present purposes to say that after *recognizing* that, on the dissolution of the League, the latter's "functions with respect to Mandated Territories will come to an end", the Resolution merely *noted* that "Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League",—and then went on to take note of the "expressed intentions" of the mandatories to continue to administer their mandates "in accordance with the obligations contained" in them, "until other arrangements have been agreed between the United Nations and the

respective [mandatories]";—again an allusion to, and a looking towards, the trusteeship system which, under the Charter, required the negotiation of trusteeship *agreements*. The interim position, and the position concerning any mandates in respect of which no trusteeship agreements were negotiated, was thus left to the operation of an ambiguous general formula, the precise effect of which (to be considered later) has been in dispute ever since.

42. The view that it was once more the trusteeship system that those concerned had in mind is borne out by the fact that the Board of Liquidation set up by the League Assembly to dispose of the League's assets—in handing over the archives of the League's mandates section to the United Nations—said in a report, the relevant part of which was entitled "*Non-Transferable* Activities, Funds and Services"—(my italics), that these archives "should afford valuable guidance to those concerned with the administration of the *trusteeship* [not the mandates] *system*"—my italics). It then also declared that "the mandates system inaugurated by the League has thus been brought to a close" (L. of N. doc. C.5.M.5., p. 20). In short, as Lord McNair said in 1950 (*I.C.J. Reports 1950*, p. 161), in a very pertinent verdict on the April 1946 resolution, it

> ". . . recognized that the functions of the League had come to an end; *but it did not purport to transfer them . . . to the United Nations*" (my italics) [28].

After adding that he did not see how this resolution could "be construed as having created a legal obligation . . . to make annual reports to the United Nations and to transfer to that Organization . . . the supervision of [the mandates]" he concluded that: "*At the most, it could impose an obligation to perform those obligations . . . which did not involve the activity of the League*"—(my italics).

43. There were however two further circumstances which suggest conclusively that no interim *mandates* régime was contemplated at Geneva—

(a) *The "Chinese" draft*—In the first place (and what must resolve all doubts) is the fact that quite a different type of resolution had previously been proposed but not proceeded with. This was what has become known in the annals of the SW. Africa complex of cases as the "Chinese" or "Liang" draft, from its source of origination, and it was in complete contrast to what was eventually adopted. It ran as follows:

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[28] In other words there was (it cannot too often be repeated) no assignment, so that the acceptance of a *new* party to the Mandate (the United Nations) by way of novation needed the Mandatory's consent.

"The Assembly,

Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into trusteeship territories;

Considering that the League's function of supervising mandated territories should be *transferred* to the United Nations, *in order to avoid a period of inter-regnum in the supervision* of the mandatory régime in these territories;—(my italics),

Recommends that the mandatory powers as well as those administering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trusteeship Council shall have been constituted."

Although this proposal would have required amendment on account of certain technical errors and defects, it needs but a glance to see that, had the *substance* of it been adopted, it would have done precisely what has since so continually and tediously been claimed as having been done by the Resolution actually adopted on 18 April 1946. It would have imposed upon the mandatories an obligation at least to seek United Nations supervision and submit to it, if forthcoming, during what the proposal termed the "period of inter-regnum" in respect of mandates. Whether the United Nations would have accepted the suggested function—and naturally no resolution of the League could have compelled it to do so—is beside the point. The inescapable fact remains that, for whatever reason (and that reason does not appear upon the record) the proposal was not adopted; and matters cannot therefore, in law, be exactly the same as if it had been. If any further proof were needed it could be found in the fact that Dr. Liang himself, in speaking on the Resolution of 18 April 1946, as actually adopted, recalled his earlier (non-adopted) draft, and, after stating that the trusteeship articles of the United Nations Charter were "based largely upon the principles of the mandates system", added "*but the functions of the League in that respect were not transferred automatically to the United Nations*"—(my italics). Therefore, he said, the Assembly of the League should "take steps to secure the continued application of [those] principles". But in fact the Assembly of the League, like the Assembly of the United Nations, decided to rely for that purpose on the (non-obligatory) conversion of mandates into trusteeships, or else on Article 73 *(e)* of the Charter to which I now come.

(b) *The reference to Chapter XI of the Charter in the Resolution of 18 April 1946*—This is the second significant circumstance showing how minds were working at Geneva in April 1946. The Resolution of 18 April (paragraph 3—see *ante* paragraph 41) referred not only to Chapters XII

and XIII of the Charter (trusteeships) but also to Chapter XI (non-self-governing territories). The reasons for this were given in the joint dissenting Opinion of 1962, at pages 541-545 of the 1962 volume of Reports, where attention was drawn to the virtual reproduction in the principal provision of Chapter XI (Article 73) of the language of Article 22, paragraph 1, of the League Covenant (both texts were set out for comparison in footnote 1 on p. 541 of that Opinion). The significance of the reference to Chapter XI in the Geneva Resolution—a reference that would otherwise have had no object—is as showing (i) that the delegates, including the various mandatories, regarded mandated territories as being in any event in the non-self-governing class, and (ii) that they regarded reporting under paragraph *(e)* of Article 73 as an alternative to the placing of mandated territories under trusteeship, *at least in the sense* of being something that would fill in the gap before the latter occurred, *or if it did not occur at all.* Furthermore, it had this advantage, that although it involved a less stringent form of reporting than specifically mandates or trusteeship reporting, and one moreover that did not involve actual accountability as such (see paragraph 59 below), it was *obligatory* for member States of the United Nations administering non-self-governing territories,—whereas the Charter created no obligation to place mandated or other territories under the trusteeship system. If therefore it be contended that there could not have been an intention to leave the "gap" totally unfilled, the answer is that this is how it was intended to be filled;—and there is evidence that several delegates and/or governments understood the matter in that sense (see *I.C.J. Reports 1962*, pp. 543-544). But equally clear it is that the gap was *not* intended to be filled on the basis that mandatories would, *as* mandatories, become accountable to the United Nations,—for if that had been the intention, the obvious course would have been followed of setting up an interim régime specifically for mandates as such, and inviting the United Nations to supervise it. There was therefore an implicit rejection of that course,—and if it is sought to explain matters (or explain them away) on the ground that the United Nations, being intent on the conversion of all mandates into trusteeships, would probably not have accepted the invitation, then surely this is an explanation that speaks for itself and can only confirm the view here put forward.

* * *

44. In relation to all these various attempts to bridge the gap between mandates and trusteeships, or alternatively to place continuing mandates on a more regular footing, the claim made in the Opinion of the Court is that their non-adoption did not necessarily imply a rejection of the underlying idea contained in them. I myself had always thought that the absolutely classic case of implied rejection was when a proposal had been considered and not proceeded with—it being, as a matter of

law, quite irrelevant why [29]. When an idea has been put forward, in much the same terms, on several different successive occasions, but not taken up, only the strongest possible contra-indications (if any there could be) would suffice to rebut the presumption—if not of rejection—at least of deliberate non-acceptation. If something is suggested but not provided for, the situation cannot be the same as if it had been. If there is a series of proposals substantially in the same sense, none of which is adopted, the quite different resolutions that eventually were adopted cannot be interpreted as having the same effect as those that were not. Even a non-jurist can hardly fail to admit the logic of these propositions.

(c) *Reasons for and significance of the United Nations attitude on mandates*

45. These persistent avoidances of any assumption of functions regarding mandates—even on an interim or temporary basis—are clear evidence of a settled policy of disinterest in anything to do with them that did not take the form of their conversion into trusteeships. This is borne out by an additional factor, namely that in spite of the considerations set out in paragraph 43 *(b)* above, the United Nations Assembly was, from the start, unwilling to allow that Article 73 of the Charter could be regarded as relating to mandated territories and, when it did receive reports about SW. Africa transmitted on that basis (see paragraphs 59 and 60 below), insisted on dealing with them through the Trusteeship Council. Individual episodes, occurring in isolation, might not have meant very much, but the cumulative effect of them, taken as a whole, is overwhelming, and can lead to only one conclusion; namely that the United Nations did not intend to take over any political function from the League except by special arrangements that were never made,—and that, as part of this policy, it did not want to become involved with mandates as such. This attitude was in fact understandable. In the first place, since the Charter made no express provision for the supervision of mandated territories by the United Nations, except if they were converted into trusteeships, which must be a voluntary act and could not be compelled, there was no legal basis upon which the Organization could claim to be *entitled* to supervise mandates not so converted. No separate machinery for doing so was instituted by the Charter, so that this would have had to be created *ad hoc*—with doubtful legality. To supervise *mandates* through the Trustee-

[29] At international conferences proposals are often not proceeded with because their originators realize that they would not be agreed to,—and this of course speaks for itself. Alternatively, they are often not proceeded with because, even though desirable in themselves, they would involve difficulties, or entail certain corresponding disadvantages;—but in that event a *choice* is made, and as a matter of law it cannot afterwards be claimed that "in reality" the proposal *was* accepted, or that at least it was not "truly" rejected. Such pleas are of a purely subjective character,—and psychology is not law.

ship Council would have been tantamount to treating them as trust territories although they had not been placed under trusteeship, and did not have to be. In consequence, all efforts had to be concentrated on endeavouring to bring the various mandates into the trusteeship system.

46. Secondly, there cannot be any shadow of doubt that (apart from the general unwillingness to take over League functions) the reason for the reluctance to assume any role relative to mandates was the fear that to do so would or might tend to perpetuate the mandates system by acting as an inducement to mandatories to maintain the *status quo* and refrain from submitting to the trusteeship system (see *I.C.J. Reports 1962*, pp. 540-541). In this connexion a point to note—though only an incidental one—is that the latter system was in certain respects more onerous for the mandatories than the mandates system—in particular as regards the character and composition of the body that would be advising the supervisory authority. In the case of mandates, this was the Permanent Mandates Commission, which was made up of independent experts of great experience in such matters, acting in their personal capacity, not as representatives of their governments, and not acting under official instructions. In the case of the trusteeship system it was to be the Trusteeship Council, a political body consisting of representatives of governments acting under instructions [30]. Be that as it may, it was evidently thought desirable to refrain from giving mandatories any excuse for not transferring their mandated territories to the trusteeship system, such as they might well have considered themselves to have had, if an alternative in the shape of an *ad hoc* continuation of the mandates system had been afforded them. There was in addition the psychological factor of avoiding any suggestion, even indirect, that, possibly, not all mandated territories would be transferred to trusteeship, such as might have been conveyed by making provision for that eventuality.

(d) *Conclusion as to the legal effects of this attitude*

47. Such then were the reasons for the United Nations attitude about mandates. But to establish the *reasons* for something is not to cancel out the *result*, as the Opinion of the Court often seems to be trying to maintain. Reliance on the proposition that, to find a satisfactory explanation of *why* a proposal was not adopted, is equivalent to demonstrating that it was not really *rejected*;—and so it must be treated as if it had "really" been *adopted*, cannot enhance respect for law as a discipline.

[30] This of course was mitigated by the fact that half the members of the Trusteeship Council had to consist of representatives of administering Powers.

48. What in actual fact did occur in the United Nations, in the period 1945/1946, was that the Assembly, in full awareness of the situation, made an *election*—or choice. The election, the choice, was this: it was, so far as the United Nations was concerned, to be "trusteeship" (though not obligatory trusteeship). The taking over of mandates on any other basis was, in effect, rejected. That being so, it was not thereafter *legally* possible to turn round and say, as regards any mandated territory not placed under trusteeship, that although the United Nations had not been given the right to supervise the administration of the territory as a trust territory, it nevertheless had the right to supervise it as a mandated territory. This would simply be an indirect way of in effect making trusteeship compulsory, which it was not, and was never intended to be. It would be like allowing the man who draws the short straw to take the long one also! There is an unbridgeable inconsistency between the two positions. Despite various warnings, there was an expectation—or hope—that, in the end, trusteeship for all mandates would come about; but the risk that it might not do so had to be accepted. In the event this expectation or hope was realized except in the case of SW. Africa. The failure in this one case may have been very annoying or even exasperating,—but it could not afford juridical ground for deeming the United Nations *ex post facto* to be possessed of supervisory functions in respect of mandated territories which were not provided for in the Charter (outside the trusteeship system), and which the Organization deliberately, and of set purpose, refused to assume. In short, so far as SW. Africa was concerned, the United Nations backed the wrong horse,—but backing the wrong horse has never hitherto been regarded as a reason for running the race over again!

49. The basic mistake in 1945/1946 was of course the failure either to make the conversion of mandates into trusteeships obligatory for Members of the United Nations, or else expressly to set up an interim régime for non-converted mandates. But by the time *political* awareness of this mistake was fully registered, it was already legally too late;—neither of these things having been done (because in effect the United Nations had preferred to trust to luck) it is hardly possible now to treat the situation virtually as if one of them had been. There is surely a limit to which the law can admit a process of "having it both ways". The cause of law is not served by failing to recognize that limit.

* * *

50. If the foregoing considerations are valid, it results that there is one and only one way in which the United Nations could have become invested with any supervisory function in respect of mandates, and that is by the consent of the mandatory concerned. Whether this was ever given by South Africa will now be considered.

5. The issue of consent to accountability and United Nations supervision

(a) *General principles*

(i) Absence of any true basis of consensus

51. The question of consent can strictly speaking be disposed of in one sentence,—for, once it is clear that at the time, the United Nations was not accepting, was not wanting to assume any function in respect of mandates as such, was in fact aiming at the total disappearance of the mandates system,—it follows that there was nothing for the mandatories to consent to in respect of mandates, unless they were willing to start negotiations for the conclusion of trusteeship agreements, which they were not obliged to do. As Judge Read said (in *I.C.J. Reports 1950*, p. 171) speaking of events at an even later date (November 1946-May 1948), it was doubtful "whether the General Assembly was willing, *at any stage* [my italics], to agree to any arrangement that did not involve a trusteeship agreement . . .". In these circumstances there was no basis of consensus for any arrangement involving United Nations supervision of mandates as *mandates*. It would have been necessary for the mandatory's "consent" to have taken the form of a positive petition or plea, which would unquestionably have received the answer that if the mandatory wanted, or was prepared to accept, United Nations supervision, all it had to do was to negotiate a trusteeship agreement.

(ii) A Novation was involved

52. Several references have been made to this principle, which I believe has not, as such, been invoked in the previous proceedings before the Court except (implicitly) by Lord McNair and Judge Read in 1950. As has been seen in paragraphs 41 and 42 above, the League declared its functions with respect to mandates to be "at an end" and that the system "inaugurated by the League" had been "brought to a close". There was no assignment in favour of the United Nations of mandates as such,—nor could there have been without the consent of the mandatories, for what would have been involved was a new and different party and therefore, in effect, something in the nature of novation of the obligation. It is well established in law that a novation which involves the acceptance of a new and different party, needs consent in order to be good as such;—and, moreover, consent unequivocably and unambiguously expressed, or at least evidenced by unequivocal acts or conduct. It is in the light of this requirement that the question of consent must be viewed.

(iii) "Statements of Intention" and their legal effect

53. Given what has been said in the preceding paragraph concerning what would be needed in the present context in order to afford adequate evidence of consent, there is no need here to consider in detail the many so-called statements of intention made on behalf of South Africa and other mandatories in 1945 and 1946, indicative of their general attitude as to the future of their mandates, from which implications have been sought to be drawn in the sense of an acceptance or recognition of a United Nations function in respect of mandates as such—i.e., mandates not converted into trusteeships,—for hardly any of them is free from ambiguity. I therefore agree with Lord McNair's verdict in 1950 (*I.C.J. Reports 1950*, p. 161) that there were "also many statements to the effect that the Union Government will continue to administer the Territory 'in the spirit of the Mandate'. These statements are in the aggregate contradictory and inconsistent;" and, he continued, he did not "find in them adequate evidence that the Union Government has either assented to an implied succession by the United Nations . . . or has entered into a new obligation . . .". I would however go further, and say that the various statements made, not only on behalf of South Africa but on behalf of the other mandatories (see next paragraph), taken broadly in the mass (many of them are given at various places from pp. 616-639 of the 1962 volume of the Court's Reports) show the following common characteristics: *(a)* they are statements of general attitude, insufficient, and not purporting, to convey any definite undertaking; *(b)* if there was any undertaking, it was to continue to *administer* the mandated territories concerned in accordance with the mandates,—and the administration of a mandate is of course a separate thing from reporting *about* that process [31]; and *(c)* they none of them implied any recognition of the existence of a United Nations function relative to mandates, or any undertakings towards that Organization. I shall now consider the three episodes or complexes of episodes that have chiefly been relied on as indicative of South African recognition of accountability to the United Nations but which, in my view, do not justify that conclusion.

[31] There was an inherent ambiguity in all those phrases whereby the mandatories said that they would continue to observe the mandates according to their terms, or to observe all the obligations of the mandates; because so far as the reporting obligation was concerned, this was, under the mandates, an obligation to report to the League Council, still in being up to 18 April 1946. Up to that date therefore, any mandatory was entitled to interpret its declaration in that sense, and after that date to interpret it as being no longer possible of execution on the basis of the mandate itself. What is quite certain is that, at the time, no one, whether mandatory or not, read these declarations as involving an undertaking then and there to report to the Assembly of the United Nations.

(b) *Particular Episodes*

(i) The final League of Nations Resolution of 18 April 1946

54. Features *(a)*, *(b)* and *(c)*, as set out in the preceding paragraph, strongly characterized the Geneva proceedings ending in the final League of Nations Resolution of 18 April 1946[32], on paragraphs 3 and 4 of which such heavy reliance was placed both in the 1950 and 1962 proceedings before the Court, and again now. Its effect has already been considered (paragraphs 41-43 above) in the related but separate context of the attitude of the States concerned on the question "mandates or trusteeships?" The question now is what if any undertakings for mandatories were implied by its paragraph 4 which is the operative one in the present connexion. This classic of ambiguity (text in footnote 32) consists essentially of a *recital* describing a situation. Since it merely "takes note" of something—namely the "expressed intentions of the [mandatories]", it does not of itself impose any obligations, so that the question is what these "expressed intentions" themselves were, and whether they amounted to binding undertakings, and if so to what effect. The statement made on behalf on South Africa is quoted in the next succeeding paragraph, and a summary of the key phrases used by the other mandatories will be found in footnote 2 on page 528 of the 1962 volume of the Court's Reports. Their vague and indeterminate character is immediately apparent [33]. As summed up and described in paragraph 4 of the League resolution of 18 April 1946, the intentions expressed had nothing to do with the acceptance of United Nations supervision. They were, simply, "to administer [the territories] for the well-being and development of the peoples concerned". The further words "in accordance with the obligations contained in the respective mandates" at once involve the ambiguities to which attention has been drawn in paragraph 53 and footnote 31 above. These words *need* mean, and were almost certainly intended by

[32] The full text of this resolution is given in footnote 1 on pp. 538-539 of the 1962 volume of the Court's Reports. It can be seen at a glance that only paragraphs 3 and 4 are relevant in the present context. The terms of paragraph 3 have in effect been cited in paragraph 41 above. Paragraph 4 was as follows:

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

[33] On the question whether, in consequence of this, the mandatories were regarded as having entered into any definite agreement about the mandates, a detail worth noting is that whereas the various arrangements made between the League and the United Nations for the transfer of funds, buildings, archives, library, etc., were all registered under Article 102 of the Charter, nothing was registered in respect of mandates.

the mandatories to specify, no more than the obligations relative to administering "for the well-being and development . . .", etc.,—for, as has already been noticed, reporting and supervision is *about* administration, not administration itself.

55. It is not upon flimsy and dubious foundations of this kind that binding undertakings (especially when dependent on unilateral declarations) can be predicated, more particularly where, as has beeen seen, a novation of an undertaking is involved, needing, in law, unambiguous consent. It is therefore instructive to see what, on this occasion, the "expressed intentions" of South Africa were, as stated by its delegate at Geneva on 9 April 1946 (*League of Nations Official Journal*, Special Supplement, No. 194, pp. 32-33). These were that, pending consideration of the South African desire, on the basis of the expressed wishes of the population, to incorporate SW. Africa in the territory of the Union (as it then was), the latter would in the meantime—

> ". . . continue to administer the territory scrupulously *in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.*
>
> The disappearance of [the] organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with . . . full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory"—(my italics).

For those who enjoy parlour games, an interesting hour could be spent in trying to decide exactly what this statement, equally a classic of ambiguity, amounted to as regards any South African acceptance of *United Nations* supervision,—for that, of course, is the point. The italicized passage clearly excludes the idea,—presaging as it does the continuation of a situation that had already lasted six years, in which no reports had been rendered, because there was no active *League* authority to which they could be rendered. The remainder of the statement, and in particular the phrase "as in no way diminishing its obligations under the mandate", involves precisely those ambiguities and uncertainties to which attention has already been drawn (footnote 31). To me it seems the very prototype of the non-committal, so far as concerns any recognition of accountability

to the United Nations, and I am unable to find in it any indication whatever of such recognition. I realize that on this matter, as on most others my view and the reasoning of the Court are operating on different wavelengths. Seeing in the South African statement a recognition of the existence of a continuing obligation towards the peoples of the mandated territory—the reasoning of the Court then makes the great leap;—*because* there was that degree of recognition there was also, and *therefore* a recognition of accountability to the United Nations. The lack of all rigour in this reasoning is evident. It involves exactly the same ellipses and telescopings of two distinct questions that characterized the reasoning of the Court in 1950, as already discussed in paragraphs 20-22 above. Nobody can have taken this declaration in that sense at the time, because everybody knew that United Nations supervision was to be exercised solely through the trusteeship system, and that there was no obligation to bring mandated territories within that system. This, to me, is one of the most decisive points in the whole case.

(ii) Question of the incorporation of SW. Africa as part of South Africa itself

56. The approach made by South Africa to the United Nations in November 1946 for the incorporation in its own territory of SW. Africa on the basis of the expressed wishes of the inhabitants who had been consulted, constitutes the only episode which can plausibly be represented as a recognition—not indeed of accountability to the United Nations on a specifically mandates basis (nor, as will be seen, was it taken by the Assembly in that sense)—but of the existence, on a political basis, of a United Nations interest in matters having a "colonial" aspect. It was also a convenient way of obtaining a large measure of general international recognition for such an incorporation [34]. This last aspect of the matter—that what was being sought through the United Nations was "international" recognition—had already been mentioned in another part of the statement cited in the preceding paragraph above, made on behalf of South Africa at Geneva earlier in the year, in which it was announced that at the next session of the United Nations Assembly there would be formulated "the case for according South West Africa a status under which it would be *internationally recognized* as an integral part of the Union [of South Africa]"—my italics.

57. This was not the first mention of the matter. The possibility of

[34] This would of course be far from being the first historical example of seeking a *political* recognition of the incorporation of territory without there being any obligation to do so.

incorporation had been foreshadowed in the most explicit terms as far back as 11 May 1945 in the long and detailed statement then made by the representative of South Africa in Committee II/4 of the San Francisco Conference, which there is every reason to believe [35] ended with a remark to the effect that the matter was being mentioned—

> ". . . so that South Africa *may not afterwards be held to have acquiesced in the continuance of the Mandate* or the inclusion of the territory in any form of trusteeship under the new International Organisation"—(my italics).

From this, it was already clear that any definite approach to the United Nation son incorporation, if and when made, would be a political one, on a voluntary basis, not in recognition of accountability.

58. When however the matter was raised in the Fourth Committee of the United Nations Assembly in November 1946 by Field-Marshal Smuts in person, it became clear that the probable reaction of the Committee would be a demand that the territory should be placed under trusteeship. Accordingly Field-Marshal Smuts later made a further statement in the course of which he said that:

> "It would not be possible for the Union Government *as a former mandatory* to submit a trusteeship agreement in conflict with the clearly expressed wishes of the inhabitants. The Assembly should recognize that the implementation of the wishes of the population was the course prescribed by the Charter and dictated by the interests of the inhabitants themselves. If, however, the Assembly did not agree that the clear wishes of the inhabitants should be implemented, the Union Government could take no other course than to abide by the declaration it had made to the last Assembly of the League of Nations to the effect that it would continue to administer the territory as heretofore as an integral part of the Union, and to do so *in the spirit of the principles* laid down in the mandate"—(my italics).

Two things may be noted about this statement: *First* the speaker referred to South Africa as a "former" mandatory. Whether or not it was correct to speak of South Africa as not still being a mandatory is not the point. The point is that such a remark is quite inconsistent with any recognition

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[35] The full text of this statement, which was only given summarily in the San Francisco records, appears in paragraph 4, Chapter VIII, of the South African written pleading in the present case. The text and provenance of the final observation, the inherently probable authenticity of which has never been challenged, appears in footnote 1 on page 9 of that pleading. The matter is also referred to in paragraph (5) on page 533 of the joint dissenting Opinion of 1962.

of accountability in respect of the mandate. *Secondly*, when at the end of this passage, the speaker stated his Government's intention to continue to administer the territory "in the spirit" of the "principles" laid down in the Mandate—(and it would be difficult to find a phrase less recognizatory of obligation)—he did not mention, and was clearly not intending to include reporting of the kind indicated in the Mandate. Instead, he went on to state an intention to report on the non-self-governing territory basis of Article 73 *(e)* of the Charter (the effect of which will be considered in the next succeeding subsection); and what he said was that his Government would "in accordance with" (not, be it noted, Article 6 of the Mandate, but) "Article 73, paragraph *(e)*, of the Charter" transmit reports to the Secretary-General "for information purposes",—this last phrase being the language of Article 73 *(e)* itself. He then concluded by saying that there was—

> "... nothing in the relevant clauses of the Charter, nor was it in the minds of those who drafted these clauses [36], to support the contention that the Union Government could be compelled to enter into a trusteeship agreement even against its own view or those of the people concerned".

And what was the reaction of the Assembly in its ensuing resolution 65 (I)?—was it to demand the submission of reports and the acceptance of supervision under Article 6 of the Mandate? Not at all,—it was to recommend that SW. Africa be placed under *the trusteeship system.* Clearly, no more than the Mandatory was the Assembly contemplating the exercise of any functions in respect of the territory on a mandates basis.

(iii) The Mandatory's offer to furnish Article 73 (e) *type information*

59. In the case of SW. Africa the Mandatory had no intention either of negotiating a trusteeship agreement or of submitting to United Nations supervision of the territory on a mandates basis;—and here again, it is not the ethics of this attitude that constitutes the relevant point, but the evidence it affords of lack of *consent* to any accountability to the United Nations. Nothing could make this—or the absence of all common ground —clearer than the next episode, starting with the statement made on behalf of South Africa in the Fourth Committee of the Assembly, on 27 September 1947, relative to the South African proposal, originally made in November 1946 (see previous paragraph), to transmit information of the same type as was required by Article 73 *(e)* of the Charter in respect of so-called "non-self-governing territories". Such information,

[36] Amongst whom of course was the Field-Marshal himself.

given about colonies, protectorates, etc., *does not imply accountability*, and is not in the formal and technical sense "reporting". The Report of the Fourth Committee on this occasion (dated 27 October 1947) describes the statement of the South African representative as follows:

> "It was the assumption of his Government, he said, that the report [i.e., the information to be transmitted] would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that as the League of Nations had ceased to exist, the right to submit petitions could no longer be exercised, since that right presupposes a jurisdiction which would only exist where there is a right of control and supervision, *and in the view of the Union of South Africa no such jurisdiction was vested in the United Nations with regard to South West Africa*"—(my italics).

What was said of petitions was *a fortiori* applicable in respect of reports of the kind contemplated by Article 6 of the Mandate. The italicized words constituted a *general* denial of United Nations jurisdiction.

60. There were further offers to furnish information on the same basis in the period 1947/1948, and one or two reports were actually transmitted. But all along the line statements were made on behalf of South Africa indicating clearly that this was done voluntarily and without admission of obligation. Thus at a Plenary Meeting of the Assembly on 1 November 1947 the representative of South Africa said that:

> ". . . the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered *on the basis that the United Nations has no supervisory jurisdiction in respect of this territory* they will serve to keep the United Nations informed in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 *(e)* of the Charter"—(my italics).

And in a letter of 31 May 1948 to the Secretary-General an explicit restatement was given of the whole South African position as follows (UN doct., T/175, 3 June 1948, pp. 51-52):

> ". . . the transmission to the United Nations for information on South West Africa, in the form of an annual report or any other form, *is on a voluntary basis and is for purposes of information only. They* [the Government] *have on several occasions made it clear that they recognise no obligation to transmit this information to the United*

Nations, but in view of *the wide-spread interest* in the administration of the Territory, and *in accordance with normal democratic practice*, they are willing and anxious *to make available to the world*[37] such facts and figures as are readily at their disposal . . . The Union Government desire to recall that in offering to submit a report on South West Africa for the information of the United Nations, they did so on the basis of the provisions of Article 73 *(e)* of the Charter. This Article calls for 'statistical and other information of a technical nature' and makes no reference to information on questions of policy. In these circumstances the Union Government do not consider that information on matters of policy, particularly future policy, should be included in a report (or in any supplement to the report) which is intended to be a factual and statistical account of the administration of the Territory over the period of a calendar year. Nevertheless, the Union Government are anxious to be as helpful and as co-operative as possible and have, therefore, on this occasion replied in full to the questions dealing with various aspects of policy. The Union Government do not, however, regard this as creating a precedent. Furthermore, the rendering of replies on policy should not be construed as a commitment as to future policy *or as implying any measure of accountability to the United Nations on the part of the Union Government*. In this connexion the Union Government have noted that their declared intention to administer the Territory in the spirit of the mandate *has been construed in some quarters as implying a measure of international accountability*. This construction the Union Government cannot accept *and they would again recall that the League of Nations at its final session in April 1946, explicitly refrained from transferring its functions in respect of mandates to the United Nations*" [38]—(my italics).

And then again in the Fourth Committee of the Assembly in November 1948 (Official Record of the 76th Meeting, p. 288), it was stated that:

". . . the Union could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended: *still less could the Trusteeship Council assume for itself the power claimed in its resolution, i.e.*, 'to determine whether the Union of South Africa is adequately discharging its responsibilities *under the*

[37] The use of such expressions as "wide-spread interest" and "make available to the world" confirms the view taken in paragraph 56 above as to the basis of the South African approach to the United Nations on the subject of incorporation.

[38] See on this matter paragraph 42 above, and Lord McNair's pronouncement in the same sense two years later, as there quoted.

terms of the mandate . . .' Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African delegation considered that in so doing the Council had exceeded its powers"— (my italics).

Since however the Assembly persisted in dealing with the reports through the Trusteeship Council, they were subsequently discontinued. It is of course evident that the "parties", so to speak, were completely at loggerheads. But no less clear is it *(a)* that the Assembly would agree to nothing, except on a trusteeship basis, and *(b)* that South Africa would agree to nothing that involved recognition of an obligation of accountability to the United Nations. In consequence there was no agreement, no consent.

(c) *Conclusions as to consent*

61. Whatever may be thought of the South African attitude from a wider standpoint than that of law, there can surely be no doubt as to what, *in* law, the character of that attitude was. In the face of the statements above set-out, it is impossible to contend that there was any recognition, or acceptance, of accountability to the United Nations as a *duty* arising for the Mandatory upon the dissolution of the League. There was in fact an express rejection of it. Consequently, in a situation in which, for the reasons given in paragraphs 51 and 52 above, nothing short of positive expressions of recognition or acceptance would have sufficed, there were in fact repeated positive denials and rejections. This being so, all attempts to *imply* it must fail in principle on *a priori* grounds; for implications are valid only in situations of relative indeterminacy where, if there are no very positive indications "for", there are also no very positive ones "against". Where however, as here, there are positive indications "against", mere *implications* "for" cannot prevail. Recognition of accountability could be attributable to South Africa only on the basis of conduct not otherwise explicable. In fact, it was both otherwise explicable, and repeatedly explained.

* * *

62. An important point of international legal order is here involved. If, whenever in situations of this kind a State voluntarily, and for reasons of policy, brings some matter before an international body, it is

thereby to be held to have tacitly admitted an *obligation* to do so (as it has quite erroneously been sought to maintain in connexion with the United Kingdom's reference of the Palestine question to the United Nations in 1948), then there must be an end of all freedom of political action, within the law, and of all confidence between international organizations and their member States.

63. Exactly the same is applicable to attempts to read binding undertakings into the language of what are really only statements of policy, as the declarations made at one time or another by the various mandatories essentially were. Clearly in the formative period of the United Nations and the dissolution of the League, the question of mandates was a matter of general interest. They were bound to be discussed,—the mandatories were bound to make known in a general way what their views and attitudes were. Clearly some conclusion had to be reached about their future. *But equally clearly, if not more so, is the fact that the conclusion reached as to their future was that they ought to be placed under the trusteeship system, and that the United Nations should not have anything to do with them as mandates. In other words United Nations supervision was to be exercised through the trusteeship not the mandates system.* At the same time no legal obligation was created under the Charter for mandatories to convert their mandates into trusteeships. Therefore it is not now legally possible (SW. Africa not having been placed under trusteeship and there having been no legal obligation so to place it) to contend that the United Nations is entitled *none the less* to exercise supervision on a mandates basis. Such a contention constitutes a prime example of a process to which I will not give a name, but which should not form part of any self-respecting legal technique.

6. General conclusion on Section A

64. Since for all these reasons the United Nations as an Organization (including therefore both the General Assembly and the Security Council) never became invested with the powers and functions of the Council of the former League in respect of mandates, in any of the possible ways indicated in paragraph 11 above, I must hold that it was incompetent to revoke South Africa's mandate, irrespective of whether the League Council itself would have had that power. It is nevertheless material to enquire whether the latter did have it,—for if not, then *cadit quaestio* even if the United Nations had inherited. To this part of the subject I now accordingly turn.

SECTION B

EVEN IF THE UNITED NATIONS BECAME INVESTED WITH THE POWERS OF THE FORMER COUNCIL OF THE LEAGUE OF NATIONS, THESE DID NOT INCLUDE ANY POWER OF UNILATERAL REVOCATION OF A MANDATE

1. Lack of competence of the United Nations to exercise any other or greater supervisory powers in respect of mandates than were possessed by the League of Nations

65. On the assumption—or postulate as it really has to be—that, contrary to the conclusion reached in the preceding section (Section A), the United Nations did inherit—or did otherwise become invested with—a supervisory function in respect of those mandates which remained mandates and were not converted into United Nations trusteeships;—it then becomes necessary to enquire what was the nature and scope (or content) of that function, as it was exercised, or exercisable, by the Council of the League of Nations. Such an enquiry is rendered necessary because of an elementary yet fundamental principle of law. In so far as (if at all) the United Nations could legitimately exercise any supervisory powers, these were perforce *derived* powers—powers inherited or taken over from the League Council [39]. They could not therefore exceed those of the Council,—for *derived* powers cannot be other or greater than those they derive from. There could not have been transferred or passed on from the League what the League itself did not have,—for *nemo dare potest quod ipse non habet*, or (the corollary) *nemo accipere potest id quod ipse donator nunquam habuit*. This incontestable legal principle was recognized and applied by the Court in 1950, and was the basis of its finding (*I.C.J. Reports 1950*, at p. 138) that:

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

This finding was specifically affirmed in the later *Voting Procedure* and *Oral Petitions* cases (1955 and 1956), both of which indeed turned on whether the way in which the Assembly was proposing or wanting to interpret and conduct its supervisory role in certain respects, would be

[39] It goes without saying that even if, contrary to the conclusion reached in the previous section, South Africa consented or can be deemed to have consented, to any exercise of supervisory powers by the United Nations, it can never in any circumstances have consented, or be deemed to have consented, to the exercise of *more* extensive powers than those of the League.

consistent with the principle thus enunciated. Furthermore, in the second of these cases the Court gave renewed expression to the principle. Referring to its original (1950) Opinion, it said (*I.C.J. Reports 1956*, at p. 27):

> "In that Opinion the Court . . . made it clear that the obligations of the Mandatory were those which obtained under the Mandates System. Those obligations could not be extended beyond those to which the Mandatory had been subject by virtue of the provisions of Article 22 of the Covenant and of the Mandate for South West Africa under the Mandates System. The Court stated therefore that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System [and that] the degree of supervision should conform as far as possible to the procedure followed by the Council of the League . . ."

66. The correctness of this view has never been challenged, and seems on principle unchallengeable. It follows inevitably therefore that if the League possessed no power of unilateral revocation of a mandate [40] the United Nations could not have become subrogated to any such power. It equally follows on the procedural side—(and here there is an important connexion)—that if, under the mandates system as conducted by the League, the position was that the supervisory body, the League Council, could not bind a mandatory without its consent, then neither could the organs of the United Nations do so, whether it was the General Assembly or the Security Council that was purporting so to act. In short, let the Assembly—or for that matter the Security Council—be deemed to have all the powers it might be thought that either organ has, or should have,—these still could not, in law, be exercised in the field of *mandates* [41] to any other or greater effect than the League Council could have done. (Both organs are of course also subject to *Charter* limitations on their powers which will be considered in main Section C below.)

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[40] The "indefinite" article—"a" not "the" mandate is here employed of set purpose,—for whatever the position was as regards the League's powers of revoking a mandate, it was the same for all mandates, not merely that for SW. Africa. The view that the latter could unilaterally be revoked entails that the various Australian, Belgian, French, Japanese, New Zealand and United Kingdom mandates equally could be.

[41] What the Security Council might be able to do not on a mandates but on a peace-keeping basis is considered separately in paragraphs 110-116 below.

2. The League had no power of unilateral revocation, express or implied

(a) *Presumption against the existence of such a power*

67. The case for deeming League of Nations mandates to have been subject to a power of unilateral revocation by the Council of the League does not rest on any provision of the mandates themselves, or of the League Covenant. (These indeed, as will be seen presently, imply the exact opposite.) The claim is one which, as noted earlier, is and can only be advanced on the assumption of fundamental breaches of the mandate concerned, such as, if the case were one of a private law contract for instance, could justify the other party in treating it as terminated [42]. The claim therefore rests entirely on the contention that, in the case of institutions such as the League mandates were, there must exist an inherent power of revocability in the event of fundamental breach, even if no such power is expressed;—that indeed there is no need to express it. This is in fact the Court's thesis.

* * *

68. In support of this view, comparisons are drawn with the position in regard to private law contracts and ordinary international treaties and agreements, as to which it may be said that fundamental breaches by one party will release the other from its own obligations [43], and thus, in effect, put an end to the treaty or contract. The analogy is however misleading on this particular question, where the contractual situation is different from the institutional,—so that what may be true in the one case

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[42] Note the intentional use of the phrase "in treating it as terminated" and not "in putting an end to it". There is an important conceptual difference. Strictly speaking, all that one party alleging fundamental breaches by the other can do, is to declare that it no longer considers itself bound to continue performing *its own* part of the contract, which it will regard as terminated. But whether the contract *has*, in the objective sense, come to an end, is another matter and does not necessarily follow (certainly not from the unilateral declaration of that party)—or there would be an all too easy way out of inconvenient contracts.

[43] The question at once arises who or what would, in the case of mandates, be the other party, and what would be its obligations from which it could claim release because of the mandatory's breaches? In the case of a mandate what obligations are there other than the mandatory's? How and by whom is the existence of fundamental breaches to be established with the effect that would attach to a judgment (not opinion) of a competent court of law (not a lay political organ)?

cannot simply be translated and applied to the other without inadmissible distortions (see footnotes 42 and 43).

69. There is no doubt a genuine difficulty here, inasmuch as a régime like that of the mandates system seems to have a foot both in the institutional and the contractual field. But it is necessary to adhere to at least a minimum of consistency. If, on the basis of contractual principles, fundamental breaches justify unilateral revocation, then equally is it the case that contractual principles require that a new party to a contract cannot be imposed on an existing one without the latter's consent (novation). Since in the present case one of the alleged fundamental breaches [44] is precisely the evident non-acceptance of this new party, and of any duty of accountability to it (such an acceptance being *ex hypothesi*, on contractual principles, *not* obligatory), a total inconsistency is revealed as lying at the root of the whole Opinion of the Court in one of its most essential aspects.

70. If, in order to escape this dilemma—and it is not the only one [45]—a shift is made into the international institutional field, what is at once apparent is that the entities involved are not private persons or corporate entities, but sovereign States. Where a sovereign State is concerned, and where also it is not merely a question of pronouncing on the legal position, but of ousting that State from an administrative role which it is physically in the exercise of, it is not possible to rely on any theory of implied or inherent powers. It would be necessary that these should have been given concrete expression in whatever are the governing instruments. If it is really desired or intended, in the case of a sovereign State accepting a mission in the nature of a mandate, to make the assignment revocable upon the unilateral pronouncement of another entity, irrespective of the will of the State concerned [46], it would be essential to make express provision for the exercise of such a power.

71. Nor would that be all,—for provision would also need to be made as to how it was to be exercised,—since clearly, *upon* its exercise a host of legal and practical questions would at once arise, requiring speedy solution, and possibly demonstrating the existence of potential problems more serious than those supposed to be solved by the revocation. To

[44] Alleged breaches that have not in any event been properly established—see paragraphs 2-5 at the start of the present Opinion.

[45] For instance, according to ordinary contractual principles, and subject to qualifications not here relevant, the death or extinction of one of the parties to a contract normally puts an end to it and releases the other party from any further obligations except such as have already accrued due but remain undischarged. Applied to mandates this would have meant their termination upon the extinction of the League of Nations, and the discharge from all further obligations of the mandatories, who would have remained in a situation of physical occupation from which they could not in practice have been dislodged.

[46] If it be objected that no State would willingly or knowingly accept such conditions, I can only agree,—but this in fact reinforces and points up the whole of my argument. The obvious absurdity of the whole idea at once emerges.

leave such matters in the air—to depend on the chance operation of unexpressed principles or rules—is an irresponsible course, and not the way things are done. If the possibility of changes of mandatory had really been contemplated, the normal method would have been to provide for a review after an initial period of years, or at stated intervals,—and even this would not imply any general or unconstrained power of revocation, but rather an ordered process of periodical re-examination in which the mandatory itself would certainly participate.

* * *

72. In consequence, within a jurisprudential system involving sovereign independent States and the major international organizations whose membership they make up, there must be a natural presumption *against* the existence of any such drastic thing as a power of unilaterally displacing a State from a position or status which it holds [47]. No implication based on supposed inherency of right—but only concrete expression in some form—could suffice to overcome this presumption,—for what is in question here is not a simple finding that international obligations are considered to have been infringed, but something going much further and involving action—or purported action—of an executive character on the objective plane. *It is as if the King of Ruritania were declared not only to be in breach of Ruritania's international obligations but also, on that account, be no longer King of Ruritania.* The analogy is not claimed to be exact, but it will serve to make the point,—namely that infringements of a mandate might cause the mandatory concerned to be in breach of its international obligations but could not cause it thereby to cease to be the mandatory or become liable to be deposed as such, at the fiat of some other authority, *unless* the governing instruments so provided or clearly implied. In the present case they not only do not do so but, as will be seen, indicate the contrary.

(b) *Positive indications negativing the notion of revocability*:—
(1) based on the terms of the relevant instruments and certain applicable principles of interpretation

(i) Essentially non-peremptory character of the mandates system

73. This point will be more fully dealt with in connexion with the basic voting rule of the League which, with certain exceptions not applicable

[47] It is not that sovereign States are above the law, but that the law itself takes account of the fact that they are not private citizens or private law entities.

in the case of mandates, was that of unanimity including the vote of the interested party, and therefore of the mandatory concerned. It is mentioned here by way of introduction as being an essential piece of background knowledge,—for since it was the case that mandatories could not in the last resort become bound by the decisions of the League Council unless they agreed with them, or at least tacitly acquiesced in, or did not oppose them [48], the system was necessarily non-peremptory in character;—and in relation to such a system there is obviously an element of total unreality in speaking of a power of unilateral revocation,—for any decision to revoke would itself, in order to be valid, have required the concurrence of the mandatory [49]. It could not therefore have been unilateral. Any other view involves an inherent logical contradiction.

(ii) Limited scope of the so-called supervisory function as exercised by the League Council

74. As was mentioned early in this Opinion (paragraph 14 above), no supervisory role in respect of mandates was, *in terms*, conferred upon the League Council, or any other organ of the League, either by the relevant mandate itself or by Article 22 of the League Covenant, which established the mandates system as a régime, and indicated its character in considerable detail—but not in this particular respect. The supervisory role or function was left to emerge entirely—or virtually so—as a kind of deduction from, or corollary of the obligation of the mandatory concerned to furnish annual reports to the Council. It is therefore to the character of *that* obligation to which regard must be had in order to establish what kind and scope of supervision could legitimately be inferred as flowing from it.

Applicable principle of interpretation

Where a right or power has not been the subject of a specific grant, but exists only as the corollary or counterpart of a corres-

[48] In fact, strictly speaking, there could not, without the concurrence of the mandatory, *be* a decision as such: there could only be something in the nature of a (non-binding) recommendation. But the mandatory could refrain from exercising its vote.

[49] The principle *nemo iudex esse potest in sua propria causa* clearly cannot apply so as to defeat the voting rules laid down in the constitutions of international organizations;—or else, to take an obvious example, the five permanent Members of the United Nations Security Council would be unable to exercise their "veto" in regard to any matter involving their own interests;—whereas one of the objects of giving them the veto was, precisely (apart from the specific exception contained in Article 27, paragraph 3, of the Charter, as also the analogous one in the League Covenant—see paragraph 80 below), to enable them to protect those interests.

ponding obligation, this right or power is necessarily defined by the nature of the obligation in question, and limited in its scope to what is required to give due effect to such correlation.

75. All the various mandates (with one exception not here pertinent [50], and subject to minor differences of language) dealt with the reporting obligation in the same way. Citing that for SW. Africa, it was provided (Article 6) that the Mandatory was to render to the Council of the League "an annual report to the satisfaction of the Council [51] containing full information with regard to the territory and indicating the measures taken to carry out the obligations assumed . . .". This was a reflection and expansion of paragraph 7 of Article 22 of the Covenant, which provided for an annual report to the Council "in reference to the territory committed to [the Mandatory's] charge". The only other relevant clause was paragraph 9 of Article 22, which provided for the setting up of what became the Permanent Mandates 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". Later, by special arrangement, written petitions from the inhabitants of the mandated territories, forwarded through the mandatories, could also be received and examined.

* * *

76. It is clear therefore that the sole real *specific* function of the Council was (via the Permanent Mandates Commission) to "receive and examine" these reports and petitions. The Council could require that the reports should be to its satisfaction, namely "contain full information" about the mandated territory, and "indicate the measures taken" by the mandatory, etc. It would also be a natural corollary that the Council could comment on these reports, indicate to the mandatory what measures it thought wrong or inadequate, suggest other measures, etc.,—but in no case with any binding effect unless the mandatory agreed. The Council could exhort, seek to persuade and even importune; but it could not

[50] That of Iraq, which was differently handled—see joint dissenting Opinion, *I.C.J. Reports 1962*, p. 498, n. 1.

[51] The phrase "to the satisfaction of the Council" cannot have related to the measures reported on, for the mandatory only had to render one annual report, and could not know, at the reporting stage, what view the Council would take as to those measures. Nor did the mandatory subsequently revise its *report*, though it might revise its measures. The object of the report was, precisely, to inform the Council about these;—and, considered *as* a piece of reporting, the report was necessarily satisfactory if it contained full and accurate information as to what was being done, so that the Council, having thus been put in possession of all the facts, would, on the basis of the report, be able to indicate to the mandatory whether it approved of the measures concerned or what other or additional measures it advocated.

require or compel,—and it is not possible, from an obligation which, on its language, is no more than an obligation to render reports of a specified kind, to derive a further and quite different obligation to act in accordance with the wishes of the authority reported to. This would need to be separately provided for, and it is quite certain that none of the various mandatories ever understood the reporting obligation in any such sense as that, and equally certain that they never would have undertaken it if they had.

77. In other words, the supervisory function, as it was contemplated for League purposes, was really a very limited one—a view the principle of which was endorsed by Sir Hersch Lauterpacht in the *Voting Procedure* case when, speaking of United Nations trusteeships (but of course the same thing applies *a fortiori* to the case of mandates) he said this (*I.C.J. Reports 1955*, p. 116):

> "... *there is no legal obligation, on the part of the Administering Authority, to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure.* The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, *but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council*"—(my italics).

* * *

78. Such then was the real and quite limited nature of the supervisory function to which the General Assembly became subrogated, if it became subrogated to any function at all in respect of mandates. It was, as the term implies, strictly a right of "supervision"; it was not a right of *control*—it did not comprise any executive power;—and therefore clearly could not have comprised a power of so essentially executive a character as that of revocation. Between a function of supervision (but not of control) and a power to *revoke* a mandate and, so to speak, evict the mandatory—and to do this unilaterally without the latter's consent—there exists a gulf so wide as to be unbridgeable. It would involve a power different not only (and greatly) in degree, but in kind. This is a consideration which, in the absence of express provision for revocation, makes it impossible to imply such a power,—and indeed excludes the whole notion of it, as being something that could not have fallen within the League Council's very limited supervisory role, and accordingly cannot fall within that of the United Nations Assembly—assuming the latter to have any supervisory role.

(iii) The League Council's voting rule

79. The views just expressed are more than confirmed by the League Council's voting rule, as embodied in paragraph 5 of Article 4 of the Covenant in combination with paragraph 1 of Article 5 (texts in footnote 52). The effect, in the case of all matters involving mandates, was to enable the mandatories, if not already members of the Council (as several invariably were), to attend if they wished, and to exercise a vote which might operate as a veto. No exception was provided for the possibility of a revocation, and no such exception can be implied from the fact that mandatories did not always attend the Council when invited to do so, or might abstain on the vote, or that certain devices might be employed on occasion to avoid direct confrontations between them and the other members of the Council. The fact that there may be no recorded case of the actual use of this veto does not alter the legal position,—it merely shows how well the system worked *in the hands of reasonable people*. None of this however can alter the fact that mandatories always had the right to attend and exercise their votes. The existence of this voting situation was confirmed by the Court not only in its Judgment of 1966 *but also in that of 1962* (*I.C.J. Reports 1966*, pp. 44-45; and *I.C.J. Reports 1962*, pp. 336-337) [53]. It is obvious that a situation in which the League Council could not impose its views on the mandatories without their consent, is with difficulty reconcilable with one in which it

[52] *Article 4, paragraph 5*: "Any Member of the League not represented on the Council shall be invited to send a *Representative to sit as a member* [italics mine] at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League."

Article 5, paragraph 1: "*Except where otherwise expressly provided* in this Covenant . . . decisions at any meeting of the . . . Council shall require the agreement of all the Members of the League *represented at the meeting*"—(italics mine).

[53] e.g. (pp. 336-337):

> ". . . approval meant the unanimous agreement of all the representatives [at the Council meeting] including that of the Mandatory who, under Article 4, paragraph 5, of the Covenant, was entitled to send a representative to such a meeting to take part in the discussion and to vote".

And again (p. 337):

> "Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory."

It may seem surprising at first sight that the Court, in its 1962 composition, was so ready to admit, and even to stress, the existence of this situation. The explanation is that it was basing itself in the absence of effective "administrative supervision" in the League system as one ground for postulating the existence of "judicial supervision" in the form of a right, on the part of any Member of the League dissatisfied with the conduct of a mandate, to have recourse to the former Permanant Court and, since then, to the International Court of Justice as set up under the United Nations Charter. It follows that although the present (1971) Opinion of the Court is wholly in line with the type of *conclusion* reached by the Court in 1962, it is wholly at variance with the 1962 *reasoning* just described; for that reasoning must, in logic, lead to the result indicated above at the end of paragraph 79.

could unilaterally revoke their mandates without their consent;—and therefore, *a fortiori*, with the idea that the United Nations possessed such a power.

Applicable Principle of Interpretation

> Where a provision [such as the League Council's voting rule] is so worded that it can only have one effect, any intended exceptions, in order to be operative, must be stated in terms.

80. This principle of interpretation is, as it happens, well illustrated, and the view expressed in the preceding paragraph is given the character of a virtual certainty, by the fact that (though not in the sphere of mandates) the League Covenant did specifically provide for certain exceptions to the basic League unanimity rule,—namely, in particular under paragraphs 4, 6, 7 and 10 of Article 15, and paragraph 4 of Article 16, dealing with matters of peace-keeping [54]. This serves to show that those who framed the Covenant fully realized that there were some situations in which to admit the vote of the interested party would be self-defeating —and these they provided for. They do not seem to have thought so in the case of mandates, nor was such a suggestion ever made in the course

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[54] It has been contended that the power given to the League Council by paragraph 4 of Article 16 of the Covenant to expel a Covenant-breaking member State (though in my opinion relating only to the *peace-keeping* undertakings of the Covenant—see paragraph 1 of this same Article 16) afforded a way by which a mandate could be revoked. Since, according to the express terms of paragraph 4 of Article 16, the concurring vote of the expelled State was not requisite for an expulsion order, a mandatory in breach of its obligations could first be expelled, and then, because it had ceased to be a Member of the League, a decision to revoke its mandate could be taken without it.

This ingenious contention however (about which there may be factual doubts not worth troubling about here) misses the real point;—for if it would not have been possible to get rid of a mandatory without going to these elaborate lengths, what better demonstration could there be that revocability, whether on a basis of inherency or otherwise, simply did not exist within the four corners of the Covenant or the mandates, in respect of any mandatory in the normal situation of still being a Member of the League? That a mandatory might lose its rights if it ceased to be a Member could in practice act as a deterrent, but has no bearing on the juridical issue of what its rights and liabilities were *as* a Member.

Exactly the same principle applies in regard to another contention based on the circumstance that, under Article 26, the Covenant could be *amended* (though only by a vote that had to include the unanimous vote of all the members of the League Council). True, the Covenant could thus be amended;—but in fact it was *not* amended: therefore it is the *un*amended Covenant that governs. It is difficult to know how to deal with this type of argument which, juridically, cannot be taken seriously, except as a clutching at straws.

of the League's dealings with mandates. It can only be concluded that terminations or changes of administration were never contemplated, except on a basis of agreement.

(iv) Contemporaneous consideration and rejection of the idea of revocability

81. Nor was it in any way a question of a mere oversight. Earlier proposals for a mandates system, in particular as put forward by President Wilson on behalf of the United States, did contain provision for the replacement of mandatories, or for the substitution of another mandatory,—and these things (contrary to what is implied in the Opinion of the Court) could of course only be done by revoking (or they would amount to a revocation of) the original mandate. Even the possibility of breaches was not overlooked, for the Wilson proposals also provided, as is correctly stated in the Opinion of the Court, for a "right to appeal to the League for the redress or correction of any breach of the mandate". There can however be no point in following the Opinion of the Court into a debate as to the precise period and the precise context in which the idea of revocability was discussed,—because what is beyond doubt is that, whether on the basis of President Wilson's proposal, or of some other proposal, it *was* discussed. The proof of this is something of which the Court's Opinion makes no mention, namely that objections were entertained to the notion of revocability by all the eventual holders of "C" mandates, and by the representatives of governments destined to hold most of the "A" and "B" mandates—in particular by M. Simon on behalf of France and Mr. Balfour (as he then was) on behalf of Great Britain, both of whom pointed out the difficulties, economic and other, that would arise if mandatories did not have complete security of tenure [55]. The idea was accordingly not proceeded with, and the final text of the mandates, and of Article 22 of the Covenant, contained no mention of it. This makes it quite impossible in law to infer that there nevertheless remained some sort of unexpressed intention that a right of revocation should exist, for this would lead to the curious legal proposition that it makes no difference whether a thing is expressed or not. Yet the classic instance of the creation of an irrebuttable presumption

[55] At the meetings of the Council of Ten on 24-28 January 1919, and subsequently. See *Foreign Relations of the United States*: *The Paris Peace Conference*, Vol. III, pp. 747-768. It was Mr. Balfour who pointed out (pp. 763-764) that although plenty of consideration had been given to the League aspect of the matter, very little had been given to the position of the mandatories, and that the system could only work if the latter had security of tenure. M. Simon pointed out (p. 761) that mandatories would have little inducement to develop the mandated territories if their future was uncertain.

in favour of a given intention is, precisely, where a different course has been proposed but not followed. The motives involved are juridically quite irrelevant, but were in this case clear [56].

Applicable Principle of Interpretation

Where a particular proposal has been considered but rejected, for whatever reason, it is not possible to interpret the instrument or juridical situation to which the proposal related as if the latter had in fact been adopted.

82. The episode described in the preceding paragraph directly illustrates and confirms the view expressed in paragraphs 70-72 above. When Statesmen such as President Wilson thought of making mandates revocable (which could only be in a context of possible breaches) they were not content to rely on any inherent principle of revocability but made a definite proposal which, had it been adopted, would have figured as an article in the eventual governing instrument, or instruments. Since however the idea met with specific objections, it was not proceeded with and does not so figure. Therefore to treat the situation as being exactly the same as if it nevertheless did, is inadmissible and contrary to the stability and objectivity of the international legal order. Again, the process of having it both ways is evident.

(v) The "integral portion" clause

83. Article 22 of the League Covenant drew a clear distinction between the "C" mandated territories and the other ("A" and "B") territories, inasmuch as in its paragraph 6 it described the former as being territories that could "be best administered under the laws of the Mandatory as integral portions of its territory",—and a clause to that effect figured

[56] For sheer audacity, it would be hard to equal the attempts made in the course of the present proceedings to represent M. Simon's statement to the effect that every mandate would be revocable and there could be no guarantee of its continuance (which of course *would* have been the case on the basis of the *earlier* idea which M. Simon was *contesting*), as affording evidence of an intention that mandates should be revocable; and that this was only not proceeded with because of a desire to be "tactful" towards the mandatories,—although it is perfectly clear on the face of the record that M. Simon (and Mr. Balfour) were *objecting* to the idea of revocability,—not on grounds of its want of tact, but for economic and other reasons of a highly concrete character,—i.e., France and Great Britain, no less than the "C" mandatories, were not prepared to accept mandates on such a basis.

in the "C" mandates accordingly (text in footnote 57). This distinction was not, however, fully maintained; for a similar clause eventually appeared in the "B" mandates as well,—though without warrant for this in the Covenant. But this does not invalidate the point to be made because, as has been seen in the previous sub-section (paragraph 81), the notion of revocability was as inacceptable to the "B" as to the "C" mandatories. The point involved is that the "integral portion" clause came very close in its wording to the language of incorporation—indeed it only just missed it. It did not amount to that of course, for annexation or cession in sovereignty of the mandated territory was something which it was one of the aims of the mandates system to avoid. But this clause did create a situation that was utterly irreconcilable with unilateral *revocability*,—with the idea that at some future date the existing administrative and legal integrations, and applicable laws of the mandatory concerned, could be displaced by the handing over of the territory to another mandatory, to be then administered as an integral portion of *its* territory and subjected to another set of laws;—and of course this process could in theory be repeated indefinitely, if the revocability in principle of mandates once came to be admitted.

84. In consequence, although the mandates did not contain any provision affirmatively ruling out revocability, the "integral portion" clause in the "B" and "C" mandates had in practice much the same effect. Significantly, no such clause figured in any of the "A" mandates which were, from the start (paragraph 4 of Article 22 of the Covenant), regarded as relating to territories whose "existence as independent nations can be provisionally recognized". Naturally the insertion of the "integral portion" clause in the "B" and "C" mandates did not in any way preclude the eventual attainment of self-government or independence by the territories concerned, as indeed happened with most of them some forty years later,—*with the consent of the mandatory concerned*; but that is another matter. What it did preclude was any interim change of régime *without* the consent of the mandatory.

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[57] In the Mandate for SW. Africa that provision read as follows:

> "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require."

The phrase "subject to the present Mandate" of course qualifies and describes the word "territory".

(c) *Positive contra-indications:—(2) based on the circumstances prevailing when the mandates system was established*

85. As is well known, the mandates system represented a compromise between, on the one hand, President Wilson's desire to place all ex-enemy territory outside Europe or Asia Minor (and even some *in* Europe) under direct League of Nations administration,—and, on the other hand, the desire of some of the Allied nations (more particularly as regards the eventual "C" mandates) to obtain a cession to themselves of these territories, which their forces had overrun and occupied during the war [58]. The factor of "geographical contiguity to the territory of the Mandatory", specifically mentioned in paragraph 6 of Article 22 of the Covenant, was of course especially (indeed uniquely) applicable to the case of SW. Africa, and had unquestionably been introduced with that case in mind. The compromise just referred to was accepted only with difficulty by some of the mandatories and, in the case of the "C" mandates only after assurances that the mandates would give them ownership in all but name [59]. Whether this attitude was unethical according to present-day standards (it certainly was not so then) is juridically beside the point. It clearly indicates what the *intentions* of the parties were, and upon what basis the "C" mandates were accepted. This does not of course mean that the mandatories obtained sovereignty. But it does mean that they could never, in the case of these territories contiguous to or very near their own [60], have been willing to accept a system according to which, at the will of the Council of the League, they might at some future date find themselves displaced in favour of another entity—possibly a hostile or unfriendly one—(as is indeed precisely the intention now). No sovereign State at that time—or indeed at any other time—would have accepted the administration of a territory on such terms. To the mandatories, their right of veto in the Council was an essential condition of their acceptance of this compromise,—and that they viewed it as extending to any question involving a possible change in the identity of the mandatory is beyond all possible doubt. Here once more is a consideration that completely negatives the idea of unilateral revocability.

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[58] Such occupation, being a war-time one, was not in the nature of annexation, and its ultimate outcome had in any case to await the eventual peace settlement.

[59] See Mr. Lloyd George's statement to the Prime Minister of Australia, and the question put by Mr. Hughes of Canada, as given by Slonim in *Canadian Yearbook of International Law*, Vol. VI, p. 135, citing Scott, "Australia During the War" in *The Official History of Australia in the War of 1914-18*, XI, p. 784.

[60] On the geographical question, see the very forthright remarks made about SW. Africa by Mr. Lloyd George to President Wilson as recorded in the former's *The Truth About the Peace Treaties*, Vol. I, pp. 114 *et seq* and 190-191.

3. General conclusion

86. Taking these various factors together, as they have been stated in the preceding paragraphs, the conclusion must be that no presumptions or unexpressed implications of revocability are applicable in the present case, and that in any event they would be overwhelmingly negatived by the strongest possible contra-indications.

87. *Test of this conclusion*—a good test of this conclusion is to enquire what happened as regards those former mandated territories that were eventually placed under the United Nations trusteeship system. Here was an opportunity for the Assembly to introduce an express power of unilateral revocation into the various trusteeship agreements entered into under Article 79 of the Charter. This however was not done, for one very simple reason, namely that not a single administering authority, in respect of any single trusteeship, would have been prepared to agree to the inclusion of such a power—any more than, as a mandatory, it had been prepared to agree to it in the time of the League. The point involved is of exactly the same order (though in a different but related context [61]) as that to which attention was drawn in paragraphs 93-95 of the 1966 Judgment of the Court [61], where is was stated (*I.C.J. Reports 1966*, p. 49) that there was *one* test that could be applied in order to ascertain what had really been intended, namely,

> ". . . by enquiring what the States who were members of the League when the mandates system was instituted did when, as Members of the United Nations, they joined in setting up the trusteeship system that was to replace the mandates system. In effect . . . they did exactly the same as had been done before . . .".

And so it was over revocation. No more than before was any provision for it made. Is it really to ascribe this to a belief that it was not necessary because all international mandates and trusts were inherently subject to unilateral revocation, irrespective of the consent of the administering authority?—or would it be more reasonable to suppose that it was because no such thing was intended? If no such thing was intended in the case of the *trust* territories (all of them formerly mandated territories), this was

[61] The 1966 Judgment of the Court found that the compulsory adjudication articles of the mandates only applied to disputes concerning clauses about the economic and other *individual* interests of members of the League, and not to clauses concerning the conduct of the mandates themselves, which was a matter vested collectively in the League as an entity. This view was confirmed by the fact that, in the trusteeship agreements relating to former mandated territories, a compulsory adjudication article figured only in those trusteeships which included clauses of the former kind, but not in those which were confined to the latter type of clause.

because no such thing had been intended, or had ever been instituted, in the case of the mandated territories themselves, *as mandates*. The former mandatories were simply perpetuating in this respect the same system as before *(and the Assembly tacitly agreed to this under the various trusteeship agreements)*. This previous system of course applied, and continues to apply, to the mandated territory of SW. Africa.

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88. Since the conclusion reached is that League of Nations mandates would not have been subject to unilateral revocation by the Council of the League or—what comes to the same thing—that the concurrence of the mandatory concerned would have been required for any change of mandatory, or for the termination of the mandate on a basis of self-government or independence;—and since the United Nations cannot have any greater powers in the matter than had the League, it follows that the Assembly can have had no competence to revoke South Africa's mandate, even if it had become subrogated to the League Council's supervisory role—for that role did not comprise any power of unilateral revocation.

* * *

89. There are however other reasons, resulting from the United Nations Charter itself, why the organs of the United Nations had no competence to revoke the Mandate, whether or not they would otherwise have had it; and these will now be considered in the next main section (Section C).

SECTION C

LIMITATIONS ON THE COMPETENCE AND POWERS OF THE ORGANS OF THE UNITED NATIONS UNDER THE CHARTER

90. In the two preceding main sections it has been held, *first* (Section A) that the United Nations as an Organization never became invested with any supervisory function in respect of mandates not voluntarily converted into trusteeships, and never became subrogated to the sphere of competence of the former League of Nations in respect of mandates; and *secondly* (Section B) that since in any event that competence did not include any power of unilateral revocation of a mandate, or of terminating it without the consent of the mandatory concerned, the United Nations would equally have had no competence to exercise such a power even if it had,

in principle, become subrogated to the role of the League in respect of mandates. But in addition to the limitations thus arising, both from general rules of law and from the provisions of the relevant governing instruments, there is also the question of the limitations imposed upon the competence and sphere of authority of the organs of the United Nations by the constitution of the latter, as embodied in its Charter. Since these organs (in the present context the General Assembly and the Security Council) are the creations of the Charter, they are necessarily subject to such limitations, and can prima facie, take valid action only upon that basis.

1. Competence and Powers of the General Assembly under the Charter

91. So far as the Assembly is concerned, there arises at the outset an important preliminary question, namely whether it was competent to act as (in effect) a court of law to pronounce, as judge in its own cause, on charges in respect of which it was itself the complainant. In my opinion it was not; and this suffices in itself to render Resolution 2145, by which the Assembly purported to revoke the Mandate for SW. Africa, invalid and inoperative. However, in order not to break the thread of the present argument, I deal with the matter in the first section of the Annex to this Opinion.

(i) The Assembly lacks any general competence to take action of an executive character

92. In contrast with the former League of Nations, in which both main bodies, except in certain specified cases, acted by unanimity, the basic structure adopted in the drafting of the United Nations Charter consisted in the establishment of a careful balance between a small organ—the Security Council, acting within a comparatively limited field, but able, in that field, to take binding decisions for certain purposes;—and a larger organ, the General Assembly, with a wide field of competence, but in general, only empowered to discuss and recommend;—this distinction being fundamental. The powers of the Security Council will be considered at a later stage. As to the Assembly, the list appended below in footnote 62 indicates the general character of what it was empowered to do. From

[62] The list shows that the Assembly is either limited to making recommendations, or that where it can do more, it is as a result of a specific power conferred by the express terms of some provision of the Charter. In other words the Assembly has no inherent or residual power to do more than recommend.

(a) The recommendatory functions are described as follows:—

[The General Assembly]
Article 10: "may discuss . . . and . . . make recommendations";
Article 11, paragraph 1: "may consider . . . and . . . make recommendations";

what this list reveals (seen against the whole conceptual background of the Charter), there arises an irrebuttable presumption that except in the few cases (see section *(d)* of the list) in which executive or operative powers are specifically conferred on the Assembly, it does not, so far as the Charter is concerned, have them. In consequence, anything else it does outside those specific powers, whatever it may be and however the relevant resolution is worded, *can* only operate as a recommendation. It should hardly be necessary to point out the fallacy of an argument which would attribute to the Assembly a residual power to take executive action at large, because it has a *specific* power so to do under certain particular articles (4, 5, 6 and 17). On the contrary, the correct inference is the reverse one—that where no such power has been specifically given, it does not exist.

93. It follows ineluctably from the above, that the Assembly has no *implied* powers except such as are mentioned in *(e)* of footnote 62. *All* its powers, whether they be executive or only recommendatory, are precisely formulated in the Charter and there is no residuum. Naturally any organ must be deemed to have the powers necessary to enable it to perform the specific functions it is invested with. This is what the Court had in mind when, in the *Injuries to United Nations Servants* (Count Bernadotte) case (*I.C.J. Reports 1949*, p. 182), it said that the United Nations:

Article 11, paragraph 2: "may discuss . . . and . . . make recommendations";
Article 11, paragraph 3: "may call . . . attention . . . to";
Article 12, paragraph 1: "shall not make any recommendation . . . unless [so requested]";
Article 13: "shall initiate studies and make recommendations";
Article 14: "may recommend measures";
Article 15: "shall receive and consider [reports]";
Article 16: "shall perform such functions . . . as are assigned to it [by Chapters XII and XIII of the Charter]";
Article 105, paragraph 3: "may make recommendations".

(b) The peace-keeping functions conferred upon the Assembly by Article 35 are, by its third paragraph, specifically stated to be "subject to the provisions of Articles 11 and 12" (as to which, see above).

(c) As regards Chapters XII and XIII of the Charter (trusteeships), the only provisions which refer to the Assembly are:

Article 85, which (without any indication of what the functions in question are) provides that the non-strategic area functions of the United Nations "with regard to *trusteeship agreements*" (italics added) "including the approval of the terms of" such agreements, "shall be exercised by the . . . Assembly".

Article 87, under which the Assembly may "consider reports" ("submitted by the administering authority"); "accept petitions and examine them" ("in consultation with [that] authority"); "provide for periodic visits" to trust

". . . must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".

This is acceptable if it is read as being related and confined to existing and specified duties; but it would be quite another matter, by a process of implication, to seek to bring about an *extension* of functions, such as would result for the Assembly if it were deemed (outside of Articles 4, 5, 6 and 17) to have a non-specified power, not only to discuss and recommend, but to take executive action, and to bind.

94. In the same way, whereas the practice of an organization, or of a particular organ of it, can modify the manner of exercise of one of its functions (as for instance in the case of the veto in the Security Council which is not deemed to be involved by a mere abstention), such practice cannot, in principle, modify or add to the function itself. Without in any absolute sense denying that, through a sufficiently steady and long-continued course of conduct, a new tacit *agreement* may arise having a modificatory effect, the presumption is against it,—especially in the case of an organization whose constituent instrument provides for its own amendment, and prescribes with some particularity what the means of effecting this are to be. There is a close analogy here with the principle enunciated by the Court in the *North Sea Continental Shelf* case (*I.C.J. Reports 1969*, p. 25) that when a convention has in terms provided for a

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territories ("at times agreed upon with the [same] authority"); and "take these and other actions *in conformity with the terms of the trusteeship agreements*" (italics added).

None of this invests the Assembly with any binding or executive powers except in so far as might specifically be conferred upon it by the express terms of the trusteeship agreements. These did not in fact any of them do so (see footnote 64 below).

(d) In the result, the only provisions of the Charter which confer executive or quasi-executive powers on the Assembly are:

Articles 4, 5 and 6, which enable the Assembly to admit a new Member, or suspend or expel an existing one,—in each case only upon the recommendation of the Security Council; and *Article 17*, under paragraph 1 of which the Assembly is to "consider and approve" the budget of the Organization, with the corollary (paragraph 2) that the expenses of the Organization are to be borne by the Members "as apportioned by the Assembly". Under paragraph 3, the Assembly is to "consider and approve" financial arrangements with the specialized agencies, but is only to "examine" their budgets "with a view to making recommendations" to them.

(e) The Assembly naturally has those purely domestic, internal, and procedural executive powers without which such a body could not function, e.g., to elect its own officers; fix the dates and times of its meetings; determine its agenda; appoint standing committees and *ad hoc* ones; establish staff regulations; decide to hold a diplomatic conference under United Nations auspices, etc., etc.

particular method whereby some process is to be carried out (in that case it was the method of becoming bound by the convention), it was "not lightly to be presumed that", although this method had not been followed, the same result had "nevertheless somehow [been achieved] in another way"—a principle which, had it been applied by the Court in the present case [63], would have led to a totally different outcome, as can be seen from Sections A and B above.

95. Translating this into the particular field of mandates, it is clear that, just as the Assembly would have no power to make a grant of sovereign independence to a non-self-governing territory under Articles 73 and 74 of the Charter, nor to terminate a trusteeship without the consent of the administering authority (see relevant clauses of the various trusteeship agreements made under Article 79 of the Charter [64]),—so equally, given the actual language of the Charter, does the Assembly have no power to evict a mandatory. Any resolution of the Assembly purporting to do that could therefore only have the status of, and operate as, a non-binding recommendation. The power given to the Assembly by Articles 5 and 6 of the Charter to suspend or expel a member State (upon the recommendation of the Security Council) would of course enable it to suspend or expel a mandatory *from its membership of the United Nations*; but this cannot be extended on a sort of analogical basis to the quite different act of purporting to revoke the mandatory's mandate.

* * *

96. From all of this, only one conclusion is possible, namely that so far as the terms of the Charter itself are concerned, *the Assembly has no power to terminate any kind of administration over any kind of territory.*

* * *

97. It may however be contended that the matter does not end there, for it may be possible for powers other or greater than its normal ones to be conferred upon an international organ *aliunde* or *ab extra*, for some particular purpose—e.g., under a treaty,—and if so, why should it not

[63] This affords an excellent illustration (and many more could be given) of the fact that, owing to the constant changes in the composition of the Court, due to the system of triennial elections created by its Statute, the Court does not always adhere to its own jurisprudence.

[64] The various trusteeship agreements deal differently with the question of the termination, or possible termination of the trust, but the effect is that in no case does the Assembly possess any unilateral power in the matter. If therefore no trusteeship can be terminated without the consent, given in one form or another, of the administering powers, why should it be so unthinkable that a mandate should not be terminable without the consent of the mandatory?

exercise them? This contention must now be considered.

(ii) The Assembly can only exercise powers conferred upon it or derived aliunde *or* ab extra *provided it keeps within the limits of its constitutional role under the structure of the Charter*

98. The question here is whether it is legally possible for a body such as the Assembly, in the purported exercise of what may conveniently be called "extra-mural" powers, to act in a manner in which, in the *intra*-mural exercise of its normal functions, it would be precluded by its constitution from doing. To put the matter in its most graphic form, suppose for instance a group of member States of the United Nations—in a particular region perhaps—entered into a treaty under which they conferred on the Assembly, in relation to themselves and for that region, exactly those peace-keeping powers which, under the Charter, the Security Council is empowered to take as regards the member States of the United Nations collectively. Could it then validly be argued that although it would be *ultra vires* for the Assembly so to act under the *Charter*, if Charter action were involved, nevertheless it could in this particular case do so because it had acquired, *aliunde*, the necessary power vis-à-vis the particular States members of the regional group concerned, by reason of the treaty concluded between them investing the Assembly with such power? It is in fact approximately upon the basis of a theory such as this one, that those who (to their credit) feel some difficulty in attributing executive powers to the Assembly, outside those specified in Articles 4, 5, 6 and 17 of the Charter, rely in contending that, although under the Charter the Assembly could not do more than discuss and recommend in the field of mandates, yet it could go further than this if it had derived from the League of Nations the power to do so.

99. It should be realized that the question asked in the preceding paragraph is not merely an academic one: it is closely related to situations that have actually arisen in the history of the United Nations. There have been times when the majority of the member States have been dissatisfied with the functioning of the Security Council, whose action had become paralyzed owing to the attitude of one or more of the Permanent Members. In these circumstances recourse was had to the Assembly, which adopted resolutions containing recommendations that were not, indeed, binding but which could be, and were by most of the States concerned, regarded as authorizing them to adopt courses they might not otherwise have felt justified in following. If such situations were to arise again and continue persistently, it could be but a step from that to attempts to invest the Assembly with a measure of executive power by the process already described, or something analogous to it.

* * *

100. It so happens that the principle of the question under discussion arose in the *Voting Procedure* case, and was dealt with both by the Court and by three individual judges in a sense adverse to the contention now being considered. It was Sir Hersch Lauterpacht who gave the most direct general negative; and though he was speaking with reference to the question of the voting rule, the principle involved was exactly the same (*I.C.J. Reports 1955*, at p. 109):

> "... the ... Assembly cannot act in that way. It cannot override a seemingly mandatory provision of the Charter *by the device of accepting a task conferred by a treaty. It might otherwise be possible to alter, through extraneous treaties, the character of the Organization in an important aspect of its activity*"—(my italics).

The passage italicised is precisely applicable to the situation that would arise if the Assembly were deemed able to accept, *ab extra*, functions of an executive character going beyond its basic Charter role of consideration, discussion and recommendation. Even if it may not be outside the scope of the Charter for the Assembly to deal in *some* form with mandated territories not placed under trusteeship—e.g., as being, at the least, non-self-governing territories within the meaning of Article 73—it can only deal with them by way of discussion and recommendation, not executive action.

101. In the *Voting Procedure* case, the Court itself was of the same way of thinking as Sir Hersch. Having regard to the view expressed in its earlier (1950) Opinion to the effect that the degree of supervision in the Assembly should not exceed that of the League Council, and should as far as possible follow the latter's procedure (see paragraph 65 above), it became evident that if the Assembly applied its usual majority, or two-thirds majority, voting rule in the course of its supervision of the mandate, it would *not* be conforming to the procedure of the League Council, which was based on a unanimity rule, including even the vote of the mandatory. Moreover, it was clear that the latter rule (being more favourable to the mandatory by making decisions adverse to its views harder to arrive at) involved in consequence a lesser degree of supervision than the Assembly's voting rule would do. This being so, the question arose whether the Assembly, in order to remain within the limits of the powers derived by it from or through the instrument of mandate, as those powers had been exercised by the League Council, could proceed according to a voting rule which was not that provided for by the

Charter—in short could depart from the Charter in this respect [65]. The Court answered this question by a decided negative in the following terms (*I.C.J. Reports 1955*, at p. 75):

> "The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. 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. These two systems are characteristic of different organs, and one system cannot be substituted for another without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League . . . would amount to a disregard of one of the characteristics of the . . . Assembly."

This view was independently concurred in by Judges Basdevant, Klaestad and Lauterpacht. Judge Basdevant said (at p. 82):

> "The majority rule laid down by Article 18 of the Charter and the unanimity rule prescribed by the Covenant of the League of Nations are something other than rules of procedure: they determine an essential characteristic of the organs in question and of their parent international institutions." (For Judge Klaestad's view see paragraph 104 below and paragraph *(a)* of footnote 66.)

102. The criteria thus enunciated by the Court and by Judge Basdevant were, be it noted, formulated precisely in the context of the mandates system. It is therefore legitimate to apply them to the present case; and if this is done in terms of the last two sentences of the foregoing quotation from the 1955 Opinion of the Court, the result is that there "cannot . . . without constitutional amendment" "be substituted" for a system which only allows the Assembly to discuss and recommend, "another" system which would allow it, in addition, to take executive and peremptory action,—and that, to deem the Assembly to be invested with such a power "would amount to a disregard of one of [its] characteristics" within the system of the Charter.

* * *

[65] The *form* in which the question arose in the *Voting Procedure* case was a little different, inasmuch as the issue was not whether the Assembly could act in a way not provided for by the Charter, but whether it *could* do so if this would involve a more stringent supervisory régime than that of the League's system. But the underlying point was the same—i.e., could the Assembly, in the exercise of *ab extra* functions, act by means of a *different* voting rule from that provided by the Charter—*could* it in any event, consistently with the Charter, apply the League unanimity rule?

103. It must be concluded that even if the League Council's supervisory powers had in principle passed to the Assembly, and had included the right to revoke an existing mandate, such a right could not, constitutionally, be exercised by the Assembly, since this would be inconsistent with the basic philosophy of its role within the general structure of the United Nations.

(iii) Elements confirming the above conclusions

104. *Dilemma of Judges Klaestad and Lauterpacht in the Voting Procedure case*—The problem in the *Voting Procedure* case was that, as has already been mentioned, the fact that decisions could be more easily arrived at under the Assembly's voting rule than under the League's rule of unanimity including the vote of the mandatory, involved for the latter a "greater degree of supervision" than the League's. Yet, as the Court found (see *ante*, paragraph 101), the Assembly could not, conformably with the Charter, depart from its own voting rule. The Court solved this problem by holding that although, in the exercise of its supervisory function, the Assembly must not depart from the substance of the mandate, the procedure by which it carried out that function must be the procedure provided for by the Charter; and that the Court's previous (1950) pronouncement, indicating that the degree of supervision must not be greater than the League's, was intended to apply only to matters of substance, not procedure. Given that the Assembly's voting rule *did* however, in principle, involve a greater degree of supervision than the League rule, by making it possible for decisions to be arrived at without the concurrence of the mandatory, this pronouncement of the Court in the *Voting Procedure* case involved a distinct element of inconsistency. That solution accordingly did not satisfy Judges Klaestad and Lauterpacht who arrived at a different and more logical one, avoiding contradictions and, at the same time, operating to confirm in a very striking manner the views expressed above as to the limits imposed by the Charter on the powers of the Assembly. They pointed out that the decisions reached by that organ in the course of supervising the mandate, not being in the nature of domestic, internal or procedural decisions (see head *(e)* in note 62 above) *could only operate as recommendations,* and could not therefore in any case be binding on the mandatory unless it had at least voted in favour of them [66]. Hence the Assembly's two-thirds rule, though theoretically more burdensome for the mandatory than the League's rule of unanimity including the mandatory's vote, would not in practice be so,

[66] *(a)* Distinguishing between the "domestic" or "internal", and the non-domestic categories of Assembly decisions, Judge Klaestad (*I.C.J. Reports 1955*, at p. 88) stated that in his opinion "recommendations . . . concerning reports and petitions relating to . . . South West Africa belong . . . to the last mentioned category". He continued:

since in neither case could the mandatory be bound without its own concurrence. In this way the balance between the weight of the League Council's supervision and that of the Assembly would be maintained or restored.

"They are not legally binding on the Union . . . in its capacity as Mandatory Power. Only if the Union Government *by a concurrent vote has given its consent to the recommendation* can that Government become legally bound to comply with it. In that respect the legal situation is the same as it was under the supervision of the League. *Only a concurrent vote can create a binding legal obligation for the Union of South Africa*"—(my italics).

(b) Judge Lauterpacht illustrated his view by reference to the trusteeship position, which he regarded as relevant to that of mandates. The passage in question is so striking as to be worth quoting *in extenso*,—and it is of course applicable *a fortiori* to the case of mandates (*loc. cit.*, at p. 116):

"This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administration of trust territories. The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. *Thus there is no legal obligation, on the part of the Administering Authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure.* The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, *but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council.* This is so as a matter both of existing law and of sound principles of government. *The Administering Authority, not the General Assembly, bears the direct responsibility for the welfare of the population of the Trust Territory.* There is no sufficient guarantee of the timeliness and practicability of a particular recommendation made by a body acting occasionally amidst a pressure of business, at times deprived of expert advice and information, and not always able to foresee the consequences of a particular measure in relation to the totality of legislation and administration of the trust territory. Recommendations in the sphere of trusteeship have been made by the General Assembly frequently and as a matter of course. *To suggest that any such particular recommendation is binding in the sense that there is a legal obligation to put it into effect is to run counter not only to the paramount rule that the General Assembly has no legal power to legislate or bind its Members by way of recommendations*, but, for reasons stated, also to cogent considerations of good government and administration"—(my italics).

"In fact States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council as approved by the General Assembly. That right has never been seriously challenged. There are numerous examples of express refusal on the part of the Administering Authority to comply with a recommendation." [Follow-

105. This conclusion could not be other than correct;—for if the Assembly's decisions bound the mandatory without the latter's consent, whereas the League's did not, there would be imposed a degree of supervision not only far heavier, *but differing totally in kind* from that of the League. To put the matter in another way, if the substitution of the Assembly for the League Council could not be allowed to operate so as to increase the Mandatory's obligations, it correspondingly could not be allowed to operate to increase the supervisory organ's powers, still less to give it a power that the former supervisory organ never had, or could never have exercised except in a certain way and by a certain kind of vote. It follows that such a power could not be exercised by the Assembly either, especially since the latter equally cannot bind the mandatory and cannot go beyond recommendations without exceeding its constitutional Charter powers. In consequence, Resolution 2145, even if it were otherwise valid, could not have any higher status or effect than, or operate except as, a *recommendation* that South Africa's administration should terminate, and not as an actual termination of it. I have to point out in conclusion that the whole of this most important aspect of the matter, resulting from the Court's own jurisprudence as it was enunciated in the 1955 *Voting Procedure* case, is now completely ignored, and not even mentioned, in the present Opinion of the Court;—for the sufficient reason no doubt that there is no satisfactory answer that can be given to it.

106. *The answer given by the Court in 1950 to the question lettered* (c) *put to it in the then advisory proceedings*—This question asked where the competence to modify the international status of SW. Africa lay, upon the assumption that it did not lie with South Africa acting unilaterally. The Court replied (*I.C.J. Reports 1950*, at p. 144):

> "... that the Union of South Africa acting alone has not the competence to modify the international status of the territory of South West Africa, and that the competence to determine and

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ing upon this (*loc. cit.*, pp. 116-117) Judge Lauterpacht cited, with references, a long list of specific instances.]

(c) With regard to mandates equally, in a passage of quite particular significance in the circumstances of the present case, Sir Hersch Lauterpacht said (*loc. cit.*, at p. 121):

> "This absence of a purely legal machinery and the reliance upon the moral authority of the findings and the reports of the Mandates Commission are in fact the essential feature of the supervision of the Mandates system. Public opinion—and the resulting attitude of the Mandatory Powers—were influenced not so much by the formal resolutions of the Council and Assembly [of the League] as by the reports of the Mandates Commission which was the true organ of supervision . . . *yet no legal sanction was attached to non-compliance with or disregard of the recommendations, the hopes and the regrets of the Commission*"—(my italics).

modify the international status of the Territory *rests with the Union of South Africa acting with the consent of the United Nations*"—(my italics).

It is clear that even if the Mandate itself persisted under another authority the *change* of authority (particularly if the new one was the United Nations as such) would unquestionably involve a modification of the international status of the territory, not only by substituting a new administration for the existing one, but by substituting one which could not itself be subjected to any supervision at all, except its own, and which would have to render reports to itself (and so—*quis custodiet ipsos custodes?*) [67]. It therefore follows from what the Court said about modifying the status of the territory, that the competence to effect any substitution of this kind (or any other change of mandatory) would rest "with the Union of South Africa acting with the consent of the United Nations", —which view invests *South Africa* with the initiative, and negatives the existence of any independent right of termination resident in the United Nations acting alone. Even allowing for the fact that the issue at that time was whether the *mandatory* had any unilateral power of modification it is impossible to reconcile the phraseology employed with the idea that the Court in 1950 could have thought the United Nations, or any organ of it, acting *alone*, had such a power. As my colleague Judge Gros points out, both aspects of the matter had been raised in the course of the proceedings.

(iv) Conclusion as to the powers of the Assembly

107. The foregoing considerations lead to the conclusion that even if the Assembly inherited a supervisory role from the League Council, it could exercise it only within the limits of its competence under the Charter namely by way of discussion and recommendation. Such a situation has no room for, and is entirely incompatible with any power to revoke a mandate. In consequence, Assembly Resolution 2145 could have effect only as a recommendation.

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[67] Even if the Assembly had "inherited" the supervisory function from the League, this function manifestly cannot include administration,—for the essence of supervision is its exercise by a *separate* body, not being the *administering* authority. The idea of mandates administered direct by the League itself without a mandatory as intermediary, which formed part of President Wilson's original proposals at Versailles, was not adopted, and formed no part of the *League* mandates system which it is claimed that the United Nations inherited.

2. Competence and powers of the Security Council relative to mandates

(i) Consequential character of the Security Council's resolutions in the present case

108. It is strictly superfluous to consider what (if any) were the Security Council's powers in relation to mandates, because it is quite clear that the Council never took any independent action to terminate South Africa's mandate. All its resolutions were consequential, proceeding on the basis of a supposed termination already effected or declared by the Assembly. Without the Assembly's act, the acts of the Security Council, which were largely in the nature of a sort of attempted enforcement of what the Assembly had declared, would have lacked all *raison d'être*;—while on the other hand, if the Assembly's resolution 2145 lacked *in se* validity and legal effect, no amount of "confirmation" by the Security Council could validate it or lend it such effect, or independently bring about the revocation of a mandate.

(ii) On a mandates basis, the powers of the Security Council are no greater than the Assembly's

109. The words "relative to mandates" have been inserted of set purpose in the title to this subsection,—because it is necessary to distinguish clearly between what the Security Council can do on a *mandates* basis and what it might be able to do on the only other possible basis on which it could act, namely a peace-keeping basis. On a mandates basis the Security Council has no greater powers than the Assembly,—for (see the 1950 Opinion of the Court at p. 137) [68] it was the United Nations as a whole which inherited—or did not inherit—the role of the League of Nations in respect of mandates, together with (if it did) such powers as were comprised in that role. Consequently, as regards any power of revocation, the Security Council stands on exactly the same footing as the Assembly in respect of such questions as whether the United Nations has any supervisory function at all and, if so, whether it includes any power of revocation;—subject however to this one qualification, namely that in 1950 the Court very definitely *(loc. cit.)* indicated the Assembly as the *appropriate* organ to exercise the supervisory function it found the United Nations to be invested with. It must therefore be questioned whether the Security Council has any specific role whatever in respect of mandates as such, similar to that which it has in respect of strategic

[68] Speaking of the final League winding-up resolution of 18 April 1946 (see paragraphs 41 and 42 above) the Court said "This resolution pre-supposes that the supervisory functions exercised by the League would be taken over by *the United Nations*"—(my italics).

trusteeships. If this is so, it would be solely for peace-keeping purposes that the Security Council would be competent to take action in respect of a mandate.

(iii) Wider powers in the field of mandates exercisable only on a peace-keeping basis

110. As regards the alternative basis of Security Council intervention, clearly that organ cannot be precluded from exercising its *normal* peace-keeping functions merely because the threat to the peace, if there is one, has arisen in a mandates context,—*provided* the intervention has a genuinely peace-keeping aim and is not a disguised exercise in mandates supervision. What the Security Council cannot properly do is, in the guise of peace-keeping, to exercise functions in respect of mandates, where those functions do not properly belong to it either as a self-contained organ or as part of the United Nations as a whole. It cannot, in the guise of peace-keeping revoke a mandate any more than it can, in the guise of peace-keeping order transfers or cessions of territory.

111. However, in my opinion, the various Security Council resolutions involved did not, on their language, purport to be in the exercise of the peace-keeping function. There is in fact something like a careful avoidance of phraseology that would be too unambiguous in this respect. That being so, their effect was as indicated in paragraphs 108-109 above. They were not binding on the Mandatory or on other member States of the United Nations. Like those of the Assembly they could only have a recommendatory effect in the present context.

(iv) Proper scope of the Security Council's peace-keeping powers under the Charter

112. This matter, so far as the actual terms of the Charter are concerned is governed by paragraphs 1 and 2 of Article 24 which read as follows:

> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations. *The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII*"— (my italics).

I am unable to agree with the extremely wide interpretation which the Opinion of the Court places on this provision. No doubt it does not limit the *occasions* on which the Security Council can act in the preservation of peace and security, provided the threat said to be involved is not a mere figment or pretext. What it does do is to limit the type of action the Council can take in the discharge of its peace-keeping responsibilities, —for the second paragraph of Article 24 states in terms that the *specific* powers granted to the Security Council for these purposes are laid down in the indicated Chapters (VI, VII, VIII and XII). According to normal canons of interpretation this means that so far as *peace-keeping* is concerned, they are not to be found anywhere else, and are exercisable only as those Chapters allow. It is therefore to them that recourse must be had in order to ascertain what the *specific* peace-keeping powers of the Security Council are, *including the power to bind.* If this is done, it will be found that only when the Council is acting under Chapter VII, or possibly in certain cases under Chapter VIII, will its resolutions be binding on member States. In other cases their effect would be recommendatory or hortatory only. (Peace-keeping action under Chapter XII—strategic trusteeships—does not really seem to me to be a separate case, since it is difficult to see how it could fail to take the form of action under Chapters VI or VII as the case might be.)

113. These limitations apply equally to the effect of Article 25 of the Charter, by reason of the proviso "in accordance with the present Charter". If, under the relevant chapter or article of the Charter, the decision is *not* binding, Article 25 cannot make it so. If the effect of that Article were automatically to make *all* decisions of the Security Council binding, then the words "in accordance with the present Charter" would be quite superfluous. They would add nothing to the preceding and only other phrase in the Article, namely "The Members of the United Nations agree to accept and carry out the decisions of the Security Council", which they are clearly intended to qualify. They effectively do so only if the decisions referred to are those which *are* duly binding "in accordance with the present Charter". Otherwise the language used in such parts of the Charter as Chapter VI for instance, indicative of recommendatory functions only, would be in direct contradiction with Article 25—or Article 25 with them.

114. Since, in consequence, the question whether any given resolution of the Security Council is binding or merely recommendatory in effect, must be a matter for objective determination in each individual case, it follows that the Council cannot, merely by *invoking* Article 25 (as it does for instance in its Resolution 269 of 12 August 1969) impart

obligatory character to a resolution which would not otherwise possess it according to the terms of the chapter or article of the Charter on the basis of which the Council is, or must be deemed to be, acting.

(v) The Security Council is not competent, even for genuine peace-keeping purposes, to effect definitive changes in territorial sovereignty or administrative rights

115. There is more. *Even when acting under Chapter VII of the Charter itself*, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a principle of international law that is as well-established as any there can be,—and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are. The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or piece of territory *in order to restore peace and security*, but it could not thereby, or as part of that operation, abrogate or alter territorial rights;—and the right to administer a mandated territory is a territorial right without which the territory could not be governed or the mandate be operated. It was to keep the peace, not to change the world order, that the Security Council was set up.

* * *

116. These limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended,—and the present case is a very good illustration of this: for not only was the Security Council not acting under Chapter VII of the Charter (which it obviously could not do—though it remains to be seen by what means and upon what grounds the necessary threat to, or breach of the peace, or act of aggression will be determined to exist);—not only was there no threat to peace and security other than such as might be artificially created as a pretext for the realization of ulterior purposes,—but the whole operation, which will not necessarily end there, had as its object the abrogation of the Mandatory's rights of territorial administration, in order to secure (not eventually but very soon) the transformation of the mandated terri-

tory into, and its emergence as, the sovereign independent State of "Namibia". This is what is declared in terms, not only in Resolution 2145 itself, but also in the subsequent Assembly Resolution 2248 (S-V) of 1967, specifying June 1968 as the intended date of transfer [69],—and this is par excellence the type of purpose, in promoting which, the Security Council (and *a fortiori* the Assembly) exceeds its competence, and so acts *ultra vires*.

SECTION D

THE LEGAL CONSEQUENCES FOR STATES

1. In general

117. On the basis of the foregoing conclusions, the answer to the question put to the Court in the present proceedings, as to what are the legal consequences for States of the continued presence of South Africa in the mandated territory of SW. Africa, despite Security Council resolution 276 of 1970 is, strictly, that there are no specific legal consequences for States, for there has been no change in the legal position. Since neither the Security Council nor the Assembly has any competence to revoke South Africa's Mandate, the various resolutions of these organs purporting to do so, or to declare it to be at an end, or to confirm its termination, are one and all devoid of legal effect. The result is that the Mandate still subsists, and that South Africa is still the Mandatory. However, from this last conclusion there do follow certain legal consequences both for South Africa and for other States.

2. Consequences for South Africa

118. *For South Africa* there is an obligation

(1) to recognize that the Mandate survived the dissolution of the League, —that it has an international character,—and that in consequence SW. Africa cannot unilaterally be incorporated in the territory of the Republic;
(2) to perform and execute in full all the obligations of the Mandate, whatever these may be.

119. With regard to this last requirement, I have given my reasons for thinking that, the United Nations not being the successor in law to the League of Nations, the Mandatory is not, and never became subject

[69] See further in the Annex, paragraph *15* in section 3.

to any duty to report to it, or accept its supervision, particularly as regards the Assembly. But as was pointed out earlier in this Opinion (paragraphs 17 and 20), it does not follow that the reporting obligation has lapsed entirely; and it is the fact that it could be carried out by the alternative means indicated in paragraph 16. This being so, the question arises whether the Mandatory has a legal duty to take some such steps as were there indicated. The matter is not free from doubt. The Court in 1950 considered the reporting obligation to be an essential part of the Mandate. Judge Read on the other hand thought that although its absence might "weaken" the Mandate, the latter would not otherwise be affected. Again if the Mandate is viewed as a treaty or contract, the normal effect of the extinction of one of the parties would be to bring the treaty or contract to an end entirely.

120. However, the better view seems to be that the reporting obligation survived, though becoming dormant upon the dissolution of the League, and certainly not transformed into an obligation relative to the United Nations. Nevertheless, if not an absolutely essential element, it is a sufficiently important part of the Mandate to place the Mandatory under an obligation to revive and carry it out, if it is at all possible to do so, by some other means [70]. But the Mandatory would have the right to insist *(a)* on the new supervisory body being acceptable to it in character and composition—(such acceptance not to be unreasonably withheld),—*(b)* on the nature *and implications* (as to degree of supervision) of the reporting obligation being as they are indicated to be in paragraphs 76-78 above,—and *(c)* that, just as with the League Council, the Mandatory would be under no legal obligation to carry out the recommendations of the supervisory body, no more than States administering trust territories are obliged to accept the views of the United Nations Assembly as supervisory organ—(see *supra*, paragraphs 77 and 104 and footnote 66)

121. A further, or rather alternative, course that could be considered incumbent on South Africa, though as a consequence of the Charter not the Mandate, would be to resume the rendering of reports under Article 73 *(e)* of the Charter (see as to this the joint dissenting Opinion of 1962, *I.C.J. Reports 1962*, pp. 541-548 and paragraph 43 *(b)* above), seeing that on any view SW. Africa is a non-self-governing territory. This resumption must however be on the understanding that the reports are not dealt with by the Trusteeship Council unless South Africa so agrees.

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[70] *Ex hypothesi* however, it would not be to the United Nations that the Mandatory would be responsible for doing this, or there would merely be the same situation in another form.

3. For other States

122. *For other States* the "legal consequences" of the fact that South Africa's Mandate has not been validly revoked, and still subsists in law are:

(1) to recognize that the United Nations is not, any more than the Mandatory, competent unilaterally to change the status of the mandated territory;
(2) to respect and abide by the Mandatory's continued right to administer the territory, unless and until any change is brought about by lawful means.

* * *

123. On the foregoing basis it becomes unecessary for me to consider what the legal consequences for States would be if the view taken in the Opinion of the Court were correct; although, since the measures indicated by the Court seem to be based mostly on resolutions of the Security Council that—for the reasons given in paragraphs 112-114 above—I would regard as having only a recommendatory effect, I would be obliged to question the claim of these measures to be in the proper nature of "legal consequences", even if I otherwise agreed with that Opinion. (I also share the views of my colleagues Judges Gros, Petrén, Onyeama and Dillard as to the standing of certain of these measures.)

124. There is however another aspect of the matter to which I attach importance and which I think needs stressing. It was for this reason, that, on 9 March 1971, during the oral proceedings (see Record, C.R. 71/19, p. 23), I put a question to Counsel for the United States of America, then addressing the Court. I do not think I can do better than cite this question and the written answer to it, as received in the Registry of the Court some ten days later (18 March 1971):

> *Question:* In the opinion of the United States Government is there any rule of customary international law which, in general, obliges States to apply sanctions against a State which has acted, or is acting, illegally—such as cutting off diplomatic, consular and commercial relations with the tortfeasor State? If not, in what manner would States become compelled so to act—not merely by way of moral duty or in the exercise of a faculty, but as a matter of positive legal obligations?
>
> *Reply:* It is the opinion of the United States that there is no rule of customary international law imposing on a State a duty to apply sanctions against the State which has acted, or is acting, illegally. However, under the Charter of the United Nations, the Security Council has the power to decide that member States should apply

sanctions against the State which acts in certain illegal ways. Thus, should the Security Council determine that an illegal act by a State constitutes "a threat to the peace, breach of the peace, or act of aggression", it would have a duty under Article 39 to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". Whenever the Security Council makes such a determination and decides that diplomatic, consular and commercial relations shall be cut off in accordance with Article 41 of the Charter, all Members of the United Nations have the duty to apply such measures.

If the latter part of this reply is intended to indicate that it is broadly speaking only in consequence of decisions taken under Chapter VII of the Charter, after a prior determination of the existence of a "threat to the peace, breach of the peace or act of aggression", that a legal duty for member States would arise to take specific measures, I can only agree.

POSTSCRIPTUM

OTHER CONSEQUENCES

125. In the latter part of his separate declaration, the President of the Court has made certain observations which, though closely related to the legal issues involved in this case, have a different character. Taking my cue from him, I should like to do the same. In the period 1945/1946, South Africa could have confronted the United Nations with a *fait accompli* by incorporating SW. Africa in its own territory, as a component province on a par with Cape province, Natal, the Transvaal and the Orange Free State. Had this been done, there would have been no way in which it could have been prevented, or subsequently undone, short of war. Wisely however, though at the same time exercising considerable restraint from its own point of view, South Africa refrained from doing this. If however "incorporation" is something which the United Nations believes it could never accept, there should equally be a reciprocal and corresponding realization of the fact that the conversion of SW. Africa into the sovereign independent State of Namibia (unless it were on a very different basis from anything now apparently contemplated) could only be brought about by means the consequences of which would be incalculable, and which do not need to be specified. Clearly therefore, in a situation in which no useful purpose can be served by launching the irresistible force against the immovable object, statesmanship should seek a *modus vivendi*—while there is yet time.

(Signed) G. G. FITZMAURICE.

ANNEX

PRELIMINARY AND INCIDENTAL MATTERS [1]

1. Incompetence of the United Nations Assembly to act as a court of law

1. When, by its Resolution 2145 of 1966, the Assembly purported to declare the termination of South Africa's mandate, on the basis of alleged fundamental breaches of it, and to declare this not merely as a matter of opinion but as an *executive* act having the intended operational effect of bringing the Mandate to an end—or registering its termination—and of rendering any further administration of the mandated territory by South Africa illegal,—it was making pronouncements of an essentially juridical character which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make.

2. There is nothing unusual in the view here expressed. On the contrary it represents the normal state of affairs, which is that the organ competent to perform an act, in the executive sense, is not the organ competent to decide whether the conditions justifying its performance are present. In all other fields a separation of functions is the rule. Thus the legislature is alone competent to enact a law,—the executive or administration alone competent to apply or enforce it,—the judiciary alone competent to interpret it and decide whether its application or enforcement is justified in the particular case. In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will, in principle, be competent to make the necessary determinations. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.

[1] Relegation to this Annex does not in any way involve that the matters dealt with in it are regarded as of secondary importance;—quite the reverse—they involve issues as salient in their way as any in the case. But to have dealt with them at the earlier stage to which they really belong would have held up or interrupted the development of the main argument which I wished to put first.

3. It must be added that besides being *ultra vires* under this head, the Assembly's action was arbitrary and high-handed, inasmuch as it acted as judge in its own cause relative to charges in respect of which it was itself the complainant, and without affording to the "defendant" any of the facilities or safeguards that are a normal part of the judicial process.

4. It has been contended that the competence of the Assembly to make determinations of a legal character is shown by the fact that Article 6 of the Charter confers upon it the right (upon the recommendation of the Security Council) to expel a member State "which has persistently violated the principles contained in ... the Charter". This however merely means that the framers of the Charter did confer this particular specific power on the Assembly, in express terms, without indicating whether or not it was one that should only be exercised after a prior determination of the alleged violations by a competent juridical organ. To argue from the power thus specifically conferred by Article 6, that the Assembly must therefore be deemed to possess a *general* power under the Charter to make legal determinations, is clearly fallacious.

5. The contention that Resolution 2145 did not actually terminate South Africa's mandate, but merely registered its termination by South Africa itself, through its breaches of it, i.e., that the Resolution was merely declaratory not executive, is clearly nothing but an expedient directed to avoiding the difficulty;—for even as only declaratory, the resolution amounted to a finding that there had been breaches of the Mandate,—otherwise there would have been no basis even for a declaratory resolution. It is moreover a strange and novel juridical doctrine that, by infringing an obligation, the latter can be brought to an end,—but doubtless a welcome one to those who are looking for an easy way out of an inconvenient undertaking.

6. No less of an expedient is the plea that South Africa had itself "disavowed the Mandate" ever since 1946. South Africa's attitude has always been that, as a matter of *law*, either the Mandate was so bound up with the League of Nations that it could not survive the latter's dissolution, or else, that if it did, it did not survive in the form claimed in the United Nations. Whether this view was correct or not it was in no sense equivalent to a "disavowal" of the Mandate. To deny the existence of an obligation is *ex hypothesi* not the same as to repudiate it [2]. Nor can any such deduction legitimately be drawn from the failure to render reports to, and accept the supervision of the Assembly, based as this was on the

[2] For this reason the justification for the revocation of the Mandate which the Court finds in Article 60, paragraph 3 *(a)*, of the 1969 Vienna Convention on the Law of Treaties is quite misplaced.

contention (considered correct by an important body of professional opinion) that no legal obligation to that effect existed. If this were not so, no party to a dispute could argue its case without being told that, by doing so, it had "disavowed" its obligations.

* * *

7. It has also been argued that the Assembly had "vainly" tried to obtain the necessary findings from the Court via the contentious proceedings brought by Ethiopia and Liberia in the period 1960-1966. But this would be tantamount *(a)* to saying that because the Assembly did not get the judgment it wanted in 1966, it was therefore justified in taking the law into its own hands, which, however, would in no way serve to validate Resolution 2145;—*(b)* to admitting that the 1966 Judgment was right in seeing the then Applicants in the light of agents of the United Nations and not, as they represented themselves to be, litigants in contentious proceedings sustaining an interest of their own;—and *(c)* recognizing that, as was strongly hinted in paragraphs 46-48 (especially the latter) of the 1966 Judgment, the correct course would have been for the Assembly as an organ to have asked the Court for an advisory opinion on the question of breaches of the Mandate, in relation to which the objection as to legal interest would not have been relevant. It was still open to the Court to do this, for instance in 1967. It cannot therefore do other than give a wrong impression if it is said that the Assembly in 1966 had no other course open to it but to adopt Resolution 2145 without having previously sought legal advice on this basis.

* * *

8. These various purported justifications for the Assembly making legal determinations, though not itself a competent legal organ, and without any reference to such an organ, or even to an *ad hoc* body of jurists (such as was the settled practice of the League Council in all important cases), are clearly illusory. In the result, the conclusion must be that the Assembly's act was *ultra vires* and hence that Resolution 2145 was invalid, even if it had not been otherwise ineffective in law to terminate South Africa's mandate.

2. The Court's right to examine the assumptions underlying any Request for an Advisory Opinion

9. Although the Court has to some extent gone into the question of the validity and effect of Assembly Resolution 2145, it has not adequately

examined the question of its right to do so having regard to the way in which the Request for an Advisory Opinion in the present case was worded. The matter is however so important for the whole status and judicial function of the Court that it becomes necessary to consider it.

10. The Court could not properly have based itself on the literal wording of the Request, in order to regard its task in the present proceedings as being confined solely to indicating what, on the assumptions contained in the Request, and without any prior examination of their validity, are the legal consequences for States of South Africa's continued presence in SW. Africa,—those assumptions being that the Mandate for that territory had been lawfully terminated and hence that this presence was illegal [3]. The Court cannot do so for the simple but sufficient reason that the question whether the Mandate is or is not legally at an end goes to the root of the whole situation that has led to the Request being made. If the Mandate is still, as a matter of law, in existence, then the question put to the Court simply does not arise and no answer could be given. Alternatively the question would be a purely hypothetical one, an answer to which would, in those circumstances, serve no purpose, so that the situation would, on a different level, resemble that which, in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15), caused the Court to hold (at p. 38) that it could not "adjudicate upon the merits of the claim" because *inter alia*, the circumstances were such as would "render any adjudication devoid of purpose". It has constantly been emphasized in past advisory cases—(and this was also confirmed in the contentious case just mentioned, in which occasion arose to consider the advisory practice)—that in advisory, no less than in contentious proceedings, the Court must still act as a court of law (and not, for instance, as a mere body of legal advisers),—that "the Court's authority to give advisory opinions must be exercised as a judicial function ' (*ibid.*, at p. 30),—and that, to use the wording of one of the most quoted dicta of the Permanent Court in the *Eastern Carelia* case, *P.C.I.J., Series B, No. 5* (1923) at page 29, the Court "being a Court of Justice, [it] cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court".

11. So much is this the case that the original tendency in the past was to question whether the mere giving of *advice*, even in solemn form such as by means of an advisory opinion of the Court, was compatible with the judicial function at all [4]. The Court has not of course taken this view but,

[3] The fact that certain representatives of member States in the Security Council said that they understood the Request in this sense, and even that they only agreed to it on that basis, cannot of course in any way bind the Court. Neither representatives of States, nor such organs as the Security Council itself, possess any competence to restrict the Court as to what it shall take account of in delivering a legal opinion.

[4] See the discussion in Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, pp. 510-511.

to cite a very high authority and former judge of the Permanent Court [5]:

> "... the Court ... has conceived of its advisory jurisdiction as a judicial function, and in its exercise of this jurisdiction it has kept within the limits which characterize judicial action. It has acted *not as an 'academy of jurists' but as a responsible 'magistrature'* "—(my italics).

The words italicized in the passage just quoted contain the key to the question. If an organ such as the General Assembly or Security Council of the United Nations likes to refer some question to a body of legal experts, whether a standing one or set up *ad hoc* for the purpose, which that body is instructed to answer on the basis of certain specified assumptions that are to be taken as read, it will be acting perfectly properly if it proceeds accordingly, because it is not a court of law and is not discharging or attempting to discharge any *judicial* function: it is indeed bound by its instructions, which the organ concerned is entitled to give it. But the Court, which is itself one of the six original main organs of the United Nations, and not inferior in status to the others, is not bound to take instruction from any of them, in particular as to how it is to view and interpret its tasks as a court of law, which it is and must always remain, whatever the nature and context of the task concerned;—and whereas a body of experts may well, as a sort of technical exercise, give answers on the basis of certain underlying assumptions irrespective of their validity or otherwise, a court cannot act in this way: it is bound to look carefully at what it is being asked to do, and to consider whether the doing of it would be compatible with its status and function as a court.

12. This faculty constitutes in truth the foundation of the admitted right of the Court, deriving from the language of Article 65, paragraph 1, of its Statute, and consecrated in its jurisprudence, to refuse entirely to comply with a request for an advisory opinion if it thinks that, for sufficient reasons, it would be improper or inadvisable for it to do so;—and if the Court can thus refuse entirely, *a fortiori* can it, and must it, insist on undertaking a preliminary examination of the assumptions on which any request is based, particularly where, as in the present case, those assumptions are of such a character that, unless they are well-founded, the question asked has no meaning or could admit of only one reply. Otherwise put, for a court to give answers that *can only* have significance and relevance if a certain legal situation is presumed to exist, but without enquiring whether it does (in law) exist, amounts to no more than indulging in an interesting parlour game, which is not what courts of law are for. In the present case, if the Court had lent itself to such a course, it would not have been engaging in a judicial activity,—it would have to

[5] Hudson, *op. cit.*, p. 511.

abnegate its true function as a court-of-law and would indeed have acted as if, in the words used by Judge Hudson, it were "an academy of jurists".

3. Should the Court have complied with the Request in this case

13. There can be no doubt that the question put to the Court was a legal one, such as it had the power to answer if it considered it proper to do so,—more especially if (as it must be) the question is regarded as relating not only to the legal *consequences* of the General Assembly Resolution 2145 but also to the validity of that Resolution itself, and its effect upon the Mandate for South West Africa.

14. On the other hand, had the Court considered that the form of the question addressed to it precluded it from following any but the first course (i.e., dealing with the "consequences" alone), and excluded, or was intended to exclude, any consideration by it of the validity and effect of the act from which those consequences are supposed to flow—i.e., Assembly Resolution 2145—then this would have been a ground for declining to comply with the Request since, for the reasons given in the preceding section of this Annex, it is unacceptable for any organ making such a request to seek to limit the factors which the Court, as a court of law, considers it necessary to take into account in complying with it, or to prescribe the basis upon which the question contained in it must be answered. A further element is that the Court, not being formally obliged to comply with the Request at all (even though it might otherwise be right for it to do so), is necessarily the master, and the only master, of the basis upon which it will do so, if in fact it decides to comply.

15. Subject to what has just been said, I agree with the conclusion of the Court that it should comply with the Request, though not with some of the reasoning on which that conclusion is based [6]. I take this view even though I have no doubt that the present proceedings represent an attempt to use the Court for a purely political end, namely as a step towards the setting up of the territory of South West Africa as a new sovereign independent State, to be called "Namibia", irrespective of what the consequences of this might be at the present juncture. This aim is made perfectly clear by operative paragraphs 1, 2 and 6 of Resolution 2145

[6] In particular as regards the question of the existence in this case of a "dispute" or "legal question pending" between States—as to which see section 4 below. But the "pendency" of a dispute or legal question is not *per se* a ground on which the Court must refuse to give an advisory opinion to the requesting organ. Where the Court was to blame, was in not applying the contentious procedure to the present advisory proceedings, as it had the power to do—(again see section 4 below).

itself, which is reproduced here *in extenso*:

"*The General Assembly*,

Reaffirming the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations, General Assembly resolution 1514 (XV) of 14 December 1960 and earlier Assembly resolutions concerning the Mandated Territory of South West Africa,

Recalling the advisory opinion of the International Court of Justice of 11 July 1950, accepted by the General Assembly in its resolution 449 A (V) of 13 December 1950, and the advisory opinions of 7 June 1955 and 1 June 1956 as well as the judgement of 21 December 1962, which have established the fact that South Africa continues to have obligations under the Mandate which was entrusted to it on 17 December 1920 and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa,

Gravely concerned at the situation in the Mandated Territory, which has seriously deteriorated following the judgement of the International Court of Justice of 18 July 1966,

Having studied the reports of the various committees which had been established to exercise the supervisory functions of the United Nations over the administration of the Mandated Territory of South West Africa,

Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming its resolution 2074 (XX) of 17 December 1965, in particular paragraph 4 thereof which condemned the policies of apartheid and racial discrimination practised by the Government of South Africa in South West Africa as constituting a crime against humanity,

Emphasizing that the problem of South West Africa is an issue falling within the terms of General Assembly resolution 1514 (XV),

Considering that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

Mindful of the obligations of the United Nations towards the people of South West Africa,

Noting with deep concern the explosive situation which exists in the southern region of Africa,

Affirming its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory,

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;

2. *Reaffirms further* that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;

3. *Declares* that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;

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

5. *Resolves* that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa;

6. *Establishes* an *Ad Hoc* Committee for South West Africa—composed of fourteen Member States to be designated by the President of the General Assembly—to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967;

7. *Calls upon* the Government of South Africa forthwith to refrain and desist from any action, constitutional, administrative, political or otherwise, which will in any manner whatsoever alter or tend to alter the present international status of South West Africa;

8. *Calls the attention* of the Security Council to the present resolution;

9. *Requests* all States to extend their whole-hearted co-operation and to render assistance in the implementation of the present resolution;

10. *Requests* the Secretary-General to provide all the assistance

necessary to implement the present resolution and to enable the *Ad Hoc* Committee for South West Africa to perform its duties.

1454th plenary meeting,
27 October 1966."

If there could be any doubt it would be resolved by the two following more recent and conclusive pieces of evidence:

(a) General Assembly Resolution 2248 (S-V) of 19 May 1967, after re-affirming Resolution 2145 and appointing a "Council for South West Africa" which later became known as the "Council for Namibia", ended as follows:

> "*Decides* that South West Africa shall become independent on a date to be fixed in accordance with the wishes of the people and that the Council shall do all in its power to enable independence to be attained by June 1968."

(b) On 29 January 1971, when the whole matter was already *sub judice* before the Court and the oral proceedings had actually started [7], the United Nations "Council for Namibia" issued a statement commenting on the South African proposal for holding a plebiscite in SW. Africa under the joint supervision of the Court and the Government of the Republic, and finishing as follows:

> "Furthermore, the issue at stake is the independence of Namibia, and not whether the Government of South Africa or the United Nations should administer the Territory. The United Nations decisions in this matter are aimed at achieving the independence of Namibia, and not its administration by the United Nations, except for a brief transitional period."

16. Despite the revealing character of these statements, and despite its obvious political background and motivation, the question put to the Court is, in itself, essentially a legal one. Moreover, in fact, most advisory proceedings have a political background. It could hardly be otherwise, as the Court pointed out in the *Certain Expenses* case with reference to interpretations of the Charter (*I.C.J. Reports 1962*, p. 155, *in fine*). But as the Court equally pointed out in that case (echoing a similar dictum

[7] A sitting *in camera* was held on 27 January 1971 to hear the South African request for the appointment of a judge *ad hoc*. The public hearings started on February 8.

made on a previous occasion [8]), such a background does not of itself impart a political character to the *question* the Court is asked to answer, and this is the important consideration. It would seem therefore that the political background of a question would only justify a refusal to answer where this background loomed so large as to impart a political character to the question also. In spite of doubts as to whether something of the kind has not occurred in the present case [9], the legal character of the questions themselves remains.

4. *The question of the appointment of a South African judge* ad hoc

(a) *The relevant provisions of the Court's Statute and Rules*

17. The Court's rejection of the South African request to be allowed to appoint a judge *ad hoc* in the present case was embodied in the Order of the Court of 29 January 1971 to which my colleagues Judges Gros, Petrén and I appended a joint dissenting declaration reserving our right to give reasons for this at a later stage. In my opinion this rejection was wrong in law, and also unjustified as a matter of equity and fair dealing,—for it was obvious, and could not indeed be denied by the Court, that South Africa had a direct, distinctive and concrete special interest to protect in this case, quite different in kind from the general and common interest that other States had as Members of the United Nations. In short, South Africa had, and was alone in having, precisely the same type of interest in the whole matter that a litigant defendant has,—and should therefore have been granted the same right that any litigant before the Court possesses, namely that, if there is not already a judge of its own nationality amongst the regular judges of the Court, it can, under Article 31 of the Statute of the Court, appoint a judge *ad hoc* to sit for the purposes of the case [10].

18. The Court's refusal to allow this was thrown into particular relief

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[8] See for instance the first *Admissions of New Members* case (*I.C.J. Reports 1947/1948*, at p. 61).

[9] The present case might well be regarded as being at the least a borderline one, for the political nature of the background is unusually prominent. Yet the two main questions involved, namely whether the Mandate has been validly terminated or not and, if it has, what are the legal consequences for States, are in themselves questions of law. The doubt arises from the way in which the request is framed, suggesting that the Court is to answer the second question only, and postulating the first as already settled. It is above all this which imparts a political twist to the whole Request.

[10] There would naturally have been no objection to the appointment also of one judge *ad hoc* to represent the common interest of what was in effect "the other side", —and see further notes 14 and 15 below.

by the almost simultaneous rejection, in the three Orders of the Court dated 26 January 1971, of the South African challenge concerning the propriety of three regular judges of the Court sitting in the case,—a matter on which, as to the third of these Orders, I wish to associate myself with the views expressed in the early part of his dissenting opinion in the present case by my colleague Judge Gros. In the light of the explanations as to this, given in the Opinion of the Court, it has now to be concluded that, outside the literal terms of Article 17, paragraph 2, of the Statute, no previous connexion with the subject-matter of a case, however close, can prevent a judge from sitting, unless he himself elects as a matter of conscience not to do so.

* * *

19. On the question of a judge *ad hoc*, the immediately relevant provision is Article 83 of the Court's Rules, which reads as follows:

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

If this provision was the only relevant one, it would be a reasonable inference from it that a judge *ad hoc* could not be allowed unless the case had the character specified. In the present one it was obvious that a legal question was involved,—or the Court would have lacked all power to comply with the Request for an advisory opinion (see Article 96, paragraph 1, of the United Nations Charter and Article 65, paragraph 1, of the Court's Statute). But could it be said to be a question "actually pending between two or more States"? I shall give my reasons later on for thinking that it was of this kind. But for the purposes of my principal ground for holding that the South African request should have been allowed, it is not strictly necessary for me to determine whether the legal questions concerned were "pending"; and if pending, "actually pending"; and if actually pending, then actually pending "between two or more States", and if so which ones, etc., etc.;—for in my view the matter is not exclusively governed by the provisions of Article 83 of the Rules, which I consider do not exhaust the Court's power to allow the appointment of a judge *ad hoc*.

* * *

20. The contrary view is based on a misreading of the true intention and effect of Rule 83 when considered in relation to Article 68 of the Statute which reads as follows:

> "In the exercise of its advisory functions, the Court shall . . . [11] be guided by the provisions of the present statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

This provision of course covers Article 31 of the Statute, and hence confers on the Court a general power to apply that Article by allowing the appointment of a judge *ad hoc* if requested. Furthermore, the provisions of the Rules are subordinated to those of the Statute. The Court has no power to make Rules that conflict with its Statute: hence any rule that did so conflict would be *pro tanto* invalid, and the Statute would prevail.

21. However, I can see no conflict between Rule 83 and Article 68 of the Statute. They deal with different aspects of the matter. The *latter* (Article 68), despite its quasi-mandatory form, confers what is in effect a power or discretion on the Court to assimilate requests for advisory opinions to contentious cases, either in whole or in part. Rule 83 on the other hand contains what amounts to a direction by the Court to itself as to how it is to exercise this discretion in certain specified circumstances. If those circumstances are found to obtain, then the Rule obliges the Court to allow the appointment of a judge *ad hoc*. But this in no way means, nor was ever intended to mean, that by making Rule 83 the Court parted with the residual discretion it has under Article 68 of the Statute, and that in *no other* circumstances than those specified in Rule 83 could the Court allow such an appointment. The object of the Rule was *not* to specify the only class of case in which the Court could so act, but to indicate the *one* class in which it *must* do so, and to ensure that, at least in the type of case contemplated in the Rule, the Court's discretion should be exercised in a positive way, in the sense of applying Article 31 of the Statute. This was entirely without prejudice to the possibility that there might be other cases than those indicated in the Rule, as to which the Court might feel that, though not *obliged* to apply Article 31, it ought nevertheless for one reason or another to do so. This view is borne out by the language of Article 82, paragraph 1, of the Rules, which relates to the application in advisory proceedings of *any* of the contentious procedure provisions, not merely those of Article 31. After recapitulating the general language of Article 68, it goes on to say that "for this purpose" (i.e., in order to determine the sphere of application—if any—of the contentious procedure), the Court is "above all" to consider "whether the request . . . relates to a legal question actually pending between two or

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[11] The omitted word is "further", which is quite otiose in the context since there is no other paragraph, or article of the Statute dealing with the matter to which this one could be "further".

more States". This wording clearly makes the test of legal pendency a primary, but equally clearly not a conclusive factor.

* * *

22. It has been contended that although the foregoing description of the relationship between the various provisions concerned might otherwise be correct, it must nevertheless break down on the actual wording of Article 31 itself, particularly its second and third paragraphs which, it has been claimed, not only clearly contemplate the case of "parties" to an actual litigation but are virtually incapable of functioning in any other circumstances, so that at the very least the requirements of Rule 83 constitute a minimum and *sine qua non*, in the absence of which no application of Article 31 is possible. I have difficulty in following the logic of this view which, if it were correct, would go far in practice to clawing back almost everything supposed to have been conferred by Rule 83, and rendering that provision a piece of useless verbiage,—for even where the case is indubitably one of a legal question actually pending between two or more States, it would be rare in advisory proceedings to find a situation such that Article 31 could be applied to it integrally as that provision stands, and without gloss or adaptation. It is in fact manifest that the provisions of the Statute and Rules concerning contentious cases were quite naturally and inevitably drafted with litigations and parties to litigations in mind. Hence these provisions are bound to be—as they are—full of passages and expressions that are not literally applicable to cases where there is no actual litigation and no parties technically in the posture of litigants,—in short to the vast majority of the cases in which there are advisory proceedings. Consequently the power given to the Court by Article 68 of the Statute to be guided by the contentious procedure would be largely nullified in practice unless it were deemed to include a power to adapt and tailor this procedure to the advisory situation. The very words "shall be guided by" indicate that such a process is contemplated.

23. In the present case in particular, no difficulty could have arisen, for the sufficient reason that, apart from South Africa, no other State presenting written or oral statements asked to be allowed to appoint a judge *ad hoc*, although they in fact had the opportunity of doing so [12], —and moreover representatives of four such States actually attended

[12] The Court does not normally invite the appointment of a judge *ad hoc*. The matter is entirely facultative, and there have been cases where, even in a litigation, and although neither or none of the parties had a judge of its nationality on the Court, no designation of a judge *ad hoc* has been made.

the separate and preliminary oral hearing held *(in camera* [13]*)* on this matter, but none of them intervened either to oppose the application or to make a similar one. Had any two or more such applications been received, in addition to South Africa's, the Court would have had to consider, under Article 3, paragraph 2, of its Rules, whether the States concerned, or any group of them, not already comprising between them a judge of the nationality of one of them amongst the regular judges of the Court, were "in the same interest" [14], in which event only one *ad hoc* judge *per* such group could have been allowed [15].

24. Reference is made in the Opinion of the Court to the Permanent Court's Order of 31 October 1935 in the *Danzig Legislative Decrees* case (Annex 1 to *Series A/B, No. 65,* at pp. 69-71). That case however has no relevance to the present one; for in 1935 no provision corresponding to what is now Article 68 of the Statute figured in the Statute as it then stood. The latter, in fact, contained no provisions at all about the advisory jurisdiction, which rested entirely on Article 14 of the Covenant of the League and the Court's own Rules. It was therefore inevitable that the Court should feel it had no discretion as to the appointment of a judge *ad hoc* unless the matter fell strictly within the terms of those Rules. Hence the *Legislative Decrees* case constitutes no precedent, either for the view that the Court lacks a discretion *now*, or for a refusal to exercise that discretion (which the Permanent Court, not then having one, could not in any event have exercised). The situation being in consequence quite different, it becomes evident that if, under Article 68, of the Statute—which takes precedence of the Rules, there is (as is unquestionably the case) a discretion to "be guided by the provisions of the . . . Statute which apply in contentious cases" (including therefore Article 31) there must be a discretion to allow the appointment of a judge *ad hoc*—one of the most important parts of the contentious process. No (manifestly non-existent) doctrine of the Court's inability to regulate its own composition could operate to prevent this.

* * *

[13] See Article 46 of the Statute. The hearing takes place before the full Court and in the main Court-room as if for a public sitting, but press and public are excluded. The decision to sit in private despite South Africa's strong representations to the contrary, was in my view mistaken and unwise (as was indeed subsequently impliedly admitted by the decision to publish the verbatim record of the sitting).

[14] Which, in advisory proceedings could be read as meaning the adoption of broadly the same view on the main legal questions involved. Any State asking to appoint a judge *ad hoc*, which had signified its intention to take part in the oral proceedings, but had not previously presented any written statement, could have been requested to furnish a brief indication of its principal views or contentions.

[15] In the present proceedings all the States which intervened, either at the written or the oral stage of the proceedings (apart from South Africa), could be said to be in the same (legal) interest, except France,—but there was already a French judge among the regular judges of the Court.

25. In the light of these various considerations, it is clear that the Court in no way lacked the power to grant the South African request, but was simply unwilling to do so. In this I think the Court was not justified, particularly in view of the fact that the request was unopposed which, to my mind, indicated a tacit recognition by the other intervening States of the contentious features of the case. The present proceedings, though advisory in form, had all the characteristics of a contentious case as to the substance of the issues involved [16], no less than had the actual litigation between South Africa and certain other States which terminated five years ago, and of which these advisory proceedings have been but a continuation in a different form. Even if, therefore, the Court did not consider the matter to come under Article 83 of its Rules, in such a way as to *oblige* it to allow a judge *ad hoc* to be appointed, it should have exercised its residual discretionary powers to the same effect.

(b) *The existence of a dispute or legal question pending between States*

26. The above expression of view has proceeded upon the assumption that, in order to determine whether the Court *could* grant the South African request, and should do so, it was unnecessary to decide whether the case fell within the strict terms of Rule 83. In fact, however, I consider that it does, and that any other conclusion is unrealistic and can only be reached by a closing of the eyes to the true position. It really involves something that gets very near to equating the words "a legal question actually pending between two or more States" in Rule 83, with circumstances in which two or more States are in a condition of actual or immediately impending litigation. But, as I have already pointed out, such an interpretation would virtually nullify the intended effect of Rule 83 by restricting its scope to situations that seldom take that precise form in advisory proceedings.

27. The nub of the whole difficulty lies in the word "pending"; but if this is taken on its normal dictionary acceptation [17] of "remaining undecided" or "not yet decided", and "not terminated" or "remaining unsettled",—or in short "still outstanding",—then it is evident that there is a whole series of legal questions in issue (or in dispute) between South Africa on the one hand and a number of other States, and that these questions are, in this sense, outstanding and unresolved, inasmuch as the view held on one side as to their correct solution differs *in toto*

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[16] In consequence of which the Court found itself obliged in practice, and in a manner virtually unprecedented in previous advisory proceedings, to conduct the oral hearing as if a litigation were in progress.

[17] As given in up-to-date publications such as *Chambers Twentieth Century Dictionary* and the *New Penguin English Dictionary*.

from that taken on the other. Would it be possible for instance to find a more concrete and fundamental issue of this kind than one which turns on whether the Mandate for SW. Africa has been legally terminated or is still in existence; whether South Africa is *functus officio* in SW. Africa or is still entitled to administer that territory, and whether South Africa's continued presence there is an illegal usurpation or is in the legitimate exercise of a constitutional authority? It would surely be difficult to think of a more sharply controversial situation than one in which, depending on the answers to be given to these questions, South Africa is on the one side being called upon to quit the territory, while she herself asserts her right to remain there,—in which it is maintained on the one side that the whole matter has been settled by the General Assembly resolution 2145 of 1966, and on the other that this resolution was *ultra vires* and devoid of legal effect,—and therefore settled nothing. The case in fact falls exactly within the definition of a dispute which, following my former colleague Judge Morelli, I gave in my separate opinion in the *Northern Cameroons* case (*I.C.J. Reports 1963*, at p. 109), when I said that the essential requirement was that:

> "... the one party [or parties] should be making, or should have made, a complaint, claim or protest about an act, omission or course of conduct, present or past of the other party, which the latter refutes, rejects or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded".

If this does not describe the situation as it has long existed, and now exists, between the United Nations or many of its member States, and South Africa, I do not know what does.

* * *

28. Nevertheless it may be suggested that these issues, concrete and unresolved as they are, and hence, in the natural and ordinary sense, "pending" and "actually pending", are not, within the primarily intended meaning of the words, pending "between two or more States", because they lie too much at large between South Africa and either the United Nations as an entity, or a group of its Members rather than as individual States. In other circumstances there might be a good deal to be said in favour of this view. But the Assembly resolution purporting to terminate the Mandate has led to a situation in which, as it was one of its objects, this resolution is being made the basis of *individual* action taken outside the United Nations by a number of States in their relations with South

Africa over SW. Africa, as described in some detail by Counsel for South Africa at the preliminary oral hearing held on 27 January 1971 [18].

29. One example must (but will) suffice—namely the situation which has arisen over the application to South West Africa of the 1965 Montreux International Telecommunication Convention. When becoming a party to this Convention, South Africa gave notice in proper form applying it to SW. Africa also. Thereupon a number of States [19] addressed official communications to the Secretariat of the International Telecommunication Union, which were all to the same effect, namely that *precisely by reason of Assembly resolution 2145* purporting to terminate the Mandate, South Africa no longer had the right to administer or speak for SW. Africa, and that, in consequence, the application of the Convention to that territory was invalid and of no effect. The Administrative Council of the Union then, in May 1967, circularized the member States with a request for their views on the matter, which was put to them in the form whether South Africa's right to represent SW. Africa "should be withdrawn". To this South Africa, on 23 May 1967, sent a full and reasoned reply affirming its continuing right to represent SW. Africa. Nevertheless at the next session of the Union a majority voted in favour of the "withdrawal". There now in consequence exists a clear-cut and concrete dispute, not only between South Africa and a majority of the members of the Union as such, but also individually between South Africa and those specific members who initiated and raised the issue in the first place. The subject-matter of this dispute is whether or not the 1965 Convention is or is not applicable to SW. Africa;—and this dispute, or legal question (to use the language of Rule 83), not only is actually pending between South Africa and those States, and continues so to be, *but also constituted one of the alleged possible "legal consequences" of the purported termination of the Mandate which the Court might have to consider in the present proceedings.*

* * *

30. For these reasons, were it necessary to hold (as in my view it is not) that the Court had no residual power outside Rule 83 to allow the appointment of a South African judge *ad hoc*, I should take the view

[18] Typescript of verbatim record, C.R. (H.C.) 71/1 (Rev.), pp. 19-28.

[19] These were, in the order named in the record (see preceding note), the Federal Republic of Cameroon, Yugoslavia, Tanzania, United Arab Republic, Soviet Union, Ukrainian S.S.R., Byelorussian S.S.R. and Poland.

that the conditions specified in the Rule were fully satisfied and that it was applicable so as to oblige the Court to grant the request, as justice and equity in any event called for, in the exercise of its undoubted discretionary power. In fact, if ever there was a case for allowing the appointment of a judge *ad hoc* in advisory proceedings, that case was this one.

* * *

31. On the basis of the foregoing views two somewhat serious consequences would ensue. The first is that, in refusing to allow the appointment of a judge *ad hoc*, the Court in effect decided that the proceedings did not involve any dispute, and thus prejudged the substance of a number of issues raised by South Africa which turned on the existence or otherwise of a dispute,—although no argument had yet been heard on these issues, nor was until after the Order embodying the Court's decision on the matter had been issued. This created a situation in which, in most national legal systems, the case would, on appeal, have been sent back for a re-trial. Similarly the Court virtually precluded itself from going into any question of fact; for disputed issues of fact are difficult to deal with except on the basis of a contentious procedure involving recognition of the existence of a dispute. This again was in advance of having heard the South African argument on the question of the admission of further factual evidence,—although the Court was, from the start, under written notice of the South African view that such further evidence was relevant and important. These views are not affected by the fact that, as the Opinion of the Court correctly observes, a decision on the question of a judge *ad hoc*, being a matter of the composition of the Court, had to be taken in advance of everything else,—although this situation may well point to a somewhat serious flaw in the present Rules. It cannot however affect the fact that, having rejected the request for the appointment of a judge *ad hoc*—and *on the very ground* that there was no dispute or legal question pending (for if the Court had thought there was, Rule 83 would have obliged it to grant the request)—the Court was thenceforward precluded in practice, in connexion with anything arising later in the case, from coming to a different conclusion as to the existence of a dispute or legal question pending. Had the Court, without prejudging these matters, simply exercised its discretion in the sense of allowing the appointment (as in my view it should in any case have done), no difficulty would have arisen. But it should at least, and *at that stage*, have heard full argument on the question, in the course of ordinary public hearings.

32. Secondly, the failure to allow the appointment of a judge *ad hoc*, coupled with the views expressed by my colleague Judge Gros, which I share, concerning the third of the three Orders of the Court referred

to in paragraph 18 of this Annex, arouses in me a number of misgivings, as to which it will suffice here to say that I associate myself entirely with what is stated at the end of paragraph 17 of Judge Gros' Opinion.

(Initialled) G.F.

SYNOPTICAL TABLE

MAIN SECTIONS

DETAILS