SEPARATE OPINION OF VICE-PRESIDENT AMMOUN

[Translation]

1. The Security Council having requested from the International Court of Justice, within the framework of the latter's advisory jurisdiction, an authoritative opinion concerning the legal consequences of the continued presence of South Africa in Namibia (formerly South West Africa) notwithstanding the termination in 1966 of the tutelary Mandate which the League of Nations had conferred upon that Power in 1920, the Court has been called upon to pronounce, for the first time in regard to certain fundamental principles of international law, on a number of problems raised by the request for an opinion. These are, in particular, the sovereignty of dependent peoples, the mandate institution, its nature and its objects, the right of peoples to self-determination and decolonization, equality between nations and between individuals, racial discrimination as expressed in the doctrine of *apartheid* in South Africa and in Namibia and, in sum, the whole body of human rights and their imperative universal character.

All these notions are the outward expression of a new body of international law, the consequence of an irreversible social and political evolution of the modern world. The Court, in its Advisory Opinion, has not overlooked them. In my view, however, it has not always gone far enough in spelling out the legal conclusions to which they point.

Furthermore, I find that neither the reasons given for the operative part nor the wording of those paragraphs are sufficiently explicit and decisive in regard to the legal qualification of the presence of South Africa in Namibia and the obligations for States that flow therefrom.

I have therefore felt it my duty to compose this separate opinion with a view to contributing to the Advisory Opinion of the Court, whose views I share, some further support, however modest it may be.

2. The Republic of South Africa, having, like certain other States, availed itself of Article 66 of the Statute of the Court in order to furnish information in connection with the request for an advisory opinion, presented itself as a party to a dispute between it and the majority of States which had taken part in voting the United Nations General Assembly and Security Council resolutions relating to Namibia. On that ground, it requested permission to choose a judge *ad hoc* to participate, with the Members of the Court, in the giving of the opinion.

Having rejected South Africa's application by a majority decision in an Order made on 29 January 1971, the Court has explained that one

of its reasons lay in the absence of a dispute between parties. To justify the appointment of a judge *ad hoc*, not only would a dispute have had to be present but there would have had to be on the Bench no judge of the nationality of one of the parties while the Bench did include a judge of the nationality of the opposing party. But what, in the present proceedings, would have been the identity of that opposing party? The States which voted against South Africa? But in that case those which voted for South Africa are *in the same interest* as it, within the meaning of Article 31 of the Statute, and as such are already represented. To have ignored this and allowed South Africa a judge *ad hoc* would in such circumstances have contravened the rule of that very equality which the Statute seeks to safeguard through the institution of judges *ad hoc*. *A fortiori* this rules out any discretionary power that some might wish to deduce from Article 68 of the Statute, for the Court may not, on the pretext of interpretation, contravene the fundamental rule and *raison d'être* of that institution. In any case, if the opinion of the minority had been accepted, the Court ought, in my view, to have permitted the choice of a judge *ad hoc* both for South Africa and for Namibia. The legal personality of Namibia would thus have been judicially recognized and Namibia would have appeared for the first time in international proceedings [1].

Namibia, even at the periods when it had been reduced to the status of a German colony or was subject to the South African Mandate, possessed a legal personality which was denied to it only by the law now obsolete. It was considered by the Powers of the day as a merely geographical concept taking its name from its location in the South-West of the African Continent. It nevertheless constituted a subject of law that was distinct from the German State, possessing national sovereignty but lacking the exercise thereof. The institution of the Mandate, *a fortiori*, did not connote the annexation of the country which was subject to it, as the Court has made clear by its reference to its earlier Advisory Opinion of 18 July 1950. Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression. General Smuts, the Prime Minister of the Union of South Africa, already recognized this in his study on what was to be the mandate institution [2]. As the beneficiaries on whose behalf the mandate agreements were to be concluded, it was right that some of the peoples who were to be subjected to them should be consulted on the selection of the mandatory. That is what was stipulated in paragraph 4 of Article 22 of the Covenant, for the peoples severed from the Ottoman Empire. In fact the commission of inquiry, reduced to its

[1] It was only as an observer that Namibia was admitted to the United Nations Economic Commission for Africa.

[2] *The League of Nations: A Practical Suggestion.*

American members, King and Crane, conducted such consultations in Lebanon, Syria, Palestine and Iraq; the United Kingdom and France having declined the American President Woodrow Wilson's invitation to take part because they had come to an agreement as to the allocation of the mandates and were already in position on the spot. The majority of the populations consulted demanded immediate independence, but the right of peoples to self-determination had not yet come to maturity and it was only in the wake of the Second World War that the four countries mentioned were to obtain their independence.

The opinion expressed by Paul Fauchille, writing in 1922, deserves attention solely as a historical illustration, since today it has lost all relevance. "It seems clear," he averred, "that, whereas in the case of mandates of the second and third categories full sovereignty is attributed to the Mandatory, there is in the case of mandates of the first category, as in a protectorate properly so called, a sharing of sovereignty between the independent communities or nations and the Mandatory [1]." Fauchille thus assimilated "B" and "C" Mandates to the colonies of his period. He conceived of a sharing of sovereignty in the case of "A" Mandates, whereas it must surely be agreed that sovereignty is indivisible, as is liberty, and that all that is conceivable is a distinction between the possession of sovereignty and its exercise. Stoyanovsky, writing three years later, took a more accurate view when he upheld the notion of virtual sovereignty residing in a people deprived of its exercise by domination or tutelage [2]. Those were also the views of Paul Pic [3].

It is true that the Namibians' status of a people, which was recognized by the General Assembly of the United Nations in its resolution 2372 (XXII) of 12 June 1968, has been disputed by the South African Government so as to justify dividing—and ruling—the country under the euphemism of separate development, known in Afrikaans as *apartheid.* But the Namibian people, whose existence and unity the Court has, in its turn, recognized in the present Advisory Opinion, has itself asserted its international personality by taking up the struggle for freedom. Since South Africa has opposed the achievement of the objects of the Mandate and blocked Namibia's path to independence and the enjoyment of its full sovereignty, Namibia has decided to fight. The legitimacy of the Namibian national struggle has been recognized in four resolutions of the General Assembly [4] and in Security Council resolution 269 (1969). This struggle, by analogy, continues the line of those waged by other members of the international community, during the First World War, before they were recognized as States, such as the Polish, Czech and

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[1] *Traité de droit international public*, 1922, Vol. I, p. 298.

[2] *La théorie générale des mandats internationaux*, 1925, pp. 83 ff.

[3] "Le régime des mandats d'après le traité de Versailles", *Revue générale de droit international public*, 1923, 2nd Series, IV, No. 5, p. 334.

[4] Resolutions 2372 (XXII), 2403 (XXIII), 2498 (XXIV) and 2517 (XXIV).

Slovak peoples; or of the French national movement [1] at the time when France was under the domination of Nazi Germany.

In law, the legitimacy of the peoples' struggle cannot be in any doubt, for it follows from the right of self-defence, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter. It is also an accepted principle that self-defence may be collective; thus we see the other peoples of Africa, members of the Organization of African Unity, associated with the Namibians in their fight for freedom. The rightness of this is also confirmed by the Universal Declaration of Human Rights, which stresses in its preamble that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The struggle of the Namibian people thus takes its place within the framework of international law, not least because the struggle of peoples in general has been one, if not indeed the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized. I could therefore have wished that the Court, like the General Assembly and the Security Council, had mentioned in its Opinion the legitimate struggle of the Namibian people. But its silence on this subject does not exclude its agreement, since it has referred to the relevant resolutions of the other two organs of the United Nations.

The Court has not mentioned the General Assembly's decision to the effect that "henceforth South West Africa comes under the direct responsibility of the United Nations" (para. 4 of General Assembly resolution 2145 (XXI)). That should have been said in order to make clear the nature of the relationships between the Organization, on the one hand, and Namibia and the Republic of South Africa on the other. Nor has the Court referred to the setting-up of a United Nations Council for South West Africa (para. 6 of the same resolution), the name of which was changed by resolution 2372 (XXII) to United Nations Council for Namibia and which resolution 2248 (S-V) had vested with powers of statehood. These are the powers which it was for the Mandatory to exercise until the expiry of the Mandate, and they entitle the Council, acting on behalf of the United Nations, to exercise legislative competence and administrative authority in Namibia as well as to represent it diplomatically and exercise diplomatic protection of its nationals. It is to this body that it would in other circumstances have fallen to choose a judge *ad hoc* for Namibia, and it might also have presented the Court with a written statement and an oral statement as did the Government of South Africa. However it did not receive the communication referred to in Article 66 which would have authorized it to do so.

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[1] These are the terms used by L. Cavaré, *Droit international public positif*, Vol. II, 2nd ed., pp. 334 f.

3. The revocation of South Africa's Mandate for Namibia which was decided upon by the General Assembly of the United Nations is based on three grounds which are mentioned in the fifth paragraph of the preamble to resolution 2145 (XXI) of 27 October 1966, reading as follows:

> "*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."

The General Assembly had reached this decision after finding, in the eighth paragraph of the preamble to the same resolution,

> ". . . 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".

The revocation of the Mandate was thus explicitly based on three grounds relating to international instruments of the first importance. In refusing, quite rightly, to question the formal or intrinsic validity of the resolutions concerned, the Court nevertheless felt it necessary to refute the arguments advanced in this connection by certain States. In doing this it had in addition to direct its consideration to each of the three grounds stated in resolution 2145 (XXI) as justifying the termination of the Mandate and entailing the illegality of the presence in Namibia of the South African authorities thus bereft of title.

The Court considered the first ground, namely that of the violation of Article 22 of the Covenant of the League of Nations and of Article 2 of the mandate agreement, according to which:

> "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

The Court could not content itself with finding that the Mandatory had violated this obligation, for it was called upon to deduce the legal consequences of the illegal presence of South Africa in Namibia, and these consequences differ in nature and in number according to whether there was a violation of the relatively limited texts constituting the mandate instruments, or a violation of the obligations flowing from the constitutional Charter of the United Nations and the Universal Declaration of Human Rights.

Furthermore, the principles and purposes of the United Nations must be observed by all its organs: by the General Assembly and the Security Council and, no less, by the International Court of Justice, as also by each of the member States.

Now, we are told that these principles have been violated, these pur-

poses gravely neglected. And when the political organs have fulfilled their obligations, by denouncing and condemning these violations and this grave neglect, the International Court of Justice owed it to itself to discharge its own obligations by not closing its eyes to conduct infringing the principles and rights which it is its duty to defend.

Again, the Court could not remain an unmoved witness in face of the evolution of modern international law which is taking place in the United Nations through the implementation and the extension to the whole world of the principles of equality, liberty and peace in justice which are embodied in the Charter and in the Universal Declaration of Human Rights.

The Court is not a law-making body. It declares the law. But it is a law discernible from the progress of humanity, not an obsolete law, a vestige of the inequalities between men, the domination and colonialism which were rife in international relationships up to the beginning of this century but are now disappearing, thanks to the struggle being waged by the peoples and to the extension to the ends of the world of the universal community of mankind.

Thus, in addition to the violation of the stipulations of the Mandate, the Court did not omit consideration of the other two grounds for its termination. By referring, like resolution 2145 (XXI), to the Charter of the United Nations and the Universal Declaration of Human Rights, the Court has asserted the imperative character of the right of peoples to self-determination and also of the human rights whose violation by the South African authorities it has denounced. It appears to me, however, that its reasoning and conclusions, to which, as I have said, I subscribe, leave room for explanations which, expressed in the separate opinions, may serve to strengthen those conclusions.

4. With regard to the survival of the Mandate after the dissolution of the League and the taking-over by the United Nations of supervision of the Mandatory's administration, which the Court has justified by legal arguments drawn from consideration of the purposes and objects of the Mandate in the light of the texts and *travaux préparatoires* and from an analysis of the pertinent Charter articles, referring also herein to certain of its earlier decisions (the Advisory Opinions of 1950, 1955 and 1956, and the Judgment of 1962), I would like to add one general observation which seems to me to be essential; it relates to the very nature of the tutelary-mandate institution and its place in the evolution of humanity.

Historians [1] have outlined the upward march of mankind from the time when *homo sapiens* appeared on the face of the globe, first of all in the Near East in what was the land of Canaan, up to the age of the greatest thinkers and, more particularly, throughout the whole history

[1] See in particular H. G. Wells, *Outline of History*.

of social progress, from the slavery of Antiquity to man's inevitable, irreversible drive towards equality and freedom. This march is like time itself. It never stops. Nothing can stand in its way for long. The texts, whether they be laws, constitutions, declarations, covenants or charters, do but define it and mark its successive phases. They are a mere record of it. In other words, the progressive rights which men and peoples enjoy are the result much less of those texts than of the human progress to which they bear witness.

The institution of tutelage, succeeding colonialization and preceding and preparing the way for sovereign independence, has its place in this upward march, at one stage of which this concept of guardianship was born, in 1920; at the following stage, it was due to end. The provisions of Article 22 of the Covenant and the terms of the mandate agreements, whether they define the purposes of tutelage or specify the assistance to be given to backward peoples to enable them to catch up the vanguard of more developed peoples, give expression to this kinetic reality. Woodrow Wilson, and even the South African General Smuts, and the French Minister Simon, were imbued with this truth when they admitted that mandates must have an end, or are revocable. And so, to revert to the arguments set forth in the Advisory Opinion, I could have wished that the revocability of the Mandate, which has been so strongly contested, had been more fully justified by reference to the nature of tutelage and in consideration of the universal context in which it finds its place. Considering its nature and purposes, the duration of the tutelary Mandate could not be determined at will by the party charged or entrusted with it. When the General Assembly, representing the international community once the League had ceased to do so, decided the revocation of that Mandate, with effect *erga omnes* in view of the Mandate's objective institutional character, that revocation was also binding on the extremely small number of States which had opposed it or, by expressing doubts and reservations, withheld their approval. For how could South Africa's Mandate, with its organs and structures, having lapsed for the quasi-unanimity of States, survive in the eyes of some others? An institution is a creature of reason which either exists or does not: it cannot at one and the same time be and not be. That would be no less curious than if a State admitted by majority vote to the United Nations should be a Member for some but not for others.

5. Recognition of the right of peoples to self-determination is expressed by the Court in paragraph 52 of the Advisory Opinion. It is there stated, *inter alia*, that:

> "Furthermore, the subsequent development of international law, in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. . . . A further important stage in this development was the Declaration on the Granting of Inde-

pendence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'."

The Opinion is not lacking in persuasive force; it would have possessed still more if it had retraced the path whereby this right of peoples has made its entry into positive international law and had determined exactly what were the factors which have gone into its making. I refer in particular to the fight of the peoples for freedom and independence, which has been going on ever since there have been conquering and dominating peoples and subject but unsubjugated peoples. To confine ourselves to modern times, we may mention the historic declarations proclaimed at the end of the eighteenth century, the provisions of present-day charters and covenants from the Atlantic Charter and the United Nations Charter to the Pact of Bogotá and the Charter of the Organization of African Unity, the repeated declarations of Bandung and of the non-aligned countries meeting in Belgrade and Cairo, the declaration contained in resolution 1514 (XV) of the General Assembly of the United Nations and, finally the two solemn Declarations which marked the close of the work of the United Nations during the first 25 years of its existence: resolution 2625 (XXV), adopted unanimously on 24 October 1970, on the principles of international law concerning friendly relations and co-operation between States in accordance with the Charter of the United Nations, and resolution 2627 (XXV), adopted on the same day on the occasion of the 25th anniversary of the United Nations. Would these international or universal instruments have seen the light of day if it had not been for the heroic fight of peoples aspiring with all their hearts after freedom and independence? If there is any "general practice" which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1 *(b)*, of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle. This struggle continues for the purpose of asserting, yet once more, the right of self-determination, more particularly in southern Africa and, specifically, Namibia. Indeed one is bound to recognize that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity. And without those same peoples, mainly of Asia and Africa, who since the Second World War have streamed into the new international Organization, the first of a universalist character, would it have been possible to achieve that impressive number of declarations and resolutions whereby the great principles they had helped consecrate have been translated into law and applied to the reshaping of international relations?

As for the "general practice" of States to which one traditionally refers when seeking to ascertain the emergency of customary law, it

has, in the case of the right of peoples to self-determination, become so widespread as to be not merely "general" but universal, since it has been enshrined in the Charter of the United Nations (Art. 1, para. 2, and Art. 55) and confirmed by the texts that have just been mentioned: pacts, declarations and resolutions, which, taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination. There is not one State, it should be emphasized, which has not, at least once, appended its signature to one or other of these texts, or which has not supported it by its vote. The confirmed rightness of this practice is moreover evinced by the great number of States—no less than 55—which, since the consecration by the Charter of the right of self-determination, have benefited from it, after having ensured, by the struggles and the strivings of their peoples, its definitive embodiment in both the theory and the practice of the new law. If any doubts had remained on this matter in the mind of the States Members of the United Nations, they would not have resolved to proclaim the legitimacy of the struggle of peoples—and more specifically the Namibian people—to make good their right of self-determination. If this right is still not recognized as a juridical norm in the practice of a few rare States or the writings of certain even rarer theoreticians, the attitude of the former is explained by their concern for their traditional interests, and that of the latter by a kind of extreme respect for certain long-entrenched postulates of classic international law. Law is a living deed, not a brilliant honours-list of past writers whose work of course compels respect but who cannot, except for a few great minds, be thought to have had such a vision of the future that they could always see beyond their own times. Everything goes to show how difficult it is to free ourselves from the servitudes of a past through which we have ourselves lived and from traditions we have always respected. It is, then, a page of history which needs turning that must be seen in attachment to an outdated law which denies the resolutions of the United Nations the authority with which the Charter has invested them, which authority has been reinforced by the almost unanimous will of the peoples of the world. That will is incomparably more decisive than that of the five or six Powers which have asserted opposite conceptions while relying on a claim to representativity whose lack of legal basis they must confess. Facts, therefore, have got the better of their last-ditch resistance, and in the last two sentences of paragraph 52 of the Advisory Opinion one may see an allusion to this struggle: one perhaps over-discreet, but at all events the Opinion has written *finis* to the matter.

6. The violation of human rights has not come to an end in any part of the world; to realize that fact one need only consult the archives of the European Court of Human Rights, the Human Rights Commission of the United Nations or the International Commission of Jurists, or simply read the world press. Violations of personal freedom and human dignity, the racial, social or religious discrimination which constitutes

the most serious of violations of human rights since it annihilates the two-fold basis provided by equality and liberty, all still resist the currents of liberation in each of the five continents. That is certainly no reason why we should close our eyes to the conduct of the South African authorities. The facts mentioned before the Court in relation to the request for an advisory opinion cannot be ignored, seeing that consideration of them is important for the determination of the legal consequences of the illegal presence of South Africa in Namibia.

The Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights. In the case of certain of the Declaration's provisions, attracted by the conduct of South Africa, it would have been an improvement to have dealt in terms with their comminatory nature, which is implied in paragraphs 130 and 131 of the Opinion by the references to their violation.

In its written statement the French Government, alluding to the obligations which South Africa accepted under the Mandate and assumed on becoming a Member of the United Nations, and to the norms laid down in the Universal Declaration of Human Rights, stated that there was no doubt that the Government of South Africa had, in a very real sense, systematically infringed those rules and those obligations. Nevertheless, referring to the mention by resolution 2145 (XXI) of the Universal Declaration of Human Rights, it objected that it was plainly impossible for non-compliance with the norms it enshrined to be sanctioned with the revocation of the Mandate, inasmuch as that Declaration was not in the nature of a treaty binding upon States.

Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1 *(a)*, of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1 *(b)* of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1 *(b)*, of the Statute. One right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.

The equality demanded by the Namibians and by other peoples of every colour, the right to which is the outcome of prolonged struggles to make it a reality, is something of vital interest to us here, on the one hand because it is the foundation of other human rights which are no more than its corollaries and, on the other, because it naturally rules out racial discrimination and *apartheid*, which are the gravest of the facts with which South Africa, as also other States, stands charged. The attention

I am devoting to it in these observations can therefore by no means be regarded as exaggerated or out of proportion.

It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights."

From this first principle flow most rights and freedoms.

Of all human rights, the right to equality is far and away the most important. It is also the one which has been longest recognized as a natural right; it may even be said that the doctrine of natural law was born in ancient times with the concept of human equality as its first element. It has been part of natural law ever since Zeno of Sidon [1] and his earliest disciples. It is in countries outside Europe that the provenance of the concept itself, as also of its most ardent present-day defenders, must be sought. Like the Christianity which later espoused the same premises, the philosophy of Zeno reflected the revolt of the humble and the oppressed. "Stoic liberty," Hegel teaches us in his *Phenomenology of the Mind*, "arose in a time of fear and slavery." Equality was not to the liking of the Greeks up to and including the time of Plato and Aristotle, who both found words to justify inequality and slavery [2], whereas for the Stoics: "man is a slave neither by nature nor by conquest." When Zeno died, his work was completed, and the notion of equality definitively received and propagated throughout the world of that era by his disciples [3], the distant forerunners of the eighteenth-century philosophers. Two streams of thought had become established on the two opposite shores of the Mediterranean, a Graeco-Roman stream represented by Epictetus, Lucan, Cicero and Marcus Aurelius; and an Asian and African stream, comprising the monks of Sinai and Saint John Climac, Alexandria with Plotinus and Philo the Jew, Carthage to which Saint Augustine gave new lustre; the two streams flowed together in Spain with Seneca. The stoic philosophy,

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[1] According to Diogenes Laertes, a statue was erected to him in that city, as also in Athens, where he had gone to teach and where he founded the school which first bore his name but was later called the Stoic school.

[2] For Aristotle, reason was a privilege of which certain people, for instance slaves, are deprived. His advice to his pupil Alexander, who was not yet called the Great, was "to treat Greeks as members of the family, the *Barbarians* as animals . . .".

Yet had not the *Barbarians* already probed space, predicted eclipses and given names to the signs of the Zodiac; divided time into months, into weeks; invented the alphabet; and were they not soon to give the world the first really humane philosophy: namely, that founded upon equality?

[3] G. Rodier, *Etudes de philosophie grecque*, 1969, p. 231.

The disciples of Zeno were, many of them, his fellow countrymen: Zeno, the second of that name, and Boëthus, both also of Sidon; Antipater, of Tyre; Apollonios, also of Tyre; Chrysippos, of Phoenician Cyprus; Herillos, of Carthage; Cato, of Utica; Perseus, friend of Zeno; Posidonios, of Hama in Syria, a Phoenician halting-place on the road to Babylon; Diogenes, of Babylon; Panetios, a pupil of Antipater of Tyre, who was born in Rhodes, a Phoenicio-Greek meeting-place as also was Cyprus, where Cicero and Pompey came to follow his teaching.

sowing for the first time in mankind's history the seeds of equality between men and between nations, influenced the greatest of the Roman jurisconsults who were of Phoenician origin, Papinius and Ulpian, and then the doctors of Christianity [1] through whom it was eventually transmitted to the Age of Reason [2]. The ground was thus prepared for the legislative and constitutional process which began with the first declarations or bills of rights in America and Europe, continued with the constitutions of the nineteenth century, and culminated in positive international law in the San Francisco, Bogotà and Addis Ababa charters, and in the Universal Declaration of Human Rights which has been confirmed by numerous resolutions of the United Nations, in particular the above-mentioned declarations adopted by the General Assembly in resolutions 1514 (XV), 2625 (XXV) and 2627 (XXV). The Court in its turn has now confirmed it.

7. The Charter has consecrated the principle of equality in even more categorical terms than it uses for the right of peoples to self-determination by reaffirming in its preamble the faith of the United Nations in the equal rights of nations large and small, and by declaring in Article 2, paragraph 1, that "The Organization is based on the principle of the sovereign equality of all its Members". The General Assembly has many times had occasion to affirm the right to equality and the fundamental rights which derive therefrom. This has been the case every time that the General Assembly has decided that it had competence notwithstanding the claim by States that such rights did not enjoy the protection of international law and therefore fell within their own national jurisdiction. Thus South Africa has regularly sought to rely on its domestic jurisdiction, denying the competence of the United Nations whenever since 1946, at session after session, it has been accused of practising *apartheid* in violation of the right to equality. The successive resolutions of the General Assembly rejecting this contention by South Africa have given it to be understood that the equality and fundamental rights violated by *apartheid* constitute obligations which are in fact placed under the protection of international law and as such fall within the competence of the United Nations.

Only recently, on 26 May 1971, the Special Committee on Apartheid decided to oppose any dialogue with South Africa unless based on prior recognition of the equality of the Black population.

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[1] Bertrand Russell, in his *History of Western Philosophy*, pp. 275 f., writes: "By nature, the stoics held, all human beings are equal . . . Christianity took this part of the stoic teachings."

[2] For this flowering of the concept of equality in the ancient land of Phoenicia, its adoption by the Graeco-Roman world and Christianity, and its development through the vicissitudes of time, the following works may be consulted: Bertrand Russell, *op. cit.*; Emile Bréhier, *Histoire de la philosophie*, Vol. 2, pp. 228 and 234; Rodis-Lewis, *La morale stoïcienne*, pp. 11 and 74; G. Rodier, *Etudes de philosophie grecque*, pp. 219, 220 and 231; Fritz Schulz, *History of Roman Legal Science*, p. 67; Ernest Renan, *Histoire des origines du christianisme*.

For the rest, how is it possible not to recognize the binding force of principles and rights which the international community has agreed that it is legitimate to defend by force of arms? That is what the General Assembly and the Security Council have been affirming ever since 1966 in proclaiming the legitimacy of the Namibian people's struggle, and that of all other dependent peoples, to defend their rights. What is more, in its resolution 2396 (XXIII) of 2 December 1968, the General Assembly, making specific reference to human rights and the struggle for their implementation, reaffirmed—

> ". . . its recognition of the legitimacy of the struggle of the peoples of South Africa for all human rights."

This resolution, adopted unanimously but for the two votes of South Africa and Portugal, demonstrates that the international community as a whole deems it legitimate to defend human rights by force of arms; it thus considers them to be peremptory rights endowed with effective sanction, or in other words that they are part and parcel of positive international law. The opposition of two States, Portugal and South Africa, does not diminish the legal authority of that resolution, because they could not be expected to go to the heroic length of condemning themselves. The Security Council in its turn, in resolution 282 (1970) ordering an embargo on the shipment of arms to South Africa, recognized—

> ". . . the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and [in] the Universal Declaration of Human Rights".

This concordance of view between the General Assembly and the Security Council offers final confirmation of the binding nature of human rights.

It will also be noted that the General Assembly equated acts which result from the policy of *apartheid* and thus violate the fundamental laws of equality and liberty, and nearly all other human rights, to war crimes and crimes against humanity when, in the International Convention of 26 November 1968, it declared them liable to prosecution without statutory limitation. Thus, in the eyes of the international community, violations of human rights by the practice of *apartheid*, itself a violation of equality and of the rights which are its corollaries, are no less punishable than the crimes against humanity and war crimes upon which the Charter of the Nuremberg Tribunal visited sanctions. General Assembly resolution 2074 (XX) even condemned *apartheid* as constituting "a crime against humanity". For how can States—other than Portugal and South Africa, so often denounced by the United Nations—cast doubt on a tenet to

which they have all subscribed, namely that human rights are binding in character? How true is what the Catholic philosopher Jacques Maritain once wrote:

> ". . . underlying the stealthy, perpetual urge to transform societies is the fact that man possesses inalienable rights while the possibility of claiming actually to exercise now this one, now that, is yet denied him by those vestiges of inhumanity which remain embedded in the social structures of every era[1]".

The particular human rights whose violation by the practice of *apartheid* is punishable for the same reason and on the same terms as war crimes, and such crimes against humanity as genocide, will be indentified when, at the end of section 8, I come in the course of the argument to deal with the various acts which go to make up *apartheid.*

8. The Court could not refrain from ascertaining the real nature of the practice of *apartheid,* which is not merely contrary to the Mandatory's obligation to ensure the moral and material well-being and social progress of the population under Mandate, but also contravenes the principles of equality and liberty, and the other rights deriving therefrom for individuals and peoples alike. The condemnation of *apartheid,* if it were only taken into account as a violation of the Mandate, would not be radical, as it should be. For it is not only practised by the former mandatory State of South Africa, nor only in the former mandated territory of Namibia. It is more widespread. It is applied in countries which are not under tutelage. It should be delineated and punished as any other attempt upon human equality and individual or national liberty would be. It should be apprehended, in the General Assembly's words, as a crime against humanity, committed in this case against the Namibian people. The breach of the obligation to submit a report to the satisfaction of the Council of the League, or to transmit the petitions of the inhabitants, both of which are obligations bound up with the safeguards for the due performance of the principal obligations assumed by the trustee-Mandatory as such, is not laden with the same degree of gravity as the violation of the latter themselves. It is therefore inadmissible to choose the easy way out and justify the revocation of the Mandate by reference to the refusal to report to the General Assembly or transmit petitions, or even the refusal to collaborate with the committees set up by the United Nations, while at the same time overlooking the gravest violations by failing to make the effort to adduce the proofs thereof, on the hollow pretext that a State has not been given an opportunity of producing factual evidence, when both the written and the oral proceedings contain superabundant proof. This point was grasped by the General Assembly when, with the exception of

[1] *Autour de la Déclaration universelle des droits de l'homme,* Unesco, 1948, p. 16.

South Africa and Portugal, it unanimously took account of the breach not only of the Mandate, but also of the Charter and the Universal Declaration of Human Rights. As is plain from the texts of its many resolutions, what decided the United Nations to penalize South Africa's conduct was much less the non-compliance over reports and petitions than the flagrant violation of the most essential principles of humanity, principles protected by the sanction of international law: equality, of which *apartheid* is the negation; freedom, which finds expression in the right of peoples to self-determination; and the dignity of the human person, which has been profoundly injured by the measures applied to non-White human beings.

That point having been made clear, a reply must nevertheless be given to two objections raised in connection with the practice of *apartheid* and the necessity of denouncing it with a view to determining the legal consequences.

When, in the first place, it is maintained that the request for advisory opinion formulated by the Security Council is not concerned with *apartheid*, it is surely forgotten that the application of that doctrine has been the underlying cause of the United Nations' action ever since the earliest days, from the raising of the question by India in 1946 to resolution 2145 (XXI) of 1966, which revoked the Mandate, and those adopted since. Resolution 2145 (XXI), which was reaffirmed by the Security Council resolution, 276 (1970), to which resolution 284 (1970) requesting the opinion of the Court refers, contains the following paragraph:

> "*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."

In view of this, can it still be said that the request for the Court's opinion does not entitle it to deal with the subject of *apartheid*?

Nor is it any excuse for evading examination of the practice of *apartheid* in Namibia to plead the absence of material proof of the application of that policy to the detriment of the Namibian people; for such proof, quite apart from ministerial admissions on the part of South Africa, is to be found in abundance in the documentation of the proceedings. After reproducing some of these admissions, I will cite the official texts of the South African Government which demonstrate the facts of the matter and reveal the explanation, which is that the policy of *apartheid* has been applied not, as South Africa claims, in the interest of the population formerly under Mandate, but to the prejudice of that population and in the interest of the mandatory State and its own nationals.

In the matter of admissions, four successive Prime Ministers from 1948 to the present day, Dr. Malan, Mr. Strijdom, Dr. Verwoerd and Mr. Vor-

ster, have defined their concept of the *apartheid* policy, as applicable in both South Africa and Namibia, in declarations which offer proof conclusive. In a speech made in April 1948, Dr. Malan asked:

> "Will the European race in the future be able to maintain its rule, its purity and its civilization, or will it float along until it vanishes for ever, without honour, in the Black sea of South Africa's Non-European population? . . . As a result of foreign influences the demand for the removal of all colour bar and segregation measures is being pressed more and more continuously and vehemently; and all this means nothing less that that the White race will lose its ruling position . . ."

In April 1955 Mr. Strijdom, describing his policy in Parliament, stated:

> "I am being as blunt as I can. I am making no excuses. Either the White man dominates or the Black man takes over . . . The only way the Europeans can maintain supremacy is by domination . . ."

Dr. Verwoerd likewise stated to Parliament in 1958:

> "Dr. Malan said it, and Mr. Strijdom said it, and I have said it repeatedly and I want to say it again: The policy of *apartheid* moves consistently in the direction of more and more separate development with the ideal of total separation in all spheres."

Later Dr. Verwoerd went into greater detail in a speech on 25 January 1963:

> "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . Keeping it White can only mean one thing, namely White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development."

Finally, in May 1965, the present Prime Minister, Mr. Vorster, then Minister of Justice, declared:

> "In this Parliament, whose business it is to decide the destiny of the Republic of South Africa, Whites, and Whites only, will have the right to sit."

Such declarations would afford ample proof of what the practice of *apartheid* means and what the motives of those who devised it were. But the Ministers whose declarations are here reproduced have not appeared

before the Court to certify their full authenticity or to explain and comment upon them. I therefore turn to the official texts which have been promulgated and published, and which constitute at one and the same time material proof and an admission; their mere enumeration, even though not exhaustive, demonstrates the various forms in which the unlawfulness of *apartheid* is manifested and the corresponding human rights which have been violated.

The chief texts possessing this probative effect are the following:

1. The Bantu Trust and Land Act of 1936, concerning reserves for Africans which constitute permanent territorial segregation; it thus encroached upon personal liberty, freedom of movement, freedom of residence and the right to own property (Universal Declaration of Human Rights, Arts. 1, 13 and 17).

2. The Natives (Urban Areas) Proclamation of 1951, amended in 1954, under which Black persons may not, with a few exceptions, reside in urban areas; this Proclamation infringes the same rights as the Bantu Trust and Land Act.

3. The Native Reserve Regulations of 1924 and 1938, which forbade Africans in the reserves to leave them or return to them without special authorization; this also violates the human rights mentioned above.

4. The Native Administration Proclamation of 1922, which forbids Africans to circulate without a pass; this violates the right to freedom of movement (Art. 13).

5. The Native Building Workers Act of 1951, which encroaches upon the principles of equality and liberty (Art. 1).

6. The Prohibition of Political Interference Act of 1968, which, in violation of democratic freedoms, prohibits parties of racially mixed membership (Art. 21).

7. The South West Africa Affairs Amendment Act of 1949, which flouted the political rights of the Africans (Art. 21).

8. The Master and Servants Proclamation of 1920, which makes the breach of a contract of employment a punishable offence; this constitutes an infringement of the right to work and an affront to human dignity, and virtually reintroduces forced labour (Arts. 1 and 23).

9. The Prohibition of Mixed Marriages Ordinance of 1953, which regards marriages between Blacks and Whites as void; this is another affront to human dignity and violates the principles of equality as well as the rights of the family (Arts. 1 and 16).

10. The Terrorism Act of 1967, intended to enforce *apartheid* through severe repression, which violates the most sacred principles of criminal law, namely the rule *nullum crimen sine lege*, the rules relating to the definition of principal and accessory, the non-retroactivity of penal laws and of penalties, the presumption of innocence, and the rule of *res judicata*.

11. The Suppression of Communism Act of 1950, extended to Namibia, which has the same unlawful characteristics as the Terrorism Act.

It is, in sum, not without interest to recall that the Commission on Human Rights, in its resolution 3 (XXIV) of 1968, denounced the laws and practices of *apartheid* and *condemned*—

> "... the Government of South Africa for its perpetuation and intensification of the inhuman policy of *apartheid*, in complete and flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights".

In the light of the foregoing it is justifiable to consider that the General Assembly was not mistaken when, in resolution 395 (V) of 2 December 1950, it emphasized that any system of racial segregation, such as *apartheid*, is necessarily based on doctrines of racial discrimination. The Assembly was no less categorical in its Declaration on the Elimination of All Forms of Racial Discrimination, adopted by resolution 1904 (XVIII). This Declaration condemns racial discrimination and *apartheid* as violating human rights. It was adopted unanimously. Given this general agreement of States, some of which have the fullest possible means of investigation at their disposal, it is difficult to understand how the material existence of the illegalities they denounce can be doubted.

Furthermore, the condemnation of *apartheid* has passed the stage of declarations and entered the phase of binding conventions. The International Convention on the Elimination of All Forms of Racial Discrimination—naturally including *apartheid*—adopted by the General Assembly on 21 December 1965, came into force on 4 January 1969.

9. South Africa has not only contested the material existence of the facts but also the interpretation placed upon them by the General Assembly and the Security Council. Its point of view—rejected by all States, even those which question the validity of the measures taken against South Africa—is that its administration has been designed with the precise aim of realising the objectives of the Mandate, these being to promote the well-being and social progress of the inhabitants; that accordingly *apartheid*, or the separate development of these populations was, given their stage of social evolution, instituted in their own interest: that the measures which have been deemed contrary to the provisions of the Charter and to the Universal Declaration of Human Rights, in particular by resolution 2145 (XXI) revoking the Mandate, were justified by the socio-anthropological circumstances and are directed solely to the accomplishment of the mission entrusted to South Africa.

The Court, in paragraph 131 of the Advisory Opinion, has very justly

adduced the textual proof which exists of the unlawfulness of the practice of *apartheid.* Concrete proof could likewise be drawn from the facts already in the Court's possession. When it is possible to refer to such proofs, it is even better to present them in order to reinforce, if need be, the decisiveness of the Court's findings. In this connection I propose to deal with two questions which the Court has not touched upon but which afford opportunities for further clarification: in order, first, to meet the assertion that the Namibian people is not a people and, secondly, to refute the claim that *apartheid* corresponds to the Mandatory's obligation of promoting the well-being and social progress of the people under Mandate.

10. The argument to which South Africa clings most tenaciously is that of the disparity of the various ethnic groups in Namibia. In order to justify the policy of *apartheid* applied not only in the Republic of South Africa but also in Namibia, successive Pretoria governments have put forward the argument that the natives in the south-west of Africa have never formed a people, and that, because of the ethnic and sociological differences which divide them and set them against each other, only the policy of separate development based upon their tribal institutions could ensure their social well-being and progress. This assertion has been used to buttress denials by the South African Government that it pursued a policy of racial discrimination and has also permitted it to reject any accusation that it violated the provisions of the Mandate and the Charter or contravened the Universal Declaration of Human Rights. I therefore propose to show that the premise upon which South Africa bases this justification of its methods of administration in Namibia is a false one; that the Namibian people, ultimate heir of an ancient civilization which in its heyday rivalled anything in Europe, had, before the days of the colonial régime, taken part in the making of great empires, notwithstanding the multiplicity of the elements of which it, like so many other peoples, is composed.

How many of the peoples that have come into being, throughout history and in our times, have not in fact been made up of a variety of human elements? Multiplicity of ethnic entities has been no obstacle to the formation of peoples and States in Africa. Not to mention the ancient States of Ghana, Mali, Bornu, Axum, Kivu, Benin and that of the Bantus, or the Congo State of the Berlin Conference, it cannot be denied that a large number of the 30 or so States liberated since 1960 are multiracial. India, China and Pakistan offer similar examples in Asia. Many States of Europe also preserve what is sometimes no faded memory of a now complete process of union: for example, Switzerland, Czechoslovakia, Yugoslavia, or the United Kingdom from the Norse invasions down to the reigns of Henry VIII (incorporation of Wales in England) and Queen Anne (union with Scotland). Moreover, is not even the South Africa of today governed by a White minority formed by the union of immigrants of different national origins—Germans, English, Dutch and

several others? Whereas the people of Namibia, which always used to be the master of the country, is nowadays united by common aspirations, the legal foundation of nationhood, towards a life of independence and freedom, whatever may be the political régime which it will select after obtaining independence.

If we take a look at the historical facts, we shall see, in the first place, what legality used to be taken to mean in Africa and what it was which used to be called "African law" as opposed to "the public law of Europe"; an African law illustrated—if one can apply the term—in the monstrous blunder committed by the authors of the Act of Berlin, the results of which have not yet disappeared from the African political scene. It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as *terrae nullius*, to be shared out among the Powers for occupation and colonization, when even in the sixteenth century Vitoria had written that Europeans could not obtain sovereignty over the Indies by occupation, for they were not *terra nullius*.

By one of fate's ironies, the declaration of the 1885 Berlin Congress which held the dark continent to be *terrae nullius* related to regions which had seen the rise and development of flourishing States and empires. One should be mindful of what Africa was before there fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale; and colonialism, which exploited humanity and natural wealth to a relentless extreme. Before these terrible plagues overran their continent, the African peoples had founded States and even empires of a high level of civilization. Only Abyssinia, by its savage resistance, escaped the slave-trade and repelled colonialism, preserving its venerable institutions of State. States less ancient but structurally no less developed than the country of the Negus have nothing to show today but ruins enshrining faint impressions of the past. It is just and pertinent that they be recalled here one by one, beginning, in the first centuries of the Christian era, with the empire of Ghana, the power and wealth of which was unequalled in Western Europe after the fall of the Roman Empire. The empire of Mali, which covered territories more vast than Europe at a time when a considerable part of the latter was a feudal and often feuding patchwork; at the centre of this empire shone a university more ancient than any of Europe, the University of Timbuktu, of which it was said, in illustration of its splendour, that the profit there obtained from the sale of manuscripts exceeded that derived from any economic activity. The State of Bornu, the prosperity of which was still such in the nineteenth century, when visited by an English traveller shortly before its conquest, that the situation of the most humble citizen appeared to him happy and comfortable. The Great Lake civilizations, where traces can be found of roads, irrigation canals, dykes and aqueducts, of a remarkable level of technical skill. Passing on, without pausing to consider the civilizations of Axum, Kivu and Benin, we come to that of Southern Africa. On the

banks of the Zambezi, in the same areas as are now dominated by the Republic of South Africa, the Portuguese found, to quote Barboza, "richer trade than in any other part of the world". This is a flattering comparison, for it was made when the Italian republics were at their splendid apogee. In Zimbabwe, the present Rhodesia, gigantic ruins, which call to mind the bastions at Nuragus or Mycenae, bear witness to its ancient grandeur. Its empire extended, into what is now the Republic of South Africa, on both banks of the Limpopo, including the present Transvaal and the sites of Pretoria and Johannesburg. To sum up, let us recall what Raimondo Luraghi has written:

> "Thus, at the time of the arrival of the Portuguese, a chequered history had unrolled for centuries and millennia between the Sahara desert and South Africa—a history of civilized peoples, comparable to that of the great empires of Latin America or of Europe in the most brilliant days of Antiquity and the Middle Ages."

Furthermore, African civilization was not merely material. To give some idea of the high intellectual level of these discredited, unknown or ignored peoples I would quote the work written by Father Placide Tempels, a Belgian Franciscan, on the Bantu people, who still live in Namibia in large numbers. Father Tempels called his book *Philisophie bantoue*, because he had observed the ontological nature of their thinking, based upon awareness of self—on the "know thyself", may I add, of Thales, the Phoenician philosopher who was adopted by the Greeks and ranked among the Seven Sages of their land. "To that intense spiritual doctrine which quickens and nourishes souls within the Catholic church," writes Placide Tempels, "a striking analogy may be found in the ontological thinking of the Bantus." The latter are in fact one of those same great ethnic groups which inhabit the immense territories to which colonialism still desperately clings, that is to say from Mozambique and Angola to Zimbabwe, South Africa and Namibia. And it is these very populations which the South African Government claims are made up of tribes of diverse origins which are incapable of uniting, and which do not deserve the title of a people which the United Nations has attributed to them.

11. Having done justice to the contention that separate development or *apartheid* is a necessity on account of the diversity of ethnic composition precluding on the part of the inhabitants a potentiality for nationhood, I shall now turn to the argument that the measures of discrimination adopted by the South African authorities can be justified in terms of the stage of social evolution reached by the Namibians.

The second paragraph of Article 2 of the mandate agreement provides that:

> "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of inhabitants of the territory subject to the present Mandate."

Here then is an obligation which the Mandatory has to carry out "to the utmost" *[par tous les moyens en son pouvoir]*. To that end the first paragraph of the same Article confers upon him "full power of administration and legislation over the territory subject to the present Mandate".

This means that, rightly or wrongly, the Council of the League of Nations deliberately conferred a power of discretion on the Mandatory. It was however a power of discretion in the legal sense of the term, thus evidently not an arbitrary power but one necessarily subordinate to certain limitations which flow from the overriding principles and rules of law, more particularly the rights of peoples and individuals.

South Africa contends that bad faith would be the only ground upon which criticism could be levelled against its use of that power. This implies that South Africa could be pardoned for irresponsible inaction or neglect, whether serious or slight; for the misuse of law; or for a wilful misinterpretation of the provisions of Article 22 of the Covenant, the Mandate and the United Nations Charter which is alleged to justify racial discrimination and *apartheid, de facto* annexation of the Territory of Namibia, and legislative, administrative or judicial measures contrary to the tenets of both national and international law, the principles of the Charter and the Universal Declaration of Human Rights.

But in fact there is no escaping the dialectical necessity of comparing the responsibility of an authority administering a country placed under its guardianship with that of other authorities entrusted with the administration of their own countries or the interests of their nationals. The latter are expected in public law to provide good government and, in the area of personal rights, to model their conduct on that of the *bonus paterfamilias*; they are for that reason the more to be blamed for any abuse of law or misuse of power. In short, the international judge cannot be denied the right of determining in all circumstances whether proper use has been made of the discretionary power; whether, in the opinion of the international tribunal, it has been exercised with a view to the promotion of the well-being and social progress of the population, or whether the mandatory State has done its utmost to fulfil its obligations. This implies ascertaining whether racial discrimination, *apartheid* and related measures, blameworthy in themselves, can be justified on account of local or temporary circumstances, usually of a social nature, and the interests of the population in question. To pass an opinion in these various situations, a judge cannot rely on his personal judgment, which is bound to be subjective and vary according to the mentality of each judge, his legal, philosophical and ethical outlook, his views on natural law and his cultural and social background. An objective criterion or standard is clearly necessary. Such a criterion is afforded by the general conduct of States and international organizations as a whole. Should the judge further decide to derive criteria from municipal precedents, which abound in such examples as the notion of the *bonus paterfamilias* already mentioned, or from powerful moral trends in a given country,

they must still be acceptable to other countries in general or be already enshrined in the universal conscience of mankind. And in fact it can be said that the many resolutions, adopted over nearly a quarter of a century, which condemn racial discrimination and *apartheid* in South Africa and, as later extended, in Namibia, disclose an objective standard which the South African Government is required to apply. The same can be said with reference to the other human rights. To this the firm attitude of the international community has borne witness whenever it has taken a stand against their infringement. Indeed, the mere perusal of the texts I have mentioned is edifying in this regard.

12. I now come to the legal consequences of the presence of South Africa in Namibia. In order to determine what these are, that presence must first of all be legally classified. Is it a matter of mere peaceful intervention? Or of a military occupation degenerating into aggression? Or a colonial war? For the legal consequences differ in international law according to whether it falls within one or another of these classifications.

The representatives of a certain number of States who have had occasion to speak in the Security Council have stated that the occupation of Namibia by the Republic of South Africa is an aggression. The representatives who so argued were those of Algeria, Colombia, Hungary, Nepal, Nigeria, the Soviet Union, the United Arab Republic, and Zambia [1]. Similarly the other African States stated at Addis Ababa in 1966 that it was a military occupation, which is the mark of aggression according to all the definitions which have been given of that term. And the representative of the United States of America, in the written statement submitted to the Court, expressed the following view:

> "The territory is occupied by force against the will of the international authority entitled to administer it. Such occupation is as much belligerent occupation as the hostile occupation of the territory of another State."

An armed force which violates the frontiers of a country indisputably commits an aggression. What then is the position as to belligerent occupation of a whole territory, to which the representative of the United States refers?

The General Assembly has made matters clear: in resolution 2131 (XX) it said that "armed intervention is synonymous with aggression".

The representative of Pakistan was more emphatic in his oral statement of 15 February last. He rightly viewed the act of using force with the object of frustrating the right of self-determination as an act of aggression, which is all the more grave in that the right of self-deter-

[1] See S/PV. 1387-1395.

mination is a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances.

I hasten to recall that the Security Council has used terms no less forceful. It described the occupation of Namibia as illegal. In its resolution 269 (1969), following the General Assembly, it recognized "the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in the territory"; a legitimate struggle against what, if not against an aggression? This is a logical interpretation, no refutation of which is possible. It follows not only from the logic of things but also from the actual text of the Charter. For Article 51 only authorizes self-defence *[légitime défense]* or legitimate struggle in cases of response to armed attack *[agression armée]*. Thus once the Security Council proclaims the legitimacy of a defence or of a struggle against a foreign occupier, it is an armed attack *[agression armée]* which is in question, and the occupier's act cannot consequently be anything other than an aggression *[agression]*. It is in this context that one must understand the Council's expression, mentioned by the Court in paragraph 109 of the Opinion, "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations".

The aggression committed by South Africa with regard to Namibia is the more serious in that, *de facto* and notwithstanding the South African Government's denials, it has turned into a veritable annexation. This can be indisputably proved by facts which cannot be denied. I will quote the more important of these, the meaning and significance of which it is easy to discern:

(1) The South West Africa Affairs Amendment Act of 1949 deleted all references to the Mandate from the Constitution of the Territory.

(2) The South African Government contends that it occupies the Territory of South West Africa by conquest or by acquisitive prescription.

(3) In the 16 following pieces of legislation, the "Union", or the "State", or the "Republic" of South Africa is defined as including South West Africa:

(a) the Terrorism Act of 1967;
(b) the Border Control Act of 1967;
(c) the War Pensions Act of 1967;
(d) the Wool Act of 1967;
(e) the Armaments Development and Production Act of 1968;
(f) the Human Sciences Research Act of 1968;
(g) the Professional Engineers' Act of 1968;
(h) the Companies Amendment Act of 1969;
(i) the Land Bank Amendment Act of 1969;
(j) the National Monuments Act of 1969;
(k) the Births, Marriages and Deaths Registration Act of 1970;
(l) the Land Survey Act of 1970;

(m) the Land Surveyors' Registration Act of 1970;
(n) the Maintenance Act of 1970;
(o) the National Supplies Procurement Act of 1970;
(p) the Reciprocal Enforcement of Maintenance Orders Act of 1970.

(4) The South West Africa Affairs Amendment Act of 1949 effects annexation at constitutional level, by providing for representation of the Namibians in the Pretoria Parliament.

The annexation of Namibia by South Africa is definitely an act of aggression. A memorable example of that kind of aggression is recorded in the historic Moscow Declaration of 30 October 1943 in which the Soviet Union, the United States, the United Kingdom and China qualified the occupation and annexation of Austria by Hitlerite Germany as aggression and solemnly declared their refusal to recognize it. The fact that the annexation of a territory by the mere movement of troops or by the presence of foreign troops is ranked as an act of aggression by that Declaration means that the word aggression covers a wider range than the notion of armed attack *stricto sensu*. This is easily understandable, inasmuch as occupation and annexation achieve the ultimate aims of aggression, bringing about the destruction of the entity which was the latter's target. As a matter of definition, can the occupation of Austria with a view to its annexation be classified as aggression, and the occupation and subsequent annexation of Namibia not be so regarded? This was what the Court has sought to exclude, when in paragraph 109 of the Opinion it recalled that in operative paragraph 3 of resolution 269 (1969) the Security Council decided "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations". The General Assembly had stated earlier in resolution 2074 (XX) that "any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression". For while the law of former times, as in the 1885 Act of Berlin and the Treaties of Bardo and Algéciras and numerous other treaties, tolerated conquest and annexation, of which South Africa's conduct appears to be one of the last examples, modern law, that of the United Nations Charter, the Pact of Bogotá and the Charter of Addis Ababa, condemns them beyond reprieve. Annexation is nothing less than the negation of the new law of self-determination. Thus the United Nations has reiterated that acquisition of a territory may not be effected by the use or the threat of force. In its recent resolution 2628 (XXV), of 4 November 1970, the General Assembly "reaffirms that the acquisition of territories by force is inadmissible", and that consequently the occupied territories must be restored. None the less, South Africa has throughout, and even before the Court, sought to justify its continued occupation of Namibia by claiming to be there by right of conquest or by the effect of acquisitive prescription. The Court has dismissed this claim in paragraphs 85 and 86 of the Opinion. The

most categorical argument on the point would have been that conquest and acquisitive prescription have totally disappeared from the new law which has condemned war and proclaimed the inalienability of sovereignty.

13. The presence of South Africa in Namibia having thus been defined as illegal and warlike, and, in short, regarded as aggression, what are the legal consequences of this?

The recognition by the United Nations of the legitimacy of the Namibian people's struggle against the South African aggression is nothing less than a recognition of belligerency. For the recognizing States, namely the States Members of the United Nations, it transforms the hostilities between a State and another subject of law, which the Namibian people is, into an international war. Consequently, when there is aggression by a State against a people for the purpose of subjugating it by force, then whatever its manifestations, it cannot be denied that it has the character of a war, or at least of a state of belligerency[1], with all the legal effects attaching thereto, including in particular the status of neutrality imposed on third-party States.

If the provisions of the Charter concerning collective security could have been implemented according to the letter and in the spirit of the San Francisco Conference, there would have been no place for neutrality, at least among States Members of the United Nations. The Charter provided on the one hand for an international army (Arts. 43 to 47) and disarmament (Art. 11, para. 1; Art. 26, and Art. 47, para. 1). But military preparations have been neglected since 1948, and in place of disarmament, which is in the doldrums, there has from the beginning been an intensive process of nuclear and conventional armament spreading into the wars being carried on more or less all over the world. On the other hand, there were the provisions concerning collective security (Arts. 39 et seq.), the executive counterpart of which was to be the international army. The fate of the new institution intended to put an end to wars was no better than that described above. The Security Council's action has been paralysed by the veto, or by the fear of a veto as in the Namibia question. Consequently, neutrality persists so long as wars are tolerated, whether deliberately or through weakness. This applies particularly in the case of the States Members which, evading the obligations deriving from the United Nations resolutions, for some reason or another, are at least under an obligation not to hinder the activities of or the measures adopted by the Organization of which they are Members.

The obligations of States not participating in hostilities, which constitute the status of neutrality, are applicable in the case of mere belli-

[1] L. Cavaré wrote as follows concerning colonial protectorates: "If the protected country retains its personality, then there is a war in the international meaning of the term and the laws of war must be applied" (*Droit international public positif*, Vol. I, 3rd ed., p. 551). *A fortiori*, this is the case for Namibia even before it was recognized by the United Nations by resolution 2372 (XXII). See also above section 2.

gerency just as in the case of war. This would be relevant if it were considered that the relations between South Africa and Namibia are only a state of belligerency between communities, one of which is not yet a State. The classic example of this is the War of Secession in the United States. Therefore, whether the Namibians are regarded as being in a state of war or in a state of insurrection against South Africa, recognized by the international community, the obligations of third States are clear: those States are bound by the status of neutrality as it derives from the 1871 Washington Rules, and Conventions V and XIII adopted by the 1907 Hague Peace Conference—which have become binding rules of customary law—and from the relevant provisons of the laws and customs of war. This means: abstention and impartiality.

In order to define the concept of impartiality, a distinction must be made between the aggressor and the victim of aggression[1]. A noteworthy example is that of the policy adopted by the United States of America, which led to the promulgation of the Cash and Carry and Lend-Lease Acts. These Acts were exceptions to the general rules of neutrality, founded on a desire to assist the victims of aggression[2]. With regard to certain Western States which continue to supply South Africa with arms, ammunition and war material, their attitude contravenes the status of neutrality, from which they have previously benefited[3], for instead of the obligation of impartiality being interpreted by them in favour of the victim, it is violated for the benefit of the aggressor. They should abstain from such deliveries. Security Council resolution 282 (1970), pronouncing the arms embargo against South Africa alone, is in line with international practice.

14. The obligation of abstention entailed by the status of neutrality

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[1] G. Schwarzenberger explains the distinction in these words in connection with the implementation of the Briand-Kellogg Pact:

> "Parties to the Kellogg Pact which remain at peace with the aggressor are entitled, by way of reprisal, to depart from the observance of strict neutrality between the Pact-breaker and his victim and to discriminate against the aggressor."

As examples in support of this rule he cites the Destroyer Deal between the United States and Great Britain, and the "Aid Britain" Act of 1941. He adds in a relevant comparison:

> "As with Members of the United Nations (Art. 2 (5) of the Charter), parties to treaties may even be under a legal duty to discriminate against an aggressor State." (*A Manual of International Law*, Vol. I, 4th ed., p. 185.)

[2] See E. Castrén, *The Present Law of War and Neutrality*, 1954, pp. 451 and 477, who mentions that:

> "The purpose may be to assist the victim of aggression . . . in which case American writers have used the expression 'supporting State' " (p. 451).

[3] R. Sherwood, in his book of memoirs entitled *Roosevelt and Hopkins*, writes on p. 221, of Churchill's overjoyed gratitude: ". . . and from this came the vast concept which Churchill later described as 'a new Magna Charta ... the most unselfish and unsordid financial act of any country in all history'. "

must be defined having regard to the development of modern armaments and the variety of means of assistance which may be supplied to the belligerents. The different prohibitions imposed by international law may moreover duplicate and reinforce or may supplement those laid down in the relevant Security Council resolutions, on account of violation of the Charter and of international law. States may thus be under various obligations by virtue of more than one source of obligation. Examples of such prohibitions are:

(1) The prohibition of all military assistance, not only *de facto*, but also in implementation of a treaty of alliance or of bilateral or multilateral defence. The obligations contained in those treaties cannot prevail over the obligation not to assist an aggressor State. A treaty which enabled assistance to be given to an aggressor would be immoral and contrary to international order, and could not therefore be tolerated by the international community. Further, treaties of alliance generally provide that they do not operate unless it is the other signatory which was attacked.

(2) The prohibition of the supply of nuclear or conventional arms and of all ammunition; of the supply of ships, aircraft or other military machines, and of armed or transport helicopters; of rockets, missiles and electronic equipment which can be put to military uses; of all arms capable of being used against guerillas, including napalm, chemical and bacteriological weapons, and gases of all sorts. As in the case of treaties of alliance or defence, agreements for the supply of any of the foregoing may not be implemented in favour of the aggressor, for any reason whatsoever, whether of joint defence or of economic necessity.

(3) The prohibition of the supply of spare parts and any equipment capable of being used for the production or maintenance of arms or ammunition or nuclear devices, and patents or licences relating thereto.

(4) The prohibition of the emigration or despatch of technicians for work in the armaments industry, or for the training of military personnel; on the transmission of military or technical information, including information relating to the peaceful uses of nuclear energy, on account of the possibility of its being adapted to military purposes.

(5) The prohibition of the supply of oil and petroleum products and of natural gas on account of their vital importance for war. If this prohibition is such as to harm South African industry, that can only be a more effective way of bringing South Africa to put an end to its aggression [1].

(6) The prohibition of the supply of all facilities for the transport of the above-mentioned arms; machinery, munitions and other products.

(7) The prohibition of all economic, industrial or financial assistance,

[1] On the subject of oil supplies see Professor Erik Castrén, *The Present Law of War and Neutrality*, 1954, p. 474.

in the form of gifts, loans, credit, advances or guarantees, or in any other form [1]. This prohibition is not confined to States. It naturally extends to institutions in which States have voting rights, such as the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation; as is well known, the International Bank for Reconstruction and Development has deliberately disregarded the resolutions of the General Assembly and the Security Council, by continuing to grant South Africa aid amounting to hundreds of millions of dollars, which is in fact aid to the illegal activity of the South African authorities in Namibia, contrary to the objects and purposes of the United Nations [2].

All the above prohibitions apply to States and to associations of States and to public and private international organizations.

Furthermore, governments must show due diligence in preventing any individual or collective act contrary to neutrality. This obligation relates to nationals and subjects, and to foreign residents. Showing due diligence means that adequate measures must be taken, including legislative measures providing for penalties. For a State which undertakes an obligation commits its own subjects and those who live under its law, and must employ every kind of means, legislative, administrative and judicial, by which it governs. It is not therefore sufficient to refuse diplomatic protection to those who transgress, as has been suggested by the Government of the United States.

It is by taking these measures, which are dictated by the status of neutrality, that States, and in particular those which are, politically and financially speaking, the Great Powers, will bring South Africa to abandon its present policy, in the interests of justice, peace and international co-operation.

15. It was to be desired that the Court should deduce all the legal consequences from the aggression observed by the Security Council. The request made of it was not confined to the effect of resolution 276 (1970), referred to in resolution 284 (1970) requesting the opinion. The legal consequences upon which it had to pronounce are all those resulting from the very presence of South Africa in Namibia, which is the first

[1] See in connection with prohibitions of a financial nature, Professor Paul Reuter, *op. cit.*, p. 321.

[2] The specialized agencies in which the voting is based on the democratic rule of one State, one vote, have all decided to refrain from any support to South Africa: for example, Unesco, ILO, FAO and WHO. The recalcitrant attitude of the IBRD and the IMF is to be explained by the multiple voting system on a capitalist basis which operates therein, by which the financial Great Powers have a number of votes calculated according to the size of their share in the capital of these two institutions. These Powers are primarily the States which the General Assembly has described as commercial partners of South Africa. In future, States ought to take it as a matter of course that they should bring their attitude in these institutions into line with decisions of the United Nations.

point mentioned in resolution 284 (1970), and which is conditioned by resolution 276 (1970). That presence was the justification for resolutions 282 (1970) and 283 (1970), which the Court could not leave out of account as not falling within the request for advisory opinion. For resolution 283 (1970) re-affirms, first resolution 276 (1970) and secondly resolution 282 (1970), in the following terms:

> "*Re-affirming* its resolution 282 (1970) on the arms embargo against the Government of South Africa and the significance of that resolution with regard to the territory and people of Namibia, . . ."

These two resolutions, 282 (1970) and 283 (1970), concerning the illegal presence of South Africa in Namibia were, what is more, adopted before the request for opinion; resolution 283 (1970) was adopted solely because of that illegal presence, which is the principal subject-matter of the request for opinion, and resolution 282 (1970) had in view *apartheid* beyond the frontiers of South Africa, as well as the policies of that Government in southern Africa, including Namibia. Resolution 282 (1970) reads as follows:

> "*Reiterating* its condemnation of the evil and abhorrent policies of *apartheid* and the measures being taken by the Government of South Africa to enforce and extend those policies beyond its borders,
>
> . . . . . .
>
> "*Gravely concerned* by the persistent refusal of the Government of South Africa to abandon its racist policies and to abide by the resolutions of the Security Council and of the General Assembly on this question and others relating to southern Africa . . ."

This latter paragraph of resolution 282 (1970), by making reference to "the resolutions of the Security Council", contemplated resolution 276 (1970) in particular.

16. Although the Court has made no mention of resolutions 282 (1970) and 283 (1970), it has nonetheless reached conclusions which do not differ in substance from those which follow from those two resolutions and from the status of neutrality.

I will begin with economic consequences, namely those enumerated in resolution 283 (1970) and the more complete set, resulting from the status of neutrality, which are mentioned in section 14, paragraph 7, of the present separate opinion. The Advisory Opinion has not failed to express the view, in the operative clause, that member States of the United Nations are under obligation "to refrain from any acts and in particular any dealings with the Government of South Africa . . . lending support or assistance to" South Africa. The prohibition of economic assistance provided for in resolution 283 (1970) and by the status of neutrality has thus been substantially adopted by the Opinion of the Court.

It is clear from a reading of the whole of the Opinion that the operative

clause is integrally connected with the reasoning, and is explained by the reasoning. But even in the light of the reasoning, there are missing details which it might have been useful to clear up. The question arose whether the legal consequences which the Court was called upon to deduce should be summed up in a few major rules, or whether they should be laid down in terms as detailed as possible. The Court has chosen the first solution, leaving it to the political organs to effect the application thereof. This does not seem to me to be quite what the Security Council wanted. Of course any analytical formulation carried to extremes would have failed to be exhaustive, and might sometimes have overlooked circumstances which were necessarily unforeseeable. Nonetheless, a more complete enumeration, but one which did not lose itself in detail, might have been more satisfying, and would have been more surely effective in stopping at the source those interpretations which are sometimes made to suit national tendencies or interests.

The possible clarifications to supplement the Opinion may, in consequence of what has been said above, be deduced from what is laid down by the status of neutrality, and by resolution 283 (1970). Although not mentioned in the Advisory Opinion, this resolution is covered by the rule which has there been laid down *erga omnes*, namely that the decisions of the Security Council are imperatively binding by virtue of Article 25 of the Charter. The following is a not exhaustive list of the prohibitions of an economic kind which result therefrom:

(1) States should debar themselves and should forbid their nationals, subjects and foreign residents, under penalties, from having any part in South African companies or undertakings registered or established in Namibian territory, or having in that territory branches, representatives or agencies, either by way of technical participation or on the financial level by the acquisition of stocks, shares or bonds.

(2) States should not authorize the shares and bonds of such companies to be quoted on the Stock Exchange, or any dealings therein to be effected. Otherwise, they would be facilitating the disposal of assets acquired by misappropriation or spoliation, taking into account the civil or commercial responsibilities attaching thereto.

(3) The exploitation of the petroleum, diamond, gold and other resources of the soil and sub-soil of Namibia, its territorial waters or its continental shelf, carried out by South Africa or its nationals, or with its authorization, is equivalent to the seizure of Namibian assets by, or with the co-operation of, the occupying authority, and the Republic of South Africa must therefore render an account to the future State of Namibia of the income and taxes which it has derived or collected from such sources. Any States which have obtained profit from these exploitations, either in the form of concessions or in the form of participation in the invested capital, may be held jointly responsible with South Africa towards Namibia. These States and their subjects must refrain from acquiring any of the production of these exploitations, in order not to incur civil respon-

sibility by being involved either as receivers or as purchasers, with notice, of assets not belonging to the vendor.

17. Turning to military matters, it should be observed that the passage in the operative clause of the Opinion forbidding any support or assistance to South Africa is drawn in very general terms. By mentioning "any acts" and "any dealings with the Government of South Africa", it clearly includes military support, and such support, being indisputably the most serious and the most heavy with consequences, must therefore be forbidden before any other form of support. Any supply of arms, munitions or war material, and any technical or scientific military assistance, are hereafter prohibited. This rule applies to all States, and none of them can evade it on any ground whatsoever, e.g., economic or strategic interests.

As in the case of economic consequences, the details of the military support which is prohibited remain to be determined. Like resolution 283 (1970), resolution 282 (1970) is a binding decision by virtue of Article 25, already referred to; the more so in that resolution 282 (1970) is related, as has been stated, to resolution 276 (1970) through resolution 283 (1970). In any event, the acts of military support or assistance from which States must refrain are those the prohibition of which is dictated by resolution 282 (1970) and by the status of neutrality mentioned in Section 14, paragraphs 1 to 6, of this separate opinion. Under each of the three documents in question—the Court's Opinion, resolution 282 (1970) and the status of neutrality—what matters is that no assistance shall be given to an aggressor: consequently, the measures to be applied must be the same, in order to meet the same need.

Certain governments, in order to some extent to evade the embargo on arms and material for land, sea and aerial warfare, have drawn a distinction between arms and war material destined for internal use, in other words for repression—to which they admit the prohibition would apply—and arms and material allocated to external defence, which they contend would be excluded from the embargo.

This distinction is condemned by the facts of the case. In the various wars waged by the colonial Powers and mandatory States, heavy armaments and military aircraft were widely used. According to Mr. McBride, the Secretary General of the International Commission of Jurists, "heavy weapons were often employed to maintain a colonial régime, and they could be very useful to a régime like that in South Africa [1]". And armoured cars were in fact deployed at Sharpeville on 21 March 1960, when the South African police opened fire and according to the United Nations report, killed a large number of peaceful and unarmed Black demonstra-

[1] *Ad Hoc* Sub-Committee of the Security Council, S/AC. 17/SR. 14, meeting of 24 June 1970.

tors while fighter aircraft flew overhead. The anniversary of that day was proclaimed by the General Assembly as the *International Day for the Elimination of Racial Discrimination.* Of course, as a diplomat observed, "it is not possible to transform submarines into amphibious vehicles in order to use them for land operations". However, no one can be unaware that in the course of colonial wars there have been bombardments by naval units or aircraft of ports, towns, villages or concentrations of people. That is why the supply of any arms capable of reinforcing South Africa's military potential must be forbidden, particularly since it is this material strength which enables it to maintain its presence in Namibia notwithstanding resolution 276 (1970).

18. Furthermore, the illegal presence of South Africa in Namibia opens up possibilities of wide application of Article 103 of the Charter. The obligations of Members of the United Nations under the Charter, contemplated by that Article, clearly include obligations resulting from the provisions of the Charter and from its purposes, and also those laid down by the binding decisions of the organs of the United Nations. Among such decisions are those of the Security Council, namely resolutions 282 (1970) and 283 (1970). Since Article 103 applies both to past and future commitments, the following, whatever their date [1], can no longer be relied on against member States in their relationship with South Africa: military alliances, naval agreements or agreements relating to joint naval manœuvres, agreements to supply arms, war material and munitions, agreements for co-operation in the nuclear field for whatever purpose, as well as all treaties involving any assistance whatsoever calculated to facilitate the maintenance of South Africa's presence in Namibia, as is stated in paragraphs 119 et seq. of the Court's Opinion.

19. In conclusion, it should be emphasized that since 1967 the United Nations has been convinced that any assistance given to South Africa, even without being earmarked for any particular application, would nevertheless further the designs of South Africa both in South African territory and in Namibia. For the South African Government has been administering Namibia as an integral part of its territory since even before it was annexed thereto, applying to it its racial policy and its policy of colonial exploitation. Any financial, economic or military assistance is likely to promote the general development of that policy and consequently to tighten South Africa's hold over the Territory of Namibia. Thus it is that the General Assembly has adopted resolution upon resolution in order to dissuade member States of the United Nations from giving any assistance whatsoever to South Africa, even such as is not expressly intended to consolidate its presence in Namibia, for so long as it continues its policy of racial discrimination and *apartheid* in the

[1] See hereon L. Cavaré, *op. cit.*, pp. 653 f.

geographical, political, economic and military ensemble of South and South West Africa. This was the purpose of resolutions 2307 (XXII), 2396 (XXIII), 2426 (XXIII) and 2506 (XXIV). In the same way, the two resolutions 282 (1970) and 283 (1970) of the Security Council concern South Africa no less than Namibia. It is in this sense that the Court's Opinion is to be understood; to do otherwise would be to run counter to reality.

(Signed) Fouad AMMOUN.