

DISSENTING OPINION OF JUDGE GROS

[Translation]

To my regret, I am unable to concur in the Advisory Opinion, whether in regard to the substance or in regard to certain problems of a preliminary character, and I propose to explain my disagreement below.

1. By way of preliminary decision, the Court made four Orders on questions concerning its composition, and as I voted against two of them I should give my reasons for doing so. The first concerned is Order No. 3 of 26 January 1971, which, having regard to Article 48 of the Statute, rejected by 10 votes to 4 an objection raised against a Member of the Court, but gave no reasons. The second Order on which I have to comment is that of 29 January 1971, which, having regard to Articles 31 and 68 of the Statute and Article 83 of the Rules of Court, rejected by 10 votes to 5 a request by the Government of South Africa for the appointment of a judge *ad hoc*; it likewise gave no reasons, and it was accompanied by two joint declarations, one made by three and the other by two Members of the Court.

2. The Court has said: "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*I.C.J. Reports 1963*, p. 29). Even if one of the Governments represented in the proceedings had not raised the problem decided by Order No. 3 of 26 January 1971, the Court would have been obliged to examine it in the application of its Statute. The observance of the provisions of its own Statute is a strict obligation, as the Court's 1963 decision emphasizes.

3. At the meeting of the Security Council on 4 March 1968, the representative of Pakistan, speaking on behalf of the co-sponsors of draft resolution S/8429 on Namibia, which was to become Security Council resolution 246 (1968), stated:

"The seven co-sponsors acknowledge with gratitude the constructive co-operation extended to them by Mr. . . . and Mr. . . . and the great contribution which they made to the formulation of the draft resolution" (S/PV. 1395, p. 32).

The first person mentioned has since become a Member of the Court; now, resolution 246 (1968) of 14 March 1968, in its preamble, takes into account the General Assembly resolution, 2145 (XXI), "by which the General Assembly of the United Nations terminated the Mandate of South Africa over South West Africa and assumed direct responsibility for the territory until its independence" (14 March 1968, S/PV. 1397, pp. 6-10). The records likewise contain summaries of several speeches,

some of them lengthy, which that same person made on the substantive problem now decided by the Court (see S/PV. 1387, pp. 61-66; S/PV. 1395, pp. 41 and 43-45; S/PV. 1397, pp. 16-20).

4. Such are the facts. Hitherto it has been the practice of the Court to determine in each case of this kind whether Article 17 of the Statute was applicable and to ascertain whether there had been any active participation on the part of a Member, before his election, in a question laid before the Court (cf. Stauffenberg, *Statut et Règlement de la Cour permanente de Justice internationale*, 1934, p. 76, citing a decision of the Permanent Court, taken at its twentieth session in which the material point was that a Member had not played an "active part" in the treatment of the question by the Council of the League). It was in application of that principle that one Member of the Court decided not to sit in the case concerning the *Anglo-Iranian Oil Company* because he had represented his country in the Security Council when it had been considering a matter arising out of the claim of the United Kingdom against Iran, and that the Court expressed its agreement with that decision (*I.C.J. Yearbook 1963-1964*, p. 100).

No reader of the records I have cited in paragraph 3 can be left in any doubt as to the character and substance of the positions adopted by the then representative, now a judge, on the question of the revocation of the Mandate by the effect of resolution 2145 (XXI). Yet that resolution is the fundamental problem of the present proceedings, inasmuch as they are concerned with the determination of its legal consequences. It must therefore be noted that Order No. 3 of 26 January 1971 marked a change in practice, and that the Court has discarded the criterion of active participation.

It was indeed, in the present case, no participation in the drafting of a general convention that had to be considered, but the expression of opinion on the international status of the Mandate after and in function of the declaration of revocation by resolution 2145 (XXI), which is the underlying legal point of the proceedings. Thus we see that the representative in the Security Council pronounced upon the substance of the case after the critical date of October 1966. There is therefore no comparison with certain precedents cited in the Advisory Opinion (para. 9), which are instances of judges having contributed to the drafting of international treaties applicable in cases which arose much later and in which they had taken no part.

The Court's decision contradicts the principle, to which Article 17 of the Statute lends formal expression, that a Member must not participate in the decision of any case in which he has previously taken part in some other capacity. This Article, moreover, is an application of a generally accepted principle of judicial organization deriving from an obvious concern for justice. The new interpretation which has been placed upon it cannot, therefore, be justified.

5. I have now to explain why I consider that Article 68 of the Statute

and Articles 82 and 83 of the Rules ought to have been given a different application from the one chosen by the Court in adopting the Order of 29 January 1971.

The Order of 29 January 1971 rejecting the request for a judge *ad hoc* was made after a closed hearing, held on 27 January, at which the observations of the South African Government were heard. Judge Sir Gerald Fitzmaurice, Judge Petrén and I reserved the right to make known the reasons for our dissent, which, inasmuch as they concerned the substance from certain aspects, could not be disclosed at the moment when the Order which discounted them was issued. The Court gave definitive shape to its interpretation of the relevant articles of the Statute and Rules by refusing the appointment of a judge *ad hoc*—a question which it thus made irreversible—without, however, disclosing any reasons for the Order embodying the decision. In that this was an interpretation of rules which are binding on the Court, it is necessary to examine the reasons for it.

The refusal of a judge *ad hoc* is justified only if the legal conditions for the exercise of the faculty to request such an appointment have not been satisfied. The Court has not, in effect, any freedom of choice in the matter for Article 83 of the Rules expressly provides that if “a legal question actually pending between two or more States” is involved in proceedings on a request for advisory opinion, the Court is to apply Article 31 of the Statute, which concerns the appointment of a judge *ad hoc* on the application of a State not represented on the Bench. Furthermore, the Court ought to have pronounced upon this legal problem “*avant tout*” [“above all”] (Rules, Art. 82), but this it failed to do, not treating the question as a preliminary one to be thrashed out in full cognizance of all the factors concerned, including those related to questions of substance. Needless to say, the idea of a preliminary question is nothing new in advisory procedure, and it would have been natural, in view of the particular circumstances of the case, to adopt on this point an approach analogous to that of contentious procedure, as is recommended by Article 68 of the Statute. This is a point with which the Court had to deal, for example, in connection with its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956)*; Poland’s objection to the Court’s jurisdiction in *International Status of South West Africa (Pleadings, p. 153, in para. 2)* was of a preliminary nature, as was also that raised in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* by the Government of Czechoslovakia, which specifically relied on Article 68 of the Statute and Article 82 of the Rules in requesting the Court to apply preliminary objection procedure (*Pleadings, p. 204*). (Note also the Permanent Court’s Order of 20 July 1931 on the appointment of judges *ad hoc* in *Customs Régime between Germany and Austria*, ruling by way of preliminary decision on the applicability of Article 71 of its Rules (Art. 82 in those of the present Court) and Article 31 of the

Statute: *P.C.I.J., Series A/B, No. 41*, p. 89; see also the Advisory Opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935, P.C.I.J. Series A/B, No. 65*, p. 69, and the explanation of it given by my colleague Judge Sir Gerald Fitzmaurice in his dissenting opinion, Annex, para. 24.) A thorough preliminary examination would not have resulted in any delay, as the deliberation would only have required a few meetings and the interval separating the Order from the oral argument on that point, which was two days, would scarcely have been lengthened. To deal with the problem by a rejection not giving reasons, and without adequate examination, is to confuse the preliminary with the *prima facie*. A preliminary question is the subject of exhaustive treatment and final decision; a *prima facie* examination can never, by definition, be thoroughgoing, and can never lead but to a provisional decision. Articles 82 and 83 entail irrevocable decisions, as has been seen in the present proceedings.

6. The fact that the Court did not *avant tout* consider whether the request related to a pending legal question constitutes a refusal to apply a categorical provision of the Rules touching a problem with regard to the Court's composition. It is no reply to argue (para. 36 of the Opinion) that, in any case, the decision to refuse a judge *ad hoc* left the question of the Court's competence on the points of substance open; what Article 82 prohibits, in requiring an examination *avant tout* of the point of law, is to fix the composition of the Court otherwise than as provided by Article 83, and it is only subsequent to that point's being decided for sound reasons after a thorough legal examination that any refusal of a judge *ad hoc* may ensue—and not the reverse.

7. The manner in which the problem was decided therefore constitutes, in my judgment, a violation of the general system laid down in the Statute and Rules, whatever view one may hold of the idea of a legal question actually pending. Moreover, I consider that the present proceedings are in fact related to a legal question actually pending (see paras. 37-45 below), and this ought to have occasioned a deliberation as to the appointment of a judge *ad hoc* or, possibly, judges *ad hoc* in the plural.

The Advisory Opinion affirms the existence of a legal obligation on the part of States which have never ceased to affirm that that obligation did not exist. The existence or non-existence of legal obligations *for States* is the question put to the Court; it was even the subject of lively controversy during the discussions in the General Assembly and the Security Council, according to the documentation in the present proceedings (cf. paras. 20 et seq. below). Judging by the declarations made on behalf of States, there was a conflict of views and much hesitation as to the law applicable.

8. The Court finds in its Opinion that the question is not a dispute between States, nor even one between the Organization and a State. That is a purely formal view of the facts of the case which does not, to my mind, correspond to realities. While it is true that an advisory opinion is given to the organ entitled to request it, and not to States (*Interpretation of*

Peace Treaties, First Phase, I.C.J. Reports 1950, p. 71), the present request has been so framed as to seek an opinion on "the legal consequences for States", a formulation which the Court in its reply has not sought to modify despite its ambiguity in relation to the rule stressed by the Court in *Interpretation of Peace Treaties*. The course taken by the oral proceedings before the Court, as also the text of the Court's present Opinion, have placed South Africa in the position of respondent in a manner difficult to distinguish from contentious proceedings. (See paras. 133, 118 and 129, which are framed like judicial pronouncements in the form of decisions.)

9. The Court observed in its Judgment of 21 December 1962:

"A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence" (*I.C.J. Reports 1962*, p. 328).

One need only substitute "legal question actually pending" for "dispute" to establish that the Court had an obligation to treat the matter in depth and take it beyond the mere assertion that, while questions did lie in dispute between States, this represented, as in the case of the 1950, 1955 and 1956 Opinions, a divergence of views on points of law, as in nearly all advisory proceedings (para. 34).

10. Rather than generalizations, it is necessary to apply to the present proceedings the test adopted by the Court in 1950, when it stated that the application of the provisions of the Statute which apply in contentious cases "depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter" (*I.C.J. Reports 1950*, p. 72).

What then are the particular circumstances of the case which might have led the Court to exercise that "large amount of discretion"? The request for an advisory opinion relates to a substantive problem over which South Africa and other States are opposed; the existence of slight divergences of view on some points among those other States is immaterial, the basic legal question for all of them without exception being that of the revocation of the Mandate with which, as a binding decision, certain States confront South Africa, but which gives rise to doubts and hesitations on the part of others; the purpose of the Advisory Opinion is to apprise the international community of the present legal position of the Territory of Namibia (South West Africa), and thus to determine the purport of a certain international status. It is another way of putting afresh the question laid before the Court in 1950: "What is the international status of the territory?" That, with the addition of "since General Assembly resolution 2145 (XXI)", could in fact have been the request.

However, any reply purporting to apprise *States* of the extent of their obligations subsequent to resolution 2145 (XXI) must connote not only the disposal of the conflict of views between the holder of the revoked

Mandate and the States which instigated and eventually pronounced the revocation, but also the imposition on all States of a certain line of conduct.

11. It is not enough to describe the problem as a "situation" for the difficulties to cease. As the Court said in respect of disputes, "a mere assertion is not sufficient". From the viewpoint of law the description "situation" used by the Security Council has no effect so far as the Court is concerned. Without denying that the Namibia affair is and remains for the Security Council a situation, the Court, in order to determine its own competence, had to enquire whether, quite apart from what the Security Council may have thought, the request of 29 July 1970 did or did not relate to a legal question actually pending between States, within the meaning of the Rules of Court (as the Court did in its Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, pp. 72-74). Any other view would confer on the political organs of the United Nations the right to interpret, subject to no appeal, the Rules of Court.

12. The Court was faced with a legal question with pronounced political features, which is often the case, but which is not enough to overrule the argument that the issue is, at bottom, a legal one. The subject of the dispute is the conflict of views between, on the one hand, those States which, through the procedures available to the United Nations, have sought and procured the revocation of South Africa's Mandate for the Territory of South West Africa and, on the other hand, South Africa, which attacks that revocation and such effects as it might have. The way in which the request was framed adds to this basic question that of the effects for all States, that is to say even for States which have not taken any active part in the development of the action proceeded with in the United Nations; but this relates to consequences, as the request itself says, and not to the essential legal question. All this emerges strikingly from the written and oral proceedings, in which the Government of South Africa behaved like a respondent, replying to veritable claims and submissions presented by other Governments (with the exception of the French Government, whose written statement is more in the nature of an intervention by an *amicus curiae*).

13. There is, said the Court in 1962, a "conflict of legal views and interests—between the respondent on the one hand, and the other Members of the United Nations . . . on the other hand" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345); and this observation was not modified in the Judgment of 1966, which dismissed the Applications not on the ground that there was no dispute, but solely in regard to the question whether the Applicants had a legal interest in the carrying-out of the "conduct" clauses of the Mandate. It is therefore impossible to deduce therefrom any refusal on the part of the Court to pronounce in any circumstances on whether there had been breaches of the Mandate (on the contrary, one might note the allusion in paras. 11 and 12 of the 1966 Judgment to Article 5 of the

Mandate for South West Africa and to the right of every League member to take action to secure its observance, which connotes recognition of a legal interest in the proving of certain breaches of the Mandate). The Advisory Opinion, as is apparent from its contents, meets the concern, expressed during the discussions in the Security Council preceding its request, for proof that the Mandate was lawfully revoked; and this, by the Opinion's own admission, comprises a legal question rooted in the very origins of the Mandate, one which at all events, as we shall see below (para. 25), made its appearance before the Court as long ago as 1950.

The Court might perhaps have been encouraged to admit the existence of a genuine dispute between States if it had taken note of the fact that the General Assembly itself, in its resolution 1565 (XV) of 18 December 1960, made a pronouncement on "the dispute which has arisen between *Ethiopia, Liberia and other member States, on the one hand, and the Union of South Africa on the other*" (my emphasis). Need one do more than recall this fact and raise the question as to whether, in the words of the Court's Advisory Opinion of 30 March 1950 on the *Interpretation of Peace Treaties*, "the legal position of the parties . . . cannot be in any way compromised by the answers that the Court may give to the question put to it" (*I.C.J. Reports 1950*, p. 72)? Judge Koretsky had a similar point in mind when, in what was in many respects a comparable case, he observed that the Court, in its Advisory Opinion, would be giving "some kind of judgment as if it had before it a concrete case" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, dissenting opinion, *I.C.J. Reports 1962*, p. 254).

14. The fact that a political organ of the United Nations places a situation on its agenda cannot have the legal effect of the disappearance of a dispute between two or more States interested in the maintenance or modification of the situation. These are two different and parallel planes; one is the manifestation of the United Nations' political interest in facilitating settlement of a situation of general concern for the community of States, the other is the determination of the existence as between certain States of opposed legal interests which give them a special position in the appraisal of the situation of general concern. Naturally, the fact that there is a divergence of views on the law does not rob the Security Council or the General Assembly of the rights they derive from the Charter to consider the situation as it presents itself. But in the same way it is impossible to admit that the mere calling-in of a general situation by the political organs of the United Nations could bring about the disappearance of the element of a dispute between States if there exists such an element underlying the general situation, when such a case is in fact provided for in the Rules of Court. This is why, in each case, the question arises of whether one is or is not confronted with what is really a dispute. Articles 82 and 83 of the Rules of Court would otherwise have no meaning, whereas their purpose is to reassure States that, if an advisory opinion be requested in relation to a legal question over which they are divided,

they will enjoy the right to present their views in the same way and with the same safeguards as in contentious procedure, more particularly where the composition of the Court is concerned.

15. To conclude in regard to this point, to say, as the Opinion does, that there is no dispute, and that the question of the application of Articles 82 and 83 of the Rules does not arise, is to suppose that the Court was, on the very first day of the proceedings, able to resolve the substantive question, namely the existence of a power in the United Nations, as an international organization, to revoke the Mandate. But on the day the Order of 29 January 1971 was made, before any discussion or deliberation of the substantive issues, the least that can be said is that this was still a point which remained to be proved. This is a question which was so important for all the subsequent examination of the case that the Court ought to have resolved it "*avant tout*", but this it failed to do. The argument that it was the Order of 29 January 1971 which established that there was no legal question pending between South Africa and other States, but merely an opinion to be given to a political organ on the consequences and repercussions of its decisions, is equivalent to an assertion that, before any oral proceedings on the substance of the case, the Court could have judicially decided the substantive problem to which the request for an advisory opinion related. To refuse the judge *ad hoc* applied for by South Africa before settling this basic question was to prejudice it irremediably. The questions whether a dispute existed, what it consisted of and who the parties might be were all disposed of *in limine litis* by the mere effect of the dismissal of the application for a judge *ad hoc*, for it was thereafter impossible to go back and modify that refusal, even if the examination of the substantive issues had eventually led the Court to conclude that there was in fact a legal question pending between States. The fact that the Court has confirmed the decision to refuse a judge *ad hoc* in its consideration of the substance does not exonerate it from the charge of having failed to consider the point of law "*avant tout*".

16. I would add that, even if the Court, after thorough preliminary examination of the point of law, had decided that Article 83 did not oblige it to accept the application for the appointment of a judge *ad hoc*, Article 68 of the Statute left it the power to do so, and on this point I would refer to the declaration of my colleagues Judges Onyeama and Dillard appended to the Order of 29 January 1971. When it is a matter of deciding whether a legal title has lawfully been withdrawn from a State and determining the legal consequences of that revocation, it is in the compelling interest of the Court that it should apply that clause of its Statute which provides for the closer approximation of advisory to contentious procedure. I am unable to accept the contention in paragraph 39 of the Opinion, to the effect that the circumstances contemplated in Article 83 of the Rules are the only ones in which the Court may agree to the appointment of a judge *ad hoc* in advisory proceedings (cf. the reasoning of Judge Sir Gerald Fitzmaurice in paragraph 25 of the Annex

to his dissenting opinion, and that of Judge Onyeama in his separate opinion).

17. The two decisions of the Court concerning its composition affect the constantly followed rule that the Court, when it gives an advisory opinion, is exercising a judicial function (*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 153: "The Court as a judicial body is . . . bound in the exercise of its advisory function to remain faithful to the requirements of its judicial character"; a formula reiterated in *Northern Cameroons, I.C.J. Reports 1963*, p. 30). For it is certain that while advisory judgments and advisory opinions are for the Court two different forms of decision, they are always the expression of its confirmed view as a tribunal on rules of international law. There are no two ways of declaring the law. For the reasons I have set down in the foregoing paragraphs, Order No. 3 of 26 January 1971 and the Order of 29 January 1971 do not appear to me to satisfy the requirements of that good administration of justice which it is the purpose of the Statute and Rules to secure.

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18. Another deviation from the line of the Court's case-law is to be observed in the way in which the Court has hesitated to examine the lawfulness of the legal step which gave rise to the question upon which the Court is asked to pronounce, i.e., General Assembly resolution 2145 (XXI). In paragraphs 88 and 89 of the Opinion the Court declares that the question of the validity or the conformity with the Charter of resolution 2145 (XXI), or of the Security Council resolutions, did not form the subject of the request for advisory opinion. It used not to be the Court's habit to take for granted the premises of a legal situation the consequences of which it has been asked to state; in the case concerning *Certain Expenses of the United Nations* it declared that:

"The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditure were 'decided on in conformity with the Charter', if the Court found such consideration appropriate. It is not assumed that the General Assembly would seek to hamper or fetter the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*I.C.J. Reports 1962*, p. 157.)

The situation in the two cases is parallel; in *Certain Expenses of the United Nations*, as in the present case, there was some question as to the desirability of stating that the Court should examine the whole of the legal situation and in particular the validity of the acts of the General

Assembly. But, unlike what has occurred in the present case, and although the General Assembly eschewed placing the Court's terms of reference on the broadest basis when it rejected the amendment of France submitted for that purpose, the Court nevertheless, on that occasion, found that it had competence and was bound to conduct that thorough examination in order to acquit itself fully of its judicative task. How indeed can a court deduce any obligation from a given situation without first having tested the lawfulness of the origins of that situation? Between the Court's decision in 1962 and the present Opinion a change of attitude is manifest.

19. In the present case, in which the Court has based its Opinion on an interpretation of Articles 24 and 25 of the Charter as to the powers of the Security Council, and on an interpretation of the legal nature of the powers of the General Assembly, it would have seemed particularly appropriate to have exercised unambiguously the Court's power to interpret the Charter, which the General Assembly itself, in resolution 171 (II) of 14 November 1947, formally recognized that it possesses. That resolution recommends the reference to the Court of points of law "relating to the interpretation of the Charter".

20. I must therefore briefly indicate the reasons why I disagree with the Court with regard to the legal nature of resolution 2145 (XXI) and its effects.

It is the content of resolution 2145 (XXI) which determines the scope of that decision; it contains various declarations:

- (a) as to the right of the peoples of South West Africa to freedom and independence, based on the Charter, General Assembly resolution 1514 (XV), and its previous resolutions concerning the Territory (first and seventh paragraphs of the preamble, para. 1 of resolution 2145 (XXI));
- (b) recalling the obligations under the Mandate and the supervisory powers of the United Nations as the successor to the League of Nations (second paragraph of preamble, para. 2 of the resolution);
- (c) as to the administration of the Territory in a manner regarded as contrary to the Mandate, the Charter, and the Universal Declaration of Human Rights (fifth paragraph of preamble, para. 3 of resolution);
- (d) as to condemnation of *apartheid* and racial discrimination as constituting a crime against humanity (sixth paragraph of preamble);
- (e) as to the right to take over the administration of the mandated territory (eleventh paragraph of preamble; paras. 4, 5, 6 and 7 of resolution).

21. It is also important to recall that underneath the quasi-unanimity which is often urged in favour of resolution 2145 (XXI) having certain legal effects there lie serious differences of view.

- (a) The Soviet Union and nine other States (Albania, Byelorussia, Cuba, Czechoslovakia, Hungary, Poland, Romania, Ukraine, Yugoslavia) expressed reservations (see Secretary-General's second written statement, paras. 30 to 39) with regard to the setting-up of a United Nations organism for the administration of the Territory of Namibia, which is one of the essential objects of resolution 2145 (XXI) (cf. last paragraph of preamble and paras. 4 and 5 of the resolution).
- (b) Australia and Japan drew attention to the complexity of the legal problems involved and reminded the General Assembly that it "must keep strictly within the framework of the Charter and of international law" (*ibid.*, Australia: para. 49; Japan: para. 57).
- (c) Canada said that "the General Assembly was not called upon to make a juridical judgment as to whether in one respect or another the government in charge of the Mandate had been delinquent in carrying out the Mandate entrusted to it..." (*ibid.*, para. 50), whereas, as we have seen in paragraph 20 above, the fifth and sixth paragraphs of the preamble and paragraph 3 of the resolution make formal declarations on that subject.
- (d) The representative of Belgium explained "that his delegation's support of the text [resolution 2145 (XXI)] for which he had voted did not, in any way, imply that the delegation approved it without doubts or reservations. His delegation would have preferred the point of law of the General Assembly's competence to be clarified as fully as possible" (*ibid.*, para. 40).
- In the same way, Brazil declared that the decision for the Mandate to be revoked and the United Nations to take over direct responsibility for the Territory "would be based on doubtful juridical grounds" and "expressed a series of reservations". For example: "it was not... legitimate for the General Assembly to decide to revoke the Mandate" (*ibid.*, para. 60).
- (e) Italy and the Netherlands formally reserved their position with regard to paragraph 4, concerning an essential point of resolution 2145 (XXI): the assumption by the United Nations of direct responsibility for Namibia (*ibid.*, paras. 45 et seq.). New Zealand reserved its position with regard to the methods of implementation.
- (f) Israel considered "that the political aspect of the question of South West Africa outweighed the possible legal problems, and that even the most scrupulous concern for legal niceties might at this juncture cede its place to the political wisdom of the majority of the General Assembly" (*ibid.*, para. 51).
- (g) It will be recalled that two States voted against resolution 2145 (XXI) and that three abstained, while all indicating definite reservations.

22. Thus there were 24 States which, in one way or another, expressed opposition, reservations or doubt. The fact that 19 of these States voted for resolution 2145 (XXI) does not in any way diminish the effect of the observations and reservations they made upon the text, for in voting for it the States in question did not withdraw them; thus their votes signified acceptance of a political solution of which some features remained, for each of them, the subject of the opinions expressed. Resolution 2145 (XXI), therefore, was not voted with quasi-unanimity of intention; it was voted by a large majority, clearly under the strong impression that law was not being made.

It was argued before the Court on behalf of the Secretary-General that the concept of reservations was not applicable to the voting of decisions in organs of the United Nations (hearing of 8 March 1971). As the Opinion makes no pronouncement on that point, suffice it to recall that the practice is a constant one, necessitated through the need to provide States wishing to dissociate themselves from a course of action with a means of making their attitude manifest (on the usefulness and meaning of such reservations, see the opinion of Judge Koretsky in *Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 279). The consequence of the rejection of this practice and its effects would be to treat the political organs of the United Nations as organs of decision similar to those of a State or of a super-State, which, as the Court once declared in an oft-quoted phrase, is what the United Nations is not. For if a minority of States which are not in agreement with a proposed decision are to be bound, however they vote, and whatever their reservations may be, the General Assembly would be a federal parliament. As for the Security Council, to affirm the non-existence of the rights of making reservations and of abstention would, for the permanent members, be a simple encouragement to use the veto. The everyday operation of the United Nations would be deprived of all the flexibility made possible by statements of reservation and by abstention; as Judge Koretsky put it:

“Abstention from the vote on the resolutions on these or those measures proposed by the Organization should rather be considered as an expression of unwillingness to participate in these measures (and eventually in their financing as well) and as unwillingness to hamper the implementation of those measures by those who voted ‘in favour’ of them.” (*I.C.J. Reports 1962*, p. 279.)

23. Resolution 2145 (XXI) is a recommendation of the General Assembly concerning a mandated territory. With certain exceptions, recommendations have no binding force on member States of the Organization. It is therefore either in the law of mandates or in the Charter that justification for an exception must be discovered.

24. First, let us re-examine the question of revocation under the man-

dates system as it was originally established. The international status of the mandated territory was defined by the Court's Opinion of 1950, and "it is in accordance with sound principles of interpretation that the Court should safeguard the operation of its Opinion of 11 July 1950 not merely with regard to its individual clauses but in relation to its major purpose" (separate opinion of Judge Sir Hersch Lauterpacht annexed to Opinion of 1 June 1956, *I.C.J. Reports 1956*, p. 45). It is in this spirit that enquiry must be made whether the power of revocation of the Mandate was, either in the 1950 Opinion which is the broadest account of the principles governing the matter, or in the proceedings and arguments preceding that Opinion, regarded as being an element of the international status defined by the Court.

25. It will be recalled that the question put by point (c) of the request for opinion contained in the General Assembly resolution of 6 December 1949 ran as follows:

"Has the Union of South Africa the competence to modify the international status of the territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the territory?"

This question was put in a sufficiently general way for it to have been possible, either in the Opinion of the Court, or in the separate and dissenting opinions, to raise the question of unilateral modification of the status of the Territory by the United Nations; competence "to determine and modify the status" is the widest kind of competence, since it enables the existing obligations both to be defined, and their limits stated, and also to be "modified". It is therefore important to observe that the only statement by the Court on point (c), to be found in identical terms in the reasoning and in the reply itself, was:

"that competence to determine and modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the United Nations".

While it is true that the Court's conclusion replied, at the time, to a claim by the Mandatory to modify the status of the Territory unilaterally, the formula used in the Opinion is absolute, and does not contain any suggestion of exceptions, as for example the case of unilateral revocation of the Mandate, or of any partial, less substantial, modification of the status by the United Nations. It must be recognized that neither the Court nor any judge who took part in the 1950 proceedings was ready to admit the existence of a power of revocation appertaining to the United Nations in case of violation of the Mandatory's obligations.

This was not, however, because the problem was not raised before the Court at the time. The written statement of the United States Government touched on the question (*I.C.J. Pleadings, International Status of*

South West Africa, pp. 137-139) and the Secretary-General, in his oral statement, attributed sufficient importance to it to make it one of his conclusions:

“Fourth, the possibility of revocation in the event of a serious breach of obligation by a mandatory was not completely precluded. It was suggested that in the event of an exceptional circumstance of this kind it would be for the Council or for the Permanent Court or for both to decide” (*ibid.*, p. 234).

Then the statement went on to discuss the notion of “*a solution agreed between the United Nations and the mandatory Power*” (*ibid.*, p. 236, italics in the original), which was to be confirmed by the Court in its reply to question (c). On this point, the statement ended as follows:

“Could not the International Court of Justice be put into a position to play a constructive role?” [for the interpretation and application of the Mandate] (*ibid.*, p. 237).

Without seeking to base a decisive argument on these facts, they do nevertheless make it impossible to advance the contrary argument that the reason why the question of unilateral revocation of the Mandate was not mentioned in the Court’s reply to question (c) was because the problem had not been mentioned during the proceedings. As is apparent, it had been raised by the United States and by the Secretary-General.

26. As early as 14 December 1946, the General Assembly had adopted resolution 65 (I), inviting the Union of South Africa to propose a trusteeship agreement for the consideration of the General Assembly. And from that time on, invitations to negotiate followed each other; resolution 141 (II) of 1 November 1947, resolution of 26 November 1948, and so on up to the request for advisory opinion of 6 December 1949. After the Opinion of 11 July 1950, the General Assembly continued its efforts towards negotiation with the Union of South Africa (resolution 449 A (V) of 13 December 1950; resolution 570 A (VI) of 19 January 1952, in which the Assembly: “Appeals solemnly to the Government of South Africa to reconsider its position, and urges it to resume negotiations . . . for the purpose of concluding an agreement providing for the full implementation of the advisory opinion”; resolution 651 (VII) of 20 December 1952, which maintained the instructions to negotiate given to the *Ad Hoc* Committee of Five by resolution 570 A (VI) of 19 January 1952, resolution 749 A (VIII) of 28 November 1953, etc.). Up to the time of the Eleventh Session, in 1957, the General Assembly does not seem to have conceived of any other means of solution of the problem of South West Africa than that of negotiation, and it was only in resolution 1060 (XI) of 26 February 1957 that the Committee on South West Africa was instructed to examine the legal means at the disposal of the organs of the United Nations, the Members of the United Nations, or the former

Members of the League of Nations; this was the source of the initiative of the two member States of the United Nations, who were also former Members of the League of Nations, which resulted in the Court's Judgments of 1962 and 1966. The question put to the Committee on South West Africa was:

“What legal action is open to *the organs of the United Nations*, or to the Members of the United Nations, or to the former Members of the League of Nations . . . to ensure that the Union of South Africa fulfils the obligation assumed by it under the Mandate . . .” (emphasis supplied).

The general line followed by the United Nations was thus to obtain a South African commitment to negotiate a trusteeship agreement, with certain attempts to arrange an interim international status, as the Opinion recalls in paragraph 84.

27. It will be sufficient to observe that between 1950 and 1960, the date of the Applications filed by Ethiopia and Liberia, when it was a question of carrying on the work done by the Court in its Opinion of 11 July 1950, no-one claimed that there existed a power of revocation of the mandate by the organs of the United Nations, or even a power to modify the provisions of the mandate by such unilateral means. The facts afford the proof: it was known in 1960 that contentious proceedings before the Court would be lengthy and would involve some risk, whereas, according to the Court's present Opinion, a power of unilateral revocation of the Mandate by the General Assembly has always existed, ever since the refusal by South Africa to submit to supervision and present reports on its administration of the Territory. The least that can be said is that the General Assembly was certainly not aware in 1960 that it had such power, when it contented itself with commending Ethiopia and Liberia upon their initiative (resolution 1565 (XV) of 18 December 1960), and that the States which opposed the claims of South Africa were no better informed since, as became apparent in October 1966, it would have been infinitely more simple and rapid to “modify” the mandate by unilateral action in 1960, even after having consulted the Court on the means to be used, by a request for advisory opinion similar to that to which the Court has now replied *ex post facto*. But this was never contemplated at any time before the revocation declared in October 1966, so flimsy did the idea of a unilateral power to revoke the Mandate appear.

28. In 1955, at the time of the Opinion on *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* (Advisory Opinion of 7 June 1955, *I.C.J. Reports 1955*, pp. 67 ff.), Judge Lauterpacht gave exhaustive study to all the problems raised by the implementation of the Opinion of 11 July 1950, including that of the legal position of a mandatory which systematically refused to take account of the recommendations addressed to it (cf. his separate opinion at pp. 118, 120-121 and 122). It is important to note that, even

when he supposes that the Mandatory had over-stepped "the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and abuse of that right" (p. 120), Judge Lauterpacht does not pronounce on the possible legal sanctions, and makes no mention of the idea of revocation for violation of the obligation of the Mandatory to act in good faith. The purpose of his argument is the affirmation of the legal nature of that obligation, the idea of sanction only being relied on as a confirmation thereof.

29. The conclusion to be drawn from the conduct of the United Nations and of the States most directly concerned by solution of the problem of South West Africa is that the power of revocation is not a feature of the mandates system as it was originally established. It is not consistent with any reasonable interpretation of the powers of the General Assembly in the field of mandates to discover today that it has had for 25 years what the Council of the League of Nations had never claimed, and thus has not merely means to revoke the Mandate, but also, merely by drawing attention to such power, the possibility of obliging the Mandatory to render account to it, which is an argument that was never employed.

30. The system described in the Opinion of 11 July 1950, which did not go so far as to affirm the existence of a legal obligation to negotiate a trusteeship agreement, did not entail, even implicitly, the concept of unilateral revocation, the accent being laid exclusively on the idea of negotiation between the United Nations and the Mandatory. As the Judgment of 21 December 1962 in the *South West Africa* cases subsequently explained, "the Council could not impose its own view on the mandatory . . . and the mandatory could continue to turn a deaf ear to the Council's admonitions" (*I.C.J. Reports 1962*, p. 337); the 1950 Advisory Opinion on the *International Status of South West Africa* had said that "the degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the mandates system . . ." (*I.C.J. Reports 1950*, p. 138).

The existence in the mandates system of a power of revocation has not been proved.

31. The second justification presented to support the revocation of the Mandate refers to a special power of the United Nations to take a decision to revoke it, even if such power did not exist with regard to mandates originally, by a sort of transposition of a general rule relating to violation of treaties. It is sought to justify resolution 2145 (XXI), with regard to its effects, by an appeal to the general theory of the violation of treaty obligations, and by affirmation of the existence of a right for the United Nations, as a party to a treaty, namely the Mandate, to put an end to that treaty by way of sanction for the refusal of the other party, the Mandatory, to fulfil its obligations.

In the first place, the idea that the mandates system is a treaty or

results from a treaty is not historically correct, as was recalled by Judge Basdevant:

“The Court has felt able to rely on what it recognizes as the treaty character of the Mandate established by the decision of the Council of the League of Nations of 17 December 1920. I do not subscribe to this interpretation. I adhere to the character of the instrument made by the Council of the League of Nations on 17 December 1920 ... I have not found anything to indicate that *at that time* the particular character of the Council’s instrument was disputed” (*I.C.J. Reports 1962*, p. 462; emphasis supplied).

It must be added that, even if one concedes that the Mandate is a treaty, there is no rule in the law of treaties enabling one party at its discretion to put an end to a treaty in a case in which it alleges that the other party has committed a violation of the treaty. An examination of the rival contentions is necessary, and the one cannot prevail over the other until there has been a decision of a third party, a conciliator, an arbitrator or a tribunal.

32. The mandates system having been established on the international level, it became binding subject to the conditions on which it was established, that is to say without the inclusion therein of any power of revocation. To modify any international status of an objective kind, there must be applied thereto the rules which are proper to it. The argument for the unilateral power of revocation of the mandate by the General Assembly has no basis but the idea of necessity, however it may be clothed. And, as Judge Koretsky recalled in 1962, the end does not justify the means (*I.C.J. Reports 1962*, p. 268). To say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law.

33. In these circumstances, for me the problem of the legal consequences of resolution 2145 (XXI), and of the related resolutions of the Security Council, arises in a way very different from that adopted by the Court. As Judge Lauterpacht said in 1955, and as Judge Koretsky said in 1962, I consider that the recommendations of the General Assembly, “although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, ... do not create a legal obligation to comply with them” (*I.C.J. Reports 1955*, p. 115). In the present case, in the absence of a power of revocation in the mandates system, neither the General Assembly nor even the Security Council can cause such a power to come to birth *ex nihilo*. Thus we have here recommendations which are eminently worthy of respect, but which do not bind member States legally to any action, collective or individual. This classic view was laid before the Court by the representative of the USSR in the case concerning *Certain Expenses of the United Nations*

(written statement, *I.C.J. Pleadings*, p. 273; oral statement, *ibid.*, pp. 411 f.). In 1962 and in 1970, France also argued that the United Nations could not, by way of recommendation, legislate so as to bind member States (*I.C.J. Pleadings, Certain Expenses of the United Nations*, pp. 133 f.; written statement of France in the present case, *Pleadings*, Vol. I, pp. 365-368, with the reminder of frequently expressed reservations, *ibid.*, p. 368, note; see also the declaration of the United States Government on the attitude of certain States following the Opinion on *Certain Expenses of the United Nations*, in particular on the problem of the double standard obtaining among member States: UN doc. A/AC.121/SR.15.Corr.1).

Resolution 2145 (XXI) is a recommendation with considerable political impact, but the member States of the United Nations, even including those which voted for its adoption, are under no legal obligation to act in conformity with its provisions, and remain free to determine their own course of action.

34. There is still to be considered the argument that the Security Council has, if need be, "confirmed" resolution 2145 (XXI) (cf. the statements made in this sense on behalf of the United States Government by Mr. Stevenson, hearing of 9 March 1971). But how can an irregular act be rendered legitimate by an organ which has declared only to have "taken note" of it or "taken it into account"? To regularize an act connotes the power of doing oneself what the first organ could not properly do. And the Security Council has no more power to revoke the Mandate than the General Assembly, if no such power of revocation was embodied in the mandates system. Hence the problem remains.

As for the contention that the Security Council was entitled under Articles 24 and 25 of the Charter to intervene directly in the revocation of the Mandate and take decisions binding on States because the situation was being dealt with under the head of the maintenance of international peace and security, that is another attempt to modify the principles of the Charter as regards the powers vested by States in the organs they instituted. To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government. The Court has well defined the conditions of the Charter:

"That is not the same thing as saying that [the United Nations] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a 'super-State', whatever that expression may mean." (*I.C.J. Reports 1949*, p. 179.)

35. There is not a single example of a matter laid before the Security Council in which some member State could not have claimed that the continuance of a given situation represented an immediate or remote

threat to the maintenance of peace. But the Charter was drawn up with too much precaution for the disturbance of its balance to be permitted. Here again the words used before the Court in 1962 by the Soviet representative are apposite:

“The opposing of the effectiveness of the United Nations Organization to the observance of the principles of the United Nations Charter is legally groundless and dangerous. It is clear to everyone that the observance of the principles of the United Nations Charter is the necessary condition of the effectiveness of the United Nations. The experience of the United Nations clearly shows that only on the basis of the strict observance of the principles of the United Nations Charter can the Organization become an effective instrument for the maintenance of international peace and security and the development of friendly relations among States.” (*I.C.J. Pleadings, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, pp. 411 f.; see also the French Government’s written statement in the same case, *ibid.*, p. 134, and cf. the parliamentary statement of H.M. Government on the legal nature of obligations arising out of Security Council recommendations: *Hansard*, Vol. 812, No. 96, 3 March 1971, pp. 1763 ff.)

The same point was stressed by the delegates of several States in Security Council discussions of the matter with which the Court is now concerned. They pointed out that the only way of laying States under obligation would be for the Council to take a decision based on Chapter VII of the Charter after proceeding to effect the requisite determinations, a method which the Council chose not to adopt.

The degree of solidarity accepted in an international organization is fixed by its constitution. It cannot be subsequently modified through an interpretation based on purposes and principles which are always very broadly defined, such as international co-operation or the maintenance of peace. Otherwise an association of States created with a view to international co-operation would be indistinguishable from a federation. It would be precisely the “super-State” which the United Nations is not.

36. There are therefore no other consequences for States than the obligation of considering in good faith the implementation of the recommendations made by the General Assembly and the Security Council concerning the situation in Namibia (cf. oral statement on behalf of the United States, hearing of 9 March 1971, section IV *in fine*).

* * *

37. Nevertheless, considering the importance of the humanitarian interests at stake and of the question of principle raised before the Court for over 20 years, one cannot, I feel, merely record these legal

findings and leave the matter there. It would be regrettable not to indicate means of pursuing what the Court established in 1950. It was in my view open to the Court to adopt towards the question put by the Security Council a different approach, one which would not only have been more in conformity with its traditions but also have offered the United Nations some prospects of a solution, instead of an impasse. However, as that approach was not adopted, I cannot do more than outline it.

What is essential in the case of a request for advisory opinion, as in that of a contentious application, is its actual subject, not the reasoning advanced in the course of the proceedings. A court seised of a matter must judge that matter and not another (cf. *Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173; *Fisheries, I.C.J. Reports 1951*, p. 126 concerning “*des éléments qui . . . pourraient fournir les motifs de l'arrêt et non en constituer l'objet*”¹; similarly, in the *Minquiers and Ecrehos Judgment, I.C.J. Reports 1953*, p. 52, the Court distinguished between the reasons advanced and the requests made). The request made to the Court was that it should define the present legal status of Namibia, and the opposing contentions of States were no more than explanations proposed to the Court, some holding that the revocation of the Mandate was final, others that it was dubious or illegal. But this is veritably a request that the Court declare what has become of the Mandate and what are the legal consequences of various actions, whether on the part of the Mandatory or on the part of the United Nations. The Court was at liberty to reply to that request with reference to other reasons than those advanced before it, and by another system of argument, on one condition, that it did not reply to another request than that formulated and that it thus avoided transforming the case “into another dispute which is different in character” (*P.C.I.J., Series A/B, No. 78*, p. 173; my emphasis).

38. The 1950 Advisory Opinion defines South West Africa as “a territory under the international Mandate assumed by the Union of South Africa on December 17th 1920” (*I.C.J. Reports 1950*, p. 143). Thus there exists an international mandatory régime which remains in force for so long as it has not been ended by a procedure legally opposable to all States concerned. The principle of the protection of peoples not yet fully capable of governing themselves, constituting “a sacred trust of civilization” concretized in the mandate status of 1920, still holds good. The Court had in 1950 shown the legal path to follow in order to modify and, if so desired, terminate that status. It was that path which ought to have been followed.

39. The Advisory Opinion of 11 July 1950 did not, to be sure, impose upon South Africa, as a legal obligation, the conclusion of a trusteeship

¹ The English text of the Judgment does not render so clearly as the French, which is the authoritative text, the distinction between reasons (*motifs*) and subject-matter (*objet*).

agreement. The Court refrained from taking to its logical extreme the position of principle which it adopted in saying "To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified" (*I.C.J. Reports 1950*, p. 133) and declined to say that the Mandatory's obligations included that of converting the Mandate into a trusteeship agreement. But that is not the end of the matter, as is shown by the suggestion of Judge De Visscher made in subsequent writings supplementing the views of his 1950 Opinion on the purport of the obligation to negotiate (*I.C.J. Reports 1950*, pp. 186 ff.) and also the treatment of the problem by Judge Lauterpacht in 1955 (para. 28 above).

40. In my view the Court should in its present Opinion have taken up and acted upon the observations made on this point by the two judges mentioned. In its Judgment of 20 February 1969 (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 48) it recalled the import of any obligation to negotiate, already defined in the Advisory Opinion on *Railway Traffic between Lithuania and Poland*: it is an obligation "not to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements" (*P.C.I.J., Series A/B, No. 42, 1931*, p. 116). In 1969 the Court found that the negotiations conducted prior to the *North Sea Continental Shelf* cases had not satisfied that condition.

41. Let us briefly recall the position hereon of the South African Government, which is to the effect that it was impossible for it to negotiate with the United Nations following the Advisory Opinion of 11 July 1950. This contention is very clearly argued in the South African Counter-Memorial and the oral statement of 11 October 1962 (*I.C.J. Pleadings, South West Africa*, Vol. II, pp. 86-95, and Vol. VII, pp. 241-250). According to that Government the *Ad Hoc* Committee set up in 1950 and the Committee on South West Africa in 1953 had been charged to seek ways and means of implementing the Advisory Opinion; similarly, the Good Offices Committee set up in 1957 was to seek an agreement whereby the Territory as a whole would continue to have an international status consistent with the purposes of the United Nations. South Africa's argument is based on these strict terms of reference and identifies them as the cause of the absence of any negotiations with a view to the implementation of the 1950 Opinion. Thus in 1959 South Africa offered "to enter into discussions with an appropriate United Nations *ad hoc* body that might be appointed after prior consultation with the South African Government and which would have a full opportunity to approach its task constructively, providing for fullest discussion of all possibilities", and this statement was repeated in identical terms in 1960 (*ibid.*, Vol. I, p. 83, Mémorial of Ethiopia; and Vol. II, p. 91, Counter-Memorial).

42. Even before the 1950 Opinion the General Assembly, by successive resolutions in 1946, 1947 and 1948, had for its part thrice called upon South Africa to negotiate a trusteeship agreement. After the Court had

found that South Africa was under no legal obligation to bring the Territory within the trusteeship system, the Assembly took many further initiatives to which paragraph 84 of the present Opinion alludes (see also para. 26 above).

43. The conflict of standpoints can be roughly summarized as follows: The aim of the United Nations was to arrive at the negotiation of a trusteeship agreement, whereas South Africa did not want to convert the Mandate into a trusteeship. It is necessary to determine which party has been misusing its legal position in this controversy on the extent of the obligation to negotiate. The difference in the appreciation of the legal problem as between 1950 and today bears solely on that point. In 1950 the Court was unable, in its Opinion, to envisage the hypothesis that difficulties might arise over the implementation of the obligation to observe a certain line of conduct which it found incumbent on South Africa in declaring that an agreement for the modification of the Mandate should be concluded; hence its silence on that point. But the general rules concerning the obligation to negotiate suffice. If negotiations had been begun in good faith and if, at a given juncture, it had been found impossible to reach agreement on certain precise, objectively debatable points, then it might be argued that the Opinion of 1950, finding as it had that there was no obligation to place the Territory under trusteeship prevented taking the matter further, inasmuch as the Mandatory's refusal to accept a draft trusteeship agreement could in that case reasonably be deemed justified: "No party can impose its terms on the other party" (*I.C.J. Reports 1950*, p. 139). But the facts are otherwise: negotiations for the conclusion of a trusteeship agreement never began, and for that South Africa was responsible. The rule of law infringed herein is the obligation to negotiate in good faith. To assert that the United Nations ought to have accepted the negotiation of anything other than a trusteeship agreement on bases proposed by South Africa, that, coming from the Government of South Africa, is to interpret the 1950 Advisory Opinion contrary to its meaning and to misuse the position of being the party qualified to modify the Mandate. In seeking to impose on the United Nations its own conception of the object of the negotiations for the modification and transformation of the Mandate, South Africa has failed to comply with the obligation established by the 1950 Opinion to observe a certain line of conduct.

The United Nations, on the other hand, was by no means misusing its legal position when it refused to negotiate with any other end in view than the conclusion of a trusteeship agreement, for such indeed was the goal acknowledged by the 1950 Opinion and already envisaged by the League of Nations resolution of 18 April 1946. "It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System" (*I.C.J. Reports 1950*, p. 134). It would have been

legitimate for the United Nations to have taken note of the deadlock and demanded South Africa's compliance with its obligation to negotiate.

44. This view is reinforced by South Africa's consistent interpretation of its own powers, whether it be its pretention to the incorporation of the Territory—something essentially incompatible with the mandate régime—or its contentions with regard to its legal titles apart from the Mandate. The legal position of Mandatory formally recognized by the Court in 1950 gave South Africa the right to negotiate the conditions for the transformation of the Mandate into a trusteeship; since 1950 that position has been used to obstruct the very principle of such transformation.

45. An analysis on these lines, if carried out by the Court and based on a judicial finding that there had been a breach of the obligation to transform the Mandate by negotiation as the 1950 Opinion prescribed, would have had legal consequences in respect of the continued presence of South Africa in the mandated territory. I consider that, in that context, the legal consequences concerned would have been founded upon solid legal reasons.

(Signed) André GROS.