INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

VOLUME I

Request for Advisory Opinion, Documents, Written Statements

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

CONSÉQUENCES JURIDIQUES POUR LES ÉTATS DE LA PRÉSENCE CONTINUE DE L'AFRIQUE DU SUD EN NAMIBIE (SUD-OUEST AFRICAIN) NONOBSTANT LA RÉSOLUTION 276 (1970) DU CONSEIL DE SÉCURITÉ

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WRITTEN STATEMENT OF THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

CHAPTER I

INTRODUCTION

1. On 29 July 1970 the Security Council purported to adopt the following resolution (described as resolution 284 (1970)):

> "*The Security Council*,
>
> *Reaffirming* the special responsibility of the United Nations with regard to the territory and the people of Namibia,
>
> *Recalling* Security Council resolution 276 (1970) on the question of Namibia,
>
> *Taking note* of the report [1] and recommendations submitted by the *Ad Hoc* Sub-Committee established in pursuance of Security Council resolution 276 (1970),
>
> *Taking further note* of the recommendation of the *Ad Hoc* Sub-Committee on the possibility of requesting an advisory opinion from the International Court of Justice,
>
> *Considering* that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking
>
> 1. *Decides* to submit in accordance with Article 96 (1) of the Charter, the following question to the International Court of Justice with the request for an advisory opinion which shall be transmitted to the Security Council at an early date:
>
> 'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?'
>
> 2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question [2]."

2. Having received due notification in terms of Article 66 of the Statute of the Court, the South African Government decided to submit this written statement and, in principle, to participate in the later stages of the proceedings. This decision does not imply any recognition of the competence of the Court to furnish the opinion requested; indeed as will appear below, it is contended that the Court in fact lacks such competence and, alternatively, that even if it *has* the competence, it should, as a matter of judicial propriety, decline to exercise it. Nor, of course, does the decision imply any acknowledgment on the part of the South African Government that the opinion, if furnished, can have any greater

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[1] UN doc. S/9863 (7 July 1970).
[2] UN doc. S/RES/284 (29 July 1970).

authority than that customarily accorded to advisory opinions of this Court [1].

3. The advisory competence of the Court, which is founded upon Article 65 of the Statute, must be established by it *in limine*. Accordingly, the Court must, before proceeding to consider the question put to it, satisfy itself that the requirements of that Article have been complied with and, in particular, that it has before it a proper request by an authorized organ. In the present case this involves an enquiry into the formal validity of Security Council resolution [2] 284 (1970), which, in turn, involves the construction of the relevant articles of the Charter according to the generally accepted principles of treaty interpretation.

4. These principles of interpretation are, however, relevant, and indeed fundamental, not only to the formal validity of resolution 284 (1970) but also to most of the other legal questions dealt with in this Statement and for that reason they will be considered at the outset—in Chapter II, *infra*.

5. Thereafter, in Chapter III, it will be submitted that resolution 284 (1970) is formally invalid in that it was not adopted in accordance with those provisions of the Charter governing the procedures of the Security Council. But since the same grounds of invalidity, as well as others, apply in the case of cognate resolutions of the Council which are relevant to the issues before the Court—including resolution 276 (1970) which is specifically mentioned in resolution 284 (1970)—Chapter III will at the same time deal with the question of the formal validity of all the resolutions concerned. The question will also be raised for the Court's consideration, but without making any submission in this regard, whether, in view of the well-known dispute concerning the representation of the Republic of China, the Council was at all relevant times properly constituted in terms of Article 23 of the Charter.

6. In Chapter IV, as adumbrated above, it will be contended that even if resolution 284 (1970) can be regarded as formally valid and that, in consequence, the Court has the competence to furnish the opinion requested therein, it should, nevertheless, as a matter of judicial propriety, refuse to exercise its competence. It will be shown that the Court has an undoubted discretion to decline to give an advisory opinion and it will be submitted that the present case is pre-eminently one in which it should exercise that discretion. In this connection attention will be drawn to the political issues which comprise the background to these proceedings and to the extent to which the Court *qua* Court and some of its individual Members have become embroiled therein—as well as to other features which it is contended should lead the Court to decline jurisdiction.

7. If, in spite of the foregoing submissions, the Court were to decide to

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[1] In this connection it is submitted, with respect, that the Court correctly decided in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71, that "the Court's reply is only of an advisory nature: as such it has no binding force". *Vide* also *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 84 and *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 168.

[2] In this written statement the term "resolution" is applied not only to valid resolutions of United Nations organs but also to purported acts, described as "resolutions", the validity of which will be disputed herein. The use of the term in the latter sense does not, of course, imply any acceptance of the validity of the "resolutions" concerned. It may be added that expressions such as "invalid resolutions" and "void resolutions", although in strict logic contradictions in terms, are nevertheless in general usage and are consequently used in this statement also.

furnish the opinion requested, it would have to consider all questions which are necessary in logic to the determination of the question before it [1].

In the present case the Court has been asked to pronounce upon the legal consequences for States of South Africa's continued presence in South West Africa, notwithstanding resolution 276 (1970). In order to do this the first question it must decide is whether South Africa's presence there is lawful or unlawful and this will depend upon whether resolution 276 (1970), assuming it to be formally valid, is also intrinsically valid, and if so, what legal effects it has. However, these questions cannot be decided without also deciding the validity of the cognate resolutions upon which resolution 276 (1970) is based.

Chapters V to XI of this Statement contain the South African Government's submissions on these questions. The purpose of these chapters is to demonstrate that South Africa's presence in South West Africa is lawful and that the legal consequences thereof for States fall to be determined on that basis.

8. Chapter V will be devoted to the question of the intrinsic validity of resolution 276 (1970). It will be shown that this resolution was invalid in that it was based upon and had as its very *raison d'être*, General Assembly resolution 2145 (XXI) [2], which for reasons expounded in Chapters VI to XI, *infra*, was itself invalid and void of legal effect. But even if the validity of the latter resolution be accepted, it will be maintained that resolution 276 (1970) and related resolutions can nonetheless have no legal consequences for States inasmuch as they were not adopted in accordance with the provisions of the Charter and are therefore intrinsically invalid. Chapter V will conclude with the alternative contention that even if resolution 276 (1970) were to be regarded as valid, its effect can be no more than recommendatory.

9. As intimated above, Chapters VI to XI hereof will be devoted to the consideration of questions germane to General Assembly resolution 2145 (XXI) (save that Chapter XI, which deals with certain factual matters, is also of some relevance in connection with the validity of Security Council resolution 276 (1970)). Since it has been found necessary to divide the material concerning the validity of General Assembly resolution 2145 (XXI) into more than one chapter, a separate introduction has been provided in Chapter VI for these parts of the written statement. It is accordingly unnecessary to summarize Chapters VI to XI here and it suffices to say that they will serve to demonstrate that, if the Mandate for South West Africa remained in existence after the dissolution of the League of Nations, resolution 2145 (XXI) could not and did not have its purported effect of terminating the Mandate. The consequence would then be that the Mandate still exists and that South Africa's presence in South West Africa is legally unimpeachable.

10. The conclusion stated in the previous paragraph renders it unnecessary to devote extensive attention to the question whether the Mandate as an institution did survive the dissolution of the League. The South African Government has consistently maintained that it did not, and has presented detailed argument before this Court in support of its contentions [3], by which it abides and which it requests should be regarded as incorporated herein. It is evident that if these contentions be accepted, there could have been no legal basis

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[1] *Vide Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157, 182, 198, 217, 236, 253 and 288.

[2] By which the General Assembly sought to terminate the Mandate for South West Africa.

[3] *Vide I.C.J. Pleadings, South West Africa*, Vol. II, pp. 165 *et seq.*

for General Assembly resolution 2145 (XXI) and the subsequent United Nations action in respect of South West Africa, including Security Council resolution 276 (1970). In particular the General Assembly would have had no authority to terminate the Mandate (which *ex hypothesi* would no longer have been in existence), to make any pronouncement on South Africa's right to administer the Territory, or to bring the Territory under the direct responsibility of the United Nations [1]. And, as will be demonstrated below [2], the validity of all subsequent United Nations action concerning South West Africa depended on the assumed effectiveness of General Assembly resolution 2145 (XXI).

It is accordingly clear that if the Mandate lapsed upon the dissolution of the League, all United Nations resolutions which are relevant to the present issue, were entirely misconceived, and of no force and effect. On the other hand, as intimated above, the same result would ensue even if it were postulated that the Mandate did survive the dissolution of the League of Nations. In what follows it will accordingly be assumed, for purposes of argument, that the Mandate did so survive.

[1] *Vide* para. 4 of resolution 2145 (XXI), quoted in Chap. VI, para. 1, *infra*.
[2] *Vide* Chap. V, sec. B, *infra*.

CHAPTER II

THE INTERPRETATION AND MODIFICATION OF TREATIES

A. Introductory

1. In his dissenting opinion in 1966, Judge Tanaka said:

> "In short the difference of opinions on the questions before us is in the final instance attributed to the difference between two methods of interpretation: teleological or sociological and conceptional or formalistic [1]."

In the context Judge Tanaka was referring more specifically to questions relating to the suggested succession of United Nations organs to the supervisory functions previously exercised in respect of Mandates by the League of Nations. The same questions require consideration in the proceedings also.

In addition a number of difficult and important matters concerning the interpretation of the Covenant of the League of Nations, the United Nations Charter and certain other instruments may have to be dealt with in any opinion which the Court may decide to furnish. In this regard consideration may also have to be given to the effect and weight of the subsequent conduct of the parties to such instruments. In respect also of these matters, which were not before the Court in 1966, the approach adopted by the Court may have an important, if not decisive, bearing on the ultimate conclusions reached.

It is proposed therefore to set out briefly the principles which, it is submitted, the Court should apply in interpreting treaties, conventions or other similar instruments embodying international obligations, and in determining the effect and weight to be accorded to subsequent conduct as an element affecting the meaning of such instruments.

B. Interpretation of Treaties

1. The Aim or Purpose of the Interpretative Process

2. It is a well-established principle of international law that the aim or purpose of treaty interpretation is to ascertain and give effect to the common intent of the parties. This would appear to be a necessary consequence of the principle that treaties owe their effect in law to the joint or common consent of the parties thereto. A collection of then-existing authorities for these propositions may be found in the pleadings of the *South West Africa* cases [2].

3. More recently the principles of treaty interpretation were considered at the United Nations Conference on the Law of Treaties, which culminated in the 1969 Vienna Convention on the Law of Treaties. Articles 31 and 32 of the Convention read as follows:

> "*Article 31*
>
> *General Rule of Interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the

[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 278.
[2] *I.C.J. Pleadings, South West Africa*, Vol. VII, pp. 37-40.

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable [1]."

This formulation was in accordance with the recommendations of the International Law Commission in its 1966 Report. [2] In this report, the Commission noted that:

"Jurists . . . differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to:

(a) The text of the treaty as the authentic expression of the intentions of the parties;

(b) The intentions of the parties as a subjective element distinct from the text; and

(c) The declared or apparent objects and purposes of the treaty [3]."

The main difference in approach between jurists who emphasize, respectively, the elements mentioned in paragraph *(a)* and those mentioned in paragraph *(b)* of the above quotation, relates to the extent to which recourse may be had to the *travaux préparatoires* and such other evidence of the intentions of the contracting States as is extraneous to the text of the treaty [3]. Both schools of

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[1] UN doc. A/CONF.39/27 (23 May 1969) United Nations Conference on the Law of Treaties: Vienna Convention on the Law of Treaties, p. 17.

[2] *Vide Yearbook of the International Law Commission 1966*, Vol. II, pp. 217-218.

[3] *Ibid.*, p. 218.

thought accept, however that the true aim of interpretation is to ascertain the common intent of the parties.

Jurists who emphasize aspect *(c)*, do not necessarily accept this basic assumption. Thus the Commission stated:

> "Some give great weight to the object and purpose of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text [1]."

The Commission noted that the textual approach, which was followed in its recommendations, enjoyed the support of the majority of jurists [1] and of the Institute of International Law [2]. Moreover, the Commission stated,

> "... the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law [2]".

4. The draft proposed by the Commission was extensively debated during the meetings of the Committee of the Whole of the United Nations Conference on the Law of Treaties [3].

Professor Myres S. McDougal, representing the United States of America, criticized the draft on the basis, *inter alia*, that the "rigid and restrictive system" introduced thereby "could be employed by interpreters to impose upon the parties to a treaty agreements that they had never made [4]". He added:

> "The parties to a treaty could well have a common intent quite different from that expressed by the 'ordinary' meaning of the terms used in the text. The imposition upon the parties of certain alleged 'ordinary' meanings, combined with the preclusionary hierarchy of means set forth in Articles [31 and 32], could lead to the arbitrary distortion of their real intentions [4]."

A United States amendment was accordingly proposed to obviate the stated objections to the draft.

The International Law Commission draft was, however, strongly supported by other representatives, in particular by the representative of Uruguay, Professor (now Judge) E. Jiménez de Aréchaga, who was also Rapporteur of the Committee of the Whole. He referred to authorities supporting the school of thought which "based interpretation on the text of the treaty" and quoted, *inter alia*, the opinion of Judge Huber to the effect that:

> "... if the parties were to be allowed freely to invoke their supposed real will, an essential advantage of the written and conventional law would be lost. The text signed was the only, and the most recent, expression of the common will of the parties [5]."

Regarding the effect to be given to the object and purpose of a treaty, Judge de Aréchaga said:

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[1] *Vide Yearbook of the International Law Commission 1966*, Vol. II, p. 218.
[2] *Ibid.*, p. 220.
[3] *Vide United Nations Conference on the Law of Treaties, OR*, First Session, Vienna, 26 Mar.-24 May 1968, pp. 166-185.
[4] *Ibid.*, p. 168.
[5] *Ibid.*, p. 170.

"The Commission [i.e., the International Law Commission] had deliberately referred to the object and purpose of the treaty as the most important part of the context, not as an independent element, since the latter course might lead to distorted interpretations, and open the door to the teleological method that might result in a subjective and self-interested approach [1]."

The attitude defended by the representative of Uruguay received wide support [2]. It is not proposed to analyse the arguments advanced by the supporters of the draft in any detail but two points, repeatedly made, require emphasis, viz., that the actual text of a treaty is the safest and most reliable indication of the intentions of the parties thereto, and that it would be, in the words of the USSR delegate, "politically dangerous . . . [to] permit an arbitrary interpretation divorced from the text and capable of altering its meaning [3]".

In the result, the United States amendment was rejected in the Committee of the Whole by 66 votes to 8, with 10 abstentions [4]. At the thirteenth plenary meeting of the Conference the draft articles under discussion were unanimously approved—draft Article 27 (Art. 31 in the final convention) by 97 votes to 0 and draft Article 28 (the present Art. 32) by 101 votes to 0 [5].

5. As appears from the discussion above, the textual approach is not only in accordance with logic as being based upon the fundamental principle of the consent of the parties, but it has received the *imprimatur* both of the International Law Commission, which is composed of some of the world's most highly qualified publicists, and of the Court (which again in 1966 rejected the teleological principle with specific reference to some of the issues arising in this case) [6]. Most important of all, it has received the unanimous endorsement of the States themselves—of this, the proceedings at the Vienna Conference provide conclusive proof.

This Conference was of the greatest significance in the development and codification of the Law of Treaties. No fewer than 110 States, 9 Specialized Agencies and 5 intergovernmental organizations participated in it. It thus provided a forum in which, on a larger scale than ever before, the views and practice of the great majority of the States of the world on virtually all aspects of the law of treaties became evident. And in no area of this law was greater consensus reached than on the question of the interpretation of treaties. The teleological approach long advocated by various jurists and some judges of this Court was decisively rejected as being not in accord with the practice of States, and the textual approach was overwhelmingly affirmed. It is submitted, therefore, that the controversy in this connection must now be regarded as finally settled.

In the result, the fundamental principle which has emerged is that the aim and purpose of treaty interpretation is to ascertain and give effect to the common

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[1] *United Nations Conference on the Law of Treaties, op. cit.*, p. 170. *Vide* also *Yearbook of the International Law Commission 1966*, Vol. II, p. 219.

[2] *Vide*, e.g., the statements by the representatives of Poland (pp. 173-174); USSR (p. 175); France (pp. 175-176); Brazil (p. 176); Bulgaria (p. 176); United Kingdom (pp. 177-178); Kenya (pp. 180-181); Liberia (p. 181); Nigeria (p. 181); Mexico (p. 181); Cuba (p. 182); Finland (p. 182); Turkey (p. 182) and Madagascar (p. 183).

[3] *United Nations Conference on the Law of Treaties, OR*, First Session, pp. 174-175.

[4] *Ibid.*, p. 185.

[5] *United Nations Conference on the Law of Treaties, OR*, Second Session, Vienna, 9 Apr.-22 May 1969, pp. 57, 59.

[6] *Vide* para. 6, *infra*.

intent of the parties. The teleological approach according to which "necessity create(s) the law independently of the will of the parties and those concerned [1]" has been shown to be completely unacceptable to States as well as to publicists and the Court.

6. As observed above, the teleological approach was specifically rejected by the Court in 1966. Thus it said:

> "It may be urged that the Court is entitled to engage in a process of 'filling in the gaps' in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should. On a previous occasion, which had certain affinities with the present one, the Court declined to find that an intended three-member commission could properly be constituted with two members only, despite the (as the Court had held) illegal refusal of one of the parties to the jurisdictional clause to appoint its arbitrator—and although the whole purpose of the jurisdictional clause was thereby frustrated. In so doing, the Court (*I.C.J. Reports 1950*, p. 229) said that it was its duty 'to interpret the Treaties, not to revise them'. It continued:
>
> > 'The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.'
>
> In other words, the Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action [2]."

II. The Principles to Be Applied in Ascertaining the Common Intent of the Parties

(a) *Actuality and Ordinary Meaning*

7. In seeking to ascertain the common intent of the parties, a tribunal will in the first instance have regard to the principle of actuality and ordinary meaning. This means that *prima facie*:

(a) the text of the treaty as it stands should be regarded as fully and accurately expressing the common intent of the parties (principle of actuality);
(b) the language of the text is to be given its ordinary, natural and unstrained meaning in its context (principle of ordinary meaning) [3].

Both these principles were incorporated in Articles 31 and 32 of the Vienna Convention (quoted above). The *prima facie* importance of the ordinary mean-

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[1] Judge Tanaka, 1966 dissenting opinion, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 277.

[2] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48.

[3] For authorities on these principles, *vide I.C.J. Pleadings, South West Africa*, Vol. VII, pp. 41-45; *Yearbook of the International Law Commission 1966*, Vol. II, pp. 220-221.

ing of the text is emphasized in Article 31, paragraph 1, whereas the principle of actuality is recognized by the restricted definition given in Article 31, paragraph 2, to the "context" within which the terms of a treaty are to be read, and by the limited field of application assigned in Article 32 to supplementary means of interpretation (including preparatory work).

(b) *Contemporaneity*

8. Inasmuch as the object of interpretation is to ascertain the common intent of the parties, it follows that the text of any instrument should be appraised in the light of concepts and linguistic usage current at the time of its execution [1]. This is the principle of contemporaneity, which is well established in international law [2] and which was again applied in the *South West Africa* cases in 1966. The Judgment reads:

> "... in order to determine what the rights and obligations of the Parties relative to the Mandate were and are ... the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant. Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at. This view is supported by a previous finding of the Court (*Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, at p. 189) the effect of which is that the meaning of a juridical notion in a historical context, must be sought by reference to the way in which that notion was understood in that context [3]."

9. Save for Judge Tanaka, whose teleological approach was mentioned above, the minority judges do not appear to have rejected this principle (as distinct from the conclusions reached by its application). Thus, for example, Judge Wellington Koo considered "a few words about the historical background of the creation of the mandates system ... useful to enable a full understanding and appreciation of its nature, spirit and purport [4]". Judge Koretsky found it "necessary to turn to the history of the inclusion of the jurisdictional clause in the mandate instrument [5]" and, after reaching a conclusion as to the meaning and object of the clause, considered the question: "Was this something strange at that time [6]?" And Judge Jessup stated:

> "The Court's Judgment rests, *as it must*, on an interpretation of historical

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[1] *Vide Yearbook of the International Law Commission 1964*, Vol. II, pp. 56-57; *1966*, Vol. II, p. 222.

[2] For earlier authorities, *vide I.C.J. Pleadings, South West Africa*, Vol. VII, pp. 45-46. *Vide* also *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 37; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 140.

[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 23.

[4] *Ibid.*, p. 217.

[5] *Ibid.*, p. 243.

[6] *Ibid.*, p. 246.

facts involved in the origin and in the operation of the mandates system of the League of Nations, *in the setting of their period* [1]." (Italics added.)

(c) *Implication of Agreement* [2]

10. The principle of actuality referred to above means that the parties must prima facie be considered to have expressed their full agreement in the written text. Exceptionally, however, a conclusion may be warranted that something "goes without saying", i.e., that the parties were in fact tacitly agreed upon something not expressly stated in the text.

Courts in all legal systems guard themselves against assenting to such a proposed implication on any but the most cogent grounds, realizing that implication on a basis of speculation, or of what the parties ought reasonably to have done, would amount to the making of a new bargain or compact for the parties, as distinct from the Court's true function of giving effect to the bargain or compact actually agreed to by the parties themselves. Consequently the requirement is stressed that an implication of *consensus* must arise *necessarily or inevitably* from the relevant facts, in the sense that all other reasonable inferences are excluded.

Two further corollaries flow from the principles stated above:

(a) The term sought to be implied must be capable of formulation in substantially one way only. If the content of the term sought to be implied is doubtful, then one cannot conclude that the parties tacitly agreed on anything at all.

(b) Where the written document makes express provision for any particular eventuality, it will be even more difficult to find that there is an implied term covering substantially the same ground as the express provision.

11. The expression "tacit agreement" is also used for a somewhat different situation, namely where there is no express agreement between the parties at all, but an agreement is nevertheless implied from the circumstances. Here again such an agreement may be held to have been concluded only if it is a necessary inference from the facts. As stated by Judge Badawi in the *Corfu Channel* case:

> "proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing, unusual and contrary to the way of the world [3]".

12. A factor which would militate very strongly against any contention that an implied agreement had been reached, is the availability of means to conclude the same agreement in express terms, and the failure to make use thereof. This factor was accorded decisive weight in the *North Sea Continental Shelf* case [4], in which it had been contended that the Federal Republic of Germany had become bound under the 1958 Geneva Convention on the Continental Shelf although the Federal Republic had not ratified the convention. The Court said:

> "As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed—that is to say if there had been a real intention to manifest

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[1] *Ibid.*, p. 326.

[2] For authorities, *vide I.C.J. Pleadings, South West Africa*, Vol. VII, pp. 46-52.

[3] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 60.

[4] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

acceptance or recognition of the applicability of the conventional régime —then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights,—if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form [1]."

13. The principles set out in the *North Sea Continental Shelf* case would of course apply *a fortiori* if the State or States which are sought to be bound by a suggested tacit agreement had not only failed to take advantage of an opportunity to conclude an express agreement, but had clearly rejected suggestions that such an agreement be concluded. Circumstances could hardly be imagined in which a State or States, which by deliberate conduct declined to enter into an express agreement, might nevertheless be said to have come to a tacit agreement of the same content.

(d) *Effectiveness* (Ut res magis valeat quam pereat) [2]

14. This principle takes account of the objects and purposes of the instrument to be interpreted, and presumes that the parties intended for particular provisions the maximum effectiveness, consistent with the text, towards achievement of such objects and purposes.

The degree to which this principle could assist interpretation also depends on circumstances. Thus it might be a factor—

(a) in choosing between alternative possible meanings of an ambiguous or obscure text, or

(b) in deciding whether an inference of tacit agreement may or may not be drawn in a particular case.

15. To some extent different considerations arise in the operation of the principle of effectiveness in these two different applications thereof. There are, however, certain basic propositions that are common to both, viz.:

(a) The principle of effectiveness is only an aid towards arriving at the intention of the parties. It cannot operate to give a higher degree of efficacy to the instrument than the parties intended. It also cannot act as a substitute for a non-existent common intention.

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[1] *I.C.J. Reports 1969*, pp. 25-26.

[2] For authorities, *vide I.C.J. Pleadings, South West Africa*, Vol. VII, pp. 57-63. *Vide* also the discussion in the Report of the International Law Commission, *Yearbook of the International Law Commission 1966*, Vol. II, p. 219.

(b) The objects and purposes, to which effect is sought to be given, must themselves be ascertained by interpretation. The principle of effectiveness cannot operate to ascribe to the parties a different purpose from the one they actually had in mind.

16. In its application as an aid to textual interpretation, the principle of effectiveness cannot override the clear meaning of the text. It can at most assist the Court in deciding which of two or more possible meanings of an expression is, in case of doubt, to be preferred. It cannot justify a "meaning" which the language cannot bear.

17. In its operation in regard to implied terms, the principle of effectiveness also has a relatively limited application. Basically it only means that, for the purpose of deciding whether a term is to be implied or not, regard is to be had to the probability that the parties intended a result which is in consonance with the general object or purpose which they had in mind. To put it in a different way, the fact that the parties had a certain object or purpose in mind may in certain circumstances give rise to grounds for inferring an implied term. In all cases the ordinary rules relating to implied terms would still apply. Thus it would not be sufficient to have regard merely to the purpose or object of the parties. The purpose or object would be only one of the circumstances to be considered, although in some cases it might be a very important one. It would, however, always be necessary to examine *all* the relevant facts and circumstances giving due weight to each one. Furthermore, the ordinary rule applies that an implied term cannot override the express terms of the instrument, or operate to regulate some aspect for which express provision is made in the instrument. Thus a finding that the parties had a certain purpose or object in mind, would not justify a radical amendment of the instrument in order to give effect to such purpose or object. In this regard, particular reference may be made to the following passage from *The Law of Treaties*, by Lord McNair:

> "The rule of effectiveness must mean something more than the duty of a tribunal to give *effect* to a treaty; that is the obvious and constant duty of a tribunal; that is what it is there to do. The rule must surely mean, in the mind of the party invoking it: 'If you (the tribunal) do not construe the treaty in the way that I submit to you to be correct, this treaty will fail in its object.' But that is a *petitio principii*, because, as has been submitted in the previous chapter, it is the duty of a tribunal to ascertain and give effect to the *intention of the parties as expressed in the words used by them in the light of the surrounding circumstances*. Many treaties fail—and rightly fail —in their object by reason of the words used, and tribunals are properly reluctant to step in and modify or supplement the language of the treaty [1]."

18. It will be appreciated that the role assigned to "effectiveness" in this Chapter is a necessary corollary to the basic approach to interpretation set out in the earlier paragraphs hereof. Indeed, "effectiveness" could play a greater or a different role only as part of an integrated interpretative system pursuing different ends and applying different methods from those described herein. In particular such interpretative system would have to proceed from a premise other than that the consent of the parties is the ultimate source of treaty obligations, and (upon rejection of such premise) could accordingly dispense with the theory that interpretation necessarily involves the ascertainment of the parties' common intent.

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[1] McNair, A. D., *The Law of Treaties* (1961), p. 383.

(c) *The Universal Applicability of the Above Principles*

19. All the above-mentioned principles are applicable to all instruments embodying international obligations, be they unilateral, bilateral or multilateral. The relative weight to be given to various aspects of the wording, the content or other permissible aids to interpretation (such as preparatory work), may however, differ according to the nature of the treaty which is the subject of interpretation [1]. In his dissenting opinion in 1966, Judge Jessup drew attention to this circumstance [2]. With the general proposition stated by him, viz., that there are differences in approach between the interpretation, on the one hand, of a bilateral treaty or a contract in private law, and, on the other, "a great international constitutional instrument, like the United Nations Charter [3]" there can be no quarrel. Close reading of this part of Judge Jessup's opinion will show that he did not attempt any precise definition of the nature of such differences. The South African Government also does not propose attempting such a definition – for present purposes it will suffice to submit that such differences in approach do not take instruments of the "constitutional" type out of the general rules of interpretation dealt with herein, and Judge Jessup does not appear to have contended otherwise.

20. One specific feature should, however, be noted. It is submitted that in "constitutional" instruments the text of the instrument attains increased importance as against other *indicia* of the intentions of its authors, inasmuch as these instruments are open to accession by States which might have no knowledge of features such as the *travaux préparatoires*, or subsequent conduct of the original parties, and whose intentions can in any event not be ascertained by reference to such features [4].

C. Subsequent Conduct

1. General

21. It was demonstrated in section B above that the aim or purpose of treaty interpretation is to ascertain and give effect to the common intent of the parties. If subsequent conduct of the parties is to play any role in the interpretative process, it could accordingly be relevant only to the ascertainment of that common intent as it existed when the treaty was concluded [5]. It follows that, in its application to interpretation, subsequent conduct of the parties could not have the result of giving to a treaty a meaning different from that which it bore at its inception. Whether the subsequent conduct of the parties could effect a modification or amendment of a treaty, is of course, an entirely different matter. Such a principle, if admitted, would amount to the recognition of a

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[1] *Vide Yearbook of the International Law Commission 1966*, Vol. II, p. 219.

[2] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 352-356. It will be noted that he advocated a more extensive use of *travaux préparatoires* than is generally accepted as permissible. (*Vide Yearbook of the International Law Commission 1966*, Vol. II, p. 220 and Article 32 of the Vienna Convention on the Law of Treaties, cited in para. 3 above.)

[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 353.

[4] *Vide*, e.g., Dahm, G., *Völkerrecht* (1961), Vol. III, p. 55; Sinclair, I. M., "Vienna Conference on the Law of Treaties", *International and Comparative Law Quarterly*, Vol. 19 (1970), p. 63; and Sir Percy Spender in *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, pp. 190-191.

[5] *Vide* paras. 5, 8 and 9, *supra*.

process whereby a new agreement is created, rather than a process whereby the meaning of an existing agreement is established [1].

In the present section, the effect of the subsequent conduct of the parties to a treaty will be considered in both the above-mentioned aspects: firstly with reference to the interpretation of treaties, and secondly with reference to their modification or amendment. Thereafter will follow a discussion of the bearing which these rules may have on practice within the United Nations Organization, which, as will be shown, involves some additional considerations.

II. Subsequent Conduct as an Aid to Interpretation

22. It is well established that the subsequent practice of the parties to a treaty may be of assistance in the interpretation of obscure or ambiguous terms. In this regard Lord McNair wrote as follows:

> "Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, *when there is a doubt as to the meaning of a provision or an expression contained in a treaty*, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law [2]." (Italics added.)

Similarly D. W. Bowett wrote as follows, relying extensively on references to the jurisprudence of the Permanent Court and this Court:

> "*In cases of doubt as to the meaning of an agreement*, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning [3]." (Italics added.)

This principle was incorporated in Article 31, paragraph 3b, of the Vienna Convention on the Law of Treaties, which reads as follows:

> "There shall be taken into account, together with the context:
>
> . . . . . .
>
> *(b)* Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation [4]."

23. Although the permissibility of recourse to subsequent practice as an aid to interpretation is clear, its value is limited. Firstly, it can be of assistance only where there is some ambiguity or uncertainty in the treaty itself. This is a necessary corollary of the textual approach to interpretation, and is recognized by the authorities quoted in the immediately preceding paragraph, as well as

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[1] *Vide Yearbook of the International Law Commission 1964*, Vol. II, para. 25, p. 60; *Yearbook of the International Law Commission 1966*, Vol. II, p. 236 (commentary on draft Art. 38, para. 1); Gross, L., "Voting in the Security Council: Abstention in the Post 1965 Amendment Phase and its Impact on Article 25 of the Charter", *A.J.I.L.*, Vol. 62 (1968), p. 329; Bernhardt, R., *Die Auslegung Völkerrechtlicher Verträge* (1963), p. 174.

[2] McNair, *op. cit.*, p. 424. *Vide* also Degan, V. D., *L'interprétation des accords en droit international* (1963), p. 130; *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 190 (separate opinion of Sir Percy Spender).

[3] Bowett, D. W., "Estoppel before the International Tribunals and its Relation to Acquiescence", *B.Y.B.I.L.*, Vol. XXXIII (1957), p. 177.

[4] *Vide* para. 3, *supra*.

in the following passages from the separate opinion of Sir Percy Spender in the *Certain Expenses* case:

> "... subsequent conduct may only provide a criterion of interpretation when the text is obscure, and even then it is necessary to consider whether that conduct itself permits of only one inference" [1],

and—

> "Even where the course of subsequent conduct pursued by both parties to a bilateral treaty or by all parties to a multilateral treaty are in accord and that conduct permits of only one inference it provides a criterion of interpretation only when, as has already been indicated, the text of the treaty is obscure or ambiguous [2]."

As a matter of interpretation subsequent conduct can accordingly not justify a departure from the clear wording of the text.

24. Moreover, the practical utility of subsequent conduct as an aid to the ascertainment of the intentions of contracting parties is in any event small [3]. As noted by Sir Percy Spender in the passages quoted above, subsequent conduct as an aid to interpretation must be so clear and consistent as to permit of only one inference. However, if all the parties to a treaty apply it in the same way, no dispute as to its meaning is likely to arise. When disputes do arise, the reason is likely to be that the treaty is applied differently by the parties, in which event there would *ex hypothesi* not be a clear concordant practice which could have substantial probative value as to the meaning of the text [4]. See in this regard also, the following comment by Sir Percy Spender:

> "It is ... evident enough ... that the subsequent conduct of one party alone cannot be evidence in its favour of a common understanding of the meaning intended to be given to the text of a treaty [5]."

With reference to the conduct of parties to a multilateral treaty he added:

> "If ... only one or some but not all of them by subsequent conduct interpret the text in a certain manner, that conduct stands upon the same footing as the unilateral conduct of one party to a bilateral treaty. The conduct of such one or more could not of itself have any probative value or provide a criterion for judicial interpretation [6]."

25. Special consideration must be given to multilateral treaties where the

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[1] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 189.

[2] *Ibid.*, p. 191.

[3] *Vide* Bindschedler, R. L., "La délimitation des compétences des Nations Unies", *Recueil des cours*, Vol. 108, No. I (1963), p. 324.

[4] *Vide* Jokl, M., *De l'interprétation des traités normatifs d'après la doctrine et la jurisprudence internationales* (1936), p. 172; Bastid, S., "De quelques problèmes juridiques posés par le développement des organisations internationales", *Les problèmes fondamentaux du droit international. Mélanges en l'honneur de J. Spiropoulos* (1957), p. 35; and McNair, *op. cit.*, p. 429.

[5] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 190.

[6] *Ibid.*, p. 191. As appears from these two passages read together, and also from other parts of his separate opinion, Judge Spender accepted that unilateral conduct of a party might in appropriate cases be evidence *against* him as to the meaning of a text.

original parties may be added to in accordance with the terms of the treaty itself. Reference has already been made to the more limited role played by indications of intention *dehors* the text (such as subsequent conduct) in the interpretation of such treaties [1]. Applying this rule to the Charter, which is the prime example of such a treaty, Sir Percy Spender said:

> "The original Members of the Charter number less than half the total number of member States. If the intention of the original Members of the United Nations, at the time they entered into the Charter, is that which provides a criterion of interpretation, then it is the subsequent conduct of *those* Members which may be equated with the subsequent conduct of the parties to a bilateral or multilateral treaty where the parties are fixed and constant. This, it seems to me, could add a new and indeterminate dimension to the rights and obligations of States that were not original Members and so were not privy to the intentions of the original Members [2]."

III. Subsequent Conduct as a Means of Modifying Treaties

26. There is substantial scholarly support for the proposition that a treaty or convention may be revised or modified by the subsequent conduct of the parties thereto [3]. States have however shown a strong reluctance to accept the validity of this proposition, as appears from the proceedings at the Vienna Conference on the Law of Treaties. In its draft Article 38 on the Law of Treaties, the International Law Commission had proposed the following:

> "A treaty may be modified by subsequent practice . . . establishing the agreement of the parties to modify its provisions."

In its commentary the Commission stated expressly:

> ". . . even if every party might not itself have actively participated in the practice, [it] must be such as to establish the agreement of the parties as a whole to the modification in question [4]."

Although this specific draft article drew very little or no comment from governments [5], amendments deleting Article 38 were adopted by 53 votes to 15, with 26 abstentions, by the Conference's Committee of the Whole.

27. Various arguments were advanced by delegates against acceptance of the draft article. One recurring objection was that it would offend against the principle of *pacta sunt servanda* [6]. The Expert Consultant (Sir Humphrey

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[1] *Vide* para. 20, *supra*.

[2] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 191.

[3] *Vide* Fitzmaurice, G., "The Law and Procedure of the International Court of Justice, 1951-1954: Treaty Interpretation and Other Treaty Points", *B.Y.B.I.L.*, Vol. XXXIII (1957), pp. 212, 225 and 252; *Yearbook of the International Law Commission 1966*, Vol. II, p. 25 (commentary on Art. 38); Tunkin, G. I., *Droit international public* (1965), p. 94.

[4] *Yearbook of the International Law Commission 1966*, Vol. II, p. 236 (commentary on Art. 38, para. 2).

[5] *Ibid.*, pp. 279 *et seq.*

[6] *United Nations Conference on the Law of Treaties, OR*, First Session. *Vide* the objections of the representatives of Spain (para. 69, p. 209); Chile (para. 75, p. 210); USSR (para. 3, p. 210); Syria (para. 30, p. 212); Uruguay (para. 34, p. 212); Cuba (para. 40, p. 213); Portugal (para. 42, p. 213); and the Netherlands (para. 47, p. 213).

Waldock) [1] contended that the draft Article 38 did not in theory necessarily encroach upon the principle of *pacta sunt servanda* since it would apply only to conduct establishing that *all* the parties to the treaty had agreed to its modification. This argument did not, however, allay delegates' fears that acceptance of the draft article would in practice pose a threat to the inviolability of treaties. Thus it was stressed that the draft article did not define with precision the type of practice contemplated, the period of time during which such practice must have continued, and the extent to which a treaty could be modified by practice. In the last-mentioned respect delegates queried whether subsequent practice would be capable of modifying the true nature or main basis of the treaty, or whether its effect would be limited to the addition or deletion of less essential features (as had previously been suggested in the International Law Commission by Professor G. I. Tunkin) [2]. It was stressed that, if practice were granted only this limited effect, the rule would be very difficult of application since no clear criteria exist for distinguishing between the main basis of a treaty and less essential features thereof.

28. Another argument strongly advanced by delegates in their opposition to draft Article 38, arose from the fact that implementation of treaties is generally in the hands of State officials who are not themselves authorized to conclude or amend treaties. States would accordingly be faced with serious difficulties if the manner of such implementation were to be regarded as capable of effecting modifications to treaties despite the fact that such modifications had not been approved by the necessary constitutional processes [3].

29. The above summary of the relevant proceedings at the Vienna Conference must necessarily cast doubt on the ambit, and, indeed, the very existence of a rule permitting modification of treaties by subsequent conduct of the parties. If, despite the attitudes of States at the Conference, such a rule were recognized, it could, it is submitted, be invoked only in a very clear case. The subsequent conduct would not only have to be unambiguous but would probably have to amount to a well-accepted and long-standing practice; the intention of all the parties to effect a modification would have to be conclusively established; and the treaty-making organs of the parties would have to be involved in the practice, whether by actual participation or acquiescence.

30. One of the elements mentioned above as essential to any possible modification of a treaty by conduct requires further elaboration, namely the relevant intentions of the parties. As noted above, the modification of an existing treaty requires in principle the conclusion of a new international agreement for that purpose [4]. Such a new international agreement would have to comply with all the usual requirements, including that of a common intent of all the parties. If the subsequent conduct of the parties is not accompanied by such an intent, it cannot have any effect in this regard. This would apply for instance to conduct reflecting a mistaken interpretation of a treaty—the parties cannot be held to have intended to effect a modification of a treaty if they were not aware that their conduct was inconsistent therewith. A further example of conduct which

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[1] *United Nations Conference on the Law of Treaties, op. cit.*, para. 56, p. 214.

[2] *Yearbook of the International Law Commission 1966*, Vol. I, Part II, para. 18, p. 4.

[3] *Vide United Nations Conference on the Law of Treaties, OR*, First Session, for the objections of the representatives of France (para. 63, p. 208); Spain (para. 68, p. 209); USSR (para. 4, p. 210); Poland (para. 16, p. 211); Turkey (para. 27, p. 211); Uruguay (para. 36, p. 212); and the Philippines (para. 43, p. 213). It is submitted that the reply of the Expert Consultant (para. 57, p. 214) did not provide an adequate answer to this argument.

[4] *Vide* para. 21, *supra*.

is irrelevant for present purposes is to be found in cases where the divergent practice is not intended to modify the treaty but is pursued purely for reasons of *ad hoc* expediency. And many other examples might be given.

31. An intention to effect a modification might of course be inferred from the conduct of the parties but such an inference would, it is submitted, be justified only in the most exceptional cases. Inferential proof of the intention to conclude an agreement is at the best of times very difficult to establish [1]. This difficulty is inevitably enhanced when the conduct said to constitute the new agreement concerns the amendment or modification of an existing written treaty, which *ex hypothesi* relates to a matter which the parties did not intend to regulate informally—a consideration the weight of which increases in direct proportion to the importance of the provision alleged to have been modified.

32. In conclusion regard must be had to treaties which specifically prescribe the method of their amendment. In principle it must be open to States to determine the procedures whereby legal relationships between them are to be established or altered. Where they have done so, any attempt to achieve the same results by different methods must, it is submitted, be ineffective in law. See in this regard, the following passage from the separate opinion of Sir Percy Spencer in the *Certain Expenses* case:

> "It (i.e., subsequent conduct) may . . . provide evidence from which to infer a new agreement with new rights and obligations between the parties, in effect superimposed or based upon the text of the treaty and amending the same. *This latter aspect of subsequent conduct is irrelevant for present consideration since no amendment of the Charter may occur except pursuant to Article 108 of the Charter* [2]." (Italics added.)

But even if this had not been the true legal position, the existence and availability of a prescribed procedure would at least have militated very strongly against any suggestion that the parties applied some different procedure towards achieving the end for the attainment of which the prescribed procedure was established [3].

IV. Practice within the United Nations

33. The effect to be given to practice within the United Nations follows largely from the principles set out in the previous parts of this Chapter. Since the Charter is a multilateral treaty open to accession by new Members, the subsequent conduct of the parties thereto can be of only limited, if any, assistance in its interpretation [4]. At any rate, such subsequent conduct can play no role at all unless there is some ambiguity or obscurity in the text [5] and unless the conduct permits of only one inference [6].

34. As regards modification, the Charter itself provides the method of its amendment, thereby excluding any possibility, which might otherwise have existed, of modification by subsequent practice [7].

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[1] *Vide* paras. 10-13, *supra*.
[2] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 191.
[3] *Vide* para. 12, *supra*.
[4] *Vide* paras. 20 and 25, *supra*.
[5] *Vide* para. 23, *supra*.
[6] *Vide* paras. 23-24, *supra*.
[7] *Vide* para. 32, *supra*.

35. If modification by subsequent conduct of the Members were nevertheless to be permissible, it could only be held to have occurred in exceptional cases where *all* the Members (acting in accordance with their proper or ostensibly proper constitutional processes) disclosed a clear intention to effect such a modification [1]. In view of the existence of the express provisions for amendment in Articles 108 and 109, it is hardly conceivable that such an intention would ever be capable of being established [2].

36. The final question which arises is to what extent the practice of *organs* of the United Nations (as distinct from *parties* to the Charter) may be of relevance to the present topic. During the San Francisco Conference it was decided not to make special provision for the interpretation of the Charter [3] and general principles must accordingly apply. As an aid to interpretation, practice within an organ could, it is submitted, have no greater probative value than the conduct of the individual members represented therein would have had if pursued outside that organ [4]. Indeed, the probative value of conduct within a United Nations organ would often be less than that of conduct pursued outside—the activities of the United Nations require continuous participation in matters of widely varying importance for different Members. In these circumstances political exigencies would encourage a tendency on the part of Members not to insist on a strict adherence to the Charter unless their own interests would be jeopardized by a departure therefrom [5]. The greater freedom of action outside the organization might lead a tribunal to attach greater weight to conduct in that sphere.

37. As regards modification of the Charter, the various organs may have a role to play in the evolution of practices which are not inconsistent with the Charter and which relate to the internal working of the organization [6]. But in so far as a modification would affect the rights and obligations of Members of the United Nations, it is submitted that the organs of the organization have even less capacity to achieve such a result by its practice than the Members have. An organ does not usually consist of representatives of all Members, and it can take decisions despite the dissent or abstention of some representatives. In these circumstances it would be quite anomalous to attribute to the organ itself any competence to effect modifications of the Charter. See in this regard the following statement of Professor G. I. Tunkin (representing the USSR) in the oral proceedings of the *Certain Expenses* case:

"The competence of each organ of the United Nations is determined by

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[1] *Vide* paras. 29-31, *supra*.

[2] Alfred Verdross suggests in an article entitled "Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 26 (1966), p. 695, that practice of the United Nations could informally modify the Charter only if such practice in effect complied with the provisions of Articles 108 and 109.

[3] UNCIO docs., Vol. XIII, pp. 709-710.

[4] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 192. (Separate opinion of Sir Percy Spender.) Sir Gerald Fitzmaurice apparently attached somewhat greater value to consistent practice of United Nations organs (*ibid.*, pp. 201-202).

[5] *Vide* Bernhardt, *op. cit.*, p. 169.

[6] *Vide*, e.g., Holloway, K., *Modern Trends in Treaty Law* (1967), p. 91; Gross, L., "The United Nations and the Role of Law", *International Organization*, Vol. XIX, No. 3 (1965), p. 540, footnote 7; de Visscher, Ch., *Les effectivités du droit international public* (1967), p. 54.

the provisions of the United Nations Charter. The Charter is a treaty concluded between States, and no organ of the United Nations can amend it except according to the provisions described by the Charter itself [1]."

38. Moreover, even in the case of an organ in which all Members are represented, such as the General Assembly, its *ad hoc* political activities [2] would only exceptionally (if ever) permit of an inference that all delegates had a common intent to amend or modify the Charter, unless the activities of the organ were specifically directed to such amendment in terms of the relevant articles of the Charter itself [3].

39. In this regard attention should be directed also to the fact that delegates to the United Nations are not normally authorized to consent on behalf of their governments to a revision or modification of the Charter. For that reason alone practice within the organs of the United Nations can have no substantial weight in this regard [4].

40. To sum up, the role played by practice within the United Nations in the interpretation of the Charter must necessarily be even more limited than that accorded to the conduct of *parties* to a treaty (as distinct from an *organ* established thereby)—and in particular more limited than that accorded to practice under a treaty which has a fixed number of parties. As regards modification or revision of the Charter by practice within the organization, the theoretical and practical objections are, it is submitted, so overwhelming as to render any such modification of revision inconceivable [5].

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[1] *I.C.J. Pleadings, Certain Expenses of the United Nations*, p. 403. *Vide* also Leca, J., *Les techniques de revision des conventions internationales* (1961), p. 141.

[2] Mentioned in para. 36, *supra*.

[3] *Vide* also Leca, *op. cit.*, p. 136; Bindschedler, *Recueil des cours*, Vol. 108, No. I, p. 415.

[4] *Vide* paras. 28-29, *supra*. On this aspect Egon Schwelb ("Neue Etappen der Fortentwicklung des Völkerrechts durch die Vereinten Nationen", *Archiv des Völkerrechts*, Vol. 13 (1966), p. 51) points out that States Members can, by virtue of their constitutional systems, safeguard themselves against the voting of their own representatives in the United Nations.

[5] For recognition of the dangers inherent in permitting such informal modifications or revisions, *vide* the debates in the United Nations Special Committee on Peacekeeping Operations.

CHAPTER III

THE FORMAL VALIDITY OF THE RELEVANT SECURITY COUNCIL RESOLUTIONS

A. Introductory

1. Various questions arise concerning the formal, as opposed to the intrinsic, validity of those resolutions of the Security Council which are relevant to the issues now before the Court. Of these questions, one arises only in regard to resolution 284 (1970), and one only in regard to resolutions 264 (1969), 269 (1969) and 276 (1970), but since the rest relate to all the resolutions concerned, it has been found convenient to devote the present Chapter to discussion of the formal validity of Security Council resolutions in general—at least in so far as this may be necessary for present purposes.

2. It is to be observed at the outset that the Court's jurisdiction in the present case depends primarily upon whether it has received from the Security Council a valid request for an advisory opinion [1]. As part of its duty to examine its own jurisdiction *in limine*, the Court would therefore have to consider whether resolution 284 (1970), which contains the "request", was validly adopted by the Security Council. It is suggested that the following questions arise in this regard:

(a) Whether the composition of the Security Council was lawful, and, in particular, whether the Republic of China was at all relevant times a member of the Security Council as required by Article 23, paragraph 1, of the Charter.

(b) Whether the correct voting procedure was followed, and, in particular,

(i) whether the resolution constituted a decision on a procedural matter within the meaning of Article 27, paragraph 2; and, if not,

(ii) whether the resolution was adopted "by an affirmative vote of nine members, *including the concurring votes of the permanent members*" as required by Article 27, paragraph 3.

(c) Whether the validity of the resolution was affected by the fact that South Africa was not invited in terms of Article 32 to participate in the discussions preceding its adoption.

The same questions, with the exception of the one relating to the procedural or non-procedural nature of the resolution, also arise in regard to resolutions 264 (1969), 269 (1969) and 276 (1970). On the other hand, a further question which arises only in regard to the latter resolutions is:

(d) Whether in terms of the proviso to Article 27, paragraph 3, certain members of the Council should have abstained in the voting on these three resolutions.

3. In what follows it is proposed to deal firstly with the general proposition that the Security Council can only act in terms of the Charter and not out-

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[1] *Vide* Art. 65, para. 1, of the Statute of the Court read with Art. 96, para. 1, of the Charter.

side it (section B); secondly, with the question of the composition of the Council (section C); thirdly, with the question of the voting procedure of the Council—in its various relevant aspects—(section D); fourthly, with the question of the procedural or non-procedural nature of resolution 284 (1970) (section E); and, lastly with the question of participation in terms of Article 32 (section F).

B. The Origin and Ambit of the Powers of the Security Council

4. The powers of the Security Council, like those of the various other organs of the United Nations, are derived exclusively from the provisions of the Charter and are limited by them. It is the Charter and the Charter alone which constitutes the Council, which prescribes its procedure, which confers upon it its powers, functions and duties, and which defines and delimits those powers, functions and duties. Consequently, in the exercise of its various competences the Council is bound to act in conformity with the requirements of the Charter and to observe the limitations imposed by them.

This fundamental principle is well established and requires little elaboration. The Court itself has stated that:

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute *limitations on its powers* or *criteria for its judgment*. To ascertain whether an organ has freedom of choice for its decisions, reference must be made *to the terms of its constitution* [1]." (Italics added.)

The principle was also dealt with by Judge Bustamante in his dissenting opinion in the *Certain Expenses of the United Nations* case [2], where he said:

> "The United Nations is an association of States in which the rights and the obligations of the Members are contractually prescribed in its constituent charter. It is the Charter which governs the mutual relations of the associates and their relations with the Organization itself. Only because of their acceptance of the purposes of the Charter and the guarantees therein laid down have the States Members partially limited the scope of their sovereign powers (Article 2). It goes without saying, therefore, that the real reason for the obedience of States Members to the authorities of the Organization is the conformity of the mandates of its competent organs with the text of the Charter [3]."

5. It is clear then that the competence of the Security Council, as an organ of the United Nations, to act in any given situation and the procedure to be adopted by it must be determined by reference to the provisions of the Charter and that if it acts outside those provisions, it acts extra-legally.

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[1] *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, I.C.J. Reports 1947-1948*, p. 64.

[2] *Advisory Opinion, I.C.J. Reports 1962*, p. 304.

[3] For further examples of the affirmation of the principle under discussion see *Jurisdiction of the European Commission of the Danube, P.C.I.J., Series B, No. 14*, p. 64; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 205 (dissenting opinion of Judge Badawi Pasha); *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 230 (dissenting opinion of Judge Winiarski); *ibid.*, pp. 184 and 196 (separate opinion of Judge Spender). *Vide* also the authorities cited in Chap. X, para. 2, *infra*.

C. The Composition of the Security Council

6. Article 23, paragraph 1, of the Charter, as amended in 1965, provides that the Security Council shall consist of 15 Members of the United Nations, of which 5 shall be permanent Members of the Security Council. Amongst these 5 is mentioned "the Republic of China". It need hardly be stated that for some years two rival governments have each claimed to be the legitimate Government of China. South Africa has always recognized the Government of Generalissimo Chiang Kai Shek. This has also been the attitude of a majority of Members of the United Nations, with the result that it is that Government which has been accepted within the Organization (including the Security Council) as properly representing China. There are, however, a substantial number of States which recognize the rival government of the "Peoples Republic of China", and support the claims of the latter to membership of the United Nations and a seat on the Security Council as a permanent member thereof. Amongst such supporters is the USSR which has contested the legality of any action by the Security Council as at present constituted [1].

7. The implications of this attitude are important. As a general rule, no body or organ can validly exercise any of its functions unless it is properly constituted —indeed, unless properly constituted, the body or organ cannot even be said to exist as such [2].

If the attitude adopted, *inter alia*, by the USSR were correct, then not only would the proper representative of China have been denied a seat on the Council, but there would also have participated in the proceedings of the Council a person who did not represent any member thereof. Such a fundamental defect in the composition of the Council must necessarily have rendered invalid any of its purported acts. This legal consequence would, it is submitted, have followed even if the member in question had been a non-permanent one. Where the member whose representation is disputed is a permanent one, the same results must apply *a fortiori* in view of the wide powers vested in such members.

8. The situation sketched in the previous paragraphs raises a number of controversial legal questions. The Charter itself provides no method for determining which of two or more rival governments is entitled to representation within the Organization. It is accordingly not surprising that the matter has received considerable attention in the proceedings of the various organs of the United Nations. Thus, for instance, the Secretary-General in 1950 caused a memorandum to be prepared on the legal aspects of the problem. The memorandum dealt fully with this issue, and stated, *inter alia*:

> "From a practical standpoint, the present position is that representation depends entirely on a numerical count of the number of Members in a particular organ which recognize one government or the other. It is quite possible for the majority of the Members in one organ to recognize one government, and for the majority of Members in another organ to recognize the rival government. If the principle of individual recognition is

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[1] *Vide SC, OR*, Fifth Year, No. 3, 461st Meeting (13 Jan. 1950), p. 10 where the following was said: ". . . the USSR delegation wishes to announce that the Union of Soviet Socialist Republics will not recognize as legal any decision of the Security Council adopted with the participation of the representative of the Kuomintang group, and will not be guided by any such decisions".

[2] This proposition appears to have been accepted in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First and Second Phases, Advisory Opinions, I.C.J. Reports 1950*, p. 65 and p. 221 respectively.

adhered to, then the representatives of different governments could sit in different organs. Moreover in organs like the Security Council, of limited membership, the question of representation may be determined by the purely arbitrary fact of the particular governments which happen to have been elected to serve at a given time.

From the standpoint of legal theory, the linkage of representation in an international organization and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different [1]."

The memorandum pointed out further that while States might regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States showed that the act of recognition was regarded as essentially a political decision, which each State decided in accordance with its own free appreciation of the situation [2].

The memorandum then continued:

"Various legal scholars have argued that this rule of individual recognition through the free choice of States should be replaced by collective recognition through an international organization such as the United Nations (e.g., Lauterpacht, *Recognition in International Law*). If this were now the rule then the present impasse would not exist, since there would be no individual recognition of the new Chinese Government, but only action by the appropriate United Nations organ. The fact remains, however, that the States have refused to accept any such rule and the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognitions by the United Nations would require either an amendment of the Charter or a Treaty to which all Members would adhere [3]."

Later it stated:

"The Chinese case is unique in the history of the United Nations, not because it involves a revolutionary change of government, but because it is the first in which two rival governments exist. It is quite possible that such a situation will occur again in the future and it is highly desirable to see what principle can be followed in choosing between the rivals. It has been demonstrated that the principle of numerical preponderance of recognition is inappropriate and legally incorrect. Is any other principle possible?

It is submitted that the proper principle can be derived by analogy from Article 4 of the Charter. This Article requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfilment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.

[1] *SC, OR*, Fifth Year, Sup. for 1 January-31 May 1950, p. 19.
[2] *Ibid.*, p. 19.
[3] *Ibid.*, p. 20.

If so, it would seem to be appropriate for the United Nations organs, through their collective action, to accord it the right to represent the State in the Organisation, even though individual Members of the Organisation refuse, and may continue to refuse, to accord it recognition as the lawful government for reasons which are valid under their national policies [1]."

9. During the Fifth Session of the General Assembly, this matter was extensively debated in the *Ad Hoc* Political Committee. The representative of Cuba submitted a draft resolution which proposed certain requirements for recognition, namely effective authority over the national territory; general consent of the population; ability and willingness to achieve the purposes of the Charter; and respect for human rights and fundamental freedoms [2].

In the debate which followed, divergent and contradictory views were expressed. So, for instance, the United Kingdom representative urged acceptance of the single objective test of effective control [3]. Similar points of view were expressed by the representatives of the USSR [4], Poland [5], and others. The debate as a whole was summed up by the representative of Uruguay as follows:

"... some preferred to have no decision on the matter by the General Assembly at the current session; some favoured and others opposed precise criteria; still others favoured the establishment of definite criteria after obtaining the advice of the International Law Commission, the International Court of Justice, the Sixth Committee or the Secretary-General, leaving wide latitude for the consideration of specific cases. Certain delegations thought the Committee and the General Assembly could reach a decision without such help [6]."

10. In the result, the General Assembly ultimately adopted the following resolution by 36 votes to 6 with 9 abstentions:

"396 (V). RECOGNITION BY THE UNITED NATIONS OF THE REPRESENTATION OF A MEMBER STATE

The General Assembly

Considering that difficulties may arise regarding the representation of a Member State in the United Nations and that there is a risk that conflicting decisions may be reached by its various organs,

Considering that it is in the interest of the proper functioning of the Organization that there should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations,

Considering that, in virtue of its composition, the General Assembly is the organ of the United Nations in which consideration can best be given to the views of all Member States in matters affecting the functioning of the Organization as a whole,

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[1] *SC, OR, op. cit.*, pp. 22-23.
[2] *GA, OR*, Fifth Sess., *Ad Hoc* Pol. Comm., Summary Records of Meetings, 30 Sep. to 14 Dec. 1950, 18th Meeting (20 Oct. 1950), pp. 111-112.
[3] *Ibid.*, p. 116.
[4] *Ibid.*, 19th Meeting (21 Oct. 1950), p. 122.
[5] *Ibid.*, 23rd Meeting (26 Oct. 1950), p. 153.
[6] *Ibid.*, 24th Meeting (26 Oct. 1950), p. 159.

1. *Recommends* that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;

2. *Recommends* that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session;

3. *Recommends* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;

4. *Declares* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;

5. *Requests* the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate [1]."

11. The South African Government does not wish to add to the already voluminous material concerning the topic now under consideration, some of which has been mentioned or quoted above. However, the question whether the Security Council is correctly constituted is important for different aspects of the present proceedings, as has been noted above. The correctness of the procedure whereby the claims of rival governments to representation in the United Nations are determined, has not been adjudicated on by this Court. The whole matter is accordingly raised for the Court's consideration lest the Court pronounce on the legal consequences of resolutions which are not universally regarded as valid, and, depending on the view taken by the Court, might indeed be held by it to be invalid—a finding which would at the same time deprive the Court of jurisdiction in the present matter.

D. The Voting Procedure of the Security Council

1. General

12. Article 27 of the Charter, as amended in 1965, reads as follows:

"1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an *affirmative vote of nine members including the concurring votes of the permanent members*; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." (Italics added.)

In terms of Article 23, also as amended in 1965, the Security Council consists of 15 members—5 permanent members and 10 non-permanent members. The said amendments merely increased the membership of the Security Council from 11 to 15, and altered the number of votes required for valid decisions in

[1] GA resolution 396 (V), 14 Dec. 1950, in *GA, OR*, Fifth Sess., Sup. No. 20 (A/1775), pp. 24-25.

terms of Article 27, paragraphs 2 and 3, from 7 to 9. In all other respects, the article has remained unchanged since the inception of the Charter.

The questions considered in the present section are:

(i) whether the words "including the concurring votes of the permanent members" in Article 27, paragraph 3, preclude the taking of valid decisions if one or more of the permanent members voluntarily abstain from voting (i.e., abstain otherwise than pursuant to the proviso to the paragraph) [1];
(ii) whether the practice of the Council in this regard has modified the provisions of that paragraph in any way; and
(iii) whether certain members of the Council should, in terms of the proviso to Article 27, paragraph 3, have abstained in the voting on certain of the resolutions relevant to the question before the Court.

These three questions will be considered *seriatim*.

II. The Requirement of the Concurring Votes of the Permanent Members of the Council

13. The relevance of the first question posed arises from the fact that in all the Security Council resolutions now in issue, one or more of the permanent members abstained from voting. Resolution 284 (1970), which contained the request for an advisory opinion in the present case and accordingly forms the basis of the Court's jurisdiction, was declared adopted despite the abstentions of Poland, the United Kingdom and the USSR [2]. In addition the representative of France requested a separate vote on the phrase "... notwithstanding Security Council resolution 276 (1970)" which was retained despite four abstentions (by France, Poland, the USSR and the United Kingdom) [3].

Resolution 276 (1970) was declared adopted on 30 January 1970, despite the abstentions of France and the United Kingdom [4].

In both these cases all the non-abstaining members voted in favour of the resolutions. The composition of the Security Council on both occasions was as follows:

Permanent Members: 1. China; 2. France; 3. Union of Soviet Socialist Republics; 4. United Kingdom of Great Britain and Northern Ireland; 5. United States of America.

Non-permanent Members: 1. Burundi; 2. Colombia; 3. Finland; 4. Nepal; 5. Nicaragua; 6. Poland; 7. Sierra Leone; 8. Spain; 9. Syria; 10. Zambia.

And the same situation concerning abstentions prevailed with respect to all other relevant Security Council resolutions on South West Africa.

14. The application of the ordinary principles of interpretation set out in Chapter II above, renders the meaning of Article 27, paragraph 3, clear and unambiguous. An "affirmative vote of nine members" is required by the Article for the validity of a resolution, and it is further provided that in this affirmative vote must be included "the concurring votes of the permanent members". As a matter of language, an abstention does not amount to a concurring vote. Moreover, an "affirmative vote of nine members" cannot be said to *include* the

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[1] The expression "voluntary abstention" will be used in this sense throughout the present section.

[2] *Vide* UN doc. S/PV. 1550 (29 July 1970), p. 81.

[3] *Ibid.*, pp. 76 and 77-80.

[4] *Vide* UN doc. S/PV. 1529 (30 Jan. 1970), pp. 83-85.

votes of the permanent members if one or more of them was absent or abstained from voting [1].

15. The considerations mentioned in the immediately preceding paragraph are, it is submitted, valid even when regard is had only to the English text of the Article. However, the French and other texts, which are equally authentic [2], place the matter beyond doubt. Thus the French text reads:

> ". . . un vote affirmatif de neuf de ses membres dans lequel sont comprises les voix de *tous* les membres permanents". (Italics added.)

The other texts are similar.

16. Not only is the wording of the article clear and unambiguous, but reference to the *travaux préparatoires* reveals that the text in fact correctly reflects the intentions of its authors.

The voting formula which was ultimately embodied in Article 27 of the Charter was agreed upon at the meeting at Yalta between the Governments of the USSR, the United Kingdom, and the United States of America, in February 1945 [3]. This formula gave rise to much criticism, conflict and controversy at the San Francisco Conference particularly by reason of the veto power which was reserved for the permanent members. During the course of the Conference, the effect of abstention by a permanent member also received some attention, as will be seen in the succeeding paragraphs.

17. On 22 May 1945 a Sub-Committee of the Conference submitted a questionnaire concerning the voting procedure in the Security Council to the Four Sponsoring Governments (USA, USSR, United Kingdom and China) in order to obtain clarification of Article 27.

Amongst these questions were two which had a bearing on the present question, the more pertinent being the following:

> "If a motion is moved in the Security Council on a matter, other than a matter of procedure, under the general words in paragraph 3, would the *abstention from voting* of any one of the permanent members of the Security Council *have the same effect* as a negative vote by that member in preventing the Security Council from reaching a decision on the matter? [4]"

The Four Sponsoring Governments did not reply specifically to each question posed [5] but issued a general statement on 7 June 1945, which set out certain considerations, in the light of which these Governments considered that it was "clear what the answers to the questions submitted by the Subcommittee should be [6]". France subsequently adhered to this statement [7].

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[1] Compare in this regard, Art. 18, paras. 2 and 3, which refer to the votes of members "present and voting".

[2] *Vide* Art. 111 of the Charter. Concerning the approach to multilingual treaties, *vide* Art. 33 of the Vienna Convention on the Law of Treaties (UN doc. A/CONF. 39/27 (23 May 1969)) and the comments of the International Law Commission (*Yearbook of the International Law Commission 1966*, Vol. II, pp. 225-226).

[3] For a summary of the history of the drafting of the Charter, *vide* Chap. VIII, para. 2, *infra*.

[4] UNCIO docs., Vol. XI, p. 707.

[5] Although by agreement amongst themselves specific replies were prepared which were, however, not communicated to other delegates—*vide* Koo, W. (Jr.), *Voting Procedures in International Political Organizations* (1947), p. 156.

[6] UNCIO docs., Vol. XI, p. 713. Only one question, which is not relevant hereto, received a specific reply—*vide* pp. 713-714.

[7] *Ibid.*, p. 710.

The statement commenced by distinguishing between procedural and non-procedural matters. With reference to the latter the statement read:

> "It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso . . . for abstention from voting by parties to a dispute [1]."

It is significant that the provision for abstention by parties to a dispute was recognized as an exception to the rule requiring unanimity—a clear indication that abstention would in other cases be incompatible with such requirement. This also appeared from the following later passage in the statement:

> "In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred. Therefore, if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members [2]."

Not only did this statement clearly imply that voluntary abstention by a permanent member would defeat a non-procedural motion but in that respect it expressed the actual intentions of the Sponsoring Governments and France. This appears clearly from the references given below [3].

18. The Five Power Statement gave rise to much discussion and considerable acrimony in Committee I of Commission III, which was concerned with the structure and procedures of the Security Council [4]. Although the particular question under consideration was of lesser importance and accordingly received relatively little attention, there appears to have been general (if not universal) acceptance that the voting formula would entail that a voluntary abstention by a permanent member would be equivalent to a veto [5]. This state of affairs was compared unfavourably by the Belgian representative with that which had prevailed in the League of Nations [6]. The matter of abstentions was pertinently brought to the fore on 13 June 1945 by the Canadian representative who proposed an amendment to Article 27, to the effect, *inter alia*, that decisions of the Security Council on all matters other than procedural matters should be made—

> ". . . by an affirmative vote of at least two-thirds of the members present and voting . . . including the concurring votes of the permanent members *present* and *voting* [7]". (Italics added.)

Explaining his proposal, the Canadian delegate said—

> ". . . that since the Yalta formula required an affirmative vote of seven out of the eleven members of the Council, absence or abstention would be equivalent to a negative vote and would thus greatly increase the chances of a

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[1] UNCIO docs., *op. cit.*, p. 712.
[2] *Ibid.*, p. 713.
[3] *Vide* para. 19, *infra*.
[4] *Vide* UNCIO docs. Vol. XI, pp. 430-527.
[5] For indications of doubt on aspects of this matter, see the statements of the representatives of El Salvador, *ibid.*, pp. 436-437 and 513, and New Zealand, *ibid.*, p. 516.
[6] *Ibid.*, p. 455.
[7] *Ibid.*, p. 515.

deadlock. . . . Much attention had been paid to the effect of a negative vote being *cast* by a permanent Council member, but it was more likely in practice that a permanent member who found himself in a small minority would merely abstain from voting. . . . The Canadian amendment did not touch the fundamental issue of the voting formula, for it merely provided that absence from the Council would not be equivalent to a negative vote [1]."

At the request of the representative of the USSR, the Canadian representative withdrew this amendment, albeit reluctantly [2].

19. The actual intentions of the Sponsoring Powers and France appear clearly from later statements by members of their delegations of high officials of their governments.

Dr. (later Judge) Wellington Koo, who was a member of the Chinese delegation, stated the following concerning the question now in issue:

". . . the question had . . . been decided by the Committee of Five [3]. The reply given by the Committee to two questions in the questionnaire relating to the effect of abstentions by a permanent member reveals that the interpretation given to the word 'concurring' by the Sponsoring Powers is such as to require the positive concurrence of all the permanent members, and that the failure or refusal of a permanent member to vote, *either from* absence of from deliberate abstention, constitutes a failute to concur in the decision of the remaining majority of the Security Council and, therefore, would serve to block any action by that body in matters other than procedure, and when the abstaining permanent member was not a party to the dispute [4]."

Dr. Yuen-Li Liang, a member of the Chinese delegation to the Dumbarton Oaks Meeting as well as to the San Francisco Conference and a former Director of the United Nations Legal Department, wrote the following:

"In the consultations among delegations of the Sponsoring Governments and France at San Francisco a strict view was taken of this requirement, and the agreement reached among these delegations was that the concurrence of the five permanent members should take the form *of affirmative votes of all of them in favour of the decision* [5]." (Italics added.)

The Head of the United States Delegation to the San Francisco Conference pointed out in his report to the President:

"The five principal military powers of our time are made permanent members of the Council. Furthermore, in order that their position of power and their use of power may be made to serve the purpose of peace,

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[1] *Ibid.*, pp. 515-556.

[2] *Ibid.*, p. 516.

[3] The "Committee of Five" was a committee of technical experts of the Four Sponsoring Governments and France which was responsible, *inter alia*, for formulating the attitude of the Five Powers on specific aspects of the Yalta formula and also for drafting the above-mentioned Five Powers statement. *Vide* Koo, *op. cit.*, pp. 121, 145-146.

[4] Koo, *op. cit.*, p. 156.

[5] Liang Yuen-Li, "The Settlement of Disputes in the Security Council: The Yalta Voting Formula", *B.Y.B.I.L.*, Vol. XXIV (1947), p. 358. The author added that this agreement was not communicated to the other delegations, although, as noted above, it was clearly implied in the Five Power statement.

it is provided that they shall exercise their power only in agreement with each other and not in disagreement [1]."

In an official publication of the British Government in 1945 it was stated:

"If any one of them [the great Powers] is a party to a dispute it has no vote in any judgment which the Security Council may pronounce. In such a case at least three elected states must concur in the judgment of the Security Council. . . .

Only when *enforcement* action is necessary is the *complete unanimity* of the Great Powers *always required* [2]." (Italics added.)

Furthermore, Mr. Josef C. Grew, United States Acting Secretary of State at the time, made a statement in 1945 before the United States Committee on Foreign Relations on the Charter of the United Nations to the effect that it was the intention of the framers of the Charter that the concurring votes of all the permanent members were required [3]. That this was the intention is also borne out by a report to the President of the United States by the Secretary of State [4].

Mr. Edward R. Stettinius, at one time a United States Secretary of State and one of the delegates of the United States of America to the First United Nations Assembly in London, stated before the United States Senate Committee on Foreign Relations:

"A majority of seven members which includes *all five of the permanent members* is required in any decision by the Council for dealing with a dispute either by peaceful means of by enforcement action, except that a party to a dispute must abstain from voting in the peaceful settlement stage [5]."

The Chairman of the United States Senate Committee on Foreign Relations, Senator Tom Connally, stated as follows:

"I apprehend that there may be some question about the proviso in which a member of the Security Council, if it is a party to the dispute, does not vote, and the other clause that there shall be five permanent members vote before positive action can be taken. The construction of that paragraph was that this proviso is an exception to the general rule, and where a party to the dispute is a member of the Security Council, that there are then only 4 permanent members of the Security Council, excluding the party to the dispute, that vote; in that case the votes of any other 3 non-permanent members can be counted to make up the number of 7. *In all other cases, however, the votes of 5 permanent members are required.* I wanted to make

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[1] *Hearings before the Committee on Foreign Relations, United States Senate on the Charter of the United Nations*, 79th Congress, First Session (1945), p. 41.

[2] *A Commentary on the Charter of the United Nations*, Cmd. 6666 (London: HMSO, Miscellaneous No. 9 (1945)), p. 16. *Vide* also Kelsen, H., *The Law of the United Nations* (1951), p. 261, footnote 4.

[3] *Hearings before the Committee on Foreign Relations, United States Senate on the Charter of the United Nations*, 79th Congress, First Session (1945), p. 213. *Vide* also Kelsen, *op. cit.*, p. 941, footnote 1.

[4] *Report to the President by the Secretary of State on the Results of the San Francisco Conference*, Department of State, Publication 2349, Conference Series 71, p. 71. *Vide* also Kelsen, *op. cit.*, p. 941, footnote 1.

[5] *Hearings Before the Committee on Foreign Relations, United States Senate on the Charter of the United Nations*, 79th Congress, First Session (1945), p. 211.

that clear before we got involved in a lot of questions on the subject [1]." (Italics added)

Mr. Grayson Kirk, Executive Officer of the Third Commission (Security Council) at the San Francisco Conference wrote:

> "The structure and proceedings of the Security Council were not greatly changed as a result of the San Francisco deliberations. The sponsoring powers were firm in maintaining their views that the Council should consist of eleven members, five seats being permanently assigned to the great powers, and six to be selected by the General Assembly. It was their contention that this was as large a body as could operate efficiently in discharging the heavy security responsibilities which the Council would be called upon to assume. They were equally firm in their adherence to the Yalta formula for voting in the Security Council whereby substantive decisions will require a vote of seven members *including the affirmative votes of all the States having permanent seats on the Council*. Procedural matters are to require a vote of any seven members [2]." (Italics added.)

20. From the foregoing it is abundantly clear that the Sponsoring Governments, which were the authors of Article 27, paragraph 3, clearly intended that in non-procedural matters a voluntary abstention by a permanent member of the Security Council would be equivalent to a negative vote, and intimated this intention to the Conference, at least by clear implication, prior to the acceptance of the article. The drafting history of the article therefore serves to confirm the clear meaning of the text.

21. Early commentators on the Charter also had no difficulty about the interpretation of Article 27, paragraph 3.

Louis Dolivet, author of a handbook on the United Nations, wrote:

> ". . . on all matters outside procedural questions a decision can be reached only if the five permanent members have voted *affirmatively among the seven voters participating*", (Italics added.)

and:

> "The only matter on which there is no disagreement is that when it comes to action—i.e., the application of diplomatic, economic, military, or other sanctions—nothing can be done without the agreement of *all* the major Powers *plus two* concurring votes by the non-permanent members [3]." (Italics added.)

Professor Alf Ross, Professor of International Law at the University of Copenhagen, came to the following conclusion:

> "In connection with the application of the primary rule concerning absolute veto the question has arisen whether a resolution can be regarded as validly carried if one of the permanent members has abstained from voting. On a literal interpretation of Article 27 the question must be

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[1] *Ibid.*, p. 265. *Vide* also Gross, L., "Voting in the Security Council", *Yale Law Journal*, Vol. 60, No. 2 (Feb. 1951), p. 248, footnote 137.

[2] Kirk, G., "Third Commission: The Security Council", *Documentary Textbook on the United Nations*, ed. by J. Eugene Harley (1947), p. 525.

[3] Dolivet, L., *The United Nations: A Handbook of the New World Organisation* (1946), p. 48.

answered in the negative. Article 27, as we saw, required seven affirmative votes including affirmative votes from all the permanent members [1]."

22. Professor Hans Kelsen, a noted authority on the United Nations Charter, wrote in 1946:

> "The wording of Article 27, paragraph 3, hardly allows an interpretation other than that, if one or more of the representatives of the five permanent members are not present or abstain from voting, no valid non-procedural decision can be taken. The only exception to this rule is the provision that, in decisions under Chapter VI and under paragraph 3 of Article 52, a party to the dispute shall abstain from voting. Since this rule applies to the permanent members, such decisions require only the concurring votes of the representatives of those permanent members not parties to the dispute. Of course, if all five permanent members, or any five members, are parties to a dispute, the required majority of seven votes is not possible.
>
> The Charter does not provide a quorum for the voting procedure of the Security Council. The autonomous rules of procedure to be adopted by the Security Council under Article 30 of the Charter may contain such a provision, but with respect to substantive decisions it could apply only to the number of representatives of non-permanent members whose presence is necessary to enable the Security Council to transact business. The rules of the procedure adopted by the Security Council would exceed the authorization given by the Charter if they provided that not all representatives of the permanent members need be present to make substantive action by the Security Council effective [2]."

But in a later work, published in 1951, Professor Kelsen appeared at first to accept that the wording of Article 27, paragraph 3, was susceptible also of the interpretation that a valid non-procedural decision could be taken despite the voluntary abstention of a permanent member [3]. He suggested that such an interpretation might be based on the fact that in Articles 108 and 109, where the conditions for amendment to the Charter are dealt with, the phrase used is "including *all* permanent members of the Security Council", whereas Article 27, paragraph 3, does not require the concurring votes of "*all*" permanent members but only "the concurring votes of *the* permanent members [4]".

However, in a supplement to this work, Professor Kelsen abandoned this argument, and stated:

> ". . . but the French text reads: 'les voix de *tous* les membres permanents'; and the other texts of Article 27, paragraph 3, have the same wording. There can be no doubt that according to the intentions of the framers of the Charter the concurring votes of *all* the permanent members are required [5]." (Italics added.)

23. The views expressed by Professor Leo Gross were to the same effect. He wrote:

> "Interpretation of the requirement [concerning the concurring votes of

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[1] Ross, A., *Constitution of the United Nations* (1950), pp. 83-84.

[2] Kelsen, H., "Organisation and Procedure of the Security Council of the United Nations", *Harvard Law Review*, Vol. LIX (1945-1946), pp. 1098-1099.

[3] Kelsen, *op. cit.*, p. 240.

[4] *Ibid.*, p. 241.

[5] *Ibid.*, p. 941, footnote 1.

the permanent members], however, need give rise to no serious differences of opinion in view of the legislative history of Article 27 and the insistence both before and after the San Francisco Conference on the principle of unanimity of the permanent members of the Security Council. Any remaining doubt might be set at rest by reference to the equally authentic French text of that paragraph which speaks of "*un vote affirmatif de sept de ses membres dans lequel sont comprises les voix de tous les membres permanents* [1]." (Italics added.)

As already indicated, the Spanish, Russian and Chinese texts also contain the word "all", and Professor Gross' conclusion was:

"There is scarcely any room for doubt, therefore, that in matters other than those falling under Article 27, paragraph 2, and under the mandatory rule of abstention under the second part of paragraph 3 of Article 27, the affirmative vote of all the five permanent members is required in addition to the affirmative vote of two elected members [2]."

24. In conclusion, reference may be made to a statement by the present President of the Court, Sir Muhammad Zafrulla Khan, in a debate in the United Nations in 1949. He was reported as follows:

"The record of the voting in the Security Council however, disclosed that one of the permanent members, the United Kingdom, had registered an abstention. Accordingly, the provision of Article 27 of the Charter had not been observed. . . .

He was aware that the Security Council had proceeded on the basis of a practice it was trying to establish whereby the abstention of a permanent member in decisions of a substantive nature was not to be treated as a veto. Paragraph 3 of Article 27, however, did not mention the veto; it merely stipulated that the concurring votes of the permanent members must be included in the seven or more affirmative votes necessary for the adoption of substantive decisions. Moreover, regardless of the interpretation placed by the Security Council in its own practice on the abstention of a permanent member, the General Assembly was not bound by any action taken by the Council which failed to comply with the explicit terms of Article 27.

The record of the Security Council's proceedings further revealed that when the vote had been taken, the President had stated that although the decision was governed by the rule of unanimity, the abstention of a permanent member did not invalidate it, inasmuch as it had obtained more than the seven affirmative votes required by the Charter. Two members of the Council had taken exception to that interpretation. . . .

Moreover, the United Kingdom which had abstained from voting in favour of the Council's recommendation to admit Israel to membership, had both generally specifically made it clear that its abstention could not be construed as an affirmation . . . Clearly, the United Kingdom had not concurred in the decision of the Security Council on the admission of Israel because it had not been satisfied that the applicant State fulfilled the conditions laid down in Article 4 or that the merits of the case warranted an affirmative vote.

In view of those considerations, the Committee had before it no Security

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[1] Gross, *Yale Law Journal*, Vol. 60, No. 2 (1951), pp. 209-210.
[2] *Ibid.*, p. 210.

Council decision which had been taken in accordance with the conditions laid down in the Charter [1]."

25. From the foregoing there can, it is submitted, be no doubt as to how the Court would have interpreted Article 27, paragraph 3, had it been called upon to pronounce upon the question now under discussion immediately after the coming into force of the Charter. It would have had before it a text which was clear and unambiguous, which was in conformity with the actual intentions of its authors, and which was accepted by contemporary publicists to mean that no resolution could be adopted by the Security Council without the affirmative and concurring votes of all its permanent members. It is therefore submitted, in accordance with the principle of contemporaneity [2], that Article 27, paragraph 3, must still be so interpreted.

26. The question may nevertheless arise whether, as a matter of interpretation, a different result would now be justified by reason of events subsequent to the coming into force of the Charter, and particularly by the practice of the Security Council itself. *Clearly such a result could not be achieved by any process of interpretation.* Whatever value the practice of an organization might have as an aid to the interpretation of its constitution, it cannot override the clear meaning of the text, particularly where, as in the present case, the meaning accords with the actual intentions of its authors [3]. The subsequent practice in the present case could accordingly have affected the original meaning of Article 27, paragraph 3, only by some process of modification or amendment of its terms. Whether such modification or amendment has occurred will form the subject of the succeeding paragraphs.

III. The Effect of the Practice of the Council upon Article 27, Paragraph 3

27. Since the late 1940s, a large number of Security Council resolutions on non-procedural matters have been declared adopted despite the voluntary abstention of one or more of its permanent members [4]. Initially this practice was questioned by some of the non-permanent members of the Council, but after a certain stage [5] it seems to have been followed without dissent in the Council. Also in the General Assembly and elsewhere Members of the United Nations do not appear to have objected to this procedure in the period between approximately 1950 and 1965; after which the situation changed as will presently be shown [6].

28. In Chapter II consideration was given to the circumstances in which, if at all, a treaty could be modified by the subsequent practice of the parties thereto. It is submitted that upon the application of the principles there set out, there is no warrant for holding that the practice referred to in the previous paragraph has tacitly introduced a modification or amendment of Article 27, paragraph 3, which would enable the Security Council to take valid non-procedural decisions despite the voluntary abstention of one or more of its permanent members.

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[1] *GA, OR*, Third Session, Part II, *Ad Hoc* Pol. Comm. Summary Records of Meetings, 6 April-10 May 1949, 42nd Meeting (3 May 1949), pp. 181-182.

[2] *Vide* Chap. II, para. 8, *supra*.

[3] *Vide* Chap. II, paras. 23 and 33, *supra*.

[4] Stavropoulos, C. A., "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Art. 27, para. 3, of the Charter of the United Nations", *AJIL*, Vol. 61 (1967), pp. 742 *et seq.*

[5] Which Stavropoulos puts at the end of 1949—*ibid.*, p. 746.

[6] *Vide* paras. 33 to 34, *infra*.

29. At the outset it should be recalled that the very existence of a principle of modification of treaties by subsequent conduct is at present subject to considerable doubt [1]. Moreover, even if the principle were conceded, it could not apply to the Charter, which contains express provisions for its amendment in Articles 108 and 109 [2].

30. However, even if Articles 108 and 109 do not constitute an absolute bar to the informal modification of the Charter, the existence of these Articles must at least render it very difficult to accept that such modification has in fact been effected [3], particularly in respect of a provision which is of such great importance in the whole scheme of the Charter as Article 27, paragraph 3. The clear consent of all member States, manifested through their proper constitutional organs, would have to be proved conclusively before such a modification could be held to have been established [4].

31. In the instant case the practice in question had been pursued in the Security Council, a body with a limited membership, and it can accordingly not be said that all members have participated in the practice. And although the practice was for many years uncontested, there is nothing to suggest that this lack of opposition was induced by any desire or intention to modify the Charter—indeed, the practice appears to have been accepted in many quarters as being in consonance with the Charter, a state of mind which is *ex hypothesi* inconsistent with any intent to modify it [5]. Moreover, it seems inherently likely that many States, whether non-permanent members of the Council or Members of the United Nations generally, failed to protest only because their own interests were not detrimentally affected by the relevant Security Council resolutions, and not because they positively intended to consent to a modification of the Charter which would be applicable to all future proceedings of the Council. The lack of positive involvement of many States in the procedure in question also renders it impossible to ascertain to what extent, if at all, their treaty-making organs could properly be said to have adverted to the matter.

32. The uncertainty which prevails as to the actual intentions of member States is emphasized when an attempt is made to determine the exact content of any modification alleged to have occurred. For here, distinctions may have to be drawn between the voting procedures followed in connection with different functions of the Council. Thus a certain procedure may be acceptable to States where the Council acts under Chapter VI of the Charter in pursuance of its function of peaceful settlement but not where it acts to apply enforcement measures under Chapter VII. Moreover, an altered voting procedure might have had a consequential effect on the authority of Security Council resolutions, as suggested by Professor Leo Gross [6].

33. A further element of uncertainty arises by reason of the amendments to the Charter which occurred in 1965 [7]. If some informal modification of the Charter had in fact been effected by conduct prior to the proposals for amend-

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[1] *Vide* Chap. II, paras. 26-29, *supra*.

[2] *Vide* Chap. II, paras. 32 and 34, *supra*.

[3] *Vide* Chap. II, paras. 32 and 35, *supra*.

[4] *Vide* Chap. II, para. 35, *supra*. It might conceivably be sufficient to prove consent substantially complying with the provisions of Article 108—*vide ibid.*, footnote 3 to para. 35.

[5] *Vide* Chap. II, para. 30, *supra*. Stavropoulos (*AJIL*, Vol. 61 (1967), p. 737) seeks to justify this practice on the basis, *inter alia*, of an interpretation of the Charter.

[6] "Voting in the Security Council: Abstention in the Post-1965 Amendment Phase and its Impact on Article 25 of the Charter", *AJIL*, Vol. 62 (1968), p. 315.

[7] *Vide* para. 12, *supra*.

ment, it is difficult to understand why it was not properly defined and incorporated when Article 27, paragraph 3, was formally amended. The natural inference to be drawn from this omission is that the sponsors of the amendments were of the opinion that there was an insufficient measure of agreement among member States concerning the existence and ambit of the modification to secure its incorporation in the Charter in accordance with the requirements of Article 108—which is in itself a cogent indication that no modification of a sufficiently precise content had been established. And there is no suggestion that any modification was effected by conduct subsequent to the amendments [1].

34. A second aspect of the amendments of 1965 is their effect upon any informal modification which, despite the contentions advanced above, might have come into existence prior to 1965. If, as a result of any such modification, resolutions of the Council prior to 1965 could validly have been adopted despite the voluntary abstention of one or more of the permanent members, the position after 1965 would be that despite the abstention of *all* the permanent members, a resolution could be adopted by the votes of the non-permanent members only —a situation which would have been impossible in the smaller Security Council as originally established, in which the positive vote of at least one permanent member was necessary in order to make up the required number of seven affirmative votes [2]. Thus, if the suggested modification survived the 1965 amendments, it could have done so only with a materially different content. It is submitted that this result could be justified in law only by holding that the formal amendments of 1965 changed not only the express provisions of the Charter but also all tacit modifications applying thereto. Apart from the notional difficulties inherent in such a proposition, it is clear that the 1965 amendments did not purport to affect anything other than the express provisions of the Charter. It is accordingly submitted that the true effect of the 1965 amendments on any modification applying to the pre-existing composition of the Council would have been to extinguish such modification.

35. Postulating the previous existence of a tacit modification, and its subsequent extinction as a result of the formal amendments in 1965, one must, it is conceded, accept the possibility of its revival or re-establishment in a suitably changed form by conduct after 1965. Evidence of fresh tacit agreement would of course be required for this purpose. In this regard it is pertinent to note that at least two Members of the United Nations (Portugal and South Africa) have since 1965 expressed reservations or objections concerning the purported adoption of non-procedural Security Council resolutions in the face of voluntary abstention by permanent members [3]; and that in any event there has not been any concordant practice for a sufficient period of time to enable a conclusion to be drawn that any new modification has been tacitly established.

36. Reference may at this stage be made to certain comments by Judge Bustamante in his separate opinion in the *Certain Expenses* case. He said:

> "It is already well known that an unwritten amendment to the Charter has taken place in the practice of the Security Council, namely, to the

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[1] *Vide* for instance, Stavropoulos, *AJIL*, Vol. 61 (1967), p. 737.

[2] *Vide* para. 12, *supra*.

[3] *Vide* letter dated 27 Apr. 1966 from the Minister of Foreign Affairs of Portugal addressed to the Secretary-General, UN doc. S/7271 (28 Apr. 1966) in *SC, OR*, Twenty-first Year, Sup. for April, May and June 1966, pp. 59-62; Note Verbale dated 22 June 1966 from the Representative of South Africa to the Secretary-General, UN doc. S/7392 (1 July 1966) in *SC, OR*, Twenty-first Year, Sup. for July, August and September 1966, pp. 16-17; letter dated 26 Sep. 1969, from the Minister of Foreign Affairs of South Africa addressed to the Secretary-General, UN doc. S/9463, Ann. 1 (3 Oct. 1969), pp. 21-22.

effect that the abstention of a permanent Member present at a meeting is not assimilated to the exercise of the right to veto. *No doubt this type of amendment may be legally repudiated in a given case by invoking the text of the Charter (Art. 27, para. 3), since no permanent Member has undertaken to apply it without reservations;* but in the case of the Congo, of the permanent Members abstaining, none asserted that its abstention was to be regarded as a veto [1]." (Italics added.)

Judge Bustamante then proceeded to examine certain subsequent Security Council resolutions, and finally reached the conclusion that later resolutions, one of which was passed without abstention by a permanent member, had ratified the earlier ones [2].

If the whole of Judge Bustamante's reasoning depended ultimately on his finding of ratification, his attitude would not necessarily be inconsistent with that set out herein [3]. However, it would appear that he also relied upon an "unwritten amendment to the Charter", and to that extent his opinion is authority against the contentions advanced in this Chapter.

It is respectfully submitted that the relevant passage from the opinion proceeded from a false premise and is consequently unsound. Judge Bustamante appears to have assumed that the voting procedure in the Security Council in the respect in question, was the concern of only the permanent members, and that only those members would be entitled to invoke the text of Article 27, paragraph 3. It is submitted that this is not a correct approach. The Charter is a multilateral treaty, and all parties thereto are entitled to insist on compliance therewith. This is not a purely formal or technical contention—the requirement of complete unanimity on the part of the permanent members does not enure only to their own advantage, but serves in the general interest to guard against the Council exercising its extensive powers without the active support of its permanent members. To this extent it also represents a protection for smaller States, which should not be expected to comply with Security Council resolutions unless they were adopted with the positive concurrence of the permanent members.

37. The practical importance of this aspect may be seen from the following examples. In the debate preceding the adoption of Security Council resolution 276 (1970), the representative of the United Kingdom, a permanent member which abstained in the voting, said:

"As regards the subject of today's meeting, I believe that the position of my Government is sufficiently well known to make it unnecessary for me to repeat it in detail. . . . We have consistently drawn attention to the practical considerations that we believe have to be faced and to the need for the United Nations to act only within its capabilities. However much we deplore it, South Africa is in fact controlling the Territory of South West Africa. We have made our rejection of this state of affairs clear to the South African Government. The action which we can take, however, is limited. We have made no secret of our own inability to contemplate action which would rapidly turn into complete economic warfare against South

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[1] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 291.

[2] *Ibid.*, p. 292.

[3] Although it might raise difficult questions, which are not material at present, concerning the ratification of invalid resolutions.

Africa. We have explained why we have felt that the adoption of resolutions which are ineffective or inoperable cannot serve the interests of the people of the Territory or of the United Nations; and for all these reasons we have abstained on a number of resolutions, notably General Assembly resolution 2145 (XXI) of 27 October 1966, Security Council resolution 264 (1969) and Security Council resolution 269 (1969).

It will therefore come as no surprise to the members of this Council *that we cannot on this occasion give our support to the draft resolution before us*, since the basis of that resolution lies of course in those earlier resolutions on which we have already abstained in the past. Moreover, in some respects, notably operative paragraph 5, the draft resolution seems to us to ignore some of the circumstances to which I have already referred. *My delegation will therefore abstain in voting on the draft resolution before us* [1]." (Italics added.)

Although the resolution was adopted, it clearly did not enjoy the support of the permanent member concerned.

Another example is apparent from the attitude of the representative of the USSR who in the debate preceding the adoption of resolution 284 (1970) stated:

"The Soviet delegation wishes to express its serious doubts with regard to the provision in the draft resolution concerning recourse to the International Court of Justice to request an advisory opinion on the question of Namibia. This approval, it seems to my delegation, cannot be regarded as an effective measure which could contribute to the withdrawal of the South African racists from Namibia. Moreover, the adoption of such a decision would delay the solution to the problem of Namibia. It would create illusions concerning the possibility of a solution to this problem by legal means and not by the taking of serious political measures by the Security Council.

In view of these considerations, the Soviet delegation will take its position accordingly when the draft resolution comes to a vote [2]."

In the event, the Soviet delegation abstained in the voting although the resolution did not bear its approval.

These extracts are typical of many and show how Security Council resolutions have been declared adopted in circumstances in which they not only lacked the positive support of all the permanent members, but were actually considered undesirable by some of these members.

38. What clearly emerges is that, were the Security Council able to act validly despite the voluntary abstention of one or more of its members, all the Members of the United Nations would thereby be deprived of an important protection accorded them in the Charter—the unanimity of the permanent members of the Security Council on non-procedural matters.

39. The aforesaid arguments lead, it is submitted, to the conclusion that the Charter does not permit the adoption of non-procedural Security Council resolutions in the face of the voluntary abstention of one or more of the permanent members. This conclusion renders it necessary to give brief consideration to the legal effect of resolutions declared adopted despite non-compliance with the terms of Article 27, paragraph 3. It should be noted that this problem would arise to some extent whether or not the contentions advanced above are correct.

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[1] UN doc. S/PV. 1529 (30 Jan. 1970), pp. 17-18.
[2] UN doc. S/PV. 1550 (29 July 1970), pp. 63-65.

Even if it be accepted that the Charter had, by subsequent practice, been properly modified to permit a changed voting pattern, a number of resolutions adopted prior to or during the period of gestation of the modification would have been invalid, or at least of doubtful validity. Had no such modification been effected, the number of such resolutions would, of course, be very much larger. But in neither event would this necessarily entail the complete nullity of all such resolutions and of everything done in pursuance of them. It seems clear that in international law acts which were initially invalid may be validated by acquiescence, lapse of time, estoppel or similar processes [1].

This would probably have happened in the case of all those resolutions, originally invalid, which were adopted prior to 1965, and possibly even in the case of some of those adopted subsequently. However, since the South African Government has clearly not acquiesced in any Security Council resolution relevant to the question of South West Africa [2], it is not necessary to pursue the matter further.

40. For the reasons aforestated it is submitted that all non-procedural Security Council resolutions which are relevant to the present case are invalid and void of effect by reason of the voluntary abstention in the voting by certain of the permanent members of the Council.

IV. Compulsory Abstention in Terms of the Proviso to Article 27, Paragraph 3

41. There is, it is submitted, a further respect in which the Security Council did not comply with the requirements of Article 27, paragraph 3, dealing with voting on non-procedural matters. In so far as it is relevant to the present question, the proviso to that paragraph lays down that "in decisions under Chapter VI . . . a party to a dispute shall abstain from voting". Security Council resolutions 264 (1969), 269 (1969) and 276 (1970), clearly relate to non-procedural matters and, as will be shown in Chapter V, *infra*, those resolutions could only have been adopted by the Council, if at all, under Chapter VI of the Charter and, therefore, constitute "decisions" within the meaning of the above proviso.

The question which arises here is whether certain members of the Council should not have abstained in the voting on the resolutions concerned. It will be shown in Chapter IV, *infra*, that if the Judgment of this Court in 1962 relevant to the existence of a dispute in the United Nations was correct [3], then there exists a dispute on the question of South West Africa between South Africa and a number of member States of the United Nations consisting probably of all those which voted in favour of General Assembly resolution 2145 (XXI). At all relevant times 13 of these same States were represented on the Security Council and it is submitted that in accordance with the proviso to Article 27, paragraph 3, all 13 should have abstained in the voting on the various resolutions in question. In fact, except in the case of resolution 269 (1969) where only two of them abstained [4], all 13 voted affirmatively [5].

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[1] *Vide* Lauterpacht, E., "The Legal Effect of Illegal Acts of International Organisations", *Cambridge Essays in International Law* (1965), p. 88.

[2] *Vide* footnote 3 to para. 35, *supra*.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345.

[4] Finland and the United States—*vide* UN doc. S/PV. 1497 (12 Aug. 1969), 12-15. France and the United Kingdom which also abstained did not vote in favour of GA resolution 2145 (XXI).

[5] *Vide* UN docs. S/PV. 1465 (20 Mar. 1969), p. 71 (resolution 264 (1969)); S/PV. 1529 (30 Jan. 1970), pp. 83-85 (resolution 276 (1970)); and S/PV. 1550 (29 July 1970), p. 76. France and the United Kingdom, which abstained on these three resolutions also abstained on GA resolution 2145 (XXI).

Had these States abstained, the Council could not, of course, have adopted the resolutions, since the requisite nine affirmative votes would have been lacking, and it is accordingly contended that their failure to abstain rendered the adoption of the resolutions concerned invalid and of no legal effect [1].

E. The Non-Procedural Nature of Security Council Resolution 284 (1970)

42. The next question to be considered is whether the adoption of Security Council resolution 284 (1970) can be regarded as a decision on a procedural matter within the ambit of Article 27, paragraph 2, of the Charter. If not, it follows from what has been stated in the preceding paragraphs that the resolution was not validly adopted, and that the Court is consequently precluded from answering the present request for an opinion.

43. The Charter itself contains no definition of "decisions . . . on procedural matters". However, according to the ordinary meaning of the words, such decisions are confined to those which relate solely to the internal functioning and structure of a particular organ (*in casu*, the Security Council) and create legal rights, competences and obligations for that organ, its subsidiary bodies or its members *qua* members, which can only be exercised or carried out within the framework of the organ itself. In contrast, a decision would be a substantive one if it has external legal effect, i.e., if it creates rights, competences and obligations for other bodies or persons.

In terms of the Charter the Court has no power to give, or to offer to give, an advisory opinion *proprio motu*; it can act only when seized of a competent request [2]. It follows that such a request confers upon the Court a concrete competence to consider it and, if deemed advisable by the Court, to accede thereto. But since the Court cannot be said to be a part of the internal structure of the Security Council, it is submitted that a decision of the Council to request an opinion can consequently not be regarded as a decision on a procedural matter.

44. This conclusion appears to be borne out by the statement made in June 1945 at the San Francisco Conference by the Sponsoring Governments, and acceded to by France, to which reference was made above [3]. One of the questions put to these Governments was:

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[1] It is also to be observed that at least five of the States which voted affirmatively for resolutions 264 (1969), 269 (1969) and 276 (1970) were among those States which requested the convening of the Council in order to consider the question of "Namibia" (*vide* UN docs. S/9090 (14 Mar. 1969), and Add. 1-3; S/9359 (24 July 1969); S/9372 (1Aug. 1969); and S/9616 (26 Jan. 1970) and Add. 1-3 (dated 27, 28 and 29 Jan. 1970 respectively)). As regards resolution 264 (1969), the States concerned were Algeria, Nepal, Pakistan, Senegal and Zambia; as regards resolution 269 (1969), they were the same five States with the addition of Colombia; and as regards resolution 276 (1970), they were Burundi, Nepal, Sierra Leone, Syria and Zambia. As will appear from Chap. V, *infra*, if the 1962 Judgment were to be followed in the relevant respect, these States must be regarded as parties to a dispute with South Africa over South West Africa and, it is submitted, should therefore have abstained in the voting on the relevant resolutions. Had they done so, then together with the other States which abstained on these resolutions, there could at no time have been more than eight votes cast in favour of the resolutions (*vide* note 4, p. 417) and, consequently, the resolutions could not have been validly adopted.

[2] Rosenne, S., *The Law and Practice of the International Court* (1965), Vol. II, pp. 698-699.

[3] *Vide* para. 17, *supra*.

"Would the veto be applicable to a decision of the Security Council . . . to *refer a justiciable dispute* to the International Court of Justice [1]?"

The Five Power Statement included the following:

". . . under the Yalta formula a procedural vote will govern the decisions made under the entire Section D of Chapter VI. This means that the Council will, by a vote of any seven of its members, adopt or alter its rules of procedure; determine the method of selecting its President; organize itself in such a way as to be able to function continuously; select the times and places of its regular and special meetings; establish such bodies or agencies as it may deem necessary for the performance of its functions; invite a member of the Organization not represented on the Council to participate in its discussions when that Member's interests are specially affected; and invite any State when it is a party to a dispute being considered by the Council to participate in the discussion relating to that dispute.

Further, no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation brought to its attention under paragraph 2, Section A, Chapter VIII. Nor can parties to such dispute be prevented by these means from being heard by the Council. Likewise, the requirement for unanimity of the permanent members cannot prevent any member of the Council from reminding the members of the Organization of their general obligations assumed under the Charter as regards peaceful settlement of international disputes.

Beyond this point, decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement under Section B, Chapter VIII. This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon States to settle their differences, or makes recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso, referred to above, for abstention from voting by parties to a dispute.

To illustrate: in ordering an investigation, the Council has to consider whether the investigation—which may involve calling for reports, hearing witnesses, dispatching a commission of inquiry, or other means—might not further aggravate the situation. After investigation, the Council must determine whether the continuance of the situation or dispute would be likely to endanger international peace and security. If it so determines, the Council would be under obligation to take further steps. Similarly, the decision to make recommendations, even when all parties request it to do so, or to call upon parties to a dispute to fulfil their obligations under the Charter, might be the first step on a course of action from which the Security Council could withdraw only at the risk of failing to discharge its responsibilities [2]."

45. It will be observed that in this statement a substantive character was attributed also to decisions which *might* create "external" obligations, rights or competences. Commenting thereon, Dr. Yuen-Li Liang has remarked:

"In the context of the Joint Statement of the Sponsoring Governments,

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[1] UNCIO docs., Vol. XI, p. 704.
[2] *Ibid.*, pp. 711-712.

a request for advisory opinion is apparently to be considered as a non-procedural matter . . . [1]"

And Rosenne has stated:

"The implication of the reply given by those Delegations, with its emphasis on the 'chain of events' doctrine, seems to be that in principle a decision to request an advisory opinion would be of a substantive character [2]."

46. It is significant that the decisions set out in the first paragraph of the quoted portion of the statement, are those envisaged in Articles 28-32 of the Charter under the heading "Procedure" (of the Security Council). None of these decisions can create legal effects outside the functioning and structure of this organ It is true that a decision in terms of Articles 31 and 32 can create a competence for a non-member to participate in the discussions of the Security Council, but such competence can be exercised only within its own internal framework.

47. It has been suggested that as the answer on the procedural or non-procedural nature of most questions is already contained in the Charter (because of the employment of the heading "Procedure" in Chapters IV, V, X and XIII), "the method of analogical interpretation is legitimate in order to make explicit those indications which are latent [3]".

Hence:

"Each time the Charter refers to specific action of the Security Council without giving an express indication of the nature of the vote required, the answer is to be found in an analysis of the particular case under consideration, and in the analogies or differences which the case offers with the procedural actions referred to above [3]."

From this premise it has been argued that since a decision of the Security Council under Article 29 of the Charter to establish an *ad hoc* committee of jurists for the purpose of obtaining advice on the legal aspects of a dispute, is a decision on a procedural matter, the same must be true of a decision to request an advisory opinion.

If it be assumed for purposes of argument that the suggested analogical method of interpretation is permissible, it is submitted that the analogy sought to be drawn between the above postulated decisions is a false one. In terms of Article 29 the committee of jurists would be a *subsidiary organ* of the Security Council and as such would function within the internal framework of this organ, whilst the same can obviously not be said of the function exercised by the Court, as an independent organ, when giving an opinion.

48. Reference may also be made to the background to the adoption of General Assembly resolution 267 (III) [4].

This resolution was adopted as a result of the report of an Interim Committee "on the problem of voting in the Security Council" [5], and recommended to the

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[1] Liang, Yuen-Li, "The Settlement of Disputes in the Security Council: The Yalta Voting Formula", *B.Y.B.I.L.*, Vol. XIV (1947), p. 354.

[2] Rosenne, *op. cit.*, p. 667.

[3] Jiménez de Aréchaga, E., *Voting and the Handling of Disputes in the Security Council* (1950), p. 6.

[4] GA Resolution 267 (III), 14 Apr. 1949, in *GA, OR*, Third Sess., Part II, pp. 7-10.

[5] *Ibid.*, first preambular paragraph.

members of the Security Council that the decisions set forth in the annex to the resolution be deemed procedural [1].

The Interim Committee concluded that a request to the Court for an advisory opinion is a procedural decision [2]. In introducing the relevant draft resolution in the *Ad Hoc* Political Committee the United States representative said:

> "With one exception, the draft did no more than repeat the decisions listed in the first conclusion of the Interim Committee. The only decision which had been omitted was the one whereby the Security Council could request an advisory opinion from the International Court of Justice on legal questions. The United States delegation was convinced that such a decision should also be regarded as procedural. In view, however, of certain objections raised in that connection by other delegations, it had agreed to delete that decision from the list which had been submitted [3]."

In the result the annex to the resolution as eventually adopted also contained no reference to a request for an opinion. It seems clear that this item was deleted because the sponsors of the draft resolution were convinced that the necessary majority in support of the inclusion of the said item could not be obtained.

49. There has been a wide divergence of opinion amongst writers on the question as to whether a decision by the Security Council (and, in the time of the League, the Council thereof) to request an opinion, is to be regarded as a procedural or substantive decision. Some maintain that it is a substantive decision [4]; others that it is a decision on a procedural matter [5]; and still others that it is a procedural decision only if the request concerns a question of procedure [6].

For present purposes it suffices to say that the writers falling into the second group fail to formulate a convincing criterion for distinguishing between procedural and substantive decisions, and that even if the views of the third group were to be adopted, the present request would still be invalid since the question clearly does not relate to the procedure of the Security Council, but on the contrary, to the substantive rights and obligations of States.

50. For the reasons stated above it is consequently submitted that the adoption of resolution 284 (1970) was *not* a decision on a procedural matter, and that since three permanent members of the Security Council abstained from voting, the resolution was not validly adopted.

F. The Failure of the Security Council to Invite South Africa to Participate in Its Discussions

51. The last question to be considered in connection with the formal validity of the relevant Security Council resolutions is the effect of the Council's failure

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[1] *Ibid.*, first operative paragraph.

[2] *GA, OR*, Third Sess., Sup. No. 10, p. 14.

[3] *GA, OR*, Third Sess., Part II, *Ad Hoc* Pol. Comm., Summary Records of Meetings, 16 Nov. to 9 Dec. 1948, pp. 197-198.

[4] *Vide*, e.g., the writers referred to in para. 45, *supra*.

[5] *Vide*, e.g., authors cited by van Roijen, R.D., *Procedure—Kwesties in het Volkenbondsrecht* (1935), pp. 132-134; Dahm, G., *Völkerrecht* (1961), Vol. II, pp. 221-222; Jiménez de Aréchaga, *op. cit.*, pp. 8-9.

[6] *Vide*, e.g., authors cited by van Roijen, *op. cit.*, pp. 129-132; McNair, A. D., "The Council's Request for an Advisory Opinion from the Permanent Court of International Justice", *B.Y.B.I.L.*, Vol. VII (1926), p. 13; Dubisson, M., *La Cour internationale de Justice* (1964), p. 307.

to invite South Africa to participate in the discussions which preceded the adoption of those resolutions. Article 32 of the Charter, in so far as it is here pertinent, provides as follows:

> "Any Member of the United Nations which is not a member of the Security Council . . . if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute . . ."

South Africa was at all relevant times a Member of the United Nations but not a member of the Security Council, and if, as this Court has decided, the question of South West Africa is to be regarded as a dispute between South Africa and other Members of the United Nations [1], it is submitted that Article 32 imposes upon the Security Council an imperative duty to invite South Africa to participate in its discussions whenever the dispute is under consideration by the Council. This the Council failed to do—not only in the case of its resolution 284 (1970) but also in the case of its related resolutions 264 (1969), 269 (1969) and 276 (1970).

52. That the provisions of Article 32 are mandatory appears from the wording of the Article itself—a party to a dispute *shall be invited* to participate in the discussion relating to the dispute. Unlike Article 31, in terms of which a Member of the United Nations not represented on the Council "may" participate in the discussion "whenever the (Council) considers that the interests of that Member are specially affected", Article 32 leaves no discretion to the Council—it *must* invite the participation of an unrepresented State which is a party to a dispute under consideration. That is the ordinary meaning and natural effect of the words "shall be invited [2]".

53. Moreover, in the practice of the Security Council itself, "on all those occasions in which the Article was considered applicable there has never been any expression of dissent as to its mandatory character . . . [3]" In 1946 the Council's Committee of Experts did not consider it advisable to provide in the provisional rules of procedure "for Members invited in accordance with Article 32 of the Charter *because the invitation to a Member under this Article is mandatory* [4]". And statements emphasizing the peremptory nature of the Article have frequently been made in the Council. Thus, in connection with the *Corfu Channel* question, the President of the Council (Australia), after quoting Article 32, stated:

> ". . . there would seem to be an obligation on the Council to invite Albania to participate in the discussion of this item of the agenda [5]".

[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345. This question is dealt with further in Chap. IV, *infra*, *q.v.*

[2] It is to be observed that in Chapter VI, section D, paragraph 5, of the Dumbarton Oaks Proposals, the corresponding phrase was "*should* be invited". (UNCIO docs., Vol. III, p. 11.) This phrase, which at the San Francisco Conference was retained by Commission III, was changed to its present form in the Tentative Draft of the Co-ordination Committee and the Advisory Committee of Jurists (*ibid.*, Vol. XV, p. 73), and is in line with amendments proposed by Canada and Venezuela in Committee III/1 (*ibid.*, Vol. XI, p. 781). The change indicates that the framers of the Charter intended that the issuing of an invitation by the Council was to be obligatory in case of Article 32.

[3] *Repertory of United Nations Practice* (1955), Vol. II, p. 183.

[4] *Vide SC, OR*, First Year, First Series, Sup. No. 2, p. 22.

[5] *SC, OR*, Second Year, No. 6, 95th Meeting, 20 Jan. 1947, p. 123.

And, at the following meeting of the Council, he observed:

> "The Council has invited the Albanian Government to participate in the discussions of the complaint brought against it. That is only fair, and it is a procedure which is *enjoined* by the Charter. *The obligation of the Council . . . as required by the text of the Charter* and as required by the dictates of common justice, *is to issue the invitation* and give the Albanian Government a reasonable opportunity to be represented [1]." (Italics added.)

On another occasion the representative of Syria declared:

> ". . . Article 32 states that such members 'shall be invited to participate . . .' The Security Council should not wait until such a party to a dispute makes an application to be heard. That party should be invited *ipso facto* without any request on its part [2]."

According to the representative of the USSR:

> "Article 32 essentially provides that when international disputes are under consideration by the Security Council, both parties must be invited to be heard at its meetings [3]."

And during discussion of the Viet-Nam question, the representative of the USSR, after quoting Article 32, declared:

> ". . . I should think it necessary to observe that if the Government of the Democratic Republic of Viet-Nam wishes to take part in the meetings of the Security Council, *it will be the obligation I repeat: the obligation—of the Security Council*, in accordance with the Article I have just quoted, *to invite forthwith representatives of the Democratic Republic of Viet-Nam at once to take part in the Council's work* [4]." (Italics added.)

Many further examples of statements to similar effect are to be found in the records of the Security Council [5].

54. The mandatory character of Article 32 has also been emphasized by the publicists. Bentwich and Martin, for example, put the matter thus [6]:

> "Any Member State not represented on the Council *is entitled, as a matter of right*, to participate, without a vote, in the discussion of any dispute to which it is a party. The Council *must issue* an invitation, but the Member is entitled to decline." (Italics added.)

In his work dealing with the Security Council, Professor (now Judge) Jiménez de Aréchaga states:

> "There is a difference between the invitation under Article 31 and under Article 32: while in the first case an invitation may be extended if the Council considers that the interests of the Member are specially affected, in the second, as was said in the Report of the Committee of Experts of

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[1] *Ibid.*, No. 7, 96th Meeting, 28 Jan. 1947, p. 133.
[2] *Vide Repertoire of the Practice of the Security Council 1946-1951*, p. 126.
[3] *Ibid.*, p. 122.
[4] *SC, OR*, Nineteenth Year, 1140th Meeting, 5 Aug. 1964, p. 10.
[5] *Vide*, for instance: *SC, OR*, Second Year, 181st Meeting, 12 Aug. 1947, p. 1933 (USA) and p. 1935 (China); *ibid.*, Fifth Year, 483rd Meeting, 4 Aug. 1950, pp. 2-3 (USSR); *ibid.*, 488th Meeting, 17 Aug. 1950, pp. 2-3 (USSR); *ibid.*, Second Year, 181st Meeting, 12 Aug. 1947, p. 1920.
[6] *Charter of the United Nations* (1951), p. 75.

> the Security Council, it 'is mandatory'. The Council is required to invite any Member of the United Nations which is a party to a dispute [1].
> . . . an invitation under Article 32 need not be requested; it must be issued by the Council even if not requested by the State party to the dispute [2]."

Goodrich and Simons [3] consider that under Article 32 the Council is "obligated" to invite a party to a dispute to participate in the discussions. And Kelsen is clearly of the same opinion [4].

55. The conclusion to be drawn from these arguments is that in failing to invite South Africa to participate in any of the discussions relating to the question of South West Africa, the Security Council did not act in conformity with the mandatory provisions of Article 32 of the Charter. It is accordingly submitted that the various resolutions adopted as a result of those discussions were formally defective in a vital respect and thus *ultra vires* the Council and of no legal effect.

G. Conclusion

56. For the reasons set out in this Chapter and even if it can be said, despite the doubts expressed by some States concerning the representation of China, that the Security Council was at all pertinent times properly constituted in terms of the Charter, it is nevertheless submitted that in adopting its various resolutions relevant to the issues now before the Court, the Council did not act in accordance with the procedures prescribed in the Charter. It is accordingly contended that all these resolutions were formally invalid and of no legal effect.

Thus, resolution 284 (1970), which it is submitted, was a decision on a matter other than a procedural matter within the meaning of Article 27, paragraph 2, of the Charter, was invalid not only because it was adopted without the affirmative and concurring votes of all the permanent members of the Council, but also because South Africa was not, in accordance with the provisions of Article 32, invited by the Council to participate in the discussions preceding its adoption.

On the other hand, resolutions 264 (1969), 269 (1969) and 276 (1970), which were clearly resolutions of a non-procedural nature, were invalid not only on the same two grounds just mentioned, but also on the further ground that certain members of the Council should, in terms of the proviso to Article 27, paragraph 3, have abstained in the voting on them, but failed to do so.

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[1] Jiménez de Aréchaga, *op. cit.*, p. 57.
[2] *Ibid.*, p. 58.
[3] *The United Nations and the Maintenance of International Peace and Security* (1955), p. 28.
[4] *Vide* Kelsen, *op. cit.*, p. 223.

CHAPTER IV

THE DISCRETION OF THE COURT

A. Introductory

1. In terms of Article 65 of the Statute of the Court, read with the provisions of the Charter, the Court *may* give an advisory opinion on any legal question at the request of, *inter alia*, the Security Council.

It is clear that Article 65 confers on the Court a discretion whether or not to accede to a competent request for such an opinion [1]. The Court itself has stated on a number of occasions that even in cases where it is legally entitled to do so, it is not obliged to give an advisory opinion [2].

However, the Court has refrained from formulating criteria which can be applied in deciding whether in any particular case it should or should not exercise its discretion. In the *Interpretation of Peace Treaties* case [3], the Court merely stated that Article 65 of the Statute is permissive in that it gives the Court the power to examine whether the circumstances of a case are of such a character as should lead it to decline to answer a request for an opinion. The Court also pointed out, however, that it is an organ of the United Nations, and that in principle a competent request from another organ should not be refused [4].

In the *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* case, the Court went further by stating that only "compelling reasons" should lead it to refuse to give a requested opinion [5]. The same attitude was adopted in the *Certain Expenses* case [6].

2. On the assumption that the present request is a valid and competent one, it is submitted that there are indeed compelling reasons why the Court should, as a matter of judicial propriety, refuse to accede to the request. These reasons are as follows:

(a) The question posed by the Security Council is intertwined with political issues and has a political background in which the Court itself has become embroiled to an extent rendering it impossible for the Court to exercise its judicial function properly.

(b) If the 1962 Judgment [7] was correctly decided in a respect to be indicated [8], the relevant legal question in the present case relates to an existing dispute between South Africa and other States.

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[1] Rosenne, S., *The Law and Practice of the International Court*, Vol. II (1965), p. 708.

[2] *Vide*, e.g., the advisory opinions referred to below.

[3] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72.

[4] *Ibid.*, p. 71.

[5] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86.

[6] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 151.

[7] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319.

[8] *Vide* paras. 37-38, *infra*.

(c) The question can only be answered by deciding, *inter alia*, disputed factual issues.

3. As regards the first reason, the South African Government wishes to make it clear at the outset that, in presenting this argument, it does not intend to cast any reflection on the standing or impartiality of the Court or any individual Member thereof. However, in support of the contention that for the reasons set out *(a)* above the Court should refrain from giving the requested opinion, it will be demonstrated that there exist in the legal systems of civilized countries principles—which have also been recognized in international law—which demand that not only should judges be impartial and unbiased, but that circumstances should not exist which may give rise to reason or doubt as to their impartiality.

B. The Political Background to the Question and the Involvement of the Court

1. General

4. States have at times contended that certain questions referred to the Court were not "legal questions" within the contemplation of the Charter and the Statute of the Court, but in fact political ones which fell outside the jurisdiction of the Court. As Rosenne [1] points out, this contention has been raised, for the most part, in connection with advisory opinions concerned with the interpretation of the Charter. In the *Admission* case the Court said:

> "It has . . . been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances [2]."

It will be observed that the Court, in upholding its jurisdiction, emphasized two factors, viz., that the question before it was an abstract one and that it involved the interpretation of a treaty provision. There is clearly no precise line separating "legal" and "political" questions, and a "political" question may also be a "legal" one. Having found that the question under consideration was a legal one, the Court was consequently obviously *entitled* to accede to the request to give an advisory opinion irrespective of the political nature of the question, if indeed it had such a nature.

5. Whether the Court might, as a matter of *propriety*, have regard to the political nature of a request for an opinion, was considered in the *Certain*

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[1] Rosenne, *op. cit.*, p. 704.

[2] *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61. *Vide* also *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7.

Expenses case. The Court specifically referred to its discretion provided for in Article 65 of the Statute and then continued:

> "The Court finds no 'compelling reason' why it should not give the advisory opinion which the General Assembly requested by its resolution . . . It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision [1]."

It will have been observed that the Court stressed the "essentially judicial task" involved in the interpretation of a treaty provision which precluded the Court from attributing a political character to the request for an opinion. It did *not* state that in every case it must be oblivious to the political nature or background of the question concerned. In none of the cases referred to above did the political background involve the Court itself, and it is indeed obvious, it is submitted, that in such circumstances different considerations must necessarily apply.

6. In Chapter XI it will be demonstrated that a political campaign, with strong emotional overtones, against South Africa led to the institution of the *South West Africa* cases by Ethiopia and Liberia. It was confidently expected by certain States that the Judgment would hold that South Africa had violated its obligations under the Mandate [2]. In the succeeding paragraphs it will be shown that when the Judgment of 18 July 1966 failed to fulfil these expectations, there was a violent reaction which took the form of verbal abuse of the Court; statements of policy that national origin and political attitudes would be taken into account in future elections of judges, which policy, according to commentators, had a marked effect on the election of five new judges in November 1966 [3]; and which led to a rejection of the supplementary appropriation of an amount of $72,500 in respect of the Court for the 1966 financial year. It will furthermore be shown that certain Members of the Court, as constituted at present, were individually involved in the aforesaid emotional political campaign. In conclusion it will be submitted that in the light of the legal principles to which reference has been made above—and which will be set out in more detail—the Court should, in the exercise of its discretion, refuse to accede to the present request for an advisory opinion.

II. The Reception of the Court's 1966 Judgment

7. The Court's Judgment on the Second Phase of the *South West Africa* cases was given on 18 July 1966. The Twenty-first Session of the General Assembly commenced in September 1966. The Judgment, the Court, and individual Members thereof were immediately made the targets of near-hysterical abuse and vilification. The Judgment was variously described as "deplorable",

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[1] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 155.

[2] *Vide*, e.g., statement made by Miss Smellie (Jamaica), *GA, OR*, Twentieth Sess., Fourth Comm., 1570th Meeting, 26 Nov. 1965, p. 328.

[3] And there is no reason to assume that this policy was not pursued during the 1969 election of judges.

"shocking", "shameful", "a distortion of law", "a denial of justice", "an insult to the international conscience and to mankind", "one of the most flagrant denials of justice in its [the Court's] history", "scandalous", "a scandal without precedent", an "infamy", "disgraceful", "perverse", "scandalous and wicked", "iniquitous", "a veritable scandal", "shameful", "grotesque", "travesty of justice" and "tangential and devious [1]".

The most vituperative attacks came from representatives of certain Afro-Asian States. It is not without significance that, as will be demonstrated [2], it was precisely these countries that for years had led the political campaign against South Africa regarding its administration of South West Africa. When the Court failed to provide ammunition for the furtherance of the campaign, the political representatives of these States would not accept the Judgment as a judicial pronouncement but attributed a political character thereto, stating, for instance, that the Court was "a body which was inimical to their interests [3]" and that the only interest which the Court "deemed worthy of legal protection" was that of South Africa [4].

8. The most serious aspect of the debates was the reflections cast on the standing and impartiality of the Court and individual members thereof, and direct and blatant allegations of corruption and extraneous motives. In their mildest form they consisted of insinuations such as the following:

Mr. Grimes (Liberia) (quoting the President of Liberia, one of the Applicant States)

> "The decision of the Court, that Applicants had no legal interest in the case, and its refusal to go into the merits . . . savour of casuistry and legal pyrotechnics, which is, to say the least, most surprising and puzzling. It in fact generates unpleasant suspicions about the Court [5]."

Mr. Kallon (Sierra Leone)

> "This [i.e., the Judgment] came as a great shock to my Government and to most of the reasonable nations of the world. It dealt a stunning blow to the authority and integrity of the International Court and raised serious questions in the minds of those who cherish the value of the rule of law in international relations [6]."

Mr. Arkhurst (Ghana)

> "The decision itself has so shaken international confidence in the Court as to have brought it to the verge of disrepute [7]."

Mr. Kapwepwe (Zambia)

> ". . . the International Court of Justice at The Hague took six long years

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[1] This will appear from the extracts from statements quoted below and in Annex A to this Chapter.

[2] *Vide* Chap. XI, section B, *infra*.

[3] Mr. Bakoto (Cameroon), *GA*, *OR*, Twenty-first Sess., Fifth Comm., 1124th Meeting, 10 Oct. 1966, p. 23.

[4] Mr. Thiam (Senegal), *GA*, *OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 25. *Vide* also Mr. Bindzi (Cameroon), 1412th Plenary Meeting, 22 Sep. 1966, p. 10.

[5] *Ibid.*, 1414th Plenary Meeting, 23 Sep. 1966, pp. 8-9.

[6] *Ibid.*, 1419th Plenary Meeting, 27 Sep. 1966, p. 10.

[7] *Ibid.*, p. 13.

of costly litigation . . . only to frustrate finally the wishes of the indigenous people of South West Africa, only to disgrace this our own Organization by cowardly shirking its responsibility to the peoples of the world, by shamelessly judging not to judge . . . [1]"

Mr. Busniak (Czechoslovak Socialist Republic)

"There is no doubt that this judgment has reduced even further the prestige of the International Court of Justice as an instrument for the peaceful settlement of international disputes [2]."

Mr. Bagaragaza (Rwanda)

"The decision of last July was, in our eyes, a surprising and disappointing contradiction, and we wonder whether one can place any further trust in the Court [3]."

Mr. Taieb Slim (Tunisia)

"Many believe, as we do, that it [i.e., the Judgment] dealt a serious blow to the prestige of the Court as the judicial organ responsible for settling international disputes. It should therefore not come as a surprise that doubt has been cast on the usefulness of the Court as at present composed [4]."

Mr. Rojas (Venezuela)

". . . my delegation feels that the Court's decision has given rise to well-founded distrust and suspicion as to future decisions of that high tribunal [5]".

9. There were also more blatant statements in which the Court and Members thereof were accused, either in so many words or by the clearest implication, of ulterior political motives and even corruption. Thus it was said:

"By its refusal, in 1966, to give a decision on the substance of the question, the International Court of Justice—that is, the seven Judges who voted against the 1962 decision on competence—has not lived up to its responsibilities and obligations. How else can one interpret the so-called technical Judgment delivered on 18 July 1966 in circumstances that cast doubt on the integrity of some of the Judges and on their impartiality? A glance at the nationality and calibre of these seven Judges who chose to repudiate a verdict of their own Court that was of an irrevocable nature, is enlightening in this respect. It is enough to see that these Judges are from Greece, Italy, the United Kingdom and France—all countries that give unqualified support to the rash policies of South Africa and secretly uphold that country because of the enormous profits that their economies derive from the pitiless implementation of the policy of economic and social slavery known as apartheid. As for the Australian Judge, Sir Percy Spender, whose name, I think, means 'spendthrift' –he needs money—his deciding

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[1] *Ibid.*, 1425th Plenary Meeting, 30 Sep. 1966, p. 1.
[2] *Ibid.*, p. 9.
[3] *Ibid.*, 1428th Plenary Meeting, 4 Oct. 1966, p. 4.
[4] *Ibid.*, 1431st Plenary Meeting, 5 Oct. 1966, p. 3.
[5] *Ibid.*, p. 13. *Vide* also the statements made by *Mr. Yifru (Ethiopia)*, 1414th Plenary Meeting, 23 Sep. 1966, p. 3; *Mr. Coomaraswamy (Singapore)*, 1420th Plenary Meeting, 28 Sep. 1966, p. 12; *Mr. El Bouri (Libya)*, 1425th Plenary Meeting, 30 Sep. 1966, p. 7; *Mr. Adeio (Nigeria)*, 1429th Plenary Meeting, 4 Oct. 1966, pp. 2-3; and *Mr. Mudenge (Rwanda)*, 1439th Plenary Meeting, 12 Oct. 1966, p. 1.

vote and his conduct throughout the proceedings show that he is not worthy of the confidence which the General Assembly placed in him in electing him and which his colleagues expressed in raising him to the high office of President of the Court. The underhand tactics of Sir Percy Spender, both in the improper disqualification of the Pakistan Judge, Sir Zafrulla Khan, and in the timing of the Judgment, handed down when the verdict favourable to South Africa and erroneously labelled 'technical' gave rise to no doubt, show clearly that this Judge, from a country where it is not so long since the aborigines were treated worse than the non-Whites of South Africa, has chosen to hold high the torch of anachronistic racism and colonialism, to the detriment of the dignity, respectability and impartiality of his office. It is indeed the alliance of colonial and racist forces with illegitimate interests of an obsolete world that prevailed in the decision of this Judge, who is guilty of the attempted murder of the International Court of Justice. As for the Polish Judge, whose behaviour has been denounced by his own Government, we can only wish for him that in the golden exile he will no doubt arrange for himself in a country in which he will claim to have 'chosen freedom', he may quietly enjoy the money he has been able to amass, to the extent to which his conscience will be able to bear the heavy burden that he is now helping to impose on the unfortunate African people of South West Africa [1]."

It will be observed that some of the majority Judges were impliedly accused of bowing to pressure exerted by their respective Governments because of the profits derived from the economic links between the States concerned and South Africa; that the President of the Court was alleged to have employed "underhand tactics" in regard to, *inter alia*, the "improper disqualification" of another Judge, and that both the President and Judge Winiarski were accused of corruption.

10. One or more of these themes were repeated in the following representative statements:

Mr. Grimes (Liberia)

"Thus, as a result of death, disability and a spurious disqualification apparently engineered by the Court's President, transparent justice was denied and seven men perverted justice and brought upon the International Court the greatest opprobrium in its history [2]."

Mr. Yifru (Ethiopia) [3]

". . . a shocked world could not but question the integrity of the Court and its freedom from political and other pressures [4]".

Mr. Murumbi (Kenya)

"The Court decision on South West Africa was an attempt to avoid a substantive matter. We all know the manoeuvres which led the President of the International Court of Justice, Sir Percy Spender, to act in the way he did by casting his vote against the plaintiffs. It is interesting to examine

[1] Mr. Achkar (Guinea), *GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, pp. 14-15.
[2] *GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 8.
[3] One of the Applicant States.
[4] *GA, OR*, Twenty-first Sess., 1423rd Plenary Meeting, 29 Sep. 1966, p. 6.

some of the methods which were employed in order to disqualify some of the Judges that should have taken part in making a decision on this case [1]."

Mr. El Bouri (Libya)

"Unfortunately the Judgment of 18 July has suggested that the interests of international finance, which is hand in glove with the racist régime in South Africa, might influence even the highest international legal authority [2]."

Mr. Bakala (Congo, Brazzaville)

"We cannot understand how a few unscrupulous judges could have so lightly shirked their obligations when, on 18 July 1966, taking refuge behind technical quibbling, they dismissed Ethiopia and Liberia with revolting cynicism and reached a decision favourable to racist Africa . . . We may assume that the motives which dictated this decision, . . . are totally unrelated to the Court's function, which is to administer justice.

. . . . . .

Where does this victory lie, if not in the fact that the Court, with a few corrupt judges, has upheld South Africa in its obstinate refusal to heed the General Assembly [3]?"

Mr. Bomboko (Congo, Kinshasa)

"A sacred Mandate entrusted to South Africa has been travestied and betrayed in the most abominable fashion and turned into a colonialist instrument for the vilest and most contemptible servitude, . . . I regret to have to note that the International Court of Justice, the sanctuary of international law, has made itself accomplice in this unprecedented scandal, so that we can say of it, as Racine did of Nero:

'Among men as yet unborn the name will be Foul insult to the foulest tyranny' [4]."

Mr. Budo (Albania)

"As far as we are concerned, the judgment of the Court, however unjust and scandalous, does not surprise us. We have never cherished any illusions about the International Court of Justice, and that is, of course, well known. Under the pretext of procedural quibbles . . . the Court refused to pass judgment on the substance of a matter concerning South Africa's Mandate over South West Africa, . . . In so doing, the Court has demonstrated to world opinion what the integrity of judges means as far as the majority of the members of the Court are concerned, and what the international justice of the Court itself is worth [5]."

11. Here and there more sober voices were heard. The representative of South Africa pointed out that other representatives were attacking not only the competence but also the integrity of judges who had merely done their duty in giving a judgment according to their consciences [6]. He was joined by the representatives of, *inter alia*, New Zealand and France who rejected any

[1] *Ibid.*, 1422nd Plenary Meeting, 29 Sep. 1966, p. 14.
[2] *Ibid.*, 1425th Plenary Meeting, 30 Sep. 1966, p. 7.
[3] *Ibid.*, 1431st Plenary Meeting, 5 Oct. 1966, pp. 1-2.
[4] *Ibid.*, 1445th Plenary Meeting, 17 Oct. 1966, pp. 11-12.
[5] *Ibid.*, 1448th Plenary Meeting, 19 Oct. 1966, p. 1.
[6] *Ibid.*, 1417th Plenary Meeting, 26 Sep. 1966, p. 1.

suggestion that individual judges had been lacking in integrity or had acted in response to governmental pressure [1]. The result of these remarks was that their authors were joined with the Court as targets for attack and abuse. This reaction is best illustrated by the following statement made by Mr. Tchernouchtchenko of the Byelorussian Soviet Socialist Republic, after Mr. Ramani of Malaysia had said [2] that his instincts militated against condemning the Court and its personnel:

> "Many remarks have already been made here—and justly so—about the International Court and about those judges who did everything in their power to reject the legitimate complaint lodged by Ethiopia and Liberia. But we cannot overlook the fact that even among those representatives who have spoken here, there are still advocates and defenders of those judges. We even witnessed this at our meeting this morning. Those judges, as well as their advocates, preferred to close their eyes to the policy of the Government of South Africa *vis-à-vis* South West Africa and to the violation of international undertakings and decisions of the United Nations General Assembly [3]."

Many more examples of the abuse showered upon the Court and its individual Members can be given. However, in order not to burden the text unnecessarily, there is attached to this Chapter an Annex A containing excerpts from relevant statements made during the Twenty-first Session of the General Assembly.

12. Coupled with the aforesaid attacks were suggestions, made by representatives of certain States, that the composition of the Court should be changed, ostensibly "in order to ensure a more equitable representation of the non-aligned countries and the forces of progress [4]", but quite clearly in an attempt to ensure that in any possible future litigation concerning South West Africa or involving similar issues, the political views of such States would be upheld. Thus Mr. Yifru of Ethiopia [5] stated:

> "We have also been taught one cardinal lesson, that is, we have to take an active part in all the organs of the United Nations, including the International Court of Justice. To this end, we shall demand equitable representation on the bench of the Court, a representation commensurate with our role in the United Nations, a representation which will allow us to contribute our due share to the fulfilment of all aspects of the objectives of the United Nations [6]."

And Mr. Mgonja of the United Republic of Tanzania said:

> "We believe that this experience—the most recent Judgment of the International Court—sad as it is, has been a salutary lesson to the newly independent countries in their struggle for effective representation in all international bodies [7]."

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[1] *Ibid.*, 1439th Plenary Meeting, 12 Oct. 1966, p. 12, Mr. Corner (New Zealand); p. 17, Mr. Seydoux (France).

[2] *GA, OR*, Twenty-first Sess., 1449th Plenary Meeting, 19 Oct. 1966, pp. 7-8.

[3] *Ibid.*, p. 16.

[4] Mr. Thiam (Senegal), *GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 25.

[5] Ethiopia was one of the Applicant States in the *South West Africa* cases.

[6] *GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 3.

[7] *Ibid.*, 1417th Plenary Meeting, 26 Sep. 1966, p. 19. *Vide* also statement made by Mr. El Mufti (Sudan), *ibid.*, 1440th Plenary Meeting, 13 Oct. 1966, p. 16.

13. With these statements should be contrasted statements to the effect that the Court (obviously as then constituted) could not be entrusted with questions relating to the welfare of the inhabitants of South West Africa. Thus Mr. Baroody of Saudi Arabia stated:

> "So cross out the International Court of Justice from the book of South West Africa and any idea that we shall ever derive any tangible result from approaching it [1]."

And in the Fourth Committee Mr. Nyirinkindi of Rwanda was reported as follows:

> "The International Court of Justice, whose members should have the highest moral qualifications, had set an iniquitous precedent in the case of South West Africa. It had sided with the brute force of evil, which was what South Africa represented. The welfare of the people of South West Africa could be entrusted neither to the International Court of Justice nor to South Africa [2]."

14. There can be little doubt that many representatives, in censuring the Court and its individual Members, intended to exert political pressure on the Court. The most striking example of the exertion of such pressure is to be found in the rejection by the Fifth Committee of the supplementary appropriation of the amount of $72,500 in respect of the International Court of Justice for the financial year 1966. Although the representatives of Argentina and Norway stressed that the Fifth Committee was not concerned with politics, but solely with budgetary matters [3], the discussions regarding the supplementary estimates for the said financial year were interspersed with attacks on the Court and its Judgment [4]. In the event, the supplementary appropriation for the said amount of $72,500 was rejected by 40 votes to 27, with 13 abstentions [5].

III. The Involvement of the Court as Constituted at Present

15. Mention has already been made of the intentions expressed by representatives of certain countries that the constitution of the Court should be altered so that it should be more representative of such countries. Certain representatives indeed went further by implying that in future the political views of candidates should be taken into account in the election of judges. Thus Mr. Murumbi of Kenya stated:

> "Before leaving this question of South West Africa, my delegation would like to draw the attention of the General Assembly to the composition of both the International Law Commission and the International Court of Justice. Kenya supports the enlargement of these two bodies to reflect geographical representation. But much more important than this enlargement, Kenya would like to emphasize that when the time comes for the General Assembly to elect the new Judges, efforts should be made to ensure that men of the utmost integrity are chosen. We must try to *avoid electing to the*

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[1] *Ibid.*, 1431st Plenary Meeting, 5 Oct. 1966, p. 14.
[2] *Ibid.*, Fourth Comm., 1603rd Meeting, 4 Oct. 1966, p. 41.
[3] *Ibid.*, Fifth Comm., 1124th Meeting, 10 Oct. 1966, p. 24.
[4] *Ibid.*, p. 23, pp. 23-24 and pp. 24-25—statements made by the representatives of Cameroon, Union of Soviet Socialist Republics and Tanzania.
[5] *Ibid.*, p. 25.

International Court of Justice Judges whose decisions will be influenced by policies of their national Governments or ideological considerations. We are surprised to find that the Government of Australia is determined to put up another candidate for election to the International Court of Justice [1]." (*Italics* added.)

The implication is clear: the majority judges who subscribed to the Judgment in the Second Phase of the *South West Africa* cases were not men of integrity and were influenced by the policies of their national governments in not finding in favour of the Applicants. Therefore, men should be chosen who would not, in giving judgment, be "influenced by . . . ideological considerations" of which certain States did not approve. The manner in which this attitude was implemented, is considered below [2].

16. Mr. Nehemias Gueiros of Brazil referred in so many words to future litigation. He said:

> "The door of juridical protection is still open. The reconstitution of the membership of the Court is to be effected during this session of the General Assembly with the election of five of its members in accordance with the principle of rotation as provided for in Article 13 of the Statute of the Court, . . .
>
> It cannot, therefore, be said that the election is a matter of 'court-packing'. Once that legal body incorporates its new members, it is legitimate to expect that it will be able to maintain its praiseworthy traditions, not only as a Court of law to discuss the incidental or literal application of rules already in existence, but as a tribunal which applies and develops international law; . . . [3]"

17. The election of the five new judges in the General Assembly took place at the beginning of November 1966. After a number of inconclusive ballots to elect a fifth judge, Mr. Achkar of Guinea, on a point of order, stated:

> "Immediately after the shocking Judgment delivered by the International Court of Justice, the Africans and their friends decided to endeavour to make the Court reflect the real international situation of today. We know that there was only one African Judge on the Court. The hope that was then expressed was that the International Court of Justice should reflect the present membership of the Security Council. The votes just taken show that a step has been taken towards fulfilling that hope [4]."

The representative of Guinea was obviously referring to the fact that Mr. Charles D. Onyeama of Nigeria had been one of the four candidates who had obtained the necessary majority and it is of some importance that he stated that the election of Mr. Onyeama was the result of the concerted efforts of African States and "their friends".

In view of the surprise expressed by the representative of Kenya that the Government of Australia was determined to put up another candidate for election [5], reference may be made to the following comment of L. C. Green on the election of new Judges:

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[1] *GA, OR*, Twenty-first Sess., 1422nd Plenary Meeting, 29 Sep. 1966, p. 15.
[2] *Vide* paras. 17-18, *infra*.
[3] *Ibid.*, 1427th Plenary Meeting, 3 Oct. 1966, p. 14.
[4] *Ibid.*, 1456th Plenary Meeting, 2 Nov. 1966, p. 3.
[5] *Vide* para. 15, *supra*.

"The impact of the decision [i.e., the 1966 Judgment] was seen in the election of judges which took place in 1966. It had been expected that Sir Kenneth Bailey would succeed Sir Percy Spender, but this did not happen [1]."

18. Other writers also commented on the election of the five new Judges. R. P. Anand wrote:

"It was, . . . suggested that the Court's membership should reflect the changed political situation and that it should contain more Afro-Asian representation, if necessary, by an enlargement of the Court. Indeed, at the first possible opportunity in 1966 itself the Afro-Asian countries exerted all their pressure to elect five new judges who seemed to be more sympathetic towards their views. *There was little doubt that if another case was brought by different parties it would meet a different fate* [2]." (Italics added.)

Elizabeth S. Landis, having pointed out that African initiatives vis-à-vis South Africa did not end with the adoption of General Assembly resolution 2145 (XXI) [3], stated:

"Since the election of new judges to the International Court was scheduled for the 1966 Assembly session, Africans for the first time carefully screened all candidates, and, with the assistance of their Asian colleagues, blocked the election of Antonio de Luna of Spain, presumably because he was a national of a colonial power. . . .

Throughout the Assembly session there were repeated suggestions, from non-African sources, that the unresolved questions in the *South West Africa Cases* be taken back to the Court in one way or another. . . . However, the Africans were not in the mood to go back to the Court about anything. And although the balance of the Court *probably* reverted, immediately after the decision, to one favoring the 1962 majority again, it seemed wiser, in any case, to wait until the arch-villains were replaced and the new judges safely installed. *After the Ad Hoc Committee makes its report in April, new judicial initiatives may again be considered—particularly if they are taken at UN expense* [4]." (Italics added.)

And G. Fischer stated (freely translated):

"In 1967, following the 1966 elections [of new judges], the developed countries had only five representatives. Australia was eliminated, the Greek Judge was replaced by a neutral, the Swede, Petrén. The attitude adopted by his government on racial questions ensured his victory over the Spanish and Swiss candidates. Africa retained two representatives (Senegal and Nigeria) while Asia had four (Pakistan, Philippines, Japan, Lebanon). At the same time, it would appear that the proportion of internationalists of world repute was getting smaller within the Court.

One sees in this evolution without any doubt the weight of the Third World and particularly of the younger States. The efforts which they made

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[1] "The United Nations, South-West Africa and the World Court", *The Indian Journal of International Law*, Vol. 7, No. 4 (Oct. 1967), p. 521.

[2] *Studies in International Adjudication* (1969), p. 145.

[3] Quoted in Chap. VI, para. 1, *infra*.

[4] "The South West Africa Cases: Remand to the United Nations", *Cornell Law Quarterly*, Vol. 52, No. 5 (Spring II, 1967), pp. 668-669.

in 1966 at the time of the elections of the members of the Court constituted one of the reactions to the decision of 18th July, 1966 [1]."

19. On various occasions comments have been made on the fact that certain judges did not participate in the 1966 Judgment. For instance, in a statement by Mr. Grimes of Liberia, to which reference has already been made [2], he said that—

". . . as a result of death, disability and a spurious disqualification apparently engineered by the Court's President, transparent justice was denied and seven men perverted justice and brought upon the International Court the greatest opprobrium in its history [3]".

It is obvious that the "disqualification" referrred to the fact that Sir Muhammad Zafrulla Khan did not participate in the Second Phase of the *South West Africa* cases. It is equally obvious that Mr. Grimes intended to convey that had this Judge participated, "transparent justice" would not have been denied.

Mr. Lopez of the Philippines stated:

"Moreover, three Judges, *who were known to be sympathetic to the applicants*, were unable to participate in the final Judgment: one had died shortly before Judgment was due, another was taken gravely ill, while a third, who had been threatened with disqualification, was too noble and decent to fight the move to disqualify him. Thus, by the accidental circumstances of death and sickness, and a sense of decency on the part of one Judge, which his opponents might have done well to emulate, a decision has been foisted on the world that men of good sense and good will shall rue for a long time to come . . . [4]" (Italics added.)

Here again one finds an unqualified expression of opinion that had Sir Muhammad Zafrulla Khan been able to participate in the Second Phase of the *South West Africa* cases, he would have been "sympathetic to the Africans" which in turn would have meant that the Court would have given a Judgment in favour of the Applicants.

Yet another reference was made to the non-participation of Sir Muhammad Zafrulla Khan. Mr. Baroody of Saudi Arabia stated:

"Certain of the members were asked not to participate—Sir Zafrulla Khan, for instance. It came out; you cannot keep the news. Why? Because they told him: 'You have your views on apartheid'. But if he has his views, he is still a judge, a member of the Court. He could give his sentiments. They ruled him out by means of a kind of gentlemen's agreement pressure [5]."

It is clear that the representative concerned also thought that Sir Muhammad Zafrulla Khan had his views on apartheid, and quite obviously views incompatible with those of South Africa.

20. It is not suggested that the mere prior expression by a judge of an opinion on a legal issue, or speculation by others as to the views which a judge might have adopted regarding any particular issue, is a factor of any importance for present purposes. What is important, is the fact that the Court became involved

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[1] "Les réactions devant l'arrêt de la Cour internationale de Justice concernant le Sud-Ouest africain", *Annuaire français de droit international*, vol. XII (1966), p. 154.
[2] *Vide* para. 10, *supra*.
[3] *GA*, *OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 8.
[4] *Ibid.*, 1417th Meeting, 26 Sep. 1966, p. 20.
[5] *Ibid.*, 1431st Meeting, 5 Oct. 1966, p. 15.

to such an extent that political views and motives were attributed not only to the majority judges, but also to a judge who did not participate in the 1966 Judgment.

21. In the debates preceding the adoption by the Security Council of the resolution containing the present request for an advisory opinion, further political pressure was brought to bear upon the Court, coupled with references to its changed membership since 1966. Thus Mr. Terence of Burundi stated:

> "... it would be proper to stress that the International Court of Justice, whose prestige was violated by the partiality of some of its members in 1966, *would gain in prestige by adopting a new attitude which would rehabilitate the Court and the United Nations as a whole* [1]". (Italics added.)

Mr. Khatri of Nepal stated that his delegation would support the draft resolution if it "would provide an opportunity for the International Court to redeem its impaired image [2]," while Mr. Mwaanga of Zambia referred to "some lingering uncertainty" that remained about the opinion envisaged by the draft resolution "despite the change in the Court's membership [3]."

The implication is clear: the change in the Court's membership rendered it probable that it would give an opinion unfavourable to South Africa which would serve "to redeem its imparted image", would cause it to "gain in prestige", and would "rehabilitate" itself. By contrast, should the opinion be favourable to South Africa, the Court would fail to redeem its image and further damage its prestige.

IV. The Involvement of Individual Members of the Court

22. Reference has already been made to the manner in which Sir Muhammad Zafrulla Khan became involved in the political reception of the 1966 Judgment. He was also involved in another manner. Sir Muhammad Zafrulla Khan was the Permanent Representative of Pakistan at the United Nations from August 1961 until he became a Member of the Court in 1964. He was a Member of the Pakistani Delegations to the Sixteenth and Eighteenth Sessions (i.e., in 1961 and 1963) of the General Assembly of the United Nations, and during those years he on occasions acted as Leader of such Delegations. During both the said sessions the Pakistani Delegation played an active role in discussions and decisions concerning matters in dispute in the Second Phase of the *South West Africa* cases, most of which are again in dispute in the present proceedings. Statements made on behalf of the Pakistani Delegation, as well as resolutions supported by it, were strongly condemnatory of South Africa's policies and actions relating to South West Africa. Particulars thereof are set out in Annexes B and C to this Chapter.

Moreover, Sir Muhammad Zafrulla Khan was, prior to his election as a permanent Member of the Court, appointed as *ad hoc* Judge in the *South West Africa* cases by Ethiopia and Liberia. He is reported to have stated that this was the reason for his disqualification in those proceedings [4]. If so, this reason would, it is submitted, retain its validity, inasmuch as the present proceedings are in effect merely a continuation of the previous ones [5].

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[1] UN doc. S/PV. 1550 (29 July 1970), p. 71.
[2] *Ibid.*, pp. 38-40.
[3] *Ibid.*, p. 53.
[4] Anand, *op. cit.*, p. 138.
[5] *Vide* paras. 35-43, *infra*.

23. The position of Judge Padilla Nervo is in certain respects similar to that of Sir Muhammad Zafrulla Khan. He was Chairman of the Mexican Delegation to the General Assembly of the United Nations during, *inter alia*, the Fifteenth, Sixteenth and Seventeenth Sessions of the Assembly (i.e., in 1960, 1961 and 1962 respectively). During this period the Mexican Delegation also took an active part in debates and participated in decisions concerning matters in issue in the present proceedings. Again the statements and resolutions in question were strongly condemnatory of South Africa on relevant matters and indeed associated the Mexican Delegation with the cause of the Applicant States in the Second Phase of the *South West Africa* cases. Particulars are set out in Annexes B and D to this Chapter.

Of special interest is the manner in which Judge Padilla Nervo expressed himself in a letter written to the Under-Secretary for Trusteeship and Information from Non-Self-Governing Territories on 16 July 1962. This letter was reproduced as Annex V to the 1963 report of the Special Committee for South West Africa [1], and is attached to this Chapter as Annex E.

24. Another Judge who was, in a like manner, involved in the political campaign against South Africa is Judge Morozov. As a representative of the USSR at the United Nations as late as 1967, he condemned the South African administration of South West Africa in the strongest imaginable terms. He stated, *inter alia*, that —

> ". . . the South African racists have extended to South West Africa the régime of repression and terror against the indigenous population that prevails in Pretoria. The South West African patriots who stand up for the liberation of their fatherland are subject to savage persecution, arrest and torture [2]."

He also stated that the acts of "South African racists" were a threat not only to the people of South West Africa but also to other African peoples. In this regard he referred to incessant military construction going on at the air base situated in the Caprivi Strip, and to "the Zumed [sic] Rocket Base in South West Africa". These statements were indeed surprising in view of the fact that the only three judges (two of whom formed part of the minority) who in 1966 expressed an opinion on the Applicants' submission that South Africa had militarized the Territory, found that this submission had been disproved [3]. Specific and uncontradicted evidence of a foreign military expert had been given that the installations at Tsumeb had no military character but were indeed established for the scientific research of the ionosphere [4].

Further details of the statements made by Judge Morozov appear from Annex F to this Chapter. The general tone of the statement may be gathered from the fact that, although this Annex consists of less than seven pages, the words "racist", "racists" and "racism" appear no less than 22 times therein with reference to the South African Government and its policies.

25. In the *Anglo-Iranian Oil Company* case Sir Benegal Rau was excluded from participation on the ground that he had "represented India on the Security Council, when it dealt with the United Kingdom's complaint against Iran for

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[1] *GA, OR*, Seventeenth Sess., Sup. No. 12 (A/5212), pp. 18-19.

[2] UN doc. A/PV. 1627 (12 Dec. 1967), p. 83.

[3] Judges Jessup, Tanaka and van Wyk, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 330, 320-322, 205-213.

[4] *Vide I.C.J. Pleadings, South West Africa*, Vol. XI, p. 585 and Chap. XI, para. 25, *infra*.

failure to comply with the interim measures indicated by the Court" [1]. It does not appear whether the President of the Court or this Judge himself took the initiative which resulted in his recusation. The relevant *Yearbook* of the Court merely stated that Sir Benegal Rau had, in agreement with the Court, considered it his duty not to sit in the case.

With reference to this decision J. D. Morley has written:

> "This, however, seems not to have been followed when, after an application by South Africa, the Court refused to disallow the participation of Judge Padilla Nervo in the *South-West Africa* case, although that judge had been the Mexican Representative on the Trusteeship Council from 1947-49, having held the position of Vice-President of that Council in 1949, and had been head of his country's delegation to the General Assembly from 1947 to 1963, and President of the Assembly in 1951.
>
> It is difficult to make a substantial differentiation between the two situations. Both played a major role in UN organs in matters intimately connected with the legal dispute considered by the Court. The fact, possibly otherwise important, that Judge Padilla Nervo held official positions in UN organs is of little significance, in that, as the Mexican Representative on the Trusteeship Council and the General Assembly, he spoke and voted on similar matters regarding the status of South-West Africa as were considered during his periods in office [2]."

Morley proceeded to refer to "the indistinguishable character of the relevant activities of Judge Sir Benegal Rau and Judge Padilla Nervo [3]" and it is consequently clear that he was of the opinion that the latter Judge should not have participated in the second phase of the *South West Africa* cases.

26. As will be shown, a number of factual and legal questions which were before the Court in the *South West Africa* cases, are again in issue in the present proceedings. It follows that an application of the decision relating to Sir Benegal Rau would, it is submitted, inevitably lead to the recusation of Judges Zafrulla Khan, Padilla Nervo and Morozov. However, as has been demonstrated, the Court itself has become so involved in the political disputes which have led to the present proceedings that it is the South African Government's submission that, in view of the legal principles set out below, the Court as such should in effect "recuse" itself by refusing to give the requested opinion.

V. The Applicable Legal Principles

27. Mention has already been made [4] of the existence in the legal systems of all civilized countries of legal principles which require that justice must be seen to be done and that there should be no reasonable cause to doubt the impartiality of the Court or of a particular judge. In an English case, *Eckersley and Others* v. *The Mersey Docks and Harbour Board*, 1894 2 Q.B. at p. 671, Lord Esher stated:

> ". . . the doctrine which is applied to judges not merely of the Superior Courts, but to all judges—that, not only must they be not biassed, but

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[1] *Yearbook of the International Court of Justice, 1951-1952*, p. 89.

[2] Morley, J. D., "Relative Incompatibility of Functions in the International Court", *The International and Comparative Law Quarterly*, Vol. 19, Part 2 (Apr. 1970), pp. 321-322.

[3] *Ibid.*, p. 322.

[4] *Vide* para. 3, *supra*.

that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed".

In *Allinson* v. *General Council of Medical Education and Registration*, 1894 1 Q.B. at p. 759, the same judge qualified his previous somewhat broad statement as follows:

"... it seems to me that a man's [i.e., the judge's] position must be such as that in substance and fact he cannot be suspected. Not that any perversely minded person cannot suspect him, but that he must bear such relation to the matter that he cannot reasonably be suspected of being biassed."

It follows that it is immaterial whether a judge is, in fact, impartial; the criterion is whether circumstances exist which, although they may not be due to any act of the particular judge, can give rise to a reasonable suspicion as to his impartiality.

28. The same principle is recognized in, *inter alia*, German law, as appears from the following statement in Leo Rosenberg's standard text book on the Law of Civil Procedure (freely translated):

"A judge can be declined upon a ground of exclusion and because of *apprehension of partiality*, that is on a ground which according to objective and reasonable considerations is apt from the point of view of the party to justify lack of confidence in the impartiality of the judge in respect of a decision *on the facts* [1]." (Emphasis in original.)

Examples given by the author are, *inter alia*, political or religious animosity, indirect participation in the result of the legal dispute, remarks by the judge which indicate that he has, by his private observations, formed an opinion on the matter in dispute, or non-official favourable or critical remarks (made by the judge) about a party or its case.

29. In international law, and especially if a dispute partakes of a political nature, it is perhaps even more important than in municipal law that justice should not only *be* done but be *seen* to be done. The following quotation from the article by J. D. Morley is in point:

"The search for impartiality in the courts of a 'horizontal' sovereignty-dominated international legal order is even more necessary than in those of a 'vertical' legal system [2]."

And with reference to this Court Sir Hersch Lauterpacht has stated:

"... it is of importance that justice should not only be done but that it should also appear to have been done [3]".

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[1] Rosenberg, L., *Lehrbuch des Deutschen Zivilprozessrechts* (8th ed.). pp. 91-92.

[2] Morley, *The International and Comparative Law Quarterly*, Vol. 19, Part 2, p. 316.

[3] Lauterpacht, H., *The Development of International Law by the International Court*, Revised edition (1958), p. 39. Reference may also be made to the following quotation from the Lehigh Valley Railroad Company case, to be found in Simpson, J. L., and Fox, H., *International Arbitration, Law and Practice* (1959), p. 90: "In international arbitration it is of equal importance that justice *be done* and that *appearances* show clearly to everybody's conviction that justice *was done*."

VI. Concluding Remarks

30. It has been demonstrated above to what extent the Court's 1966 Judgment was made the subject of vituperative attacks by representatives of a number of States merely because the Judgment was not unfavourable to South Africa and did not satisfy the political aims of such States. It has also been shown how political pressure was applied to the Court and to what extent the election of five new judges in 1966 was politically motivated [1]. It has furthermore been shown that a number of judges, through their participation in the political organs of the United Nations, have become identified with their countries' political campaign against South Africa concerning its administration of South West Africa.

It is not difficult to imagine what the political reaction will be should the Court decide to give the requested opinion and should its decision again in any way be favourable to South Africa. If possible, it will be even more violent than in 1966. Moreover, any such opinion would certainly not be accepted by majorities in the United Nations. This much was made clear by Mr. Terence of Burundi. Prior to the adoption of resolution 284 (1970) embodying the present request, he stated in the Security Council that there was—

> "... the hope that an impartial judgment, which would be in conformity with the interests of the Namibian people, would serve the two-fold purpose of rehabilitating the prestige of the International Court and also harmonising the position of the Court with the position taken by the General Assembly in putting an end to South Africa's Mandate over Namibia".

He then added:

> "At any rate, *whatever the result*, my delegation believes that the political decision of the General Assembly with regard to the status of Namibia is irrevocable, because the political nature of *the Namibian problem is such that it is definitely within the sphere of political solutions* to be imposed by the Security Council and the General Assembly, the most competent organs [2]." (Italics added.)

Furthermore, in the debates preceding the adoption of General Assembly resolution 2145 (XXI) a number of representatives made it abundantly clear that they considered the problem of South West Africa to be a political and not a legal one. Thus, Mr. Pirzada of Pakistan stated that "the failure of the Court to pronounce on the merits of a case [was] not an end of this matter", and that "it only gave proof ... of the futility of the judicial process for a just settlement of the issue of the future status of South West Africa [3]"; Mr. El Bouri of Libya said that "the problem [was] a political one; the legal aspect could not be decisive [4]"; Mr. Tarabanov of Bulgaria expressed the view that "it is only too obvious that the very essence of the question of South West Africa is political; therefore it can be settled only by political means [5]"; and Mr. Sharif of Indonesia stated that "for this political problem we cannot seek recourse

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[1] There is no reason to suppose that this motivation would not, and did not, at least attempt to influence the election of new judges in later years.

[2] UN doc. S/PV. 1550 (29 July 1970), pp. 71, 72-75.

[3] *GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1970, p. 10.

[4] *Ibid.*, 1425th Plenary Meeting, 30 Sep. 1966, p. 7.

[5] *Ibid.*, 1449th Plenary Meeting, 19 Oct. 1966, p. 4.

to a juridical body like the International Court of Justice . . . [1]". The representatives concerned made it abundantly clear that *in their opinion the problem* of South West Africa was a political one to be solved by political means, and that any judicial decision in conflict with what they regard as the proper political solution would be unacceptable to them.

On the other hand, should any opinion which the Court might decide to give be unfavourable to South Africa, it is inevitable that there will exist in the minds of reasonable men doubt as to whether the Court did not bow to political pressure and as to whether justice was in fact done.

C. The Dispute Between South Africa and Other States

1. General

31. The leading case concerning the question whether an international court may or should accede to a request for an advisory opinion relating to an existing dispute between States, is the *Eastern Carelia* case [2].

In 1923 the Council of the League of Nations requested the Permanent Court of International Justice to give an advisory opinion on the question whether the Treaty of Peace between Finland and Russia signed at Dorpat on 14 October 1920, and the Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constituted international engagements which placed Russia under an obligation to Finland as to the carrying out of the provisions thereof. In a telegram dispatched to the Court, Russia repudiated the jurisdiction of the League of Nations and the Court, and declared that it was impossible for the Russian Government to take part in the discussions of the question before the Court. Having heard the representative of the Finnish Government in June 1923 the Court delivered an Opinion on 23 July 1923. By a majority of 7 to 4 the Court declined to rule upon the question referred to it. The Court stated:

> ". . . the opinion which the Court had been requested to give bears on an actual dispute between Finland and Russia . . . It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement [3]."

32. It is not clear whether the Permanent Court, because of the existence of a dispute, decided that it was not competent to give an opinion, or whether, in the exercise of its discretion, it declined to do so.

In the *Peace Treaties* case this Court expressed the view that "no State . . . can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take [4]". The Court did not express disagreement with the decision in the *Eastern Carelia* case, but said that "the circumstances of the present case are profoundly different from those which [existed in the former case when the Permanent Court] declined to give an opinion because it found that the question

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[1] *GA, OR*, Twenty-first Sess., 1449th Plenary Meeting, 19 Oct. 1966, p. 14.

[2] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5.*

[3] *Ibid.*, p. 27.

[4] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

put to it was directly related to the main point of a dispute actually pending between two States. . . . [1]"

In casu, the Court found that the request for an opinion did not touch the merits of the disputes between the States concerned, and it consequently acceded to the request.

33. If it be assumed for purposes of argument that the mere existence of a dispute neither precludes the Court from giving an opinion, nor, generally speaking, justifies a refusal to do so in the exercise of its discretion, the jurisprudence of the Court nevertheless seems to support the proposition that the Court should not accede to a request if the question relates directly to a main point of a dispute between States [2]. And as will be shown in the succeeding paragraphs, this is indeed the position in the present case [3].

II. The Existence of a Dispute

34. In the *Mavrommatis Palestine Concessions* case the Permanent Court defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons [4]".

In the *German Interests in Upper Silesia* case the same Court found that a difference of opinion existed "as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views [5]". The Court furthermore found that the absence of diplomatic negotiations proving the difference of opinion was immaterial [6].

35. In their Memorials in the *South West Africa* cases the Applicants (Ethiopia and Liberia), in relying on the *Mavrommatis Palestine Concessions* case, submitted that a dispute existed between them and Respondent (South Africa). They stated:

> "The record of the present case makes clear that, for more than ten years, the Applicant [7] herein has had a disagreement on points of law and fact, as well as a conflict of legal views and interests, with the Union [8]. The Applicant has maintained at all times that the Mandate is in force; the Union, that the Mandate has lapsed. The Applicant has insisted that the Union has violated the Mandate; the Union has denied doing so. The Applicant has contended that the United Nations has supervisory pow-

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[1] *Ibid.*, p. 72.

[2] And *a fortiori* not, it is submitted, if the dispute is politically motivated. As C. F. Murphy (Jr.) has said: "When an international dispute grows out of deep political tensions, the controversy is in fact non-justiciable, even where it is superficially resolvable in terms of legal rights and obligations." *Vide* "The South-West Africa Judgment: A Study in Justiciability", *Duquesne University Law Review*, Vol. 5 (1966-1967), p. 479.

[3] As was stated in Chapter I, *supra*, the participation of the Government of South Africa in the present proceedings should not be construed as consent to the Court's acceding to the request for an opinion.

[4] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[5] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

[6] *Ibid.*, p. 22.

[7] The Applicants submitted separate but identical Memorials.

[8] At that time, 1960, the present Republic of South Africa was still officially known as the Union of South Africa.

ers over the Union as mandatory; the Union has repeatedly rejected its contention [1]."

36. In its Preliminary Objections South Africa did not deny that there was disagreement between itself and the Applicants concerning a number of points of law, but contended that there did not exist a dispute within the meaning of Article 7 of the Mandate [2].

In their Observations on the Preliminary Objections the Applicants, in further argument addressed to the question whether a dispute existed, stated that they had in fact, prior to the filing of their Applications and Memorials, announced their position on all points comprising their side of the dispute, and continued:

> "They [i.e., the Applicants] have consistently voted to approve and adopt the Annual Reports of the Committee on South West Africa which, since 1954, have set forth detailed criticisms of Respondent's exercise of the Mandate. Indeed, one Applicant, Ethiopia, has been a member of that Committee. If during all the time since 1954 Respondent has not seen fit to respond to these contentions, but has continued to exercise the Mandate without regard to the criticisms supported and adopted by the overwhelming number of the members of the international community, it would appear that Respondent disagrees with the criticisms [3]."

37. In its 1962 Judgment this Court found that a dispute existed, and that it was a dispute within the meaning of Article 7 of the Mandate for South West Africa which could not be settled by negotiation. In the course of the reasoning leading up to this finding the Court stated:

> "... it should be pointed out that behind the present dispute there is another and similar disagreement on points of law and fact—a similar conflict of legal views and interests—between the Respondent on the one hand, and the other Members of the United Nations, holding identical views with the Applicants, on the other hand. But though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical [4]."

Regarding the question whether there had been negotiations in order to solve the dispute, the Court said:

> "The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition [5]."

It seems clear, therefore, that the Court was of the opinion that a dispute could be generated, and negotiations to settle it, conducted, within the frame-

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[1] *I.C.J. Pleadings, South West Africa*, Vol. I, p. 89.
[2] *Ibid.*, pp. 376 *et seq.*
[3] *Ibid.*, pp. 452-453.
[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 344-345.
[5] *Ibid.*, p. 346.

work of the Charter and the structure of the organs of the United Nations. In his separate opinion Judge Jessup expressed a similar view:

> "There are numerous instances in the history of the United Nations where it might be said that certain States which are in a minority in the voting on some action to be taken by the Organization, have a 'dispute' with the Organization, but it cannot be doubted that in many of these cases the States in the minority, also have a 'dispute' with certain States in the majority and that the latter States can easily be identified. It might be invidious, and it is unnecessary to mention specific cases which illustrate the point. It is not maintained that in every instance in which there is a division of votes, every State voting in the majority has a 'dispute' with every State voting in the minority. It is maintained that in the instant cases, on the record, there is a dispute between the Applicants and Respondent [1]."

38. The Court thus found that there existed a dispute between, on the one hand, South Africa, and, on the other, Ethiopia, Liberia, and other Members of the United Nations who held and expressed "identical views with the Applicants" regarding questions of law and of fact which were in issue in the *South West Africa* cases. The South African Government has consistently disputed the correctness of this finding of the Court [2] and adheres to its views. It must be noted, however, that if the Court in the present proceedings were to follow the 1962 Judgment, the same "points of law and fact" which were held in 1962 to be the subject of the dispute again fall to be decided in the present proceedings, should the Court decide to give the requested advisory opinion [3]. As will be demonstrated below, this "dispute" still exists and has indeed gained in proportion. In what follows, the correctness of the Court's Judgment in 1962 as to the existence of a dispute will be assumed for the purposes of argument.

39. In the debates leading up to the adoption of General Assembly resolution 2145 (XXI), representatives of various States expressed the view that the General Assembly was legally entitled to revoke the Mandate for South West Africa. Thus Mr. Yifru of Ethiopia stated:

> "I should like to reiterate what Ethiopia, with other like-minded Governments, will request of the Assembly. We shall, first of all, demand that that part of the Mandate which confers upon South Africa the power of administration of the Territory be revoked and that the Assembly assume, through a special machinery to be established for the purpose, the administration thereof. We believe that this demand is consistent with the Mandate jurisprudence and law evolved by the Court [4]."

40. After the South African representative, with reference to the proposals relating to, *inter alia*, the revocation of the Mandate, had stated that it was the firm belief and view of his delegation that there could not be any legal basis for the proposed decision by the General Assembly [5], Mr. Mgonja of Tanzania said:

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[1] *Ibid.*, separate opinion of Judge Jessup, p. 436.
[2] *Vide I.C.J. Pleadings, South West Africa*, Vol. II, pp. 175 *et seq.*
[3] *Vide* para. 43, *infra*.
[4] *GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 5.
[5] *Ibid.*, 1417th Plenary Meeting, 26 Sep. 1966, p. 2.

"Following the adjudication that South West Africa is an international Territory over which the United Nations has jurisdiction, then the power to terminate the Mandate thereof—once the Mandatory Power has failed to meet the standard of the Mandate and the United Nations Charter—is unquestionably within the competence of the United Nations[1]."

At a later stage the South African representative, having analysed the supervisory powers of the League of Nations, and relying on this Court's 1966 Judgment, stated that at best the United Nations could have no greater powers than those which the League of Nations had enjoyed, and that the League itself was not empowered to revoke a Mandate[2]. However, representatives of other States still maintained that the General Assembly did in fact enjoy the power to revoke the Mandate for South West Africa. Thus Mr. Kironde of Uganda expressed the opinion that in view of the fact that the United Nations had "inherited the assets and liabilities of the League of Nations, including the Territory of South West Africa", it was its duty to transfer the Mandate from South Africa to other Powers of its own choosing[3]. Examples of further similar expression of opinion are to be found in the statements made by Mr. Swaran Singh of India[4]; Mr. Fuentealba of Chile[5], and Mr. Martin of Canada[6].

41. In the same debates a number of representatives expressed the view that South Africa, by the implementation of its policies in South West Africa, had acted in conflict with its obligations in terms of the Mandate, whilst the South African representative maintained that his Government had in fact promoted to the utmost the material and moral well-being and progress of the population of the Territory[7]. It is thus abundantly clear that there arose during the course of the said debates a dispute as to the (alleged) power of the General Assembly to revoke the Mandate, and that there continued to be a dispute as to whether South Africa had acted in conflict with its obligations under the Mandate, if it were still in existence. Further evidence of the existence of these disputes is to be found in the adoption, against the opposition of, *inter alia*, South Africa, of resolution 2145 (XXI) in which the General Assembly purported to exercise a power to revoke the Mandate because of the alleged failures of South Africa to fulfil its obligations in terms thereof[8].

42. A further dispute was generated by a letter to the President of the Security Council, dated 14 March 1969, in which the representatives of more than 40 States, mostly Afro-Asian, stated that it was incumbent upon the Security Council to take measures and action to enable the people of South West Africa "to exercise their right to self-determination and independence" in the light of the adoption of the aforesaid resolution of the General Assembly and South Africa's continued presence in South West Africa[9]. In response to, *inter alia*, this letter, the Security Council adopted resolution 264 of 1969 in which it called upon the Government of South Africa to withdraw its adminis-

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[1] *GA, OR*, Twenty-first Sess., 1417th Plenary Meeting, 26 Sep. 1966, p. 19.
[2] *Ibid.*, 1431st Plenary Meeting, 5 Oct. 1966, p. 24.
[3] *Ibid.*, 1433rd Plenary Meeting, 7 Oct. 1966, p. 9.
[4] *Ibid.*, 1417th Plenary Meeting, 26 Sep. 1966, p. 13.
[5] *Ibid.*, 1427th Plenary Meeting, 3 Oct. 1966, p. 18.
[6] *Ibid.*, 1433rd Plenary Meeting, 7 Oct. 1966, p. 5.
[7] *Ibid.*, 1414th and following Plenary Meetings.
[8] *Vide* Chap. XI, section A, *infra*.
[9] UN doc. S/9090 (14 Mar. 1969) in *SC, OR*, Twenty-fourth Year, Sup. for January-March 1969, pp. 126-127.

tration from South West Africa [1]. The text of a further resolution (269 (1969)), which was based upon this resolution, was transmitted by the Secretary-General of the United Nations to the South African Minister of Foreign Affairs, who, in his reply, dated 26 September 1969, stated that the South African Government had no doubt that resolution 2145 (XXI) of the General Assembly was invalid, and that since this resolution formed the basis of resolution 269 (1969) of the Security Council, it was consequently also invalid [2]. He stated further that the finding of this Court in its 1966 Judgment indicated plainly that the League had no power of unilateral cancellation of a Mandate, and that the General Assembly, even assuming that it had succeeded to the supervisory powers of the League, could not possibly claim greater rights than the Council of the League itself had enjoyed [3].

It appears, therefore, that there also exists a dispute between South Africa and the aforesaid States, which addressed the letter dated 14 March 1969, to the President of the Security Council, as regards the question whether the Security Council could validly take steps relative to the continued presence of South Africa in South West Africa [4].

43. It will therefore be seen that the dispute (or disputes) between, on the one hand, South Africa and, on the other hand, certain Members of the United Nations, comprises a number of important factual and legal issues. These include the questions whether the General Assembly succeeded to the supervisory powers of the League of Nations; whether the League enjoyed a power to revoke a Mandate; if so, whether such a power also vested in the General Assembly; whether South Africa in fact acted in conflict with its obligations under the Mandate, assuming the same to be still in existence or to have been in existence when General Assembly resolution 2145 (XXI) was adopted; and whether Security Council resolution 264 (1969) and subsequent resolutions, including resolution 276 (1970), were validly adopted. These are the very issues on which the Court is requested to pronounce in the present proceedings [5].

D. The Factual Issues Involved

44. As has been pointed out [6], in the *Eastern Carelia* case the Permanent Court declined to give an opinion because of the existence of a dispute between Finland and Russia. The Court went on to state that there were other cogent reasons which rendered it inexpedient that it should attempt to deal with the question in issue. The question whether Finland and Russia had contracted on the terms of the Declaration as to the nature of the autonomy of Eastern Carelia was, according to the Court, really one of fact, and to answer it would have involved the duty of ascertaining what evidence might have thrown light upon the contentions which had been put forward on the subject by Finland

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[1] *Vide* Chap. V, para. 9, *infra*.

[2] South Africa's Reply to the Secretary-General of the United Nations (Security Council resolution 269 (1969)) reproduced in UN doc. S/9463 (3 Oct. 1966), Annex A, p. 1, and in Annex C to Chap. XI hereof.

[3] *Ibid.*, p. 42. The reasons for the views of the South African Government were set out at some length.

[4] *Vide* also Chap. III, footnote 1 on p. 418, *supra*.

[5] As to the inter-relationship between General Assembly resolution 2145 (XXI) and Security Council resolutions 264 (1969); 269 (1969) and 276 (1970). *vide* Chap. V, paras. 6-15, *infra*.

[6] *Vide* para. 31, *supra*.

and Russia respectively. The Court did not say that there was an absolute rule that the request for an advisory opinion might not involve some enquiry as to facts, but stated that under ordinary circumstances it was certainly expedient that the facts upon which the opinion of the Court was desired should not be in controversy and that it should not be left to the Court itself to ascertain such facts [1].

45. As Rosenne points out, it must still be regarded as unsettled whether, in the exercise of its advisory jurisdiction, the Court may answer a question directed exclusively to the establishment of facts. Rosenne also mentions that both the Permanent Court and the present Court have regularly made relatively simple findings of fact, established on the basis of the documentation submitted to the Court, but states that these instances can hardly be regarded as conclusive, since the Court has never been faced with the problem of establishing underlying unagreed facts in the course of rendering an advisory opinion [2].

In municipal law it is often necessary to distinguish between questions of law and questions of fact [3]. A distinction is normally drawn between primary facts [4] and secondary facts, the latter being inferences from primary facts. There appear to be differences of opinion as to whether decisions involving inferences from primary facts may be viewed as decisions on legal questions. However, it can clearly not be doubted that a finding relating to a primary fact is a pure factual finding. Since the Court may only give an advisory opinion on a *legal* question, it may consequently be doubted whether it is entitled to furnish an opinion if, in order to do so, it also has to make findings as to primary facts. On the assumption, however, that the Court is indeed entitled to do so, it is submitted that the Court, in the exercise of its discretion, should refuse to give an advisory opinion if it has to establish controverted primary facts which do not fall within a limited compass admitting of easy and speedy ascertainment.

46. In addition to the theoretical objections, based upon the wording of the Statute, to the making of factual findings by the Court in advisory proceedings, there are obvious practical difficulties in this regard. These difficulties do not obtain, or not to the same extent, in contentious proceedings, where there are parties to the litigation who would normally adduce such evidence as they consider necessary to establish their contentions. In any event, the Court may itself in such proceedings request the calling of witnesses or experts, or the production of evidence, documents or explanations [5]. Moreover, the Court is entitled to entrust any individual, body, bureau, Commission or other organization with the task of carrying out an enquiry or giving an expert opinion [6]. The effective exercise of these powers would normally require the assistance and co-operation of the parties, which, in contentious proceedings, can reasonably be expected to be forthcoming. Because the parties *ex hypothesi* consented, in one form or another, to the jurisdiction of the Court they can be presumed to desire an authoritative pronouncement by the Court. But in any

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[1] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28.

[2] Rosenne, *op. cit.*, pp. 700-701.

[3] The problem often arises when provision is made for an appeal to a higher tribunal on a question of law only.

[4] These are also referred to as "basic facts". *Vide* Plunkett E. A. (Jr.), "UN Fact-Finding as a Means of Settling Disputes", *Virginia Journal of International Law*, Vol. 9, No. 1 (1969), p. 156.

[5] Article 54 of the Rules of Court and Article 49 of the Statute.

[6] *Vide* Article 50 of the Statute of the Court.

event, if they fail to co-operate, they do so at their peril. A failure to adduce evidence or provide information might, in appropriate circumstances, lead to an adverse inference, or it might result in insufficient evidence being placed before the Court to discharge the *onus* of proof resting on a party. In these circumstances, a failure to co-operate with the Court in an investigation of the facts might have a significant effect on the outcome of contentious proceedings, and would in any event not render it impossible for the Court to make any finding of fact which is necessary for the determination of the case.

47. The position is profoundly different in advisory proceedings. There are no parties to such proceedings who might reasonably be expected to adduce the necessary evidence—indeed, the States in possession of the required information might well disagree with the decision to request an opinion or take no part in the proceedings. Although the Court would conceivably be entitled to conduct an enquiry *mero motu* by exercising the powers mentioned above [1], there would not be the same incentive for States to co-operate and a failure to do so would seldom, if ever, justify any inference which might be of assistance in determining disputed factual issues—the only legitimate inference would normally be that the State does not wish to be involved (or to be involved more deeply) in the proceedings. And in advisory proceedings the Court lacks the final means of cutting the Gordian knot - there is no *onus* of proof which, in the absence of sufficient evidence, would lead to the resolution of factual disputes.

48. It has already been mentioned [2] that the Court, if it considers that a valid request for an advisory opinion has been made by the Security Council, would have to decide whether resolution 2145 (XXI) of the General Assembly was validly adopted. Should the Court find that the General Assembly was legally empowered to revoke the Mandate, it will also have to decide whether this organ *in casu* had valid grounds for doing so. As will be demonstrated, the said resolution was based on an alleged failure of South Africa to promote the moral and material well-being and security of the indigenous inhabitants of South West Africa [3]. In the Second Phase of the *South West Africa* cases one of the most controversial and contested issues was whether South Africa had in fact failed to promote the moral and material well-being and security of the inhabitants of the Territory. This was essentially a factual issue, and still remains so. The Government of South Africa has always maintained that it has in fact promoted the said well-being and security, and in resolution 2145 (XXI) is included a purported finding of the General Assembly to the contrary. In a later chapter [4] reference will be made to facts and circumstances relating to the Territory regarding which there has been a factual dispute between South Africa and certain other Members of the United Nations over a period of many years. It will be shown to what extent facts were and are in issue and it will be made clear that the factual issues which the Court may be called upon to decide certainly do not fall within a small or confined ambit. It follows that the Court will not be in a position to give the requested advisory opinion unless it also makes findings on controverted and controversial factual issues of such proportions that the present question, in ultimate analysis, cannot be regarded as

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[1] The above-mentioned provisions could possibly be invoked in terms of Article 68 of the Court's Statute and Article 82 of the Rules.

[2] *Vide* para. 43, *supra*.

[3] *Vide* Chap. XI, section A, *infra*.

[4] *Vide* Chap. XI, *infra*.

a purely legal one, and that it would in any event at least be "inexpedient" [1] for it to give the requested opinion.

F. Conclusion

49. For the reasons stated above, viz., the political background of the question referred to the Court, and the manner in which the Court and individual Members thereof have become involved in the political struggle concerning South Africa's administration of South West Africa; and the existence of a dispute and of controverted factual issues, it is submitted that the Court, in the exercise of its discretion, should decline to accede to the Security Council's request to give an advisory opinion.

[1] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5,* p. 28.

Annex A

EXTRACTS FROM STATEMENTS BY REPRESENTATIVES OF CERTAIN STATES AT THE TWENTY-FIRST SESSION OF THE GENERAL ASSEMBLY CONCERNING THE COURT'S JUDGMENT OF 18 JULY 1966

Albania

PLENARY

Mr. Budo: "Many speakers here have condemned the position adopted by the International Court of Justice, which, by its judgement of 18 July 1966, arbitrarily rejected the well-founded application put forward on behalf of Africa by two African States, Ethiopia and Liberia.

As far as we are concerned, the judgment of the Court, however unjust and scandalous, does not surprise us. We have never cherished any illusions about the International Court of Justice, and that is, of course, well known. Under the pretext of procedural quibbles, which contradicted its own previous decisions, the Court refused to pass judgement on the substance of the matter concerning South Africa's Mandate over South West Africa, thereby rejecting all the justified claims of Ethiopia and Liberia. In so doing, the Court has demonstrated to world opinion what the integrity of judges means as far as the majority of the members of the Court are concerned, and what the International justice of the Court itself is worth.

What happened only confirms our view of the Court. The judgement of the Court, however, has served to dissipate some illusions and above all has helped the peace-loving States better to understand the value of international institutions in which the imperialist and colonialist Powers predominate, and this cannot but result in strengthening these States in the struggle they must wage against imperialism and colonialism and against all their ignoble manœuvres and overt or covert tools."

(*GA, OR*, Twenty-first Sess., 1448th Plenary Meeting, 19 Oct. 1966, p. 1.)

Algeria

PLENARY

Mr. Bouteflika: "As regards the Court, we are witnessing a lag which seems to prevent that institution from responding to present world realities. Young States daily find themselves succumbing to scepticism and doubt and they are noticeably losing confidence in international institutions.

The motives behind the Court's judgement are certainly not encouraging to the Members of the United Nations, who may one day have reason to appeal to that international tribunal.

Indeed, we have a right to ask whether the Court, after its scholarly deliberations, has not decided to wash its hands of the matter. The issue at hand clearly transcends its legal aspects to reveal its true political dimensions, which fall exclusively within the province of the General Assembly.

If such was the Court's motive, we could only note it and calmly ponder the immense responsibilities which face us."

(*GA*, *OR*, Twenty-first Sess., 1429th Plenary Meeting, 4 Oct. 1966, p. 13.)

Brazil

PLENARY

Mr. Nehemias Gueiros: "The door of juridical protection is still open. The reconstitution of the membership of the Court is to be effected during this session of the General Assembly with the election of five of its members in accordance with the principle of rotation as provided for in Article 13 of the Statute of the Court, which has as its objective precisely that of assuring, on the Tribunal, in accordance with Article 9, 'representation of the main forms of civilization and of the principal legal systems of the world'.

It cannot, therefore, be said that the election is a matter of 'court-packing'. Once that legal body incorporates its new members, it is legitimate to expect that it will be able to maintain its praiseworthy traditions, not only as a court of law to discuss the incidental or literal application of rules already in existence, but as a tribunal which applies and develops international law; since, by express disposition of Article 38 of the Statute which brought it into being as an integral part of the United Nations, it is granted the function of applying 'the general principles of law recognized by civilized nations' and, equally, 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'."

(*GA*, *OR*, Twenty-first Sess., 1427th Plenary Meeting, 3 Oct. 1966, p. 14.)

Bulgaria

PLENARY

Mr. Tarabonov: "The question of South West Africa has come up time and again before the General Assembly since the United Nations was founded. However, one particular aspect of the question has now made it a burning issue; I am referring to the recent decision of the International Court of Justice which has also dramatized the fact that for the past twenty years the United Nations has not found a solution to the problem.

It is only too obvious that the very essence of the question of South West Africa is political; therefore it can be settled only by political means. If any proof were necessary, it would suffice to draw attention to the underlying factors. The conquest of South West Africa and its transformation into a colony was purely and simply a military and political act, and the decision of the League of Nations to entrust the Mandate to the British Crown was another political act.

Freeing a country from foreign domination is another extremely important political act. The refusal of the International Court of Justice to give a ruling, in response to Ethiopia's and Liberia's application, on whether South Africa did not violate the terms of the Mandate for the Territory by establishing the *apartheid* régime in South West Africa, has brought the problem into dramatic prominence."

(*GA*, *OR*, Twenty-first Sess., 1449th Plenary Meeting, 19 Oct. 1966, p. 4.)

Burundi

PLENARY

Mr. Nsanze: "The Court at The Hague delivered a deplorable verdict on the legal aspects of the question of South West Africa."

(*GA, OR*, Twenty-first Sess., 1454th Plenary Meeting, 27 Oct. 1966, p. 16.)

Byelorussian Soviet Socialist Republic

PLENARY

Mr. Tchernouchtchenko: "Many remarks have already been made here—and justly so - about the International Court and about those judges who did everything in their power to reject the legitimate complaint lodged by Ethiopia and Liberia. But we cannot overlook the fact that even among those representatives who have spoken here, there are still advocates and defenders of those judges. We even witnessed this at our meeting this morning. Those judges, as well as their advocates, prefer to close their eyes to the policy of the Government of South Africa vis-à-vis South West Africa and to the violation of international undertakings and decisions of the United Nations General Assembly. One cannot help noticing that the present activities of this international body do not comply with the requirements and tasks delegated to it by the United Nations Charter.

The membership of the Court must be changed and it should have, as stated in Article 9 of the Court's Statute, equitable representation 'of the main forms of civilization and of the principal legal systems of the world'."

(*GA, OR*, Twenty-first Sess., 1449th Plenary Meeting, 19 Oct. 1966, p. 16.)

Cameroon

PLENARY

Mr. Bindzi: "Even international organs have joined in this battle against Africa. On 18 July 1966 the International Court of Justice delivered its verdict on South West Africa. The unanimous censure which this evoked throughout the world and the rejoicing that followed in South Africa are eloquent testimony and need no comment. Sound justice does not consist in the casuistic declamation of legal mysteries. It lies, rather, in popular acceptance and in the knowledge that the just cause and the good law have been defended. In the circumstances, the verdict may be interpreted as follows: 'Ethiopia and Liberia should mind their own business! South Africa is right in annexing South West Africa! The mode of administration is in conformity with the Charter and its objectives.' Over-simplification, the jurists will say! I retort: a translation of scientific subtleties into practical and concrete realities. Besides, it is easy to discuss the legal basis of the decision without being a jurist, for what is at issue is the very future of this Territory, which is under an international mandate and which has never formed an integral part of South Africa. The Charter and the historical Declaration appearing in General Assembly resolution 1514 (XV) call for the granting of independence to all countries and territories which are still dependent. How can this future be guaranteed by the verdict of The Hague?

This Judgment has demonstrated once and for all, and in the clearest possible fashion, the crisis facing certain organs of the United Nations.

Here you have an organ based on the Charter, and this organ hands down a *verdict contrary to the Charter! It is quite simple: the law itself is vitiated*, and the machinery established expounds the 'law' for which it was created. The privilege of the veto enjoyed by some members of the Security Council is a result of this same concept. Why, then, should we be surprised that international problems remain unresolved? Their solution is not considered just unless the great Powers alone are satisfied with it; too bad if it is injurious to the peoples directly involved. This curious subjective morality might be summed up in a single sentence: 'Everything is well which is accepted by the great Powers' . . . the Republic of South Africa seizes South West Africa by force with the blessing—which no one can understand —of the International Court of Justice . . ."

(*GA, OR*, Twenty-first Sess., 1412th Plenary Meeting, 22 Sep. 1966, pp. 10, 15.)

FIFTH COMMITTEE

Mr. Bakoto: ". . . his country had originally had a great respect for the International Court of Justice. It had brought a case before the Court on a matter of great importance to it, but because of the manœuvres of a certain colonial Power the outcome had not been satisfactory. That same Power had been behind the recent decision in the South West Africa case, a decision which was contrary to law and justice. The African countries were therefore bound to ask themselves what they stood to gain from participating in the proceedings of a body which was inimical to their interests. His country would have voted against the appropriation under section 19 if that sum had been intended to finance future activities. Since the money had already been spent, however, it would abstain in the vote on the section as a whole, while opposing the increase."

(*GA, OR*, Twenty-first Sess., Fifth Comm., 1124th Meeting, 10 Oct. 1966, p. 24.)

Central African Republic

PLENARY

(i) *Mr. Gallin-Douathe:* "The Court, in handing down a Judgement which I am sorry to have to describe as totally unsound from both the legal and moral standpoints, has just been guilty of the most shattering denial of justice in its history by refusing to express an opinion on the substance of the issue. That is why my Government was one of the first to proclaim its disappointment and indignation at the Judgement, which, as many delegations have already said, has aroused great concern in countries such as mine, which believe in the rule of law.

The Court has fully justified our previous expressed reservations concerning its membership, which fails to reflect the current range of legal and political trends in the United Nations."

(*GA, OR*, Twenty-first Sess., 1427th Plenary Meeting, 3 Oct. 1966, p. 7.)

(ii) *Mr. Guimali*: "By a Judgement unfortunately devoid of any foundation, either juridical or moral, the International Court of Justice, as we have had occasion to state, has just committed one of the most flagrant denials of justice in its history by refusing to hand down a judgement on the substance of the case. That is why my Government was among the first to proclaim its disappointment and indignation in the face of such a

judgement, which, as many delegations have stressed, has disturbed countries which, like mine, of course, believe in the rule of law . . .

I should not like to leave this rostrum without saying a few words on the conditions of work and, in particular, the present structure of the United Nations. To our great satisfaction we have already achieved the enlargement of the Security Council and the Economic and Social Council. For this reason, in view of the flagrant denial of justice of which the International Court of Justice was guilty last July, my Government considers that the composition of that important body must be enlarged, and without delay."

(*GA*, *OR*, Twenty-first Sess., 1441st Plenary Meeting, 13 Oct. 1966, pp. 17-18, 19.)

Ceylon

PLENARY

Mr. Ponnambalam: "The patience of the international community has been strained and taxed by the transparent subtleties and nuances of the Court which, by the accident of certain fortuitous circumstances, became different in composition. One would have thought that a judicial tribunal of such standing would avoid procedures of such utter futility and place a high premium upon predictability, instead of which we see the paradoxical spectacle of tenacious consistency on the part of individual Judges and damaging inconsistency on the part of the Court. One bemoans the fact that the Court in 1966 appears to have abdicated the role assigned to it to serve as a final bulwark of protection against possible abuse or breach of the Mandate."

(*GA*, *OR*, Twenty-first Sess., 1419th Plenary Meeting, 27 Sep. 1966, p. 6).

Chad

PLENARY

Mr. Baroum: "Portugal and its ally, South Africa—both supported by some great Powers —continue to make a mockery of world opinion, and have even boldly set themselves up as the champions of recolonization. South Africa, with its policies of apartheid, is the symbol of a return of man, with all his animal instincts reawakened, to the dark ages of history. It is a great challenge to mankind as it is today, and a constant challenge to all Africa. Narrowly selfish interests have always engendered such situations, but very often they are but a last refuge, and these interests are therefore mistaken interests.

It was this feeling which led the International Court of Justice to render a disgraceful Judgment on the South West African situation."

(*GA*, *OR*, Twenty-first Sess., 1428th Plenary Meeting, 4 Oct. 1966, p. 8.)

Congo (Brazzaville)

PLENARY

Mr. Bakala: ". . . I must mention the question of South West Africa, which has become extremely urgent because of the scandalous Judgement handed down by the International Court of Justice on the complaint

against South Africa submitted jointly by Liberia and Ethiopia on behalf of all Africa.

I cannot fail to mention my country's indignation when we learned of this infamy. . . .

The situation in South-West Africa has reached a dangerous phase. It has seriously deteriorated since the Judgement of the International Court of Justice of 18 July 1966. South Africa's annexationist designs are now more transparent than ever. The very evening that he learned of the Judgement, Mr. Verwoerd, the then Prime Minister of the Republic of South Africa, declared: 'The Judgement delivered this afternoon by the International Court of Justice at The Hague is a great victory for South Africa.'

Where does this victory lie, if not in the fact that the Court, with a few corrupt judges, has upheld South Africa in its obstinate refusal to heed the General Assembly?"

(*GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, pp. 1, 2.)

Congo (Kinshasa)

PLENARY

Mr. Bomboko: "In regard to South West Africa the scandal is even worse. A sacred Mandate entrusted to South Africa has been travestied and betrayed in the most abominable fashion and turned into a colonialist instrument for the vilest and most contemptible servitude, the most shameful bondage that the world has ever known. I regret to have to note that the International Court of Justice, the sanctuary of international law, has made itself accomplice in this unprecedented scandal, so that we can say of it, as Racine did of Nero:

Among men as yet unborn thy name will be Foul insult to the foulest tyranny."

(*GA, OR*, Twenty-first Sess., 1445th Plenary Meeting, 17 Oct. 1966, pp. 11-12.)

Cuba

PLENARY

Mr. Rodrigues Astiazarain: "The people and the Revolutionary Government of Cuba condemn the shameful decision of the International Court of Justice of 18 July 1966 favouring imperialism and other reactionary forces in the world and reaffirm their intention to lend moral and material support to the people of South West Africa in their just struggle for independence."

(*GA, OR*, Twenty-first Sess., 1449th Plenary Meeting, 19 Oct. 1966, p. 6.)

Czechoslovak Socialist Republic

PLENARY

Mr. Busniak: "The delegation of the Czechoslovak Socialist Republic fully associates itself with the representatives of those States which have expressed their indignation at the Judgment of the International Court of Justice of 18 July 1966 on the question of South West Africa.

As the delegation of Czechoslovakia indicated during the general debate, the Czechoslovak Socialist Republic disagrees with this Judgment and does

not accept it. There is no doubt that this Judgment has reduced even further the prestige of the International Court of Justice as an instrument for the peaceful settlement of international disputes. The Court's decision on South West Africa has proved once again that that organ's activities are hardly consonant with the tasks laid upon it by the Charter.

In this connection it is pertinent to note that the composition of the International Court of Justice is not representative and does not correspond to the present situation in the world. If the International Court is to become a useful instrument and to acquire due authority as one of the principal organs of the United Nations, a change must be made in its composition so that it reflects the legal and political realities of the present-day world, in conformity with Article 9 of its Statute. In the view of the Czechoslovak delegation this means first and foremost that the new States of Africa and Asia, and also the socialist countries, must be properly represented on the Court."

(*GA, OR*, Twenty-first Sess., 1425th Plenary Meeting, 30 Sep. 1966, p. 9.)

Dahomey

PLENARY

Mr. Zinsou: "In addition to the impotence we have just discussed, our own International Court recently delivered a scandalous and wicked judgement under the guise of legal and fallacious reasoning which, in order to safeguard what it erroneously claims to be the letter of the law, has violated its spirit. It is a serious matter that such an institution should have failed in its duty, and it is urgent that we correct the situation."

(*GA, OR*, Twenty-first Sess., 1432nd Plenary Meeting, 7 Oct. 1966, p. 12.)

Ethiopia

PLENARY

(i) *Mr. Yifru:* "We have also been taught one cardinal lesson, that is, we have to take an active part in all the organs of the United Nations, including the International Court of Justice. To this end, we shall demand equitable representation on the bench of the Court, a representation commensurate with our role in the United Nations, a representation which will allow us to contribute our due share to the fulfilment of all aspects of the objectives of the United Nations."

(*GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, p. 3.)

(ii) *Mr. Yifru:* "Secondly, since it has become increasingly apparent that a change in the composition of the International Court of Justice is urgently called for, my delegation would like to propose that such a change be instituted on the lines adopted in enlarging the membership of the Security Council and of the Economic and Social Council in order to ensure an equitable geographic distribution of Member States in those organs. The Ethiopian delegation specifically urges the amending of Article 3 of the Statute of the International Court of Justice with a view to enlarging the membership of the Court so that it will reflect the increase

in the family of nations and thereby ensure the effective representation of all regions in that body."

(*GA*, *OR*, Twenty-first Sess., 1423rd Plenary Meeting, 29 Sep. 1966, p. 6.)

Gabon

PLENARY

Mr. Engone: "In this connection my Government cannot but add its voice to those raised in all parts of the world in denunciation of the recent Judgement of the International Court of Justice at The Hague which maintains and consolidates South Africa's domination over South West Africa. Based on legal artifice, without regard to the substance of the matter, that purely formal Judgement, which could not have been handed down but for the casting vote of the President of the Court, is a veritable scandal in the eyes of all the States of the 'third world'."

(*GA*, *OR*, Twenty-first Sess., 1438th Plenary Meeting, 12 Oct. 1966, p. 3.)

Ghana

PLENARY

(i) *Mr. Arkhurst:* "The International Court of Justice, by its grotesque decision of 18 July 1966, has confronted this Organization with a crisis of immense dimensions regarding the question of the Mandated Territory of South West Africa.

The decision itself has so shaken international confidence in the Court as to have brought it to the verge of disrepute. For the Court to have abdicated its responsibilities as the highest court of international justice and to appear, by default, at any rate, to support the position of an international pariah like South Africa is a very grave issue. The General Assembly is therefore bound seriously to take stock of the Court's performance and to ensure that its members do not take their responsibilities so lightly as to make one of the Organization's principal subsidiary organs an international laughing stock. In particular, the composition of the Court must reflect the reality of the membership of the United Nations and the twenty-first session of the Assembly must ensure that representation on the Court begins to conform to the proper geographical distribution of the membership of the Organization. Furthermore, and this is extremely important, since the Court is the foremost body for the development of international law and justice, judges elected to the Court must be men of agile mind and with the courage to adapt to the evolving norms of the international community. It is only thus that they can make the law of nations a living thing and serve the interests of justice and international harmony. It is, therefore, in this spirit that my delegation will vote in the forthcoming elections to the International Court of Justice."

(*GA*, *OR*, Twenty-first Sess., 1419th Plenary Meeting, 27 Sep. 1966, p. 13.)

(ii) *Mr. Kotoka:* "The recent decision of the International Court of Justice on the South West Africa case has undoubtedly detracted from the prestige and reputation of the Court. But it is the view of my delegation that every attempt should now be made to strengthen the Court and to make it an

effective instrument for the development of a body of international law which will have as its main objective not the mere interpretation of static legislation, but principally the dispensing of justice and equity within the framework of an evolving international morality."

(*GA, OR*, Twenty-first Sess., 1435th Plenary Meeting, 10 Oct. 1966, p. 12.)

Guinea

PLENARY

(i) *Mr. Achkar:* "On 18 July 1966 the International Court of Justice, after six long years of deliberation, delivered its Judgment on the application of Liberia and Ethiopia concerning South Africa's administration of the Mandated Territory of South West Africa. The disgraceful and unexpected nature of this Judgment immediately aroused indignation throughout the world . . . By its refusal, in 1966, to give a decision on the substance of the question, the International Court of Justice – that is, the seven Judges who voted against the 1962 decision on competence—has not lived up to its responsibilities and obligations. How else can one interpret the so-called technical Judgment delivered on 18 July 1966 in circumstances that cast doubt on the integrity of some of the Judges and on their impartiality? A glance at the nationality and calibre of these seven Judges who chose to repudiate a verdict of their own Court that was of an irrevocable nature, is enlightening in this respect. It is enough to see that these Judges are from Greece, Italy, the United Kingdom and France—all countries that give unqualified support to the rash policies of South Africa and secretly uphold that country because of the enormous profits that their economies derive from the pitiless implementation of the policy of economic and social slavery known as apartheid. As for the Australian Judge, Sir Percy Spender, whose name, I think, means 'spendthrift' –he needs money—his deciding vote and his conduct throughout the proceedings show that he is not worthy of the confidence which the General Assembly placed in him in electing him and which his colleagues expressed in raising him to the high office of President of the Court. The underhand tactics of Sir Percy Spender, both in the improper disqualification of the Pakistan Judge, Sir Zafrulla Khan, and in the timing of the Judgment handed down when the verdict favourable to South Africa and erroneously labelled 'technical' gave rise to no doubt, show clearly that this Judge, from a country where it is not so long since the aborigines were treated worse than the non-Whites of South Africa, has chosen to hold high the torch of anachronistic racism and colonialism, to the detriment of the dignity, respectability and impartiality of his office. It is indeed the alliance of colonial and racist forces with the illegitimate interests of an obsolete world that prevailed in the decision of this Judge, who is guilty of the attempted murder of the International Court of Justice. As for the Polish Judge, whose behaviour has been denounced by his own Government, we can only wish for him that in the golden exile he will no doubt arrange for himself in a country in which he will claim to have 'chosen freedom', he may quietly enjoy the money he has been able to amass, to the extent to which his conscience will be able to bear the heavy burden that he is now helping to impose on the unfortunate African people of South West Africa. . . .

We must spare no effort to redress the incalculable wrong which these

Judges, out of touch with the realities of our time, and sometimes accomplices, if not promoters, of obsolete prejudices, have inflicted upon the edifice so laboriously set up for the maintenance of peace and security and for the development of co-operation and international law."

(*GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, pp. 14, 15.)

(ii) *Mr. Achkar:* "Immediately after the shocking Judgement delivered by the International Court of Justice, the Africans and their friends decided to endeavour to make the Court reflect the real international situation of today. We know that there was only one African Judge on the Court. The hope that was then expressed was that the International Court of Justice should reflect the present membership of the Security Council. The votes just taken show that a step has been taken towards fulfilling that hope."

(*GA, OR*, Twenty-first Sess., 1456th Plenary Meeting, 2 Nov. 1966, p. 3.)

FIFTH COMMITTEE

Mr. Kouyate: "Similarly, in the past three years, the expenses of the International Court of Justice amounting to over $3.5 million had produced a scandalous result whose consequences might be even more costly to the international community. A complete reorganization of the Court was imperative. The Court, while remaining aloof from political issues, should be a faithful reflection of the international community as it was today and not as it had been in the time of colonial and imperialist ventures."

(*GA, OR*, Twenty-first Sess., Fifth Comm., 1132nd Meeting, 25 Oct. 1966, p. 70.)

Haiti

PLENARY

Mr. Chalmers: "My delegation wishes to say that it considers the Judgment of the International Court of Justice as a distortion of law, a denial of justice, an insult to the international conscience and to mankind."

(*GA, OR*, Twenty-first Sess., 1440th Plenary Meeting, 13 Oct. 1966, p. 3.)

Hungary

PLENARY

Mr. Csatorday: "In rendering its judgement, the International Court of Justice has entirely disregarded the international character of the problem and the well-founded interest of the community of nations—first of all, that of the African countries—and has made questionable its own legal competence, in its present composition, and the usefulness and necessity of its own existence. The judgement of the Court is diametrically opposed, also, to the requirement of the Charter that international peace and security should be ensured in accordance with the principles of justice and international law and on the basis of respect for the right of self-determination and the sovereign equality of peoples."

(*GA, OR*, Twenty-first Sess., 1429th Plenary Meeting, 4 Oct. 1966, p. 11.)

India

PLENARY

Mr. Swaran Singh: "The Judgment is unlikely to inspire confidence in the International Court. There is growing feeling in the world that the International Court as it is constituted today is outmoded in its concepts and is incapable of responding to the needs of modern times.

(*GA, OR,* Twenty-first Sess., 1417th Plenary Meeting, 26 Sep. 1966, p. 12.)

Indonesia

PLENARY

Mr. Sharif: "With all respect to the good name of the learned Judges who have been able to follow the conscience of mankind of the post-war era, it is only too obvious by now that that legal forum does not and cannot deserve the confidence of men for problems of this kind. The basic concept, as well as the structure and the procedures, should be brought up to date. A review is inevitable, if the Court is to serve further as an independent organ of our world Organization to which mankind can put its trust and confidence for an honest appraisal of matters in the spirit of the Charter, of equality of man and oneness of mankind."

(*GA, OR,* Twenty-first Sess., 1449th Plenary Meeting, 19 Oct. 1966, p. 14.)

Iran

PLENARY

Mr. Vakil: "This brings me to the conclusion that the Court might have reached its opinion, not on judicial, but on political grounds. While I do admit that the case is primarily a political and moral problem I cannot see how a court of justice, especially the International Court of Justice which must exercise the greatest caution to safeguard its name and integrity against doubts and aspersions, should be guided in its judgement by political considerations."

(*GA, OR,* Twenty-first Sess., 1427th Plenary Meeting, 3 Oct. 1966, p. 11.)

Ireland

PLENARY

Mr. Aiken: "We must, of course, accept the decision of the Court, but, as a non-lawyer, it seems to me to have been an outrageous waste of time, energy and money. Indeed, I feel sure that all who supported the election of those Judges who voted for the decision as men who would give wise, equitable and speedy decisions, must bitterly regret that their confidence was misplaced . . ."

(*GA, OR,* Twenty-first Sess., 1427th Plenary Meeting, 3 Oct. 1966, pp. 4, 5.)

Ivory Coast

PLENARY

(i) *Mr. Usher:* ". . . and the Ivory Coast condemned the Judgment delivered

by the International Court of Justice on 18 July 1966 because it was politically rather than juridically motivated."

(*GA, OR*, Twenty-first Sess., 1418th Plenary Meeting, 27 Sep. 1966, pp. 2-3.)

(ii) *Mr. Ake:* "The question arises as to what motives prompted the judges of the International Court of Justice to deny an earlier decision which acknowledged that all former Member States had the right to submit to it at any time, individually or collectively, any dispute which might arise between the mandatory Power and themselves concerning the interpretation or the application of the provisions of the Mandate.

It is our feeling that the Court's judgement of 18 July 1966 is a scandal without precedent in the annals of law. That is why it was vigorously denounced by all justice-loving Governments. In a communiqué published immediately after the judgement, the Government of the Republic of the Ivory Coast expressed its grief and indignation in the following terms:

> 'The Government of the Republic of the Ivory Coast was deeply upset to learn that the International Court of Justice had rejected the complaint of Ethiopia and Liberia against South Africa in the South West Africa case.
>
> The judgement just delivered seriously and dangerously undermines the prestige of the International Court, and thereby, of the United Nations.
>
> The international tribunal at The Hague has not only shown itself incapable of conceiving of and taking the just and reasonable decisions required to settle a problem involving the honour, freedom and dignity of man, but also delivered a judgment which is all the more scandalous since it flagrantly contradicts the advisory opinion which the same Court delivered on 11 July 1950.'

As the head of my delegation said here last week (1418th meeting), we feel that the judgement which the International Court of Justice delivered on 18 July 1966 was based not on legal, but on political considerations, all efforts to prove otherwise notwithstanding.

In the Ivory Coast we have scrupulous respect for institutions, but this respect cannot prevent us from deploring the fact that the judges of the International Court of Justice did not consider it their duty to confine themselves strictly to legal arguments in verifying the many and continued violations of the Mandate by South Africa. Instead, they allowed themselves to be distracted by considerations which had no bearing on the subject-matter of the complaint . . . The judges must have allowed themselves to be swayed by other motives, for we find it hard to believe that these eminent judges could have deliberately committed such a glaring error, which discredits the Court and the United Nations, unless they had been guided by other considerations.

Knowing in advance the very negative reaction South Africa was bound to have if, by chance, the Court had honoured the Africans' request, the judges—influenced by several Powers deeply involved in the present situation, which enables them to pillage the Territory's vast resources—saw immediately the possible consequences for those Powers if the United Nations decided to implement the provisions of Article 94 (2) of the Charter. The judges preferred to commit an injustice rather than provide an opportunity to have recourse to those provisions . . .

We could consider a new appeal to the Court, but such an appeal

would entail considerable danger in view of the fact that the composition of the Court remains unchanged and that, on this subject, we have good reason to question its impartiality. I feel that the member States should seriously consider altering the Court's composition so as to assure more equitable representation for all the different cultures. The arguments which led to changes in the membership of the Security Council and the Economic and Social Council are equally valid for the International Court of Justice. Until the appropriate measures are enacted, we must ensure more equitable representation for Africa by reserving two of the five vacant seats in this important institution for African representatives."

(*GA, OR*, Twenty-first Sess., 1429th Plenary Meeting, 4 Oct. 1966, pp. 15-16, 16-17.)

Jamaica

PLENARY

Mr. Shearer: "The Government and people of Jamaica received the news of the July Judgement of the International Court of Justice on the question of South West Africa with complete consternation and a deep sense of shock . . .

. . . these gentlemen shocked the conscience of mankind by their perverse determination to make no judgement on the merits of the case but to find instead that the applicants had no entitlement to a decision—a conclusion which, if I may say so, is manifestly absurd . . .

Of the effect of this Judgement on the Court's own prestige, I shall have little to say. Unavoidably, however, thoughtful men everywhere, reflecting on the recent conduct of the majority Judges, can scarcely help coming to the conclusion that these gentlemen have entirely misconceived their function."

(*GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, 5 Oct. 1966, p. 5.)

Kenya

PLENARY

Mr. Murumbi: "The Court decision on South West Africa was an attempt to avoid the substantive matter. We all know the manœuvres which led the President of the International Court of Justice, Sir Percy Spender, to act in the way he did by casting his vote against the plaintiffs. It is interesting to examine some of the methods which were employed in order to disqualify some of the Judges that should have taken part in making a decision on this case . . . Before leaving this question of South West Africa, my delegation would like to draw the attention of the General Assembly to the composition of both the International Law Commission and the International Court of Justice. Kenya supports the enlargement of these two bodies to reflect geographical representation. But much more important than this enlargement, Kenya would like to emphasize that when the time comes for the General Assembly to elect the new Judges, efforts should be made to ensure that men of the utmost integrity are chosen. We must try to avoid electing to the International Court of Justice Judges whose decisions will be influenced by policies of their national Governments or ideological considerations. We are surprised to find that

the Government of Australia is determined to put up another candidate for election to the International Court of Justice."

(*GA, OR*, Twenty-first Sess., 1422nd Plenary Meeting, 29 Sep. 1966, pp. 14, 15.)

Liberia

PLENARY

(i) *Mr. Grimes:* "Thus, as a result of death, disability and spurious disqualification apparently engineered by the Court's President, transparent justice was denied and seven men perverted justice and brought upon the International Court the greatest opprobrium in its history.

As the President of Liberia, speaking on 26 July 1966, declared:

'The decision of the Court, that applicants had no legal interest in the case, and its refusal to go into the merits after its previous determination in December 1962 that applicants did have a legal interest and the Court had jurisdiction to determine the case on its merits, savour of casuistry and legal pyrotechnics, which is, to say the least, most surprising and puzzling. It in fact generates unpleasant suspicions about the Court.

I believe in due respect, regard and submission to the final decision of a Court of Justice because I believe in the rule of law; but a decision or judgement of a court such as the International Court of Justice in the South West Africa case does not admit to obtaining submission because it is opaque as to law, justice, equity and morality.

It is so opaque that it cannot borrow light from any legal or moral sun to illumine it but it is transparent with racism and the old game of colonialism; and it leads one to wonder whether it is not the handiwork of men still infused and imbued with bias and race prejudice'."

(*GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, pp. 8-9.)

(ii) *Mr. Grimes:* "On the most flimsy pretext imaginable, for which no good word has been said by any reputable lawyer or scholar, the 1966 judgement refused to give effect to the clear meaning and scope of the 1962 judgement, which was 'final and without appeal', in terms of the Court's own Statute. The Court evaded its responsibility—and, I might add, its opportunity—to adjudicate upon the real merits of the dispute, as the 1962 judgement obviously required. Instead, the Court made a futility of four years of pleading and oral argument on the merits of the case by holding that although the Applicants had a sufficient standing to 'activate' the Court—whatever that word may mean in this context—they were not entitled to a judgement on the validity of their claim. Such an aberration of the judicial process can hardly be called a 'victory' for anyone concerned. It represented a total loss, most of all for the reputation and dignity of the Court itself."

(*GA, OR*, Twenty-first Sess., 1433rd Plenary Meeting, 7 Oct. 1966, p. 12.)

Libya

PLENARY

Mr. El Bouri: "Unfortunately the Judgment of 18 July has suggested that the interests of international finance, which is hand in glove with the racist régime in South Africa, might influence even the highest international legal authority."

(*GA, OR*, Twenty-first Sess., 1524th Plenary Meeting, 30 Sep. 1966, p. 7.)

Madagascar

PLENARY

Mr. Rakotomalala: "In South West Africa, that same Government is introducing segregation laws which have already been rejected by the universal conscience and is claiming that the Mandate which it holds from the League of Nations puts it beyond all United Nations control, despite the decisions handed down in 1950 and 1962 by the International Court of Justice, whose scandalous recent Judgment has not altered the substance of the operative part of those decisions: namely, that the United Nations is the successor of the League of Nations."

(*GA, OR*, Twenty-first Sess., 1445th Plenary Meeting, 17 Oct. 1966, p. 2.)

Mali

PLENARY

(i) *Mr. Ousman Ba:* "It is not my intention to undertake a legal exegesis. I merely wish to emphasize the flagrant contradiction between the 1962 and 1966 judgements, between two decisions by the same Court. We feel that the latter judgement seriously impairs the institution's prestige and its authority which should be universal.

It thus seems essential and urgent for the Assembly to decide on the reform, or I should say, the complete reconstruction, of the Court, and on a fresh look at the Court's Statute and its interpretation, for the membership of the Court no longer reflects the relationship between the various world forces, or the legal and political realities of the present international situation. It cannot meet current needs in the area of international relations, for it still adheres to a narrow, static and anachronistic interpretation of international law that is out of step with the present international situation . . .

The problem of South West Africa is not, moreover, a legal problem, and it was simply to show that they had faith in that legal institution that the African countries appealed to the Court. But that faith can no longer exist; the African peoples have lost faith in the Court.

A nation's future cannot be placed in the hands of a jurist, whoever he may be, but must depend on political judgement and choice, adopted judiciously and not on a false technocratic basis designed to serve huge financial capital interests that are so abundant in this African country."

(*GA, OR*, Twenty-first Sess., 1433rd Plenary Meeting, 7 Oct. 1966, p. 6.)

(ii) *Mr. Ba:* "The recent statement by the International Court of Justice was like a dagger in the heart of all Africans, for it has merely strengthened the lust of South Africa for all this area left to its mercy by the defunct League of Nations. We urge those judges who assumed the grave responsibility of such a decision to examine their consciences as men. There can be no doubt that they will feel, as well as the weight of their verdict, the disappointment and indignation of other men. We think of the three million Africans now handed over to their executioners because of the complicity of seven members of an institution whose aim, by a tragic irony of fate, is to do justice, to ensure equality and to defend the rule of law and international custom."

(*GA, OR*, Twenty-first Sess., 1443rd Plenary Meeting, 14 Oct. 1966, p. 13.)

Mongolia

PLENARY

Mr. Banjar: "Events in South West Africa have taken an even more critical turn as a result of the unjust and unjustified judgement handed down by the International Court of Justice in the proceedings instituted by Ethiopia and Liberia against the Government of the Republic of South Africa.

The International Court of Justice has handed down a decision which, in effect, encourages the unlawful actions of the South African racist régime instead of condemning South Africa's virtual annexation of the Mandated Territory of South West Africa and the application of the criminal policy of apartheid to its population . . .

The judgement of the International Court of Justice on the question of South West Africa has once again shown that in its work that body is incapable of reflecting the spirit of the times and is not equal to the tasks entrusted to it by the Charter of the United Nations.

In this connection, the delegation of Mongolia shares the view that serious consideration should be given to the need to make the structure of the Court reflect the changes which have occurred in the alignment of forces in the world and within the United Nations itself."

(*GA, OR*, Twenty-first Sess., 1429th Plenary Meeting, 4 Oct. 1966, pp. 5-6, 7.)

Niger

PLENARY

Mr. Sidikou: "For our part, no doubt is possible and it is not going too far to refer to this iniquitous judgement as frivolous. Be that as it may, my country, in the name of human rights, rejects the conclusions of a juridical formalism inspired by obsolete notions of race, colour or civilization."

(*GA, OR*, Twenty-first Sess., 1434th Plenary Meeting, 10 Oct. 1966, p. 9.)

Nigeria

PLENARY

(i) *Mr. Adebo:* ". . . the International Court of Justice now stands discredited and the confidence, particularly of the developing countries, in the international judiciary has been seriously undermined . . ."

(*GA, OR*, Twenty-first Sess., 1423rd Plenary Meeting, 29 Sep. 1966, p. 24.)

(ii) *Mr. Adebo:* "No comment on the present situation of South West Africa will be complete without a word about the recent astounding judgment of the International Court of Justice. On this also, I shall be brief, for the less said about the recent decision of the Court, the better for its reputation and its effectiveness as an instrument of international justice and law . . .

The Court reversed itself, after six years, and decided that Ethiopia and Liberia had no legal standing or interest in the case. If this is not irresponsibility, we wonder how else it can be categorized. Our consolation from the whole sorry episode is that as many as half the members of the Court refused to join in this travesty of justice."

(*GA, OR*. Twenty-first Sess., 1429th Plenary Meeting, 4 Oct. 1966, pp. 2, 3.)

Peru

PLENARY

Mr. Belaunde: "... I am not referring to the tangential and devious Judgment the Court has just handed down."

(*GA, OR*, Twenty-first Sess., 1439th Plenary Meeting, 12 Oct. 1966, p. 5.)

Philippines

PLENARY

Mr. Lopez: "In the face of this series of three advisory opinions and the Judgment of 21 December 1962, the Court's Judgment of 18 July can be regarded only as a fluke, an accident, perhaps as an anomaly. It was not a clear-cut majority decision because one member, in accordance with the rules of the Court, had to vote twice in order to create the statutory majority. Moreover, three Judges, who were known to be sympathetic to the applicants, were unable to participate in the final Judgment: one had died shortly before Judgment was due, another was taken gravely ill, while a third, who had been threatened with disqualification, was too noble and decent to fight the move to disqualify him. Thus by the accidental circumstances of death and sickness, and a sense of decency on the part of one Judge, which his opponents might have done well to emulate, a decision has been foisted on the world that men of good sense and good will shall rue for a long time to come and none more deeply than the loyal friends of the Court itself.

For this is a decision which the technical majority of the Court, knowing full well that it was sure only of this kind of majority, did not have the courage to make upon the substance of the case itself; to have done so would have been to violate too crudely the reason and the conscience of the vast majority of mankind. The alternative, therefore, was to give South Africa the appearance of a victory that would not be quite a victory on the issues, and this could have been done only by ruling upon a fine point of legal procedure. In short, the Court has given the world a decision through the back door because it would have been too embarrassing to give that decision through the front door."

(*GA, OR*, Twenty-first Sess., 1417th Plenary Meeting, 26 Sep. 1966, p. 20.)

Romania

PLENARY

Mr. Georgescu: "This decision of the International Court of Justice obliges us to reflect anew upon the 'impartiality' of the Court and upon its ability to serve the cause of promoting one of the principal purposes of the United Nations, namely, that of bringing about 'by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'."

(*GA, OR*, Twenty-first Sess., 1439th Plenary Meeting, 12 Oct. 1966, p. 4.)

Rwanda

PLENARY

(i) *Mr. Bagaragaza:* "The Government of the Rwandese Republic did not hesitate to join the Afro-Asian countries and other friendly countries in categorically condemning the Judgment rendered by the International Court of Justice. We welcome the decision taken by the African States in requesting that the General Assembly should consider the question of South West Africa as a matter of priority. Indeed, my delegation eagerly sponsored this proposal (A/6386).

We continue to believe that the preliminary ruling of the International Court of Justice in December 1962, when the Court decided that it was competent to pass on the substance of the dispute, has not changed and is still completely valid as concerns the status of South West Africa. The decision of last July was, in our eyes, a surprising and disappointing contradiction, and we wonder whether one can place any further trust in the Court."

(*GA, OR*, Twenty-first Sess., 1428th Plenary Meeting, 4 Oct. 1966, p. 4.)

(ii) *Mr. Mudenge:* "Since the International Court of Justice handed down its Judgment on 18 July last, the situation in South West Africa has been threatening to explode at any moment. The Court's decision aroused the revulsion of the whole world and placed in question the very existence of the Court . . .

The International Court of Justice was established to act as an arbiter and to help member States settle their disputes; but by its Judgment it has lost the confidence of the whole world and demonstrated that it is no longer adapted to our times."

(*GA, OR*, Twenty-first Sess., 1439th Plenary Meeting, 12 Oct. 1966, p. 1.)

FOURTH COMMITTEE

Mr. Nyirinkindi: "The International Court of Justice, whose members should have the highest moral qualifications, had set an iniquitous precedent in the case of South West Africa. It had sided with the brute force of evil, which was what South Africa represented. The welfare of the people of South West Africa could be entrusted neither to the International Court of Justice nor to South Africa."

(*GA, OR*, Twenty-first Sess., Fourth Comm., 1603rd Meeting, 4 Oct. 1966, p. 41.)

Saudi Arabia

PLENARY

Mr. Baroody: "It took the International Court five years to pronounce itself on a technicality, on form. I think most of the Judges are gentlemen of more than sixty years old. If they were to pronounce themselves on the substance, they would be dead and their bones bleached with our bones before they could give any verdict. So cross out the International Court of Justice from the book of South West Africa and any idea that we shall ever derive any tangible result from approaching it. . . .

Now, I am not making fun of the Judges—for, after all, I am over 60 myself—but they must have been too relaxed, enjoying the tulips of the Netherlands, looking at the windmills, and those of them who were smoking cigars watching the curls of smoke. It took them five years—

five years. Poor Liberia and Ethiopia; poor Saudi Arabia if it had joined them in placing confidence in the hope that the Court would pronounce itself with dispatch. Thank God we were not one of the pleaders because we had our suspicions of certain members of the International Court, despite our confidence in certain individuals."

(*GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, 5 Oct. 1966, pp. 14, 15.)

Senegal

PLENARY

Mr. Thiam: "Yet in spite of everything how can we fail to feel somewhat pessimistic in the face of the recent Judgment delivered by the International Court of Justice in the case of South West Africa? This problem will certainly be taken up again during the special debate. But we cannot help drawing attention, in passing, to the actual denial of justice that we are witnessing. We all know, of course, that the International Court of Justice is above all a political organ, by virtue of the very manner in which its members are selected. But it might have been thought that certain general principles that have been repeatedly affirmed, particularly that of the right of peoples to self-determination, were so widely accepted by the universal conscience that they were now part of the unwritten law of international society. . . . The only interest deemed worthy of legal protection, according to the logic of the Court—a logic that was not formulated, but logic just the same—is the interest of South Africa. We shall have to see, during subsequent debates, what solutions can be contemplated. But it seems to us that we should reflect here and now on the composition of the International Court of Justice. We have requested and obtained the expansion of the specialized organs of the United Nations, such as the Security Council and the Economic and Social Council. We should also study the Statute of the International Court of Justice, examine the composition of the Court and call for its enlargement, in order to ensure a more equitable representation of the non-aligned countries and the forces of progress."

(*GA, OR*, Twenty-first Sess., 1414th Plenary Meeting, 23 Sep. 1966, pp. 24, 25.)

Sierra Leone

PLENARY

Mr. Kallon: "That decision, delivered on 18 July 1966, dismissed the charges of Liberia and Ethiopia against the Republic of South Africa without ruling on the merits of the case. This came as a great shock to my Government and to most of the reasonable nations of the world. It dealt a stunning blow to the authority and integrity of the International Court and raised serious questions in the minds of those who cherish the value of the rule of law in international relations."

(*GA, OR*, Twenty-first Sess., 1419th Plenary Meeting, 27 Sep. 1966, p. 10.)

Singapore

PLENARY

Mr. Coomaraswamy: "My delegation does not believe that this decision

of the Court has enhanced its reputation as an institution served by wise and just men, for the Judgement of the Court on this issue is neither wise nor just, nor is it even in accordance with the dictates of common sense."

(*GA*, *OR*, Twenty-first Sess., 1420th Plenary Meeting, 28 Sep. 1966, p. 12.)

Sudan

PLENARY

(i) *Mr. El Mufti:* "The entire African people expects this Assembly to pass a Judgment which will restore to the people of South West Africa the right to independence and progress that has been denied them by the Government of apartheid in Pretoria and betrayed by the International Court of Justice."

(*GA*, *OR*, Twenty-first Sess., 1427th Plenary Meeting, 3 Oct. 1966, p. 5.)

(ii) *Mr. El Mufti:* "We now declare that the time has come for a more equitable and adequate representation of the emergent nations on this Court, in consonance with their representation in other organs of the United Nations. And again we declare, before this Assembly, our irreversible commitment to shoulder our share of all United Nations efforts towards the restoration of freedom to the people of South West Africa."

(*GA*, *OR*, Twenty-first Sess., 1440th Plenary Meeting, 13 Oct. 1966, p. 16.)

Tanzania

PLENARY

(i) *Mr. Mgonja:* "We believe that this experience—the most recent Judgment of the International Court—sad as it is, has been a salutary lesson to the newly independent countries in their struggle for effective representation in all international bodies."

(*GA*, *OR*, Twenty-first Sess., 1417th Plenary Meeting, 26 Sep. 1966, p. 19.)

(ii) *Mr. Mgonja:* "I have already stated in my earlier intervention that my delegation, together with other African States and a great number of other member States of this Organization, has been profoundly shocked by the recent decision of the International Court of Justice concerning South West Africa. That decision, because of the unexpectedly narrow grounds on which it was based and the unsatisfactory procedures under which the case was conducted, has severely shaken the confidence and respect which had hitherto been felt for the Court. In fact, the decision was as great a blow to international law and the principle of the pacific settlement of disputes between States as it was to liberty and human dignity. The harm done will be almost irreparable unless effective action is taken to ensure a more equitable geographical distribution of the Court's membership and more rational judicial procedures."

(*GA*, *OR*, Twenty-first Sess., 1437th Plenary Meeting, 11 Oct. 1966, p. 5.)

FIFTH COMMITTEE

Mr. Mtingwa: "It has been said that the Committee should take an over-all view of the activities of bodies such as the International Court and not be swayed by particular aspects. In reply, he would say that Africans had a

high respect for law, but only if that law was fair and was not swayed by political considerations. That could not be said of the International Court's decision in the South West Africa case. The Court, moreover, had spent six years on what it claimed was a question of procedure. If it was as inefficient as that, it could hardly expect an increase."

(*GA, OR*, Twenty-first Sess., Fifth Comm., 1124th Meeting, 10 Oct. 1966, pp. 23-24.)

Tunisia

PLENARY

Mr. Taieb Slim: "The world has not received favourably the Judgement of 18 July 1966. Many believe, as we do, that it dealt a serious blow to the prestige of the Court as the judicial organ responsible for settling international disputes. It should therefore not come as a surprise that doubt has been cast on the usefulness of the Court as at present composed. Two decades ago, when it was established, the Court reflected the world as it was after the last war. Today, it gives only a dull and blurred picture of a world that has been emancipated and enriched by the contributions of the new nations. In its present composition, the Court cannot exercise its basic function. The world's legal concepts have evolved in the light of the progress achieved. By its failure to act, the Court seems to excuse apartheid, a political practice which all nations have condemned."

(*GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, 5 Oct. 1966, p. 3)

Ukrainian Soviet Socialist Republic

PLENARY

Mr. Shevel: "My delegation considers that this shameful Judgment of the Court is a violation of international law."

(*GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, 5 Oct. 1966, p. 9.)

Union of Soviet Socialist Republics

PLENARY

Mr. Fedorenko: "Furthermore a situation has now arisen which gives grounds for grave concern over the fate of that Territory's people, and our anxiety has been merely increased by the recent decision of the International Court of Justice, whose pro-colonialist majority declined to take a stand against the South African racists and the policy of apartheid. That decision has not only inspired the South African racists to continue their criminal policy towards the people of South West Africa but, as the Prime Minister of the Republic of South Africa stated, has put a valuable weapon in the hands of their allies and friends in the West who are interested in preserving the colonial ways in South West Africa. We must assume that the decision of the International Court of Justice has dispelled the illusions of those who had entertained hopes that the colonial ways could be abolished in South West Africa with the aid of legal proceedings. Now everyone sees that the solution to this problem must be sought on the political grounds defined in the Declaration on the granting of independence to colonial countries and peoples."

(*GA, OR*, Twenty-first Sess., 1425th Plenary Meeting, 30 Sep. 1966, p. 12.)

FIFTH COMMITTEE

Mr. Kulebiakin: "The increased appropriation sought under that section was due mainly to additional expenditure in connexion with the South West Africa case, in which, after lengthy deliberations the International Court of Justice had taken a decision that could only be described as shameful, since it was contrary to the interests of the people of South West Africa and to the principles of humanity and justice. In obedience to its Statute, the Court should have rendered a decision consistent with General Assembly resolution 1514 (XV), condemning racism and colonialism. Instead it had given them its support. To seek additional appropriations for an organ whose actions were thus at variance with the fundamental principles of the United Nations was illogical."

(*GA, OR*, Twenty-first Sess., Fifth Comm., 1124th Meeting, 10 Oct. 1966, p. 23.)

Upper Volta

PLENARY

Mr. Ilboudo: "We are surprised that the Court, whose prestige has undoubtedly declined since its latest Judgment should have contented itself with a purely procedural decision. . . .

The International Court of Justice has lost a unique opportunity to affirm its authority as an interpreter of the law. Established at a time when the world was altogether different from the world of today, the International Court of Justice, so far as its composition is concerned, is no longer consistent with current reality. To revise its composition could not but benefit the entire United Nations."

(*GA, OR*, Twenty-first Sess., 1425th Plenary Meeting, 30 Sep. 1966, p. 6.)

Venezuela

PLENARY

Mr. Rojas: "Although the Court did not go into the substance of the issue and considered only the applicants' legal standing, my delegation feels that the Court's decision has given rise to well-founded distrust and suspicion as to future decisions of that high tribunal.

My delegation believes that the International Court of Justice has made valuable contributions to the cause of right and justice; but it is also concerned over the fact that strict and scrupulous adherence to legal rules, to the exclusion of political and humanitarian considerations such as those involved in this matter, could render sterile the decisions which that high court may hand down in the future."

(*GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, 5 Oct. 1966, p. 13.)

Yugoslavia

PLENARY

Mr. Belovski: "It is inconceivable, in the light of the tragic position of the non-white population in South West Africa, and in view of the obnoxious policy of *apartheid*, that six members of the International Court of Justice,

by availing themselves of legal fictions and procedural technicalities, avoided pronouncing themselves on the merits of the submissions presented by the Governments of Ethiopia and Liberia. In our opinion, the six Judges thereby acknowledged the fact that an impartial appraisal of the present position of the population of South West Africa and of the policy of South Africa with regard to that Territory would lead to a conclusion that South Africa had violated the terms of the Mandate."

(*GA*, *OR*, Twenty-first Sess., 1439th Plenary Meeting, 12 Oct. 1966, p. 8.)

Zambia

PLENARY

Mr. Kapwepwe: "Indeed, the International Court of Justice at The Hague took six long years of costly litigation, involving scores of sessions and thousands of pages of words, only to frustrate finally the wishes of the indigenous people of South West Africa, only to disgrace this our own Organization, by cowardly shirking its responsibility to the peoples of the world, by shamelessly judging not to judge . . ."

(*GA*, *OR*, Twenty-first Sess., 1425th Plenary Meeting, 30 Sep. 1966, p. 1.)

Annex B

RESOLUTIONS

1. *GA Resolution 1565 (XV), 18 December 1960*
(*GA, OR*, Fifteenth Sess., Sup. No. 16 (A/4684), pp. 31-32.)

Operative paragraph 4 of the resolution commends the Governments of Ethiopia and Liberia on taking the initiative in submitting the dispute concerning South West Africa to the Court.

In Fourth Committee:

Mexico voted in favour: 1076th Meeting of Fourth Committee on 6 December 1960. (*GA, OR*, Fifteenth Sess., Fourth Comm. (Part I), p. 457.)

In General Assembly:

No roll-call vote taken: Resolution adopted 86-0, with 6 abstentions; 954th Plenary Meeting on 18 December 1960. (*GA, OR*, Fifteenth Sess. (Part I), Vol. 2, p. 1387.)

2. *GA Resolution 1568 (XV), dated 18 December 1960*
(*GA, OR*, Fifteenth Sess., Sup. No. 16 (A/4684), pp. 33-34)

Allegation that the administration of South West Africa—

"particularly in recent years, has been conducted in a manner increasingly contrary to the Mandate . . ."

The resolution "deplores" the administration of South West Africa as being—

"contrary to its obligations under the international Mandate of 17 December 1920 . . ."

In Fourth Committee:

Mexico voted in favour: 1076th Meeting on 6 December 1960. (*GA, OR*, Fifteenth Sess., Fourth Comm. (Part I), p. 460.)

In General Assembly:

Mexico voted in favour: 954th Plenary Meeting on 18 December 1960. (*GA, OR*, Fifteenth Sess. (Part I), Vol. 2, p. 1388.)

3. *GA Resolution 1593 (XV), dated 16 March 1961*
(*GA, OR*, Fifteenth Sess., Sup. No. 16 (A/4686/Add. 1), p. 7)

Inter alia, alleged attempts by South Africa to assimilate South West Africa are mentioned.

This resolution was proposed by Mexico and Venezuela: *see* statement to this effect by Mr. Castañeda of Mexico; 963rd Plenary Meeting on 16 March 1961. (*GA, OR*, Fifteenth Sess. (Part II), p. 19.)

(Cf. speech by Mr. Cuevas Cancino of Mexico during the 1076th Meeting of the Fourth Committee on 6 December 1960 in *GA, OR*, Fifteenth Sess., Fourth Comm. (Part I), p. 456.)

4. *GA Resolution 1702 (XVI), dated 19 December 1961*
(*GA, OR*, Sixteenth Sess., Sup. No. 17 (A/5100), pp. 39-40.)

The allegation is made of *expanding militarization* for the purpose of oppressing the indigenous people, creating an "increasingly explosive

situation which, if allowed to continue, will endanger international peace and security"; and of persistent failure by South Africa to fulfil its international obligations in the administration of South West Africa.

The resolution provides for the appointment of a Committee "whose task will be to achieve, in consultation with the Mandatory Power", ... *inter alia*,

"The repeal of all ... laws and regulations which establish and maintain the intolerable system of *apartheid*",

and—

"Preparations for general elections to the Legislative Assembly, based on universal adult suffrage, to be held as soon as possible under the supervision and control of the United Nations."

In Fourth Committee:

Mexico voted in favour: 1247th Meeting of the Fourth Committee on 13 December 1961. (*GA, OR*, Sixteenth Sess., Vol. I, p. 588.)

Pakistan voted in favour *(ibid.)*.

In General Assembly:

No roll-call vote taken: resolution adopted 90-1, with 4 abstentions; 1083rd Plenary Meeting on 19 December 1961. (*GA, OR*, Sixteenth Sess., Vol. II, p. 1106.)

This resolution was referred to with approval by Mr. Padilla Nervo of Mexico:

See Report of the Special Committee for South West Africa in *GA, OR*, Seventeenth Sess., Sup. No. 12 (A/5212), Annex 5, pp. 18-19.

5. *GA Resolution 1805 (XVII), dated 14 December 1962*
(*GA, OR*, Seventeenth Sess., Sup. No. 17 (A/5217), pp. 38-39.)

Confirmation of, *inter alia*, resolution 1702 (XVI) mentioned above.

In Fourth Committee:

Mexico voted in favour: 1389th Meeting of the Fourth Committee on 19 November 1962. (*GA, OR*, Seventeenth Sess., Fourth Comm., Vol. II, p. 406.)

In General Assembly:

No roll-call vote taken: resolution adopted 98-0, with 1 abstention; 1194th Plenary Meeting on 14 December 1962. (*GA, OR*, Seventeenth Sess., Vol. III, p. 1146.)

6. *GA Resolution 1979 (XVIII), dated 17 December 1963*
(*GA, OR*, Eighteenth Sess., Sup. No. 15 (A/5515), p. 51.)

The resolution, *inter alia*, "condemns" South Africa "for its non-compliance with the General Assembly resolutions with regard to South West Africa".

The *Pakistan* delegation supported this resolution. See the roll-call vote at the 1515th Meeting of the Fourth Committee on 13 December 1963, *GA, OR*, Eighteenth Sess., Fourth Comm., Vol. II, p. 586.

Annex C

Pakistan

FOURTH COMMITTEE

(i) *Mr. Hamdani:* "... he had very carefully studied the reports of the Committee on South West Africa (A/4926, A/4957). The Committee was to be congratulated on having submitted such detailed reports in the face of the non-co-operation, and even the hostility, of the Government of South Africa. The reports confirmed the explosive situation in the Territory, and warranted the conclusion that South Africa was unfit to administer it. The conclusions and recommendations in paragraphs 152 to 164 of the report of the Committee (A/4926) deserved the fullest consideration.

Since 1954, the Committee on South West Africa had repeatedly come to the conclusion that the Mandatory Power had continued to administer the Territory on the basis of an apartheid policy, which was contrary to the Mandate, to the Charter of the United Nations, and to the Universal Declaration of Human Rights. South Africa was the only State in the world that officially practised the doctrine of apartheid, racial segregation and discrimination, which the United Nations and world opinion unceasingly condemned. The Committee's report described the effects of that doctrine in the political, economic, social, and educational fields. It was by reason of that policy that the Mandatory Power, in the Committee's opinion, was no longer qualified to continue its administration of the Territory.

The fact that the South African Government was planning to annex the Mandated Territory, and to integrate it progressively into South Africa itself, had led the Committee to the conclusion that no solution of the situation would be acceptable to that Government unless it were based on the virtual annexation of the Territory. By its refusal to submit reports to the United Nations and to recognize the supervisory authority of the United Nations over the administration of the Mandated Territory, South Africa had violated its obligations under the terms of the Mandate and of the Charter. It was persisting in disregarding the resolutions of the General Assembly, and had rejected three advisory opinions of the International Court of Justice. This attitude compelled the Committee to find a speedy solution.

In accepting the Mandate over South West Africa, which was inhabited by peoples not then considered able to assume a full measure of self-government, South Africa had agreed to assume a number of obligations under the supervision of the League of Nations. That Mandate had mentioned neither cession of territory nor transfer of sovereignty. The general obligation to promote to the utmost the material and moral well-being of the inhabitants, which constituted the very essence of the sacred trust of civilization referred to in Article 22 of the Covenant of the League of Nations, could not have ceased to exist because the League of Nations itself had ceased to exist. South Africa still continued to be bound by the international obligations set forth in Article 22 of the

Covenant and in the Mandate, as well as by the obligation to transmit petitions. The Mandatory Power, however, had not only failed to discharge those obligations, but had even, by its policy, plunged the indigenous inhabitants of the Mandated Territory into a situation of hopeless despair.

In his statements before the Committee at the 1218th and 1226th meetings, the Minister for Foreign Affairs of South Africa had given no indication that his Government had experienced a change of heart or had any real desire to contribute to a solution of the problem. He had cited figures from the United Nations *Demographic Yearbook* on the life expectancy of the indigenous inhabitants, or else, on every question of substance, he had taken shelter behind the *sub judice* rule. Obviously he had been unable to deny that the policy of apartheid was being applied in the Mandated Territory. Nor could he find any inconsistency in stating, at the same time, that South West Africa was being administered as an intégral part of South Africa, under the rights conferred by the Mandate, and that the Mandate had lapsed. According to him, the apartheid policy was humane, generous, and noble; yet the whole world had made it very clear what it thought of that policy."

(*GA, OR*, Sixteenth Sess., Fourth Comm., 1233rd Meeting, 1 Dec. 1961, pp. 490-491.)

(ii) *Mr. Raza Shah:* ". . . the fact that the question of South West Africa had still, after 17 years, not been solved had created doubts in many minds concerning the usefulness and effectiveness of the United Nations. The testimonies of the petitioners had frequently brought to mind what one knew of the fascist régimes of the first half of the century. The United Nations had vowed not to let nazism arise in the world again. He wondered what greater human indignity there could be than the indignity suffered by the indigenous population of South West Africa. What greater violation of the freedom of the individual and of all the principles of civilization was possible? South Africa's attitude was a challenge to the principles of the Charter and an outrage to modern concepts of freedom and democracy. The arrogance of the South African Government and its indifference to the General Assembly's resolutions had done great harm to the United Nations. . . .

His delegation considered that the Committee should recommend the abrogation of the Mandate, and intervention by the Security Council with a view to enabling the South West African people to accede to independence and freedom as speedily as possible. Pakistan had always supported the principle of self-determination, and advocated application of that principle in the peaceful settlement of disputes. That was why it recommended that the principle should be applied in South West Africa. *His delegation would support* any resolution recommending the establishment of an effective United Nations presence in the Territory for that purpose, and the termination of the Mandate." (Italics added.)

(*GA, OR*, Eighteenth Sess., Fourth Comm., 1464th Meeting, 31 Oct. 1963, pp. 218, 219.)

Annex D

Mexico

PLENARY

Mr. Cuevas Cancino: "With respect to the actions of the representative of Mexico, I should like to dispel all doubts once and for all. Men, as such, are all fallible, but in any case it cannot be said that their mistakes reflect a country's foreign policy, which is linked with its own real philosophy of life. Nothing they could do would change a policy like Mexico's which on the subject of the equality of peoples and their right to self-determination has never varied.

In the above-mentioned communiqué there is no reference to the policy of apartheid. Nevertheless the statements of the Prime Minister of South Africa oblige me to refer to it. Without denying its own inmost beliefs, Mexico's only position could be a complete rejection of this policy. . . .

Neither can Mexico condone the sacrifice of one people by another on the altar of suppositious and obsolete interests; even less can it respect such subjugation when it is based on completely inadmissible racist theories. . . .

The only new position which we could accept as of vital importance would be the abandonment of the apartheid policy. If the Government of South Africa can assure us that this will be its future policy, my Government will be the first to try to obtain the most flexible terms which will enable the people of South West Africa to exercise the right of self-determination under the watchful supervision of the United Nations."

(*GA, OR,* Seventeenth Sess., 1128th Plenary Meeting, 24 Sep. 1962, pp. 72, 73.)

FOURTH COMMITTEE

(i) *Mr. Cuevas Cancino:* ". . . his delegation endorsed the action taken by Liberia and Ethiopia in having initiated resort to the International Court of Justice, . . .

For the Mexican delegation, the question of responsibility was the crux of the matter. It feared that the countries with a Western civilization did not really wish to put an end to the intolerable situation in South West Africa, where the inhabitants lived in conditions that were worse than slavery. That situation was more dangerous to Western civilization than Nazism because South Africa was applying its inhuman policy under cover of Christian ideals. Something must be done before Africa forgot the good that Christianity had brought it and remembered only the tortures carried out in the name of Christianity by the Union of South Africa."

(*GA, OR,* Fifteenth Sess., Fourth Comm., 1063rd Meeting, 24 Nov. 1960, p. 374.)

(ii) *Mr. Cuevas Cancino:* ". . . the Charter of the United Nations, and particularly Articles 73 and 76, provided a clear formulation of its approach to Non-Self-Governing Territories and the Trusteeship System. The Union of South Africa had persistently infringed the Charter. Three

courses of action were open to the world community: judicial action, such as had been taken by the Governments of Ethiopia and Liberia, which deserved the Committee's congratulations on their initiative; direct action undertaken by the General Assembly through the adoption of resolutions such as those now before the Committee; and indirect action involving moral influence and diplomatic pressure. . . .

The concern expressed in the second preambular paragraph showed that the whole concept of the sacred trust had been violated by the Union of South Africa."

(*GA, OR*, Fifteenth Sess., Fourth Comm., 1076th Meeting, 6 Dec. 1960, p. 456.)

(iii) *Mr. Castañeda:* ". . . his delegation considered the report of the Committee on South West Africa (A/4926) to be of exceptional importance, because the recent action undertaken by that Committee represented the greatest effort the United Nations could make to solve the problem of South West Africa with the voluntary co-operation of the South African Government. That last attempt was the supreme test, and the decision on what should be the direction of the future action of the United Nations depended upon its outcome. Unfortunately the results had been entirely negative. After so many years of fruitless efforts, the Committee on South West Africa considered that the path previously followed was completely closed and it was recommending a radically different approach. The realism, sincerity and courage with which each member was prepared to face the new situation would have an important influence on the future of the United Nations.

In general his delegation endorsed the conclusions and recommendations in the Committee's report. The Committee's basic recommendation was that the Mandate entrusted by the League of Nations to the Union of South Africa should be terminated, so that the administration of the Territory could be assumed directly by the United Nations for a period of time with a view to eventual independence. As the Committee had not examined in detail the problem of the legal grounds for revoking the Mandate, and as that was no doubt a question which would give rise to some debate, he wished to give his country's views on that subject.

Previous United Nations efforts on the question of South West Africa had been confined to seeking the fulfilment on the part of the South African Government of its obligations under the League of Nations Mandate. The purpose of seeking an advisory opinion from the International Court of Justice in 1950 had been to determine whether South Africa was still bound by the Mandate and whether Chapter XII of the Charter was applicable to South West Africa. That had also been basically the purpose of General Assembly resolution 749 (VIII) setting up the Committee on South West Africa. Ever since then, the resolutions adopted annually by the Assembly had been based on the assumption that South West Africa was a Territory with an international status and had been designed to secure the compliance of the South African Government with its obligations under the Mandate. Yet not one of those resolutions had been heeded by the South African Government; in particular it had ignored resolutions 1568 (XV) and 1596 (XV). Hence there no longer seemed to be any real possibility that the South African Government would comply with the terms of the Mandate, nor was there any indication that it would submit reports on the situation in the Territory or permit petitioners to leave it freely. It was quite clear that there would be no

polit.cal, economic or social advancement for the people of the Territory so long as the present régime continued; that was the Committee's view, expressed in paragraph 160 of its report (A/4926). . . .

In order to prove that the Mandate over South West Africa should be terminated, it was first necessary to show that South Africa had not fulfilled its obligations. There was no difficulty in that respect; the case submitted by Liberia and Ethiopia to the International Court of Justice gave a full account of the many instances of South Africa's violation of the Mandate, and the debates in the General Assembly, year after year, had confirmed the numerous cases in which South Africa had not complied with the terms of the Mandate and of the corresponding article of the League Covenant. Not only had South Africa failed to fulfil its obligations to promote the well-being of the people, but, through racial segregation and the suppression of fundamental rights and freedoms, it had hampered the material and moral welfare of the people and prevented their normal development towards independence. Contrary to the obligation imposed by the Mandate, it only allowed persons of European origin to vote or to be a candidate for election in the Territory; it maintained a system of racial segregation in education; it established zones of segregated residence; it refused to allow members of the aboriginal races or tribes of Africa to join trade unions; and it denied Africans the entry to numerous professions and activities. The law qualified some workers in the Territory as 'servants' and their employers as 'masters'; the 'servants' were subject to corporal punishment in case of a breach of their labour contract. In the towns the Native population had to live in certain areas and there was a complicated system of permits and passes governing their movements in the Territory. The indigenous inhabitants could not rent certain lands in the Territory and it was forbidden for White people to transfer such lands to 'Natives, Asians or Coloured persons'. The Governor-General had the right to remove any tribe or individual African to another part of the Territory. The indigenous inhabitants were forbidden to belong to political organizations, under pain of criminal sanctions.

The South African Government had also systematically violated article 6 of the Mandate in refusing to submit to the General Assembly annual reports on conditions in the Territory, an obligation which had been confirmed by the 1950 advisory opinion of the International Court of Justice. Again, many laws of the Territory constituted a violation of article 7 of the Mandate, which prohibited any modification of the terms of the Mandate without the consent of the League of Nations. As was indicated in paragraph 156 of the report of the Committee on South West Africa (A/4926) the South African Government had failed to respect the Territory's international status in that it had given the European population representation in the South African Parliament, had integrated the administration of the entire Native population with that of South Africa and had incorporated South West African Native reserve land into the South African Native Trust. Lastly, South Africa had violated article 4 of the Mandate by encouraging the European population of the Territory to arm and by establishing military fortifications and large defence forces in the Territory."

(*GA, OR*, Sixteenth Sess., Fourth Comm., 1226th Meeting, 28 Nov. 1961, pp. 436, 437.)

(iv) *Mr. Cuevas Cancino:* "The problem was certainly one of special complexity. In the first place, South Africa had obtained its independence from the United Kingdom at a time when the only accepted standards of civilization had been European and it had consequently continued the doctrine of white supremacy. The United Nations was now faced with the difficult task of inducing South Africa to conform to the principles of the new era which had been ushered in by the United Nations Charter. . . .

The Governments of Liberia and Ethiopia deserved the Assembly's thanks for having carried out some of its recommendations."

(*GA, OR*, Seventeenth Sess., Fourth Comm., 1376th Meeting, 8 Nov. 1962, pp. 301-302, 303.)

Annex E

LETTER DATED 16 JULY 1962 FROM THE PERMANENT REPRESENTATIVE OF MEXICO TO THE UNITED NATIONS TO THE UNDER-SECRETARY FOR TRUSTEESHIP AND INFORMATION FROM NON-SELF-GOVERNING TERRITORIES

"I have the honour to address you with reference to the communiqué issued on 26 May by the Prime Minister and Minister of External Affairs of the Republic of South Africa, on the one hand, and the Chairman and Vice-Chairman of the United Nations Special Committee for South West Africa, on the other hand. In this connexion I wish to make plain, on the express instructions of the Ministry of Foreign Affairs of Mexico, the position of my Government with respect to the aforementioned communiqué, this being necessary both on account of the part played in the drafting of the communiqué by Ambassador Salvador Martínez de Alva in his capacity as Vice-Chairman of the Committee and on account of the subsequent repercussions of the said document.

In the first place, the Government of Mexico had no prior knowledge that the communiqué was to be issued, or, much less, of its contents. Indeed, it was only through the international press services that my Government first learned of the communiqué in question. It should be pointed out in this connexion that the customary procedure in such cases would have been for the Chairman and Vice-Chairman of the Committee to have reported to the latter before taking upon themselves the responsibility of making a joint declaration with the South African Government.

On the other hand, I would point out that in my opinion due consideration should be given the explanation offered by Ambassador Martínez de Alva in this connexion, namely, that when a representative in a United Nations organ or committee, acting in an elective capacity, assumes the role of an official or representative of that organ or committee, he need not, generally speaking, receive instructions in that capacity from his Government, since he must be guided in his conduct exclusively by the mandate conferred on him for that purpose by the body which elected him or authorized him to act as its representative. This statement is the more applicable to the present case seeing that under the terms of the reply given by the Chairman of the Special Committee for South West Africa to the letter dated 11 April 1962 of the Permanent Representative of the Republic of South Africa, the Chairman and Vice-Chairman were to enter informally into a review of the matter at issue between the United Nations and the South African Government.

It is clear from the foregoing that Ambassador Martínez de Alva never thought that the communiqué should express the views of the Government of Mexico, as indeed it does not.

Turning now to the actual content of the document under discussion, I wish to state that neither my Government's traditionally anti-colonialist position nor its position on the specific case of South West Africa, have varied by one iota. This being so, it is obvious that if it had been consulted on the contents of the communiqué the Mexican Government would have had to reserve its position with regard to certain judgements and opinions expressed in it, especially those that might be interpreted as ignoring or contradicting the

various resolutions adopted on the subject by the General Assembly and supported by my country's vote. Especially as this point was not dealt with in the communiqué, I feel that I should take this opportunity to reaffirm the well-known position of the Government and people of Mexico, a position absolutely opposed to any form of racial discrimination.

In view of the particular importance of the question, I should like, as Permanent Representative of Mexico to the United Nations, to reaffirm my Government's deep faith in the ultimate objectives of General Assembly resolution 1514 (XV) and its sincere desire that the new States attaining independence in exercise of the right of peoples to self-determination should do so in conditions ensuring the political, economic and social advancement of their inhabitants. It may be pertinent to recall that in pursuit of this policy the Mexican delegation in the Fourth Committee went so far as to suggest, during the sixteenth regular session of the General Assembly, that the United Nations, in its capacity as successor to the League of Nations, might if necessary revoke the mandate conferred by the latter on the Union of South Africa on the ground that the Government of South Africa had not complied with the obligations it had freely assumed in accepting the mandate, and that the administration of South West Africa might in that event be assumed directly by the United Nations for the period required to prepare the Territory for independence, the objective contemplated in General Assembly resolution 1702 (XVI).

Having made that clear, I should now like to inform you that my Government in response to the request made to it by the Special Committee for South West Africa, has instructed Ambassador Martinez de Alva to come to New York in order to report to the Committee, in his capacity as its envoy, on what he saw and heard during the visit he made in accordance with the mission the Committee had entrusted to him. I believe it fitting to point out that my Government maintains its confidence in the integrity, good faith and seriousness of purpose which Ambassador Salvador Martinez de Alva has consistently demonstrated throughout the long years of his service.

With reference to the letter sent to you on 16 June by Ambassador Victorio Carpio, I am enclosing herewith a communication from Ambassador Martinez de Alva which he has asked to have circulated in the same way as Ambassador Carpio's letter. In this communication, Ambassador Martinez de Alva explains the circumstances in which the communiqué referred to in the first paragraph of this letter was drafted and issued.

I would request you to have this letter circulated to all Members of the United Nations.

(Signed) Luis PADILLA NERVO".

(*GA, OR*, Seventeenth Sess., Sup. No. 12 (A/5212), Annex V, pp. 18-19.)

Annex F

Union of Soviet Socialist Republics

PLENARY

(i) *Mr. Morozov:* "The discussion on the question of South West Africa testifies to growing resistance to the forces of imperialism, colonialism and racism by the overwhelming majority of States Members of the United Nations. The independence of the people of South West Africa is being resisted by the same forces of reaction and imperialism that are upholding colonialism in other parts of the world—the forces carrying out armed aggression in South-East Asia and supporting aggression in the Near East. It is known that in the plans of international imperialism a particular role is assigned to the southern part of Africa—especially to South West Africa. As has been pointed out here more than once already, that may be explained by the rich natural resources of that country and also by its strategic location.

South West Africa has become an important link in the chain of the last bastions of colonialism. Having proclaimed their defiance of the decisions of the United Nations, the South African racists have extended to South West Africa the régime of repression and terror against the indigenous population that prevails in Pretoria. The South West African patriots who stand up for the liberation of their fatherland are subject to savage persecution, arrest and torture.

In the decisions of the Committee of 24 and in all progressive world opinion, there is condemnation of the illegal arrests by the authorities of South West Africa of dozens of fighters belonging to the South West African peoples' organization who are still in the hands of the police authorities in South West Africa.

In this connection, the Soviet delegation vigorously supports the demand put forward by African delegations for the urgent consideration of the question of condemning the illegal arrest, deportation and imminent reprisals against 37 freedom fighters and fighters for independence of South West Africa. It is essential that the General Assembly should immediately demand their release.

We consider further that, on the basis of paragraph 2 of the draft resolution which is before us in document A/L.536, the Governments of the United States and the United Kingdom must immediately take all necessary steps to force the racist régime in Pretoria to discontinue the illegal trial, to free and repatriate the 37 patriots and freedom fighters, the fighters for national independence, to their homeland in South West Africa.

The acts of South African racists are a threat not only to the people of South West Africa; they are a threat to other African peoples also. For example, it is known that the police and troops of the South African racist régime patrol the frontiers of South West Africa with Angola and Zambia. In the policy of repressing the national liberation movement, the racists based themselves on a closely knit system of military bases that are situated both in the Republic of South Africa itself and in South West Africa. The biggest port of South West Africa, Walfisch Bay, has

been transformed into a naval base, built with the assistance of the Federal Republic of Germany. Incessant military construction is also going on at the air base situated in an important strategic region of South West Africa, Kaprivi Strip [sic], which is adjacent to Zambia and Angola.

It should be emphasized that this policy is being pursued in close contact with the Portuguese colonies and the racists of Salisbury. As has already been noted in the course of the present discussion on South West Africa, a policy aimed at dismembering the Territory of South West Africa is being carried on. In this connection, as is known, the Soviet delegation supported the resolution adopted by the Committee of 24 on 19 June to which a reference has been made, reaffirming the territorial integrity of South West Africa and condemning measures aimed at changing the status of Ovamboland.

We put the question: What are the real reasons for the fact that the South African racists are able to ignore the decisions of the United Nations? Quite a bit has already been said here about this. We emphasize this point that it has been clear for a long time now that the Republic of South Africa could not long resist the lawful demands of the Member States of the United Nations relying on its own forces alone. If, however, resistance to the decisions of the United Nations continues, this has to be explained primarily by the active participation in the racist policies by the so-called main partners of the Republic of South Africa and these main partners are primarily the United States of America and the United Kingdom. The ruling circles of these countries continue to be guided by the selfish interests of a political, economic, military and strategic nature. For this reason, they continue to give all kinds of assistance to the racist régime Pretoria. That is why we wish to raise our voice here most energetically to protest against attempts to pass over in silence these obvious facts. We raise our voice and we speak against attempts to confine ourselves to hints without decisively demanding of those Members that are principally responsible for the tragedy of the people of South West Africa that they change their criminal policy of direct and indirect support to the shameful régime of the racists.

Unfortunately, it must be noted that the representatives of some States that are the sincere friends of the people of South West Africa do pass over these facts which establish the direct responsibility of the United States of America and the United Kingdom and other Western Powers. Yet it is clear that the United States and a number of other Western countries, while proclaiming in words their sympathy for the people of South West Africa and voting for a number of decisions taken by the United Nations, in reality and in fact continue to subordinate their policies in regard to the racists from Pretoria to considerations of an economic, military and strategic character and, on the basis of these narrow, selfish and imperialist considerations continue in practice to afford broad assistance and support to the racists of South Africa. In fact, the unprecedented statements and acts of the Pretoria leaders in their refusal to carry out the decisions of the United Nations are based on this very support of this policy.

A number of Western Powers are closely bound up with the foreign monopolies and their interests in maintaining South West Africa as a colony. The international monopolies are exposing the population of this country to the most savage colonial exploitation through plundering its natural resources and it is a fact which no one can deny. The very

fact that almost half the territory of the country has been sold to a few large foreign monopolies shows the predominant role played by the American, English and South African capital . . .

It is the intention of the imperialists that South West Africa should be united into a single geographical mass under the administration of colonialists and racists in South Africa, whose purpose is to preserve their rule over the many millions of indigenous inhabitants.

The imperialists understand very well that if South West Africa should win true independence the solidity, the monolithic nature of this bloc would be broken. That is why the imperialists cling to the Territory of South West Africa so tenaciously, and why they are setting up military installations and bases there, where they intend to concentrate their armed forces.

It will be useful to say a little more about the strategic importance of the southern African continent. Let us consider such a witness as the Assistant Secretary of State for African Affairs of the United States of America, Mr. Williams. On 1 March 1966 he said:

> 'The situation of the Republic of South Africa, close to waterways which run round the Cape of Good Hope, makes its ports very useful for the naval fleet of the United States of America, particularly as regards giving assistance to vessels bound for Viet-Nam and on their way from Viet-Nam.'

And here is another no less noble witness, as he is understood to be. I am referring now to the Deputy Assistant Secretary of Defence of the United States of America, Mr. Land. This gentleman, speaking of the military and communications bases of the United States of America in South Africa, stated on 8 March 1966:

> 'The United States will continue to need tracking stations in South Africa in connexion with the launching of military communications satellites.'

Those examples could be continued. The more than frank comments that I have quoted need no commentary.

It should be emphasized that relations between the West German revenge seekers and the racists of Pretoria have developed with particular intensity, which perhaps helps to explain the failure to comply with the repeated decisions of the United Nations, together with their most powerful trade and military allies.

In March of this year the so-called Prime Minister of the so-called Republic of South Africa, Mr. Vorster, stated that:

> 'In recent years we have developed good relations with the Bonn Government. I see no reason why we should not extend these more than heartfelt relations further.'

That pronouncement is particularly interesting and should attract the attention of the General Assembly because the co-operation between the racist régime of Pretoria and the Federal Republic of Germany is assuming an ever more dangerous character—dangerous to peace, that is—since it embraces not only economics but also the military sphere.

These are the facts. On 3 April 1967, the War Minister of the Republic of South Africa, Mr. Botha, visited the Federal Republic of Germany to hold talks on the further development of the joint manufacture of rockets

and other modern weapons. In accordance with these plans for joint research, in the same month there was a return visit by the Federal Republic of Germany to the Zumeb [sic] Rocket Base in South West Africa. It was a visit by the West German specialist on the manufacture of missiles and a member of the Neo-Nazi Party, a certain Hermann Obert, who went to familiarize himself with the work on the two-stage rocket, Harp-3 . . .

When we were considering the question of South West Africa at the fifth special session of the General Assembly, the Soviet delegation had an opportunity to explain the position of the Soviet Union as regards ways of solving the problem of South West Africa. The Soviet Union's position is based on an unchanging traditional policy which is aimed at giving comprehensive support to peoples fighting for their freedom and independence. It is a a policy aimed at overcoming the resistance of the imperialist and colonial Powers to the process of liquidating the remnants of colonialism.

In accordance with this policy, we support—and have supported—the Afro-Asian States in their efforts aimed at liberating the people of South West Africa from the colonial and racist yoke and of giving the people of South West Africa the necessary assistance in creating a free and independent State.

We consider, as we always have, that for the attainment of this purpose the General Assembly must, first of all, overcome the resistance being shown by the ruling circles in the United States of America, the United Kingdom and the Federal Republic of Germany, and a number of other Western Powers. We assert that the guarantee of unimpeded and independent development for the people of South West Africa—and the only guarantee of such development—would be the immediate granting of independence and the handing over of power to representatives of the indigenous population. The experience of the liberation struggle of the young States of Asia, Africa and Latin America convinces us that it is only the handing over of administration to representatives of the people that can ensure the rising and the construction of a new State. We consider, and we would like to stress, that no palliatives can lead to the necessary results. Events which have occurred in the period which has elapsed since the adoption of the most recent United Nations decisions on West Africa have shown, as the representatives who have spoken before me, particularly those from Asia and Africa, have pointed out, what little grounds there are for placing any hope or trust in the forces of racism in Pretoria. In the period which has passed since the adoption of those most recent United Nations decisions the viewpoint of the Soviet Union and a number of other socialist countries has been vindicated. That viewpoint is that it is essential to demand decisively of the Republic of South Africa that it should immediately and unconditionally eliminate the whole of its military and police apparatus illegally maintained on the Territory of South West Africa, to demand the liberation of political prisoners and to demand the creation of conditions for repatriation of the fighters for freedom and independence of South West Africa."

(UN doc. A/PV.1617 (12 Dec. 1967), pp. 82-87, 91-92, 93-96.)

(ii) *Mr. Morozov:* "In our statement in the general debate on the question under consideration we already indicated that we fully supported the draft resolution in document A/L.536, and in this statement for the

purpose of explaining our vote we should like to make certain remarks and to bring out certain considerations concerning the draft resolution now before us, submitted by a large number of countries from Asia and Africa (A/L.540).

In our opinion, it would be appropriate to make the following remarks in connexion with our vote and our position on this draft resolution.

In the course of the general debate on this question the Soviet Union had the opportunity of stating its point of view as to the reasons why the people of South West Africa are still suffering under the yoke of colonialism. We said that it was our deep conviction that the only effective solution of the question of South West Africa was immediate accession to independence for the people of that country, rather than the creation of any kind of administration for the Territory by the United Nations. We wish to confirm our position on this matter, which position was stated in the course of the fifth special session of the General Assembly.

Our opinion in connexion with the establishment of the United Nations Council for South West Africa has not changed, and in this connexion we would recall the reservations which flow from that position concerning operative paragraphs 1, 2 and 3 in draft resolution A/L.540. We have, in addition, further reservations on other parts of the draft resolution regarding the United Nations Council for South West Africa.

We note with pleasure that the draft resolution contains provisions which could contribute to bringing an end to the colonial domination by the racist régime of Pretoria, which has been extended by that Government to a Territory which does not belong to it, the Territory of South West Africa. It is with this in mind that we have taken note of paragraphs 3 and 4 of draft resolution A/L.540. These paragraphs condemn the racist Government of South Africa for its refusal to comply with the resolutions of the General Assembly, since that refusal infringes on the international status of the Territory of South West Africa.

Paragraph 5 is useful in that it calls upon the Government of Pretoria to withdraw unconditionally and without delay from the Territory of South West Africa all its military and police forces as well as its administration, and calls upon it to release all political prisoners and to allow all political refugees who are natives of the Territory to return to it. This provision seems to us to be fundamental since an end to the persecution of South West African nationalists would make it possible for them to create those conditions which would prepare the Territory of South West Africa for accession to independence and would enable it to free itself from the colonial yoke.

We believe that paragraph 6 contains provisions which are timely and well warranted since they recognize that the racist régime in South Africa continues to benefit from the resolute resistance on the part of several countries—especially the United States, the United Kingdom and the Federal Republic of Germany, which support the régime by maintaining commercial, economic and political relations with that country and have no wish to lose their strategic position in South Africa, thus causing the failure of all attempts to bring South West Africa to independence.

The Soviet Union believes that the United Nations should take such steps, which are aimed particularly at the United States, the United Kingdom and the Federal Republic of Germany, which in fact are the main trading partners of South Africa. We hope that those countries will thus put an end to their policy of support for the racist régime of

Pretoria, and that, as provided in operative paragraph 6 of draft resolution A/L.540, they will 'take effective economic and other measures designed to ensure the immediate withdrawal of the South Africa administration from the Territory of South West Africa', which is vital, as we have already had occasion to state, if we really want the people of that Territory to accede to independence."

(UN doc. A/PV. 1635 (16 Dec. 1967), pp. 92-96.)

CHAPTER V

THE VALIDITY AND LEGAL EFFECT OF SECURITY COUNCIL RESOLUTION 276 (1970)

A. Introductory

1. It was maintained in Chapter III above that Security Council resolution 276 (1970) [1] *was invalid and without legal effect by reason of certain formal* defects. In the present Chapter it will be submitted that even if it be assumed that the resolution in question is *formally* valid, it is nevertheless not *intrinsically* valid and is thus of no legal consequence and, alternatively, that even if it be both formally and intrinsically valid, it has no binding consequences for States. In this connection three main submissions will be made, the nature of each of which will now be briefly set out.

2. In the first place, it will be submitted that resolution 276 (1970) is invalid and void of any legal consequences for States because it is based upon and, indeed, has as its very *raison d'être* the decision of the General Assembly in the fourth operative paragraph of its resolution 2145 (XXI)—and that decision, as will be shown in Chapters VI to XI, *infra*, is itself invalid and void of any legal consequence. For this reason alone, resolution 276 (1970) and other cognate resolutions of the Security Council are intrinsically invalid and can have no legal effect.

3. In the second place, even assuming resolution 2145 (XXI) to be valid, it will be submitted that resolution 276 (1970) was not adopted in conformity with the provisions of the Charter and that it was therefore *ultra vires* the Security Council.

In this connection it has already been shown that the powers of the Security Council, like those of other organs of the United Nations, are derived exclusively from the provisions of the Charter and are limited by them [2]. Accordingly, in order to establish whether the Council in adopting resolution 276 (1970) and related resolutions acted in conformity with the provisions of the Charter, it will have to be ascertained under which of those provisions it purported to act. Since the terms of the resolutions themselves provide no clear answer, it will be necessary to determine the matter in the light of all the available evidence.

Various chapters of the Charter have a bearing on the powers and functions of the Council. They are Chapters I, II, V, VI, VII, VIII, XII, XIV and XV. It is submitted, however, that in the context of the question upon which the Court is now asked to advise, the only chapters which can conceivably be of any relevance are Chapter V (in so far as it deals with the functions and powers of the Council), Chapter VI (dealing with the pacific settlement of disputes) and Chapter VII (dealing with action with respect to threats to the peace, etc.) – as read with Chapter I (setting out the Purposes and Principles of the United Nations).

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[1] For the sake of convenience this resolution is reproduced as an annex to this Chapter.

[2] *Vide* Chap. III, paras. 4-5, *supra*.

It will be shown, however, that in adopting the relevant resolutions the Security Council did not act in terms of Chapter VII, that Chapter V provides no separate basis for the action of the Council and that the Council did not comply with the requirements of Chapter VI. The conclusion will accordingly be drawn that the action of the Council in adopting the relevant resolutions cannot be justified by reference to any provision of the Charter and is therefore *ultra vires* and of no legal effect.

4. In the third and last place, it will be demonstrated that even assuming the validity of resolution 276 (1970), its terms have no legally binding consequences for States but are at the most recommendatory in their effect.

5. These various contentions will be treated of in separate sections of this Chapter. The section immediately following *(section B)* will be devoted to demonstrating that resolution 276 (1970) is based squarely upon General Assembly resolution 2145 (XXI). Thereafter Chapters VII, V and VI of the Charter will be dealt with separately and *seriatim* (*in sections C, D and E* respectively) in order to determine whether and in how far they may be relevant to the question before the Court. Finally, upon the assumption that resolution 276 (1970) was validly adopted, consideration will be given (in *section F*) to its legal consequences, if any, for States.

B. The Basis for the Adoption of Security Council Resolution 276 (1970)

6. The adoption by the Security Council of resolution 276 (1970) was but one step in a chain of events which commenced on 27 October 1966 with the adoption by the General Assembly of its resolution 2145 (XXI) [1]. In operative paragraph 4 of that resolution the Assembly purported to decide—

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

It is clear that it was this "decision" of the Assembly which gave rise to and constituted the basis of all the various subsequent resolutions, both of the Assembly and of the Council, which are relevant to the present question and which on 30 January 1970 culminated in Security Council resolution 276 (1970). As will now be shown, this appears not only from the terms of the resolutions themselves but from the debates and correspondence which preceded their adoption.

7. In its resolution 2145 (XXI) the Assembly, having decided to terminate the Mandate and place South West Africa "under the direct responsibility of the United Nations", resolved that "in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa [2]" and called "the attention of the Security Council to the present resolution [3]". During the period 27 October 1966 (when it adopted resolution 2145 (XXI)) to 30 January 1970 (when the Security Council adopted resolution 276 (1970)), the Assembly expressly *reaffirmed or recalled resolution 2145 (XXI)* in all but

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[1] Quoted in full in Chap. VI, para. 1, *infra*.
[2] Operative para. 5.
[3] Operative para. 8.

one of its resolutions dealing with the question of South West Africa [1]. In resolution 2248 (S-V) it decided to establish a United Nations Council for South West Africa with wide powers of administration and legislation over the Territory [2] and requested the Security Council "to take all appropriate measures to enable the United Nations Council for South West Africa to discharge the functions and responsibilities entrusted to it by the General Assembly [3]". Thereafter, in resolutions 2325 (XXII) [4], 2372 (XXII) [5], 2403 (XXIII) [6], 2498 (XXIV) [7] and 2517 (XXIV) [8], the Assembly *drew the attention* of the Security Council to the situation in South West Africa and/or *recommended* that the Council take effective measures to implement the various resolutions concerned and to secure the withdrawal of South Africa from the Territory. Two typical examples of these calls upon the Council are the following:

> "*The General Assembly,*
>
> . . . . . .
>
> 3. *Decides* to draw the attention of the Security Council to the serious situation which has arisen as a result of the illegal presence and actions of the Government of South Africa in Namibia;
>
> 4. *Recommends* the Security Council urgently to take all effective measures, in accordance with the relevant provisions of the Charter of the United Nations, to ensure the immediate withdrawal of South African authorities from Namibia so as to enable Namibia to attain independence *in accordance with the provisions of resolutions 1514 (XV) and 2145 (XXI)* [9]." (Italics added to last phrase.)
>
> "*The General Assembly,*
>
> . . . . . .
>
> 4. *Draws the attention* of the Security Council to the need for taking appropriate measures in accordance with the relevant provisions of the Charter to solve the grave situation that has arisen *as a result of South Africa's refusal to withdraw* its administration from Namibia [10]." (Italics added to last phrase.)

The terms of all the Assembly resolutions concerned thus leave no room for doubt that the General Assembly, having decided to terminate the Mandate and to place South West Africa under United Nations responsibility, thereafter

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[1] *Vide* GA resolutions 2248 (S-V), 19 May 1967, in *GA, OR*, Fifth Special Sess., Sup. No. 1 (A/6657), pp. 1-2; 2324 (XXII), 16 Dec. 1967; 2325 (XXII), 16 Dec. 1967, in *GA, OR*, Twenty-second Sess., Sup. No. 16 (A/6716), pp. 3-4; 2372 (XXII), 12 June 1968, in *GA, OR*, Twenty-second Sess., Sup. No. 16 (A/6716/Add. 1), pp. 1-2; 2403 (XXIII), 16 Dec. 1968, in *GA, OR*, Twenty-third Sess., Sup. No. 18 (A/7218), p. 3 and 2517 (XXIV), 1 Dec. 1969, in *GA, OR*, Twenty-fourth Sess., Sup. No. 30 (A/7630), p. 68.

[2] Sec. II, para. 1.

[3] Sec. IV, para. 5.

[4] Operative para. 7.

[5] Operative para. 13.

[6] Operative paras. 3 and 4.

[7] Operative para. 3, in *GA, OR*, Twenty-fourth Sess., Sup. No. 30 (A/7630), pp. 65-66.

[8] Operative para. 4.

[9] GA resolution 2403 (XXIII), 16 Dec. 1968, in *GA, OR*, Twenty-third Sess., Sup. No. 18 (A/7218), p. 3.

[10] GA resolution 2517 (XXIV), 1 Dec. 1969, in *GA, OR*, Twenty-fourth Sess., Sup. No. 30 (A/7630), p. 68.

continued to act throughout on the basis of that decision, and that, not itself having any powers of enforcement under the Charter, it turned to the Security Council to take steps to implement *that* decision.

8. It is equally clear that it was in fact upon the basis of that decision, and not independently of it, that the matter came before the Security Council.

Thus, for example, in United Nations document S/8307 dated 20 December 1967 [1], the Secretary-General transmitted to the President of the Security Council the text of General Assembly resolution 2325 (XXII) and drew attention to operative paragraphs 7 and 8, in which the Assembly requested the Council to take effective steps to enable the United Nations to fulfil the responsibilities it had assumed with respect to South West Africa. The "responsibilities" referred to are clearly those envisaged in operative paragraph 4 of Assembly resolution 2145 (XXI) [2].

Similarly, in a letter dated 14 March 1969 [3], addressed to the President of the Security Council, 46 member States requested an urgent meeting of the Council to examine "the deteriorating situation in Namibia". The letter continued:

> "Your Excellency and the Members of the Security Council will recall that the General Assembly, *by its resolution 2145 (XXI) of 27 October 1966, terminated the Mandate of the South African Government to administer Namibia* (South West Africa), and decided that 'henceforth South West Africa comes under the direct responsibility of the United Nations'." (Italics added.)

The letter added that the South African Government, *in spite of the General Assembly and Security Council decisions*, had continued to maintain its occupation of South West Africa, thus constituting "a grave threat to international peace and security".

These examples are typical of many other communications to the Security Council concerning the question of South West Africa which it would be tedious and unnecessary to detail. They serve the purpose, however, of showing that the basis of the approaches to the Council was in fact the decision of the General Assembly in resolution 2145 (XXI) to terminate the Mandate and to substitute the responsibility of the United Nations for that of South Africa.

9. That decision also constituted the basis for the actual measures taken by the Security Council. Reference to its relevant resolutions and the debates preceding them shows this clearly.

Resolution 264 (1969) was the first in which the Council addressed itself pertinently to the question of South Africa's "continued occupation of Namibia [4]" as such. The first two preambular paragraphs of that resolution *took note of* General Assembly resolutions 2248 (S-V), 2324 (XXII), 2325 (XXII), 2372 (XXII) and 2403 (XXIII), and *took into account* Assembly resolution 2145 (XXI) "by which the General Assembly of the United Nations terminated the Mandate of South West Africa and assumed direct responsibility for the territory until its independence".

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[1] *SC, OR*, Twenty-second Year, Sup. for October-December, 1967, p. 325.

[2] *Vide* preambular para. 3 of GA resolution 2325 (XXII).

[3] UN doc. S/9090 (14 Mar. 1969), in *SC, OR*, Twenty-fourth Year, Sup. for January-March, 1969, pp. 126-127.

[4] SC resolution 264 (1969), preambular para. 5, in UN doc. S/RES/269, 20 Mar. 1969.

The operative paragraphs of the resolution, besides condemning the refusal of South Africa to comply with the General Assembly resolutions just mentioned, demonstrate the uncritical acceptance by the Security Council of the validity of Assembly resolution 2145 (XXI) and the fact that that resolution was the foundation upon which the subsequent action of the Council rested. The first three operative paragraphs of resolution 264 (1969) read as follows:

> "*The Security Council,*
>
> . . . . . .
>
> 1. *Recognizes* that the United Nations General Assembly terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the territory until its independence;
>
> 2. *Considers* that the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter and the previous decisions of the United Nations and is detrimental to the interests of the population of the territory and those of the international community;
>
> 3. *Calls upon* the Government of South Africa to immediately withdraw its administration from the territory."

The Council continued by, *inter alia*, *inviting* all States to exert their influence in order to obtain compliance by South Africa "with the provisions of the *present resolution* [1]" and *deciding that in the event of South Africa's failure to* comply therewith it would meet again "to determine upon necessary steps or measures" in accordance with the Charter [2].

10. The Council's invitation to other States to use their influence to secure South Africa's compliance with the resolution, like its recommendations to "all States" in its subsequent resolutions 269 (1969) [3] and 276 (1970) [4], was obviously designed primarily to secure South Africa's immediate withdrawal from South West Africa in terms of operative paragraph 3 of resolution 264 (1969). That withdrawal, however, could only be demanded if South Africa's presence in the Territory was in fact *illegal* as postulated in operative paragraph 2 of the resolution. And, in turn, that presence could not be illegal unless the Mandate had in fact been *terminated* as postulated in operative paragraph 1 of the resolution. It will be seen therefore that the action taken by the Security Council was based entirely upon the decision of the General Assembly in resolution 2145 (XXI) to terminate the Mandate and to place South West Africa under the responsibility of the United Nations. (The further consideration that the action of the Council could not have legal effect unless the Mandate was *validly* terminated by the Assembly is dealt with elsewhere the point made here is simply that the action of the Council did in fact rest upon Assembly resolution 2145 (XXI).)

11. In its resolution 269 (1969) the Security Council *recalled* and *reaffirmed* its resolution 264 (1969) [5], *condemned* South Africa for its refusal to comply with it and for its "persistent defiance of the authority of the United Nations [6]", *recognized* the illegality of the presence of South African authorities in the

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[1] Operative para. 7.
[2] Operative para. 8.
[3] *Vide* operative para. 7 of SC resolution 269 (1969) in UN doc. S/RES/269, 12 Aug. 1969.
[4] *Vide* operative paras. 5 and 7.
[5] Preambular para. 1 and operative para. 1.
[6] Operative para. 2.

Territory [1] and *called upon* South Africa to withdraw its administration of the Territory [2].

In resolution 276 (1970) the Council *reaffirmed* General Assembly resolution 2145 (XXI) and its own resolution 264 (1969) "which recognized the termination of the mandate and called upon the Government of South Africa immediately to withdraw from the territory", and recalled its resolution 269 (1969) [3]. It again *condemned* South Africa's refusal to comply with "General Assembly and Security Council resolutions pertaining to Namibia [4]" and *declared* the continued presence of South African authorities in South West Africa illegal "and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia *after the termination of the Mandate* are illegal and invalid [5]". (Italics added).

It is apparent from this that, like resolution 264 (1969), both resolutions 269 (1969) and 276 (1970) were ultimately based entirely upon General Assembly resolution 2145 (XXI).

12. The debates preceding the adoption of these various resolutions of the Security Council reveal that in the minds of the members of the Council the resolutions were indissolubly linked with resolution 2145 (XXI). Some examples will be adduced in illustration.

(a) *The debate surrounding the adoption of Security Council resolution 264 (1969)*

The representative of Algeria stated that the:

> ". . . United Nations has put an end to the Mandate of South Africa over Namibia. We [i.e., the Members of the Security Council] are today in duty bound to accept the consequences *of that decision* and consider the practical measures that must be taken to shoulder our responsibility . . . we must react by demanding the withdrawal of the South African authorities from Namibia [6]." (Italics added).

So far as the delegation of Nepal was concerned,

> ". . . it has always remained our contention that the possibilities of the Security Council . . . should be utilized *with a view to giving effect to the General Assembly's historic resolution 2145 (XXI)* . . .
>
> Nearly as important as this fundamental resolution is resolution 2248 (S-V) . . . [7]
>
> Under the present draft resolution, the Security Council would significantly, for the first time in its history, *reinforce the historic General Assembly resolution 2145 (XXI) by recognizing the termination of the Mandate and the assumption by the Organization of direct responsibility* for the Territory until its independence [8]." (Italics added.)

According to the representative of Finland, the starting point of the Council—

> ". . . must, of course, be *recognition of the fact that the United Nations*

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[1] Operative para. 4.
[2] Operative para. 5.
[3] Preambular paras. 2, 3 and 5.
[4] Operative para. 1.
[5] Operative para. 2.
[6] UN doc. S/PV. 1464 (20 Mar. 1969), p. 16.
[7] *Ibid.*, p. 41.
[8] *Ibid.*, p. 46.

General Assembly has terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence. Adoption by the Security Council of a resolution expressing such recognition . . . will mean that for the first time the authority and the power of the Security Council will be fully engaged in the task of *translating that decision* into reality [1]." (Italics added.)

In the view of the representative of Paraguay, a pronouncement by the Council *recognizing the action of the General Assembly* (in terminating the Mandate and assuming direct responsibility for South West Africa) was—

". . . *basic and essential in the case before us for the ultimate consideration of further steps or measures which this Council might take* in the exercise of its powers and functions . . . in order to enable the Namibian people to become masters of their own national destiny [2]". (Italics added.)

(b) *The debate surrounding the adoption of Security Council resolution 269 (1969)*

The representative of Paraguay saw the recognition by the Security Council of Assembly resolution 2145 (XXI) as the juridical basis of the Council's action in regard to South West Africa. He said:

"There can be no doubt that the major importance of resolution 264 (1969) of the Council lies *in the express recognition of the fact that the General Assembly has terminated the Mandate* . . . and that the United Nations has assumed direct responsibility for the Territory until its independence. *The other provisions of that resolution have a juridical basis in that recognition* [3]." (Italics added.)

The representative of France stated that his delegation—

". . . has had to express certain reservations with respect, particularly, to *resolution 2145 (XXI), which in our view has a very weak juridical basis*, and which it was very clear could not be implemented in practice. . . .

In those conditions the French delegation *had to abstain from the vote on resolution 264 (1969) on* 20 March 1969 [4]." (Italics added.)

(c) *The debate surrounding the adoption of Security Council resolution 276 (1970)*

The representative of Spain stated that—

". . . resolution 264 (1969) declares that the 'presence of South Africa in Namibia is illegal and contrary to the principles of the Charter'. *Any title that South Africa might have held over the Territory expired at the moment when the General Assembly by resolution 2145 (XXI) of 27 October 1966, declared the Mandate terminated* and decided that the Territory would become a direct responsibility of the United Nations.

In resolution 269 (1969), adopted on 12 August 1969, the Security Council took a further step forward . . .[5]" (Italics added.)

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[1] UN doc. S/PV. 1465 (20 Mar. 1969), p. 27.
[2] *Ibid.*, pp. 47-48.
[3] UN doc. S/PV. 1495 (8 Aug. 1969), p. 7.
[4] *Ibid.*, p. 17.
[5] UN doc. S/PV. 1528 (29 Jan. 1970), pp. 63-65.

According to the representative of Poland, the—

> "... political and legal framework for the United Nations action on Namibia has been precisely drawn. Its cornerstone is resolution 1514 (XV) ... *Its foundation is contained in resolution 2145 (XXI) terminating the Mandate of the Republic of South Africa over South West Africa, now Namibia* [1]." (Italics added.)

For the representative of the United Kingdom, the *basis* of the draft resolution lay in the earlier relevant resolutions, *including 2145 (XXI)*. He said:

> "... we have abstained on a number of resolutions, notably General Assembly resolution 2145 (XXI) of 27 October 1966, Security Council resolution 264 (1969) and Security Council resolution 269 (1969).
>
> It will therefore come as no surprise to the members of this Council that we cannot on this occasion give our support to the draft resolution before us, *since the basis of that resolution lies of course in those earlier resolutions* ... [2]" (Italics added.)

13. Of special significance is the fact that at no time during the course of these debates of the Security Council did any representative deny the proposition that the relevant resolutions of the Council, including resolution 276 (1970), were founded upon the decision of the General Assembly in resolution 2145 (XXI) to terminate the Mandate and place South West Africa under United Nations responsibility. Nor was this denied in the debate which preceded the adoption of Council resolutions 283 (1970) and 284 (1970). Even those States which there stated, in effect, that in giving its advisory opinion the Court should refrain from pronouncing upon the validity of resolution 2145 (XXI) [3], did not deny that proposition. And indeed, there were certain other States which clearly recognized that that resolution was of fundamental importance to the issues being considered by the Council [4].

14. The inevitable conclusion to be drawn from all this is that Security Council resolution 276 (1970), like the other relevant resolutions of the Council, is based entirely upon the "decision" of the General Assembly in paragraph 4 of resolution 2145 (XXI) to terminate the Mandate over South West Africa, to deny South Africa any other right to administer the Territory and to place it under the direct responsibility of the United Nations. And all the measures adopted by the Council and set forth in its resolutions were clearly taken in pursuance of that decision and in order to implement it.

15. It follows as a matter of course that if the decision of the General Assembly was invalid and of no legal effect, as is contended below [5], then the resolutions of the Security Council, including resolution 276 (1970), which are based upon that decision are equally invalid and legally ineffective and that resolution 276 (1970) can therefore have no legal consequences for States—including South Africa.

C. The Non-Applicability of Chapter VII of the Charter

16. It is clear that in adopting the resolution concerned, the Council did not

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[1] *Ibid.*, 1529 (30 Jan. 1970), pp. 7-10.
[2] *Ibid.*, p. 18.
[3] UN doc. S/PV. 1550 (29 July 1970), pp. 37 (Nepal), 47 (Syria) and 53 (Zambia).
[4] *Ibid.*, pp. 87 (France) and 88, 89-90, 91 (United Kingdom).
[5] In Chaps. VI-XI.

intend or purport to act in terms of Chapter VII of the Charter. It must first be noted that the Council did not in terms of Article 39 of the Charter make any determination, either expressly or tacitly, that there existed "any threat to the peace, breach of the peace or act of aggression", and such a determination is a condition precedent to further action under Chapter VII. But in any event it is manifest from the debates surrounding the adoption of resolutions 264 (1969), 269 (1969) and 276 (1970) that the Council deliberately declined to impose measures under Chapter VII despite the pressure brought to bear on it by certain members of the Council who were strongly in favour of their being imposed. Some illustrations from the records of these debates will suffice to show this beyond doubt.

17. Thus in the debates preceding the adoption of resolution 264 (1969), the representative of Zambia, who introduced the draft resolution concerned, is reported as saying:

> "The second paragraph [of the draft resolution] is a logical sequel. We should have liked categorically to state the truth that South Africa's continued stay in Namibia is an act of aggression and, therefore, a threat to international peace and security. While we have had to accommodate the feelings of certain members who are averse to the idea of an inevitable confrontation with South Africa, we found it necessary to try to advance on such little progress as we had been able to achieve previously. . . .
>
> I wish to emphasize that, in our view, Paragraph 8 [1] does not entirely exclude the application of Chapter VII. . . .
>
> The draft before us carries us only a little further; and after what I have said, and given South Africa's almost traditional defiance, we should have liked the provisions of Chapter VII to come into immediate play. But we are realistic enough to recognize the social, political and economic structure of the international community [2]."

The representative of Nepal was to much the same effect. Of the draft resolution he said:

> ". . . my delegation is not entirely satisfied with its provisions, in so far as the draft resolution fails to determine the reality of the situation, namely the continued illegal occupation of the Territory, which constitutes a threat to international peace and security, and wards off any hint or suggestion of enforcement actions under Chapter VII in the event of failure on the part of South Africa to comply with the resolution . . . my delegation [hopes] that its adoption as a starting-point will make it possible for the Security Council to take further effective and logical measures, if necessary under Chapter VII of the Charter . . . [3]".

The representative of the United States was able to support the draft resolution "because it wisely does not commit the Council to the narrow path of mandatory sanctions under Chapter VII of the Charter" [4], and the representative of the United Kingdom stated:

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[1] Operative para. 8 of the draft resolution read as follows: "8. *Decides* that in the event of failure on the part of the Government of South Africa to comply with the provisions of the present resolution, the Security Council will meet immediately to determine upon necessary steps or measures in accordance with the relevant provisions of the Charter of the United Nations."

[2] UN doc. S/PV. 1464 (20 Mar. 1969), pp. 21, 22 and 32.

[3] *Ibid.*, pp. 43-45 and 46.

[4] UN doc. S/PV. 1465 (20 Mar. 1969), p. 7.

"... it is well that an original intention to include language from Chapter VII of the Charter has been abandoned. I have already made it clear that my Government is not and will not be prepared to agree to commitments under Chapter VII of the Charter in this regard [1]."

18. It is clear, then, that in adopting resolution 264 (1969) the Council did not intend or purport to act in terms of Chapter VII of the Charter. And the same is true in regard to the adoption of resolution 269 (1969). Speaking early in the debate concerned, the representative of Zambia again called for the application of Chapter VII. After stating that the invocation of Chapter VII was the only way to compel South Africa to comply with resolutions of the General Assembly and of the Council, he expressed the hope that "those who oppose our call for the application of Chapter VII ... will, in the course of this debate, offer us a more attractive alternative [2]".

Nor was his plea unsupported. The representative of Pakistan declared that the time had come "for passing from warnings to deeds, from words to action —and action under Chapter VII of the Charter ... [3]". The representative of India (a non-member of the Council, speaking at his own request) was of the view that "only resolute action by the Security Council under the provisions of Chapter VII" would secure "immediate withdrawal of South Africa from the Territory [4]." The representative of Senegal was convinced that "there is no other way of dealing with this matter than to apply the provisions of Chapter VII of the United Nations Charter [5]". Algeria too, called for action under Chapter VII [6].

However, these calls were not heeded by the Council. As the representative of Finland pointed out, it was obvious that "agreement cannot be reached on a proposal to resort to enforcement action under Chapter VII of the Charter. Significantly, proposals to that effect would not be likely to command the support of the great Powers permanent members of the Security Council ... [7]" These views were echoed by the representative of China [8], and that they were well founded is apparent from the interventions of two of the permanent members. Thus the representative of the United Kingdom declared:

"Lord Caradon repeated again in this Council that the United Kingdom would not be prepared to agree to commitments under Chapter VII of the Charter in this regard. We know that the same is true of other Permanent members of this Council ... We all know that there is no chance of agreement on effective measures against South Africa such as are envisaged in Chapter VII of the Charter [9]."

And the representative of the United States reaffirmed the stand previously taken by his Government. He said:

"Our view as to the wisdom and efficacy of action under Chapter VII of

[1] *Ibid.*, p. 41.
[2] UN doc. S/PV. 1492 (30 July 1969), pp. 21 and 22.
[3] UN doc. S/PV. 1493 (4 Aug. 1969), p. 26.
[4] *Ibid.*, p. 31.
[5] UN doc. S/PV. 1494 (6 Aug. 1969), p. 13.
[6] UN doc. 1493 (4 Aug. 1969), pp. 8-10.
[7] UN doc. S/PV. 1494 (6 Aug. 1969), p. 7.
[8] UN doc. S/PV. 1495 (8 Aug. 1969), p. 12.
[9] UN doc. S/PV. 1496 (11 Aug. 1969), p. 6.

the Charter remains unchanged . . . speakers maintain that the time has come for the Council to compel compliance with previous resolutions by adopting measures under Chapter VII, such as mandatory sanctions.

In all sincerity, my Government still cannot support that view . . . my Government still would not consider that in present circumstances the application of international sanctions in this case would be wise or effective [1]."

The final position of the Council in regard to the application of Chapter VII is unequivocally shown by the statements of the representatives of Zambia and Nepal at the close of the debate.

The former declared:

". . . we have, as always, heard a million reasons why the permanent members of the Security Council, and especially the Western major Powers, are not prepared to apply Chapter VII of the Charter against South Africa, without any attractive alternatives being offered us [2]".

The representative of Nepal stated:

"Although we know that the present draft resolution falls far short of the requirements of the situation in that it fails to commit the Security Council to a specific course of action under Chapter VII of the Charter, which is what is vitally needed, we have not ceased to view the developments in this case with our usual sense of optimism [3]."

19. The debate which preceded the adoption of resolution 276 (1970) continued to reflect the discord prevailing in the Council regarding the application of measures under Chapter VII of the Charter. The calls for such action were fewer and less categorical and there can be little doubt that the reason for this was the general realization that such a course of action would be quite unacceptable to certain of the permanent members of the Council. This attitude was reflected in the statement of the representative of Finland who introduced the draft resolution.

He said:

"The crucial question concerns, of course, the use of coercive measures under Chapter VII of the Charter. The division of opinion on that question in the Council seems to be irreconcilable, at least for the present. . . .

In the absence of the possibility of action under Chapter VII of the Charter, the Security Council has a duty to examine every other means by which it can advance the cause of the people of Namibia . . . there are, in our view, possibilities of practical action which so far have not been explored.

The purpose of the draft resolution which I am introducing on behalf of its sponsors [4] is to make it possible for the Security Council to explore those possibilities [5]."

For present purposes it is significant that in the discussion which followed the introduction of the draft resolution, there was acceptance by members of the Council that the draft resolution concerned did *not* represent action taken under

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[1] UN doc. S/PV. 1496 (11 Aug. 1969), pp. 8 and 9-10.
[2] UN doc. S/PV. 1497 (12 Aug. 1969), p. 6.
[3] *Ibid.*, p. 11.
[4] Viz. Burundi, Finland, Nepal, Sierra Leone, Syria and Zambia.
[5] UN doc. S/PV. 1527 (28 Jan. 1970), p. 26.

Chapter VII of the Charter—indeed, there was some strong criticism of those States opposed to such action. As the representative of Nepal stated:

> "The draft resolution . . . does not initiate those appropriate measures called for in the Assembly resolution [2517 (XXIV)]. The reasons are obvious. Those measures cannot be applied without the support of all the permanent members of the Security Council most of which, as we all know, are unfortunately opposed . . . My delegation is convinced that no measure by the United Nations which fell short of those provided for in Chapter VII of the Charter would be sufficient to persuade or coerce the Government of South Africa to withdraw its illegal presence from Namibia. We realize the difficulty in the way of securing the application of those measures by the Security Council [1]."

The representative of India (a non-member of the Council, speaking at his own request), after suggesting that the Security Council should immediately apply certain interim measures, continued by saying that his delegation was "fully conscious, however, that more energetic action under Chapter VII will be necessary to bring about the full implementation of the United Nations mandate to secure the freedom and independence of the people of Namibia [2]". According to the representative of Pakistan (also speaking at his own request):

> "It is clear that the Asian-African Members are unanimous in their sincere belief that nothing short of measures under Chapter VII of the Charter will be adequate and that such measures are eminently practicable. But the second part of this proposition is not accepted by some of the permanent members of the Security Council [3]."

And, in the opinion of the representative of the USSR:

> "The Security Council in different conditions and with a different approach on the part of some delegations could adopt an effective resolution in keeping with the provisions of Article 41 of Chapter VII of the United Nations Charter, which would really contribute to achieving the objective for which we are met here today [4]."

20. It is thus abundantly clear that in adopting the resolutions in question the Security Council neither intended nor purported to act (and accordingly did not in fact act) under Chapter VII of the Charter [5]. Indeed, having regard to the attitude of certain of its permanent members, it *could not* have acted in terms of that chapter. It follows that whatever else the nature of the measures adopted in resolution 276 (1970) may be, they were not preventive or enforcement measures within the meaning of Chapter VII.

D. The Relevance of Chapter V of the Charter as a Separate Basis for the Action of the Security Council

21. The next question is whether, in adopting the resolutions concerned, and especially resolution 276 (1970), the Security Council can be said to have acted

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[1] UN doc. S/PV. 1528 (29 Jan. 1970), p. 57.
[2] UN doc. S/PV. 1529 (30 Jan. 1970), p. 41.
[3] *Ibid.*, p. 53. And see also at p. 56.
[4] *Ibid.*, p. 87.
[5] Further proof of this is to be found in the debate preceding the adoption of Security Council resolutions 283 and 284 (1970). See especially the statements of the

under Chapter V of the Charter. It is obvious that the only provisions of that chapter which could possibly be taken to serve as a basis for the action of the Council are paragraphs 1 and 2 of Article 24. Those paragraphs read as follows:

"*Functions and Powers*

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

How are these provisions to be interpreted? The question which arises here is whether, as has sometimes been maintained, Article 24 constitutes "a residuary source of authority which can be drawn on to meet situations which are not covered by the more detailed provisions in the succeeding Articles [1]". To put the question another way, does Article 24 confer upon the Security Council not only the powers laid down in Chapters VI, VII, VIII, and XII, but also such *further* powers, consistent with the Purposes and Principles of the United Nations, as are necessary to enable it to maintain international peace and security?

It is submitted that the answer must be in the negative. To interpret the Article as conferring upon the Council powers for the maintenance of international peace and security in excess of those specifically granted in the chapters in question and limited only by the Purposes and Principles of the Charter, is to invest the Council with implied powers which would be virtually unlimited in their scope. Such an interpretation is not only negated by the clear language of the Article itself but can hardly correspond with the intentions of those who framed the Charter.

22. Paragraph 1 of Article 24 is clearly general in its nature and effect. It provides in essence that the Members of the United Nations confer upon the Security Council primary responsibility for the maintenance of international peace and security. It indicates that this responsibility is conferred in order to ensure prompt and effective action by the United Nations, and that in carrying out its duties under this responsibility the Council acts on behalf of the Members of the United Nations. It says no more than that. As will be pointed out [2], it is highly probable that the object of inserting this paragraph in the Charter was merely to emphasize the paramount importance of the Council's "peace-keeping" function and its primary responsibility in this regard. As one eminent commentator has suggested, the paragraph "means nothing else but that the Charter confers upon the Security Council primary responsibility for the achievement of the general purpose of the United Nations [3]" which is, of course, the

representatives of Nepal and Zambia (UN doc. S/PV. 1550 (29 July 1970), pp. 36 and 51 respectively).

[1] *Repertory of United Nations Practice*, Vol. II, p. 19.

[2] *Vide* para. 27, *infra*.

[3] Kelsen, *The Law of the United Nations* (1951), p. 283.

maintenance of peace and security. But there is nothing at all in the language of paragraph 1 which warrants the construction that the primary responsibility of the Council implies a hidden reserve of powers. The conferment of "primary" responsibility upon the Council—obviously vis-à-vis another organ, the General Assembly—implies nothing more than that the other organ has only a "secondary" responsibility for the maintenance of peace and security. Moreover, paragraph 1 does not even deal with "powers", much less confer them. It merely prescribes in general terms what the most important *function* (or responsibility) of the Council is to be. The powers necessary to the exercise of that function are adverted to only in paragraph 2.

Paragraph 2 of the Article provides in plain language that in discharging "these duties", i.e., its duties under its primary responsibility for the maintenance of peace and security, the Council "shall act in accordance with the Purposes and Principles of the United Nations"—an obvious reference to the Purposes and Principles set out in Articles 1 and 2 of the Charter—and furthermore that "the specific powers granted to the Security Council for the discharge of *these duties*" shall be those "laid down in Chapters VI, VII, VIII and XII". These words, in their ordinary meaning, far from *extending* the "peace-keeping" powers of the Council, in fact *limit* them. And they limit them in two different ways.

23. In the first place, the Council is bound to act in accordance with the Purposes and Principles which are set out in Articles 1 and 2. The Purposes describe in very general terms the "common ends" of the member States; they are the "cause and object of the Charter [1]". The Principles prescribe the fundamental tenets in accordance with which the Organization and its Members undertake to act "in pursuit of" the Purposes. The Principles may impose obligations; the Purposes are essentially a guide to conduct. However, neither the Purposes nor the Principles add to powers conferred elsewhere in the Charter. Nor do they indicate, except in the most general way, the *means* by which the stated Purposes are to be implemented and understandably so, because that is something which is left to and governed by other provisions of the Charter. Relevant examples are afforded in the case of the basic Principle set out in Article 1, paragraph 1:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace",

and further,

> ". . . to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

The detailed implementation of the first of these Purposes, which is often described as "collective security", is provided for in Chapter VII of the Charter, while the way in which the second, the peaceful settlement of disputes, is to be implemented, is prescribed in detail in Chapters VI and VIII.

These examples are illustrative of the principle, which has found expression in the jurisprudence of this Court, that the Purposes of the United Nations, broad though they may be, cannot be implemented by any means whatever but

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[1] Report of the Rapporteur of Committee 1 to Commission I, UNCIO docs., Vol. VI, p. 447.

only in accordance with the means specifically provided for in the Charter. Thus, as Judge Winiarski stated in the *Certain Expenses* case [1]:

> "The Charter has set forth the purposes of the United Nations in very wide, and for that reason too indefinite, terms. But—apart from the resources, including the financial resources, of the Organization—*it does not follow, far from it, that the Organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful.* The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence *and means of action.*
>
> The intention of those who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. *It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes.* It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being." (Italics added.)

And in the words of Judge Koretsky in the same case:

> "I am prepared to stress the necessity of the strict observation and proper interpretation of the provisions of the Charter, its rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: 'The ends justify the means' [2]."

24. It follows from this, as well as from the plain wording of Article 24, paragraph 2, that the second way in which the Security Council is limited in the exercise of its responsibility for the maintenance of international peace and security is that it must act in accordance with those specific provisions of the Charter which prescribe the relevant means of execution—all of which are contained in Chapters VI, VII, VIII and XII. And that is exactly what paragraph 2 of Article 24, perhaps somewhat tautologically, says where it provides that the "specific powers granted . . . for the discharge of these duties are laid down" in those chapters. As Kelsen has pointed out [3], paragraph 1 of Article 24:

> ". . . can hardly be interpreted to confer on the Council the competence to maintain peace and security—in the widest possible sense—*by any means that the Council may choose.* Such interpretation is incompatible with the statement of Article 24, paragraph 2, that the powers granted to the Council for the discharge of the duties which it has under the responsibility for the maintenance of peace are laid down in Chapters VI, VII, VIII and XII." (Italics added.)

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[1] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 320 (dissenting opinion). *Vide* also Bindschedler, R. L., "La Délimitation des Compétences des Nations Unies", *Recueil des cours*, Vol. 108, No. 1 (1963), pp. 320 and 388.

[2] *Ibid.*, p. 268 (dissenting opinion).

[3] *Op. cit.*, p. 284.

The position can hardly be otherwise, for were it so, there would have been no point in even enacting the chapters in question—they would have been superfluous.

25. It is submitted, then, that the language of Article 24 provides no basis at all for the assertion that that Article invests the Council with certain implied residuary powers. And in view of this it can hardly be maintained that the States represented at the San Francisco Conference could ever have intended to confer upon the Council, by mere implication, unspecified powers which, limited only by the very general provisions of Articles 1 and 2, would in practice be virtually unlimited.

As Judge Hackworth pointed out in his dissenting opinion in the *Reparation for Injuries* case:

> "There can be no gainsaying the fact that the Organization is one of the delegated and enumerated powers. *It is to be presumed that such powers as Member States desired to confer upon it are stated* either in the Charter or in complementary agreements concluded by them. *Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted* [1]." (Italics added.)

And dealing specifically with Article 24 of the Charter, Judge Azevedo stated in his dissenting opinion in the *Competence of the General Assembly for the Admission of a State to the United Nations* case [2]:

> "Article 24, which is the keystone of the Charter, embodies *the alienation of their natural freedom accepted by the nations convened at San Francisco* . . . The signatories of the Pact have granted exceptional faculties to the Security Council, which, on the other hand, has assumed duties, for the performance of which it has required that *proper, specific and clearly defined powers be granted to it.* This is the basis of a system which attempted *to balance two forces which enter into play: sovereign equality and concern for security by means of world peace.* The normal operation of the Organization rests upon the even balance of these forces." (Italics added.)

26. In view of the conclusions reached, the question might well be posed: if Article 24 were not intended to confer upon the Security Council functions and powers additional to those conferred elsewhere in the Charter, what then was the purpose of inserting that Article in the first place? In answer to this question it is to be noted at the outset that the heading to Article 24 —"Functions and Powers"—is somewhat misleading in that the Article is not exhaustive of the powers and functions of the Council but enumerates only one of them, albeit the principal one, namely the maintenance of international peace and security. There are, however, other articles of the Charter which confer upon the Council powers which do not relate to the maintenance of international peace and security as such. Examples are Articles 4, 5 and 6 in terms of which the Council is required to make recommendations for the admission of States to membership in the United Nations, the suspension of the rights and privileges of membership and the expulsion of Members from the Organization, respectively. Article 93 requires a recommendation of the Council before a non-Member of the United Nations may become a party to the Statute of the International Court. Article

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[1] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 198.

[2] *Advisory Opinion, I.C.J. Reports 1950*, p. 27.

96 provides that the Council may request the Court for an advisory opinion on any legal question. In terms of Article 97 the Council is required to make a recommendation regarding the appointment of the Secretary-General of the Organization. Article 4 of the Statute of the International Court, which forms an integral part of the Charter [1], requires the participation of the Council in the election of the members of the Court.

27. These examples show that the functions and powers of the Council are not confined to the maintenance of international peace and security. Why then does Article 24 make specific reference to this function and to this one alone? The records of the United Nations Conference on International Organization held at San Francisco in 1945 provide no unequivocal answer to this question but from those records it appears highly probable that Article 24 was inserted in the Charter with the object not only of emphasizing the paramount importance of this particular function of the Council but also of stressing the *primacy of the Council in the field of peace and security* [2]. *These would appear to be the* real objects of the insertion of Article 24, or at least of paragraph 1 thereof.

Nor are the reasons for this far to seek. The maintenance of peace and security is the overriding aim of the Charter of the United Nations: the first of its stated Purposes is to "maintain international peace and security" and it is understandable that the importance of this function should be emphasized in the case of the organ charged with primary responsibility in exercising it. But that responsibility, although "primary", is not "exclusive", since under the provisions of Chapter IV of the Charter the General Assembly too has responsibility in the field of peace and security [3], and in these circumstances it is not surprising that the Charter should stress the primacy of the responsibility of the Council—an organ which because of its comparatively small size, its continuous functioning and its ability in certain circumstances to take preventive or enforcement measures can operate to maintain or restore the peace much more speedily and effectively than can the General Assembly, as, indeed, is recognized in the opening words of Article 24 itself.

28. Despite the foregoing, arguments have been advanced in support of the thesis that Article 24 does contain a reserve of powers and that consequently the Security Council can act to maintain peace and security otherwise than in accordance with the chapters of the Charter specifically mentioned in paragraph 2 of that Article. In this connection the practice of the Council itself falls to be considered. Thus the report of the majority of the Council's Committee

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[1] *Vide* Art. 92 of the Charter.

[2] It was not doubted at San Francisco that the Security Council would have other duties besides those stipulated in connection with the maintenance and enforcement of international peace and security. (See the statements of the United Kingdom and Belgian representatives in Committee 1 of Commission III—UNCIO docs., Vol. XI, at pp. 381 and 393, respectively.) Nevertheless, the heading to sec. B of Chap. VI of the Dumbarton Oaks Proposals (which was the precursor of Art. 24), viz. "*Principal* Functions and Powers", was retained by that Committee despite a Norwegian proposal to delete the word "Principal" on the grounds that: "As a matter of legal principle, the functions and powers of the organs of the Organization should be exhaustively stated in the Charter" (UNCIO docs., Vol. XI, p. 767). In the tentative draft of the Co-ordination Committee, the heading "Primary Responsibility" was substituted (*ibid.*, Vol. XV, p. 70) but in the final draft of the Charter approved by the Co-ordination Committee and the Advisory Committee of Jurists on 22 June 1945, the present heading—"Functions and Powers"—was decided upon.

[3] *Vide Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 163.

of Experts noted in connection with one question before it that "the problem *should not be considered from a legalistic point of view* since 'The Charter has in fact invested the Security Council, especially under Article 24, with certain *political functions of primary importance* by conferring on it the *primary* responsibility for the maintenance of international peace and security' [1]". In connection with another question, the view was put forward in the Council that it "was a basic conception of the Charter that the Members of the United Nations had conferred upon the Security Council *powers commensurate with its responsibility* for the maintenance of peace and security. The *only limitations* were those imposed by the stipulations contained in the fundamental Purposes and Principles to be found in Chapter I [2]." In connection with a third question it was urged that—

> "... the powers of the Security Council under Article 24 were *not* restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII. Grave reservations about these 'so-called wide reserve powers' were expressed, but it was emphasized *that once the Security Council had determined that there was danger to international peace and security*, it had full authority to take the proposed action" (to set up a Commission of good offices and investigation) [3].

In furnishing an opinion in connection with yet another question, the Secretary-General concluded that by its decision in the Trieste case the Council "had 'recognized the principle that it has sufficient power, under the terms of Article 24 of the Charter, *to assume new responsibilities, on condition that they relate directly, or even indirectly, to the maintenance of international peace and security*, and that in discharging these duties, the Security Council acts in accordance with the Purposes and Principles of the Charter' [4]".

29. These views did not, however, go unopposed in the Council. Particularly in the Trieste case, although it was not doubted that the question related to the maintenance of peace and security, it was contended that the responsibility of the Council in that connection could only be exercised through the specific powers granted for the purpose in Chapters VI, VII, VIII and XII [5].

30. It is submitted that in the final analysis, the arguments which have been advanced in the Security Council in support of the proposition that the Council can act to maintain peace and security otherwise than in accordance with Chapters VI, VII, VIII and XII of the Charter, are political rather than legal. They are teleological in nature and seek to justify action in situations for which the Charter in fact does not provide. They are, in short, extra-legal arguments which seek to circumvent or supplement the provisions of the Charter. As one commentator has put it:

> "There has been a definite tendency on the part of the principal organs [of the United Nations], especially of the Security Council, to adopt and justify a particular course of action in terms of its effective contribution to advancing the purposes and principles of the Organization rather than on the ground that the action is in accordance with the detailed provisions of the Charter governing the powers and functions of the particular organ.

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[1] *Repertory of United Nations Practice*, Vol. II, p. 20. (Italics added.)
[2] *Ibid.*, p. 21. (Italics added.)
[3] *Ibid.*, p. 22. (Italics added.)
[4] *Ibid.*, p. 23, footnote 18. (Italics added.)
[5] *Ibid.*, p. 21.

> Thus, in dealing with disputes and situations, the Security Council in practice has not considered itself rigidly bound by the detailed provisions of Chapters VI and VII of the Charter regarding the course of action to be followed. Rather the Council has adapted its course to the circumstances of each case . . . [1]"

The arguments heard in the Council in this connection and mentioned above [2] amount in effect to the contentions that in regard to its responsibility for the maintenance of peace and security and within the sole limits of the Purposes and Principles of the Charter, the Council has been entrusted with political functions of the highest importance and that therefore, whenever the peace is threatened or disturbed, it must have powers commensurate with its responsibility, even to the extent of assuming new powers not otherwise conferred.

The frankly political nature of this proposition will be at once apparent. And that its basis is in fact political rather than legal is confirmed when reference is had to statements made in the Security Council. The debate concerning the Trieste question will suffice as an example. During that debate the representative of Poland stated:

> "We do not have any legal qualms about the Security Council accepting the responsibilities it is asked to accept. *I know that it may be somewhat difficult to point to a specific phrase in the Charter which would justify the taking over of the functions we are asked to assume. However*, I think it would be entirely *within the general spirit of the Charter* of the United Nations, if it were decided to form a Free Territory under a quasi-international administration [3]." (Italics added.)

The representative of Colombia was even more outspoken. He said:

> "We are not concerned with indicating our decision, particularly with regard to the powers and functions of the Security Council, but I must say that *we are in favour of enlarging the powers of the Security Council* and of the Assembly as well. But the question has arisen . . . under the assumption that *it can be argued and based on the spirit of the Charter rather than on any definite provision of the Charter. I feel it is a very good thing that we should establish this precedent* . . . [4]" (Italics added.)

Basically similar views were expressed by the representatives of the United Kingdom and the United States [5].

Political arguments such as these and decisions taken in pursuance of them cannot override the provisions of the Charter or be used to supplement a supposed *lacuna* in the Charter. As the Court has said [6], "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers". The Security Council is no exception to this rule. It has only the powers conferred upon it by the Charter and it must act in accordance with them. Article 24 prescribes that in exercising its responsibility for the maintenance of international peace and security, it shall act within the limits of the Purposes and

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[1] Goodrich, L. M. and Simons, A. P., *The United Nations and the Maintenance of International Peace and Security* (1955), p. 599.

[2] *Vide* para. 28, *supra*.

[3] *SC, OR*, Second Year, No. 1, 89th Meeting, 7 Jan. 1947, pp. 14-15.

[4] *Ibid.*, p. 18.

[5] *Ibid.*, pp. 10 and 11 respectively.

[6] *Vide* Chap. III, para. 4, *supra*.

Principles of the Charter *and* in accordance with the specific powers granted it in Chapters VI, VII, VIII and XII. It cannot, therefore, act otherwise in discharging that responsibility.

31. The conclusion is that since, in adopting resolution 276 (1970) and the other relevant resolutions, the Council did not act in terms of Chapter VII of the Charter, and since Article 24 of Chapter V confers upon it no separate and independent powers, the only remaining Chapter under which it could have acted, is Chapter VI. It therefore remains to enquire whether the Council did act in terms of that Chapter.

E. The Relevance and Requirements of Chapter VI of the Charter

I. General

32. If, as has been submitted, the Security Council in adopting these various resolutions could not have acted under any chapter of the Charter other than Chapter VI, it is still a question whether its action was authorized by and in conformity with the provisions of that Chapter.

In this connection it will be contended:

(i) that the powers of the Council under Chapter VI can only be invoked for the purpose of maintaining international peace and security and that since the real purpose or purposes of the Council in adopting the resolutions concerned were altogether different and quite unrelated to the maintenance of peace and security, its action was not authorized by that Chapter; and, in any case,

(ii) that the Council did not act in conformity with the provisions of Chapter VI because at no time did it conduct an impartial and objective investigation in order to determine whether the dispute or situation in question was likely to endanger international peace and security and that this was a *sine qua non* for its adoption of the relevant resolutions.

II. The Scope of the Powers of the Council under Chapter VI

33. It would seem indisputable that the only powers of the Security Council under Chapter VI which are relevant here are those which are conferred in Articles 34, 36 and 37. For in adopting the resolutions concerned the Council clearly did not act in terms of Article 33, paragraph 2; it could not have acted in terms of Article 38 because the parties did not so request; and Article 35 does not confer any powers upon the Council. And since Article 34 confers only powers of investigation, it follows that the measures adopted by the Council in the relevant resolutions could be justified, if at all, only by reference to the relevant paragraphs of Article 36 or Article 37. Article 36, paragraph 1, lays down that:

> "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 [i.e., one 'the continuance of which is likely to endanger the maintenance of international peace and security'] or of a situation of like nature, recommend appropriate procedures or methods of adjustment."

Article 37, paragraph 2, provides that:

> "If the Security Council deems that the continuance of the dispute [i.e., one 'the continuance of which is likely to endanger the maintenance of

> international peace and security—*vide* paragraph 1 read with Article 33] is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate."

It must be obvious that when, pursuant to these Articles, the Council attempts to settle a dispute by way of recommending appropriate procedures or methods of adjustment or terms of settlement, it does so with only one end in view—to maintain international peace and security. Indeed, it *can* only act for that purpose. The sole purpose of the *whole* of Chapter VI is the maintenance of international peace and security. *And it is for that purpose and that purpose alone that the powers of the Council under Chapter VI were conferred.* That is evident from the provisions of Article 24 where the powers conferred upon the Council in Chapter VI are expressly stated to be granted "for the discharge of *these* duties", that is to say, its duties under its "primary responsibility for the maintenance of international peace and security". It is also evident from the language of every article in Chapter VI save perhaps Article 38. Consequently, since the Council is bound by the terms of the Charter and the Charter has conferred upon it the powers in question for one specific purpose, it cannot invoke them for any other purpose.

34. Nevertheless, even in the field of international peace and security, the Council cannot intervene in *every* dispute or situation. For although in terms of Article 35, paragraph 1, a Member of the United Nations may bring to the attention of the Council any dispute, or any situation which *might lead to international friction or give rise to a dispute*, and although in terms of Article 34 the Council may investigate any dispute, or situation of *such* a nature, there is, except in the case of Article 38, a condition precedent to any further action of the Council under Chapter VI, namely that in the determination of the Council, tacit or express, the dispute or situation must be one the continuance of which is "*likely to endanger the maintenance of international peace and security*".

If this latter requirement is not satisfied the Council has no basis for action [1]. It was in fact for this very reason that Article 38 found its way into the Charter. The insertion of that Article, which did not appear in the original Dumbarton Oaks Proposals, was proposed by the Sponsoring Governments and motivated as follows:

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[1] *Vide* Ross, A., *Constitution of the United Nations* (1950), p. 160; Goodrich, L. M., and Hambro, E., *Charter of the United Nations*, 2nd ed. (1949), pp. 102 and 238; Goodrich and Simons, *op. cit.*, p. 233; Jiménez de Aréchaga, E., *Voting and the Handling of Disputes in the Security Council* (1950), pp. 102 and 103-104; Kelsen, *op. cit.*, p. 404. Statements to this effect have frequently been made in the proceedings of the Security Council itself. Thus during consideration of the *Corfu Channel* question

> ". . . several members observed that the Charter had circumscribed the functions of the Council by providing that it might make recommendations under Article 36 *only when the continuance of the dispute was likely to endanger the maintenance of international peace and security. The consideration of any other dispute or situation enlarged the competence of the Council beyond the limits fixed by the Charter*". (*Repertory of Practice of United Nations Organs*, Vol. II, p. 285, para. 32.) (Italics added.)

For examples of statements to similar effect *vide* also pp. 203-204, para. 36; p. 219, para. 91; p. 285, para. 38; p. 286, para. 41; p. 299, para. 73.

"The purpose of this amendment was to give the Security Council, at the request of the parties to a dispute, the power to make recommendations concerning its settlement, *even if the dispute was not of such a character as to constitute a threat to the peace.* Under the Dumbarton Oaks Proposals *the Security Council did not possess authority to deal with such secondary disputes* and it had been thought desirable thus to broaden its competence [1]."

35. It will thus be apparent, both from the clear language of Chapter VI, read with Article 24, and from the relevant *travaux préparatoires*, that the powers conferred upon the Council in Articles 36 and 37 can be invoked by it *only for the purpose of maintaining the international peace and security* and then only in a case where, in the opinion of the Council, the continuance of a particular dispute or situation *is likely to endanger* that peace and security. That being so, it is axiomatic that it cannot invoke those powers for any other purpose whatsoever.

III. The Real Purposes of the Council

36. Yet, it is submitted, that is precisely what the Council purported to do when it adopted resolution 276 (1970) and its two precursors, resolutions 264 (1969) and 269 (1969). It is clear from the terms of these resolutions and the debates preceding their adoption that the real purpose of the Council in adopting them was *not* to maintain international peace and security, but to secure the removal of the South African authorities from South West Africa in order to bring about the self-determination and independence of the peoples of the Territory in pursuance of the United Nations campaign against "colonialism" [2].

That is equally true of the General Assembly which, in drawing the attention of the Security Council to its various resolutions and urging it to "take all effective measures . . . to ensure the immediate withdrawal of South African authorities from Namibia so as to enable Namibia to attain independence [3]", was clearly far less concerned with the possibility of any threat to the peace than with enabling "the people of the Territory to exercise the right of self-determination and to achieve independence [4]", and, to that end, with discharg-

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[1] UNCIO docs., Vol. XII, p. 9. The proposal was adopted in Committee III/2, with virtually no discussion, by 31 votes to 0 (*ibid.*, pp. 15-16). See also the statement of the United States representative in this Committee (*ibid.*, p. 32) who considered that—

"... the Council should and must intervene in any dispute which threatened world peace, *but that it should not possess such power with regard to all disputes, since its competence would then be unduly and unnecessarily expanded*". (Italics added.)

See further the summary report of the second meeting of the Committee (*ibid.*, p. 284).

[2] *Vide* Chap. XI, *infra*.

[3] GA resolution 2403 (XXIII), operative para. 4. *Vide* also resolutions 2145 (XXI), operative para. 8; 2248 (S-V), section IV, para. 5; 2325 (XXII), operative para. 7; 2372 (XXII), operative para. 13; 2403 (XXIII), operative para. 3; 2517 (XXIV), operative para. 4.

[4] GA resolution 2145 (XXI), operative para. 6. *Vide* also resolutions 2248 (S-V), preambular para. 5 and secs. I and VI; 2325 (XXII), preambular paras. 2 and 3 and operative para. 6; 2372 (XXII), preambular para. 3 and operative paras. 5, 10 and 13; 2403 (XXIII), operative paras. 1 and 4; 2517 (XXIV), preambular para. 4 and operative para. 1.

ing its "special and direct responsibility towards the people and the Territory of South West Africa [1]".

37. It was these purposes that the Security Council sought to implement when it adopted resolution 264 (1969). At the outset of the debate which led to the adoption of that resolution the President of the Council drew the Council's attention to a letter from the Secretary-General [2] in which the latter transmitted the text of General Assembly resolution 2403 (XXIII), "drawing particular attention to operative paragraphs 3 and 4 which are of immediate concern to the Security Council [3]". Paragraph 3 of the resolution drew the attention of the Council to the "serious situation which has arisen as a result of the illegal presence and actions of the South African Government in Namibia". Paragraph 4 reads as follows:

> "Recommends to the Security Council urgently to take all effective measures, in accordance with the relevant provisions of the Charter of the United Nations, to ensure the immediate withdrawal of South African authorities from Namibia *so as to enable Namibia to attain independence in accordance with the provisions of resolutions 1514 (XV) and 2145 (XXI)*." (Italics added.)

During the ensuing debate, the pre-occupation of the members of the Council with this objective became obvious. The first speaker, the representative of Algeria, described the "fundamental question confronting us today" as "*the adoption of practical means to achieve our objectives, which are the accession of the Namibian people to sovereignty and the independence of that country* [4]". The representative of Pakistan, pointing out that the General Assembly had no powers of enforcement, stated that it must turn to the Security Council to take measures "*in order to enable Namibia to attain independence* [5]" and that only sanctions would "convince South Africa that the United Nations has the will and the capability to meet the challenge to its competence *to decolonize the Territory* [6]".

The representative of the USSR declared that his country's "opposition to *colonialism and racism*" and its "full solidarity with the peoples *fighting for their liberation*", would "*determine the position of the Soviet Union in the problem of Namibia* [7]". Referring to a programme of measures proposed by the USSR in the Assembly, he considered that its implementation—

> ". . . could speed up the attainment of *the main objective, the final objective, the liberation of Namibia*, and create the conditions in that country which would enable its population to settle its fate as it sees fit [8]". (Italics added.)

The representative of Finland stated:

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[1] GA resolution 2372 (XXII), preambular para. 7. *Vide* also resolutions 2145 (XXI), preambular para. 9 and operative para. 5; 2248 (S-V), preambular paras. 4 and 5; 2325 (XXII), operative paras. 7 and 8; 2498 (XXIV), preambular para. 3; 2517 (XXIV), preambular para. 4. See also Chap. XI, *infra*.

[2] UN doc. S/8943 (23 Dec. 1968), in *SC, OR*, Twenty-third Year, Sup. for October-December 1968, p. 179.

[3] UN doc. S/PV. 1464 (20 Mar. 1969), pp. 7-10.

[4] *Ibid.*, pp. 11-12.

[5] *Ibid.*, pp. 54-55.

[6] *Ibid.*, p. 56.

[7] UN doc. S/PV. 1465 (20 Mar. 1969), p. 12.

[8] *Ibid.*, p. 22.

"No progress whatsoever has been made in United Nations efforts *to help the people of Namibia to achieve self-determination and independence.* The resolutions passed by the General Assembly in the past two and a half years since the termination of the mandate have had no practical effect . . . *the Security Council should now take up the search for practical and effective means* by which the United Nations *could discharge its responsibilities for Namibia and its people* [1]." (Italics added.)

In restating the position of his Government, the United Kingdom representative reiterated an earlier statement made in the General Assembly where he had said:

". . . let me state again plainly that *our motive, our aim,* our determination *must be to set the people of South West Africa free,* free to advance to the destiny of their own choice *in full self-determination* [2]". (Italics added.)

The representative of the United Arab Republic (a non-member of the Council, participating at his own request) asserted that South Africa's continued presence in and administration of South West Africa was—

". . . an encroachment on the jurisdiction of the United Nations and defiance of its authority [and] an impediment in the way of *the freedom of the people.* . . .

Consequently, the immediate withdrawal of South Africa from the Territory becomes the most fundamental demand, *if we want the people of Namibia to be free and independent* [3]." (Italics added.)

The representative of Paraguay, a co-sponsor of the draft resolution, declared:

"We must make use of all the legal instruments available to us and bring them all to bear in order *to ensure that the Namibian people will effectively and securely be able to exercise their inalienable right to self-determination, full independence and sovereignty.* . . .

Convinced that every step taken in the right direction . . . *will serve as a positive contribution towards hastening the hour of Namibia's independence,* my delegation has joined . . . in submitting . . . the draft resolution. *We want to come to the aid of the people of Namibia in their just and legitimate aspiration for full independence and unlimited sovereignty* [4]."

In the view of the representative of China, with the adoption of General Assembly resolution 2145 (XXI) and Security Council resolution 246 (1968)—

". . . reaffirming the inalienable right of the people and the Territory of South West Africa to freedom and independence . . . the administration of Namibia came under the direct responsibility of the United Nations [and it] is incumbent, therefore, upon the United Nations *to discharge the responsibilities thus assumed* in such a manner *as to enable the people of the Territory to exercise the right of self-determination and to achieve independence as soon as possible* [5]".

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[1] *Ibid.*, p. 27.
[2] *Ibid.*, p. 32.
[3] *Ibid.*, p. 42.
[4] *Ibid.*, pp. 47-48.
[5] *Ibid.*, p. 62.

The statements of the representatives of the United States [1], Spain [2] and Colombia [3] also indicate that the purpose of the draft resolution was the attainment of freedom and independence by the people of Namibia and the eradication of "colonialism" rather than the maintenance of international peace and security.

The same purpose is also apparent from the debates preceding the adoption of Security Council resolutions 269 (1969) [4] and 276 (1970) [5].

38. Moreover, the general conviction of the Council in this connection is reflected in the terms of the relevant resolutions which it finally adopted. It has already been demonstrated that these resolutions were based squarely upon the "decision" of the General Assembly in paragraph 4 of its resolution 2145 (XXI) to terminate the Mandate for South West Africa and to place the Territory under the direct responsibility of the United Nations, and that the measures subsequently adopted by the Council were taken in pursuance of that decision and in order to implement it [6]. As will be shown in Chapter XI, *infra*, the purpose underlying the decision of the Assembly was to secure at all costs the speedy independence and self-determination of the peoples of South West Africa as a homogeneous whole. The terms of the resolutions of the Security Council reveal a like purpose.

Thus resolution 264 (1969) reaffirmed "the inalienable right of the people of Namibia to freedom and independence" in accordance with General Assembly resolution 1514 (XV) [7] and also reaffirmed "its special responsibility toward the people and the territory of Namibia [8]". In resolution 269 (1969) the Council decided that the "continued occupation" of the Territory by South Africa constituted "a denial of the political sovereignty of the people of Namibia [9]", recognized "the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in the territory [10]", and requested all States to "increase their moral and material assistance to the people of Namibia in their struggle against foreign occupation [11]". And in resolution 276 (1970) the Council again reaffirmed "the inalienable right of the people of Namibia to freedom and independence recognized in General Assembly resolution 1514 (XV) of 14 December 1960 [12]". Again the emphasis is on

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[1] UN doc. S/PV. 1465 (20 Mar. 1969), p. 7.

[2] *Ibid.*, p. 52.

[3] *Ibid.*, pp. 58-60.

[4] *Vide*, e.g., the statements of the representatives of Colombia, UN doc. S/PV. 1492 (30 July 1969), pp. 7, 8-10, 12; Algeria, UN doc. S/PV. 1493 (4 Aug. 1969), pp. 7, 8-10; Pakistan, *ibid.*, p. 21; India, a non-member of the Council, *ibid.*, pp. 33, 34-35; the USSR, UN doc. S/PV. 1494 (6 Aug. 1969), pp. 13, 21; Hungary, UN doc. S/PV. 1495 (8 Aug. 1969), pp. 4-5; Paraguay, *ibid.*, pp. 8-10; China, *ibid.*, pp. 13-15.

[5] For examples *vide* the statements of the representatives of Syria, UN doc. S/PV. 1528 (29 Jan. 1970), pp. 22, 26; Sierra Leone, *ibid.*, pp. 31 and 33; the USSR, *ibid.*, pp. 52, 53-55; Poland, UN doc. S/PV. 1529 (30 Jan. 1970), pp. 7-10, 12-13, 14-15; Colombia, *ibid.*, p. 27; Zambia, *ibid.*, p. 47; India, a non-member, *ibid.*, pp. 33-35, 41; Pakistan, also a non-member, *ibid.*, p. 66.

It may be noted that the same is true of the debate which led to the adoption of resolutions 283 and 284 (1970). *Vide* UN doc. S/PV. 1550 (29 July 1970), pp. 41 (Colombia); 46, 47 (Syria); 51, 52 (Zambia); 57, 61-62, 66 (USSR); 66 (Poland).

[6] *Vide* paras. 2-10, *supra*.

[7] Preambular para. 4.

[8] Preambular para. 6.

[9] Operative para. 3.

[10] Operative para. 4.

[11] Operative para. 8.

[12] Preambular para. 1.

freedom, independence and self-determination rather than on the maintenance of international peace and security.

39. On the other hand, there were some members of the Council who did maintain that the situation in South West Africa constituted a threat to international peace and security. And in document S/9090 dated 14 March 1969 [1], addressed to the President of the Security Council, 46 member States in requesting an urgent meeting of the Council, stated, *inter alia*:

> "In spite of the decisions of the General Assembly and the Security Council, the Government of South Africa continues to maintain its occupation of the territory of Namibia, *constituting a grave threat to international peace and security*." (Italics added.)

In the debates leading to the adoption of resolutions 264 (1969), 269 (1969) and 276 (1970) various reasons were advanced for the contention that the situation in South West Africa constituted a threat to international peace and security. These reasons were:

(i) South Africa's "illegal occupation" of an international territory under the direct responsibility of the United Nations [2];
(ii) South Africa's "systematic destruction of the unity of the Namibian people and of the integrity of its territory [3]";
(iii) South Africa's racial policies and its "violation" of human rights [4]; and
(iv) South Africa's "defiance" of resolutions of the General Assembly and the Security Council [5].

However, despite these expressions of opinion by certain members of the Council, the terms of the resolutions eventually adopted by the Council certainly do not indicate that the Council, *qua* Council, considered the situation in South West Africa to be a threat to international peace and security or likely to endanger that peace and security. On the contrary, and significantly in view of the opinions of certain of its members, it studiously refrained from saying

[1] *SC, OR*, Twenty-fourth Year, Sup. for January-March 1969, pp. 126-127.

[2] *Vide* statements made by the representatives of Algeria, UN doc. S/PV. 1464 (20 Mar. 1969), p. 12; Zambia, *ibid.*, p. 21 and UN doc. S/PV. 1497 (12 Aug. 1969), p. 7; Nepal, UN doc. S/PV. 1464 (20 Mar. 1969), pp. 43-45 and UN doc. S/PV. 1493 (4 Aug. 1969), pp. 13-15 and 17, and the United Arab Republic, not a member of the Council, UN doc. S/PV. 1465 (20 Mar. 1969), p. 42. Colombia, while not going so far as to aver that South Africa's occupation of the Territory constituted a threat to the peace, nevertheless considered that it was an element which "disturbed" the peace and heightened "international tension", UN doc. S/PV. 1465 (20 Mar. 1969), p. 61 and UN doc. S/PV. 1492 (30 July 1969), p. 12.

[3] *Vide* statements by the representatives of Algeria, UN doc. S/PV. 1464 (20 Mar. 1969), p. 12; and India, a non-member of the Council, UN doc. S/PV. 1493 (4 Aug. 1969), p. 33.

[4] *Vide* statements by the representatives of Zambia, UN doc. S/PV. 1464 (20 Mar. 1969), p. 27 and UN doc. S/PV. 1497 (12 Aug. 1969), p. 6; Senegal, UN doc. S/PV. 1464 (20 Mar. 1969), pp. 36 to 38-40 and Nepal, *ibid.*, p. 42. According to the representative of Pakistan, the situation held "the latent danger of racial war", UN doc. S/PV. 1464 (20 Mar. 1969), pp. 54-55.

[5] *Vide* statements by the representatives of the USSR, UN doc. S/PV. 1528 (29 Jan. 1970), p. 46 and four non-members of the Council—the United Arab Republic, UN doc. S/PV. 1465 (20 Mar. 1969), p. 42; India, UN doc. S/PV. 1529 (30 Jan. 1970), p. 38; Pakistan, *ibid.*, pp. 48-50 and 51; and Turkey, whose representative spoke as President of the United Nations Council for "Namibia", UN doc. S/PV. 1528 (29 Jan. 1970), pp. 11 and 12.

this. It confined itself to saying that it was mindful of "*the grave consequences* of South Africa's continued occupation of Namibia [1]"; that that occupation constituted "*an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the people of Namibia* [2]"; that that occupation "in defiance of the relevant United Nations resolutions and of the United Nations Charter has *grave consequences for the rights and interests of the people of Namibia* [3]"; and that "the defiant attitude of the Government of South Africa towards the Council's decisions *undermines the authority of the United Nations* [4]". In essence then, the Council asserted that South Africa's presence in South West Africa had grave consequences for the people of South West Africa and undermined the authority of the United Nations. These assertions may or may not be consistent with a finding or determination that the situation in South West Africa is one which is "likely to endanger international peace and security" but they are not of themselves indicative of the making of such a determination. Clearly the Council made no express determination. Whether it can be said to have made a *tacit* determination to this effect is a conclusion to be drawn from the facts and circumstances. And these, it is submitted, firmly negative any such conclusion.

40. In the first place, the fact that the Council refused to apply measures under Chapter VII of the Charter, despite the pressure brought to bear on it by certain of its members [5], leads to the inference that it did *not* consider that there existed any threat to the peace, breach of the peace or act of aggression.

In the second place, had the Council considered that the situation in question was one even *likely to endanger* international peace and security, it may be assumed that in the circumstances it would have given a clearer indication of this than it did in its relevant resolutions. As the debates show, it was certainly urged in this direction by certain of its members. But it deliberately avoided and stopped short of any assertion to this effect and, instead, employed watered-down phrases such as "grave consequences for the rights and interests of the people of Namibia" and "aggressive encroachment on the authority of the United Nations". Nor can it be said that the situation in question posed such an obvious or notorious threat to international peace as, in the opinion of the Council, not even to require any conscious determination. Indeed, it will appear from the facts set out in Chapter XI, *infra*, that such a threat is, as a matter of observable fact, non-existent. Moreover, as will now be shown, opinions in the Council were divided on the matter.

In the third place, analysis of the debates in the Council shows that of the 15 members [6] of the Council as constituted when it discussed resolutions 264 (1969) and 269 (1969), only 5 (Algeria, Zambia, Nepal, Senegal and Pakistan [7]) indicated that in their opinion the international peace was endangered or likely to be endangered. And of the members of the Council as constituted when it considered resolution 276 (1970) and resolutions 283 and 284 (1970), only 4 (Zambia, the USSR, Nepal and Burundi) gave any such indication [8]. Most

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[1] Resolution 264 (1969), preambular para. 5. (Italics added.)
[2] Resolution 269 (1969), operative para. 3. (Italics added.)
[3] Resolution 276 (1970), operative para. 4. (Italics added.)
[4] *Ibid.*, operative para. 3. (Italics added.)
[5] *Vide* paras. 16-20, *supra*.
[6] Excluding non-members who participated in the debate at their own request.
[7] Though possibly 6 if Colombia be included—*vide* footnote 6 on p. 514, *supra*.
[8] A statement by the representative of Syria may possibly be so construed however, UN doc. S/PV. 1528 (29 Jan. 1970), p. 21. There is also an oblique reference to the question by the representative of Sierra Leone, *ibid.*, p. 32.

significantly, no other member of the Council indicated in debate that they in any way shared this opinion. Indeed, with the exception of the representative of the United States, they were careful not even to advert to the question. That representative stated:

> "All of us most earnestly desire that the United Nations acquire the capability to deal more effectively not only with threats to international peace and security but also with *other* flagrant violations of the purposes and principles of the Charter *such as that which is occurring in Namibia* [1]."

Since the expressions of opinion of a few of its individual members can obviously not bind the Council it would seem from what has been said that the Council was *not* of the opinion that the situation in South West Africa was likely to endanger international peace and security and did not make a tacit determination to this effect.

Finally, the evidence already adduced to show the real purposes of the Council [2], *qua* Council, indicates that it was not even concerned with the question of peace and security and thus still less with making a determination in that connection.

41. In the light of the above appraisal it is submitted that in adopting the relevant resolutions the Council did not act because it envisaged any threat, actual or potential, to international peace and security, but that it acted in an attempt to secure the immediate independence and self-determination of the peoples of South West Africa in pursuance of General Assembly resolution 2145 (XXI). In so doing, it is submitted, it invoked its powers for a purpose altogether unauthorized by Chapter VI of the Charter and, consequently, the resolutions which it adopted to effect that purpose were *ultra vires*. Since all other possible sources of authority for the action of the Council have been eliminated in the earlier parts of this Chapter, it follows that its relevant resolutions have no legal consequences for States.

IV. The Investigation and Determination by the Council

42. It has been submitted that in adopting resolution 276 (1970) and its cognate resolutions the Council did not act in order to maintain international peace and security and that its action can therefore not be justified by reference to Chapter VI of the Charter. There is, however, also a further reason why it is submitted that its resolutions were *ultra vires* Chapter VI, and that is that it did not act in conformity with Article 34 of that Chapter. Article 34 provides as follows:

> "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."

As appears from the final clause of this Article, the sole purpose of an investigation is to enable the Council to determine whether international peace and security is likely to be endangered or, to put it another way, "to provide the Council with information in order to enable it to take the appropriate steps at

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[1] UN doc. S/PV. 1496 (11 Aug. 1969), p. 11.

[2] *Vide* paras. 36-38, *supra*.

the end of its enquiry [1]". This power of the Council to investigate a dispute or situation is one of its most important since (except in the case of Article 38) an affirmative determination, made as a result of its investigation, is a *sine qua non* for any further action it may take under Chapter VI of the Charter [2]. It has already been contended that in regard to the situation in South West Africa the Council made no determination, either tacit or express [3]. On that ground alone, the resolutions of the Council which, as has been shown [4], could only have been adopted in terms of Articles 36 or 37 of Chapter VI, would be *ultra vires*.

43. But again, even if it can be said that the Council did make a tacit determination, it is submitted that it still did not act as required of it by Article 34. In conducting an investigation in order to arrive at a determination under that Article the Council must act "in conformity with the principles of justice and international law [5]" and this presupposes that there rests upon it an overriding legal obligation to consider all the facts, to consider them objectively and dispassionately, and to consider both or all sides of the question.

That the Council must consider all the relevant facts is obvious.

> "To *investigate disputes, to pronounce upon their nature and the degree* to which they may threaten peace, and to state publicly the existence of a threat to the peace demand a complete insight into and an impartial consideration of the facts before the Council [6]."

And, as has been stated in this Court itself, the "main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view [7]".

The second requirement, viz., that the investigation must be objective and dispassionate is well summed up in the words of the Netherlands representative in the Security Council during consideration of the Spanish question:

> "Sentiment and inclination, therefore, may well urge us to do something about the situation. But let us be very careful. It is pure Nazi doctrine to let things be determined by what Hitler called 'healthy, popular reaction'. . . . Let us avoid the shifting sands of emotion and determine the issue in conformity with those principles of justice and international law which Article 1 of the Charter commands us to apply [8]."

Finally, as regards the necessity to consider all sides of the question, the representative of the USSR once pointed out to the Council:

> "I also want to draw the attention of the Security Council to the following extremely important fact. The Security Council cannot take a decision

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[1] *Repertory of United Nations Practice*, Vol. II, p. 238, para. 47 *(b)*. See also Kelsen, *op. cit.*, p. 390.

[2] *Vide* para. 34, *supra*.

[3] *Vide* para. 40, *supra*.

[4] *Vide* para. 33, *supra*.

[5] Article 1, para. 1, of the Charter read with Article 24, para. 2.

[6] UNCIO docs., Vol. XI, p. 327: Statement by the delegate of the Netherlands at the ninth meeting of Committee III/1. For examples of statements to similar effect in the proceedings of the Security Council see *SC, OR*, First Year, No. 2, 35th Meeting, pp. 182 (United Kingdom), 199 (China) and 197 (Australia).

[7] Joint dissenting opinion of Judges Basdevant, Winiarski, McNair and Read. *Conditions of Admission of a State to Membership of the United Nations (Article 4 of Charter), Advisory Opinion, I.C.J. Reports 1947-1948*, p. 85.

[8] *SC, OR*, First Year, First Series, No. 2, 34th Meeting, 17 Apr. 1946, pp. 174-175.

> on any dispute which it has considered unless both parties concerned in this dispute are heard . . . the Security Council cannot, without a breach of the Charter, take a decision . . . unless it hears both parties directly concerned in the dispute [1]."

The fundamental nature of these three requirements of natural justice need not be emphasized further.

44. It is submitted that in so far as the question of South West Africa is concerned, the Security Council has consistently violated all these requirements. As will appear in Chapter XI, *infra*, it made no attempt to ascertain the truth of the facts which the South African Government from time to time presented to the United Nations in general and to the Security Council in particular. A letter from the South African Minister for Foreign Affairs [2], in response to resolution 269 (1969), was either completely ignored or simply dismissed—in the words of the representative of Zambia—as "a volume of distortions and fallacies" containing "the wildest of wild distortions [3]". The representative of Poland saw it as an attempt "to dilute the negative answer of South Africa in a maze of legal arguments [4]", while the representative of Syria said of it:

> "The authorities of South Africa deliberately escalated their defiance of the United Nations to new heights of cynicism by trying to prove, in their letter . . . that the Namibian people were reaping the benefits of their benevolent presence, reasons usually sustained only by the morally bankrupt, blinded by the arrogance of ephemeral power [5]."

At no time was it even suggested that the facts set out in the letter should be impartially appraised in order to establish whether or not they were true.

That a large part of the relevant discussions in the Council was anything but dispassionate is amply demonstrated by the very language employed by many of its members. Even a cursory reading of the records of the debates reveals that those discussions teemed with references to South Africa and her policies in South West Africa in terms such as "inhuman racist régime", "rape of Namibia", "inhuman atrocities", "intolerable oppression", "demented fascist régime", "colonialist and racist policy", "shameful crime", "unbridled terror", "militaristic voracity", "malicious intentions", "base of aggression", "racial rage"—and so on *ad nauseam*.

Even the fundamental rule of *audi alteram partem* was ignored by the Council. It did not at any time invite South Africa to participate in the discussions preceding the adoption of its relevant resolutions notwithstanding that in terms of Article 32 of the Charter it was bound to do so [6]. On the other hand, it allowed the President for the time being of the "United Nations Council for Namibia" to participate at length in all its discussions [7].

45. The conclusion, then, is that since an affirmative determination by the Security Council in terms of Article 34 of the Charter is a condition precedent to any further action which it may take under Article 36 or 37—the only two Articles under which it could here have acted—and since the Council made no

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[1] *SC, OR*, First Year, First Series, No. 2, 32nd Meeting, 15 Apr. 1946, p. 124.
[2] *Vide* Annex C to Chap. XI, *infra*.
[3] UN doc. S/PV. 1527 (28 Jan. 1970), pp. 31 and 32.
[4] UN doc. S/PV. 1529 (30 Jan. 1970), p. 11.
[5] UN doc. S/PV. 1528 (29 Jan. 1970), p. 21.
[6] *Vide* Chap. III, sec. F, *supra*.
[7] *Vide* S/PV. 1465 (20 Mar. 1969), pp. 41-46; S/PV. 1492 (30 July 1969), pp. 6-13; and S/PV. 1528 (29 Jan. 1970), pp. 8/10-16.

such determination preparatory to adopting the resolutions in question, its action was not in conformity with the provisions of Article 34 and therefore *ultra vires*. On the other hand, even if it can be said that the Council did make a determination of the nature required, it did not make it in accordance with the principles of justice which, in terms of the Charter, it is enjoined to apply and its action was therefore void of any legal effect. Accordingly, its resolutions can have no legal consequences for States.

F. The Legal Consequences of Security Council Resolution 276 (1970)

I. General

46. It has been submitted that for the reasons set out above Security Council resolution 276 (1970) is invalid and of no legal effect.

In what follows it will be submitted in the alternative that even if the resolution can be said to be valid and to have been adopted under Chapter VI of the Charter, only certain of the provisions of that resolution have legal consequences for States and that these are not binding but at most recommendatory in their nature and effects. In this connection it is proposed, firstly, to analyse the juridical nature and legal effects of the various parts of the resolution and thereafter to establish what legal consequences it has for States.

II. The Juridical Nature and Legal Effects of Resolution 276 (1970)

47. The Security Council is a collegiate organ which in adopting a resolution takes a collective decision by way of a qualified majority vote [1]. Every paragraph of its resolution, whatever its purport, may thus be regarded as a separate decision of the Council which reflects and sums up the opinion of the majority of its members on the particular matter which is dealt with therein. In this sense every part of the resolution is a "decision" in the wide sense of that term.

Juridically, however, these "decisions" may differ in their nature and their legal effects according to whether they are essentially preambular statements, binding decisions, declarations of attitude or expressions of opinion, injunctions, requests, or recommendations. In distinguishing between these various categories there are, it is submitted, two criteria which fall to be applied, viz.:

(i) what effect the decision is *intended* to produce; and
(ii) what effect it *can* produce in terms of the Charter.

In order properly to determine the legal effects of any particular "decision" of the Council, both these criteria must be applied. The first seeks to ascertain the intention of the Council by reference to the language used and, where necessary, to the preparatory debates [2]; the second seeks to establish whether the Council was authorized by the Charter to take the "decision".

The language of a resolution, while never by itself conclusive (since it bears on only one of the criteria mentioned above, viz., the intention), may nevertheless indicate the proper choice between two permissible alternatives. Thus

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[1] *Vide* Kelsen, *op. cit.*, p. 95.

[2] Thus Kelsen, *op. cit.*, at p. 740, states in connection with Article 40 of the Charter: "whether the 'call' [referring to the expression 'call upon' in that Article] is an act constituting an obligation of the parties concerned or a simple 'recommendation' depends on the intention of the Security Council . . ."

where the Council is, for example, authorized to make a definitive determination, it may presumably (perhaps by way of warning) do something less, such as express its opinion or declare its attitude on a matter [1]. In the former case it may, *inter alia*, "decide" or "determine" or "declare" something; in the latter it may "consider" or "regard" or "deem" something. The choice of words will usually indicate the intention of the Council.

On the other hand, the language may indicate that the Council is purporting to do something more than it is authorized by the Charter to do. The Council may, for example, "demand" or "call upon" a State to take certain measures in a case where the relevant provisions of the Charter authorize it merely to "recommend" the measures. Here the language, taken by itself, purports to *enjoin* something but because of the provisions of the Charter the apparent injunction cannot amount to *more* than a recommendation [2]. As one author has observed, where the authorized power is one of recommendation, that power cannot "be transmuted into a power of binding decision by a mere choice of phraseology [3]", and the use of peremptory language will usually be found to represent an attempt on the part of the Council to compensate for an absence of power. In this case the language obscures rather than clarifies the legal effect of the resolution.

In the light of these considerations, the juridical nature and legal effects of the various parts of Security Council resolution 276 (1970) may now be analysed.

48. The preamble to resolution 276 (1970) consists of a series of reaffirmations. These are only statements, essentially explanatory in nature, which define the attitude of the Council and constitute the ostensible justification for the operative parts of the resolutions which follow. They may serve to clarify the intentions of the Council as expressed in the operative paragraphs and so be employed as an aid in interpretation, but being mere statements they neither establish nor purport to establish any legal obligations.

49. Paragraph 1 of the operative part of the resolution, in which the Council—

> "*Strongly condemns* the refusal of the Government of South Africa to comply with General Assembly and Security Council resolutions pertaining to Namibia"

is clearly no more than, and does not purport to be more than, a mere condemnatory statement—a declaration of attitude on the part of the Council. As such, it imposes no legal obligations.

In operative paragraphs 2, 3 and 4, the Council:

> "2. *Declares* that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid;
>
> 3. *Declares further* that the defiant attitude of the Government of South

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[1] As Blaine Sloan, F., *in* "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", *B.Y.B.I.L.*, Vol. XXV (1948), p. 3, puts it: "Even where a body may be competent to make a binding decision it may voluntarily limit its action to something less."

[2] It might, however, amount to something *less* than a recommendation. Thus the purported exercise of a non-existent power to issue an injunction might be completely *ultra vires* the Council, and therefore invalid—even if the Council, had it so wished, might have made a valid recommendation on the same subject.

[3] Halderman, J. W., *The United Nations and the Rule of Law* (1966), p. 87.

Africa towards the Council's decisions undermines the authority of the United Nations;

4. *Considers* that the continued occupation of Namibia by the Government of South Africa in defiance of the relevant United Nations resolutions and of the United Nations Charter has grave consequences for the rights and interests of the people of Namibia."

The expression "declares" in operative paragraphs 2 and 3 appears to have no other meaning than "decides" [1] and the whole tenor of the language of these two paragraphs indicates that they are intended to be binding decisions. They are essentially in the nature of definitive "findings" or "determinations" on the part of the Council. In the first of these two paragraphs the Council has purported to make a legal finding to the effect that South Africa's presence in South West Africa is illegal and devoid of legal consequence; in the second it has purported to make a finding of fact.

Operative paragraph 4 may also be intended as a binding decision—it represents either a legal or a factual finding. On the other hand, having regard to the expression "considers", this paragraph may perhaps be intended only as a non-definitive expression of opinion or declaration of attitude.

Again, it may be that all three of these paragraphs are intended to be not findings of the Council itself, but merely declarations of attitude made by the Council in pursuance of purported definitive findings of the General Assembly [2]. Or lastly, they may be intended to represent recommendations addressed to South Africa—though the language used renders this alternative most unlikely.

If the paragraphs were intended to be no more than declarations of attitude or non-definitive expressions of opinion they can have no legal effects since, legally, such declarations or expressions are mere neutral statements which more properly belong in the preamble than in the operative part of the resolution. Certainly, they would not impose legal obligations.

If, on the other hand, they were intended by the Council to be definitive and binding determinations of law and fact, as appears likely, they do not achieve their object. In the first place, although a finding or determination of the Council may produce legal effects in the sense that it may in a proper case create the condition precedent for further action by the Council (e.g., where the Council determines the existence of a threat to the peace in terms of Article 39), nevertheless, alone and of itself the finding imposes no legal obligations. For obligations to flow some further act of the Council is necessary (e.g., an injunction to States, based on the finding, to take measures in terms of Article 41). In the second place, since in the present case the Council could only have acted under Chapter VI of the Charter, and since Article 34 is the only Article of that Chapter which authorizes the Council to make a finding or determination, it could only have done this in conformity with the provisions of that Article. And that Article authorizes only one kind of determination—that the continuance of a dispute or situation is likely to endanger the maintenance of

[1] It is to be observed that in Security Council resolution 264 (1969) operative paragraph 2, the Council ". . . *Considers* that the continued presence of South Africa in Namibia is illegal . . ." This appears to be an expression of opinion as opposed to the definitive finding, introduced by the word *declares*, in operative paragraph 2 of resolution 276 (1970).

[2] *Vide*, e.g., General Assembly resolutions 2145 (XXI), operative para. 4; 2372 (XXII), operative paras. 7 and 9; and 2403 (XXIII), operative para. 3. In these paragraphs the Assembly purports to declare South Africa's presence in South West Africa illegal.

international peace and security. It does *not* authorize legal or factual findings of the kind embodied in paragraphs 2, 3 and 4 of resolution 276 (1970). Thus these findings are *ultra vires* the Council even assuming that the resolution was otherwise validly adopted under Chapter VI and they can for this reason, as well as for the first one advanced, impose no legal obligations.

Finally, if the three paragraphs in question were intended, despite their language, to be in the nature of recommendations addressed to South Africa they can, of course, have no greater legal effect than can any other recommendation under Chapter VI—a question which is dealt with below.

50. Operative paragraphs 6 and 9 of resolution 276 (1970) in which the Council respectively *decides* to establish an *ad hoc* sub-committee for certain designated study purposes and *decides* to resume consideration of "the question of Namibia" after receiving the recommendations of the sub-committee, are no doubt binding decisions. But they are "institutional" decisions which relate to the functioning of the Council itself and they impose no legal obligations upon States [1].

51. In operative paragraph 8 of the resolution the Council "*further requests* the Secretary-General to give every assistance to the sub-committee in the performance of its task". Whether this request is really a "request" or an injunction to the "chief administrative officer" of the Organization [2] is irrelevant to the present question since it obviously imposes no legal obligations upon States.

52. In operative paragraph 5 of the resolution, the Security Council—

> "*Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution";

and in operative paragraph 7 of the resolution, the Council—

> "*Requests* all States as well as the specialized agencies and other relevant United Nations organs to give the sub-committee all the information and other assistance that it may require in pursuance of this resolution."

The expression "calls upon" in paragraph 5 may have been intended by the Council to introduce either an injunction or a recommendation. But whatever the intention of the Council, the nature and legal effects of paragraph 5 can only be conclusively determined by reference to the provisions of Chapter VI. *Prima facie*, the powers conferred upon the Council in that Chapter are, except in the case of Article 34, recommendatory only [3] and it would appear, therefore, that paragraph 5 constitutes a recommendation and not an injunction and for the present this will be assumed [4]. Paragraph 7, on the other hand, may be intended as a recommendation or something less than a recommendation. The word "requests" which introduces it is consonant with either alternative. However, since it is probable in the context of the resolution that it was *intended*

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[1] Unless perhaps States can be said to be bound to contribute to the expenses of the sub-committee. In this case, however, the "legal consequences for States" arise otherwise than from "the continued presence of South Africa in Namibia" (*vide* Council resolution 284 (1970)) and therefore do not appear to be immediately germane to the present question.

[2] *Vide* Article 97 of the Charter.

[3] *Vide* particularly the wording of Articles 36 and 37.

[4] The question is further considered in paras. 54-58, *infra*.

as a recommendation and since it cannot and does not purport to be *more* than a recommendation, it will here be treated as a recommendation.

Assuming then that both paragraphs 5 and 7 of the resolution in question constitute recommendations, what is their juridical nature and what are their legal effects? A recommendation is a form of advice or suggestion [1] and its essential characteristics are that it must be addressed to some person or body and that it leaves to that person or body a choice of action. By its very nature it cannot of itself impose upon those to whom it is addressed an obligation to behave in conformity with it [2]. As Judge Winiarski has stated in the context of the Charter:

> "Recommendations are never binding and the United Nations must in all its activities ever have in view that its means of action are thus limited. . . .
>
> It is difficult to see by what process of reasoning recommendations could be held to be binding on States which have not accepted them. It is difficult to see how it can be conceived that a recommendation is partially binding . . . [3]"

A recommendation can have binding force and thus impose legal obligations, only through the operation of some rule of law, as, for example, where the addressee binds himself in advance to carry out the recommendations [4]. Under the Charter, a recommendation of the Security Council can only assume a binding character if a provision of the Charter operates to invest it with that character.

53. The conclusions reached thus far indicate that of all the parts of resolution 276 (1970) only operative paragraphs 5 and 7 may impose legal obligations upon States [5], and it follows that only those two paragraphs may have legal consequences for States. The nature and extent of those consequences will now be considered.

III. The Legal Consequences for States of Resolution 276 (1970)

54. The legal consequences of operative paragraph 5 of resolution 276 (1970)

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[1] According to Judge Bustamante in his dissenting opinion in *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 306:

> "The word recommendation implies suggestion, advice, advisability, usefulness, but not an order or an imperative mandate. Logically, suggestion or advice cannot normally be transformed into an obligation."

[2] *Ibid.*, p. 250 (dissenting opinion of Judge Moreno Quintana); Kelsen, *op. cit.*, pp. 195-196; Dahm, G., *Völkerrecht* (1958), Vol. I, p. 26; Pushmin, E. A., "On the Powers Mediation Activities of the United Nations Security Council in Peaceful Settlement of International Disputes" (in Russian with English Summary), *Sovetskii Ezhegodnik Mazhdunarodnogo Prava* (Soviet Year-Book of International Law) (USSR) (1966-1967), p. 251; *Corfu Channel, Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, pp. 31-32 (joint separate opinion of Judges Basdevant, Alvarez, Winiarski, Zoricić, de Visscher, Badawi and Krylov) and pp. 33-34 (dissenting opinion of Judge Daxner).

[3] Dissenting opinion, *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, pp. 233-234.

[4] *Vide Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 27.

[5] Unless paras. 2, 3 and 4 of the resolution, or some of them, are to be regarded as

will depend upon whether that paragraph is in its essential nature an imperative injunction or only a recommendation. As already stated, it may have been intended by the Council to be either. However, since it could only have been adopted by the Council under Chapter VI of the Charter and, more specifically, under the provisions of Article 36 or 37[1] and since according to the wording of those Articles the Council is empowered to "recommend" and not to "enjoin", the question to be decided is whether there is any provision of the Charter which can be said to invest such recommendations with binding force. The only provision which might appear to do so is Article 25 which provides as follows:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The obligation imposed in this Article is "a specification of the general obligation of the Members stipulated in Article 2, paragraph 5: to give the United Nations every assistance in any action it takes in accordance with the present Charter[2]". It is generally agreed that the obligation extends only to decisions which are taken in accordance with the Charter[3].

55. The pertinent question is whether the word "decisions" in Article 25 means *all* decisions of the Council in the wide sense of that term (and thus including recommendations) or whether it means only such decisions as the provisions of the Charter under which they are taken may be said to characterize as obligatory[4]. It is submitted that the only possible interpretation is the second one.

In the first place, the word "recommend" which is the word used in Article 36, paragraph 1, and in Article 37, paragraph 2, connotes in its ordinary meaning a form of advice or suggestion, which, as already pointed out[5], is not binding upon those to whom it is addressed.

In the second place, it was made clear at the San Francisco Conference that recommendations under Chapter VI of the Charter were to have no binding force, as the following extract from the records of that Conference indicates:

> "The Delegate of Belgium requested a more precise answer to his previously posed question as to whether the term 'recommend' ('recommander') in Chapter VIII, section A [corresponding to the present Chapter VI], *entailed obligations for States*, parties to a dispute, *or whether it meant only that the Council was offering advice which might or might not be accepted.*
>
> The Delegate of the United States expressed agreement with the views of the Delegate of the United Kingdom, and said *he had intended to make it clear that in section A no compulsion or enforcement was envisaged. . . .*

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recommendations addressed to South Africa, which seems improbable when regard is had to the essential characteristics of a recommendation (*vide* para. 49, *supra*).

[1] *Vide* para. 33, *supra*.

[2] Kelsen, *op. cit.*, p. 97.

[3] *Ibid.*, p. 95; Goodrich and Hambro, *op. cit.*, p. 208; *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 304 (dissenting opinion of Judge Bustamante); Shapira, A., "The Security Council Resolution of November 22, 1967 Its Legal Nature and Implications", *Israel Law Review*, Vol. 4, No. 2 (Apr. 1969), pp. 229-241 at pp. 232-233.

[4] Kelsen, for example, states that the word "decisions" in Article 25 is ambiguous and considers either interpretation possible (*op. cit.*, pp. 293 and 444 *et seq.*).

[5] *Vide* para. 52, *supra*.

> The Delegate of Belgium stated that since it now was clearly understood that a recommendation made by the Council under section A of Chapter VIII did not possess obligatory effect, he wished to withdraw the Belgian amendment [1]." (Italics added.)

The significance of this excerpt from the records of the Conference may be deduced from the statement made by four Members of this Court in regard to a comparable excerpt from those records relating to Article 4 of the Charter. They said, with reference to the practice of resorting to *travaux préparatoires* in the interpretation of treaties:

> "... it must be admitted that if ever there is a case in which this practice is justified it is when those who negotiated the treaty have embodied in an interpretative resolution or some similar provision their precise intentions regarding the meaning attached by them to a particular article of the treaty [2]".

56. Moreover, it appears both from the jurisprudence of the Court and from the views of the publicists to be generally accepted that recommendations under Chapter VI have no binding legal force. As one commentator has declared:

> "... it would seem evident that decisions of the Security Council under this Article [25] do not include recommendations made by the Security Council under Chapter VI, as, for example, recommendations of appropriate procedures or methods of adjustment under Article 36 (1) or recommendations of terms of settlement under Article 37 (2). ... It would seem reasonable, then, to limit 'decision' under Article 25 to those decisions by the Security Council which by the terms of the articles under which they are taken create obligations for Members [3]."

57. Finally, statements made in the Security Council itself bear out this interpretation [4]. The debate in connection with the Greek Frontier Incidents provides perhaps the best illustration. There the question arose whether a decision by the Council to conduct an investigation in terms of Article 34 was

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[1] UNCIO docs., Vol. XII, p. 66. *Vide* also *ibid.*, pp. 48, 162, 380 and 507; *ibid.*, Vol. XI, p. 84; Goodrich and Hambro, *op. cit.*, pp. 208-209; Kelsen, *op. cit.*, p. 444, footnote 3.

[2] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, I.C.J. Reports 1947-1948*, p. 87 (joint dissenting opinion of Judges Basdevant, Winiarski, McNair and Read).

[3] Goodrich and Hambro, *op. cit.*, pp. 208-209. *Vide* also Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council*, pp. 110-111; Nicholas, H. G., *The United Nations* (1967), pp. 86-87; Di Quai, L., *Les Effets des Résolutions des Nations Unies* (1967), pp. 79 and 81; Vallat, F., "The Peaceful Settlement of Disputes", *Cambridge Essays in International Law* (1965), pp. 161-162; *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 295 (dissenting opinion of Judge Bustamante) and pp. 233-234 (dissenting opinion of Judge Winiarski); *Corfu Channel, Preliminary Objections, Judgment, I.C.J. Reports 1947-1948*, pp. 31-32; Bindschedler, *Recueil des cours*, Vol. 108, No. 1 (1963), p. 345; Shapira, *Israel Law Review*, Vol. 4, No. 2 (Apr. 1969), pp. 231-232 and 235; Bentwich, N., and Martin, A., *A Commentary on the Charter of the United Nations* (1951), p. 63; Kahng, Tae Jin, *Law, Politics and the Security Council* (1964), pp. 13-14; Bowett, D. W., *The Law of International Institutions* (1963), p. 32; and Schwarzenberger, G., *A Manual of International Law*, 5th edition (1967), p. 293.

[4] *Vide* Jiménez de Aréchaga, *op. cit.*, p. 111.

a decision in the sense of Article 25 or merely a recommendation. Those members of the Council *opposed* to the establishment of the commission argued that all resolutions under Chapter VI were merely recommendations and that States which did not carry them out bore only a moral responsibility; that it was only measures under Chapter VII which took on a binding quality; that the singular nature of the latter measures were attested in Article 2 (7) which affirmed the principle of non-intervention in matters essentially within the domestic jurisdiction of a State *save* in the application of enforcement measures under Chapter VII; and that if Chapter VI measures were obligatory, a State which failed to comply with them would automatically be liable to other measures of a compulsory character—in which event Chapter VI would lose its significance and meaning.

Those members who *favoured* the establishment of a commission did not deny these propositions except in regard to a determination under Article 34, which they considered to be a binding decision. It was stated that Chapter VI conferred two distinct powers upon the Council—the power of conciliation and the power of investigation. The conciliatory powers "could not be enforced upon the States concerned". This power, "by definition, could not encroach upon what the various States might finally decide to accept or reject. It implied voluntary co-operation . . ."[1]

58. It is submitted, then, that a recommendation under Chapter VI is not a "decision" within the meaning of Article 25 and that therefore it has no binding force for the States to which it is addressed. That being so, whatever the intention of the Council might have been, paragraph 5 of resolution 276 (1970) cannot be characterized as an injunction but can only be a recommendation. It follows that that paragraph as well as paragraph 7 of the resolution, which can also be no more than a recommendation[2], does not impose upon "all States" the obligation to comply with their terms.

59. That is not to say, however, that these two paragraphs have no effect whatsoever. For Article 2, paragraph 2, of the Charter imposes upon all Members of the Organization the duty to "fulfil in good faith the obligations assumed by them in accordance with the present Charter". And the requirements of good faith would seem to postulate that member States should consider recommendations seriously and in good faith[3] and decide for themselves whether to implement them or not.

IV. Conclusion

60. The conclusion is that only operative paragraphs 5 and 7 of Security Council resolution 276 (1970) can have legal consequences for States. Since, however, the paragraphs in question embody mere recommendations made by the Council under the provisions of Chapter VI of the Charter and since such recommendations do not involve a binding legal obligation to comply with them, States are not obliged to give effect to their provisions. The only con-

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[1] *Repertory of United Nations Practice*, Vol. II (1955), pp. 237-239, paras. 46-47.

[2] *Vide* para. 49, *supra*.

[3] In *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 88, Judge Klaestad in his separate opinion stated that "a duty of such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation". *Vide*, however, the separate opinion of Judge Lauterpacht (*ibid.*, pp. 118-119).

sequences which the resolution has for States is, therefore, that such States as are Members of the United Nations Organization should consider the recommendations contained in paragraphs 5 and 7 in good faith and decide for themselves whether or not to carry them out.

G. Conclusion

61. For the reasons set out in this Chapter, it is submitted that all the relevant resolutions of the Security Council, and in particular resolution 276 (1970), are invalid and of no legal effect in that they are based upon General Assembly resolution 2145 (XXI) which is itself invalid; that the Council resolutions were in any event invalid because they were not adopted in conformity with the provisions of Chapter VI of the Charter—which was the only chapter under which the Council could have acted; and that in so far as resolution 276 (1970) is concerned, even if it *can* be said to be valid, only its operative paragraphs 5 and 7 can have legal consequences for States and then only to the extent that States should consider the recommendations contained therein in good faith and decide for themselves whether to implement them or not.

Annex

SECURITY COUNCIL RESOLUTION 276 (1970)

The Security Council,

Reaffirming the inalienable right of the people of Namibia to freedom and independence recognized in General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming General Assembly resolution 2145 (XXI) of 27 October 1966, by which the United Nations decided that the mandate of South-West Africa was terminated and assumed direct responsibility for the territory until its independence,

Reaffirming Security Council resolution 264 (1969) which recognized the termination of the mandate and called upon the Government of South Africa immediately to withdraw its administration from the territory,

Reaffirming that the extension and enforcement of South African laws in the territory together with the continued detentions, trials and subsequent sentencing of Namibians by the Government of South Africa constitute illegal acts and flagrant violations of the rights of the Namibians concerned, the Universal Declaration of Human Rights and of the international status of the territory, now under direct United Nations responsibility,

Recalling Security Council resolution 269 (1969),

1. *Strongly condemns* the refusal of the Government of South Africa to comply with General Assembly and Security Council resolutions pertaining to Namibia;

2. *Declares* that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid;

3. *Declares further* that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations;

4. *Considers* that the continued occupation of Namibia by the Government of South Africa in defiance of the relevant United Nations resolutions and of the United Nations Charter has grave consequences for the rights and interests of the people of Namibia;

5. *Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution;

6. *Decides* to establish in accordance with rule 28 of the provisional rules of procedure an *ad hoc* sub-committee of the Council to study, in consultation with the Secretary-General, ways and means by which the relevant resolutions of the Council, including the present resolution, can be effectively implemented in accordance with the appropriate provisions of the Charter, in the light of the flagrant refusal of South Africa to withdraw from Namibia, and to submit its recommendations by 30 April 1970;

7. *Requests* all States as well as the specialized agencies and other relevant

United Nations organs to give the sub-committee all the information and other assistance that it may require in pursuance of this resolution;

8. *Further requests* the Secretary-General to give every assistance to the sub-committee in the performance of its task;

9. *Decides* to resume consideration of the question of Namibia as soon as the recommendations of the sub-committee have been made available.

(UN doc. S/RES/276 (1970), 30 Jan. 1970.)

CHAPTER VI

INTRODUCTION TO THE CONTENTIONS CONCERNING GENERAL ASSEMBLY RESOLUTION 2145 (XXI)

1. General Assembly resolution 2145 (XXI) reads as follows:

"*The General Assembly*,

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

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

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

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

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

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

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

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

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

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

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

1. *Reaffirms* that the provisions of General Assembly resolution 1514 (XV) are fully applicable to the people of the Mandated Territory of

South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;

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

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

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

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

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

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

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

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

10. *Requests* the Secretary-General to provide all the assistance necessary to implement the present resolution and to enable the *Ad Hoc* Committee for South West Africa to perform its duties [1]."

The crux of this resolution lies in operative paragraph 4, the legal effect of which (if any) will be considered in the present and succeeding chapters of this written statement.

2. It is necessary at the outset to have clarity as to the capacity in which the General Assembly purported to act in passing resolution 2145 (XXI), and in particular whether the General Assembly claimed the authority to take the action in question otherwise than as purported successor to the Council of the League of Nations as supervisory authority in respect of the Mandate for South West Africa.

The resolution itself contains references to conduct allegedly contrary to the Charter and the Universal Declaration of Human Rights [2] and places considerable emphasis on General Assembly resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and

[1] GA resolution 2145 (XXI), 27 Oct. 1966, in *GA, OR*, Twenty-First Sess., Sup. No. 16 (A/6316), pp. 2-3.

[2] Preambular para. 5.

Peoples) [1]. However, if resolution 2145 (XXI) is read as a whole, it is apparent that the General Assembly did not rely on the Charter and the two Declarations [2] as by themselves providing authority for the measures set out in operative paragraph 4 of the resolution. Thus the preamble recalls the 1950, 1955 and 1956 Opinions and 1962 Judgment of this Court which are said to have "established the fact that South Africa continues to have obligations under the Mandate ... and that the United Nations as the successor to the League of Nations has supervisory powers in respect of South West Africa [3]"; it expresses concern at the "situation in the Mandated Territory [4]"; it refers to the reports of the various committees "which had been established to exercise the supervisory functions of the United Nations" over the administration of the Territory [5]; it expresses a conviction that the administration of the Territory has been conducted "in a manner contrary to the Mandate, the Charter ... and the Universal Declaration of Human Rights [6]" and it considers that 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 ... have been of no avail [7]". The main emphasis in the preamble is on the existence of the Mandate; on supervisory powers in respect thereof, said to be exercisable by the General Assembly; and on alleged violations of the Mandate obligations by South Africa. This appears also from the operative part of the resolution, particularly paragraphs 2 and 3, leading up to 4.

3. It is apparent therefore that the General Assembly purported to exercise a power of terminating (in the sense of revoking) [8] the Mandate which it considered appertained to it as successor to the supervisory powers previously vested in the Council of the League of Nations. The references to the two Declarations and the Charter were probably intended to bolster the contention that South Africa had committed a breach of the Mandate, and to justify the remedial action envisaged in the resolution: they do not appear to have been offered as providing a legal basis independent of the Mandate for the Assembly's action in operative paragraph 4.

4. It is, indeed, clear that any reliance on the said instruments as an independent basis for the action of the General Assembly would have been misconceived. Breaches of the Charter would not by themselves have entitled the General Assembly to sever the bonds between a State and a territory subject to its control, or to bring such a territory under the direct responsibility of the United Nations. The Charter clearly does not bestow such powers [9]. The same applies to the Universal Declaration of Human Rights, which in fact does not purport to grant any powers at all to the General Assembly or even to impose

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[1] *Vide* preambular paras. 1 and 7 and operative para. 1. The text of the latter resolution is attached as an annex to this Chapter and the background to its adoption is sketched in Chap. XI below.

[2] I.e., the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

[3] Second preambular para.

[4] Third preambular para.

[5] Fourth preambular para.

[6] Fifth preambular para.

[7] Eighth preambular para.

[8] *Vide* Chap. VII, para. 65, *infra*.

[9] As to the powers of the General Assembly in respect of matters such as these, *vide* Chapter X, *infra*. Particular powers of the Security Council and the General Assembly to suspend or terminate membership of the United Nations in cases of breaches of the Charter (Arts. 5 and 6) are not relevant to the present topic.

legal obligations on Members of the United Nations. And whatever recommendatory effect the Declaration on the Granting of Independence to Colonial Countries and Peoples may have as a resolution of the General Assembly [1], it does not seek to impose obligations or confer authority on the General Assembly.

5. It is accordingly on a claim of *supervisory powers* in respect of the Mandate for South West Africa that resolution 2145 (XXI) was sought to be based. The General Assembly did not purport to act by virtue of any other right or in any other capacity. In particular, it must be emphasized that the General Assembly did not purport to act as a *contractual party* to a mandate treaty and to terminate such treaty by reason of an alleged material breach thereof by South Africa. Indeed, this Court itself has never found that the United Nations was a party to any mandate "treaty". On the contrary, the findings of the Court (particularly when overruling the South African Preliminary Objections in 1962) implicitly refute any such notion. This aspect will be further considered in the succeeding paragraphs.

6. When the legal position relative to the Mandate for South West Africa first came before the Court in 1950, the Court was concerned merely to ascertain whether the Mandate was still in existence, and, if so, what the international obligations of South Africa were in respect thereof [2]. The Court distinguished between two types of obligations originally assumed under the Mandate, as follows:

> "One kind was directly related to the administration of the Territory, and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation *and was closely linked to the supervision and control of the League. It* corresponded to the 'securities for the performance of this trust' referred to in the same article [3]."

As regards the former class, the Court said:

> "Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist [4]."

In the words of Sir Arnold McNair:

> "In short, the Mandate created a status for South-West Africa. This fact is important in assessing the effect of the dissolution of the League. This status—valid *in rem* —supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League [5]."

In its reasoning and finding on this aspect, the Court did not consider whether the obligations in question derived their legal effect from international

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[1] *Vide* Chap. X, *infra*, as to the recommendatory effect of General Assembly resolutions (save for immaterial exceptions).

[2] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 129.

[3] *Ibid.*, p. 133. Similar distinctions were drawn in the separate opinions of Judge McNair at pp. 156-157 and 158, and Judge Read at pp. 164-165.

[4] *Ibid.*, p. 133.

[5] *Ibid.*, pp. 156-157. *Vide* also Judge Read at pp. 165-166.

agreement; who the parties to any such agreement might have been; or whether any such agreement (as distinct from rights and obligations which had already accrued thereunder) had survived the dissolution of the League of Nations. These questions were irrelevant to the Court's task on that occasion.

7. As regards the second class of obligations, the Court held that supervisory functions were to be exercised by the United Nations, to which the annual reports were to be submitted. This finding will be dealt with in detail below [1]. At present it will suffice to note that although the Court apparently reached its conclusion by implying an agreement among certain States (including South Africa) in 1945-1946 to effect a substitution of supervisory organs, the Court did not specifically advert to the question who the parties to such an agreement were. Again this question was not directly relevant to the Court's task.

8. The questions whether the Mandate derived its legal force and effect from agreement, and, if so, who the parties to any such agreement were, both before and after the dissolution of the League, were first pertinently raised in the Preliminary Objections in the *South West Africa* cases. They became of importance by reason of Article 37 of the Court's Statute which effected a substitution of Courts where "a treaty or convention in force" provided for reference of a matter to the Permanent Court of International Justice. Such a reference was contained in Article 7 (2) of the Mandate in respect of "any dispute whatever . . . between the Mandatory and another Member of the League of Nations".

The South African contentions in the Preliminary Objection proceedings were (in so far as relevant) that the Mandate never was a treaty or convention, but owed its legal force to an administrative or quasi-legislative act of the Council of the League acting in terms of Article 22 (8) of the Covenant. Alternatively, it was contended, if the Mandate had been a treaty or convention at its inception, it no longer was in force *as a treaty or convention* after dissolution of the League (whatever might have been the position of its "real" or "objective" aspects) since the only possible parties thereto (save South Africa itself) were the League as an institution and its Members in their capacities as such, all of which would have fallen away as parties on dissolution of the League. Moreover, it was contended, there was, after such dissolution, no longer any "member of the League of Nations" entitled to invoke Article 7 (2) of the Mandate.

9. The Applicants (Ethiopia and Liberia) contended that the Mandate had from its inception been a treaty or convention conferring rights and interests on the League and its Members. On dissolution of the League of Nations, they contended, it remained a treaty or convention on one of two alternative bases, viz., on the basis *either* that a succession had occurred of the United Nations and its Members to the rights and interests previously enjoyed by the League and its Members, *or*, *alternatively*, that the States Members of the League at its dissolution remained vested with rights in their individual capacities as parties to a mandate agreement [2].

10. The Court held in 1962 that the Mandate had initially been an agreement "between the Mandatory and the Council representing the League and its Members [3]" and said:

"The Mandate for South West Africa . . . is an international instrument

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[1] *Vide* Chap. IX, *infra*.

[2] *Vide I.C.J. Pleadings, South West Africa*, Vol. I, pp. 443-449 (Observations).

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 331.

of an institutional character, to which the League of Nations, represented by the Council, was itself a Party [1]."

The Court did not, however, proceed from this basis to find in favour of the Applicants' main contention that the United Nations and its Members had succeeded to the contractual rights previously (on the Court's finding) enjoyed by the League and its Members. On the contrary, it accepted the Applicants' alternative contention and based its finding largely on the League resolution of 18 April 1946 which, the Court held, "was adopted precisely with a view to . . . continuing the Mandate *as a treaty between the Mandatory and the Members of the League of Nations* [2]". (Italics added.)

11. In the proceedings on the merits of the *South West Africa* cases, South Africa contended that the 1962 Judgment was incorrectly decided in the respects now under discussion, and presented detailed argument in support of its contentions [3]. The South African Government abides by these contentions which it requests should be regarded as incorporated herein, and submits that, they in themselves refute any suggestion that in 1966 (when resolution 2145 (XXI) was passed) there could still have been (if there ever was) any contractual party to the Mandate save South Africa itself. For present purposes, however, it should be stressed that even if the 1962 Judgment were correct, it identified the contractual parties to the Mandate, since the demise of the League, as South Africa and the other States who were Members of the League at its dissolution, and in effect rejected any suggestion that the United Nations was to be regarded as a party thereto.

12. The resolution can in no way be regarded as an act of the contracting parties as identified in the 1962 Judgment. Firstly, it cannot even be said that all States, save South Africa, who were Members of the League at its dissolution expressed themselves in favour of resolution 2145 (XXI)—one such State (Portugal) voted against, and two (France and the United Kingdom) abstained. Four such States, not being members of the United Nations, or no longer being in existence, were not represented (Switzerland, Lithuania, Latvia and Estonia).

13. Secondly, even if all States, save South Africa, who had been Members of the League at its dissolution had voted in favour of resolution 2145 (XXI), the resolution could not have been justified on the basis of rights or powers vested in such States by reason of their former membership of the League. The resolution clearly did not purport to be anything other than an act of the General Assembly operating as part of the whole system established by the Charter [4]. It would be ludicrous to regard the resolution as a decision taken at a meeting of the States which were Members of the League at its dissolution, plus in addition a large number of other States which had no rights in the matter but nevertheless participated actively in accordance with a constitution (the Charter) which, on this hypothesis, was not applicable to the proceedings. The resolution moreover included matters within the concern of the General Assembly and foreign to a gatheringof ex-League Members as such, e.g., paragraphs 1, 5, 6, 8, 9 and 10. The action of the General Assembly in passing resolution 2145 (XXI) must accordingly be justified by reference to powers vested in the Assembly, or else it cannot be justified at all.

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 332.
[2] *Ibid.*, p. 341, read with the reference to this resolution at p. 334.
[3] *Vide I.C.J. Pleadings, South West Africa*, Vol. II, pp. 193 *et seq.*
[4] Note in particular the last paragraph of the preamble, in which the General Assembly is concerned to affirm *its* right "to take appropriate action in the matter".

14. A further factor in support of the conclusion stated in the immediately preceding paragraph, is that even during the lifetime of the League of Nations, the individual Members of the League had no legal right or interest in ensuring compliance by the Mandatory with the obligations imposed by the Mandate in favour of the indigenous inhabitants of the Territory [1]. Clearly they could not have had greater rights after the dissolution of the League [1].

It follows that a violation of any of these obligations (as claimed in operative para. 3 of the resolution) would not have constituted a breach of the Mandate *as against the individual Members*, and would therefore not have justified a cancellation of the Mandate by them.

15. Brief consideration must also be given to the extent of the contractual rights vesting in the League of Nations as an organization distinct from its Members [2]. According to the 1962 Judgment, the League was a party to a mandate agreement together with its individual Members [3]. As a contractual party, the League would therefore have been only one of the parties to a multilateral treaty and would accordingly not have been entitled to terminate the treaty unilaterally—the consent of the other parties would have been required [4]. Had the United Nations replaced the League as a contractual party to a mandate agreement, the same situation would have existed—the United Nations would have required the consent of the other parties to the multilateral treaty (namely on the Court's finding, the States Members of the League at its dissolution) for a cancellation of the treaty. And, as shown above, the former Members of the League did not as such play any role in the purported termination. But be that as it may: whatever the rights of the United Nations might have been had it replaced the League as a contractual party to the Mandate, seems of academic interest only in view of the fact that the Court did not find in 1962 that any such substitution had occurred, and, on the contrary, seemed to reject such a notion by declining to accept the succession argument advanced by the Applicants. And, as noted, the 1950 Opinion was not concerned with this issue at all.

16. The position then is that resolution 2145 (XXI) was based squarely on powers claimed to vest in the General Assembly as successor to the supervisory functions previously exercised by the Council of the League of Nations. In the chapter succeeding the present one, the South African Government will set out its reasons for contending that resolution 2145 (XXI) cannot be justified on any such basis. Chapter VII contains an examination of the mandates in their historical context from which it will appear that the supervisory powers which vested in the Council of the League did not include any power of unilateral revocation in the event of violations of the mandate by a mandatory, nor did they include any power to assume direct control over any mandated territory. Moreover, that Chapter will indicate that the obligations of a mandatory to submit to supervision were not of the nature of international accountability in a general sense but were specifically and intentionally defined with reference to specific organs of a particular organization; and that by reason neither of their content, nor of any rule of law applicable thereto, could they therefore

[1] *Vide South West Africa, Second Phase, Judgment, I.C.J. Reports 1966.*

[2] We are not now concerned with the supervisory functions in respect of mandates which the League exercised through its appropriate organs. This will be dealt with in Chap. VII below.

[3] *Vide* para. 10, *supra.*

[4] *Vide* Art. 60 of the Vienna Convention on the Law of Treaties, in UN doc. A/CONF. 39/27 (23 May 1969), pp. 28-29.

have survived the dissolution of the League in the sense that they would thereafter have been owed to some other organ of a different organization. Chapter VIII will be devoted to a demonstration that the supervisory powers of the Council of the League (whatever ambit such powers may have had) did not pass to the General Assembly of the United Nations by virtue of any agreement concluded during the period of the establishment of the United Nations or the dissolution of the League, or thereafter. These two chapters will thus between them cover the various methods whereby a transfer of supervisory powers might possibly have been effected. The conclusions reached in them are contrary to that expressed by the majority of this Court in 1950; and the Opinions and Judgments in 1955, 1956, 1962 and 1966 also contain much which is of relevance to this topic. It has accordingly been found convenient to devote a separate chapter (Chap. IX) to the previous pronouncements of this Court on the question whether a substitution of supervisory organs occurred on dissolution of the League. In Chapter X the Government of South Africa will give its reasons for contending that resolution 2145 (XXI) is in any event *ultra vires* the General Assembly in terms of the Charter. In the last chapter of this written statement (Chap. XI) the Government of South Africa will advert to the factual situation in South West Africa. The purpose thereof will be to demonstrate that, whatever the legal position might be, there was no factual justification for the claim made in the resolution that South Africa had violated the substantive obligations contained in the Mandate. Indeed, it will be shown that the General Assembly, though invited to do so by the South African representatives, did not enquire adequately into the facts in order to come to a proper conclusion on this score, nor did the Security Council in the proceedings leading up to its resolutions on South West Africa [1]. In this regard, the discussion of the facts will show that for some years the majority of Members in the United Nations have not been interested in the merits of the South African administration in South West Africa, or in the standard of material, moral or social well-being of its inhabitants, but have engaged in a campaign aimed at securing independence of the Territory (on the basis of a single political unit) as an end in itself irrespective of all other considerations.

Moreover, if any of the relevant resolutions of the Security Council or the General Assembly were to be regarded, contrary to the submissions of the South African Government, as embodying valid recommendations calling on South Africa to abandon its administration of South West Africa, the factual exposition in Chapter XI will demonstrate that compliance with any such recommendation would operate to the grave detriment of the inhabitants of the Territory.

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[1] These resolutions are considered in Chap. V, *supra*.

Annex

Declaration on the Granting of Independence to Colonial Countries and Peoples

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to

the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

(GA resolution 1514 (XV), 14 Dec. 1960, in *GA, OR*, Fifteenth Sess., Sup. No. 16 (A/4684), pp. 66-67.)

CHAPTER VII

HISTORY AND CONTENT OF THE MANDATE

A. Introductory

1. This Chapter is devoted to a consideration of the history and content of the Mandate in the context of the dispositions effected at the termination of the First World War. The purpose of this exposition is to ascertain the ambit of the reciprocal powers and obligations in respect of the mandates of the League, on the one hand, and, on the other, of the various mandatories. The grounds of relevance of this topic have already been considered above [1] and require only brief mention herein. Resolution 2145 (XXI) which underlies all subsequent United Nations action regarding South West Africa, was based upon powers which alleged to have vested in the General Assembly as successor to supervisory functions previously exercisable by the Council of the League of Nations. The nature of the supervisory functions of the League (and the corresponding obligations of the mandatories) accordingly has a bearing on the validity of the resolution 2145 (XXI) in several vital respects.

It is relevant firstly to the whole issue of succession, and in particular to the question whether the obligation of accountability under the Mandate was such that, on dissolution of the League, a substitution of the General Assembly as supervisory organ could have occurred without fresh consent on the part of a Mandatory. The South African Government will demonstrate herein that such a substitution could not have been effected as a result of the application of express or implied terms of the Mandate, or of any objective legal rule applicable to the Mandate. Whether a succession of supervisory organs occurred by the operation of consent given subsequently to the establishment of the mandates system, will be considered in Chapter VIII below, where it will be submitted that the answer must be in the negative.

2. But even if it were to be held, contrary to the contentions advanced by the South African Government, that the General Assembly did succeed to the supervisory functions of the Council of the League, the Court will still have to consider whether the Council was vested with the specific powers purported to have been exercised in resolution 2145 (XXI). In particular, the question arises whether the Council itself was legally entitled to revoke the Mandate for South West Africa; a question which is dealt with below. For reasons there stated, it is contended that the Council of the League possessed no such power.

3. From the foregoing it is apparent that an analysis of the respective rights and obligations of the League Council and the various mandatories has an important bearing on different aspects of the argument presented by the South African Government in this written statement. Since, however, the same instruments and events would have to be considered in regard to both the relevant aspects (i.e., those relating to supervision and revocation), it has been found convenient to devote this separate chapter to the history and contents of the Mandate.

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[1] *Vide* Chap. VI, *supra*.

The next three sections hereof will be devoted to the history of the mandates system, the framing of the Mandate for South West Africa and the manner in which the League of Nations exercised its supervisory functions in respect of mandates. These sections thus contain matter which is mainly historical. Thereafter follows an analysis of the Mandate for South West Africa. The final two sections of this Chapter are directed to the content of the mandatory's obligation to report and account to organs of the League, and to the extent of the League's competence, if any, to revoke mandates, substitute mandatories or assume direct administration of mandated territories.

B. History and Origin of the Mandates System

4. Although the term "mandate" had been used before in regard to certain international relationships [1], it first acquired a special meaning in international law when the mandates system of the League of Nations was instituted. This system originated, together with the League, from the peace settlements effected after the First World War. As Quincy Wright remarked:

> "This system, like most other political innovations, was not a product of disinterested juristic thought nor of detached scientific investigation but was a compromise invented by the Versailles statesmen to meet an immediate political dilemma [2]."

5. The dilemma which required resolution by compromise involved, briefly, a clash of views and aspirations within the ranks of the Allied and Associated Powers relative to the future of territories and colonies conquered from enemy powers during the war.

6. Among such territories was German South West Africa, which had been surrendered to South African military forces in July 1915 as a result of which South Africa remained in military occupation for the remainder of the war and thereafter pending the peace settlements. Similar situations obtained in respect of other territories conquered and occupied by other Allied and Associated Powers. These included, *inter alia*, the former German colony in New Guinea, which was occupied by Australia; that in Samoa, by New Zealand; the German islands in the Pacific Ocean north of the Equator, by Japan; and various German territories elsewhere in Africa, by Great Britain, Belgium and France. Further north, various portions of the Ottoman Empire were in Allied occupation.

7. During the war, secret treaties and agreements were made between some of the Allies whereby their respective claims to various occupied territories were to be recognized in the event of an Allied victory. And the British Imperial War Cabinet decided in March 1917 that the three Dominions, Australia, New Zealand and South Africa, should be allowed to annex the above-mentioned

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[1] In this respect *vide* Hall, H. D., *Mandates, Dependencies and Trusteeship* (1948), pp. 17 *et seq.* and "The Trusteeship System", *B.Y.B.I.L.*, Vol. XXIV (1947), pp. 44-46; Wright, Q., *Mandates Under the League of Nations* (1930), pp. 15-23; Schneider, W., *Das Völkerrechtliche Mandat* (1926), pp. 14 *et seq.*; Mohr, E. G., *Die Frage der Souveränität in den Mandatsgebieten* (1928), p. 4; Temperley, H. W. V., *A History of the Peace Conference of Paris* (1920-1924), Vol. VI, p. 502; Kennedy, W. P. M., and Schlosberg, H. J., *The Law and Custom of the South African Constitution* (1935), pp. 514-515; Rolin, H., "Le Système des Mandats Coloniaux", *R.D.I.*, Vol. XLVII (1920), No. 1, pp. 356-357.

[2] Wright, *op. cit.*, p. 3.

occupied territories, adjacent to their own, namely German New Guinea, German Samoa and German South West Africa respectively [1].

On the other hand, certain proposals for international control of conquered colonies, some of them even relating to all colonies [2], were also made during the war years.

In 1918, G. L. Beer, historian and adviser to President Wilson of the United States of America, connected such proposals with others then current for the establishment of the League of Nations. He proposed a mandates system for Mesopotamia and certain of the German colonies, urging that the administration of these areas should be entrusted to "different States acting as mandatories of the League of Nations [3]". Beer considered, however, that the mandates system could not be applied to South West Africa and recommended that this region be incorporated in the Union of South Africa [4].

8. The United States of America was not a party to the secret treaties and agreements mentioned above; she entered the war after most of them had been concluded. At the termination of the war President Wilson strongly advocated a policy of "no annexations"; as will be shown, he went to the Paris Peace Conference determined to secure application of the proposed mandates system in an extreme form, to *all* ex-enemy colonies and possessions.

In October 1918 Colonel House, who had been chosen by the President as a member of the American delegation to the Peace Conference [5], met with Mr. Lloyd George and gained British acceptance of the trusteeship principle for all enemy territories, with the exception of South West Africa and the Asiatic Islands. The British Prime Minister stated that these territories would have to go to South Africa and Australia respectively, since if this did not happen he might be confronted by a revolution in those Dominions [6]. According to Mr. Lloyd George the Dominions were not prepared to give up any of the colonies conquered by them during the war and contiguous to their own territories [7].

Three weeks after the war ended, on 11 November 1918, President Wilson left for Europe. In the course of a meeting aboard ship the President stated that "the *German colonies should be declared* the *common property* of the *League of Nations and administered by small nations*. The *resources* of each Colony should be *available to all members of the League* . . . [8]"

9. In December 1918 General Smuts published a pamphlet in which he, like Beer, linked a proposed mandates system with a proposed League of Nations [9]. He limited his proposals to "territories formerly belonging to Russia, Austria-

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[1] *Vide* Lloyd George, D., *The Truth about the Peace Treaties* (1938), Vol. I, pp. 114-123 and Vol. II, p. 766; Spiegel, M., *Das Völkerrechtliche Mandat und seine Andwendung auf Palästina* (1928), pp. 8-9; Temperley, *op. cit.*, Vol. I, p. 195; Logan, R. W., *The African Mandates in World Politics* (1948), pp. 1-2; Townsend, M. E., *The Rise and Fall of Germany's Colonial Empire* (1930), pp. 363-369, 377-378.

[2] *Vide* Hobson, J. A., *Towards International Government* (1915). *Vide* also the discussion by Potter, P. B., "Origin of the System of Mandates under the League of Nations", *A.P.S.R.*, Vol. XVI, No. 4 (Nov. 1922), pp. 563-583.

[3] Beer, G. L., *African Questions at the Paris Peace Conference*, ed. by L. H. Gray (1923), p. 431.

[4] *Ibid.*, p. 443.

[5] Tillman, S. P., *Anglo-American Relations at the Paris Peace Conference of 1919* (1961), p. 59.

[6] *Vide For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. I, p. 407.

[7] Lloyd George, *op. cit.*, Vol. I, p. 114.

[8] *Vide* Miller, D. H., *The Drafting of the Covenant* (1928), Vol. I, p. 43.

[9] Smuts, J. C., *The League of Nations: A Practical Suggestion* (1918), p. 15.

Hungary and Turkey". As far as these territories were concerned, he proposed that the League of Nations should be considered as the reversionary in the most general sense and as clothed with the right of ultimate disposal in accordance with certain fundamental principles. He expressly excluded the "German colonies in the Pacific and Africa", since in these cases "it would be impracticable to apply any ideas of political self-determination in the European sense [1]". General Smuts furthermore proposed in regard to the territories to which he intended the mandates system to apply:

(a) that any authority, control or administration which might be necessary in respect of those territories and peoples, other than their own self-determined autonomy, should be the exclusive function of and vested in the League of Nations and exercised by or on behalf of it;

(b) that it should be lawful for the League of Nations to delegate its authority, control or administration in respect of any people or territory to some other State which it might appoint as its agent or mandatory; and

(c) that the degree of authority, control or administration exercised by the mandatory State should in each case be laid down by the League in a special act or charter, which should reserve to the League complete power of ultimate control and supervision, as well as the right of appeal to it from the territory or people affected against any gross breach of the mandate by the mandatory State.

10. Towards the end of December 1918 President Wilson had a discussion with Mr. Lloyd George in London. The President agreed that the German colonies should not be returned to Germany but stated that each should be put under some Power acting as a mandatory. Mr. Lloyd George impressed upon the President the distinction between the German colonies conquered by the British Dominions and adjacent to them, and those in the conquest of which the forces of the Empire as a whole had shared. He pointed out that it would be quite impossible to separate South West Africa from the Union of South Africa because the former was essentially part of South Africa. The President did not seem prepared to contest that contention but retorted that the position of Australia with regard to the Pacific colonies was not quite the same. In answer to an argument based on grounds of security the President answered that a case on similar grounds might be made out for every other captured territory [2].

11. After his meeting with Mr. Lloyd George, President Wilson went to Paris where he drew up a draft Covenant in which he incorporated much of the thought and language of General Smuts. This draft document was known as Wilson's First Paris Draft. In this draft the President suggested the extension of the mandates system to all German colonies, including those in Africa and the Pacific. Like General Smuts, the President proposed that any authority, control or administration which might be necessary in respect of the said territories should be the exclusive function of the League of Nations, which should in each case explicitly define the degree of authority, control or administration to be exercised by the mandatory State, whilst reserving to itself complete power of supervision and of ultimate control. The draft also proposed that there should be reserved to the people of any such territory the right to appeal to the League of Nations for the redress and corrections of any breach of the

[1] Smuts, *op. cit.*, pp. 12 and 15.
[2] Lloyd George, *op. cit.*, Vol. I, pp. 190-191.

mandate by the mandatory State. Provision was also made for the possible conferment of mandates on "organized agencies" other than States, and for the substitution of mandatories (being States or "organized agencies") by the League [1].

12. From the above, the makings of conflict at the Paris Peace Conference will be manifest. The future of the German Colonies was discussed as from 24 January 1919, in the "Council of Ten", which consisted of the heads of government and foreign ministers of the United States of America, the United Kingdom, France, Italy and Japan. Representatives of Australia, New Zealand and South Africa were allowed to be present and to express their views at the discussions concerning the future of the former German Colonies in New Guinea, Samoa and South West Africa.

There was fairly general agreement that a mandates system was to be established. The controversy concerned the content of such a system, and particularly the peoples and territories to which it was to be applied, especially inasmuch as there was general recognition of the wide differences between the various peoples and territories concerned, ranging from, on the one hand, developed societies to, on the other, peoples still living in Stone Age conditions [2].

13. At the Peace Conference the discussion relating to colonial territories was opened by Mr. Lloyd George on 24 January 1919. He said that two or three methods had been proposed regarding the manner in which these territories should be dealt with. The first was internationalization or control by the League of Nations. It was generally agreed, however, that these territories could not be directly administered internationally. Therefore, it had been suggested that some single nation should undertake the trusteeship on behalf of the League as mandatory. The conditions of the trust would include a stipulation that the territories should be administered, not in the interests of the mandatory, but in the interests of all the nations in the League. There would also, no doubt, be a right of appeal to the League of Nations if any of the conditions of the trust were broken, for instance, if the missionaries or concessionaries of any nation complained of unfair treatment.

The next alternative, according to Mr. Lloyd George, was frank annexation. He stated that the German colonies conquered by Australia, New Zealand and South Africa would be dealt with in detail by the Ministers representing those Dominions, but pointed out that South West Africa was contiguous to the territories of the Union. He went on to say:

> "There was no real natural boundary and unless the Dutch and British population of South Africa undertook the colonization of this area it would remain a wilderness. If the Union were given charge of German South West Africa in the capacity of a Mandatory there would be in a territory, geographically one, two forms of administration. It was questionable whether any advantage would be derived from this division capable of outweighing its practical difficulties [3]."

14. On 25 January 1919 Lord Robert Cecil circulated a British "Draft Convention regarding Mandates" which distinguished between two categories

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[1] Miller, *op. cit.*, Vol. II, pp. 88-89.

[2] *Vide For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 786. According to an article in the *United Nations Review* of September 1954 (Vol. I, No. 3, p. 31), the people in some parts of New Guinea still live "in Stone Age conditions of primitive savagery". *Vide* also Vol. 2, No. 3 (Sep. 1955), p. 34.

[3] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 719-720.

of mandated territories, i.e., "assisted States" being those territories relatively close to independence, and "vested territories" which required some form of direct administration by the mandatory power. What is important is that this draft also provided for the creation of a Commission to assist the League in its supervisory role and to receive annual reports from the mandatory powers [1].

15. After each of the Dominion Ministers had stated his case for annexation of the territories concerned, President Wilson, at the second meeting on this issue on 27 January, outlined his concept of the mandatory system. He stated, *inter alia*:

> "It was in the mind of many people that the mandatory power might be subject to constant irritation and constant interference by the League of Nations. In his opinion, that would not be so, as long as the mandatory performed his duties satisfactorily. In so far as the administration by the mandatory power became a financial burden, it was clearly proper that the League of Nations should bear a proportion of the expense. The fundamental idea would be that the world was acting as trustee through a mandatory, and would be in charge of the whole administration until the day when the true wishes of the inhabitants could be ascertained. It was up to the Union of South Africa to make it so attractive that South West Africa would come into the Union of their own free will [2]."

In this regard it should be pointed out that on 20 January President Wilson had prepared his so-called Second Paris Draft. As far as the mandates system was concerned, this draft did not differ materially from his first draft, save that it provided as follows:

> "Any expense the mandatory State or agency may be put to in the exercise of its functions under the Mandate, so far as they cannot be borne by the resources of the people or territory under its charge upon a fair basis of assessment and charge, shall be borne by the several signatory Powers, their several contributions being assessed and determined by the Executive Council in proportion to their several national budgets, unless the mandatory State or agency is willing itself to bear the excess costs; and in all cases the expenditures of the mandatory Power or agency in the exercise of the mandate shall be subject to the audit and authorization of the League [3]."

The Dominion Ministers were not persuaded by the President's remarks and Mr. Lloyd George pointed out that he saw practical difficulties as regards the President's suggestion of ultimate League financial responsibility for the mandates [4].

16. At the third meeting of the Conference regarding the colonial question, on 28 January, Mr. Lloyd George stated that as far as the territories conquered by troops from the United Kingdom (as distinct from those conquered by Dominion troops) were concerned, he saw no insuperable difficulty in reconciling the views of Great Britain with those expressed by President Wilson. He expressed the hope, however that the President would again consider the Dominions' case which was, according to him, a special one. The contiguity

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[1] Miller, *op. cit.*, Vol. I, pp. 106-107.
[2] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 741-742.
[3] Miller, *op. cit.*, Vol. II, p. 104.
[4] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 747.

of the territories in question to the Dominions claiming them suggested that they should form an integral part of those countries [1].

17. After Mr. Massey of New Zealand had again presented his country's case for the annexation of Samoa, Mr. Simon, the French Minister for Colonies at the meeting held in the afternoon of 28 January, presented his country's case for the annexation of the Cameroons and Togoland. In developing his argument against the acceptance of President Wilson's mandatory system he pointed out that every mandate would be revocable and that there would therefore be no guarantee for its continuance. There would thus be little inducement for the investment of capital and for colonization in a country the future of which was unknown. The mandatory would have to be content to live quietly without trying to develop a country or to improve the conditions of life of the natives [2].

18. President Wilson then observed that the discussion up to that point had been, in essence, a negation in detail—one case at a time—of the whole principle of mandatories. The discussion had been brought to a point where it looked as if their roads diverged. He was followed by Mr. Balfour who enquired whether it was not true that whilst a good deal of thought had been given to the League of Nations, very little thought had been given to the position of a mandatory Power. He said that he knew of no paper or speech in which the practical difficulties of the mandates system had been worked out in detail. In particular, no conclusion had been reached and no authoritative statement had been made regarding an important point, namely whether the tenure of a mandatory should be made temporary or not. He pointed out that if the tenure were merely temporary, difficulties would arise and that there would be perpetual intrigues and agitation. For instance, if a German population were left in one of the German colonies who could hamper the mandatory and promote a sense of grievance in the minds of the natives by raising expectations of some elysium to come, that might lead to a change in the mandatory by the League of Nations. In his opinion, the mandatory system could only work if a mandatory were secured in his term of office [3].

The same view was expressed by Mr. Orlando of Italy who raised the question how far the power of a mandatory should extend. He thought that the trusteeship need not be purely transitory [4].

Mr. Clemenceau, although stating that his sentiments were in agreement with those of President Wilson, expressed serious misgivings:

> "The League of Nations, he thought, was to be a League of Defence to ensure the peace of the world. But it appeared they had now gone beyond that limit when they proposed to create a League of Nations with governmental functions to interfere in internal affairs, with trustees in various places sending reports to—he did not know whom. Throughout the world, even in Europe, and perhaps in the Adriatic, a control would be set up. President Wilson himself had said so, and, as a result, appeals would be heard from all parts of the world. Who should deal with those appeals? It had been said that an International Legislature and some sort of executive power, about which he knew nothing, would have to be created without any power to administer penalties, since this question had never

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[1] *Ibid.*, pp. 739-750.
[2] *Ibid.*, p. 761.
[3] *Ibid.*, pp. 736-764.
[4] *Ibid.*, p. 768.

been raised. The idea of an unknown mandatory acting through an undetermined tribunal gave him some anxiety [1]."

In answer to Mr. Clemenceau, Mr. Lloyd George said that he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse. The Powers at that stage exercised this right by diplomatic correspondence, resulting in the giving of assurances, but frequently nothing was done. He went on to make an appeal to President Wilson not to insist on postponing the selection of mandatories until after the League of Nations had been established, since, as long as these questions were unsettled, everything would be unsettled [2].

19. The next morning the Imperial War Cabinet met. Mr. Hughes, the Australian Prime Minister, still insisted on outright annexation of New Guinea, but Mr. Lloyd George warned of the danger of a deadlock, with a possibility that the President might leave the country before an agreement could be reached, and called upon his fellow Cabinet Ministers to endorse a draft resolution which had been worked out in the interval by General Smuts [3], and which, with unimportant alterations and one important addition concerning the Permanent Mandates Commission, eventually became Article 22 of the Covenant [4].

The Australian Prime Minister was still deeply dissatisfied since he felt that Australia's security was imperilled. Mr. Lloyd George then attempted to convince him that a Class "C" Mandate for New Guinea was tantamount to Australian ownership of the island, subject to certain conditions on behalf of the inhabitants. Finally, Mr. Hughes asked: "Is this the equivalent of a 999 years lease as compared with a freehold?" Assured that it was, Mr. Hughes notified Mr. Lloyd George in writing of his acceptance of the draft [5].

20. At the next meeting of the Council of Ten, Mr. Lloyd George stated that he had circulated the Smuts resolution to each of the representatives of the Great Powers. He said that the document did not represent the real views of the Dominions, but that it had been accepted by them as an attempt at a compromise. It had been decided to accept the doctrine of a mandatory for all conquests

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[1] *For. Rel. U.S., op. cit.*, pp. 768-769.

[2] *Ibid.*, p. 770.

[3] Slonim, S., "The Origins of the South West Africa Dispute: The Versailles Peace Conference and the Creation of the Mandates System", *The Canadian Yearbook of International Law*, Vol. VI (1968), p. 132.

[4] A draft clause on mandates was introduced by General Smuts at the Sixth Meeting of the League of Nations Commission on 8 February 1919. As to amendments to this draft made in the League Commission, *vide* Miller, *op. cit.*, Vol. II, pp. 283, 285, 306, 314-315, 323, 333-334, 362, 384-385 and 679-680. At the Sixth Meeting, an attempt was made to insert the word "if" between the words "as" and "integral" in the provision relating to "C" Mandates, which would then have read, "South West Africa and certain of the islands in the South Pacific . . . can be best administered under the laws of the mandatory State as if integral portions thereof". After discussion, the word "if" was not inserted. *Vide* Miller, *op. cit.*, Vol. I, p. 186 and Vol. II, pp. 273, 275 and 286.

[5] Slonim, *Canadian Yearbook of International Law*, Vol. VI, p. 135, citing Ernest Scott, *Australia During the War*, in XI *The Official History of Australia in the War of 1914-1918*, p. 784 (1936).

in the late Turkish Empire and in the German Colonies, but three classes of mandates would have to be recognized, the third category being described as follows:

> "Mandates applicable to countries which formed almost a part of the organization of an adjoining power, *who would have to be appointed the mandatory* [1]." (Italics added.)

It was obvious from the formulation of the Smuts resolution and from what Mr. Lloyd George had said that the Pacific Islands and South West Africa would be territories to which the third category of mandates would apply, and that New Zealand, Australia and South Africa would have to be appointed Mandatories.

President Wilson indicated that he considered the document containing the Smuts resolution to be a gratifying paper. On the other hand he did not think that the Council could make a final decision immediately. He stated that he had in his possession a separate paper showing how the scheme of mandates would work in connection with the League of Nations (presumably his Second Paris Draft), but that scheme had not yet been accepted. At that stage nobody could say how a mandate would be exercised and what it would involve. Whilst prepared to accept the resolution as a precursor of agreement, it did not, in his opinion, constitute a rock foundation, as the League of Nations had not yet been fixed, on which this superstructure would rest [2].

Mr. Lloyd George replied that the President's statement had filled him with despair. He pointed out that it was only with the greatest difficulty that the representatives of the Dominions had been prevailed upon to accept the draft submitted, even provisionally. He consequently made an appeal that the mandates issue should not be left hanging in the air until the League was established and called for a provisional adoption of the resolution subject to such reconsideration as might be required when the complete scheme of the League of Nations was formulated [3].

In replying, President Wilson said that he was willing to accept Mr. Lloyd George's proposals subject to reconsideration when the full scheme of the League of Nations had been drawn up [4]. However, Mr. Hughes was not satisfied with a purely provisional arrangement. He wanted a definite decision and enquired whether they should await the acceptance of the League of Nations by the Conference and by the world whilst they were waiting for a decision. "Was not the *de facto* League of Nations already in existence in that room?", he asked. In his opinion this League should say who were to be the mandatories [5].

21. At the afternoon meeting Mr. Massey of New Zealand specifically dealt with paragraph 8 of the Smuts resolution which eventually became Article 22 (6) of the Covenant. He referred to the specific obligations of a mandatory under a Class "C" Mandate and asked the President to confirm that these would be the only obligations of such a mandatory [6]. A somewhat heated discussion ensued in which the Prime Minister of Australia rendered clear that Australia really desired "direct control" and that for his country and New

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[1] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, p. 786.
[2] *Ibid.*, pp. 788-789.
[3] *Ibid.*, pp. 789-790.
[4] *Ibid.*, p. 791.
[5] *Ibid.*, pp. 793-794.
[6] *Ibid.*, p. 798.

Zealand the Smuts resolution represented the maximum of their concession [1]. A speech, generally described by commentators as "conciliatory" was then made by the South African Prime Minister, General Botha, in which he stated, *inter alia*:

> "He appreciated the ideals of President Wilson . . . They must remember that their various peoples did not understand everything from the same point . . . Personally he felt very strongly about the question of German South-West Africa. He thought that it differed entirely from any question that they had had to decide in this conference, but he would be prepared to say that he was a supporter of the document handed in that morning [by Lloyd George], *because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country*. That was why he said he would accept it [2]." (Italics added.)

After Mr. Massey had spoken again, Mr. Lloyd George proposed that the Council should adopt the Smuts resolution as a provisional decision "subject to revision when either they found the League of Nations was unsatisfactory", or there was some other reason for revising the resolution [3]. After further discussion, President Wilson agreed to accept the proposal. No formal vote was taken on the resolution, but at the suggestion of President Wilson it was agreed that a communiqué be issued stating that the Conference had arrived at a satisfactory provisional arrangement regarding the German and Turkish territories outside Europe [4]. Implicitly it was agreed that the Dominions would receive the territories, to which they had laid claims, as Class "C" Mandates upon the terms specified [5], and at a subsequent meeting early in May, President Wilson confirmed that the tacit arrangements had settled the matter to all intents and purposes, and that the Mandate for South West Africa should be given to South Africa, for New Guinea and the adjacent islands to Australia, and for Samoa to New Zealand [6].

22. Even after the Smuts resolution had been tacitly adopted, President Wilson did not entirely give up his own ideas. In his Third Paris Draft, printed on 3 February [7], he again included a clause reserving to the League complete power of supervision in respect of mandates, and to the people of any mandated territory the right to appeal to the League for the redress or correction of any breach of the mandate by the mandatory State or agency and for the substitution of some other State or agency as mandatory [8].

The copies of this, the last of the President's drafts, were sent to him on the morning of 3 February by D. H. Miller, American legal adviser in Paris. In a letter to Miller the President stated that he hoped with all his heart that his final draft would serve as the basis of the work of the Drafting Commission [9].

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[1] *For. Rel. U.S., op. cit.*, p. 800.
[2] *Ibid.*, pp. 801-802.
[3] *Ibid.*, p. 802.
[4] *Ibid.*, p. 816.
[5] Slonim, *Canadian Yearbook of International Law*, Vol. VI, p. 138.
[6] *Ibid.* In its eventual form, as Art. 22 (6) of the Covenant, the Smuts resolution became part of the Treaty of Versailles which was signed on 28 June 1919.
[7] Miller, *op. cit.*, Vol. I, p. 73.
[8] *Ibid.*, Vol. II, p. 153.
[9] *Ibid.*, Vol. I, p. 75.

But, as Miller puts it:

> "Wilson's hope was not realized; it was the Hurst-Miller Draft and not his revised Covenant which became the basis of the work to come [1]."

23. It is necessary to stress the main elements of the compromise embodied in Article 22 (6) of the Covenant [2]. In return for the concession that all the German colonial possessions were brought into the mandates system, President Wilson had to abandon certain of the extreme aspects of his proposals concerning League supremacy and control and the payment of expenses of mandate administration by League Members. All mandatories were to be States, not "organized agencies". The mandates were to be allocated by the Principal Allied and Associated Powers (not the League), and, at any rate in the case of the "C" Mandates, the allocation "*would have to be*" made to the adjacent claimant States. The President's express provisions relating to complete power of supervision on the part of the League, including the power to revoke a mandate and substitute some other State or agency as mandatory, were not retained in Article 22. The relationship between the League and mandatories was in each case to be regulated by a mandate instrument, the terms of which were assented to by the mandatory and would normally require its consent for alteration. All this was very far removed from the envisaged free League discretion to appoint and change mandatories. And in the case of "C" Mandates, the mandatories were to have power to administer the territories "as integral portions" of their own. And there would be no objection if such administration were to lead to eventual amalgamation, if agreed to by the inhabitants. At the Peace Conference President Wilson stressed that:

> "It was up to the Union of South Africa to make it so attractive that South West Africa would come into the Union of their own free will. . . . If sucessful administration by a mandatory should lead to union with the mandatory, he would be the last to object. . . . [3]"

Later he said that—

> "if South Africa managed South-West Africa as well as she had managed her own country, then she would be married to South-West Africa [4]".

Finally, the "open-door" principle of equal trade opportunities for Members of the League, although originally envisaged for all mandates, was excluded in the case of "C" Mandates [5]. This exclusion was subsequently referred to by Lord Milner, Chairman of the Commission appointed to frame draft mandates, as "a compromise actually accepted by the Powers [6]".

24. In view of the above features, commentators quite naturally referred to

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[1] *Ibid.*, the Hurst-Miller Draft embodied the Smuts resolution.

[2] As was commented generally by W. E. Rappard, Secretary and subsequently member of the Permanent Mandates Commission: "The terms of the compromise were obvious: President Wilson succeeded in preventing annexation; the conquerors in retaining their conquests." *Vide* "The Mandates and the International Trusteeship System", *Varia Politica* (1953), p. 182.

[3] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 741-742.

[4] *Ibid.*, p. 788.

[5] *Vide* final words of Art. 22 (6).

[6] *Conférence de la Paix 1919-1920, Recueil des Actes de la Conférence*. Partie VI, *Traités avec les Puissances Ennemies, mise en vigueur*, A. *Préparation de la mise en vigueur*, 1er Fasc., p. 353.

"C" Mandates as being in their practical effect not far removed from annexation.

Thus, during the First Session of the Permanent Mandates Commission, Mr. Ormsby-Gore, the United Kingdom member, stated:

> "... this case of South West Africa was, indeed, a typical example of the complete political incorporation of a mandated territory in the territory of the mandatory Power [1]".

Margalith wrote:

> "It has been found necessary, also, to devise three types of administration, and to give in the case of 'C' Mandates, powers that amount nearly to annexation. Otherwise the British Dominions could not have been won over to the acceptance of the mandates principle at all [2]."

When introducing the Peace Treaty in the British House of Commons on 3 July 1919, Lloyd George stated:

> "... South West Africa, running as it does side by side with Cape Colony, was felt to be so much a part, geographically, of that area that it would be quite *impossible to treat it in the same way as you would a colony* 2,000 or 3,000 miles away from a centre of administration. *There is no doubt at all that South West Africa will become an integral part* of the Federation of South Africa. It will be colonized by people from South Africa. You could not have done anything else. You could not have set customs barriers and have a different system of administration [3]." (Italics added.)

And Temperley wrote:

> "Clearly the development of this territory must in the main come from the adjoining Union of South Africa, *and its progress would be seriously handicapped if it were administered as a distinct entity with separate native, fiscal, and railroad policies. As, however, it was feared that an exception made in one case—no matter how valid it might be—might open the door to others, a general application of the system was insisted upon.* This had some unfortunate consequences since, mainly in order to meet the special circumstances in South Africa, a broad formula had to be adopted which was not completely satisfactory as far as other areas were concerned [4]." (Italics added.)

C. The Framing of the Mandate for South West Africa

25. In terms of Articles 118, 119 and 157 of the Treaty of Versailles, Germany renounced all rights in or over her colonial possessions in favour of the Principal Allied and Associated Powers.

On 7 May 1919, thus even before the Treaty of Versailles was signed [5], the Council of Three, represented by Mr. Clemenceau, President Wilson and Mr. Lloyd George, announced that they had decided on 6 May as to the disposition of the former German Colonies, *inter alia*, as follows: "German South West Africa: The Mandate shall be held by the Union of South Africa [6]."

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[1] *PMC. Min.*, 1, p. 17.
[2] Margalith, A. M., *The International Mandates* (1930), pp. 33-34.
[3] Temperley, *op. cit.*, Vol. III, p. 95.
[4] *Ibid.*, Vol. II, pp. 233-234.
[5] The Treaty was signed on 28 June 1919, and came into force on 10 January 1920.
[6] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. V, p. 508.

26. Before the end of the Paris Peace Conference of 1919, a Mandates Commission was established and was instructed by the Supreme Council, *inter alia*: "To give attention to the editing of draft mandates [1]." (Translation.)

On the basis of the Commission's decisions and recommendations, draft mandate instruments were eventually prepared by the legal experts of the Drafting Committee of the Peace Conference. These drafts were first cast in the form of conventions [2] and the intention had originally been that such conventions should form annexes to the Peace Treaty [3]. By the time they were submitted to the Council, as recounted below, they had, however, been recast in the form of Council resolutions.

Transmission of the draft mandates to the Council of the League was delayed because of a difference of opinion among the Members of the Commission regarding the question whether the open-door principle was to be applicable in the case of "C" Mandates [4].

27. On 5 August 1920 the Council of the League of Nations considered and adopted a very full report by Mr. Hymans concerning the mandates system [5]. After giving a summary of the main aspects of the system, the report dealt with measures to be taken to apply it, measures already taken by the Principal Allied and Associated Powers and the Mandates Commission, and measures which the Council should take. It pointed out that the right to allocate mandates belonged to the Principal Powers. Since, however, the mandatory would govern in the name of the League of Nations, the allocation should be confirmed by the League.

The next issue was the determination of the terms of the mandates. Mr. Hymans pointed out that this question was only partially solved by Article 22 (8) of the Covenant, since most of the mandates would contain many provisions other than those relating to the degree of authority. As regards Article 22 (8) he concluded:

> "It seems to me that the real explanation of paragraph 8 of Article 22 is as follows. When this Article was drafted in January 1919, its authors supposed that the conventions dealing with the Mandates could certainly be included in the Treaty itself, or form annexures to it. It was also thought at that time that only the Allied and Associated Powers would be considered as Original Members of the League of Nations. In other words, that on the day of its foundation they would be its only Members. It was, therefore, intended in using the words 'the Members of the League' to refer to all the signatories except Germany of the Treaty of Versailles [6]."

The report proceeded:

> "How is paragraph 8 to be applied to the present moment? It is in practice almost impossible to apply literally the procedure which we have just defined. How could the assent of all those signatories of the Treaty of Versailles who are Members of the League be obtained?

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[1] *Conférence de la Paix 1919-1920*, Partie VI, A, 1er Fasc., p. 327.

[2] *Ibid.*, pp. 399-416 (Annexes II to VIII).

[3] *Vide* Report by Mr. Hymans to the Council of the League of Nations, *L. of N., O.J.*, 1920 (No. 6), pp. 335, 338.

[4] *Vide* Wright, *op. cit.*, pp. 47-48, 50; Temperley, *op. cit.*, Vol. II, pp. 237, 239; Hall, *op. cit.*, p. 136; House, E. M. and Seymour, C. (eds.), *What Really Happened at Paris* (1921), pp. 227, 440.

[5] *L. of N., O.J.*, 1920 (No. 6), p. 334.

[6] *Ibid.*, p. 338.

Has not the Council now the right to take cognizance of the absence of any Convention such as is referred to by the Covenant and itself to regulate the degree of authority or administration of the Mandatory Power?

This right appears theoretically incontestable, but one which would not be opportune to exercise. We must bear in mind, indeed, that in the 'A' Mandates the degree of authority must vary according to the population of the mandated territories and according to who is the Mandatory Power. In these circumstances and as far as these Mandates are concerned, the Council should in any case wait until the Powers have arrived at a decision with regard to the appointment of the Mandatory Power and the delimitation of the territories.

Moreover, the examination of the degree of authority to be conferred presupposes somewhat specialized knowledge; with regard to 'B' and 'C' Mandates, the Council would probably consider that it could not make a pronouncement until it should have taken the opinion of experts, appointed by it. Would it not be more reasonable to take advantage of the work which has already been accomplished by the experts of the Principal Powers. I propose, therefore, to ask these Powers at the same time as they acquaint us with their decision as to the Mandatory Power, to inform us of their proposals with regard to the terms of the Mandate to be exercised [1]."

The resolution proposed by Mr. Hymans was also unanimously adopted by the Council (on 5 August 1920). It read as follows (in so far as is relevant):

"(i) The Council decides to request the principal Powers to be so good as to *(a)* name the Powers to whom they have decided to allocate the Mandates provided for in Article 22; *(b)* to inform it as to the frontiers of the territories to come under these Mandates; *(c)* to communicate to it the terms and the conditions of the Mandates that they propose should be adopted by the Council from following the prescriptions of Article 22.

(ii) The Council will take cognizance of the Mandatory Powers appointed, and will examine the draft Mandates communicated to it, in order to ascertain that they conform to the prescriptions of Article 22 of the Covenant.

(iii) The Council will notify to each Power appointed that it is invested with the Mandate, and will, at the same time, communicate to it the terms and conditions [2]."

28. According to the Minutes of the Council of 14 December 1920, Mr. Balfour, the United Kingdom representative, on that date handed in draft mandates proposed by the British Government for a certain number of territories, including South West Africa [3]. The Council referred these drafts to the Secretariat of the League: ". . . to consider the Mandates and to consult other legal experts on any points which they considered necessary [4]."

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[1] *L. of N., O.J.*, 1920 (No. 6), pp. 338-339.

[2] *Ibid.*, pp. 340-341. *Vide* also Wright, *op. cit.*, pp. 109-112; Hall, *op. cit.*, p. 146.

[3] *L. of N., O.J.*, 1921 (No. 1), p. 11. A photostat copy of the mandate instrument handed in by Mr. Balfour was transmitted by the Agent of the Government of the Republic of South Africa to the Registrar of the Court under cover of a letter dated 24 October 1962.

[4] *L. of N., O.J.*, 1921 (No. 1), p. 12.

29. On 17 December 1920 the Council considered a memorandum prepared by the Secretariat and containing suggestions for amendment in certain respects of the draft mandates handed in by Mr. Balfour [1].

The Council accepted the suggested amendments, confirmed, *inter alia*, the Mandate for South West Africa, and defined its terms.

The relevant portions of the text of the Balfour draft mandate for South West Africa which were amended are here quoted in juxtaposition to the text thereof as amended and adopted by the Council resolution of 7 December 1920.

The Balfour draft mandate for German South West Africa submitted for approval.	*Text as amended and finally adopted*
	Insertion of a fourth paragraph to the preamble.
	"*Whereas*, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:
"The Council of the League of Nations . . .	[The Council of the League of Nations . . .]
Hereby approves of the terms of the Mandate as follows:	Confirming the said Mandate, defines its terms as follows:
ARTICLE 7	ARTICLE 7
The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate, provided that in the case of any modification proposed by the Mandatory, such consent may be given by a majority."	The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate."

30. The reasons for the insertion of the fourth paragraph of the preamble and for the amendment of the text of Article 7 are explained in a report to the Council of the League by Viscount Ishii on 20 February 1922 [2].

According to the Ishii report, the fourth paragraph of the preamble was inserted—

> ". . . to define clearly the relations which, under the terms of the Covenant, should exist between the League of Nations and the Council on the one hand, and the mandatory Power on the other . . . [3]".

The proviso to the first paragraph of Article 7 was deleted—

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[1] *Ibid.*, Hall, *op. cit.*, p. 153.
[2] *L. of N., O.J.*, 1922 (No. 8, Part II), pp. 849 *et seq.*
[3] *Ibid.*, p. 850.

"... because it [the Council] did not think it advisable to consider the possibility of altering the terms of a mandate by a decision taken on a majority vote [1]".

D. The League of Nations Period

31. The functions of the League of Nations in respect of Mandates were exercised by the Council, the Assembly and the Permanent Mandates Commission.

32. The *Council* was the body to which every mandatory was ultimately accountable. It was to the Council that the mandatories had to render annual reports [2], to its "satisfaction" [3].

The Council alone had the power to take decisions and address recommendations to the mandatories [4].

Article 4 of the Covenant entitled any Member of the League not represented on the Council "to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member". This provision enabled a mandatory to be represented when the Council considered matters relating to its own mandate and to mandates in general.

In terms of Article 5 of the Covenant, decisions of the Council required "the agreement of *all* the Members of the League represented at the meeting". (Italics added.) Whether a mandatory could exercise its vote in the Council in such a way as to frustrate the unanimous view of all the other Members on a matter affecting its own mandate, was never raised, but it is now settled law that a mandatory did have this right [5]. In fact no occasion on which there was such a division of votes ever arose; all Council decisions concerning mandates were taken unanimously [6].

33. The *Assembly* derived its powers in respect of mandates from Article 3 of the Covenant in terms of which it could "deal at its meetings with any matter within the sphere of action of the League . . .".

At the First Assembly a "working basis" was, however, decided on according to which:

> "Neither body (i.e., the Assembly or the Council) has jurisdiction to render a decision in a matter which by the Treaties or the Covenant has been expressly committed to the other organ of the League. Either body may discuss and examine any matter which is within the competence of the League [7]".

Thus, in respect of mandates, the Assembly's role was confined to—

> "... the exercise of a certain moral and very general influence in this

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[1] *L. of N., O.J.*, 1922 (No. 8, Part III), p. 854.

[2] Art. 22 (7).

[3] *Vide*, e.g., Art. 6 of the Mandate for South West Africa.

[4] *Vide The Mandates System—Origin—Principles—Application* (1945), p. 35; Hall, *op. cit.*, p. 174; *PMC, Min.*, I, p. 5.

[5] *Vide* para. 83, *infra*.

[6] *Vide Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, pp. 100-101. (Judge Lauterpacht's separate opinion.)

[7] *L. of N., Assembly, Rec.*, I, p. 320.

domain. Its function may be said to be to maintain touch between public opinion and the Council [1]."

34. The Permanent Mandates Commission was instituted by the Council on 29 November 1920, pursuant to the provisions of Article 22, paragraph 9, of the Covenant, in terms of which its functions were "to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates".

Article 22 of the Covenant did not make provision for petitions from inhabitants of mandated territories, nor did the mandate instruments do so. Petitions were, however, sent to the Permanent Mandates Commission, and as a result the Council, at its 23rd session in 1923, framed rules relating to the procedure to be adopted with regard thereto. In terms of these rules, petitions from "communities or sections of the populations of mandated areas" were to be submitted only through the mandatory concerned, which would be entitled to attach "such comments as it might think desirable". Petitions "regarding the inhabitants of mandated territories received . . . from any source other than that of the inhabitants themselves", were to be addressed to the Chairman of the Commission who had to decide whether they should be regarded as "claiming attention". If so, the mandatory concerned was then to be asked for its comments thereon [2].

The question whether the Permanent Mandates Commission was entitled to grant oral hearings to petitioners was raised on several occasions in the organs of the League, especially during the years 1926-1927, when a proposal for such hearings "in certain cases" met with considerable opposition. When the views of the mandatories were sought in regard thereto, they unanimously expressed their opposition, with the result that the Council on 27 March 1927, decided that "there is no occasion to modify the procedure which has hitherto been followed by the Commission in regard to this question [3]".

35. In constituting the Permanent Mandates Commission, the Council decided, *inter alia*, that it was to consist of nine members [4], the majority to be nationals of non-mandatory States. It further provided that:

> "All the Members of the Commission shall be appointed by the Council and selected *for their personal merits and competence. They shall not hold any office which puts them in a position of direct dependence on their Governments while members of the Commission* [5]." (Italics added.)

The Permanent Mandates Commission was described as—

> ". . . essentially an advisory body—a body whose duty it is to examine and report—designed to assist the Council in carrying out its task. Its work is preliminary in character. Constitutionally, it has no power to take decisions binding on the mandatory Powers or to address direct recommendations to them. Its conclusions are not final until they have been approved by the Council [6]."

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[1] *The Mandates System—Origin—Principles—Application*, p. 35.
[2] *L. of N., O.J.*, 1923 (No. 3), p. 300.
[3] *Ibid.*, 1927 (No. 4), p. 348.
[4] Later increased to 10 and then to 11.
[5] *L. of N., O.J.*, 1920 (No. 8), p. 87.
[6] *The Mandates System—Origin—Principles—Application*, p. 35. *Vide* also van Asbeck, F. M., "International Law and Colonial Administration", *Grotius Soc.*, Vol. 39 (1953), p. 14.

The Commission itself realized and stated that, having adopted the rule of "absolute independence and impartiality", its Members should exercise their authority "less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour [1]".

36. Although its powers were purely advisory, the Commission developed into an effective institution. In this connection Mr. Rappard—at first Secretary and later for a long time a Member of the Commission—stated:

> "As the Commission, thanks to the personal competence and generally recognized independence of its members, came to enjoy a real respect and, indeed, quite some prestige, an international or rather a supernational moral authority sprang up. . . . In its capacity as a purely advisory body . . . the Permanent Mandates Commission had no powers of coercion whatever. As a universally esteemed group of impartial and independent experts, however, its powers of persuasion were indisputably very effective. No mandatory government . . . could afford to disregard its advice for fear of no other sanctions but those of public and parliamentary opinion.
>
> The net result was a willing co-operation between the League and the mandatory governments, and the enhancement of the standards of administration in the mandated territories and even, by a natural repercussion, in colonial administration everywhere [2]."

37. There was at all times cordial co-operation between South Africa and the Permanent Mandates Commission. On occasion differences of opinion arose—as was the case also with regard to other mandated territories—but this was inevitable in view mainly of uncertainties and obscurities in a new system, operating under the somewhat vague terms of the compromise embodied in Article 22 of the Covenant. And with both South Africa and the Commission approaching their task in the spirit of that compromise, the problems which arose were always satisfactorily solved [3].

E. Analysis of the Mandate for South West Africa

38. It is convenient at this stage to proceed to a more detailed analysis of the mandate for South West Africa in the context of the system as a whole.

Article 22 of the Covenant of the League of Nations commenced with setting out the signatories' agreement that to the colonies and territories in question ". . . there should be applied the principle that the well-being and development of . . . [the inhabitants] form a sacred trust of civilization . . ." It further recorded their agreement that "securities for the performance of this trust" should be embodied in the Covenant.

The second paragraph of the Article stated that "the best method of giving practical effect to this principle" would be to "entrust" the "tutelage" of the "peoples" concerned to suitable "advanced nations", willing to accept it, who would "exercise" it "as mandatories on behalf of the League".

The wording of the Article as a whole, as well as its historical background, suggest strongly that the references to "trust", "tutelage" and "mandatories" were not intended to bear technical legal meanings, by exact or close analogy to

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[1] *L. of N., O.J.*, 1921 (Nos. 10-12), pp. 1124-1125.

[2] Rappard, *Varia Politica*, p. 184.

[3] For further details see Counter-Memorial filed by the Government of the Republic of South Africa in *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 24-32.

municipal law institutions of *trust*, *tutelage* and *mandatum*. So, for instance, the English word "trust", which is capable of a technical legal meaning as well as of a more general ordinary meaning, depending on context, was rendered in the French version by the word *mission*, meaning in this context "task" or "understanding", thus confirming that a non-technical connotation of "trust" was intended. The conception, also, of the "tutelage" of a backward people or community by an "advanced nation" could at most have been intended in a broad, metaphorical sense. It is significant that in the actual mandate instruments which came into existence subsequently, the words "trust" and "tutelage" did not appear at all. Even in the case of the words "mandatory" and "mandate", which were retained in the mandate instruments themselves, the analogy, if any, with a private law *mandatum* was probably intended to be of the broadest and most general nature only. The more detailed and technical aspects of the private law institution could hardly have been known to the Peace Conference as a whole—as distinct possibly from certain of its Members —and cannot therefore fairly be presumed to have been intended to be incorporated in its covenants. It was probably by reason of considerations such as these that the majority of the Court in the 1950 Advisory Opinion expressed the view that it was "... not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law [1]".

It seems, then, that what was said in the opening paragraphs of Article 22 concerning a "sacred trust" and "tutelage", must be regarded as being descriptive of the idealistic or humanitarian objectives involved in the mandates system, and that the reference to "mandatories on behalf of the League" is to be understood as affording a broad indication of the method whereby those objectives would be sought to be attained. It is, therefore, to the more detailed provisions in Article 22 for "securities for the performance of this trust" that regard must be had in order to determine the juridical content of the mandates system as envisaged by the signatories to the Covenant.

39. On analysis, the securities embodied in the provisions of Article 22 were those provisions requiring the mandatory to provide certain safeguards in the interests of the indigenous population, to secure certain interests or benefits for Members of the League and their nationals, and to render to the Council of the League an annual report in reference to the Territory committed to its charge. Furthermore, a Permanent Mandates Commission would receive and examine the reports and advise the Council on all matters relating to the observance of the mandates; and the degree of authority, control or administration to be exercised by the mandatory was to be explicitly defined in each case—by agreement between Members of the League or by the Council.

40. It will be observed that Article 22 did not itself purport to put the mandates system into operation. It set forth the agreed idealistic objectives of the system, agreed methods whereby it would be put into operation and agreed features which would be incorporated therein. The provisions of Article 22 clearly envisaged that concrete steps would have to be taken for the complete constitution of the system, namely towards entrusting the "tutelage" of the inhabitants of particular territories to particular "advanced nations ... willing to accept it" (Art. 22 (2)), constituting those "nations" as mandatories on behalf of the League (Art. 22 (2)), and explicitly defining the degree of authority,

[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 132.

control or administration to be exercised by them (Art. 22 (8)); and those provisions prescribed conditions which were in this process to be imposed as obligations upon the mandatories, substantively in the interests of the mandated peoples and Members of the League (*vide* Art. 22 (5) and (6)) and procedurally with a view to international supervision of the "observance of the mandates", i.e., of the exercise of the substantive powers and compliance with the substantive obligations (Art. 22 (7) and (9)).

In other words, Article 22 was an agreement between Members of the League as such, regarding a mandates system to be constituted in pursuance thereof. The system itself, however, would begin to operate only upon the conferment on the respective mandatories of specific mandates in respect of particular territories, and upon the specific definition of the mandatories' rights and obligations in connection therewith.

41. The concrete steps envisaged by Article 22 were duly taken, in the following order:

(a) The Principal Allied and Associated Powers (in whose favour Germany was to renounce her overseas possessions by Arts. 118 and 119 of the Treaty) allocated the various territories to different mandatories, and, *inter alia*, decided on 7 May 1919, that the Mandate for South West Africa should be held by South Africa [1].

(b) Draft mandate instruments were considered by the Principal Allied and Associated Powers and, after agreement amongst themselves and with the designated mandatories as to the terms thereof, submitted to the Council of the League [2].

(c) The Council of the League confirmed the mandates [3], thereby constituting the designated mandatories as "mandatories on behalf of the League".

(d) The Council further, in pursuance of Article 22 (8), defined the terms of the mandates in the manner set out in the instruments of mandate [4]. This was generally in accordance with the drafts submitted, subject to certain alterations [5].

42. The provisions of the Mandate for German South West Africa, as defined by the Council on 17 December 1920 were typical of "C" Mandates. The mandatory's title appeared from the Preamble which set out that there was conferred and confirmed, in accordance with Article 22 of the Covenant, "a Mandate . . . to administer the territory aforementioned", which the mandatory had undertaken "to exercise . . . on behalf of the League", and from Article 2 which provided that the mandatory should have full power of administration and legislation over the Territory "as an integral portion of the Union of South Africa", and that it might apply the laws of the Union of South Africa to the Territory, subject to such local modifications as circumstances might require. The mandatory's substantive obligations were set out in Articles 2 to 5 and its obligations regarding supervision in Article 6, which required the mandatory to render to the Council of the League, to its satisfaction, an annual report "containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under

[1] *Vide* para. 25, *supra*.
[2] *L. of N., O.J.*, 1921 (No. 1), p. 89.
[3] End of Preamble of Mandate for South West Africa and also of other "C" Mandates.
[4] *Vide* end of Preamble.
[5] *Vide* para. 29, *supra*.

Articles 2, 3, 4 and 5". Article 7 provided that the consent of the Council of the League was required for any modification of the terms of the Mandate and also set out the mandatory's agreement to the submission to the Permanent Court of International Justice of disputes between itself and another Member of the League of Nations, in so far as they related to the interpretation or application of the provisions of the Mandate and could not be settled by negotiation.

F. The Mandatory's Obligation to Report and Account

I. General

43. This section is devoted to an analysis of a mandatory's obligations with respect to supervision of the administration of a territory under its control. The purpose of this analysis is to ascertain whether these obligations were capable of surviving the dissolution of the League of Nations, in the sense that after such dissolution a substitution of supervisory organs could have taken place without the need of fresh consent on the part of a mandatory. Such a result could notionally have been achieved by the operation of some principle of international law operating independently of the intentions of the parties, or by some agreement incorporated in the express or implied terms of the Mandate. These various possibilities will be dealt with in turn hereafter.

II. Substitution of Supervisory Organs by Virtue of some Objective Principle of International Law

44. There was no suggestion by any Member of the Court in the 1950 opinions, or in the Judgment and opinions on the Preliminary Objections in 1962 or the Judgment and opinions on the Merits in 1966, that there exists any principle of succession, which, operating independently of the intentions of the parties, could automatically have effected a substitution of the United Nations, its organs and/or Members, for the League of Nations, its organs and/or Members [1].

The only real discussion of this topic is found in the 1962 dissenting opinion of Judge van Wyk [2], where he held that no such principle exists, quoting, *inter alia*, the following statement of Judge Levi Carneiro in the *Ambatielos* case:

> "Even when the organ which was formerly competent has been abolished,

[1] Judge Tanaka's teleological approach in 1966 may be said to achieve much the same result as an objective principle of international law. *Vide* the discussion thereof, Chap. IX, para. 63, *infra*. However, Judge Tanaka expressly stated that "we cannot recognize universal succession in the juridical sense in these cases" (p. 274) and based his conclusion that a succession of supervisory powers had taken place on an interpretation of the Mandate, albeit by a process of interpretation which was not concerned with ascertaining the intentions of the parties (pp. 276-278). For the reasons stated in Chap. II, *supra*, it is submitted that Judge Tanaka's approach should not be followed. Reference may also be made to Judge Alvarez' dissenting opinion in 1950 in which he concluded that the United Nations had succeeded "*ipso facto*" to the League of Nations (p. 182). Judge Alvarez failed, however, to formulate any legal principle or rule on which his conclusion could be based, nor did he cite any authority in support thereof.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 603-604.

its powers cannot be regarded as automatically transferred to the new organ which replaces it [1]."

Judge Bustamante, in his separate opinion in 1962, also in passing rejected the possibility of either "automatic" or "*ex officio*" succession of the United Nations to the League of Nations [2].

45. The Applicants in the *South West Africa* cases, in their Observations on the Preliminary Objections, relied on a "Doctrine of Succession [3]" which, they then said, had formed the basis of the majority opinion in 1950. They did not, however, indicate the exact legal origin of such doctrine. This doctrine was analysed and, it is respectfully submitted, refuted by South Africa in the pleadings and oral proceedings, and received no support from any Member of the Court in 1962. In the oral proceedings on the merits in 1965 the Applicants thereupon expressed regret for having used the expression "automatic succession" and stated explicitly that they did not conceive—

> ". . . that the United Nations acquired title to the League's supervisory power over mandates by virtue of some general international legal principle of devolution or succession, *aliunde* the mandate [4]".

It was probably by reason, *inter alia*, of this concession that the possibility of succession by virtue of an objective rule of international law was not dealt with in the Judgment and opinions in 1966 [5].

46. In view of the largely academic nature of any suggestion of automatic succession by operation of law, it suffices to state that the South African Government contends that no legal principle exists which could (without consent of the parties, and, in particular, the mandatory) have resulted in a transfer of supervisory powers in respect of mandates to the United Nations. In the succeeding paragraphs, the South African Government will consider whether such a transfer could have resulted from the express or any implied terms of the mandate documents themselves, i.e., Article 22 of the Covenant and the mandate instrument.

III. The Express Terms of the Mandate

47. Although commentators frequently employ the broad descriptive terms "League supervision" and "supervisory functions of the League", such phraseology did not occur in the relevant provisions of Article 22 of the Covenant or of the mandate instruments. These provisions were as follows:

(a) Article 22 (7) of the Covenant:

> "In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

(b) Article 22 (9) of the Covenant:

> "A permanent Commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates."

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[1] *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 54.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 364.

[3] *I.C.J. Pleadings, South West Africa*, Vol. I, p. 429.

[4] *Ibid.*, Vol. VIII, p. 132.

[5] It was, however, mentioned in a footnote to Judge van Wyk's separate opinion, at p. 84, with reference to the ultimate attitude of the Applicants as quoted above.

(e) Article 6 of the Mandate for South West Africa (and corresponding provisions in other mandate instruments):

> "The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

These specific provisions are further to be read in the light of:

(i) the provision in Article 22 (2) that the "tutelage" should be exercised by advanced nations "as mandatories on behalf of the League", and
(ii) the mandatories' undertakings (as recorded in the preamble of the mandate instruments) to exercise their mandates "on behalf of the League of Nations".

48. The "supervisory functions of the League" spoken of by commentators was a concept in essence derived from the obligation, imposed upon the mandatories by the above provisions, to report with reference to the respective territories and to the measures taken to carry out the substantive obligations. The reports would (by implication) regularly be considered by the Permanent Mandates Commission and the Council of the League with a view to achieving and maintaining observance of the mandates, if necessary by Council resolutions directed to that end.

Moreover the Council, without express provision to that effect in the Covenant or the mandate instruments, accepted that the consideration of petitions regarding alleged grievances about observance of the mandates by the mandatories would form part of its functions as the supervisory organ. And it laid down in that regard the rules of procedure already referred to above [1]. Briefly these involved that petitions from inhabitants were to be forwarded through the respective mandatories, who could then at the same time furnish their comments, and that petitions from other sources were to be addressed to the Chairman of the Permanent Mandates Commission, who was to decide whether they merited attention and, if so, to forward them to the mandatory concerned for comment.

Thus the regular consideration of reports and of petitions and the mandatories' comments thereon, with a view to securing observance of the mandates, constituted League supervision correlative to the mandatories' obligation to report and account to the Council. Without the imposition of this obligation on the mandatories, there would be no justification for an inference that the League Council was intended to exercise a "supervisory function", or for speaking of any obligation to submit to such supervision.

So, by contrast, Article 23 *(b)* of the Covenant of the League imposed upon League Members the obligation "to secure just treatment of the native inhabitants of territories under their control". But, in the absence of any additional provisions requiring the Members affected by Article 23 *(b)* to act in this respect as mandatories on behalf of the League, and to render reports to the League indicating the measures taken to comply with the obligation undertaken in that sub-article, nobody has ever suggested that the League was given a supervisory function with reference to that obligation or that the Members in question were obliged to submit to any such supervision.

It is evident, therefore, that the essence of League supervision or the supervisory functions of the League was the mandatories' obligation to report and

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[1] *Vide* para. 34, *supra*.

account to the Council of the League in respect of compliance with the substantive obligations pertaining to administration of the territories and protection and development of the inhabitants. The further obligation or function of the mandatories relative to supervision, viz., the forwarding of petitions, was purely subsidiary and dependent on the fact that the Council was the supervisory organ-- which fact in turn depended on the obligation to report and account.

49. By its content the obligation required the mandatories to report and account to a specific supervisory body, constituted and functioning under the provisions of a particular international convention. It was *not* an obligation to submit *generally* to "international supervision" or to supervision by the "international community" or "the Family of Nations", or "the civilized nations of the world" or the like. It was an obligation to report and account to a specific organ of a specific organization of certain of the nations of the world, viz., the Council of the League of Nations.

The implications of this feature are of major importance. The League was constituted by a Covenant, the provisions of which were known to the mandatories, and to which all mandatories were, initially, signatories. The Constitution of the Council and the manner in which it was to function were laid down in the Covenant. As has been noted above [1], the provisions of the Covenant in that regard required, *inter alia*, unanimity, as a general rule, for Council decisions (Art. 5), and an invitation to any Member of the League not represented on the Council to be represented at any meeting during the consideration of matters specially affecting the interests of that Member (Art. 4). The Council would in regard to mandates be assisted and advised by a permanent commission (Art. 22 (9)). It was to supervision through machinery governed, *inter alia*, by these provisions of the Covenant, and to no other, that the mandatories consented to submit.

50. The practical importance of the fact that the obligation related to specific supervisory machinery, is illustrated by certain statements made by delegates at the Paris Peace Conference. It will be recalled [2] that on 30 January 1919, when the compromise arrangement regarding the mandates system was arrived at, the South African Prime Minister, General Louis Botha, stated that although he felt very strongly about the question of German South West Africa and thought that it differed entirely from any question that they had to decide in the Conference, he would be prepared to say that he was a supporter of the Smuts resolution—

> "... because he knew that, if the idea fructified, the League of Nations would consist mostly of the same people who were present there that day, who understood the position and who would not make it impossible for any mandatory to govern the country".

To this explanation by General Botha, added significance is lent by earlier statements of Mr. Lloyd George and President Wilson in the Council of Ten on 28 January 1919, as follows:

> "Mr. Lloyd George said that he agreed with M. Clemenceau that if the League of Nations were made an executive for purposes of governing, and charged with functions which it would be unable to perform, it would be

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[1] *Vide* para. 32, *supra*.
[2] *Vide* para. 21, *supra*.

destroyed from the beginning. But he had not so interpreted the mandatory principle when he had accepted it.

President Wilson said he too had not so interpreted it.

Mr. Lloyd George, continuing, said that he regarded the system merely as a general trusteeship upon defined conditions. Only when those conditions were scandalously abused would the League of Nations have the right to interfere and to call on the mandatory for an explanation. For instance, should a mandatory allow foul liquor to swamp the territories entrusted to it, the League of Nations would have the right to insist on a remedy of the abuse [1]."

Reference may also be made to the anxiety expressed by Mr. Clemenceau, regarding the idea of an unknown mandatory acting through an undetermined tribunal [2], to President Wilson's statement that it would be extremely unwise to accept any form of mandate until it was known how it was intended to work [3], and to Mr. Hughes' request at the meeting of the Council of Ten on 30 January 1919 that a definite decision regarding the question of mandates be taken immediately since the *de facto* League of Nations was "already in existence in that room [3]".

51. It is accordingly clear that the prospective Mandatory Powers required clarity as to the content of the mandates system before consenting thereto, and were strongly influenced by the contemplation that supervision by the League would be exercised in a conservative manner. This contemplation became a reality upon the establishment of the League. The report by Mr. Hymans, unanimously adopted by the Council of the League on 5 August 1920 [4], included the following passage:

"The Annual Report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration. *In this matter the Council will obviously have to display extreme prudence so that the exercise of its right of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the Mandatory Power* [5]." (Italics added.)

The Permanent Mandates Commission was constituted with a view specially to securing an impartial and non-political approach to the exercise of the supervisory functions. Reference has been made above to the independence and the individual merit of the members of the Commission, and to their expressed endeavour to exercise their authority –

"... less as judges from whom critical pronouncements are expected, than as collaborators who are resolved to devote their experience and their energies to a joint endeavour [6]".

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[1] *For. Rel. U.S.: The Paris Peace Conference, 1919*, Vol. III, pp. 769-770.
[2] *Vide* para. 18, *supra*.
[3] *Vide* para. 20, *supra*.
[4] *Vide* para. 27, *supra*.
[5] *L. of N., O.J.*, 1920 (No. 6), p. 340.
[6] *Ibid.*, 1921 (Nos. 10-12), p. 1125. *Vide* para. 35, *supra*.

The dual function of supervision and co-operation was again stressed in later reports [1], and observed in practice [2].

The Council of the League seldom took any action in regard to mandates supervision save on the basis of the Commission's advice, and usually accepted it when given; resolutions were tactfully worded as suggestions or invitations to mandatories [3]; and due to the considerable representation of Mandatory Powers on the Council, it was generally sympathetic to the mandatories' point of view [4].

Thus the agreed supervisory machinery was in fact very carefully checked and balanced so as to render unlikely any injurious, biased or unfair interference with mandatory government, and, indeed, as was then apparently considered to be in the best interests of the inhabitants of mandated territories, so as to contain the minimum of political element and a maximum of independent expert approach.

52. In the above circumstances, the wording of the obligation to report and account as relating to a specific supervisory authority and no other, was quite evidently not a matter of mere form or technicality, but one of basic practical importance. As a matter of interpretation there can therefore be no doubt that the parties never intended nor contemplated any other supervisory authority than the Council of the League, assisted by the Permanent Mandates Commission.

Since the principle of contemporaneity would have to be applied in interpreting the provisions of the mandate [5], the question may be posed whether any interpretation could reasonably be given to the mandate which would have entailed any obligation on the mandatory to submit *during the lifetime of the League* to supervision by any other international organization or any other organ of the League as regards performance of its functions under the mandate. It seems self-evident that the answer must be in the negative. If, for example, a group of States which did not join the League had formed an organization of their own, with objectives similar to those of the League and with organs capable of exercising a supervisory function in regard to the government of mandated territories, it could surely not have been contended that the mandatories, having agreed to submit to "international supervision" by League organs, must for that reason be regarded as obliged to submit to "international supervision" by some organ of the parallel organization. Such a contention would seek to attribute to the mandatories an obligation to which they had never agreed; and its untenability would become the more manifest if the other form of supervision should be lacking in the very qualities which had made the specific League supervision acceptable to the mandatories and had induced them to agree thereto [6].

Similarly it could not have been contended that the mandatories would, without fresh consent on their part, be obliged to submit to "international supervision" by some other international organization in fact established and having for its members largely the same States as the League of Nations—such

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[1] *Vide PMC, Min.*, VIII, p. 200; Wright, *op. cit.*, pp. 196-197.

[2] *Vide* Wright, *op. cit.*, pp. 199-200; Hall, *op. cit.*, p. 209.

[3] Wright, *op. cit.*, p. 128.

[4] *Ibid.*, pp. 87-90.

[5] *Vide* Chap. II, paras. 8 and 9, *supra*.

[6] This argument is therefore not merely a technical one. In logic and fairness, similar considerations apply *a fortiori* to those which in municipal law prevent a master from ceding a service contract without the servant's consent.

as, for instance, the International Labour Organisation. Again such a contention would seek to attribute to the mandatories an obligation substantially different from that agreed to by them in Article 22 of the Covenant and the mandate instruments.

53. Even within the League of Nations organization, an alteration in the supervisory machinery provided for in the Covenant could not be imposed upon the mandatories without their consent—e.g., an alteration transferring the supervision from the Council to the Assembly, or providing that the Council could in matters of mandate supervision arrive at valid decisions by a simple majority or by a two-thirds vote. For again such an alteration would seek to impose upon the mandatories an obligation of a content different from that agreed to by them in the Covenant and the mandate instruments. Article 26 of the Covenant did provide for amendments to the Covenant, through ratification by the Members whose representatives composed the Council and a majority of the Members whose representatives composed the Assembly: but it proceeded to provide that no such amendment would bind a Member signifying dissent therefrom, although the dissentient would then cease to be a Member of the League. At worst, therefore, a mandatory refusing to agree to an alteration in supervisory machinery could lose its membership in the League, but the alteration could not be rendered binding upon it as a mandatory without its consent given either expressly, or tacitly through acquiescence without dissent in a Covenant amendment in terms of Article 26.

54. The considerations set out above did not, of course, operate only in favour of the mandatories, but could have been invoked against them. The question might be posed: what would have been the reaction during the lifetime of the League if a particular mandatory were to have claimed a right to perform its obligation of "international accountability" by submitting reports, not to the Council of the League, but to some other international organization, or to some other organ of the League, or in some other manner than provided in its mandate instrument or the Covenant? It is quite clear that such a claim would have been summarily rejected.

55. As a matter of interpretation, it is therefore submitted that there cannot possibly be any warrant for reading the mandatory's duty to submit to supervision by the Council of the League as meaning supervision by any other international organization, or as being equivalent to a wider obligation of "international accountability" or something similar which could have survived the dissolution of the League.

IV. Whether an Implied Term Can Be Read into the Mandate Instrument

56. The further question then arises whether there can be read into the mandate instrument an implied term which could have had the effect of preventing the lapse, on the dissolution of the League, of the mandatory's obligations relating to supervision. The Court in the 1950 Advisory Opinion apparently did not rely on any such implied term, as will be pointed out hereunder [1]. In the proceedings on the Preliminary Objections in the *South West Africa* cases, Judge van Wyk dealt with the possibility of such an implied term only to reject it [2]. No other Judge dealt with this aspect at that stage of the proceedings. In

[1] *Vide* Chap. IX, paras. 5 *et seq., infra.*

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* pp. 605 *et seq.*

the proceedings on the merits, Judge van Wyk again considered this aspect with the same result [1] and he was supported therein by Judge Tanaka [2].

57. The features discussed above to indicate that the express terms of the mandate documents correctly reflected the actual intentions of the parties thereto, in themselves refute any suggestion of an implied term running counter to such express terms. But there is a further fundamental obstacle to any possibility that the authors of the mandates system would have intended to provide for the consequences of the future dissolution of the League of Nations. Such provision would have been required only if the possible future dissolution of the League, or the creation of another body to take its place, was contemplated in the years when the mandates system was established. It seems clear that no such contemplation existed.

Thus, Judge Bustamante stated in his separate opinion on the Preliminary Objections:

> "Obviously the provisions of the Covenant which had instituted the international Mandates System did not envisage the possibility of the dissolution of the League of Nations and did not foresee its possible effects on the Mandate agreements in force [3]."

Judge Jessup referred to the League System as "a system which it was fondly hoped in 1919 would become universal [4]". In their joint dissenting opinion in 1962, Judges Sir Percy Spender and Sir Gerald Fitzmaurice expressed the view that it is—

> ". . . evident that those concerned did *not* foresee, and would have refused to contemplate, a possible break-up of the League [5]".

Judge van Wyk stated as follows:

> "The truth is that the possibility of the dissolution of the League was not contemplated when the Covenant was agreed to or when the Mandate Declaration was made . . . [6]"

In 1966 the Court found that the circumstances of the League's dissolution were "neither foreseen not foreseeable" by the framers of the mandates system [7].

And Judge Tanaka said that a conclusion that the United Nations had succeeded to the supervisory powers of the League —

> ". . . cannot be derived from the express or tacit intent of the parties to the Mandate agreement and those concerned, because at the period of the inception of the Mandate an event such as the dissolution of the League surely could not be foreseen by them . . . [8]".

58. Even if one were to assume, contrary to the generally accepted facts, that the authors of the mandates system did contemplate the possibility of a future dissolution of the League, it is still clear that no tacit intent can be imputed to

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 84 *et seq.*
[2] *Ibid.*, p. 275.
[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 362.
[4] *Ibid.*, p. 412.
[5] *Ibid.*, p. 514.
[6] *Ibid.*, p. 601.
[7] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 48-49. *Vide* also Judge van Wyk at p. 87.
[8] *Ibid.*, p. 275.

them which would have had the effect of the substitution of a new supervisory organ. It has been pointed out above [1] that certain of the mandatories could only with great difficulty be prevailed upon to accept the mandates system at all in substitution for contemplated annexation; that a special compromise formula had to be devised in order to meet their difficulties, and that their acceptance thereof, with reluctance, was strongly influenced by the composition and nature of the supervisory organs. It is therefore almost inconceivable that they would have agreed in advance in 1920 to submit to supervision at some unknown date in the future by a body, the composition, procedure and attitude of which were *ex hypothesi* unknown to them. This becomes the more apparent if one adds the considerations that the circumstances whereunder the League would be dissolved would in the nature of things have been unknown and unpredictable in 1920, and that the authors of the Mandate made express provision in Article 7 thereof for its future amendment. Surely, had the matter been raised, the reaction of at least some of the prospective mandatories would have been that the matter was to be left for further agreement in pursuance of the amendment provisions, in the light of the as yet unknown circumstances that might apply at the time of postulated dissolution of the League.

59. It seems clear, therefore, that no such implied agreement could possibly have been concluded. Further confirmation for this conclusion is found in the fact that no State has ever alleged the existence of such an implied agreement. During the discussions concerning the future of the mandates by the founders of the United Nations in 1945-1946 and by the Members of the League at its final session in April 1946, there was ample opportunity and every incentive for representatives to refer to such an agreement, if it was thought that one existed. No such reference was made. Again, in the discussions during the years 1946-1949 in the various organs of the United Nations, concerning the continued existence of the Mandate, no suggestion was made of any implied agreement concluded at the time of the creation of the Mandate, providing for a possible future succession of supervisory organs [2].

60. It is consequently submitted that, likewise as regards interpretation of its express provisions, there was nothing in the Mandate or its surrounding circumstances which would, by way of an implied term, provide a warrant for rejecting the prima facie conclusion that the Mandatory's obligation to report and account lapsed on the dissolution of the League [3].

V. Judicial Pronouncements

61. As has been pointed out [4], it has been found convenient to devote a separate chapter to the previous pronouncements of this Court regarding the question whether a substitution of supervisory organs occurred on the dissolution of the League. It will be demonstrated that the weight of judicial opinion favours the view that such a substitution could not have taken place without

[1] *Vide* paras. 13 *et seq.*, *supra*.

[2] See generally in regard to this topic, the dissenting opinion of Judge van Wyk in *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 607-610 and *Second Phase, Judgment, I.C.J. Reports 1966*, pp. 84-91, and Chap. VIII, *infra*, for a review of the relevant events.

[3] As far as can be ascertained, no writer of repute has ever made a contrary suggestion. *Vide* Chap. IX, paras. 20-27, *infra*.

[4] *Vide* Chap. VI, para. 16, *supra*.

fresh consent of a mandatory, and that such consent was not given in the case of South West Africa [1].

Since, however, Judge Jessup in 1966 made certain statements pertaining to historical events and the mandates system which may appear to be in conflict with contentions advanced in this Chapter, certain aspects of his dissenting opinion will be considered below.

VI. Judge Jessup's Dissenting Opinion in 1966

62. In his dissenting opinion in 1966 Judge Jessup dealt at some length with the "nature of the supervision of the mandates" and with an argument of the South African Government (the then Respondent) which stressed the role of the Council and of the Permanent Mandates Commission "as exclusive instrumentalities of supervision [2]". This was in the course of a section of his opinion in which he contended that on a proper interpretation of historical events and of relevant international instruments, the Court laid too much stress on the roles played by particular organs of the League in supervising mandates [2].

It should be borne in mind that, for present purposes, Judge Jessup's comments on this topic are relevant only to the question whether the mandatories *were under an obligation of accountability which could have obliged them to* submit to supervision by other international organs than the specific League organs mentioned in Article 22 of the Covenant and the Mandate Declaration. Judge Jessup did not indeed find that such an obligation existed—his contention that South Africa was not much concerned with the precise nature of the supervision to which it would become subject, was clearly advanced for a different purpose, namely as a step towards his conclusion that:

> "If South Africa agreed to submit to the jurisdiction of the Permanent Court of International Justice without devoting much thought to the nature of that jurisdiction, that fact would not supply any basis for denying the right or juridical interest which Applicants properly asserted in this case [3]."

Since the nature of the juridical interests of League Members, and the extent of the Court's powers under Article 7 of the Mandate Declaration, are not of direct relevance in the present proceedings, it would serve no purpose to present a detailed refutation of Judge Jessup's reasoning. However, as already pointed out, some of his statements appear to be inconsistent with contentions advanced in this Chapter and will accordingly be dealt with below.

63. In attempting to minimize the roles of the Council and of the Permanent Mandates Commission as against that of other organs, institutions and individual Members of the League in the context of League supervision, Judge Jessup attempted to make the following points which may be pertinent also to the issues now under consideration:

(a) Judge Jessup stated that, for a proper understanding of the negotiations at the Paris Peace Conference, regard should be had to the following factors, viz., that although the leaders of the Principal Allied and Associated Powers were prepared to give the Dominions a special status at the Peace Conference, the Dominions did not at that stage have any recognized separate international personality; that in the last few days of January 1919

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[1] *Vide* Chap. IX, *infra*.
[2] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 389.
[3] *Ibid.*, p. 406.

> President Wilson had succeeded in gaining the support of Mr. Lloyd George for the principle of non-annexation and the establishment of the mandates system; that the other members of the "Big Five "were no longer in opposition; that the final "compromise" based on the Smuts resolution [1] which, with only some modifications, became Article 22 of the Covenant, was a domestic matter concerning the internal arrangements of the British Empire; and that from the international point of view Great Britain had not conditioned her acceptance of the mandates system or the role of a mandatory on the adoption of this resolution [2].

It is respectfully submitted that this line of reasoning is untenable.

It may be true that in the last days of January 1919 the Principal Powers other than the United States were no longer in opposition to the *principle* of a mandates system, but there is certainly nothing to suggest that they were prepared to accept any of the Paris Drafts incorporating President Wilson's ideas, and more particularly the provisions relating to termination of mandates and of ultimate League financial responsibility [3]. It may also be true that Great Britain had not conditioned her acceptance of the mandates system on the adoption of the Smuts resolution. What is clear, however, is that at least as far as South West Africa and the Pacific Islands were concerned, Great Britain was not prepared to accept the particular type of mandates system proposed by President Wilson. It will be recalled that when President Wilson had shown himself disinclined to accept the Smuts resolution, Mr. Lloyd George had stated that "the statement to which they had just listened filled him with despair [4]".

What was ultimately accepted was not any of the systems proposed by President Wilson, but the system embodied in the Smuts resolution. It is clear that this resolution was adopted, *inter alia*, because of the vehement opposition of the Dominions to President Wilson's proposals. Whether or not Mr. Lloyd George would have been more amenable to President Wilson's proposals had it not been for the opposition of the Dominions, might be open to debate, but appears to be purely speculative and in any event entirely irrelevant. The important feature is the attitudes actually adopted and the compromises actually reached at the Paris Peace Conference.

(b) A further contention advanced by Judge Jessup was that when she accepted the Mandate for South West Africa, South Africa did not know in detail what kind of supervisory system would be established in respect of mandates, inasmuch as the Smuts resolution did not include any provision for the Permanent Mandates Commission, which was inserted later, and became paragraph 9 of Article 22 of the Covenant [5].

Since the features of major importance for the prospective mandatory powers were the composition and probable attitude of the Council, which was to be the real supervisory organ, Judge Jessup's contention, even if correct, would not materially affect the force of the contentions set out above. But it is submitted

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[1] *Vide* para. 19, *supra*.

[2] Dissenting opinion of Judge Jessup, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 397-398.

[3] *Vide* paras. 11 and 15, *supra*.

[4] *Vide* para. 20, *supra*.

[5] Dissenting opinion of Judge Jessup, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 399.

the argument advanced by Judge Jessup does not rest upon a sound factual basis.

It is indeed true that the Smuts resolution did not contain a provision for the Permanent Mandates Commission, but it is highly probable that the Dominions and other interested States anticipated the inclusion of such a provision in the Covenant at the time when the Smuts resolution was provisionally adopted. It will be recalled that on 25 January 1919, D. H. Miller, the United States legal adviser in Paris, received a British "Draft Convention Regarding Mandates" from Lord Robert Cecil [1]. This draft made provision for annual reports by the Mandatory Power and included a provision for the creation of a Commission to assist the League in its supervisory role and to receive the annual reports [2]. In this regard S. Slonim remarks:

> "Judge Jessup, in his dissenting opinion in *S.W.A. 1966 Judgment*, p. 399, in the course of rejecting South Africa's argument that the compromise worked out on January 30, 1919, was the sum total of obligation to which South Africa had been prepared to subscribe, points out that that compromise had not contained the provision for the Permanent Mandates Commission, which was only added at a later date. It is evident, however, that South Africa and the remaining Dominions were familiar with this provision, since it was part of Cecil's draft, completed on January 24. The provision in fact was re-inserted into the mandates article by General Smuts himself, when he presented the final version of that article to the Commission of the League of Nations on February 8, 1919. See Miller, *Drafting of the Covenant*, Vol. I, at 185; . . . [3]"

(c) A further statement by Judge Jessup was that South Africa had accepted the Mandate for South West Africa before all the details of the mandate instrument (such as the nature of the report which would have to be submitted) were known and agreed upon [4]. In this regard Judge Jessup pointed out that, prior to the coming into force of the Covenant on 10 January 1920, and the formal approval of the Mandate for South West Africa on 17 December 1920, the following had occurred, viz., South Africa had on 30 January 1919 tacitly agreed to accept the Mandate; the formal allocation had been made by the Council of Four on 7 May 1919, and the South African Parliament had in September 1919 passed the South West Africa Mandate Act (subsequently extended by resolution by both Houses of Parliament), which Act, *inter alia*, empowered the Governor-General to do all such things "as may be proper and expedient for giving effect in so far as concerns the Union to the Treaty *or to any Mandate issued in pursuance of the Treaty with reference to the territory of South West Africa*; . . . [5]"

It is, of course, true that after the Smuts resolution had been provisionally adopted South Africa was prepared to accept a Mandate for South West Africa, but obviously a Mandate which would conform to the provisions of the Smuts resolution. No doubt everybody confidently expected that the mandate instru-

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[1] *Vide* para. 14, *supra*.
[2] Miller, *op. cit.*, Vol. I, pp. 106-107.
[3] Slonim, *Canadian Yearbook of International Law*, Vol. VI, p. 126, footnote 36.
[4] Dissenting opinion of Judge Jessup, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 399-400.
[5] Italics added by Judge Jessup; *ibid.*, p. 399.

ments would not contain any provisions placing a greater burden on the mandatories than that envisaged by the Smuts resolution, although it was obvious that certain details still had to be settled.

It will be observed that Judge Jessup italicised that portion of the preamble of the South West Africa Mandate Act which contained the words "any Mandate". It seems as if Judge Jessup intended to suggest that South Africa was prepared to accept *any* mandate which might have been issued in pursuance of the Treaty of Versailles. It is obvious, however, that the word "any" was used in its ordinary sense in legislation of an empowering nature in order to confer upon the Governor-General (i.e., the executive branch of the Government) a wide discretion. To infer from this that the South African Government was instructed by Parliament to accept any mandate, irrespective of its terms, is, with respect, a complete *non sequitur*.

The important point is that when South Africa accepted the Mandate, i.e., when it became legally bound [1], it had full knowledge of the terms of the Covenant and the mandate instrument, and was consequently aware of the details of the League's supervisory powers. These powers did not differ in essence from the powers to be conferred upon the League in terms of the Smuts resolution, on which tacit agreement had been reached early in 1919. What is even more important is that South Africa knew that the Council of the League had to act unanimously and that as regards any question relating to the Mandate South Africa would be entitled to exercise a vote [2].

(d) Judge Jessup also stated that the composition of the Permanent Mandates Commission, the actual procedures to be followed by the Commission and the development of the organs of the League of Nations were not known when the Mandate was conferred upon South Africa [3].

It is submitted that the extent to which these aspects were unknown when the mandates were assumed, was not such as to affect the issues under consideration. In any event, paragraph 9 of Article 22 of the Covenant provided that a Permanent Commission would be constituted to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates. It was known that this Commission would consist of experts and it was also clear that it would have no power to take any binding decision in regard to the administration of the mandated territory by a mandatory [4]. It is consequently not clear how any relevance can be attached to the fact that the composition of the Permanent Mandates Commission had not been settled and that its actual procedures were unknown when South Africa accepted the Mandate. Every mandatory at least knew that the procedures to be adopted by the Permanent Mandates Commission had to comply with paragraph 9 of Article 22 of the Covenant and with the provisions of the mandate instruments.

As regards the development of the organs of the League of Nations, Judge Jessup pointed out that, according to Article 4 of the Covenant, the Council would have been composed of the five Principal and Associated Powers and

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[1] *Vide* paras. 40-41, *supra*.

[2] *Vide* para. 32, *supra*.

[3] Dissenting opinion of Judge Jessup, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 401-403.

[4] The Constitution of the Permanent Mandates Commission was approved by the Council of the League before any mandate declaration was made by the Council. *Vide* Hall, *op. cit.*, p. 139.

four non-permanent Members selected by the Assembly, and that, since the United States did not participate in the League, the Large Powers did not have a majority even at the outset. As already noted, however, every decision of the Council had to be unanimous. Apart from the fact that a mandatory would also be entitled to vote on a Council resolution if its interests were specially affected, every mandatory knew in advance that no binding decision would be taken by the Council in the face of the opposition of only one of the Principal Allied and Associated Powers [1].

VII. Conclusion

64. From what has been stated above, it is clear that during the existence of the League a mandatory could not have been compelled to submit to the supervision of another international organization, and that the mandatories did not, by accepting the mandates, submit to "international supervision" in the abstract. It is consequently contended that South Africa consented to no other supervision than that exercised by the specific organs of the League of Nations mentioned in the mandate documents, which supervision fell away on the dissolution of the League.

G. The Possibility of Revocation of the Mandate

I. General

65. A number of writers and commentators on the mandates system have posed the question whether the League had the legal power to "revoke" or "terminate" a mandate. At the outset it is necessary to obtain clarity as to the phraseology to be employed. In order to obviate misunderstanding, the word "revocation" will be used in the succeeding paragraphs to connote the taking away of a mandate from a particular mandatory resulting in the mandatory being deprived of its right (and freed from its obligations) under the mandate, but the status of the mandated territory remaining unaltered. The word "termination" will be used to indicate the process whereby a mandate is completely brought to an end because it has served its purpose, in other words, because the inhabitants of the particular territory have developed to such an extent that the need for administration by a mandatory power has fallen away. The League's rights (if any) of "termination" in this sense are not of any relevance in the present proceedings for the reasons noted in an earlier chapter hereof, viz., that the General Assembly of the United Nations did not in resolution 2145 (XXI) purport to terminate the Mandate but to revoke it pursuant to powers claimed to vest in the General Assembly as successor to the Council of the League [2].

66. The present section will accordingly be limited to a discussion of the question whether the League was legally entitled to revoke mandates, and,

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[1] It is not clear what was meant by the rather cryptic statement in a footnote at p. 403 of Judge Jessup's opinion, viz., "The unanimity rule was not always controlling". If he was intending to refer to the limited class of matters in respect of which the Covenant specifically did not require unanimity, his statement was correct but hardly relevant, since supervision of mandates was not included therein.

[2] *Vide* Chap. VI, para. 5, *supra*.

if so, on what grounds. It has never been suggested [1] that the League had the far-reaching power of revoking a mandate at will. It would be completely unrealistic to contend that the League was empowered to revoke a mandate otherwise than by reason of serious violations by the mandatory of its obligations under the mandate. It was indeed on this ground that the General Assembly sought to base resolution 2145 (XXI) [2]. The question whether even this relatively limited power of revocation vested in the League, forms the subject-matter of the next succeeding paragraphs.

67. On analysis, it appears that a power of revocation on the part of the League could have been derived only from the express terms of the mandate instruments, read with Article 22 of the Covenant; or an implied term, or some principle of international law. These possibilities will be dealt with in some detail below, and it will be shown that although this Court has never dealt specifically with the question under consideration, the weight of judicial opinion expressed in proceedings relating to South West Africa supports the South African Government's contention that the League was not legally empowered to revoke a mandate.

II. Revocation by Virtue of a Principle of International Law

68. It will be convenient to deal first with the possible application of some rule of international law operating independently of the intentions of the parties. It is clear that legal rules in international law operate between subjects of international law only when, and to the extent that, the parties so desire; in the sense that it is open to the parties to exclude such operation by agreement [3]. If the rule in question prescribes the incidents, effects or consequences of a transaction as between the parties thereto, this general principle applies *a fortiori*: the parties are entitled to create whatever relationship they wish and may by agreement, express or implied, exclude any rule of international law which would otherwise have added to the incidents, effects or consequences of their transactions. It is not necessary to consider to what extent, if at all, this general principle is qualified by the existence of peremptory rules of law *(jus cogens)* which would apply even if contrary to the will of the parties, since in the instant case there clearly exists no such peremptory rule of law which could have introduced a right of revocation into the mandates even against the will of the authors thereof.

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[1] Save by certain German writers. Paul Fauchille, *Traité de Droit International Public*, Tome I, 2e Partie (1925), p. 846, points out that the reason why such writers maintained that the League had sovereignty over the mandated territories, and why they readily accepted a right of revocation on the part of the League, was that they hoped that when Germany became a Member of the League she would be nominated as Mandatory for all or part of her former colonies. In this regard it should be pointed out that in a Note addressed by the German Government to the League in 1924 regarding the question of German accession to the League, the following was stated (freely translated): "Germany, who has since the last war been excluded from every colonial activity, waits to take part actively at an appropriate time in the mandates system of the League of Nations." *Vide* Wehburg, H., *Die Völkerbundsatzung* (1927), pp. 117-118.

[2] *Vide* Chap. VI, para. 2, *supra*.

[3] *Vide North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 42: "Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties . . ."

69. It has been suggested, however, that a right of revocation was introduced into the mandates by a generally recognized principle of law, either on the basis of the ordinary right of a party to a treaty to renounce it in the event of a fundamental breach by the other party [1], or by analogy with the three institutions of private law to which reference was made, directly or indirectly, in Article 22 of the Covenant, viz., mandate, trust and tutelage, all of which recognize a right of revocation or termination in the event of a failure of duty by the person subject to fiduciary obligations [2]. Since no right of revocation on either of these bases could have existed if contrary to the intentions, express or implied, of the authors of the mandates system, any decision as to their applicability would first require an enquiry into the said intentions. For the reasons stated in the succeeding paragraphs a right of revocation can be justified on neither of these bases.

70. The possibility of equating a revocation of a mandate with a renunciation of a treaty may be immediately discarded. It has been noted above that, whether or not the Mandate ever was a treaty, or remained such after the dissolution of the League, resolution 2145 (XXI) did not purport to rely on, and could not in law be justified by, the application of rights of renunciation possessed by a party to a treaty [3]. Indeed, it could hardly be contended that even during its lifetime the League *ipso iure* had a right *qua* contractual party to renounce a mandate (assuming for the purposes of argument that the mandates were treaties, and, on this assumption, disregarding the complications caused by their multipartite character) [3]. The League itself and the concept of supervisory powers were innovations in the field of international law. It is hardly credible that the authors of this system would have differentiated, for the purposes of revocation of mandates, between the League's authority as supervisory organ and its rights as a party to a mandate treaty. For these and other obvious reasons it has repeatedly been emphasized that the mandates system was *sui generis* and that mandates (even if they were agreements) could not be equated with ordinary treaties [4]. And, as regards the applicability of principles of the private law institutions of mandate, trust and tutelage, reference may be made to the statement of the Court in 1950 that it is "not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law [5]".

71. It follows that there is no rule of international law which could provide a simple answer to the problem under consideration. The answer to the question whether or not the League of Nations was legally empowered to revoke a mandate, can therefore be found only in the intentions of the authors of the mandates system, as expressed in the relevant documents or to be implied therefrom. These intentions will be examined below.

III. The Express Terms of the Mandate

72. Neither Article 22 of the Covenant nor any of the mandate instruments

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[1] Dugard, J., "The Revocation of the Mandate for South West Africa", *A.J.I.L.*, Vol. 62 (1968), pp. 84-88.

[2] *Ibid.*, p. 87.

[3] *Vide* Chap. VI, paras. 2-5, *supra*.

[4] *Vide* e.g., Rolin, *Revue de Droit International et de Legislation Comparée*, Vol. XLVII, p. 436.

[5] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports* 1950, p. 132.

contained any provision authorising the League to revoke a mandate. Article 7 of the Mandate Declaration for South West Africa (and similar articles appearing in all the other Mandate Declarations) provided that the terms of the mandate could only be amended with the consent of the Council of the League. This provision was, no doubt, inserted to make it abundantly clear that the mandatory did not have the right to amend the mandate unilaterally. It did not, however, confer on the Council the right to modify the terms of the mandate. As stated by Judge Tanaka:

> "The prohibition of unilateral modification exists not only in regard to the mandatory but in regard to the League of Nations also [1]."

IV. Revocation by Virtue of an Implied Term

73. The circumstances under which a term may be implied in the course of the interpretation of an international treaty or agreement have been dealt with in Chapter II [2]. It has been pointed out that courts in all legal systems guard themselves against assenting to a proposed implication on any but the most cogent grounds, realising that implication on a basis of speculation, or on what the parties ought reasonably to have done, would amount to the making of a new bargain or compact for the parties. Consequently, it is required that an implication of tacit *consensus* must arise necessarily or inevitably from the relevant facts.

74. It is therefore necessary to have regard to the circumstances surrounding and preceding the conferment of the mandates in order to determine whether a clear tacit intent to provide a right of revocation on the part of the League can be deduced. At the outset it must be noted that had such an intent existed, it would have been strange not to have incorporated it in the mandate instruments. A term providing for revocation of a mandate would have been a potentially far-reaching provision with a number of implications affecting the population of the territory concerned, the League and its members, the mandatory and any new mandatory to which the territory might be entrusted. Had a possible revocation of mandates been contemplated, one would have expected explicit agreement concerning, *inter alia*, the grounds which would have justified revocation, the manner in which it would have to be effected, the methods by which the future administration of the territory concerned would have to be determined (including the appointment of a new mandatory), and the adjustments of the rights of the various interested parties.

75. The failure to make express provisions for revocation attains increased importance when regard is had to the conflicting points of view which were ultimately resolved in the compromise relating to the mandates system. It will be recalled that at the end of the First World War certain of the successful Powers claimed the annexation of some of the former enemy territories, and that agreements in this regard had been reached during the war [3]. Amongst the States with such claims were South Africa, Australia and New Zealand. On the other hand, there was a strong current of feeling in favour of international administration of enemy colonies, which point of view was pressed particularly strongly by President Wilson [4]. The crux of the dispute between the two

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 323.
[2] *Vide* Chap. II, paras. 10-13, *supra*.
[3] *Vide* para. 7, *supra*.
[4] *Vide* para. 8, *supra*.

schools of thought therefore lay precisely in the extent of control which would be exercised by governing States over ex-enemy territories, and the revocability or otherwise of a Mandate was one of the most important aspects thereof, as appears from the attention given thereto in the negotiations preceding the mandate compromise.

76. It has already been pointed out that in December 1918 General Smuts proposed the establishment of a mandates system for the peoples and territories formerly belonging to Russia, Austria-Hungary and Turkey. He suggested that the League of Nations should be considered as the reversionary in the most general sense and as clothed with the right of ultimate disposal; that it should be lawful for the League to delegate its authority, control or administration in respect of any people or territory to some other State; and that the League should reserve to itself complete power of ultimate control and supervision, as well as the right of appeal to it from the territory or people affected against any gross breach of the mandate by the mandatory State. General Smuts, however, expressly excluded the African and Pacific Colonies from the mandates principle [1]. This proposal was substantially adopted by President Wilson and extended to all ex-enemy territories. In terms of President Wilson's Paris Drafts, the League would be vested with complete authority and control, it would be entitled (not obliged) at its discretion to delegate to a State or "organized agency" powers to act "as its agent or mandatory" and the League could in appropriate circumstances, substitute some other State or agency as mandatory[2]. In keeping with this conception, President Wilson's Second and Third Drafts proposed that the expenses of mandatory administration would, if necessary, be borne by all the Members of the League [3].

77. However, serious misgivings, presumably inspired by the provisions of President Wilson's Paris Drafts, were expressed relative to the idea that a mandatory's tenure might be only of a temporary nature. At the fifth meeting of the Council of Ten regarding the colonial question, Mr. Simon, the French Minister for Colonies, in developing his argument against the acceptance of President Wilson's mandatory system, pointed out that in terms thereof every mandate would be revocable and that there would therefore be no guarantee for its continuance. Thus there would be little inducement for the investment of capital and for colonization in a country the future of which was unknown [4].

At the same meeting Mr. Balfour, of Great Britain, stated that very little thought had been given to the position of the mandatory Power. In particular no conclusion had been reached and no authoritative statement had been made regarding an important point, namely whether the tenure of a mandatory should be made temporary or not. Mr. Balfour pointed out that if the tenure were merely temporary, difficulties would arise and that there would be perpetual intrigues and agitation. In his opinion the mandatory system could only work if a mandatory were secured in his term of office [5]. The same view was expressed by Mr. Orlando [5].

It will also be recalled that when Mr. Lloyd George attempted to convince Mr. Hughes, the Australian Prime Minister, that a Class "C" Mandate for New Guinea was tantamount to Australian ownership of the island, subject to certain conditions in favour of the inhabitants, Mr. Hughes asked whether

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[1] *Vide* para. 9, *supra*.
[2] *Vide* para. 11, *supra*.
[3] *Vide* para. 15, *supra*.
[4] *Vide* para. 17, *supra*.
[5] *Vide* para. 18, *supra*.

this would be the equivalent of a 999 years lease as compared with a freehold, and that it was only after Mr. Lloyd George had assured him that it was, that Mr. Hughes notified the former of his acceptance of the Smuts resolution [1].

78. In this regard it is also pertinent to refer to the diary kept by Colonel House. On 27 January 1919, he wrote that he had had an interesting meeting with Lord Robert Cecil upon the subject of the League of Nations. He recorded that there were some strong points of difference between the American drafts and the draft of Lord Robert Cecil. They argued at length, especially upon the question of the German colonies, and whether or not the mandatory principle should be applied to them. Colonel House contended strongly in favour thereof, and Lord Robert Cecil was prepared to accept it, but objected to the clause by which a territory could, by applying to the League of Nations, ask for a substitution of mandatories. Lord Robert Cecil thought this to be impracticable and said that the Dominions would not consent to it [2].

79. It was only a few days later, on 30 January 1919, that the Smuts resolution was provisionally adopted by the Council of Ten. This resolution which, with certain modifications not relevant for present purposes, became Article 22 of the Covenant, constituted the cornerstone of the compromise between the conflicting points of view. In particular, President Wilson had to abandon certain of the extreme aspects of his proposals concerning League supremacy. The mandates were to be allocated by the Principal Allied and Associated Powers (not the League), and, at any rate in the case of the "C" Mandates, the allocation "*would have to be*" to the adjacent claimant States [3]. The relationship between the League and the mandatories was in each case regulated by a mandate instrument, the terms of which were assented to by the mandatory and would require its consent for alteration. But most important for present purposes, President Wilson's provisions relating to revocation of mandates and substitution of mandatories did not appear in the Smuts draft and found no place in Article 22 of the Covenant[4]. In the light of the preceding events this could hardly have been accidental or fortuitous.

80. The failure of the proposals concerning substitution of mandatories to gain acceptance is of course a natural corollary of the falling away of the proposals relative to revocability of mandates. But it is also significant in itself. The League had no powers of direct administration of mandated territories, and the proposed powers to entrust the administration to "organized agencies" came to nothing. It follows that a power of revocation would have been of no avail unless a new mandatory could have been substituted, which in turn fortifies the views that mandates were not intended to be revocable.

81. Indeed, not only did the proposals for substitution fall away but ultimately the League did not even have control over the initial appointment of mandatories—as noted, in terms of the compromise that competence was granted to the Principle Allied and Associated Powers [4]. In the light hereof it would indeed be surprising if the framers of the Covenant and the mandate instruments had the intention that the League should in the future be empowered to substitute mandatories, and had it been their intention, it would be astonishing if, in the light of the above-mentioned facts, they had failed to give expression thereto in the provisions of the relevant documents.

82. It is consequently abundantly clear that, far from there being any evidence

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[1] *Vide* para. 19, *supra*.
[2] Seymour, C., *The Intimate Papers of Colonel House* (1928), Vol. IV, p. 307.
[3] *Vide* para. 20, *supra*.
[4] *Vide* para. 23, *supra*.

from which it can be concluded that it was the unexpressed intention of the States concerned that the League would have the power to revoke mandates and substitute mandatories, the record shows conclusively that the ideas of revocation and substitution were deliberately not incorporated in the Smuts resolution and in Article 22 of the Covenant, and therefore also not in the mandate instruments. There is consequently no room for the implication of a term which would have empowered the League to revoke a mandate or to substitute a mandatory.

83. This conclusion is fortified by the consideration that, had it been the intention that a mandate should be revocable by the League, it is inconceivable that the founders of the League would have made it impossible for this competence to be exercised in practice. Reference has already been made to the provisions of the Covenant whereby any decision of the Council pertaining to a particular mandate required the agreement of, *inter alios*, the representative of the mandatory State, and it follows that a decision to revoke a mandate could not have been taken had the mandatory opposed such a course [1].

This feature was emphasized in the Judgments and opinions both in 1962 and 1966. In 1962, in support of its findings that the judicial protection of the sacred trust was an essential feature of the mandates system, the Court stated that the *raison d'être* of this essential provision in the mandates was obvious, since, by reason of the unanimity rule mentioned above, supervision by the League could in the last resort not have been effective [2]. The Council's ultimate lack of effectiveness would of course also have rendered it impossible for the Council to revoke a mandate against the wishes of the mandatory. The logical conclusion to be drawn from this situation is that it was not the intention of the authors of the Covenant that the Council of the League would be entitled to impose its will on the mandatories, whether in order to revoke a mandate or for any other purpose. This was expressly so held by the Court in 1966, in the following words:

> "The plain fact is that, in relation to the 'conduct' provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories—the system adopted was one which deliberately rendered this impossible. . .
>
> *As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the mandate itself, the risk of this was evidently taken with open eyes*, and that the risk was remote, the event proved [3]." (Italics added.)

84. This feature was also stressed by Judge Sir Louis Mbanefo. In his dissenting opinion he posed the question how, assuming the League still to have been in existence in 1966, a dispute between South Africa and a majority of Members of the League as to whether the South African policies were in

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[1] The difference of opinion on this point between Judges Klaestad and Lauterpacht in the 1955 Opinion (*vide Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, pp. 85-86 and 99-100) was resolved by the Court and individual Judges in 1962 and 1966 (*vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 336-337 and 354; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 44 and 218-219). The statement in the text can accordingly now be regarded as settled law.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 336-337.

[3] *Vide South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 46.

breach of the mandate provisions, could be resolved. He gave the following answer:

> "The Judgment says that the Mandate provides no remedy for such a situation and that it was a risk the League members took with their eyes wide open. It seems to me that it was to meet such a situation that Article 7 (2) was introduced [1]."

Judge Sir Louis Mbanefo was accordingly also of the opinion that the framers of the mandates system took the risk of a breach of the mandate with their eyes wide open in the sense that the League as such (as distinct from its Members acting in terms of Art. 7, para. 2) would have been powerless had a mandatory acted in breach of its obligations, and, consequently, would not have had the competence to revoke the mandate [2].

85. As far as "C" Mandates were concerned, there is an additional reason for concluding that the Council did not have the power to revoke the mandates falling in that category. It will be recalled that during the discussion of the Council of Ten stress was repeatedly laid on the contiguity of the Pacific Islands to Australia and New Zealand, and especially of South West Africa to South Africa [3]. Even before the Council met in Paris, Mr. Lloyd George pointed out to President Wilson that it would have been quite impossible to separate South West Africa from South Africa, because the former was essentially a part of South Africa [4].

When opening the discussion relating to Colonial territories at the Peace Conference on 24 January 1919 Mr. Lloyd George pointed out that South West Africa was contiguous to the territories of South Africa. He went on to say that there was no real natural boundary and unless the Dutch and British population of South Africa undertook the colonization of this area it would remain a wilderness [5].

At the third Meeting on 28 January 1919 Mr. Lloyd George again stressed the contiguity of the Pacific Islands and South West Africa to the territories of the Dominions which laid claim to these colonies. This contiguity, according to Mr. Lloyd George, suggested that the Territories in question "*should form an integral part of those countries* [6]". (Italics added.)

86. Speaking at the fifth meeting of the Council of Ten, Mr. Lloyd George, with reference to the Smuts resolution, said that three classes of mandates would have to be recognized; the third category being described as:

> "Mandates applicable to countries which formed almost a part of the organization of an adjoining power, *who would have to be appointed the mandatory* [7]." (Italics added.)

It was obvious from the formulation of the Smuts resolution and from what Mr. Lloyd George had said that the Pacific Islands and South West Africa

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[1] *Ibid.*, p. 505.

[2] In the dissenting opinions of Judges Wellington Koo and Koretsky there are also to be found passages which are for the same reasons to a greater or lesser degree inconsistent with the notion of a power of revocation vesting in the Council. *Vide* their dissenting opinions at pp. 218-219 and 245.

[3] *Vide* paras. 13 et seq., *supra*.

[4] *Vide* para. 10, *supra*.

[5] *Vide* para. 13, *supra*.

[6] *Vide* para. 16, *supra*.

[7] *Vide* para. 20, *supra*.

would be territories to which the third category of mandates would apply and that South Africa, New Zealand and Australia would have to be appointed mandatories.

As already pointed out, the Smuts resolution was provisionally adopted and it was tacitly agreed that the "C" Mandates would be administered by the said three countries [1]. At a later stage the three Dominions were in fact nominated as mandatories of the territories subject to "C" Mandates [1].

87. The conception that the Dominions had to be appointed mandatories in respect of those territories appears also from the wording of paragraph 6 of Article 22 of the Covenant which, almost word for word, followed paragraph 8 of the Smuts resolution, and read as follows:

> "There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the mandatory, and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population [2]."

It will be observed that specific reference was made to the "geographical contiguity" of the territories concerned to the mandatory States and that this was one of the reasons for stating that the territories "can be best administered under the laws of the mandatory State as integral portions of its territory". In view of this formulation it is inconceivable that the framers of the Covenant could have intended that the mandatories in respect of the Pacific Islands and South West Africa could ever have been any other State than the three Dominions concerned. At that stage there was, for instance, no State other than South Africa which was contiguous to South West Africa and certainly no other State which could best have administered South West Africa under its laws as an integral portion of its territory. This is indeed still the position. It would consequently be idle to suggest that the framers of the Covenant and the mandate instrument for South West Africa could ever have intended that the Mandate for South West Africa could be revoked by the Council and transferred to another mandatory, to which, by reason of its position, situation and general circumstances, the said paragraph of the Covenant could never be applicable.

88. There can accordingly, it is submitted, be no doubt that a term empowering the League to revoke a mandate cannot be implied, and even if it is assumed, for the purposes of argument, that the Council did enjoy such a power in relation to "A" and "B" Mandates, it is abundantly clear that the Council could not have revoked a "C" Mandate and have appointed a substitute mandatory.

89. The question whether the League had a power of revocation has been discussed by a large number of writers and commentators but unfortunately the views of most are based more on speculation than on legal argument or on a realistic appraisal of the relevant facts and events. These writers and commentators can be divided into three groups; viz.:

(a) those who hold the view that the League had a power of revocation [3];

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[1] *Vide* para. 21, *supra*.

[2] Miller, *op. cit.*, Vol. II, p. 737.

[3] *Vide* Bentwich, N., *The Mandates System* (1930), p. 16; Pahl, R., *Das Völker-*

(b) those who express the opinion that if the Permanent Court had rules that a mandatory had materially breached its obligations, the League would have had a power of revocation [1]; and

(c) those who hold the view that the League had no power of revocation [2].

90. As a typical example of the facile approach of by far the majority of writers who fall in the first group, reference may be made to the following remarks of Professor Verzijl:

> "Was the termination of a Mandate indeed permissible? And if so, by whom? And if by either party to it, would it be on a footing of equality? And with what legal effects? No directions whatsoever bearing on these points were to be found in Article 22 of the Covenant or in the Mandate instruments. It seems obvious that a mandatory having once voluntarily assumed the task should only be allowed to withdraw for overriding political or economic reasons and that its release should only be granted subject to guarantees against such withdrawal causing any serious disturbance of the existing political situation. On the other hand, *it was reasonable to hold* that the League should have the power to revoke the Mandate should the mandatory fail to discharge its duties or should it act against the fundamental principles of the League [3]." (Italics added.)

No grounds are given for this expression of opinion, nor is any reference made to the relevant historical events preceding the conferment of the mandates. It is submitted that a conception of what is "reasonable" cannot serve as a substitute for historical and legal analysis. In this regard reference may be made to the Court's rejection, in its 1966 Judgment, of an argument introducing "necessity" as a factor in ascertaining what the rights of League Members were [4].

91. It is significant that not one of the writers falling into the first group make any distinction between "A" and "B" Mandates on the one hand, and "C" Mandates on the other. Nor do they attempt to explain how, if the League had revoked a mandate, a new mandatory could have been appointed or how the provisions of Article 22 of the Covenant relating to, *inter alia*, the contiguity of territories under "C" Mandates could have been applicable to such a new mandatory.

92. For the reasons set out above, it is submitted that the true position is reflected by those writers who deny the existence of a right of revocation of a

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rechtliche Kolonial-Mandat (1929), p. 103; Pelichet, E., *La Personnalité Internationale Distincte des Collectivités sous Mandat* (1932), p. 39; Dugard, *A.J.I.L.*, Vol. 62 (1968), pp. 84-88.

[1] *Vide* Wright, *op. cit.*, p. 440, footnote 11, who seems to adopt the view of Sir Frederick Lugard that in the "almost inconceivable contingency" of revocation of a Mandate, "the International Court of Justice would be the agency employed".

[2] *Vide* Chowdhuri, R.M., *International Mandates and Trusteeship Systems* (1955), p. 62; Freiherrn von Freytach-Loringhoven, "Die Mandatsherrschaft des Völkerbundes", *Zehn Jahre Versailles*, II. Band (1929), p. 191 and *Das Mandatsrecht in den deutschen Kolonien* (1938), p. xiv; Margalith, *op. cit.*, pp. 199-200; Millot, A., *Les Mandats Internationaux* (1924), p. 89; Rousseau, C., "Chronique des Faits Internationaux", *Revue Générale de Droit International Public*, No. 2 (1967), p. 384; van Rees, D. F. W., *Les Mandats Internationaux* (1927), pp. 38-39; Zeineddine, F. M., *Le régime du Contrôle des Mandats de la Société des Nations* (1932), p. 295.

[3] Verzijl, H. J. W., "International Status of South-West Africa", *The Jurisprudence of the World Court* (1966), Vol. II, p. 50.

[4] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 47-48.

mandate, which writers, in any event, form a majority group. As an illustration of the views expressed by such writers reference may be made to the following extract from an article written by G. Diena in 1924 (freely translated):

> "Certain people maintained that since a Mandate has to be exercised in the name of the League of Nations, the power vests in the League to choose and appoint the mandatory and that such nomination must be done by the Assembly, because although paragraph 8 of Article 22 of the Covenant confers certain powers on the Council in the determination of the Mandates, that concerns merely the terms of the Mandate, and not the choice and nomination of a mandatory. That opinion, however, did not prevail; and it seems nothing but just and normal that it should be so. The League of Nations could not completely ignore the agreements which had been concluded between the Allied and Associated Powers before the League was set up; also the League could not ignore as something that did not exist the factual conditions which resulted at the end of the struggle between the belligerents, and consequently, the League had to take into consideration the circumstances that certain Powers had already, by virtue of conquests during the War, taken possession of the territories which were to become objects of the Mandates [1]."

93. Another author who adverted to the respective rights and obligations of the League and the mandatories, was Duncan Hall. Commencing with a reference to the discussions in the Council of Ten, he said:

> "It was the governments taking part in this debate that, by their agreement, created the mandate system. It was they that drafted the self-imposed limitations of the Mandate charters. It was they that put the system into operation . . . It was they . . . that sustained it and made it effective by their loyal co-operation within the central organs of the League . . . Throughout this period the relation of the League to the mandatory powers remained as stated by Mr. Balfour in the Eighteenth Session of the League of Nations Council. Speaking with special reference to Palestine, he said that 'mandates were not the creation of the League, and that they could not in substance be altered by the League'. He further pointed out that 'a mandate was a self-imposed limitation by the conquerors on the sovereignty which they exercised over the conquered territory. In the general interest of mankind, the Allied and Associated Powers had imposed this limitation upon themselves, and had asked the League to assist them in

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[1] *Vide* Diena, G., "Les mandats internationaux", *Recueil des cours*, IV, Tome 5 (1924), p. 224.

"Quelques-uns ont soutenu que, puisque le mandat doit être exercé au nom de la Société des Nations, il appartient à celle-ci de choisir et de nommer le mandataire et que cette nomination doit être faite par l'Assemblée, car si le paragraphe 8 confie certaines attributions au Conseil dans la détermination des mandats, cela ne concerne que les termes du mandat, mais non pas le choix et la nomination du mandataire. Cette thèse, cependant, n'a pas prévalu; et il semble juste et naturel qu'il en ait été ainsi. La Société des Nations ne pouvait pas faire complètement abstraction des accords conclus entre les nations alliées et associées, même avant qu'elle fût constituée; elle ne pouvait non plus considérer tout à fait comme inexistantes les conditions de fait résultant de l'issue de la lutte entre les belligérants et, par conséquent, devait tenir compte de la circonstance que certaines puissances, en vertu des conquêtes réalisées pendant la guerre, avaient déjà la possession des territoires destinés à être objet de mandats."

seeing that this general policy was carried out, but the League was not the author of it [1]."

94. It is convenient at this stage also to refer to statements made by Members of the Permanent Mandates Commission. In 1924 Lord Lugard presented a memorandum to the Commission in which he concluded that although a Mandate could be revoked in the event of gross violation thereof, such a revocation might for practical purposes be regarded as inconceivable [2]. However, Mr. van Rees, in the ensuing discussion stated that the possibility of unilateral revocation "did not really exist either in law or in fact [3]". Too much importance should not be attached to these statements since they did not profess to be based on a legal analysis of the mandates system and its origin, but were in essence merely speculations directed to the abstract hypothesis of revocability of a mandate.

95. Among the important unofficial societies devoted to the promotion of international co-operation was the Inter-Parliamentary Union. It gave serious study to the mandates system as from its 20th session in 1922. During its 22nd conference in 1924 the Union adopted a resolution recommending that the Assembly of the League be empowered to modify and revoke mandates [4]. This recommendation was obviously based on the assumption that no organ of the League did have the legal power to revoke a mandate.

96. As already pointed out, neither the Permanent Court nor this Court has been called upon to consider specifically whether or not the League enjoyed a power of revocation of a mandate. Neither has any individual Judge in so many words expressed an opinion as to this question [5]. As also pointed out, however, there are *dicta* in Judgments and opinions which are incompatible with any notion that a mandate was revocable at the instance of the League [6].

V. Conclusion

97. The above exposition demonstrated that neither Article 22 of the Cove-

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[1] Hall, *op. cit.*, p. 117.

[2] PMC, Min. V, pp. 177-178.

[3] *Ibid.*, p. 155.

[4] *Vide* Wright, *op. cit.*, pp. 83-84.

[5] In his 1950 dissenting opinion Judge Alvarez stated that, if a Mandatory State did not perform the obligations flowing from its Mandate, the United Nations Assembly would have the power, under Article 10 of the Charter, to revoke the Mandate (p. 182). For present purposes it is sufficient to point out that Judge Alvarez did not find that the *League* had the power to revoke a mandate. For the ambit of Article 10 of the Charter, *vide* Chap. X, *infra*. In contrast to Judge Alvarez, Judge Bustamante in his 1962 separate opinion, having mentioned that Article 22 of the Covenant did not mention whether the Allied Powers were to preserve for the future the power to appoint mandatories where necessary, or whether that power was to be conferred on the League of Nations through the Council, stated that "I would personally opt for the latter presumption since, in my view, the intention of the Powers was to renounce finally any rights to the former colonies" (p. 354). Judge Bustamante did not give any reasons for his conclusion that the Council had the power to appoint mandatories, and there is nothing to indicate that in the passage quoted he had in mind a revocation of a Mandate by the Council. He could as well have had in mind the situation in which a Mandatory Power, with the consent of the Council, decided no longer to act as such, and the relevant views expressed by him consequently do not constitute any authority for the proposition that the Council or any other organ of the League was empowered to revoke a Mandate.

[6] *Vide* paras. 82-83, *supra*.

nant nor the mandate instruments contained any provision, express or implied, empowering the League to revoke a mandate and either to assume powers of administration itself, or to appoint another mandatory; and that there is no objective legal principle, the application of which could have conferred such powers on the League. It shows that the weight of scholarly opinion favours the view that the League did not enjoy these powers. It demonstrates, finally, that *dicta* in the relevant judgments of the Court and in opinions of individual judges strengthen this conclusion.

It is consequently submitted that it has been conclusively shown that the League was not legally entitled to revoke a mandate, or to assume administration of a mandated territory or to appoint a new mandatory in the place of a deposed one.

Annex A

ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS

(1) To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the League.

(3) The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the mandatory.

(5) Other peoples, especially those of Central Africa, are at such a stage that the mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

(6) There are territories, such as South West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the mandatory, and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

(7) In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

(8) The degree of authority, control, or administration to be exercised by the mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

(9) A permanent Commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the Council on all matters relating to the observance of the mandates.

Annex B

MANDATE FOR GERMAN SOUTH-WEST AFRICA

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said Mandate, defines its terms as follows:

Article 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2

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

The 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.

Article 3

The mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except the essential public works and services, and then only for adequate remuneration.

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6

The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

The mandatory agrees that, if any dispute whatever should arise between the mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December 1920.

CHAPTER VIII

THE TRANSITIONAL YEARS 1945-1946 AND THEREAFTER

A. Introductory

1. In Chapter VII above it was demonstrated that no express or implied term in the Mandate, nor any legal rule appertaining thereto, could have resulted in a transfer of supervisory functions to the United Nations without a fresh agreement amongst all interested parties, including in particular South Africa as mandatory. The present Chapter will be devoted to a consideration of the question whether such an agreement was ever concluded. From a practical point of view this involves an examination of events during the years when the United Nations was established and the League of Nations dissolved, i.e., 1945-1946, and shortly thereafter. It was on events during this period that the Court in 1950 placed reliance for its conclusion that a succession of supervisory organs had occurred, and as far as is known, it has never been suggested that any relevant agreement (other than those involved in the creation of the Mandate itself) was concluded at any other time. The present Chapter will contain a survey of the material events during the said period, which will lead up to a consideration of the legal implications flowing therefrom, and in particular to the conclusion that no agreement was reached providing for transfer of supervisory powers in respect of mandates from the Council of the League of Nations to any organ of the United Nations.

B. Establishment of the United Nations

2. The establishment of the United Nations Organization resulted largely from inter-Allied co-operation during the Second World War. The name "United Nations" had been adopted by the Allies in the later stages of the war and used in declarations, such as that of 1 January 1942, at Washington, pledging war-time co-operation. The prospect of establishing a new international organization for the preservation of international peace was mentioned in a declaration signed on 30 October 1943, at Moscow, by the representatives of four of the major Allied Powers, viz., the Union of Soviet Socialist Republics, the United States of America, the United Kingdom and China. The first blueprint of the organization was prepared during discussions in the period August to October 1944 at Dumbarton Oaks, Washington, in which the said four Powers participated. Following on these discussions there was published the proposal, *inter alia*, that the key body in the contemplated organization was to be a Security Council on which the "Big Five" Powers (being the above four and France) were to be permanently represented. During the Yalta Conference of February 1945, between President Roosevelt of the United States of America, Prime Minister Churchill of the United Kingdom and Premier Stalin of the Soviet Union, came an announcement that the question of voting procedure in such a Security Council had been settled and that "a conference of United Nations" should be called to meet at San Francisco to prepare a charter for "a general international organization to maintain peace and security . . . along the lines proposed in the informal conversations of Dumbarton Oaks".

A conference of delegates of 50 nations was held at San Francisco between 25 April and 26 June 1945, at which the Charter of the United Nations was

drafted, unanimously agreed upon and signed by all the representatives. It came into force on 24 October 1945, when, as required by Article 110 thereof, the five Powers that were to be Permanent Members of the Security Council and a majority of the other signatory States had filed their ratifications [1].

3. During the aforesaid events the League of Nations was still in existence; and it continued to exist side by side with the new organization until April 1946.

There was no suggestion that the United Nations was to be the League under a new name, or an automatic successor in law to League assets, obligations, functions or activities. Indeed, two of the major Powers which played a leading role in the establishment of the United Nations, and were to be Permanent Members of the Security Council, were known to be strongly averse to any notion of automatic succession. They were the Soviet Union, which had been expelled from the League in December 1939, and the United States of America, which had never been a Member of the League.

In terms of Article 3 of the Charter, the original Members of the United Nations were the States which, having participated in the San Francisco Conference or having signed the Declaration by the United Nations of 1 January 1942, also signed the Charter and ratified it in accordance with Article 110. There were 51 such original Members of the United Nations, of which 17 were not at that time (1945-1946) Members of the League. They were: Byelorussian Soviet Socialist Republic, Chile, Costa Rica, El Salvador, Guatemala, Haiti, Honduras, Lebanon, Nicaragua, Paraguay, Peru, Philippines, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United States of America and Venezuela. Of those 7, 16 had never been Members of the League. They were: Byelorussian Soviet Socialist Republic, Lebanon, Philippines, Saudi Arabia, Ukrainian Soviet Socialist Republic and the United States of America. All the others (except the Soviet Union) had many years before withdrawn from the League on notice [2].

Further, of the 42 Members of the League of Nations at that time, 11 were not original Members of the United Nations. They were: Afghanistan, Bulgaria, Estonia, Finland, Ireland, Latvia, Lithuania, Portugal, Siam (Thailand), Sweden and Switzerland. Four of these, viz., Switzerland, Lithuania, Latvia and Estonia, never became Members of the United Nations. The others were admitted to membership at various times, in some cases years after the establishment of the United Nations [3].

As a result of the admission of new Members, United Nations membership grew to 99 as at the end of 1960, to 110 as at the end of 1962, and to 127 at the present time. Although 14 of these new Members had at some stage or another been Members of the League, the others had never been.

4. At the San Francisco Conference, during the discussions concerning the provisions of the Charter relative to a proposed trusteeship system [4], the South African representative made the following statement:

> "I wish to point out that there are territories already under Mandate where the mandatory principle cannot be achieved.

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[1] *Everyman's United Nations* (6th ed.), pp. 4-5. *Vide* also Goodrich, L. M. and Hambro, E., *Charter of the United Nations* (2nd ed.), pp. 3-18.

[2] For dates *vide* Walters, F. P., *A History of the League of Nations* (1952), Vol. I, pp. 64-65.

[3] *Vide* dates in *Everyman's United Nations* (6th ed.), p. 6.

[4] In Committee II/4 on 11 May 1945.

As an illustration, I would refer to the former German territory of South West Africa held by South Africa under a 'C' Mandate.

The facts with regard to this territory are set out in a memorandum filed with the Secretariat, which I now read:

When the disposal of enemy territory under the Treaty of Versailles was under consideration, doubt was expressed as to the suitability of the mandatory form of administration for the territory which formerly constituted the German Protectorate of South West Africa.

Nevertheless, on 17 December 1920, by agreement between the Principal Allied and Associated Powers and in accordance with Article 22 Part I (Covenant of the League of Nations) of the Treaty, a Mandate (commonly referred to as a 'C' Mandate) was conferred upon the Government of the Union of South Africa to administer the said territory.

Under the Mandate the Union of South Africa was granted full power of administration and legislation over the territory as an integral portion of the Union of South Africa, with authority to apply the laws of the Union to it.

For 25 years, the Union of South Africa has governed and administered the territory as an integral part of its own territory and has promoted to the utmost the material and moral well-being and the social progress of the inhabitants.

It has applied many of its laws to the territory and has faithfully performed its obligations under the Mandate.

The territory is in a unique position when compared with other territories under the same form of Mandate.

It is geographically and strategically a part of the Union of South Africa, and in World War No. 1 a rebellion in the Union was fomented from it, and an attack launched against the Union.

It is in large measure economically dependent upon the Union, whose railways serve it and from which it draws the great bulk of its supplies.

Its dependent native peoples spring from the same ethnological stem as the great mass of the native peoples of the Union.

Two-thirds of the European population are of Union origin and are Union Nationals, and the remaining one-third are Enemy Nationals.

The territory has its own Legislative Assembly granted to it by the Union Parliament, and this Assembly has submitted a request for incorporation of the territory as part of the Union.

The Union has introduced a progressive policy of Native Administration, including a system of local government through Native Councils giving the Natives a voice in the management of their own affairs; and under Union Administration Native Reserves have reached a high state of economic development.

In view of contiguity and similarity in composition of the native peoples in South West Africa the native policy followed in South West Africa must always be aligned with that of the Union, three-fifths of the population of which is native.

There is no prospect of the territory ever existing as a separate state, and the ultimate objective of the mandatory principle is therefore impossible of achievement.

The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.

As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this

matter, it is here only mentioned for the information of the Conference in connection with the Mandates question [1]."

5. The significance of the above statement is further accentuated by an extract from a later statement by Field-Marshal Smuts, which can conveniently —although out of historical sequence—be cited here. Addressing the Fourth Committee of the General Assembly of the United Nations at its Fourteenth Meeting on 4 November 1946, Field-Marshal Smuts stated, *inter alia*:

> "It was . . . incumbent on the Union Government as trustee of the interests of the people of South West Africa to ensure that, when the proper time arrived for consideration of any change in the status of the Territory, such consideration should not be prejudiced by any prior commitment on the part of the Union Government by virtue of its membership of any organization which might replace the League of Nations; accordingly, in May 1945, when questions relating to trusteeship were under consideration by the San Francisco Conference, the Union Government entered a reservation designed to ensure that the future status of South West Africa and the desirability of its incorporation in the Union should not be prejudiced by any proposals adopted by the Conference in regard to the future of mandated Territories. The text of this reservation is given in Paragraph I of Document A/123. In the event, however, the Charter of the United Nations by the use of the term 'may' instead of 'shall' in Article 77 excluded any obligation to place mandated Territories under trusteeship and made the application of the trusteeship system to such territories a matter of voluntary agreement. This no doubt accounts for the fact that in addition to South West Africa three other mandates—Transjordan, Palestine and the Japanese Pacific Islands—have so far been excluded from the Trusteeship System [2]."

6. Towards the end of the San Francisco Conference, on 25 June 1945, there was established a Preparatory Commission of the United Nations, consisting of

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[1] The official records of the San Francisco Conference contain only a brief summary of this statement (UNCIO docs., Vol. 10, p. 434). The text quoted here is taken from the original typewritten document from which the South African representative Dr. D. L. Smit, read the statement in the Committee on Trusteeship on 11 May 1945, which accords with an unofficial verbatim record in the custody of the United Nations Secretariat. The original document read by the South African representative contains also the following paragraph which is, however, not reflected in the unofficial verbatim record:

> "As stated in the Memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the Conference so that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new International Organization."

Dr. Smit, who died during 1962, affirmed by letter to the South African Government before his death, that he made the whole statement as it appears in the South African records. It was suggested in the dissenting opinion of Judge Jessup in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, at p. 340, that Dr. Smit's memory may have been faulty regarding this last paragraph. It is submitted that it is of no importance whether or not the additional paragraph was read since it would not have added anything which was not already implied in the rest of the statement. This appears to have been accepted by Judge Jessup.

[2] *GA, OR*, First Sess., Second Part, Fourth Comm., Part I, p. 239.

one representative of each signatory State [1]. The functions entrusted to it were to convoke the General Assembly in its first session, to prepare the provisional agenda, documents and recommendations for the first sessions of the principal organs of the Organization, and to do certain other defined preparatory work pending establishment of the Secretariat [2]. One of these items of preparatory work was to:

> "Formulate recommendations concerning the possible transfer of certain functions, activities and assets of the League of Nations which it may be considered desirable for the new Organization to take over on terms to be arranged [3]."

7. Provision was also made for an Executive Committee (consisting of representatives of 14 States) which would exercise the powers and functions of the Preparatory Commission when it was not in session. The Executive Committee, for the purpose of carrying out its functions, set up 10 Sub-Committees. The terms of reference of Committee 4 of the Executive Committee included the following:

> "This Committee should be concerned with the preparation of the Agenda and appropriate documents for the first session of the Trusteeship Council. It should make recommendations defining the role of the General Assembly and of the Security Council in trusteeship matters and of their respective relations with the Trusteeship Council. . . .
>
> The Committee should prepare recommendations for procedures which might be followed for approving trusteeship agreements, for examining annual reports, for receiving and examining petitions, for arranging periodic visits to territories and for establishing a questionnaire as a basis for annual reports. *It should study the questions arising if the Mandates System were to be wound up and examine the feasibility of providing for such interim arrangements as may be possible, pending the establishment of the Trusteeship Council* [4]." (Italics added.)

Committee 9 of the Executive Committee was entrusted with the task mentioned above [5], viz., to

> ". . . formulate recommendations concerning the possible transfer of certain functions, activities, and assets of the League of Nations which it may be considered desirable for the United Nations to take over on terms to be arranged [6]".

To this was added:

> "This Committee should also keep in contact with the arrangements being made for winding up the League of Nations [6]."

This Sub-Committee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League. Among the exceptions were the political functions of the League; and the Sub-Committee also indicated that:

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[1] UNCIO docs., Vol. V, pp. 300, 315 and Vol. 1, p. 630.
[2] *Ibid.*, Vol. 5, pp. 300, 316.
[3] *Ibid.*, p. 316, item *(c)*.
[4] Doc. PC/EX/113/Rev. 1, 12 Nov. 1945, p. 133.
[5] *Vide* para. 6, *supra*.
[6] Doc. PC/EX/113/Rev. 1, p. 134.

"Since the questions arising from the winding up of the mandates system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here [1]."

8. The reference to Part III, Chapter IV, was to a recommendation by Committee 4, later accepted by the Executive Committee, that a Temporary Trusteeship Committee be formed [2].

The reasons assigned for this recommendation were that in accordance with Article 86 of the Charter, the Trusteeship Council could not be formed until a number of territories were first placed under trusteeship and that it was desirable that some interim organ should be established to assist the General Assembly in expediting the constitution of the trusteeship system, and, pending the establishment of the Trusteeship Council, in taking such other action in connection with the trusteeship system as might be found necessary [3].

The functions recommended for the Temporary Trusteeship Committee were the following:

"The Temporary Trusteeship Committee would, *inter alia*, perform the following functions:

(i) assist the United Nations in expediting the conclusion of trusteeship agreements by the States directly concerned, and the coming into operation of the trusteeship system provided for in Chapters XII and XIII of the Charter;

(ii) assist and advise the General Assembly in the discharge of any of its functions with regard to proposed non-strategic areas, including the approval of trusteeship agreements;

(iii) assist the Security Council in such matters as the Security Council might wish to refer to the Temporary Trusteeship Committee in relation to matters mentioned in Article 83 (3);

(iv) *advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System* [4]." (Italics added.)

In the proposed provisional agenda for the Temporary Trusteeship Committee there appeared, *inter alia*, the following:

"Problems arising from the transfer of functions in respect of existing mandates from the League of Nations to the United Nations [5]."

9. While the subject of the Temporary Trusteeship Committee was under consideration in the Executive Committee of the Preparatory Commission, the United States of America filed a proposal, dated 14 October 1945, to the effect that the proposed functions of the Temporary Trusteeship Committee, and subsequently the Trusteeship Council, should be extended specifically to cover the case of mandated territories not brought under trusteeship. This proposal sought to confer the following further function on the Temporary Trusteeship Committee:

". . . to undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, the functions previously performed by the Mandates Commission in connection with receiving and

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[1] *Ibid.*, Chap. IX, Sec. 3, paras. 1, 2 and 5, p. 110.
[2] *Ibid.*, Chap. IV, p. 55.
[3] *Ibid.*, pp. 7-8.
[4] *Ibid.*, p. 56.

examining reports submitted by mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function [1]".

On 18 October 1945, i.e., four days after the date of the United States proposal, the report of Committee 4 of the Executive Committee containing the enumeration of the suggested functions of the Temporary Trusteeship Committee as set out in paragraph 8 above, was accepted by the Executive Committee without inclusion of or reference to the further addition suggested by the United States of America [2]. It may be inferred that the United States delegation decided not to proceed with the proposal at that stage. As will be noted later, a similar proposal was put forward subsequently on behalf of the United States of America.

10. After adoption of the said report by the Executive Committee, the proposals regarding a Temporary Trusteeship Committee were submitted to Committee 4 of the Preparatory Commission itself. The matter was dealt with at the Second Meeting of Committee 4 on 29 November 1945. The Australian representative explained the reasons underlying the proposal for a Temporary Trusteeship Committee [3]. The Soviet representative thereupon stated his Government's objection to the proposal for a temporary body based upon three main contentions, viz.:

(a) it would be unconstitutional;
(b) it would have no work to do since no territories had yet been placed under trusteeship;
(c) it would delay the implementation of the provisions of the Charter rather than speed it up [4].

He was supported by the representative of Yugoslavia [4].
Thereafter the representative of South Africa spoke as follows:

"He had followed the argument against the establishment of a temporary organ most closely. It seemed to him that they were based on the one hand on constitutional grounds, on the other on expediency. The delegate for the Soviet Union might be right, but that was a legal question. The Committee must seek legal judgment on this question if doubt existed among some of the Delegations.

On the question of expediency, it seemed reasonable to create an interim body as the mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report [5]."

11. On 4 December 1945 a proposal was submitted by the United States of America (which in effect repeated the earlier proposal refered to in paragraph 9, *supra*) reading as follows:

[1] Doc. PC/EX/92/Add. 1.
[2] Doc. PC/EX/107, pp. 9-13.
[3] Doc. PC/TC/2, pp. 2-3.
[4] *Ibid.*, p. 3.
[5] *Ibid.*, p. 4.

"PROPOSED AMENDMENT TO PART III, CHAPTER IV, SECTION 2, PARAGRAPH 4, CONCERNING FUNCTIONS OF THE TEMPORARY TRUSTEESHIP COMMITTEE.

1. The Report by the Executive Committee makes no provision for any organ of the United Nations to carry out the functions of the Permanent Mandates Commission. In Part III, Chapter IX, dealing with the League of Nations there occurs the following statement:

'Since the questions arising from the winding up of the Mandates system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here.' (Section 3, paragraph 5, page 110.) No specific reference to the functions of the Permanent Mandates Commission is to be found, however, in Part III, Chapter IV, relating to the trusteeship system. Section 2, paragraph 4 of that Chapter (page 56) merely assigns to the Temporary Trusteeship Committee a general advisory function in this field: '(iv) advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system.'

2. *In order to provide a degree of continuity between the mandates system and the trusteeship system, to permit the mandatory powers to discharge their obligations, and to further the transfer of mandated territories to trusteeship, the Temporary Trusteeship Committee (or such a committee as is established to perform its functions) and, later, the Trusteeship Council should be specifically empowered to receive the reports which the mandatory powers are now obligated to make to the Permanent Mandates Commission.* The existing obligations and rights of the parties involved under the mandates system with respect to any mandated territory continue in force until such territory is placed under trusteeship by an individual trusteeship agreement or until some other international arrangement is made. *To bridge any possible gap which might exist between the termination of the mandates system and the establishment of the trusteeship system, it would appear appropriate that the supervisory functions of the Permanent Mandates Commission should be carried on temporarily by the organ of the United Nations which is to handle trusteeship matters.*

3. In order, therefore, that the report of the Preparatory Commission may be complete in this respect the following amendment is proposed.

4. *Amendment*

Add a new sub-paragraph (v) to paragraph 4 of Part III, Chapter IV, Section 2, to be worded as follows:

'(v) undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, *to receive and examine reports submitted by mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function*' [1]." (Italics added.)

This proposal was placed on the agenda of Committee 4 of the Preparatory Commission for the Ninth Meeting held on 8 December 1945 [2]. At that meeting, the United States representative delivered a lengthy address. It is of great

[1] Doc. PC/TC/11.
[2] Doc. PC/TC/31, pp. 21-22.

significance that he made no reference to the above-mentioned proposal [1].

12. In the course of the proceedings of Committee 4 of the Preparatory Commission, various proposals were placed before it as alternatives for the recommendation of the Executive Committee that a Temporary Trusteeship Committee be established. Amongst these was a proposal that an *ad hoc* committee be established rather than a Temporary Trusteeship Committee, as also the proposal which was ultimately adopted, viz., that the General Assembly should adopt a resolution calling on States administering territories under League of Nations Mandate to undertake practical steps for submitting trusteeship agreements in respect of them "preferably not later than during the Second Part of the First Session of the general Assembly [2]". The recommendation proceeded:

> "Those trusteeship matters which will be taken up by the General Assembly at the First Part of its First Session for the purpose of expediting the establishment of the trusteeship system, will be considered by the Trusteeship Committee of the General Assembly, using the methods which the General Assembly considers most appropriate for the further consideration of these matters [2]."

13. While these various proposals were before Committee 4 of the Preparatory Commission, the representative of Australia on 20 December 1945 made certain reservations concerning aspects of the preamble proposed in respect of the resolution which was ultimately adopted. He stated, *inter alia*:

> "There was an implication that Article 80 imposed an obligation on States administering the territories mentioned in Article 77 to place those territories under trusteeship. The terms of Articles 75 and 77 made it clear that the placing of a territory under trusteeship would be a voluntary act.
>
> Thirdly, the phrase 'calls on', since it had a special connotation in the Charter (e.g., Articles 33 and 41), was unfortunate in this context.
>
> His Delegation cordially associated itself with the language of the resolution, but had to insist that the language of the preamble was not within the letter and spirit of the Charter: *the action of a mandatory would be as voluntary as that of any State putting any kind of dependent territory under trusteeship* [3]." (Italics added.)

The South African representative on the same occasion—

> "... reserved the position of his Delegation until the meeting of the General Assembly, because his country found itself in an unusual position. The mandated territory of South-West Africa was already a self-governing country, and last year its legislature had passed a resolution asking for admission into the Union. His Government had replied that acceptance of this proposal was impossible owing to their obligations under the mandate.
>
> The position remained open, and his Delegation could not record its vote on the present occasion if by so doing it would imply that South-West Africa was not free to determine its own destiny. His Government would, however, *do everything in its power to implement the Charter* [4]."

In the discussion on the same subject in the Preparatory Commission meeting on 23 December 1945 the South African representative stated:

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[1] Doc. PC/TC/30.
[2] Doc. PC/20, Chap. IV, Sec. 1, p. 49.
[3] Doc. PC/TC/42, p. 39.
[4] *Ibid.*, p. 40.

"... the South African Delegation associated itself wholly with the desire of Committee 4 to apply the principles laid down in the Charter and that its efforts had been directed towards that end. In view, however, of the special position of the Union of South Africa, which held a mandate over South-West Africa, it reserved its position with regard to the document at present under review, and especially because South Africa considered that it had fully discharged the obligations laid upon it by the Allies, under the Covenant of the League of Nations, on the advancement towards self-government of territories under mandate, and that the time had now come for the position to be examined as a whole. For that reason, the South African delegation reserved its attitude until the Assembly met [1]."

The attitudes adopted by mandatories other than South Africa [2] concerning proposals for interim bodies were conveniently summarised in the 1966 separate opinion of Judge van Wyk as follows:

"*(a)* The United Kingdom, although supporting the proposal of the Executive Committee for the establishment of a temporary trusteeship committee [3]—a proposal which did not contemplate that the said committee would have any supervisory functions in respect of mandates not converted to trusteeship—also expressed itself in favour of the alternative proposal for the establishment of an *ad hoc* committee, but suggested that the only functions which such an *ad hoc* committee should have relative to mandates should be—

'... to advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system [4]'.

The United Kingdom therefore intended the same limited role for the proposed *ad hoc* committee relative to mandates as did the Executive Committee in its proposal for a temporary trusteeship committee.

(b) Australia supported the recommendation of the Executive Committee for the establishment of a temporary trusteeship committee without making any suggestion that the Executive Committee should have provided for wider powers for the proposed temporary trusteeship committee so as to enable it also to supervise mandates not converted to trusteeship [5].

(c) Belgium expressed misgivings with regard to the establishment of a temporary body and made proposals which intended to avoid the establishment of any temporary or provisional body [6].

(d) New Zealand supported the proposal made by Yugoslavia, which included the appointment of an *ad hoc* body, subject, *inter alia*, to the amendments suggested by the United Kingdom (as to which see

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[1] *UN, PC, Journal*, p. 131.

[2] The comments of the South African representative are quoted in the present paragraph and para. 10, *supra*.

[3] Doc. PC/TC/2, p. 4 and Doc. PC/TC/4, p. 7.

[4] Doc. PC/TC/25.

[5] Doc. PC/TC/2, pp. 2-3 and 5.

[6] Doc. PC/TC/24 and Doc. PC/TC/32, p. 25.

paragraph *(a)* above) but 'hesitated to agree that a temporary committee of any kind was necessary' [1].

(e) France recommended the establishment of an *ad hoc* committee which was intended to have no mission other than that of helping to bring about as quickly as possible the establishment of the Trusteeship Council. This proposed body would have had no supervisory functions in respect of trust territories and would have had no function relative to mandates other than—

> '... to advise the Assembly on any matters arising out of the transfer to the United Nations of those functions and responsibilities which originated either in the mandates system, or in other international agreements or instruments [2] [3].''

14. The reasons why the proposals for a Temporary Trusteeship Committee or an *ad hoc committee were rejected, were that in certain quarters it was* considered that any such body would be unconstitutional and that the establishment of a temporary body might delay the formation of the Trusteeship Council [4].

15. The Preparatory Commission's recommendations (summarised in para. 12, *supra*) were considered at the First Part of the First Session of the General Assembly in January-February 1946. Addressing a Plenary Meeting on 17 January 1946, the South African representative stated his Government's position on the South West Africa Mandate in the following terms:

> "Under these circumstances, the Union Government considers that it is incumbent upon it, as indeed upon all other mandatory Powers, to consult the people of the mandated territory regarding the form which their own future government should take, since they are the people chiefly concerned. *Arrangements are now in train for such consultations to take place and, until they have been concluded, the South African Government must reserve its position concerning the future of the mandate, together with its right of full liberty of action*, as provided for in paragraph 1 of Article 80 of the Charter.
>
> From what I have said I hope it will be clear that South West Africa occupies a special position in relation to the Union which differentiates that territory from any other under a C mandate. *This special position should be given full consideration in determining the future status of the territory*. South Africa is, nevertheless, properly conscious of her obligations under the Charter. I can give every assurance that any decision taken in regard to the future of the mandate will be characterized by a full sense of our responsibility, as a signatory of the Charter, to implement its provisions, in consultation with and with the approval of the local inhabitants, in the manner best suited to the promotion of their material and moral well-being [5]." (Italics added.)

On 22 January 1946, in the Fourth Committee, he added:

> "Referring to the text of Article 77, he said that *under the Charter the*

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[1] Doc. PC/TC/32, p. 25.

[2] Doc. PC/TC/33.

[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 99-100. Original footnotes are retained but, where necessary, renumbered.

[4] *UN, PC, Journal*, p. 125; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, dissenting opinion of Judge Jessup, p. 344.

[5] *GA, OR*, First Sess., First Part, 12th Plenary Meeting, 17 Jan. 1946, pp. 185-186.

transfer of the mandates régime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this Article invalidated paragraph 1. *The position of the Union of South Africa was in conformity with this legal interpretation.*

He explained the special relationship between the Union and the territory under its mandate, referring to the advanced stage of self-government enjoyed by South-West Africa, and commenting on the resolution of the Legislature of South-West Africa calling for amalgamation with the Union. *There would be no attempt to draw up an agreement until the freely expressed will of both the European and native populations had been ascertained.* When that had been done, the decision of the Union would be submitted to the General Assembly for judgment [1]." (Italics added.)

16. Of the other mandatories the representative of the United Kingdom stated (on 17 January 1946):

"We have decided to enter forthwith into negotiations for placing Tanganyika, the Cameroons and Togoland under the trusteeship system. Preliminary negotiations have already started. *I must make it clear that our willingness to place these territories under the trusteeship system naturally depends upon our being able to negotiate terms which in our view are generally satisfactory, and which achieve the objectives of the Charter and are in the best interests of the inhabitants of the territories concerned.* . . .

Regarding Palestine, the Assembly is aware that an Anglo-American Committee of Enquiry is, at this very moment, examining the question of European Jewry, which is one of the most tragic episodes in the whole of history, and also the Palestine problem. *We think it necessary to await the Committee's report before putting forward any proposals relating to the future of Palestine.*

Regarding the future of Transjordan, it is the intention of His Majesty's Government in the United Kingdom to take steps in the near future for establishing this territory as a sovereign independent State and for recognizing its status as such. In these circumstances, the question of Transjordan going under trusteeship does not arise [2]." (Italics added.)

The representative of France stated (on 19 January 1946):

"The French Government intends to carry on with the work entrusted to it by the League of Nations. *Believing further that it is in the spirit of the Charter that this work should henceforward be carried on under the trusteeship system, it is prepared to study the terms of the agreements by which this régime could be defined* in the case of Togo and the Cameroons, on the understanding, however, that this shall not entail, for the populations concerned, any diminution in the rights which they already enjoy by reason of their integration into the French community, and further that these agreements will be submitted for approval to the representative organs of these populations [3]." (Italics added.)

Other Mandatory Powers, New Zealand, Australia and Belgium, stated

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[1] *Ibid.*, Fourth Comm., 3rd Meeting, 22 Jan. 1946, p. 10.
[2] *Ibid.*, 11th Plenary Meeting, 17 Jan. 1946, pp. 166-167.
[3] *Ibid.*, 16th Plenary Meeting, 19 Jan. 1946, p. 251.

intentions to negotiate trusteeship agreements in respect of the mandated territories administered by them [1].

17. In its resolution XI of 9 February 1946, the General Assembly (in the preamble), *inter alia*, expressed regret at the fact that the Trusteeship Council could not be brought into being at that Session, because trusteeship agreements had first to be concluded, and referred to the above-mentioned recommendation of the Preparatory Commission as regards expediting the conclusion of such agreements. The resolution proceeded to state, *inter alia*, that:

> "... *with respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> *Welcomes* the declarations, made by certain States administering territories now held under mandate, of an intention to negotiate trusteeship agreements, in respect of some of those territories and, in respect of Transjordan, to establish its independence.
>
> *Invites* the States administering territories now held under mandate to undertake practical steps, in concert with the other States directly concerned, for the implementation of Article 79 of the Charter [which provides for the conclusion of agreements on the terms of trusteeship for each territory to be placed under the trusteeship system], in order to submit these agreements for approval, preferably not later than during the second part of the first session of the General Assembly [2]."

18. The manner in which the question of mandates was dealt with in the Preparatory Commission and the First Session of the General Assembly of the United Nations, must be contrasted with the treatment afforded to other activities of the League of Nations and the assets of the League. As already stated, Committee 9 of the Executive Committee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League. These recommendations, which were cited in section 3 of Chapter IX of the report of the Executive Committee, expressly excepted the political functions of the League. Also excepted were "the questions arising from the winding up of the mandates system" which were dealt with separately, as shown above [3].

In regard to functions arising from treaties, the Sub-Committee recommended the adoption of a resolution by which the United Nations should express their willingness to exercise functions and powers previously entrusted to the League, reserving, however, the right to decide which functions and powers they were prepared to take over and to determine which organ of the United Nations, or specialized agency associated with it, would exercise the functions or powers taken over [4].

Added to this recommendation was the following:

> "The transfer to the United Nations of functions or powers entrusted to the League of Nations by treaties, conventions, agreements or instruments having a political character, would if the parties to these instruments desire, be separately considered in each case [5]."

As regards possible transfer of functions and activities as well as of assets,

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[1] *Ibid.*, 14th and 15th Plenary Meetings, 18 Jan. 1946, pp. 227, 233 and 238.
[2] UN doc. A/64, p. 13.
[3] *Vide* paras. 7 *et seq.*, *supra*.
[4] Doc. PC/EX/113/Rev. 1, Chap. IX, sec. 3, para. 8, p. 111.
[5] *Ibid.*, para. 10, p. 111.

the Sub-Committee suggested the appointment by the Preparatory Commission of a small committee to negotiate with the Supervisory Commission of the League of Nations regarding "the parallel measures that should be adopted by the League of Nations and the United Nations [1]".

19. The Executive Committee's recommendations, as set out in sections 1 and 2 of Chapter IX of its report, reveal acceptance in substance of the Sub-Committee's recommendations. Recommendation No. 1 of the Executive Committee reads as follows:

> "1. that the functions, activities and assets of the League of Nations be transferred to the United Nations with such exceptions and qualifications as are made in the report referred to above, and without prejudice to such action as the United Nations may subsequently take with the understanding that the contemplated transfer does not include the political functions of the League, which have in fact already ceased, but solely the technical and non-political functions [2];"

A footnote relative to exceptions and qualifications reads in part:

> "The Committee recommends that no political questions should be included in the transfer. *It makes no recommendation to transfer the activities concerning refugees, mandates or international bureaux* [2]." (Italics added.)

Section 2 of this chapter of the Executive Committee's report contained a draft resolution for the General Assembly, concerning the assumption by the United Nations of functions of the League under international agreements. It distinguished between:

> "A. Secretarial Functions";
> "B. Functions and Powers of a Technical and Non-Political Character"; and
> "C. Treaties and International Conventions, Agreements and other Instruments having a Political Character."

In regard to A and B it suggested an expression of willingness, subject to the eservations mentioned by the Sub-Committee, to ensure continued exercise of functions and powers. In regard to C it suggested the following:

> "The General Assembly of the United Nations decides that it will itself examine or will submit to the appropriate organ of the United Nations any request from the parties that the United Nations should take over the exercise of functions or powers entrusted to the League of Nations by treaties and international conventions, agreements or other instruments having a political character [3]."

The Sub-Committee's recommendation that a small Committee be appointed to negotiate with the League Supervisory Commission regarding parallel measures, was endorsed [4].

20. Discussions in the Preparatory Commission itself revealed that two delegates in the Executive Committee had voted against acceptance of Chapter

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[1] *Ibid.*, paras. 32 and 33, p. 114.
[2] *Ibid.*, p. 108.
[3] *Ibid.*, p. 110.
[4] *Ibid.*, p. 109 (last para. of sec. 1).

IX of its report [1], and also that there was concern amongst some delegates about the possibility that the word "transfer", as used in the recommendations concerning functions and activities of the League, could "imply a legal continuity which would not in fact exist", resulting in a suggestion that the phrase "the assumption of responsibility for certain functions and activities" might be adopted [2]. This was eventually done [3], with the further substitution of "powers" for "activities". The recommendations of the Commission, relative to functions and powers, in the form as finally adopted by the General Assembly in its resolution XIV (1) of 12 February 1946, read as follows:

"TRANSFER OF CERTAIN FUNCTIONS, ACTIVITIES AND ASSETS OF THE LEAGUE OF NATIONS

I

FUNCTIONS AND POWERS BELONGING TO THE LEAGUE OF NATIONS UNDER INTERNATIONAL AGREEMENTS

Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

Therefore:

1. *The General Assembly* reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. *The General Assembly* records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

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

A. *Functions pertaining to a Secretariat*

. . . . . .

B. *Functions and Powers of a Technical and Non-Political Character*

Among the instruments referred to at the beginning of this resolution are some of a technical and non-political character which contain pro-

[1] Doc. PC/LN/2, para. 1, p. 2.
[2] *Ibid.*, para. 3, pp. 2-3.
[3] Doc. PC/LN/10, pp. 10-11.

visions, relating to the substance of the instruments, whose due execution is dependent on the exercise, by the League of Nations or particular organs of the League, of functions or powers conferred by the instruments. Certain of these instruments are intimately connected with activities which the United Nations will or may continue.

It is necessary, however, to examine carefully which of the organs of the United Nations or which of the specialized agencies brought into relationship with the United Nations should, in the future, exercise the functions and powers in question, in so far as they are maintained.

Therefore:

The General Assembly is willing, subject to these reservations, to take the necessary measures to ensure the continued exercise of these functions and powers, and refers the matter to the Economic and Social Council.

C. *Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character*

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character. . . [1]"

Regarding transfer of assets, the Preparatory Commission on 18 December 1945 set up a committee—

". . . to enter, on its behalf, into discussion with the League of Nations Supervisory Commission, which has been duly authorized by the members of the League of Nations, for the purpose of establishing a common plan for the transfer of the assets of the League to the United Nations on such terms as are considered just and convenient. This plan will be subject, so far as the United Nations is concerned, to approval by the General Assembly [2]."

It will be observed that the task of this negotiating committee was confined to assets, the earlier recommendations of the Executive Committee and its Sub-Committee (paras. 18 and 19 above) not being followed in so far as they related to functions and activities—ostensibly inasmuch as the conception of a "transfer" of certain functions and activities had been abandoned in favour of one of "assumption" of certain functions and powers.

The Commission's recommendation regarding assets was merely that the plan to be developed as a result of the discussions should be submitted for approval to the General Assembly [2]. This was done at the First Part of the First Session, the General Assembly approving of the common plan in Part III of resolution XIV of 12 February 1946 *(supra)*.

C. Dissolution of the League of Nations

21. The situation as far as the League of Nations was concerned, after establishment of the United Nations, was described in a League publication as follows:

"The adoption of the Charter of the United Nations by a Conference at

[1] GA resolution XIV (1), 12 Feb. 1946, in UN doc. A/64, pp. 35-36.
[2] Doc. PC/20, p. 118.

which the great majority of the States Members of the League were represented made the latter's ultimate disappearance a foregone conclusion and from that time onwards the chief concern of those responsible for its destinies was to see that its activities were terminated in a manner worthy of the part it has played in world affairs during the last quarter of a century [1]."

22. The Secretary-General of the League, in a communication dated 20 September 1945, drew the attention of League Members to the task entrusted at San Francisco to the United Nations Preparatory Commission relative to "the possible transfer of certain functions, activities and assets of the League which it may be considered desirable for the new Organization to take over on terms to be arranged [2]". The communication contained a proposal that the Supervisory Commission of the League be empowered to negotiate with representatives of the United Nations in this regard and to draw up provisional terms of transfer "subject to the final decision of the League Assembly [1]". The proposal was accepted by the Members of the League, and negotiations were entered into with the United Nations negotiating committee established by its Preparatory Commission on 18 December 1945 [3]. By reason of the limited terms of reference of the United Nations committee [3], the negotiations concerned *assets* only. The joint deliberations were successful and resulted in the "common plan", which was approved by the General Assembly of the United Nations in Part III of its resolution XIV of 12 February 1946 [3]. It still required the assent of the League Assembly to become effective.

After having referred to the United Nations resolutions relative to possible assumption of League functions and powers [3], the authors of *The League Hands Over* stated:

"Thus by the time the Assembly met in its twenty-first session it was in possession of the United Nations' plans for taking of the League's material assets and for carrying on, either directly or through one of its related agencies, all the League's most important functions and activities of a non-political character. Its main business, therefore, was 'to make provision for bringing the League of Nations to an end in orderly fashion, so that as much as possible of its surviving work can be continued without interruption and as much as possible of its property can be used to promote those high purposes of international peace and co-operation for which the League itself was founded' [4]."

23. The League Assembly met in its Twenty-first, and last, Session from 8 to 18 April 1946.

Its final resolution, adopted on 18 April 1946, provided at the commencement of its operative part as follows:

"*Dissolution of the League of Nations*

1. (1) With effect from the day following the close of the present session of the Assembly, the League of Nations shall cease to exist except for the

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[1] *The League Hands Over* (1946), p. 61.

[2] *Vide* para. 6, *supra*.

[3] *Vide* para. 20, *supra*.

[4] At p. 63. The quotation was taken from the Report of the First Committee to the Assembly in *L. of N., O.J.*, Spec. Sup., No. 194, p. 250.

sole purpose of the liquidation of its affairs as provided in the present resolution [1]."

The rest of the resolution related to practical arrangements concerning liquidation. Thus in paragraph 2 provision was made for the appointment of certain persons to form a "Board of Liquidation" which was to "represent the League for the purpose of effecting its liquidation".

In the same paragraph the powers of the Board were circumscribed as follows:

> "Subject to the provisions of this resolution and other relevant decisions taken by the Assembly at the present session, the Board shall have full power to give such directions, make such agreements and take all such measures as in its discretion it considers appropriate for this purpose."

Paragraph 5 of the resolution approved of the "Common Plan" for transfer of *assets* to the United Nations.

The final paragraph of the resolution provided as follows:

> "On the completion of its task, the Board shall make and publish a report to the Governments of the Members of the League giving a full account of the measures which it has taken, and shall declare itself to be dissolved. On the dissolution of the Board, the liquidation shall be deemed to be complete and no further claims against the League shall be recognized."

The resolution contained no provisions with regard to mandates or functions in connection with mandates.

24. "*The Assumption by the United Nations of Functions and Powers hitherto exercised by the League under International Agreements*" was the heading of a separate resolution adopted earlier on 18 April 1946. It read, in so far as is relevant, as follows:

> "The Assembly of the League of Nations,
>
> Having considered the resolution on the assumption by the United Nations of functions and powers hitherto exercised by the League of Nations under international agreements, which was adopted by the General Assembly of the United Nations on February 16th 1946 [2].
>
> Adopts the following resolutions:
>
> 1. *Custody of the Original Texts of International Agreements.*
>
> . . . . . .
>
> 2. *Functions and Powers arising out of International Agreements of a Technical and Non-political Character.*
>
> The Assembly recommends the Governments of the Members of the League to facilitate in every way the assumption without interruption by the United Nations, or by specialized agencies brought into relationship with that organization, of functions and powers which have been entrusted to the League of Nations, under international agreements of a technical and non-political character, and which the United Nations is willing to maintain [3]."

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[1] *L. of N., O.J.*, Spec. Sup., No. 194, p. 281.

[2] The text of the General Assembly resolution appears in para. 20, *supra*. The date thereof was 12 February 1946, not 16 February as stated in the League resolution.

[3] *L. of N., O.J.*, Spec. Sup., No. 194, p. 278.

25. "*The Assumption by the United Nations of Activities hitherto performed by the League*" was the heading of a further separate resolution of 18 April 1946, reading as follows:

> "The Assembly directs the Secretary-General of the League of Nations to afford every facility for the assumption by the United Nations of such non-political activities, hitherto performed by the League, as the United Nations may decide to assume [1]."

26. Finally, "*Mandates*" was the heading of another important separate resolution of 18 April 1946. Before setting out its terms, regard is to be had to certain events which preceded its adoption.

(a) The session was scheduled to last less than two weeks, and delegates knew that it would not be possible to discuss the future of the mandates system at any length in an appropriate Committee. Informal discussions were consequently initiated between those Members of the League most directly concerned, with a view to securing the greatest possible measure of agreement before the matter was officially considered in the Committee.

In pursuance of the said discussions, the representatives of Mandatory Powers, in addressing the Plenary Meeting of the Assembly, made statements indicating the intentions of their Governments regarding their respective mandates. In the resolution ultimately adopted the Assembly "took note" of these statements.

(b) The following are relevant extracts from these statements of intention by the various mandatories:

(i) *By the representative of the United Kingdom* (on 9 April 1946):

> "The mandates administered by the United Kingdom were originally those for Iraq, Palestine, Transjordan, Tanganyika, part of the Cameroons and part of Togoland. Two of these territories have already become independent sovereign States, Iraq in 1923, and Transjordan just the other day in 1946. As for Tanganyika and Togoland under their mandate, and the Cameroons under their mandate, His Majesty's Government in the United Kingdom *have already announced their intention of placing them under the trusteeship system of the United Nations, subject to negotiations on satisfactory terms of trusteeship.*
>
> *The future of Palestine cannot be decided until the Anglo-American Committee of Enquiry have rendered their report*, but until the three African territories have actually been placed under trusteeship and until fresh arrangements have been reached in regard to Palestine—*whatever those arrangements may be*—it is the intention of His Majesty's Government in the United Kingdom to continue to administer these territories in accordance with the general principles of the existing mandates [2]." (Italics added.)

(ii) *By the representative of South Africa* (on 9 April 1946):

> "Since the last League meeting, new circumstances have arisen obliging the mandatory Powers to take into review the existing arrangements for the administration of their mandates. As was fully explained at the recent United Nations General Assembly in London, the Union Government have deemed it incumbent upon them to consult the peoples of South-West Africa, European and non-European alike, regarding the form which their own future Government should take. On the basis of those consul-

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[1] *L. of N., O.J.*, Spec. Sup., No. 194, p. 278.
[2] *Ibid.*, p. 28.

tations, and having regard to the unique circumstances which so signally differentiate South-West Africa—a territory contiguous with the Union—from all other mandates, *it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South-West Africa a status under which it would be internationally recognized as an integral part of the Union.* As the Assembly will know, it is already administered under the terms of the mandate as an integral part of the Union. In the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory [1]." (Italics added.)

(iii) *By the representative of France* (on 10 April 1946):

"The French Government intends to pursue the execution of the mission entrusted to it by the League of Nations. It considers that it is in accordance with the spirit of the Charter that this mission should henceforth be carried out under the régime of trusteeship and it is ready to examine the terms of an agreement to define this régime in the case of Togoland and the Cameroons [2]."

(iv) *By the representative of New Zealand* (on 11 April 1946):

"New Zealand has always strongly supported the establishment of the International Trusteeship System, and has already declared its willingness to place the mandated territory of Western Samoa under trusteeship. . . . New Zealand does not consider that the dissolution of the League of Nations and, as a consequence, of the Permanent Mandates Commission will have the effect of diminishing her obligations to the inhabitants of Western Samoa, or of increasing her rights in the territory. Until the conclusion of our Trusteeship Agreement for Western Samoa, therefore, the territory will continue to be administered by New Zealand, in accordance with the terms of the Mandate, for the promotion of the well-being and advancement of the inhabitants [3]."

(v) *By the Belgian representative* (on 11 April 1946):

"At the meeting of the General Assembly of the United Nations in London on January 20th last, she [i.e., Belgium] declared her intention of entering into negotiations with a view to placing the Territory of Ruanda-Urundi under the new régime. In pursuance of this intention, the Belgian Government has prepared a draft agreement setting out the conditions under which it will administer the territory in question.

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[1] *Ibid.*, pp. 32-33.
[2] *Ibid.*, p. 34.
[3] *Ibid.*, p. 43.

In the course of the same declaration of January 20th, we expressed our confidence that the Trusteeship Council would soon come to occupy in the United Nations Organization the important place which it deserves. We can only repeat that hope here and give an assurance that, pending its realization, Belgium will remain fully alive to all the obligations devolving on members of the United Nations under Article 80 of the Charter [1]."

(vi) *By the Australian representative* (on 11 April 1946):

"The trusteeship system, strictly so called, will apply only to such territories as are voluntarily brought within its scope by individual trusteeship agreements. . . . *After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety.*

Notwithstanding this, the Government of Australia does not regard the dissolution of the League as lessening the obligations imposed upon it for the protection and advancement of the inhabitants of the mandated territories, which it regards as having still full force and effect. Accordingly, until the coming into force of appropriate trusteeship agreements under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories, in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants. In making plans for the dissolution of the League, the Assembly will very properly wish to be assured as to the future of the mandated territories, for the welfare of the peoples of which this League has been responsible. So far as the Australian territories are concerned, there is full assurance. In due course these territories will be brought under the trusteeship system of the United Nations; until then, the *ground is covered not only by the pledge which the Government of Australia has given to this Assembly to-day but also by the explicit international obligations laid down in Chapter XI of the Charter*, to which I have referred. *There will be no gap, no interregnum, to be provided for* [2]." (Italics added.)

In the earlier reference to Chapter XI of the Charter the Australian representative had said:

"Amongst other things, each administering authority under that chapter undertakes to supply to the United Nations information concerning economic, social and educational conditions in its dependent territories [2]."

(vii) No statement was made concerning the future of the Pacific Islands in respect of which a Mandate had been granted to Japan.

(c) After the above statements by the representatives of the United Kingdom and of South Africa had been made (on the morning of 9 April 1946), but before the others could be delivered, and while the informal discussions were still proceeding regarding the drafting of a resolution, the representative of China, Dr. Liang, raised the question of the future of mandates in the First Committee on the afternoon of 9 April 1946.

The Committee was at the time considering the draft resolution concerning assumption by the United Nations of League functions and powers arising out of international agreements of a technical and non-political character (*vide*

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[1] *L. of N., O. J.*, Spec. Sup., No. 194, p. 43.
[2] *Ibid.*, p. 47.

para. 24 above). Dr. Liang wished to propose for discussion the following draft resolution, which he read out:

> "The Assembly,
>
> Considering that the Trusteeship Council has not yet been constituted and that all mandated territories under the League have not been transferred into territories under trusteeship;
>
> Considering that the League's function of supervising mandated territories should be transferred to the United Nations, in order to avoid a period of interregnum in the supervision of the mandatory régime in these territories.
>
> *Recommends* that the mandatory powers as well as those administering ex-enemy mandated territories shall continue to submit annual reports to the United Nations and to submit to inspection by the same until the Trustee Council shall have been constituted [1]."

The Chairman, however, ruled that the proposal was not relevant to the item then under consideration by the Committee. What transpired is set forth as follows in the *Summary Records* of the League:

> "*Dr. Lone Liang* (China) referred to the position of territories under mandate and to the position which would arise on the dissolution of the League, in view of the fact that the trusteeship council of the United Nations has not yet been appointed and was not likely to be set up for some time. The Chinese delegation wished to submit a resolution recommending that the mandatory powers should continue to submit annual reports on the mandated territories to the United Nations and that they should agree to inspection by the latter, pending the constitution of the trusteeship council.
>
> *The Chairman* thought that the question raised by the Chinese delegation could be discussed later, but for the moment they must confine themselves to examining the resolutions of the United Nations in the order in which they appeared in document A/13.1946. The General Assembly of the United Nations had certainly not had the question of the system of trusteeship in mind when it drafted its resolution on functions and powers under international agreements of a technical and non-political character.
>
> *Dr. Lone Liang* (China) accepted the Chairman's explanation [2]."

(d) Following this incident, the informal discussions mentioned above were renewed, the Chinese delegation also participating therein. The final outcome was that when the question of Mandates was reached in the First Committee, on 12 April 1946, the Chinese delegate, Dr. Liang, himself introduced a new draft of which Sir Hartley Shawcross of the United Kingdom said, when seconding the proposal, that it - -

> ". . . had been settled in consultation and agreement by all countries interested in mandates, and he thought it could, therefore, be passed without discussion and with complete unanimity [3]".

In proposing the new draft resolution Dr. Liang—

> ". . . recalled that he had already drawn the attention of the Committee to the complicated problems arising in regard to mandates from the

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[1] *Vide* L. of N., 21st Assembly, 1st Comm., 2nd Meeting, provisional record.
[2] *L. of N., O.J.*, Spec. Sup., No. 194, p. 76.
[3] *Ibid.*, p. 79.

transfer of functions from the League to the United Nations. The United Nations Charter in Chapters XII and XIII established a system of trusteeship based largely upon the principles of the mandates system, but the functions of the League in that respect *were not transferred automatically* to the United Nations. The Assembly should therefore take steps to secure the continued application of the principles of the mandates system. As Professor Bailey had pointed out to the Assembly on the previous day, the League *would wish to be assured* as to the future of mandated territories. The matter had also been referred to by Lord Cecil and other delegates.

It was *gratifying* to the Chinese delegation as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers *had announced their intention* to administer the territories under their control in accordance with their obligations under the mandates system *until other arrangements were agreed upon. It was to be hoped* that the *future* arrangements *to be made* with regard to these territories *would* apply, in full the *principle of trusteeship* underlying the mandates system.

The Chinese delegation had pleasure in presenting the draft resolution now before the Committee, so that the question could be discussed by the Assembly in a concrete form and the position of the League clarified [1]." (Italics added.)

The resolution was supported by the French and Australian representatives. The French representative, speaking in support,

"... wished to stress once more the fact that all territories under the mandate of his Government would continue to be administered in the spirit of the Covenant and of the Charter [2]".

The Australian representative:

"... welcomed the initiative of the Chinese delegation in moving the resolution, which he supported. The Australian delegation had made its position clear in the Assembly—namely, that Australia did not regard the dissolution of the League as weakening the obligations of countries administering mandates. They regarded the obligations as still in force and would continue to *administer* their mandated territories in accordance with the provisions of the mandates for the *well-being of the inhabitants*. Over and above that, Australia recognized obligations under the Charter which she had already assumed as a Member of the United Nations and others which she would assume in bringing the Territories under the international trusteeship system [2]." (Italics added.)

The Egyptian representative "made all reservations on behalf of his Government with regard to Palestine [2]".

The draft resolution was put to the vote and adopted unanimously subject to drafting, the Egyptian representative abstaining [1].

(e) The new draft contained what eventually became the Assembly's resolution concerning mandates. The adoption of that resolution by the Assembly on 18 April 1946 was without discussion, save that the Egyptian representative indicated that he would abstain from voting by reason of a reservation of

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[1] *L. of N., O. J.*, Spec. Sup., No. 194, pp. 78-79.
[2] *Ibid.*, p. 79.

his Government in regard to the Mandate for Palestine. The essence of the reservation appears from the following extracts from his statement:

> "The opinion of my Government is that Palestine has intellectually, economically, and politically reached a stage where it should no longer continue under mandate or trusteeship or whatever other arrangements may be considered. . . . It is the view of my Government *that mandates have terminated with the dissolution of the League of Nations*, and that, in so far as Palestine is concerned, there should be no question of putting that country under trusteeship [1]." (Italics added.)

(f) Thereupon the resolution was adopted (Egypt abstaining) as follows:

> "The Assembly:
>
> Recalling that Article 22 of the Covenant applies to certain territories placed under mandate the principle that the well-being and development of peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilization:
>
> 1. Expresses its satisfaction with the manner in which the organs of the League have performed the functions entrusted to them with respect to the mandates system and in particular pays tribute to the work accomplished by the Mandates Commission.
>
> 2. Recalls the role of the League in assisting Iraq to progress from its status under an 'A' mandate to a condition of complete independence, welcomes the termination of the mandated status of Syria, the Lebanon and Transjordan, which have, since the last session of the Assembly, become independent members of the world community;
>
> 3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;
>
> 4. Takes note of the expressed intentions of the members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective mandates until other arrangements have been agreed between the United Nations and the respective mandatory powers [2]."

27. The Board of Liquidation appointed in terms of the final resolution of the League Assembly [3], duly completed its work and submitted a report to the States which were Members of the League at its dissolution [4].

Part I of the Report contained a general discussion of the Boards activities. Part II dealt specifically with the different aspects thereof, and was divided into a number of chapters, three of which, viz., Chapters 1, 3 and 4, are of significance. Chapter 1 was headed "Disposal of Material Assets" and dealt with the transfer of assets from the League of Nations to the United Nations in accordance with the common plan mentioned above [5]. Chapter 3 was headed "Assumption of Activities by the United Nations and Specialized Agencies". After

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[1] *Ibid.*, pp. 58-59.
[2] *Ibid.*, pp. 58, 278-279.
[3] *Vide* para. 23, *supra*.
[4] L. of N. doc. C.5.M.5.1947.
[5] *Vide* para. 22, *supra*.

reference to various resolutions relevant to this subject taken at the final session of the League Assembly, this chapter of the report dealt with a number of topics, under the following headings: Treaty Registration; Transfer of Powers and Functions Performed by the League under International Agreements of a Technical and Non-Political Character; and Transfer of Certain Non-Political Activities to the United Nations. In respect of all these matters the report indicated in express terms that the various activities of the League (described in the report as "powers and functions", "duties" or "responsibilities") had been transferred to the United Nations.

Chapter 4 of Part II of the report stood in sharp contrast to the chapters mentioned above. It was headed "Disposal of Non-Transferable Activities, Funds and Services". The last item in this chapter was headed "Mandates; Protection of Minorities".

The passage under this heading dealing with Mandates, consisted only of the following:

> "On the proposal of the First Committee, the 1946 Assembly adopted a resolution whereby it 'recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant'.
>
> *The mandates system inaugurated by the League has thus been brought to a close*, but the Board is glad to be able to record that the experience gained by the Secretariat in this matter has not been lost, *the United Nations having taken over, with the small remaining staff, the Mandates Section's archives*, which should afford valuable guidance to those concerned with the administration of the Trusteeship system set up by the Charter of that organization [1]." (Italics added.)

28. The various arrangements made with respect to the liquidation of the League and the transfer of its assets and activities were, where appropriate, duly registered in the *United Nations Treaty Series*. Volume I of the *Treaty Series* appeared in two parts [2]. Part I contained treaties falling under Article 102 of the Charter, i.e., treaties entered into "by any Member of the United Nations after the present Charter comes into force". In Part II appeared treaties and agreements not falling under Article 102 but registrable in terms of Article 10 of regulations adopted by the United Nations General Assembly [3]. In the latter category fell, *inter alia*, treaties or international agreements entered into by the United Nations, or by one or more of the specialized agencies.

In the introduction to Volume I of the *United Nations Treaty Series*, the Secretariat explained its views on the type of international engagement that would be registrable, as follows:

> "The exact meaning of the term 'treaties and international agreements' has been the subject of discussion. In this connection, the Secretariat thought it necessary to conform to the interpretation of the term 'agreement' given in the report of Committee IV/2 of the San Francisco Confe-

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[1] L. of N. doc. C.5.M.5.1947, p. 20.

[2] *United Nations Treaty Series*, Vol. 1 (1946-1947), pp. xvi-xvii.

[3] *Vide* regulations established by General Assembly resolution 97 (I) quoted in *United Nations Treaty Series*, Vol. 1, pp. xx-xxx.

rence which includes 'unilateral engagements of an international character which have been accepted' [1]".

29. An examination of Volume I of the *Treaty Series* of the United Nations discloses that no international agreements arising from the liquidation of the League were registered under Part I. Had an agreement (including a unilateral engagement which had been accepted) been entered into whereby any member of the United Nations undertook to submit to United Nations supervision in respect of Mandates, such an agreement would have required registration in terms of Article 102 of the Charter.

Under Part II of Volume I of the *Treaty Series*, the first six items all relate to matters involving the transfer of assets and activities from the League of Nations to the United Nations Organization. No agreement relating to Mandates is included.

D. The Period 1946-1949

30. Over the years of the Mandate's existence a growing desire had developed amongst the inhabitants of South West Africa for closer association with South Africa and for termination of the Mandate. This desire found concrete expression in resolutions passed by the South West Africa Legislative Assembly as far back as 1934. On 14 May 1943 the Legislative Assembly again asked for termination of the Mandate and incorporation of the Territory in the Union of South Africa. A similar resolution was passed on 8 May 1946.

Since these resolutions emanated from a body wherein the non-White sections of the population were not directly represented, the South African Government felt that they should be fully and directly consulted as to their wishes. The South African Government had made known on a number of occasions during 1945 and 1946 its intentions as to the future of South West Africa. This was done first at the San Francisco Conference in May 1945 [2]. In January 1946, at the First Part of its First Session, the United Nations General Assembly was informed [3], and in April of that year also the League of Nations Assembly at its final Session [4], of South Africa's intention to consult the inhabitants of South West Africa regarding the future of the Territory.

The consultations which were thereupon conducted, resulted in an overwhelming majority of the non-White inhabitants of South West Africa expressing themselves in favour of "our country [becoming] part of the Union of South Africa"; 208,850 were in favour; 33,520 were against; and 56,790 could not be consulted because of practical difficulties.

The results and the manner of consultation, as well as a reasoned statement on the question of incorporation, were fully set out in a "Memorandum on the administration of South West Africa and on the wishes of its peoples as to the future of the Territory", submitted to the Secretary-General of the United Nations by the South African Government in October 1946 [5].

31. In November 1946, the South African representative (Field-Marshal

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[1] *United Nations Treaty Series*, Vol. I, p. xvi.
[2] *Vide* para. 4, *supra*.
[3] *Vide* para. 15, *supra*.
[4] *Vide* para. 26, *supra*.
[5] UN doc. A/123, in *GA*, *OR*, First Sess., Second Part, Fourth Comm., Part I, pp. 199-235.

Smuts) further elaborated on the question of incorporation in an address to the Fourth Committee of the United Nations General Assembly.

He dealt, *inter alia*, with the fundamental concepts of the mandates system and stressed the importance of the wishes of the inhabitants of mandated territories as to their ultimate destiny. In emphasizing that South West Africa was "uniquely different" from other mandated territories, he referred to the statement by President Wilson at Versailles [1] as to South West Africa's future association with South Africa.

He advanced many reasons why incorporation would facilitate the administration of the Territory and would also be in the best interests of South West Africa and beneficial to its inhabitants. He referred to the reservation made by the South African representative at the San Francisco Conference in May 1945, as to the future of the Territory [2], and concluded by saying he was confident that the United Nations would recognize that, to give effect to the wishes of the population of South West Africa, would be "the logical application of the democratic principles of political self-determination" and would also be—

> "... the inevitable fulfilment of a historical evolution which is in itself designed to promote the best interests of the territory and confer upon it the benefits of the membership of a larger community without loss of *those individual rights and responsibilities which the territory enjoyed* under the Mandate [3]".

Some days later Field-Marshal Smuts also informed the Fourth Committee that:

> "It would not be possible for the Union Government as a former mandatory to submit a trusteeship agreement in conflict with the clearly expressed wishes of the inhabitants. The Assembly should recognize that the implementation of the wishes of the population was the course prescribed by the Charter and dictated by the interests of the inhabitants themselves. If, however, the Assembly did not agree that the clear wishes of the inhabitants should be implemented, the Union Government could take no other course than to abide by the declaration it had made to the last Assembly of the League of Nations to the effect that it would continue to administer the territory as heretofore as an integral part of the Union, and to do so in the spirit of the principles laid down in the mandate.
>
> In particular the Union would, in accordance with Article 73, paragraph *(e)* of the Charter, transmit regularly to the Secretary-General of the United Nations 'for information purposes, subject to such limitations as security and constitutional regulations might require, statistical and other information of a technical nature relating to economic, social and educational conditions' in South West Africa. There was nothing in the relevant clauses of the Charter, nor was it in the minds of those who drafted these clauses, to support the contention that the Union Government could be compelled to enter into a trusteeship agreement even against its own view or those of the people concerned [4]."

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[1] Quoted in Chap. VII, para. 23, *supra*.

[2] *Vide* para. 4, *supra*.

[3] UN doc. A/C.4/41, in *GA, OR*, First Sess., Second Part, Fourth Comm., Part I, p. 244.

[4] *GA, OR*, First Sess., Second Part, Fourth Comm., Part I, 19th Meeting, 13 Nov. 1946, p. 102.

32. Apart from the expressed wishes of the inhabitants, the numerous other considerations relied on for incorporation, as set out in the Memorandum [1] and elaborated on by Field-Marshal Smuts in his addresses, included the following (briefly stated):

(a) Experience had shown that the circumstances of South West Africa did not permit of entirely satisfactory administration under the mandates system—or any analogous system.

(b) The geographical features and location of South West Africa, its vast semi-desert areas, its climate and low rainfall, and its sparse population rendered it incapable of a separate economic existence.

(c) Experience in two World Wars had shown that for strategic and security reasons South Africa and South West Africa should constitute a single unit.

(d) The various peoples of South West Africa had a close ethnological and national affinity with those of South Africa—a substantial number in fact being of South African origin and South African citizens.

(e) A large measure of integration of the administration of South West Africa with that of South Africa—as sanctioned by Article 22 of the Covenant and the Mandate—had already taken place, and further integration was essential if the Territory were to share fully in the advanced technical and administrative services South Africa could provide.

(f) South West Africa was economically dependent on South Africa, not only for financial assistance and the subsidization of its economic life, but also as a free market for its agricultural produce.

(g) The uncertainty as to the political future of the Territory inevitably militated against racial tranquillity and the optimum development of the Territory.

33. In view of the above considerations the South African Government considered that the General Assembly ought to endorse the proposal for incorporation. The General Assembly, however, rejected (in resolution 65 (I)) the proposal on the ground "that the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory", and recommended that South West Africa be placed under the international trusteeship system of the United Nations [2].

In rejecting the proposal for incorporation on this ground the General Assembly reflected on only one aspect of the factors favouring incorporation, namely the expressed wishes of the population, and remained silent on all the others.

In the view of the South African Government the other factors, especially those relating to the interests of the inhabitants, were of importance and should have been given weight in the General Assembly's consideration of the proposal, particularly if there were doubts as to the ability of the population to express themselves.

From the fact that the General Assembly did not, in its resolution 65 (I), reflect on these factors at all, coupled with the nature of the discussions in the Fourth Committee, the South African Government felt justified in inferring that there were other reasons which had motivated the approach of at least some Members of the United Nations to the proposal for incorporation.

The tone of the statements made in the Fourth Committee and the General

[1] UN doc. A/123.

[2] GA resolution 65 (I), 14 Dec. 1946, in UN doc. A/64/Add. I, p. 123.

Assembly by some delegations was regarded as an indication that political motivations, unrelated and even detrimental to the interests of the inhabitants of South West Africa, would be an inherent element in any supervisory system under the United Nations. This, in the view of the South African Government, would greatly hamper its task in administering the Territory; and as South Africa had assumed a "sacred trust" in respect of the inhabitants, it had in any event to be mindful of their expressed wishes and their interests.

34. In response to the General Assembly's invitation "to propose for the consideration of the General Assembly a trusteeship agreement [1]", the South African Government consequently replied by letter (of 23 July 1947) to the Secretary-General, *inter alia*, as follows:

> "The Union Government desire to reiterate their view that it is implicit in the mandate system and in the mandate for South West Africa that due regard shall be had to the wishes of the inhabitants in the administration of the Territory. The wish clearly expressed by the overwhelming majority of all the native races in South West Africa and by unanimous vote on the part of the European representatives of the Territory that South West Africa be incorporated in the Union therefore debars the Union Government from acting in accordance with the resolution of the General Assembly, and thereby flouting the wishes of those who under the Mandate have been committed to their charge. In the circumstances the Union Government have no alternative but to maintain the *status quo* and to continue to administer the territory in the spirit of the existing Mandate [2]."

In the same letter the South African Government referred to a resolution adopted by the House of Assembly of the Union Parliament, on 11 April 1947, reading as follows:

> "Whereas in terms of the Treaty of Versailles full power of legislation and administration was conferred on the Union of South Africa in respect of the Territory of South West Africa, subject only to the rendering of reports to the League of Nations; and
>
> *Whereas the League of Nations has since ceased to exist and was not empowered by the provisions of the Treaty of Versailles or of the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization, or to any other international organization or body, and did not in fact do so*; and
>
> Whereas the Union of South Africa has not by international agreement consented to surrender the rights and powers so acquired, and has not surrendered these by signing the Charter of the United Nations Organization and remains in full possession and exercise thereof; and
>
> Whereas the overwhelming majority of both the European and non-European inhabitants of South West Africa have expressed themselves in favour of the incorporation of South West Africa with the Union of South Africa;
>
> Therefore this House is of opinion that the Territory should be represented in the Parliament of the Union as an integral portion thereof, and requests the Government to introduce legislation, after consultation with the inhabitants of the Territory, providing for its representation in the Union Parliament, and that the Government should continue to render

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[1] GA resolution 65 (I), 14 Dec. 1946, in UN doc. A/64/Add. 1, p. 123.
[2] UN doc. A/334, in *GA, OR*, Second Sess., Fourth Comm., p. 135.

reports to the United Nations Organization as it has done heretofore under the Mandate[1]." (Italics added.)

The letter also referred to the fact that "the Union Government have already undertaken to submit reports on their administration for the information of the United Nations", clearly a reference to the above-quoted statement by Field-Marshal Smuts[2].

35. In compliance with an undertaking given by South Africa at the First Session of the General Assembly in 1946, meetings were held throughout South West Africa during 1947 to acquaint the non-White inhabitants with the General Assembly's resolution 65 (I). These meetings showed that the overwhelming majority were still in favour of incorporation. Likewise, the South West Africa Legislative Assembly on 7 May 1947 unanimously adopted a further resolution urging incorporation.

The wishes of the people of South West Africa were again communicated to the United Nations in a special report[3], and were further elaborated on by the South African representative in the Fourth Committee on 25 September 1947. He intimated that South Africa:

Would not proceed with the incorporation of South West Africa;

Would consider itself under no legal obligation to propose a trusteeship agreement for the Territory;

Could not further ignore the wishes of the great majority of the inhabitants of South West Africa who favoured incorporation, by placing the Territory under the trusteeship system; and

Would continue to maintain the status quo, to administer the Territory in the spirit of the Mandate, and to transmit to the United Nations for its information an annual report on the administration of the Territory of South West Africa.

At the thirty-third meeting of the Committee on 27 September 1947 in response to a request by the representative of Denmark for amplification of the South African proposal regarding maintenance of the status quo, the representative of the Union of South Africa explained that:

> "... *the annual report which his Government would submit on South West Africa would contain the same type of information on the Territory as is required for Non-Self-Governing Territories under Article 73 (e) of the Charter*. It was the assumption of his Government, he said, that the report would not be considered by the Trusteeship Council and would not be dealt with as if a trusteeship agreement had in fact been concluded. He further explained that, since the League of Nations had ceased to exist, the right to submit petitions could no longer be exercised, since *that right presupposes a jurisdiction which would only exist where there is a right of control or supervision, and in the view of the Union of South Africa no such jurisdiction is vested in the United Nations with regard to South West Africa*[4]." (Italics added.)

36. In November 1947, the South African representative dealt in the General Assembly with the question of an alleged moral obligation to submit a trustee-

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[1] *Ibid.*, p. 134.

[2] *Vide* para. 31, *supra*.

[3] UN doc. A/334/Add. 1, in *GA, OR*, Second Sess., Fourth Comm., pp. 136-138.

[4] UN doc. A/422, in *GA, OR*, Second Sess., Plenary Meetings, Vol. II, p. 1538.

ship agreement—a contention based, firstly, on the fact that all other mandated territories had been placed under the trusteeship system or had been offered independence, and secondly, on resolutions of the General Assembly of 9 February [1] and 14 December [2] 1946. He again stressed the many and material respects in which South West Africa differed from other mandated territories, and emphasized that South Africa would be acting in defiance of the wishes of the vast majority of the inhabitants if a trusteeship agreement were concluded. He added that, whereas the resolution of 9 February 1946 conveyed an *invitation*, and that of 14 December 1946 a *recommendation*, that a trusteeship agreement be submitted in respect of South West Africa, his Government had "conscientiously performed" its duty in giving "most anxious consideration" to the recommendation, but could not accede thereto [3].

At the same time he informed the General Assembly that—

> "... the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands. Although these reports, if accepted, will be rendered *on the basis that the United Nations has no supervisory jurisdiction in respect of this territory* they will serve to keep the United Nations informed in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73*(e)* of the Charter [4]." (Italics added.)

37. Despite the above, the General Assembly adopted a resolution maintaining its previous recommendation that South West Africa be placed under the trusteeship system and urging South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the Territory, motivating its resolution in the following terms:

> "Whereas it is a fact that all other States administering territories previously held under mandate have placed these territories under the Trusteeship system or offered them independence [5]."

At the Third Session of the General Assembly in 1948 the South African representative formally reiterated—

> "... that the Union Government, after full consideration of all the aspects of the matter, had once again come to the conclusion that it would be in the interests neither of the Territory of South West Africa and its people, nor of the Union and its people, to place the Territory under the authority of the Trusteeship Council of the United Nations, and that, in the circumstances, the Government regretted not being able to comply with the request of the United Nations Assembly to submit, voluntarily a trusteeship agreement [6]".

38. In compliance with its earlier voluntary undertaking, the South African Government submitted in September 1947 a report on South West Africa for the year 1946.

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[1] GA resolution XI (1), in UN doc. A/64, p. 13.
[2] GA resolution 65 (1).
[3] *GA, OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 Nov. 1947, pp. 632 *et seq.*
[4] *Ibid.*, p. 632.
[5] GA resolution 141 (II), 1 Nov. 1947, in UN doc. A/519, p. 47.
[6] *GA, OR*, Third Sess., Part I, Fourth Comm., 76th Meeting, 9 Nov. 1948, p. 292.

This report was submitted on the basis clearly stated in the said undertaking, namely:

(a) that it would be for information purposes only, containing the same type of information on the Territory as required for Non-Self-Governing Territories under Article 73 *(e)* of the Charter; and

(b) that South Africa did not recognize the United Nations as a supervisory authority in respect of the Territory—the reports not being intended for use by the United Nations as if the latter were the supervisory authority or as if a Trusteeship agreement had in fact been entered into.

After receipt of this report, the General Assembly authorized—

> "... the Trusteeship Council in the meantime to examine the report on South West Africa ... and to submit its observations thereon to the General Assembly [1]".

South Africa declined an invitation by the Trusteeship Council to send a representative to attend its examination of the report since such action would not have been consistent with its view that the Council was not vested with supervisory functions in respect of South West Africa.

The South African Government, however, offered to transmit further information in writing if requested to do so. In response to such a request, further information was submitted; and in a covering letter of 31 May 1948 the South African Government, *inter alia*, reiterated:

> "... that the transmission to the United Nations of information on South-West Africa, in the form of an annual report or any other form, *is on a voluntary basis and is for purposes of information only. They have on several occasions made it clear that they recognize no obligation to transmit this information to the United Nations*, but in view of the wide-spread interest in the administration of the Territory, and in accordance with normal democratic practice, they are willing and anxious to make available to the world such facts and figures as are readily at their disposal ... The Union Government desire to recall that in offering to submit a report on South West Africa for the information of the United Nations, they did so on the basis of the provisions of Article 73 (e) of the Charter. This Article calls for 'statistical and other information of a technical nature' and makes no reference to information on questions of policy. In these circumstances the Union Government do not consider that information on matters of policy, particularly future policy, should be included in a report (or in any supplement to the report) which is intended to be a factual and statistical account of the administration of the Territory over the period of a calendar year. Nevertheless, the Union Government are anxious to be as helpful and as co-operative as possible and have, therefore, on this occasion replied in full to the questions dealing with various aspects of policy. The Union Government do not, however, regard this as creating a precedent. Furthermore, the rendering of replies on policy should not be construed as a commitment as to future policy *or as implying any measure of accountability to the United Nations on the part of the Union Government*. In this connection the Union Government have noted that their declared intention to administer the Territory in the spirit of the mandate has been construed in some quarters as implying a measure of international accountability.

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[1] GA resolution 141 (II).

> This construction the Union Government cannot accept and they would again recall that the League of Nations at its final session in April 1946, *explicitly refrained from transferring its functions in respect of mandates to the United Nations* [1]." (Italics added.)

When the Trusteeship Council's observations on the report on South West Africa [2] came before the Fourth Committee in 1948, the South African representative referred to his Government's earlier reservations, and stated that, in view thereof:

> ". . . the Union could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended: still less could the Trusteeship Council assume for itself the power claimed in its resolution, i.e., 'to determine whether the Union of South Africa is adequately discharging its responsibilities under the terms of the mandate . . .' Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African delegation considered that in so doing the Council had exceeded its powers [3]."

The South African representative also observed that the Trusteeship Council, in dealing with the report, apparently considered that it had a supervisory function in respect of South West Africa and that South Africa was accountable to it for the administration of the Territory—which was not in accordance with the basis of the undertaking with regard to reports [4].

39. It is not proposed to deal here with the substance of the Trusteeship Council's comments on the report. What is relevant, however, is that those comments and the subsequent discussions thereon did not observe the reservations under which the report had been submitted. Moreover, many of the conclusions contained in the Trusteeship Council's observations were apparently based on misconceptions as to conditions in the Territory, and the discussions in the Fourth Committee made it clear to the South African delegation that similar misconceptions existed also amongst some of the members of that Committee. The South African representative consequently dealt at length with conditions in the Territory [5] in order to acquaint the Committee with the true facts. It was found, however, that a majority of members did not pay regard to the information given, and some continued with prepared speeches based on the Trusteeship Council's observations and the misconceptions involved therein—a fact to which the South African representative drew attention [6].

Representatives of certain States also used the occasion for attacking South Africa's domestic policies in the Union. The South African representative had occasion to point out that such attacks, based on unfounded allegations, were unrelated to the welfare of the peoples of South West Africa.

In a statement to the General Assembly on 26 November 1948 after explaining once more the reasons why South Africa could not enter into a trusteeship agreement, the South African representative in conclusion recalled:

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[1] UN doc. T/175, 3 June 1948, pp. 51-52.
[2] *GA, OR*, Third Sess., Sup. No. 4 (A/603), pp. 42-45.
[3] *GA, OR*, Third Sess., Part I, Fourth Comm., 76th Meeting, 9 Nov. 1948, p. 288.
[4] *Ibid.*, 77th Meeting, 10 Nov. 1948, p. 297.
[5] *GA, OR*, Third Sess., Part I, Fourth Comm., 78th Meeting, 11 Nov. 1948, pp. 308 *et seq.*
[6] *Ibid.*, 81st Meeting, 16 Nov. 1948, pp. 343-344.

". . . that the League of Nations, at the last session of its Assembly, had not referred to Trusteeship Agreements and had simply stated that territories should be administered as heretofore until other arrangements could be made. The Union was anxious to make arrangements which would be satisfactory to all concerned. All he asked the General Assembly was that it should not make his Government's task more difficult and should believe in his country's good faith as the previous Mandates Commission had done. The Union was not likely to do anything in connection with the territory of South West Africa which might earn the ill-will of other nations. He asked the Assembly to keep the door open for other arrangements [1]."

The majority in the General Assembly nevertheless supported a resolution maintaining its previous requests that South West Africa be placed under the United Nations trusteeship system and expressing regret that South Africa had not yet done so. This resolution (227 (III)) also contained the following recommendation:

"Without prejudice to its resolutions of 14 December 1946, and 1 November 1947, that the Union of South Africa, until agreement is reached with the United Nations regarding the future of South West Africa, continue to supply annually information on its administration of the Territory [2]."

40. In a letter of 11 July 1949 to the Secretary-General, the South African Government referred to the previous explanations for its inability to place South West Africa under the United Nations trusteeship system and, in referring to resolution 227 (III), stated, *inter alia*:

"The recommendation of the General Assembly that the Union should continue to supply information on its administration of South West Africa has been given most careful consideration.

It will be recalled, however, that the Union Government have at no time recognized any legal obligations on their part to supply information on South West Africa to the United Nations, but in a spirit of goodwill, co-operation and helpfulness offered to provide the United Nations with reports on the administration of South West Africa, with the clear stipulation that this would be done on a voluntary basis, for purposes of information only and on the distinct understanding that the United Nations has no supervisory jurisdiction in South West Africa. In this spirit a report was submitted in 1947, and in 1948 detailed replies were furnished to a subsequent questionnaire, formulated by the Trusteeship Council. It was emphasized at the time that the forwarding of information on policy should not be regarded as creating a precedent, or construed as a commitment for the future or as implying any measure of accountability to the United Nations on the part of the Union Government. The Union Government also expressed their confidence that the Trusteeship Council would approach its task in an entirely objective manner and examine the report in the same spirit of goodwill, co-operation and helpfulness as had motivated the Union in making the information available.

These hopes have not been realized. Instead the submission of infor-

[1] *Ibid.*, 164th Plenary Meeting, 26 Nov. 1948, pp. 589-590.
[2] GA resolution 227 (III), 26 Nov. 1948, in UN doc. A/810, pp. 89-91.

mation has provided an opportunity to utilize the Trusteeship Council and the Trusteeship Committee as a forum for unjustified criticism and censure of the Union Government's administration not only in South West Africa but in the Union as well. Inferences and deductions have been drawn from the information submitted which are quite inconsistent with facts and realities. The misunderstandings and accusations to which the United Nations discussions of this subject have given rise have had repercussions both in the Union and in South West Africa, with deleterious effects on the maintenance of the harmonious relations which have hitherto existed and are so essential to successful administration. Furthermore, the very act of submitting a report has created in the minds of a number of Members of the United Nations an impression that the Trusteeship Council is competent to make recommendations on matters of internal administration of South West Africa and has fostered other misconceptions regarding the status of this Territory.

In these circumstances the Union Government can no longer see that any real benefit is to be derived from the submission of special reports on South West Africa to the United Nations, and have regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded. In coming to this decision the Union Government are in no way motivated by a desire to withhold from the world factual and other information regarding South West Africa published in accordance with the customary practice of democratic nations, and information of this nature previously embodied in annual reports to the League of Nations or the United Nations will continue to be made available to the general public in the form of statistics, departmental reports, reports by the Administrator to the South West African Legislature, blue books, and other governmental publications [1]."

At the Fourth Session of the General Assembly in September 1949, the South African representative (with reference to the aforesaid letter) dealt fully with the South African decision to discontinue the submission of reports [2].

41. In the preceding paragraphs attention was given more particularly to the South African attitude concerning the question whether the supervisory powers of the League had been transferred to the United Nations in respect of mandated territories not placed under the trusteeship system. It is however relevant to have regard also to the attitudes expressed by other Members of the United Nations on this question. In order to facilitate an accurate review of the attitudes of United Nations Members in this respect, an Annex, marked A, is attached hereto, the *First Part* of which comprises an index to statements made by the representatives of all the States which participated in debates on South West Africa over the years 1947, 1948 and 1949, and the *Second Part* of which contains extracts from statements made by representatives of certain States over the said years [3]. Both parts list the States in alphabetical order.

The following paragraphs contain what is submitted to be the significant aspects emerging from the contents of Annex A.

42. *(a)* As reflected in the First Part of Annex A, the representatives of 41

[1] UN doc. A/929, in *GA, OR*, Fourth Sess., Fourth Comm., Annex, p. 7.

[2] *GA, OR*, Fourth Sess., Fourth Comm., 128th Meeting, 18 Nov. 1949, p. 200.

[3] The South African proposal regarding incorporation of South West Africa was rejected by the resolution of the General Assembly on 14 Dec. 1946. Debates regarding the question of accountability under the Mandate, as a result of the incorporation proposal, started in 1947.

member States addressed the various organs of the United Nations—the Fourth Committee, the Trusteeship Council and the General Assembly—during the year 1947 on the question of South West Africa [1].

(b) The statements made by the South African representatives conveyed the South African attitude clearly and unambiguously, namely that South Africa was not obliged to conclude a trusteeship agreement for South West Africa, and was not prepared to do so [2], and that, in the absence of a trusteeship agreement, the United Nations had no supervisory jurisdiction over South West Africa [3]. In this attitude South Africa remained consistent throughout.

(c) With regard to the other 40 States which participated in the debates during 1947, one finds that they differed in their attitudes regarding various aspects of the situation.

Some contended that South Africa was legally obliged to enter into a trusteeship agreement concerning South West Africa; others denied such an obligation [4].

Some States contended for an obligation on the part of South Africa to submit to the Secretary-General in terms of Article 73 *(e)* of the Charter, statistical and other information of a technical nature—a different and very much lesser obligation than that of reporting and accounting under the Mandate.

Other States, again, expressed the view that South Africa, in undertaking to submit annual reports for the information of the United Nations, had committed itself to the United Nations, to some extent falling short of submitting to supervision. This view could in any event only rest on a misconception of the nature and extent of South Africa's voluntary undertaking, which was later withdrawn [5].

There were also States that contended that the Mandate had lapsed altogether, and others that contended not for legal obligations on the part of South Africa but for obligations which they termed "political" or "moral".

But, whatever these differences, one thing is clear, and that is that not a single State, in response to the South African attitude, either alleged or suggested that there was any agreement, express or implied, or any understanding, reached during the establishment of the United Nations and the dissolution of the League, whereby the League's supervisory powers over the Mandate became vested in the United Nations, or whereby South Africa became obliged to report and account to the United Nations regarding compliance with substantive mandate obligations.

(d) At least 14 of the 41 States which took part in the debates acknowledged, either expressly or by clear implication, that in the absence of a trusteeship agreement the United Nations would have no supervisory powers in respect of South West Africa. These States were Australia, China, Colombia, Cuba,

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[1] In 1947 the Members of the United Nations totalled 57, of which 51 were original Members. Of the 51, 34 had been original Members of the League of Nations and 32 had been Members of the League at the time of its dissolution.

[2] *GA, OR*, First Sess., Second Part, Fourth Comm., Part I, 19th Meeting, 13 Nov. 1946, pp. 101-102, and *GA, OR*, Second Sess., Fourth Comm., 31st Meeting, 25 Sep. 1947, pp. 3-9.

[3] *GA, OR*, Second Sess., Fourth Comm., 33rd Meeting, 27 Sep. 1947, pp. 13-18, and *GA, OR*, Second Sess., 105th Plenary Meeting, 1 Nov. 1947, pp. 626-638. *Vide* paras. 31 to 38, *supra*.

[4] *Vide* summary of attitudes of Members as given in the written statement of the United States of America in *I.C.J. Pleadings, International Status of South West Africa*, pp. 122 to 123, from which it appears that States which took part in debates on this particular question were more or less equally divided.

[5] A matter dealt with in paras. 31 to 40, *supra*.

France, India, Iraq, the Netherlands, New Zealand, Pakistan, the Philippine Republic, the Soviet Union, the United States of America and Uruguay. Extracts from the statements made by representatives of these 14 States are quoted in the Second Part of Annex A.

It is not necessary to recite all such extracts. The following are indicative of the tenor of the statements made:

Mr. Gerig, representative of the United States of America, in the Trusteeship Council on 12 December 1947:

> "*It was said here* earlier this afternoon, and *I did not hear any member object*, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory [South West Africa], *we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory*. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exists." (Italics added.)

Mr. Kerncamp, representative of the Netherlands in the General Assembly on 1 November 1947:

> "The mandates system now does not operate. As there is no longer a supervising authority, there is no longer a mandates system. The voluntary transmission of information, merely for the sake of information, by the Union of South Africa to the Trusteeship Council does not give the Council the same jurisdiction as the Permanent Commission on Mandates had. . . . we consider that the present situation constitutes a step backward, in so far as *a territory once under international supervision is now under no superintendence* . . ." (Italics added.)

Draft resolution proposed by the representative of India in the General Assembly on 1 October 1947 (para. 5):

> "*Whereas* the territory of South West Africa, though not selfgoverning, *is at present outside the control and supervision of the United Nations*." (Italics added.)

The statements on behalf of Pakistan and China were equally explicit, and those on behalf of Australia also very clear on the point. In other cases the attitude emerged by necessary implication. Thus the representatives of Colombia, Iraq, the Soviet Union and Uruguay, considered that the Mandate had lapsed altogether—from which would follow that there could be no duty of reporting and accounting with regard to mandate obligations. And in the cases of France, New Zealand, Cuba and the Philippine Republic the statements were to the effect that the information in fact submitted by South Africa could be examined for information purposes only, or not at all.

43. During the years 1948 and 1949, in debates on South West Africa, similar views were expressed also on behalf of at least four other States. They were Canada [1], Costa Rica [1], Greece [1], and the United Kingdom [1].

With a view to curtailment of the record, the extract from the statement made by the representative of the last mentioned State only is recited here.

Sir Terence Shone, in the Fourth Committee on 24 November 1949:

> "It could not be said that the Government of the Union of South Africa

[1] *Vide* Annex A, Second Part.

had repudiated its previous assurance [concerning rendering of reports] since *it had complete liberty to decide whether or not to transmit information.*" (Italics added.)

44. Also in respect of other mandated territories, similar views were expressed from time to time up to 1948 by representatives of member States.

(a) In a debate concerning a draft trusteeship agreement for Western Samoa in a Sub-Committee of the Fourth Committee, on 22 November 1946, the representative of New Zealand stated as follows:

> "New Zealand, although it would be most co-operative, could not be forced to amend its draft agreement. The result of disapproval of the draft agreement by the General Assembly would be that New Zealand would carry on, as in the past, its sacred trust to lead the people of Samoa in their orderly progress towards self-government. *In this eventuality, New Zealand would have to carry on without the privilege of the supervision by the United Nations which it desired* [1]." (Italics added.)

(b) On 2 April 1947, during the 124th Meeting of the Security Council, there was a discussion of a draft trusteeship agreement for the former Japanese Mandated Islands, more particularly with reference to a Polish amendment to insert in the preamble the words:

> "*Whereas Japan has violated the terms of the above mandate of the League of Nations and has thus forfeited her mandate . . .* [2]"

Mr. Gromyko's statement, on behalf of the Soviet Union, contained, *inter alia*, the following:

> "It seems to me that there is no need for such an amendment. *There is no continuity, either legal or otherwise, between the mandatory system of the League of Nations and the Trusteeship System laid down in the United Nations Charter.* There is therefore nothing which might entitle the Security Council to discuss this question, let alone take any decisions on it. The mandatory system of the League of Nations is distinct from the trusteeship system which the United Nations is now trying to establish". (Italics added.)

After referring to "a difference in the fundamental principles" of the two systems, he proceeded:

> "It seems to me, moreover, that in this connection we should not lose sight of the fact that, since there is no continuity such as would permit and justify the discussion of this question by the Security Council, the latter cannot investigate the substance of the matter. For the reasons which I have just stated, *the Security Council is not competent to decide to what extent Japan may have violated the conditions of the mandates system and the duties involved in the administration of mandated territories* [3]." (Italics added.)

(c) The case of Palestine was investigated and reported upon by a United Nations Special Committee, consisting of representatives of the following 11 Members of the United Nations: Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia.

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[1] *GA, OR*, First Sess., Second Part, Fourth Comm., Part II, 5th Meeting, 22 Nov. 1946, p. 28.

[2] *SC, OR*, Second Year, No. 31, 124th Meeting, 2 Apr. 1947, pp. 643-644.

[3] *Ibid.*, p. 648.

The following are extracts from the Committee's report dated 3 September 1947, all from portions unanimously agreed to by the Committee:

> "Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and* generally account for the exercise of its responsibilities in accordance with the terms of the Mandate. *Having this in mind*, at the final session of the League Assembly *the United Kingdom representative declared* that Palestine would be administered '*in accordance with the general principles*' of the existing Mandate until 'fresh arrangements had been reached' [1]." (Italics added.)

After recommending unanimously that:

> "The Mandate for Palestine shall be terminated at the earliest practicable date [2]",

the Committee commented as follows:

> "*(d)* It may be seriously questioned whether, in any event, the Mandate would now be possible of execution. The essential feature of the mandates system was that it gave an international status to the mandated territories. This involved a positive element of international responsibility for the mandated territories and *an international accountability to the Council of the League of Nations* on the part of each mandatory for the well-being and development of the peoples of those territories. The Permanent Mandates Commission was created for the specific purpose of assisting the Council of the League in this function. But the League of Nations and the Mandates Commission have been dissolved, *and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations.*
>
> *(e)* The International Trusteeship System, however *has not automatically taken over* the function of the mandates system with regard to mandated territories. Territories can be placed under Trusteeship only by means of individual Trusteeship Agreements approved by a two-thirds majority of the General Assembly.
>
> *(f) The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration, in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system.* At the time of the termination of the Permanent Mandates Commission in April 1946, the mandatory Power did, in fact, declare its intention to carry on the administration of Palestine, pending a new arrangement, in accordance with the general principles of the Mandate. The mandatory Power has itself now referred the matter to the United Nations [3]." (Italics added.)

The report also contained a special note by Sir Abdur Rahman, representative of India, in which note the following passage occurred:

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[1] *GA, OR*, Second Sess., Sup. No. 11, Vol. I (A/364), pp. 26-27.
[2] *Ibid.*, p. 42.
[3] *Ibid.*, p. 43.

"Moreover, the international machinery in the form of the Permanent Mandates Commission, which had been created for the purpose of scrutinizing the actions of the Mandatory Powers, and to which they were bound to submit annual reports, has, along with the League of Nations, ceased to exist. *There are no means by which the international obligations in regard to mandates can be discharged by the United Nations.*

The Mandate has in any case become infructuous, and must, in my opinion, go. Whether it could be superseded by any other system within the present Charter is a different matter, and will be dealt with when I consider the solution of the present problem [1]." (Italics added.)

(d) In a debate regarding Palestine in the Security Council on 19 March 1948 the representative of the United States of America stated:

"The United Nations does not automatically fall heir to the responsibilities either of the League of Nations or of the Mandatory Powers in respect of the Palestine Mandate. The record seems to us entirely clear that *the United Nations did not take over the League of Nations Mandates system* [2]." (Italics added.)

45. It was only as from the end of 1948 that certain States voiced any contradiction at all to the South African contention regarding supervisory jurisdiction in the absence of trusteeship. This contradiction came from five States: Belgium, Brazil, Cuba, India and Uruguay.

The view expressed by the representative of Belgium was that Article 80 of the Charter preserved the benefits of international supervision for the people of South West Africa [3].

The representative of Brazil took up the attitude that, inasmuch as South West Africa had been placed under the mandates system of the League of Nations, it was "under the supervision of the community of Nations, namely, the General Assembly [3]".

On behalf of Cuba, the view was put in 1949 that "the rights and duties of the United Nations were the same as those of the League of Nations for both organizations represented the international community [3]".

The representative of India contended in 1948 that:

"The provisions of Article 80 of the Charter, safeguarding the existing rights of the people of South West Africa until a Trusteeship Agreement had been concluded, had to be recognized. One of these rights, under the mandates system, had been the examination, by the Permanent Mandates Commission, of annual reports . . . That right could not be extinguished merely because the Permanent Mandates Commission had ceased to exist [3]".

The argument advanced by the representative of Uruguay in 1948 was that Article 80 of the Charter "safeguarded the rights of indigenous populations and imposed on the administering authorities the duty of reporting progress and of communicating to the international community how they were fulfilling their obligations". The argument then proceeded on the line that the United Nations had taken the place of the League of Nations as the "co-ordinating centre" of the "civilized and organized international collectivity" with the result that it was "through the organization [United Nations] that the Union of South Africa

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[1] *Ibid.*, Vol. II (A/364/Add. 1), p. 38.
[2] *SC, OR*, Third Year, Nos. 36-51, 271st Meeting, 19 Mar. 1948, p. 164.
[3] Annex A, Second Part.

should fulfil its obligations towards the international community and give an account of its administration [1]".

In the cases of the last-mentioned three States, Cuba, India and Uruguay, these contentions were in conflict with the statements made, or attitudes adopted, by them in 1947.

For the earlier statement by the representative of Cuba, see Annex A, Second Part.

In the case of India, reference is made to paragraph 42 *(d)*, *supra*. Attention is also drawn to the report on Palestine, paragraph 44 *(c)*, *supra*, and to the written statement submitted by India in the 1950 Advisory Proceedings, which contained the following:

> "It is respectfully submitted that the only respect in which the position has changed [as a result of the dissolution of the League] is that Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with. In other respects, the rights and obligations of the mandatory are exactly the same as they were before. The result is that the mandatory is not obliged to submit an annual report under Article 6 and that it cannot modify the terms of the Mandate at all because the procedure by which it could have modified the terms of the Mandate has ceased to be applicable [2]."

And, in the case of Uruguay, the statement made by its representative in 1948 runs counter to the contention advanced on its behalf in 1947 [3] and to its attitude concerning the Mandate for Palestine [4].

46. Also in respect of other territories previously held under Mandate, the practice of States up to 1948 shows a clear understanding that the United Nations would have no supervisory powers over the administration of a mandated territory not placed under trusteeship. Thus the trusteeship agreement for Nauru was concluded as late as November 1947, i.e., more than two years after the Charter had come into force [5]; and the United Kingdom withdrew from the administration of Palestine only as from 15 May 1948 [6]. Nevertheless no reports were in the interim period submitted to the United Nations in respect of either territory. The South African Government is not aware that it was ever suggested by any State or organ of the United Nations that such reports should be submitted either in respect of these territories or in respect of any other mandated territories during the period after dissolution of the League and prior to "new arrangements" being "agreed" upon in regard to them.

E. The Effect of the Events during the Transitional Years

1. General

47. In Chapter VII above the conclusion was reached that no mandatory could, by reason only of its agreement in 1920 to report and account to, and thus to submit to the supervision of, the Council of the League of Nations, subsequently be held obliged to report and account to, and submit to the super-

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[1] Annex A, Second Part.
[2] *I.C.J. Pleadings, International Status of South West Africa*, p. 148.
[3] As to which *vide* Annex A, Second Part.
[4] As to which *vide* para. 44 *(c)*, *supra*.
[5] *Vide GA, OR*, Second Sess., Sup. No. 10 (A/402/Rev. 1).
[6] *Vide Keesing's Contemporary Archives*, Vol. VII (1948-1950), p. 9354.

vision of, the United Nations or any of its organs. The *content* of the latter obligation would be materially different, in substance as well as in form, from that agreed to in 1920 by the mandatories, and for this reason alone it follows that a mandatory could only have become bound to such an obligation by fresh agreement and consent thereto.

The purpose of the review of relevant historical facts in the earlier parts of this chapter, was accordingly to serve as basis for an enquiry whether South Africa had, by any binding juristic act, consented to an obligation to report and account to, and submit to the supervision of, any organ of the United Nations.

48. Although the enquiry as thus posed essentially concerns South Africa's consent to an obligation as postulated, it must of necessity also have reference to another aspect, viz., with whom South Africa agreed to submit to such an obligation if any. (The majority Advisory Opinion of 1950 does not expressly refer to this aspect of the question.)

It seems evident that the international persons, other than the mandatory, who were intended to derive rights or legal interests from the mandates were the League of Nations and the Members of the League [1]. One would therefore prima facie expect the League and/or its Members to be parties to an agreement, if any, rendering a mandatory obliged to report and account to a new supervisory authority. And if that new supervisory authority were to be an organ of the United Nations, it seems that the United Nations, and/or its Members would *necessarily* have had to be parties to such an agreement.

49. For all practical purposes the enquiry is therefore directed towards ascertaining whether South Africa at any time bound itself by agreement, either with the Members of the League at the time of its dissolution (directly or *via* the League as representing them), or with the United Nations and/or its Members, or with both these groups, to an obligation as postulated. Such an agreement could conceivably have been either part and parcel of *general* multipartite conventions concerning the formation of the United Nations and/or the dissolution of the League, or *special* as between South Africa and the others who could conceivably have been parties thereto as aforestated.

II. The United Nations Charter

50. There could be no warrant for any suggestion that the provisions of the Charter of the United Nations by themselves rendered South Africa obliged to the United Nations or the other Members thereof to report and account to, or to be subject to the supervision of, any organ of the United Nations with regard to performance of its functions under the Mandate for South West Africa. In this respect there appears to have been general agreement in the Advisory Opinion of 1950. The majority opinion particularly emphasized that:

> ". . . the Charter has contemplated and regulated only a single system, the International Trusteeship System. It did not contemplate or regulate a co-existing Mandates System [2]".

The whole of the portion of the Opinion in which this statement occurred (answer to question *(b)*) was concurred in by Judge McNair and Judge Read [3];

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[1] In the *South West Africa* cases, Judgment of 18 July 1966, the majority and the minority seem to have been *ad idem* as far as this broad proposition is concerned.

[2] *International Status of South West Africa. Advisory Opinion, I.C.J. Reports 1950*, p. 140.

[3] *Ibid.*, pp. 146 and 164 respectively.

and the particular statement was agreed to by Judge De Visscher [1], Judge Krylov [2], and apparently also Judges Zoricić and Badawi (who concurred in the dissenting opinion of Judge De Visscher) [3]. It is borne out entirely on reference to the Charter. The provisions of the Charter make no mention of anything pertaining to supervision in regard to mandates. They do make provisions for supervision of administration under the trusteeship system, but render it clear that this would apply only to cases in respect of which trusteeship agreements are entered into [4]. Clearly they impose no obligation upon any mandatory to enter into a trusteeship agreement, as was (with respect, correctly) held by the majority of Judges in the Advisory Opinion in 1950. In any event South Africa had at the San Francisco Conference, when the Charter was being drafted, rendered clear and explicit that it did not intend to place South West Africa under United Nations trusteeship or to be a party to any other arrangement involving commitment to the United Nations [5].

In the circumstances, it is manifest that, by agreement to the Charter, South Africa did not agree to any United Nations supervision of the performance of its functions under the Mandate. Furthermore, inasmuch as the Charter provided for supervisory machinery only in respect of trusteeship agreements voluntarily entered into, there would have had to be some further appropriate arrangement, in amplification or possibly even amendment of the Charter, if United Nations supervision was to be brought about regarding any mandated territory or territories not placed under trusteeship.

51. Notwithstanding the above, contentions have been advanced from time to time that Article 80, paragraph 1, of the Charter served in some way to effect a substitution of supervisory organs in respect of mandates. The Applicants in the *South West Africa* cases, for instance, appeared to advance such a contention in the oral proceedings on the Preliminary Objections, and seemed to contend that a similar interpretation of the Article had formed an essential part of the Court's reasoning in the 1950 Opinion [6]. Article 80, paragraph 1, reads as follows:

> "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

The Court, in its Judgment on the Preliminary Objections, did not deal with the Applicants' argument relating to Article 80, paragraph 1. It is respectfully submitted that the true meaning and effect of the Article are clearly set out in the following footnote to the joint dissenting opinion of Judges Spender and Fitzmaurice, the reasoning of which, although it deals more particularly with the suggested effect of Article 80 (1) on Article 7 of the Mandate, applies also to its effect on Article 6:

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[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 186.
[2] *Ibid.*, p. 191.
[3] *Ibid.*, p. 145.
[4] Arts. 76, 77 and 79 of the Charter.
[5] *Vide* para. 4, *supra*.
[6] *I.C.J. Pleadings, South West Africa*, Vol. VII, pp. 304-308.

"It has however been sought to call it [i.e., Article 80 (1)] in aid as follows: the Article, it is said, 'conserved' the rights of States: one of these rights was that stated in Article 7 of the Mandate instrument; therefore the rights survived the League dissolution until the mandated territory was brought under trusteeship.

The argument is not only inherently unsound, it ignores the words of Article 80 (1). This Article is clearly an interpretation clause, commonly called a saving clause, of a type frequently to be found in legislative or treaty instruments, designed to prevent Statute or Treaty provisions being *interpreted* so as to operate beyond their intendment.

Such a clause does not, except in a loose and quite indefinite sense, 'conserve' any rights. It prevents the operation of the Statute or Treaty from affecting them (whatever they are and whatever their content) except as provided by the Statute or Treaty. Article 80 (1) does not maintain or stabilize rights as they existed at the date of the Charter coming into operation, nor does it insure the continuance of those rights or increase or diminish them. It leaves them unaffected by Chapter XII of the Charter.

What Article 80 (1) does not say is as important as what it does say. It does not say that rights shall continue. It does not provide that these rights shall not thereafter, until trusteeship agreements have been concluded, be subject to the operation of law, or that they shall not terminate or be extinguished by effluxion of time, failure of purpose, impossibility of performance or for any other reason. It does not say these rights shall not be altered or be subject to alteration even by normal legal processes.

It is evident that the purpose of Article 80 (1) was quite different to what has been contended and does not lend itself by any rational method of interpretation to support the contention advanced. The sole purpose of the Article was to prevent any provision of Chapter XII of the Charter being construed so as to alter existing rights prior to a certain event [1]."

In the oral proceedings on the Merits of the *South West Africa* cases, the Applicants' counsel expressed his regret for the incompleteness of his presentation in the Preliminary Objections phase regarding Article 80, paragraph 1, and expressly associated himself with the above-quoted views of Judges Spender and Fitzmaurice [2]. He still added however: "The language of the Court [in the 1950 Opinion] might . . . imply a different view [3]". This concession that the Court might well have been mistaken in its interpretation of Article 80, paragraph 1, in 1950 will be further dealt with when the 1950 Opinion is considered [4].

III. United Nations Resolutions of January-February 1946 Pertaining to Assumption of Certain League Functions and Establishment of the Trusteeship System

52. These resolutions and their history, as dealt with above [5], in the first place clearly demonstrate that the United Nations did not consider itself to be an automatic successor in law to any League functions, and consequently that

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 516, footnote 1. *Vide* also dissenting opinion of Judge van Wyk at pp. 615 *et seq.*, and separate opinion of Judge van Wyk in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 93-95.

[2] *I.C.J. Pleadings, South West Africa*, Vol. VIII, pp. 223-226.

[3] *Ibid.*, p. 226.

[4] *Vide* Chap. IX, *infra*.

[5] *Vide* paras. 6 *et seq.*, *supra*.

in its contemplation the assumption and continuation of any League function by it would have to be a matter of active arrangement. Indeed, in contrast with assets, which were to be "transferred" in terms of the mutually adopted "common plan [1]", the earlier idea of a "transfer" of certain functions and activities was abandoned in favour of one of "assumption" by the United Nations organs of certain functions and powers [1].

53. The second feature of importance is that in resolution XIV as finally adopted by the General Assembly on 12 February 1946 [1], the statement of *general willingness* to ensure the continued exercise of League functions was carefully limited to *functions of a non-political character* [2]. This would obviously not include the function of supervision regarding mandates. The only portion of the resolution under which such function could possibly fall would be Part I, 3, C, which read as follows:

> "*C. Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character*
>
> *The General Assembly* will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character [3]."

In other words, for the assumption of a supervisory function regarding mandates, the procedure envisaged by the resolution would involve a "request from the parties" to, or legally interested in, the respective mandates, and a *decision acceding to the request* by the General Assembly or other United Nations organ considered to be the appropriate one.

54. However, even in so far as the said Part I, 3, C of resolution XIV supplied a method whereby it might have been *possible*, at the initiative of the parties to the mandates themselves, to effect an assumption of supervisory functions in respect of mandates by some United Nations organ, it is apparent from its history that it was not designed for this purpose at all—at any rate as far as its proposers were concerned. For it will be recalled that the resolution was based on a recommendation of the United Nations Preparatory Commission, which in turn had considered a prior report from its Executive Committee [4]. The relevant portion of the Executive Committee's Report had stated, *inter alia*, that—

> "Since the question arising from the winding up of the Mandate system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here [5]."

"Part III, Chapter IV" as there referred to formed part of the history leading eventually to resolution XI, adopted at the same Session of the General Assembly on 9 February 1946. The said "Part III, Chapter IV" of the Executive Committee's report dealt with the establishment of the trusteeship system. It will be recalled that a recommendation was made therein for the establishment of a temporary trusteeship committee, one of whose functions would be to:

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[1] *Vide* para. 20, *supra*.
[2] Part I, para. 3, A and B of the resolution.
[3] *Vide* para. 20, *supra*.
[4] *Vide* paras. 7 and 8, *supra*.
[5] Doc. PC/EX/113/Rev. 1, 12 Nov. 1945, p. 110.

"... advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System [1]".

55. On two occasions while the proposal regarding a temporary trusteeship committee was under consideration, the problems which would arise in respect of supervision of mandates after dissolution of the League, were pertinently raised. In a proposal to the Executive Committee of the Preparatory Commission, dated 14 October 1945, the United States delegation suggested that "following the dissolution of the League of Nations and of the Permanent Mandates Commission, the functions previously performed by the Mandates Commission in connection with receiving and examining reports submitted by Mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements", should first be undertaken by the Temporary Trusteeship Committee, and, after establishment of the Trusteeship Council, by the Council itself. This proposal was apparently never formally raised [2].

On 4 December 1945 substantially the same proposal was again raised by the United States delegation (although with slight textual changes) before the Preparatory Commission itself, accompanied by an explanatory memorandum. The memorandum pointed out that the—

"... report by the Executive Committee makes no provision for any organ of the United Nations to carry out the functions of the Permanent Mandates Commission".

It stated that—

"... in order to provide a degree of continuity between the Mandates system and the trusteeship system, to permit the mandatory powers to discharge their obligations, and to further the transfer of mandated territories to trusteeship, the Temporary Trusteeship Committee (or such a committee as is established to perform its functions) and, later, the Trusteeship Council should be specifically empowered to receive the reports which the mandatory powers are now obliged to make to the Permanent Mandates Commission".

Later in the memorandum the purpose of this proposal was described as "to bridge any possible gap which might exist between the termination of the mandates system and the establishment of the trusteeship system [3]". Although duly filed and placed on an agenda, this proposal was never formally moved or discussed.

The significance of the two United States proposals is that thereby it was pertinently drawn to the attention of the Preparatory Commission that no machinery would exist for the supervision of mandates after dissolution of the League, and that such machinery would only be re-established if and when a particular mandated territory were placed under trusteeship. Nevertheless the Members of the Preparatory Commission (consisting of all the then Members of the United Nations) were clearly not prepared to make any provision at all for supervision of mandates, either by empowering some interim body, or even by authorising the Trusteeship Council itself to undertake it. In this connec-

[1] *Ibid.*, p. 56.
[2] *Vide* para. 9, *supra*.
[3] *Vide* para. 11, *supra*.

tion the attitude of the Mandatory powers is also not without significance. With the exception of one stray comment by the South African representative [1], not one of the mandatories showed any wish to create machinery for interim supervision of mandates pending the conclusion of trusteeship agreements or other arrangements [2].

The very recommendation regarding establishment of the Temporary Trusteeship Committee was rejected by the Preparatory Commission [3]; and no other proposal regarding investigation of, or machinery for, the possible "transfer to" or "assumption by" the United Nations "of any functions and responsibilities hitherto exercised under the mandates system", was substituted for the rejected proposal. Resolution XI as adopted in effect merely urged expedition in the submission of proposed trusteeship agreements by "the States administering territories now held under Mandate [4]".

56. In adopting resolution XI the Assembly knew beforehand that such proposed agreements would not be submitted in respect of all mandated territories. Express reservations had been made by the South African representative indicating an intention on the part of his Government to refrain from placing South West Africa under United Nations trusteeship and to seek recognition for incorporation thereof in the Union [5]. From reservations made by the representative of the United Kingdom, the future of the Palestine Mandate was known to be uncertain [6]. Furthermore, the Pacific Islands under Japanese Mandate were occupied by the United States and no decision had been come to as to their future.

In addition, the representatives of the United Kingdom and France had indicated that their Governments' willingness to place certain mandated territories under United Nations trusteeship depended upon their being able to obtain satisfactory terms [6].

57. That the Assembly was in fact aware that a number of States administering mandates had no intention at that time of submitting trusteeship agreements, appears indeed from the text of resolution XI, especially the following:

> "... *with respect to Chapters XII and XIII of the Charter, the General Assembly:*
>
> 3. *Welcomes* the declarations, made by *certain States* administering territories now held under mandate, of an intention to negotiate trusteeship agreements in respect of *some of those territories* and, in respect of Transjordan, to establish its independence.
>
> 4. *Invites the States* administering territories now held under mandate to undertake practical steps ... for the implementation of Article 79 of the Charter [7]." (Italics added save for the heading and the words "Welcomes" and "Invites".)

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[1] *Vide* para. 10, *supra*. The function suggested by him for the Temporary Trusteeship Committee clearly did not indicate any contemplation that any reports concerning South West Africa would be submitted—*vide South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 100-101 (Judge van Wyk); p. 345, footnote 1 (Judge Jessup).

[2] *Vide* para. 13, *supra*.

[3] *Vide* paras. 12 and 14, *supra*.

[4] *Vide* para. 17, *supra*.

[5] *Vide* para. 15, *supra*.

[6] *Vide* para. 16, *supra*.

[7] UN doc. A/64, p. 13 quoted in para. 17, *supra*.

The references to "*certain States*" and "*some of those territories*" in the first part of the resolution may partially have been inspired by the absence of Japan (which was not a Member of the United Nations, and not present at the Assembly) and the case of Transjordan, to which reference was made later in the resolution. Nevertheless in view of the express reservations, *inter alia*, by South Africa, the resolution must have been intended to refer thereto as well. In addition, the invitation extended, in the second part of the resolution, to "*the States* administering" mandates, to submit trusteeship agreements, suggests that the General Assembly realized full well that there was a class of mandatories which did not fall under the "certain States" which had made declarations, but which the General Assembly nevertheless hoped would submit agreements [1].

58. In all the circumstances, the silence on the part of the United Nations in regard to supervision of mandatory government is significant. Its Members were aware that time would elapse before the coming into effect of the trusteeship system, and that there was no certainty that all mandated territories would end up as trust territories (paras. 56 and 57, *supra*). Yet, despite the United States initiative in this regard [2], no attempt was made to arrive at a general arrangement either for *interim* supervision (after dissolution of the League) regarding mandated territories until they should become trust territories, or for any supervision at all in respect of mandated territories which might not become trust territories. The United Nations made elaborate provision for the "assumption" of certain League functions and powers, and for transfer to it of League assets, knowing, however, that its resolution XIV in this regard was not designed for supervisory functions in respect of mandates (para. 54, *supra*). A specific proposal envisaging investigation and recommendation concerning possible "transfer" of "functions . . . under the mandates system" was rejected and nothing substituted for it, and even more specific proposals urging United Nations supervision in respect of mandates came to nothing. The inference seems inescapable that the omissions were deliberate. It is highly unlikely that it would have been possible to achieve a *general* arrangement applicable to all mandated territories, in view of the widely varying circumstances pertaining to them and the differing intentions of the mandatory Powers in regard to their future—with the result that the matter perforce had to be left to *special* arrangement, if any, to be arrived at in each particular case.

59. However that might be, the contents and history of resolutions XI and XIV clearly show that, at the time of their adoption being shortly prior to dissolution of the League of Nations:

(a) there had been no agreement, express or implied, between South Africa and the United Nations and/or its Members whereby South Africa consented to United Nations supervision regarding the performance of its functions under the Mandate;

(b) the only provision made on the part of the United Nations whereby such agreement could possibly have come about, if at all, was that contained in Part I, 3, C, of resolution XIV, envisaging a request therefor by the interested parties and agreement thereto by a United Nations organ; and

(c) in view of the repeated reservations made by South Africa the Members of

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[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 537-538 (joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice).

[2] *Vide* para. 55, *supra*.

the United Nations must have realized that the prospects of South Africa being a party to such a special request were remote [1].

IV. League of Nations Resolutions during Last Session of Its Assembly, 8 to 18 April 1946

60. The texts of the relevant resolutions that were adopted by the League Assembly on 18 April 1946 are set out above [2].

As will appear from the preamble of the resolution relating to assumption by the United Nations of League functions and powers arising out of international agreements [3], the Assembly of the League had "considered" the United Nations General Assembly resolution XIV of 12 February 1946 on the same subject [4]. The League resolution in question, as did the one following upon it and set out above [5], specifically confined itself to functions, powers and activities of a *non-political character*, and contained provisions designed to facilitate assumption of such functions, powers and activities by the United Nations in terms of its resolution XIV; it remained silent in regard to functions and powers arising out of international agreements of a *political* character, as dealt with in Part I, 3, C, of the United Nations resolution XIV. The inference seems clear that the League Assembly considered that that was a matter in regard to which it had no role to play, and which was to be left to the *ad hoc* treatment envisaged by Part I, 3, C, of United Nations resolution XIV. In other words, the League Assembly clearly knew that the United Nations wished each case involving political functions to be dealt with separately, by way of a request by the interested parties to the United Nations and consideration thereof by the United Nations General Assembly or other appropriate organ; and if it contemplated or intended transfer of such functions to the United Nations in any other manner, it could be expected to have said so.

61. This was exactly what had been contemplated in the *first* draft proposal by China concerning mandates [6]. The second paragraph of the draft invited the League Assembly to express the view that "the League's function of supervising mandated territories should be *transferred* to the United Nations in order to avoid a period of *interregnum* in the supervision of the mandatory régime". The third paragraph invited it to recommend *submission of annual reports by the mandatories to the United Nations* until the Trusteeship Council should be constituted. Here, then, was a proposal involving a course of action differing from that contemplated in Part I, 3, C, of the United Nations General Assembly resolution XIV: instead of *separate* consideration by United Nations organs of *separate* requests from parties interested in *particular mandates*, the proposal envisaged transfer to the United Nations of supervisory functions in respect

[1] It is to be noted that the discussion of the events during the formation of the United Nations and the early months of its existence in the dissenting opinion of Judge Jessup in 1966, pp. 341-347, was not directed toward controverting the conclusions drawn herein. It is accordingly apparent that nothing stated there disturbs the conclusion that the Members of the United Nations deliberately refrained from making any provision for the supervision of mandated territories otherwise than by the conclusion of trusteeship agreements. For a further discussion of this part of the said dissenting opinion, *vide* Chap. IX, para. 66, *infra*.

[2] *Vide* paras. 23-26, *supra*.

[3] *Vide* para. 24, *supra*.

[4] The League resolution erroneously refers to the date as 16 February 1946.

[5] *Vide* para. 25, *supra*.

[6] *Vide* para. 26 *(c)*, *supra*.

of *all mandated territories* and submission to the United Nations of reports by *all mandatories*.

62. It seems quite clear that such a proposal could not have obtained the unanimous support required for a League Assembly resolution. By reason of the reservation stated by South Africa in regard to South West Africa—being, in effect, that neither a mandates system nor a trusteeship system should in future apply to the Territory—the Union could not support the original Chinese proposal [1]. Nor does it seem that that proposal could have received the support of the United Kingdom, which, in terms of the statement by its representative, reserved its future intentions in regard to Palestine [2]. Furthermore, the reservation by its representative of Egypt was to the effect that mandates would, in his Government's view, terminate with the dissolution of the League, and that Palestine must in any event be considered to have outgrown the need for being governed under mandate or trusteeship [3]: thus it also seems most unlikely that Egypt could have supported the original Chinese proposal.

63. In the light of the above considerations, the significance of the fact that the original Chinese draft was dropped after informal discussions and replaced by an agreed draft, which was then unanimously adopted, is self-evident. It will be observed that in paragraph 3 of the resolution, as adopted [4], the Assembly "recognizes" that on dissolution of the League its functions with respect to mandated territories will come to an end, and it "notes" the existence in the Charter of the United Nations of principles "corresponding to" those of Article 22 of the League Covenant: but it says nothing in regard to transfer to the United Nations of the League's functions with respect to mandates, or of assumption or continuation of such function by the United Nations. In paragraph 4 it expresses a contemplation of "other arrangements" that may be "agreed between the United Nations and the respective mandatory powers"; and as regards the *interim* period, pending such agreement upon "other arrangements", it "*takes note*" of the "*expressed intentions*" of those powers to continue—

> ". . . to *administer* [the territories] for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates . . .[5]". (Italics added.)

In all the circumstances, the only inference that can be drawn is that the omissions in the adopted resolution, as compared with the original Chinese draft, were intentional. The author of that draft had also envisaged an *interim* period, described by Dr. Liang on 9 April 1946, as follows: ". . . in view of the fact that the trusteeship council of the United Nations had not yet been appointed and was not likely to be set up for some time[6]", and described in the last paragraph of the draft itself as "until the Trusteeship Council shall have been constituted [7]". It was specifically in respect of this *interim* period that the author of the original draft wished "to avoid a period of *interregnum* in the supervision of the mandatory régime [7]"; and consequently invited the Assembly (i) to express the view "that the League's functions of supervising mandated terri-

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[1] *Vide* text of statement in para. 26 *(b)* (ii), *supra*.
[2] *Vide* para. 26 *(b)* (i), *supra*.
[3] *Vide* para. 26 *(e)*, *supra*.
[4] *Vide* text in para. 26 *(f)*, *supra*.
[5] *L. of N., O.J.*, Spec. Sup., No. 194, p. 58; para. 26 *(f)*, *supra*.
[6] *Ibid.*, p. 76; para. 26 *(c)*, *supra*.
[7] L. of N., 21st Assembly, 1st Comm., 2nd Meeting, provisional record; para. 26 *(c)*, *supra*.

tories should be transferred to the United Nations [1]", and (ii) to recommend "that the mandatory powers . . . shall continue to submit annual reports to the United Nations [1]".

Instead, as indicated above, the adopted resolution in respect of such *interim* period confined itself to stating that the Assembly "*takes note*" of "*expressed intentions*" "*to administer the territories*" in a certain manner (italics added.)

64. That the representative of China was himself fully aware of the significance of the contrast, appears from what he said upon introducing the eventual agreed draft, on 12 April 1946 [2], as compared with his earlier speech on 9 April 1946 [3]: He emphasized (on 12 April) that the functions of the League in respect of mandates "were not transferred automatically" to the United Nations and that the Assembly "should therefore take steps to secure the continued application of the principles of the mandates system". But instead of moving from this foundation to the earlier proposal "recommending that the mandatory powers should continue to submit annual reports . . . to the United Nations", he then stated that, as the Australian representative had pointed out the previous day, the League "would wish to *be assured*" as to the future of mandated territories. He referred to statements by representatives of other mandatory Powers, and described as "gratifying" the fact that all had "announced their intention to administer the territories under their control in accordance with their obligations under the mandates system until other arrangements were agreed upon". His comment on the substance of the matter concluded that "it was to be *hoped*" that "the principles of trusteeship underlying the mandates system" "*would*" be applied to the territories "*in full*" by "the *future* arrangements *to be made*".

Clearly then, the conclusion is inescapable that there was in the final result a deliberate decision to refrain from attempting to secure a general transfer to the United Nations of League supervisory functions in respect of mandated territories not placed under trusteeship, and even from attempting to secure a recommendation that reports should in respect of such mandates be rendered to the United Nations.

65. In sum: the subject of possible United Nations supervision regarding mandates not converted into trusteeship had not been treated as something generally understood so as to "go without saying", but an express resolution to bring about such supervision had been sought by a proposer who later stressed that the League functions concerning mandates "were not transferred automatically to the United Nations". The obvious failure of the proposal to secure the necessary support for an Assembly resolution thus rules out all possible basis of inferring general tacit intent to bring about such United Nations supervision. The known absence of such intent is confirmed by the text of, and omissions in, the resolution actually adopted, and by the speech of its proposer.

The intention must have been to leave to such "other arrangements", if any, as may be "agreed" in each case, the possibility of the assumption by the United Nations of supervisory powers in respect of mandates not converted into trusteeship—in other words, to the *ad hoc* method which was the only possibility provided for by the United Nations General Assembly in Part I, 3, C, of its resolution XIV of 12 February 1946.

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[1] L. of N., 21st Assembly, 1st Comm., 2nd Meeting provisional record; para. 26 *(c)*, *supra*.

[2] *Vide* para. 26 *(d)*, *supra*.

[3] *Vide* para. 26 *(c)*, *supra*.

66. The above conclusions are further confirmed by the fact that none of the "expressed intentions" of mandatory States referred to in paragraph 4 of the resolution, included an *intention to report* under their Mandates to the United Nations pending such "other arrangements": they were confined to administration of the territories in accordance with obligations regarding protection and promotion of the well-being and development of the inhabitants, and certain of the statements clearly suggested that there would be no such reporting pending the "other arrangements". Thus:

(a) The statement of the South African representative pointedly referred to the "disappearance of those organs of the League concerned with the *supervision* of mandates, primarily the Mandates Commission and the League Council [1]", as something which would "necessarily preclude complete compliance with the letter of the Mandate [1]"; and immediately before, he had stated an intention of continued administration by the Union in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, "as she has done during the past six years when meetings of the Mandates Commission could not be held[1]" (and when reports were in fact not rendered).

(b) The Australian representative also stated, *inter alia*, that—

"After the dissolution of the League of Nations and the consequent *liquidation of the Permanent Mandates Commission*, it will be *impossible to continue the mandates system in its entirety* [2]." (Italics added.)

He further intimated that for the *interim*, pending trusteeship, he regarded Chapter XI of the Charter as being applicable, including the limited obligation thereunder (i.e., Article 73*(e)*) to supply to the United Nations, for information purposes, certain statistical and other information of a technical nature [2]. This necessarily excluded contemplation of the more onerous obligation of reporting and accounting as regards compliance with substantive mandate obligations and thus submitting to supervision.

(c) The United Kingdom's intention was expressed as being—

" . . . to continue to administer these territories in accordance with *the general principles* of the existing mandates [3]". (Italics added.)

An interesting light is cast on the meaning intended to be conveyed by the italicized words in the above quotation, by the report of the Special Committee on Palestine, extracts from which are quoted above [4]. One passage reads as follows:

"Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate. Having this in mind, at the final session of the League Assembly, *the United Kingdom representative declared* that Palestine would be administered 'in accordance with the

[1] *L. of N., O.J.*, Spec. Sup. No. 194, p. 33; para. 26 *(b)* (ii), *supra*.
[2] *Ibid.*, p. 47; para. 26 *(b)* (vi), *supra*.
[3] *Ibid.*, p. 28; para. 26 *(b)* (i), *supra*.
[4] *Vide* para. 44 *(c)*, *supra*.

general principles' of the existing Mandate until 'fresh arrangements had been reached' [1]". (Italics added.)

This was a report by an Eleven-Nation Committee, not by the United Kingdom itself, but it seems most unlikely that this explanation could have been given for the United Kingdom's statement had it not been obtained at the statement's very source.

67. In view of the above, the conclusion is clear that the relevant resolutions of the Assembly of the League of Nations at its last session did not embody an agreement, either express or implied, between South Africa and the League and/or its Members, whereby South Africa was rendered obliged to report or account to, or to submit to the supervision of, any organ of the United Nations relative to performance of its functions under the Mandate. On the contrary, the indications point to a mutual understanding that, pending "other arrangements" which might be "agreed" upon between the United Nations and South Africa there would be no such reporting or accounting or supervisory authority. Such "other arrangements" could potentially, as far as the League resolution was concerned, cover a variety of possibilities, such as,

(a) recognition of a new status for the Territory, e.g., as was being proposed by South Africa, or independence, or partition as in the case of Palestine; or
(b) a trusteeship agreement; or
(c) the "assumption" by the United Nations, in terms of Part I, 3, C, of its Assembly's resolution XIV of 12 February 1946, of supervision regarding continued mandatory administration of the Territory in pursuance of a request to that end.

68. The mutual understanding to which the events at the Final Session of the League Assembly thus point, at the same time of course excludes the possibility of any contemplation on the part of those present at the said session that proper provision had already been made for the continued supervision, after dissolution of the League, of mandated territories not placed under trusteeship. These events consequently reinforce the conclusion that no such provision had been made in the mandate instruments, the Charter or during the proceedings of the United Nations, i.e., both the Preparatory Commission and the First Session of the General Assembly. It is significant that of the 36 States present at the Final Session of the League Assembly, 25 were founding Members of the League of Nations and 29 were founding Members of the United Nations.

69. The conclusion reached in the preceding paragraphs is reinforced when regard is had to the actions and report of the Board of Liquidation of the League [2].

In contrast to assets and certain functions which were transferred to the United Nations Organization, the mandates system was described in the report as having "thus been brought to a close" and all that remained to be transferred to the United Nations were said to be "the small remaining staff" and "the mandates section archives" which the Board of Liquidation expected to afford valuable guidance to those concerned with the administration of the trusteeship system. There is no record that the correctness of the report of the Board of Liquidation was disputed by any of the Members of the League present at the session, to which copies of the report were sent.

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[1] *GA, OR*, Second Sess., Sup. No. 11, Vol. I (A/364), pp. 26-27.
[2] As to which, *vide* para. 27, *supra*.

70. The same picture emerges from the *Treaty Series* of the United Nations. As previously noted, any international agreement (which includes a unilateral engagement which has been accepted) required registration in terms of Article 102 of the Charter or Article 10 of the General Assembly regulations regarding registration of treaties [1]. In respect of those activities and assets which were transferred from the League to the United Nations, proper registration was effected. No agreement in respect of the transfer of supervisory functions in respect of mandates can be found in the *Treaty Series* [2]. Again the only possible inference is that the Members participating in the activities of the United Nations in the early months of its existence in 1945-1946, which comprised in the main the same States which were Members of the League at the final session of the Assembly in April 1946, did not consider that any international agreement had been concluded during this transitional period which effected a substitution of supervisory organs in respect of mandated territories not placed under trusteeship.

V. Negotiations Subsequent to Dissolution of the League

71. The evidence shows that subsequent events never led to any agreement whereby South Africa was rendered obliged to submit to the supervision of any United Nations organ.

(a) "Other arrangements", as contemplated by the resolution of the last League Assembly were never "agreed" upon between the United Nations and South Africa. The United Nations was not prepared to agree to an arrangement whereby recognition would be given to incorporation of South West Africa in the Union, nor to other proposals subsequently made [3]. On the other hand, South Africa, for the reasons explained above, was not prepared to agree to trusteeship for the Territory [3]. And there never was, in terms of Part I, 3, C, of the United Nations General Assembly's resolution XIV of 12 February 1946, any "request from the parties", or agreement thereto by any United Nations organ, as to "assumption" by the United Nations of supervisory functions regarding continued mandatory administration of the Territory.

(b) A survey is given above [3] of the history of the South African undertaking, later withdrawn, to submit statistical and other information such as mentioned in Article 73, paragraph *(e)*, of the Charter. Article 73 *(e)*, where it applies as a matter of law, does not involve an obligation to submit to "supervision". The whole of Article 73 comprises a counterpart in amplified form of Article 23 *(b)* of the League Covenant, in respect of which, as indicated above, no obligation concerning supervision applied [4]. The same situation was intended to apply in Article 73 of the Charter; and it is to this end that paragraph *(e)* thereof emphasizes that the transmission is to be "for information purposes [5]".

In the present case, there was a purely *voluntary* undertaking to furnish information "in accordance with" or "on the basis of" Article 73 *(e)* [6] coupled with an express denial of liability to submit to United Nations supervision, and with an understanding that the information was not to be dealt with as

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[1] *Vide* para. 28, *supra*.
[2] *Vide* para. 29, *supra*.
[3] *Vide* paras. 30 to 40, *supra*.
[4] *Vide* Chap. VII, para. 48, *supra*.
[5] *Vide* Hall, *op. cit.*, pp. 285-286, 288-289.
[6] *Vide* paras. 31, 35 and 36, *supra*.

if a trusteeship agreement had, in fact, been concluded [1]. Inasmuch as the United Nations neither accepted nor observed the conditions attached to the undertaking, in which circumstances the undertaking was withdrawn, there was never any *consensus ad idem* or agreement, express or implied, even as regards the furnishing of information in accordance with Article 73 *(e)*, much less as regards South Africa being obliged to submit to supervision by the United Nations.

VI. Practice of States

72. During the years immediately after establishment of the United Nations and the dissolution of the League, the practice of States showed a general understanding that the League's supervisory powers in respect of mandates had not been transferred to, or assumed by, the United Nations.

As appears above [2], South Africa expressed its attitude very clearly both before the Fourth Committee and before the General Assembly during the period September to November 1947, to the effect that South Africa was not obliged to conclude a trusteeship agreement for South West Africa, and was not prepared to do so, and that in the absence of a trusteeship agreement, the United Nations had no "right of control or supervision [3]" or "supervisory jurisdiction [4]" in respect of South West Africa. At that time the United Nations consisted of 57 Members, of which 51 had been original Members. Of the 51, 31 had been Members of the League at the time of its dissolution and 34 had been original Members of the League. Had these States or any of them disagreed with the South African contention that the supervisory functions of the League had not been transferred to the United Nations, one would have expected them to have contested it, particularly if they had been parties to an agreement, express or implied, concluded the previous year and providing for such a transfer.

73. In fact, representatives of 41 States addressed the various organs of the United Nations on the question of South West Africa during 1947, *but at no stage did any of them aver the existence of any such agreement or suggest that the supervisory functions of the League had passed to the United Nations on any other basis* [5]. On the contrary, at least 14 of the 41 States who took part in the debates, acknowledged either expressly or by clear implication that, in the absence of a trusteeship agreement, the United Nations would have no supervisory powers in respect of South West Africa. These were Australia, China, Colombia, Cuba, France, India, Iraq, the Netherlands, New Zealand, Pakistan, the Philippine Republic, the Soviet Union, the United States of America and Uruguay [5].

During 1948 and 1949, 4 additional States associated themselves with this view, viz., Canada, Costa Rica, Greece and the United Kingdom [6].

Up to 1949, 18 States therefore expressed the view that in the absence of a trusteeship agreement, the United Nations would have no supervisory powers with regard to South West Africa. If South Africa is added, the number is increased to 19.

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[1] *Vide* para. 35, *supra*.
[2] *Vide* paras. 31, 35 and 36, *supra*.
[3] *Vide* para. 35, *supra*.
[4] *Vide* para. 36, *supra*.
[5] *Vide* para. 42, *supra*.
[6] *Vide* para. 43, *supra*.

74. Whereas there had been no contradiction in 1947, 5 States adopted a contrary attitude in 1948 and 1949[1]. They were Belgium, Brazil, Cuba, India and Uruguay. Cuba, India and Uruguay had previously taken up a different attitude as indicated above; and India did so again, in its written statement to this Court in the 1950 proceedings relating to the status of South West Africa[2].

As will be seen from the extracts quoted above[3], none of these States relied on any agreement (other than Article 80 (1) of the Charter) having been concluded during the transitional period of 1945-1946.

75. Also in respect of other mandated territories, the practice of States up to 1948 shows a clear understanding that the United Nations would have no supervisory powers over the administration of a mandated territory not placed under trusteeship. This understanding appears from the following:

(a) The trusteeship agreement for the mandated territory of Nauru was entered into as late as November 1947, i.e., more than two years after the Charter had come into force[4]; and the United Kingdom withdrew from the administration of Palestine only as from 15 May 1948[5]. Nevertheless no reports were in the interim period submitted to the United Nations in respect of either Territory. As far as the United Nations records show, and as far as the South African Government is aware, no State ever suggested that such reports should be submitted—either in respect of these Territories or in respect of any other mandated territories during the period after dissolution of the League and prior to "new arrangements" being "agreed" upon in regard to them.

(b) (i) The case of Palestine is of particular significance inasmuch as it was investigated and reported upon by a United Nations Special Committee, consisting of representatives of 11 Members of the United Nations. Relevant extracts from the report, dated 3 September 1947, are set out above[6]. It is important to note that this Committee unanimously expressed the clear understanding that the United Nations did not take over the supervisory functions of the League of Nations with respect to mandated territories which were not placed under trusteeship. Five of these 11 Members (Australia, Canada, India, the Netherlands and Uruguay) at various times during the relevant period expressed the same view regarding the Mandate for South West Africa, as has been noted above. The further six were Czechoslovakia, Guatemala, Iran, Peru, Sweden and Yugoslavia.

(ii) Also in debates on the Palestine question the same view was expressed. On 19 March 1948, before the Security Council, the representative of the United States of America stated:

> "The record seems to us entirely clear that the United Nations did not take over the League of Nations Mandate system[7]".

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[1] *Vide* para. 45, *supra*.

[2] *Vide I.C.J. Pleadings, International Status of South West Africa*, p. 148. *Vide* also para. 45, *supra*.

[3] *Vide* para. 45, *supra*.

[4] *Vide GA, OR*, Second Sess., Sup. No. 10 (A/402/Rev. 1).

[5] The Mandate terminated on 15 May 1948. The last British troops left from Haifa on 30 June 1948. *Vide Keesing's Contemporary Archives*, Vol. VII (1948-1950), p. 9354.

[6] *Vide* para. 44 *(c)*, *supra*.

[7] *SC, OR*, Third Year, Nos. 36-51, 271st Meeting, 19 March 1948, p. 164. *Vide* para. 44 *(d)*, *supra*.

(c) On 22 November 1946, the representative of New Zealand clearly expressed a similar understanding in relation to the Mandate for the Territory of Western Samoa [1].

(d) On 2 April 1947, a similar understanding emerged from statements made by the representative of the Union of Soviet Socialist Republics in relation to the former Japanese Mandated Islands [2].

76. In the result therefore:

(a) Up to the year 1947, no Member of the United Nations voiced any contradiction to South Africa's contention that in law the United Nations was not vested with supervisory powers in respect of the Mandate for South West Africa, although 41 took part in debates on South West Africa in that year and New Zealand had adopted a similar view in relation to Western Samoa.

(b) Over the years 1947 to 1949, at least 24 States Members of the United Nations (other than South Africa) in participating in debates in the organs of the United Nations, or in expressing views in its agencies, whether relative to the Mandate for South West Africa or to other mandates, such as Palestine and the Japanese Mandated Islands, either expressly or by clear implication acknowledged that, in the absence of a trusteeship agreement, the United Nations would have no supervisory powers over a mandated territory. These States were: Australia, Canada, China, Colombia, Costa Rica, Cuba, Czechoslovakia, France, Greece, Guatemala, India, Iran, Iraq, the Netherlands, New Zealand, Pakistan, Peru, the Philippine Republic, the Soviet Union, Sweden, the United Kingdom, the United States of America, Uruguay and Yugoslavia [3].

(c) Up to 1949 only 5 States voiced any contradiction to the proposition aforestated. These States were Belgium, Brazil, Cuba, India and Uruguay. In the case of the last-mentioned 3 States, the attitude adopted by them in 1948 and 1949 was in conflict with their earlier contentions, and in the case of India also with its contentions before this Court in 1950. And in no case was the contradiction based on a suggested agreement or understanding (other than Article 80 (1) of the Charter) arrived at during the period 1945-1946.

77. It is submitted that the understanding which emerges from the above circumstances, and in particular the written and oral statements made on behalf of a large number of States, Members of the United Nations, in a variety of circumstances and situations, and within a relatively short time after the establishment of the United Nations and the dissolution of the League, when the events were still reasonably fresh in memory, effectively refutes any suggestion of agreement, express or implied, as between Members of the United Nations or other interested parties, to the effect that mandatories would be subject to United Nations supervision in respect of mandated territories not placed under trusteeship [4].

[1] *Vide* para. 44 *(a)*, *supra*.

[2] *Vide* para. 44 *(b)*, *supra*.

[3] *Vide* paras. 42, 43 and 44, *supra*. In the years 1947, 1948 and 1949, the Members of the United Nations totalled, respectively, 57, 58 and 59. During the oral proceedings in the *South West Africa* cases the Applicants sought to dispute the correctness of the statement in the text concerning the number of States, but it is submitted, without success. *Vide I.C.J. Pleadings, South West Africa*, Vol. VIII, pp. 468 *et seq.*

[4] Similarly, it is submitted, these discussions clearly refute any suggestion that

F. Conclusion

78. To conclude the analysis of events which occurred during the transitional period of the establishment of the United Nations, the dissolution of the League of Nations and immediately thereafter, there is one final point that should be emphasized. Had South Africa intended to place South West Africa under United Nations supervision, there were two established procedures that might have been followed. In the first place, a trusteeship agreement might have been negotiated under the Charter on such terms as were mutually satisfactory. Secondly, if South Africa had preferred to continue the Mandate rather than place the Territory under Trusteeship, South Africa might have submitted an appropriate request to the United Nations in terms of Part I, 3, C, of resolution XIV to assume the exercise of functions previously entrusted to the organs of the League of Nations by Article 22 of the Covenant and the Mandate Declaration [1]. It is undisputed that neither of these procedures was followed. In these circumstances it is not lightly to be presumed that South Africa, which did not carry out the prescribed formalities, though at all times fully able and entitled to do so, somehow became bound in another way [2]. In this regard "it is clear that only a very definite, very consistent course of conduct [2]" on the part of South Africa could justify the Court in holding that South Africa became bound to report and account to the General Assembly of the United Nations as successor to the Council of the League of Nations. Far from establishing such a definite and consistent course of conduct, the circumstances discussed above serve completely to negative any consent by South Africa to the assumption of supervisory functions in respect of South West Africa by the United Nations General Assembly.

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such an obligation arose out of a term to be implied in the Mandate Declaration (*vide* Chapter VII, para. 59, *supra*). In this regard it must be noted that 18 of the 24 States which expressed the view during 1947 to 1949 that the United Nations did not succeed to the supervisory functions of the League in respect of mandates, had been founder Members of the League of Nations, and 17 had been Members at the time of its dissolution.

[1] *Vide* paras. 52 to 54, *supra*.

[2] *Vide North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, at* pp. 25-26, quoted in Chap. II, para. 12, *supra*.

Annex A

PARTICIPATION BY MEMBERS OF THE UNITED NATIONS IN DEBATES IN THAT ORGANIZATION DURING THE YEARS 1947, 1948 AND 1949 CONCERNING THE "QUESTION OF SOUTH WEST AFRICA"

First Part

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38th Meeting, 7 October 1947, *Mr. Lucero*, p. 52.

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FOURTH COMMITTEE

130th Meeting, 21 November 1949, *Mr. Tedin Uriburu*, p. 218.
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1947

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1949

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1947

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1948

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1949

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1947

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Brazil

1947

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1948

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1949

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1948

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1947

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1947

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1949

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1947

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1949

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China

1947

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1949

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Cuba

1947

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1948

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1949

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Czechoslovakia

1947

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1948

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Denmark

1947

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1948

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1949

PLENARY

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Dominican Republic

1948

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1949

FOURTH COMMITTEE

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Egypt

1947

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1949

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France

1947

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1948

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1949

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TRUSTEESHIP COUNCIL

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Greece

1947

FOURTH COMMITTEE

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1948

FOURTH COMMITTEE

79th Meeting, 12 November 1948, *Mr. Tranos*, p. 320.
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1949

FOURTH COMMITTEE

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Guatemala

1947

FOURTH COMMITTEE

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1949

FOURTH COMMITTEE

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Haiti

1947

FOURTH COMMITTEE

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PLENARY

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1948

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1949

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Honduras

1947

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India

1947

FOURTH COMMITTEE

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1948

FOURTH COMMITTEE

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Liberia

1947

FOURTH COMMITTEE

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1949

FOURTH COMMITTEE

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Mexico

1947

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1948

FOURTH COMMITTEE

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1949

FOURTH COMMITTEE

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TRUSTEESHIP COUNCIL

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Netherlands

1947

FOURTH COMMITTEE

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1949

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New Zealand

1947

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1948

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1949

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Nicaragua

1947

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Norway

1949

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Pakistan

1947

FOURTH COMMITTEE

39th Meeting, 8 October 1947, *Mr. Pirzada*, p. 54.

PLENARY
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1948

FOURTH COMMITTEE
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1949

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Panama

1947

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Peru

1947

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1949

FOURTH COMMITTEE
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Philippine Republic

1947

FOURTH COMMITTEE
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1948

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TRUSTEESHIP COUNCIL
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1949

FOURTH COMMITTEE
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TRUSTEESHIP COUNCIL

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Poland

1947

FOURTH COMMITTEE

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45th Meeting, 15 October 1947, *Mr. Bramson*, p. 94.
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1948

FOURTH COMMITTEE

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1949

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Sweden

1948

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Syria

1947

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32nd Meeting, 26 September 1947, *Emir Adel Arslan*, p. 11.
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1949

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Thailand

1949

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1947

FOURTH COMMITTEE

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Union of South Africa

1947

FOURTH COMMITTEE

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1948

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1949

FOURTH COMMITTEE

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Union of Soviet Socialist Republics

1947

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United Kingdom of Great Britain and Northern Ireland

1947

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1949

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United States of America

1947

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1949

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Uruguay

1947

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1949

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Venezuela

1947

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1948

FOURTH COMMITTEE

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1949

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Yugoslavia

1947

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1948

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1949

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Second Part

Extracts from Statements by Representatives of Certain States
(in alphabetical order)

1947

Australia

FOURTH COMMITTEE

Mr. Evatt: "Although the General Assembly was entitled to recommend that a trusteeship agreement be submitted, the countries represented at San Francisco had never intended it to be a legal obligation to place any territory under trusteeship. The obligation to submit information under Chapter XI for territories not under trusteeship ran parallel to the provisions of Chapter XII." (*GA, OR*, Second Sess., Fourth Comm., 39th Meeting, 8 October 1947, p. 58.)

PLENARY

Mr. Evatt: "Therefore, there is no gap in the Charter of the United Nations. If the Union of South Africa does not bring its Territory under the Trusteeship System, it is still, in my view, a Non-Self-Governing Territory. The Union Government will have to give, voluntarily, reports for the information of the Secretary-General. The Secretary-General can do as he chooses with this information." (*GA, OR*, Second Sess., Vol. I, 104th Plenary Meeting, 1 November 1947, p. 588.)

TRUSTEESHIP COUNCIL

Mr. Forsyth: "The reports on Trust Territories are submitted not merely to inform the Trusteeship Council but to enable the Trusteeship Council to exercise its main function, the supervision of administration. In the case of South West Africa, which is not a Trust Territory, the Trusteeship Council does not have the function of supervising administration. The administration of South West Africa has been reserved by the Government of the Union of South Africa as its own concern, and that Government, not having placed the territory under trusteeship, does not recognize the power of the Trusteeship Council to supervise its administration. There is, therefore, a fundamental difference between the purpose for which the report on South West Africa is submitted and the purpose for which reports on Trust Territories are submitted." (*TC, OR*, Second Sess., First Part, 15th Meeting, 12 December 1947, p. 477.)

China

FOURTH COMMITTEE

Mr. Liu Chieh: "The only choice lay between trusteeship and the grant of independence. Article 80, paragraph 2, of the Charter further proved the obligatory character of the [the trusteeship] system. . . . If the Union of South Africa placed South West Africa under trusteeship, it would not be deprived of the administration of the territory; and the only change would be the placing of that administration under international supervision." (*GA, OR*, Second Sess., Fourth Comm., 31st Meeting, 25 September 1947, p. 6.)

PLENARY

Mr. Chieh: "We are told that the Union of South Africa would administer the Territory of South West Africa in the spirit of the Mandate of the League of Nations. I do not doubt the sincerity of this statement on the

part of the Union of South Africa, but we all know that the mandates system has ceased to exist and that the trusteeship system has been established. Would it not be more desirable, to administer the Territory in question under a living system than under the shadow of a ghost system?" (*GA*, *OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 November 1947, p. 601.)

Colombia

FOURTH COMMITTEE

Mr. Yepes: "If the Mandate were to be continued, on whose behalf would it be exercised? The League of Nations was defunct. In international as well as in civil law, the Mandatory Power could not continue to hold a mandate after the institution to which it was responsible had ceased to exist." (*GA*, *OR*, Second Sess., Fourth Comm., 33rd Meeting, 27 September 1947, p. 14.)

PLENARY

Mr. Yepes: ". . . on whose behalf would the mandate of the old League of Nations be exercised?

It could certainly not be the League of Nations, for it has ceased to exist, and the mandate could not be exercised on behalf of a dead institution. In civil law, as we all know, power of attorney ceases upon the death of the principal. The same idea extends, by analogy, to international law. We can conclude that, since the League of Nations is dead, mandates exercised under its authority have also lapsed, and the territories concerned must fall under the Trusteeship System established by Article 77 of the Charter." (*GA*, *OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 November 1947, p. 602.)

Cuba

FOURTH COMMITTEE

(i) *Mr. Meyer:* ". . . the information submitted by the Government of the Union of South Africa with regard to South West Africa could not be examined since South West Africa was neither a Trust Territory nor a Non-Self-Governing Territory." (*GA*, *OR*, Second Sess., Fourth Comm., 32nd Meeting, 26 September 1947, p. 10.)

(ii) *Mr. Meyer:* ". . . disputed the contention of the Government of the Union of South Africa that it had no alternative to retaining the *status quo*, nor did he recognize that South West Africa constituted a category *sui generis*. The Charter was very clear in recognizing only three categories: Trust Territories, the Non-Self-Governing Territories and independent States." (*GA*, *OR*, Second Sess., Fourth Comm., 39th Meeting, 8 October 1947, p. 55.)

France

TRUSTEESHIP COUNCIL

Mr. Garreau: "That text [of the General Assembly Resolution] was very carefully drafted after lengthy discussion because the Assembly, in referring the report of the Government of the Union of South Africa to the Trusteeship Council, wanted above all to take the first step in the direction of international supervision over the former mandated Territory of South West Africa, pending reconsideration of the Assembly resolution by the Government of the Union of South Africa and a decision of that Government in that connection . . .

Indeed, in the absence of a trusteeship agreement, the Council—and the

same would have been true of the Fourth Committee—could examine the report of the South African Government only for information." (*TC, OR*, Second Sess., First Part, 15th Meeting, 12 December 1947, p. 480.)

India

FOURTH COMMITTEE

India submitted a draft resolution which in paragraph 5 thereof contained the following statement:

> "*Whereas* the territory of South West Africa, though not self-governing, is at present outside the control and supervision of the United Nations." (*GA, OR*, Second Sess., Fourth Comm., Annex 3h, p. 197.)

Iraq

FOURTH COMMITTEE

Mr. Khalidy: ". . . pointed out that the trusteeship system of the United Nations had replaced the mandates system. . . .

The mandates sytem had ceased to function. The Union of South Africa had not accepted the trusteeship system, to which there was no alternative. The trusteeship system offered the only legal right to administer a territory formerly under mandate." (*GA, OR*, Second Sess., Fourth Comm., 32nd Meeting, 26 September 1947, p. 10.)

PLENARY

Mr. Jamali: "Now the League of Nations is dead, but the principles underlying the mandate are not dead. Chapter XII of the Charter certainly replaces Article 22 of the Covenant. . . .

There is no obligation [to place a mandated territory under the trusteeship system], but these members of the General Assembly who worked on the trusteeship Chapter of the Charter at San Francisco will remember that, although there was no obligation on the mandatory power to put a territory under the trusteeship system, it was implied that the mandatory Power would either put such a territory under trusteeship in due course, or declare its independence. . . . There is no further alternative. . . .

I believe that the retention of the Territory of South West Africa, neither under the trusteeship system nor as an independent territory, is a retrograde step. It is contrary to the spirit of the Charter, and it is a denial of the right of the United Nations to supervise the welfare and freedom of all peoples all over the world." (*GA, OR*, Second Sess., Vol. I. 105th Plenary Meeting, 1 November 1947, pp. 621-622.)

TRUSTEESHIP COUNCIL

Mr. Khalidy: "I had occasion to say at the time [in the Fourth Committee] that South West Africa is neither a colony, a mandated territory nor a Trust Territory. It is not a mandated territory, I said, and I still say so because the League of Nations from which the mandate derived legally, is dead." (*TC, OR*, Second Sess., *First Part*, 15th Meeting, 12 December 1947, p. 482.)

Netherlands

FOURTH COMMITTEE

Mr. Kernkamp: "He felt that the refusal of South Africa to place the territory under the international trusteeship system was regrettable because since independence had not been granted to the territory its withdrawal from any system of international supervision was a retro-

gressive step." (*GA*, *OR*, Second Sess., Fourth Comm., 38th Meeting, 7 October 1947, p. 52.)

PLENARY

Mr. Kernkamp: "The mandates system now does not operate. As there is no longer a supervising authority, there is no longer a mandates system. The voluntary transmission of information, merely for the sake of information, by the Union of South Africa to the Trusteeship Council does not give the Council the same jurisdiction as the Permanent Commission on Mandates had. . . .

. . . we consider that the present situation constitutes a step backward, in so far as a territory once under international supervision is now under no superintendence . . ." (*GA*, *OR*, Second Sess., Vol. I, 105th Plenary Meeting 1 November 1947, p. 605.)

New Zealand

FOURTH COMMITTEE

Sir Carl Berendsen: "Speaking as the representative of New Zealand, he favoured the international supervision of all backward peoples, but maintained that there was no legal obligation on any Mandatory Power to place a mandate under the trusteeship system. The Committee could not therefore accuse the Union of South Africa of failing in its duty." (*GA*, *OR*, Second Sess., Fourth Comm., 33rd Meeting, 27 September 1947, p. 17.)

TRUSTEESHIP COUNCIL

Sir Carl Berendsen: "This [South West Africa] is not a Trust Territory. We derive no powers from the Charter. Our only powers are derived from the resolution of the General Assembly, and our powers are limited by that resolution. . . . But we are not entitled—and I regret it very much indeed—we are clearly not entitled to send a visiting mission. We are clearly not entitled to accept petitions. We are clearly not entitled to hear oral representation." (*TC*, *OR*, Second Sess., First Part, 15th Meeting, 12 December 1947, pp. 478-479.)

Pakistan

PLENARY

Mr. Pirzada: "A simple comparison of the relevant articles in Chapters XI and XII of the Charter will show clearly the advantages of one system over the other. The first advantage that I would stress is that, under the present mandates system, only one country is responsible for the proper administration and the development of political and other institutions within the Territory. It is the conscience of one State which will be guiding it all the time to follow the provisions laid down in Chapter XI of the Charter. On the other hand, if it comes under the international trusteeship system, it will be the conscience of all the United Nations, as represented in the Trusteeship Council, which will be guiding the administration of the Territory and which, therefore, has a greater chance of being directed in the interests of the people of that Territory.

The second advantage which the trusteeship system has over the ordinary administration under Chapter XI is that international supervision is provided under the international trusteeship system, according to Article 75 of the Charter. As against that, under Chapter XI of the Charter, which relates to the administration of Non-Self-Governing Territories –to which class this Territory of South West Africa will have to belong if it is not

brought under the trusteeship system—there is no provision for international supervision, and the only supervision that exists takes the form of supplying information on non-political matters for the consideration of the United Nations: in other words, economic, social, and other matters. . . .

There are two systems under the Charter of the United Nations, namely the administration of Non-Self-Governing Territories, and the administration of territories under the trusteeship system. This would be a third system—administering in the spirit of the mandate—which the Charter does not recognize and which the Charter seems to abolish altogether. . . .

Therefore, by refusing to place this Territory under the trusteeship system, the Union of South Africa is going back on both principles recognized by the Covenant of the League of Nations: first, trusteeship of an international body; second, supervisory control of an international body." (*GA, OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 November 1947, pp. 618-619.)

Philippine Republic

FOURTH COMMITTEE

(i) *General Romulo:* "The Union of South Africa had contended that it had obtained its powers from the League of Nations, but it had forgotten the new obligations it had assumed under the Charter. Chapter XI of the Charter contained a declaration which applied to all the Non-Self-Governing Territories, whether mandated or not. That declaration embodied obligations which far exceeded those of the mandates system. The resolution of the Union Parliament implied that these obligations would be fulfilled by the submission of information." (*GA, OR*, Second Sess., Fourth Comm., 31st Meeting, 25 September 1947, p. 7.)

(ii) *General Romulo:* "While supporting the draft resolution submitted by the representative of India, [he] could not subscribe to the fifth paragraph of that proposal, to the effect that South West Africa was 'at present outside the control and supervision of the United Nations'. Chapter XI of the Charter applied to all the Non-Self-Governing Territories . . .

According to Article 103 of the Charter, obligations under the present Charter superseded other international obligations, and that meant in effect that the Union of South Africa was bound to fulfil its obligations under Chapter XI as long as South West Africa remained outside the trusteeship system." (*GA, OR*, Second Sess., Fourth Comm., 39th Meeting, 8 October 1947, p. 57.)

Union of South Africa

FOURTH COMMITTEE

(i) *Mr. Lawrence:* "In respect of its administration of South West Africa, that Government [of the Union of South Africa] would maintain the *status quo* in the spirit of the Mandate. It would not submit a trusteeship agreement, but would transmit information annually. Information relating to 1946 was now in the hands of the Secretary-General." (*GA, OR*, Second Sess., Fourth Comm., 31st Meeting, 25 September 1947, p. 4.)

(ii) *Mr. Lawrence:* "In reply to the request made by the Danish representative at the thirty-first meeting regarding clarification of document A/334, Mr. Lawrence stated that the Mandate gave certain powers and

imposed certain obligations. The Government of the Union of South Africa had full powers of administration over South West Africa, and it proposed to continue to exercise them, just as it would continue to fulfil its obligations under the Mandate to promote the moral and material well-being of the population and to advance social progress. The Union of South Africa did not claim that South West Africa was a colony, but it was willing to submit annual reports like those required for the Non-Self-Governing Territories under Article 73 e [sic].

The right to petition had ceased to exist with the disappearance of the League of Nations, the authority to which petitions could be addressed. In the absence of a trusteeship agreement, the United Nations had no jurisdiction over South West Africa and therefore no right to receive petitions." (*GA, OR*, Second Sess., Fourth Comm., 33rd Meeting, 27 September 1947, pp. 15-16.)

PLENARY

Mr. Lawrence: "In addition, the Government of the Union of South Africa has expressed its readiness to submit annual reports for the information of the United Nations. That undertaking stands.

Although these reports, if accepted, will be rendered on the basis that the United Nations has no supervisory jurisdiction in respect of this Territory, they will serve to keep the United Nations informed, in much the same way as they will be kept informed in relation to Non-Self-Governing Territories under Article 73 e of the Charter." (*GA, OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 November 1947, pp. 632-633.)

Union of Soviet Socialist Republics

PLENARY

Mr. Stein: "It is also known that the South African Government refused to comply with this recommendation [to submit a trusteeship agreement] and set up an absurd juridical status for South West Africa which consisted in the administration of South West Africa being carried out 'in the spirit of the League of Nations Mandate'. I say that this is an absurd juridical status, since now, in 1947, after the League of Nations and the mandates system have ceased to exist, and reference is made to this system in order to conceal the actual annexation of South West Africa." (*GA, OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 November 1947, p. 612.)

The United States of America

FOURTH COMMITTEE

Mr. Dulles: "The Union of South Africa had no legal title to the territory at present, because its only title was a Mandatory under the League of Nations." (*GA, OR*, Second Sess., Fourth Comm., 38th Meeting, 7 October 1947, p. 50.)

TRUSTEESHIP COUNCIL

Mr. Gerig: "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate,

admitting that it exists." (*TC*, *OR*, Second Sess., First Part, 15th Meeting, 12 December 1947, p. 505.)

Uruguay

FOURTH COMMITTEE

(i) *Mr. Arrosa:* "The duty to submit trusteeship agreements was not only a moral one. Article 80, paragraph 2, of the Charter permitted no delay on the part of the Mandatory Powers. At a time when only two classes of dependent territories remained in existence, the Non-Self-Governing Territories and the Trust Territories, South West Africa's position had clearly become anomalous." (*GA*, *OR*, Second Sess., Fourth Comm., 33rd Meeting, 27 September 1947, p. 14.)

(ii) *Mr. Arrosa:* "His delegation was of the opinion that since the mandates system was defunct and South West Africa was neither independent nor a colony, the Union of South Africa was under an obligation to place it under the international trusteeship system." (*GA*, *OR*, Second Sess., Fourth Comm., 40th Meeting, 9 October 1947, p. 60.)

PLENARY

Mr. Arrosa: "We maintain once more that it is impossible to conceive of a mandate continuing, even only in spirit, now that the body which granted it, the League of Nations, has ceased to exist. There is here a clear anomaly, for the Territory in question is neither independent nor a colony.

The international system now in force takes account of two classes of dependent territories only: those called by Chapter XI of the Charter 'non-self-governing', and those placed under the trusteeship system in accordance with Chapters XII and XIII. There is no third category or class of dependent territories." (*GA*, *OR*, Second Sess., Vol. I, 105th Plenary Meeting, 1 November 1947, p. 615.)

1948

Belgium

FOURTH COMMITTEE

Mr. Ryckmans: "Under the mandates system, South West Africa had been administered under a 'C' Mandate, and it had always been understood that the Territory would eventually be incorporated in the Union of South Africa.

On the other hand, [he] felt bound to draw the attention of the South African representative and the Committee to the terms of Article 80, which provided that nothing in Chapter XII of the Charter should be 'construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples . . .'. That included the people of South West Africa, who, having had the benefit of international supervision under the mandates sytem, could not be deprived of that right." (*GA*, *OR*, Third Sess., Part I, Fourth Comm., 79th Meeting, 12 November 1948, pp. 325-326.)

China

FOURTH COMMITTEE

Mr. Liu Chieh: "It was true that, as no trusteeship agreement had been concluded for South West Africa, the United Nations could not intervene or exercise its power of supervision in regard to that Territory. But paragraph 2 of Article 80 imposed an obligation to conclude such an agreement without delay." (*GA*, *OR*, Third Sess., Part I, Fourth Comm., 76th Meeting, 9 November 1948, p. 296.)

Costa Rica

FOURTH COMMITTEE

Mr. Canas: "The United Nations should not act as though its hands were tied by the Mandate. It had not been a party to the mandate agreement, and could not therefore be obliged to act in accordance with its provisions. Indeed, the Union of South Africa itself did not consider that the Mandate was still in existence, since it had stated that it would administer the Territory of South West Africa in the 'spirit' of the Mandate. As a legal contract between the Union of South Africa and the League of Nations, the Mandate had disappeared with the League, and there had been no provision whereby the United Nations became a party to the Mandate." (*GA, OR*, Third Sess., Part I, Fourth Comm., 82nd Meeting, 17 November 1948, p. 365.)

Cuba

FOURTH COMMITTEE

Mr. Pérez Cisneros: "In his opinion, however, the revised joint resolution did not make it clear that the United Nations had assumed the League of Nations' responsibility in relation to South West Africa, the only mandated territory not yet placed under the trusteeship system. . . . It should be clearly stated also that the reports were sent to the United Nations so that the Organization could exercise its functions of control and supervision, in the same manner as would have been done by the League of Nations . . ." (*GA, OR*, Third Sess., Part I, Fourth Comm., 82nd Meeting, 17 November 1948, p. 356.)

France

FOURTH COMMITTEE

Mr. Garreau: "The French delegation had frequently had occasion to recall that the trusteeship system had been substituted for the mandates system. Once the League of Nations had ceased to exist, so had the institutions which functioned under its aegis. When the United Nations was set up, there remained nothing of the Covenant of the League of Nations except its moral influence. The mandates system was reconstituted as the trusteeship system with certain characteristic differences. . . .

The South African Government had on serveral occasions expressed its desire to administer the Territory of South West Africa in the spirit of the Covenant. It accepted the moral obligation of ensuring the well-being and the development of the population, leading it in due course to autonomy and ultimately to independence." (*GA, OR*, Third Sess., Part I, Fourth Comm., 79th Meeting, 12 November 1948, pp. 322, 324.)

India

FOURTH COMMITTEE

Mrs. Pandit: "The provisions of Article 80 of the Charter, safeguarding the existing rights of the people of South West Africa until a trusteeship agreement had been concluded, had to be recognized. One of those rights, under the mandates system, had been the examination, by the Permanent Mandates Commission, of annual reports submitted by the Union Government on the administration of the Territory of South West Africa. A representative of the Union Government had been personally present for interrogation. That right could not be extinguished merely because the Permanent Mandates Commission had ceased to exist." (*GA, OR*, Third

Sess., Part I, Fourth Comm., 81st Meeting, 16 November 1948, p. 352 [1].)

Union of Soviet Socialist Republics

TRUSTEESHIP COUNCIL

(i) *Mr. Tsarapkin:* ". . . his delegation held that the Trusteeship Council could not consider the report submitted by the Government of the Union of South Africa, because the status of the Territory was at present undetermined. While it was true that the Union of South Africa had declared that it would administer the Territory in the spirit of the existing mandate, it should not be forgotten that both the mandates system of the League of Nations and the Permanent Mandates Commission no longer existed. Hence, there was no legal basis for the administration of that Territory by the Union of South Africa." (*TC, OR*, Third Sess., 31st Meeting, 23 July 1948, p. 406.)

(ii) *Mr. Tsarapkin:* "He was of the opinion that a report on the Territory of South West Africa could be considered only after this Territory is included in the trusteeship system and a trusteeship agreement is approved by the General Assembly . . . He considered that there exist only two alternatives to deal with the former Mandated Territory of South West Africa—either this Territory should become an independent State or should be included in the trusteeship system . . ." (*TC, OR*, Third Sess., 41st Meeting, 4 August 1948, p. 537.)

United Kingdom

TRUSTEESHIP COUNCIL

Sir Alan Burns: "The Council had been asked to consider the report on the administration of South West Africa simply because that Territory was formerly under mandate, and the General Assembly hoped soon to see it placed under the trusteeship system. It was important, therefore, to bear in mind that the Council's consideration of the report on the administration of South West Africa and its report thereon to the General Assembly were *sui generis*; the Council had no right to assume that the General Assembly would take any particular course of action on the basis of the Council's report." (*TC, OR*, Third Sess., 41st Meeting, 4 August 1948, p. 531.)

Uruguay

FOURTH COMMITTEE

Mr. Gerona: ". . . pointed out that the obligation to send an annual report on the administration of mandated territories had been imposed on every Mandatory Power by the provisions of Article 22, paragraph 7, of the Covenant of the League of Nations. . . .

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[1] "It is respectfully submitted that the only respect in which the position has changed [as a result of the dissolution of the League] is that Article 6 of the Mandate and the first portion of Article 7 of the Mandate have become incapable of being complied with. In other respects, the rights and obligations of the Mandatory are exactly the same as they were before. The result is that the Mandatory is not obliged to submit an annual report under Article 6 and that it cannot modify the terms of the Mandate at all because the procedure by which it could have modified the terms of the Mandate has ceased to be applicable." ("Written statement of the Government of India", in *International Status of South West Africa, Pleadings, Oral Arguments, Documents*, p. 148.)

Article 80 of the United Nations Charter provided, in connexion with the trusteeship agreements, that . . .

That provision of the Charter clearly safeguarded the rights of indigenous populations and imposed on the Administering Authorities the duty of reporting progress and of communicating to the international community how they were fulfilling their obligations.

It could be maintained that since the organ which was to receive that information, namely the Council of the League of Nations, was no longer in existence, the Mandatory Power was automatically relieved of its obligation to report progress. The Council had studied the reports in its capacity as an organ of the international community; it acted as a co-ordinating centre for the other States concerned, i.e., members of the civilized and organized international collectivity. The dissolution of the League of Nations meant the disappearance of only the common co-ordinating centre. But that co-ordinating centre was once more in existence: it was the United Nations, and it was through the organization that the Union of South Africa should fulfil its obligations towards the international community and give an account of its administration." (*GA, OR*, Third Sess., Part I, Fourth Comm., 78th Meeting, 11 November 1948, pp. 311-312.)

1949

Brazil

FOURTH COMMITTEE

Mr. d'Aquino: "South West Africa, however, was not a sovereign State, but a territory placed under the mandates system of the League of Nations and, consequently, was under the supervision of the community of Nations, namely, the General Assembly." (*GA, OR*, Fourth Sess., Fourth Comm., 132nd Meeting, 22 November 1949, pp. 223-224.)

Canada

FOURTH COMMITTEE

Mr. Blais: "The Canadian delegation was submitting that amendment ['Expresses regret that the Government of the Union of South Africa has not continued . . . to submit reports on its administration of the Territory of South West Africa for the information of the United Nations'] because the use of the word 'repudiated' in the Indian text gave the impression that the Union Government was under a legal obligation to submit information, which was not the case." (*GA, OR*, Fourth Sess., Fourth Comm., 139th Meeting, 28 November 1949, p. 268.)

Cuba

FOURTH COMMITTEE

Mr. Pérez Cisneros: "The prestige of the United Nations was at stake just as that of the League of Nations might have been in similar circumstances: the rights and duties of the United Nations were the same as those of the League of Nations for both organizations represented the international community. The substance of the question was clear: although there was no Trusteeship Agreement in respect of South West Africa, there remained the old Mandate which provided for a certain number of obligations. Those had to be observed and the Power concerned could not denounce them by unilateral action. Under the terms of the Mandate, the Union of South Africa had been required to transmit information to the League of

Nations, because it was the international community's duty to be informed how the territories it entrusted to the administration of some countries were being governed. That information was to have been examined by the international community; the populations concerned had had the right to send petitions; furthermore, the right of petition had been recognized as 'an essential human right' by the General Assembly at its third session . . . as a result of a proposal made by the Cuban and French delegations. . . .

No trusteeship agreement had in fact been concluded in respect of South-West Africa. Attention should be drawn, however, to Article 80 of the Charter which explicitly stated . . . It was therefore clear that the situation which had prevailed under the mandates system should not be changed in the case under discussion. The rights of the people concerned were clearly compromised when the international community ceased to receive information on how they were being administered, and when the people themselves could no longer exercise their right of petition." (*GA*, *OR*, Fourth Sess., Fourth Comm., 130th Meeting, 21 November 1949, p. 216.)

Greece

PLENARY

Mr. Lely: "He recalled that at the third session of the General Assembly the representative of the Union of South Africa had stated that, when the Government of the Union of South Africa had given an assurance that it would send information on the Territory, it had made a specific reservation that the sending of such information would imply no commitment for the future and would not be indicative of accountability to the United Nations.

[He] felt that that statement spoke for itself. The sending of information was a voluntary act on the part of the Union Government. If that was so, and he believed that it was, then the Union Government had not repudiated any previous assurance." (*GA*, *OR*, Fourth Sess., 269th Plenary Meeting, 6 December 1949, p. 530.)

United Kingdom

FOURTH COMMITTEE

Sir Terence Shone: "It could not be said that the Government of the Union of South Africa had repudiated its previous assurance since it had complete liberty to decide whether or not to transmit information." (*GA*, *OR*, Fourth Sess., Fourth Comm., 135th Meeting, 24 November 1949, p. 247.)

CHAPTER IX

THE EARLIER OPINIONS AND JUDGMENTS CONCERNING SUPERVISION OF SOUTH WEST AFRICA

A. Introductory

1. In Chapters VII and VIII above, the South African Government has given its reasons for contending that its obligation to report and account to the Council of the League of Nations lapsed on the dissolution of that organization. This contention runs counter to the decision of the majority of the Court in the 1950 Advisory Opinion[1]. The 1950 Opinion was the subject of two later interpretative Opinions in 1955[2] and 1956[3]. The question whether the General Assembly of the United Nations had succeeded to the supervisory functions previously vested in the Council of the League (as was held by the majority in 1950) was again debated in both phases of the *South West Africa* cases. Although the Court itself (as distinct from individual Members thereof) made no explicit pronouncement on this issue either in 1962[4] or in 1966[5], there is much of relevance thereto in both sets of Judgments and in some of the separate opinions (both concurring and dissenting). This Chapter will be devoted to an analysis of the 1950 majority opinion and to a reasoned statement of the grounds upon which it is submitted the Court should in the present case depart therefrom.

2. The general rule as to the effect and weight of advisory opinions was stated as follows by Judge Winiarski in the *Peace Treaties* case:

> "Opinions are not formally binding on States nor on the organ which requests them, they do not have the authority of *res judicata*; but the Court must, in view of its high mission, attribute to them great legal value and a moral authority[6]."

The extent of the "legal value and moral authority" of advisory opinions is not, however, a constant factor but depends on circumstances. In this regard, Edvard Hambro stated:

> "... Advisory Opinions, even more than the judgments of the Court, will be judged on their intrinsic merits. A judgment of the Court, even if it is not perfect and even if the reasoning can be criticised, can serve a useful purpose because it will put an end to a dispute between two or more States. An Advisory Opinion, on the other hand, does not serve this pur-

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[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128.

[2] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67.

[3] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23.

[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319.

[5] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

[6] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65.

pose. It stands or falls with the legal arguments that can be deduced from the reasoning of the majority . . .[1]"

3. It follows from the principles set out in the above passages that, although the Court would not lightly depart from a previous opinion, it would do so if good reasons existed. It would be impossible to define in exact terms the circumstances which would induce a Court to adopt such a course. A distinction would have to be made between an opinion on a pure point of law as against one involving factual elements as well. On questions of fact a Court's findings are necessarily governed by the evidence known to it, and, where *res judicata* is not applicable, a Court does not regard it as a derogation from its authority if in subsequent proceedings it comes to a different conclusion in the light of a fuller presentation of the facts. Pure questions of law are on a somewhat different footing, although even in that respect, it is submitted, the Court would not follow a previous opinion clearly based upon faulty reasoning. The existence of dissenting opinions might weaken the authority of an advisory opinion[2], as might inconsistent findings by Judges in subsequent proceedings, or critical comments of eminent authorities on international law.

4. The various features mentioned in the preceding paragraph as affecting the authority of an advisory opinion, are all relevant to the present case. In the course of the years since 1950 a great mass of facts, not placed before the Court in that year, have been uncovered by new research, and the correctness of the majority opinion regarding transfer of the League's supervisory functions has been debated with a thoroughness and depth out of all proportion to that involved in the proceedings leading up to that Opinion[3]. In the result there is now available a great deal of factual material, scholarly and judicial comment, and other features such as the course of the proceedings leading up

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[1] "The Authority of the Advisory Opinion of the International Court of Justice", *International and Comparative Law Quarterly*, Vol. 3 (1954), p. 21.

[2] This point was stressed by Hambro, *International and Comparative Law Quarterly*, Vol. 3 (1954), p. 21.

[3] In his separate opinion in 1966 Judge Jessup said (at pp. 350-351):

> "If it be thought that in advisory proceedings the Court does not receive as full a statement or argument as is presented in contentious proceedings, it may be noted that in 1950 the volume of *Pleadings, Oral Arguments and Documents* on the question of the *International Status of South West Africa*, contains 350 pages. In the course of the presentation, Dr. Steyn, representative of the Union of South Africa, spoke at four separate sessions of the Court."

It is interesting to note that whereas the volume of *Pleadings, Oral Arguments and Documents* (which includes Dr. Steyn's oral statement) in the 1950 proceedings relates to all the issues then before the Court, and includes purely formal matter, the volumes of *Pleadings, Oral Arguments and Documents* in the 1966 contentious proceedings on the merits (i.e., excluding the Preliminary Objections phase) contain over 700 pages of facts and arguments relating to the question of administrative supervision alone. If the treatment of this issue in 1950 were isolated from matters not directly concerned therewith, the ratio between the attention given thereto in 1963 to 1966 as against that given in 1950 must be of the order of six or seven to one (and the treatment in the present proceedings might be even longer still). The South African Government does not of course contend that a quantitative comparison of this type is of any particular significance in itself—indeed this aspect is mentioned here only because Judge Jessup seems to have attached some importance thereto. What is important is a qualitative analysis of material of which the Court was unaware, or to which it did not advert, or which was then not yet in existence. This will be essayed below.

to the 1966 Judgment and opinions, which in the submission of the South African Government do not only render necessary a re-appraisal of the correctness of the 1950 majority opinion, but would lead this Court to a different conclusion.

The facts, and the conclusions to be drawn from them, have already been considered in Chapters VII and VIII. In the present Chapter reference will be made to them only to indicate their bearing on the previous findings of the Court.

As regards scholarly writings, the present Chapter will contain a number of extracts from comments on the 1950 majority opinion. As will be noted they are uniformly critical of the finding of the Court concerning transfer of supervisory powers. Indeed, the South African Government is not aware of any academic writing which contains a reasoned support of or concurrence with the said finding otherwise than by applying a teleological principle of "filling the gap" [1]. As has been noted, such a principle has been rejected by this Court and by the overwhelming weight of contemporary legal opinion [2].

Finally, the South African Government deals in this Chapter with the judicial pronouncements since 1950. In this respect also, it will be submitted, the effect of such pronouncements has on the whole been to demonstrate the untenability of the reasoning of the majority in 1950.

B. Analysis of, and Comment on, the 1950 Advisory Opinion

5. The majority of the Members of the Court in 1950 came to the conclusion:

> "... that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it [3]".

At the next page of the Opinion followed a consequential conclusion regarding petitions, viz.:

> "... In view of the result at which the Court has arrived with respect to the exercise of the supervisory functions by the United Nations and the obligation of the Union Government to submit to such supervision, and having regard to the fact that the dispatch and examination of petitions form a part of that supervision, the Court is of the opinion that petitions are to be transmitted by that Government to the General Assembly of the United Nations, which is legally qualified to deal with them [4]."

6. The Court's reasoning in support of its above main conclusion, is set out at pages 136 to 137 of the Opinion. It commences with a recognition of

> "... the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were

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[1] *Vide*, e.g., Dahm, G., *Völkerrecht* (1958), Vol. I, p. 565.
[2] *Vide* Chap. II, *supra*.
[3] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.
[4] *Ibid.*, p. 138.

neither expressly transferred to the United Nations nor expressly assumed by that organization [1]".

Then follow what in the Court's words "Nevertheless, . . . seem to be decisive reasons" for its conclusion. These can briefly be summarized as follows:

(i) The obligation to accept "international supervision" and to submit reports is an *important part* of the Mandates System—considered by the authors of the Covenant to be *required for effective performance* of the sacred trust, and similarly regarded by the authors of the Charter relative to the international trusteeship system. The "*necessity for supervision*" cannot be admitted to have disappeared "merely because the supervisory organ has ceased to exist", when the United Nations has another international organ performing similar, though not identical, supervisory functions.

(ii) "These general considerations" are confirmed by Article 80 (1) of the Charter, which cannot "effectively safeguard" the rights of the peoples of mandated territories without international supervision or a duty to render reports to a supervisory organ.

(iii) In its resolution of 18 April 1946, concerning mandates, the Assembly of the League of Nations gave expression to a "*corresponding view*". In the Court's view "*This resolution presupposes that the supervisory functions exercised by the League would be taken over by the United Nations* [2]". (Italics added.)

(iv) The General Assembly of the United Nations is rendered competent to exercise such supervision and to receive and examine such reports by Article 10 of the Charter.

7. It seems evident that the Court could not have meant that each of the above four "reasons", or stages in the reasoning, was to be regarded as in itself affording full justification for the conclusion arrived at.

So, for instance, stage (iv) is concerned merely with the determination *within the United Nations* of an organ which would be competent to undertake the supervision: but this would have no relevance in the enquiry unless there should be an obligation to submit to United Nations supervision. Stage (iv) clearly proceeds on the basis that such an obligation has been affirmatively established by the first three stages.

8. The first stage in the reasoning is described in the Opinion itself as embodying "general considerations". As noted above, they relate to "effective performance" of the "sacred trust of civilization". At the outset the learned Judges state in effect that the authors of the Covenant considered that international supervision of mandatory administration was necessary for such effective performance; that the authors of the Charter had in mind the same necessity relative to the trusteeship system; and that such necessity continues to exist despite disappearance of the supervisory organ under the mandates system. These statements are clear, and were apparently meant to supply a basis for possible application of the principle of effectiveness, in the sense that there can be said to be a presumption or general likelihood that the interested parties would have intended to keep alive, after dissolution of the League, an obligation on the part of mandatories to submit to international supervision regarding mandatory administration. In other words, the consideration of effectiveness was invoked as a factor in reasoning towards a possible implication of tacit agreement.

[1] *Ibid.*, p. 136.
[2] *Ibid.*, p. 137.

9. The next general consideration is the existence within the United Nations of an organ performing supervisory functions—for which reason it cannot be "admitted" that the obligation to submit to supervision has disappeared merely because the League supervisory organs have ceased to exist. The suggestion seems to be that, in the light of the consideration of effectiveness already stated, the interested parties might well (or would probably) have intended that supervision of mandates should be continued by this new organ. Again this is reasoning by inference relative to tacit intent.

10. Clearly the "general considerations" were not considered conclusive. If they should be read as purporting to be full justification, by themselves, for the Court's conclusion in question, they would have to be interpreted as meaning in effect that because international supervision is desirable, therefore the Court holds that it must exist; and, that because the United Nations has an organ performing supervisory functions under a trusteeship system, which are similar to, though not identical with, the supervision previously exercised by the League organs in respect of mandates, therefore the Court holds that a mandatory previously obliged to submit to League supervision must now be obliged to submit, in respect of its mandate, to supervision of the United Nations organ (despite the fact that the mandatory is not obliged and may not be willing to submit to the trusteeship system). If this were what the Court intended to signify, it would mean that the Court in effect forsook its function of deciding in accordance with law and assumed the role of a legislator. It is submitted that such an interpretation of the Court's reasoning cannot be justified. The Court could hardly have ignored the universal principle of law and logic that a party which consents to an obligation of a certain content, cannot, merely for that reason, and without fresh consent or agreement on its part, be held liable to an obligation of a substantially different content[1].

11. Nor does it seem that the Court could have intended to apply the principle that an obligation is not extinguished by impossibility of performance when the impossibility affects only one of two or more equivalent methods of compliance therewith. That principle clearly cannot find application in the present case, for the very reason that the obligation was not one to submit to "international supervision" but to the specific supervision of particular League organs. Submission to United Nations supervision would thus be a different obligation in substance as well as in form, and not a mere equivalent method of complying with the same obligation. That there were certain inherent and unavoidable differences, appears to have been acknowledged by the majority of the Court in the 1955 Advisory Opinion, particularly in the following passage:

> "The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the

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[1] *Vide* Chap. VII, paras. 49-51, *supra*, as to the material difference in form and substance between an obligation to submit to League supervision in respect of mandates and one to submit to United Nations supervision.

introduction of a procedure, but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature [1]."

In the result it seems evident that the first stage in the reasoning should be interpreted as not having been intended to be conclusive in itself but merely as affording indications of probability which, together with other relevant factors, could justify an inference of tacit agreement rendering mandatories obliged to submit to United Nations supervision.

12. The second stage in the reasoning refers to Article 80 (1) of the Charter, and holds that the general considerations are "confirmed" by this clause "as . . . interpreted above". These last words relate to an earlier passage which distinguishes the actual content of the clause from something "presupposed" by it, namely that the rights of States and peoples regarding mandates would not lapse automatically on dissolution of the League [2]; the earlier passage proceeds that "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 [3]". (Italics added.) The reasoning regarding supervision [4] then proceeds by stating that the "purpose *must have been* to provide a real protection for those rights; but no such rights of the peoples could be *effectively safeguarded* without international supervision and a duty to render reports to a supervisory organ [5]". (Italics added.) Again, therefore, the *presupposition*, the *obvious intent* and *purpose* referred to unexpressed, i.e., tacit intent, and the *effective safeguarding* was employed as a factor of probability in reasoning towards an implication regarding such intent.

In the *South West Africa* cases [6] the Applicants at one stage seemed to rely heavily on Article 80 (1) but after the Judgment and Opinions on the Preliminary Objections (and particularly the discussion in the joint dissenting opinion of Judges Spender and Fitzmaurice on the effect of Article 80 (1)) the Applicants conceded that this Article could not have had any positive effect to enable supervision in respect of mandates to survive the dissolution of the League [7]. They, however, apparently still attributed a different (and therefore, in their view erroneous) attitude to the Court in the 1950 Opinion [7]. If they were right in their interpretation of the 1950 Opinion, the Court, it is submitted, clearly erred in this vital respect, and this in itself would diminish if not destroy any persuasive value which the Opinion might otherwise have had.

13. The third stage in the reasoning concerns the last League Assembly resolution regarding mandates [8]. After giving the contents of its third and fourth paragraphs, the Opinion states the conclusion: "This resolution *presupposes* that the supervisory functions exercised by the League would be taken

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[1] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 75.

[2] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 133-136.

[3] *Ibid.*, p. 134.

[4] *Ibid.*, p. 136.

[5] *Ibid.*, pp. 136-137.

[6] *Ethiopia and Liberia* v. *The Republic of South Africa*.

[7] *Vide* Chap. VIII, para. 51, *supra*.

[8] For its text, *vide* Chap. VIII, para. 26 *(f)*, *supra*.

over by the United Nations [1]". (Italics added.) Once more the reference is clearly to an inferred, tacit intent; the word "presupposes" renders this clear, as also the fact that the resolution itself made no mention of any transfer or taking over of supervisory functions.

14. To sum up, the Court was apparently arguing from what it considered to be probabilities inherent in objective features referred to by it in the first two stages of its reasoning, and seeking to draw from these probabilities an inference of tacit agreement between the parties to the Charter of the United Nations to the effect that mandatories would be obliged to submit to the United Nations supervision, pending trusteeship or other agreement with the United Nations. And, in the third stage of its reasoning, it sought to draw a similar inference of a corresponding tacit agreement on the part of the Members of the League of Nations at the time of its dissolution. It is contended that neither of these inferences is justified, particularly in the light of material now available which was not before the Court in 1950, or to which the Court did not then advert.

In his judgment in the case of *Rex* v. *Blom*, Judge Watermeyer, a South African Judge of Appeal and later Chief Justice of the Union, stated as follows:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
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> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct [2]."

These rules of logic are clearly of general application. In particular they are applied by courts of civilized States to the question whether a tacit agreement, or a tacit term in an express agreement, can justifiably be inferred or implied in a given case.

When regard is had to these principles and logical considerations, it is self-evident that in the absence of knowledge of certain relevant facts, a conclusion arrived at in reasoning by inference may be vitally different from what it would be if all the facts were known and considered. A number of facts which were either not before the Court in 1950 or were not considered in the majority opinion and are of particular importance in this regard, are dealt with in the next succeeding paragraphs.

15. The majority conclusion as to the *presupposition* involved in the last League resolution on mandates [3], was an integral part, if not the crux, of its reasoning in concluding that the League's supervisory functions had by tacit agreement been transferred to or assumed by the United Nations. But the introduction of the *facts concerning the original Chinese proposal* [4], which were not before the Court in 1950, puts a completely different complexion on the tacit intentions of the League Members at the last Session. It shows that what the

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[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.

[2] *Rex* v. *Blom*, 1939 A.D. 188, at pp. 202-203.

[3] *Vide* para. 13, *supra*.

[4] *Vide* Chap. VIII, paras. 60-67, *supra* and earlier paragraphs to which reference is there made.

Court considered to be a presupposition or tacit understanding, had been sought to be achieved by express resolution, but that the proposal to that end could not be proceeded with because it became plain that certain of the parties would not agree thereto [1]. Moreover, the attention of the Court was not drawn to the contents of the report of the Board of Liquidation in respect of mandates which reflected a conception that the mandates system had "been brought to a close" [2] nor to the absence of any reference to mandates in Volume I of the United Nations *Treaty Series*, in marked contrast to other matters in respect of which agreements for United Nations succession or assumption had been concluded [3]. All these features confirm the absence of any tacit agreement or presupposition concerning a transfer of supervisory functions from the League to the United Nations.

16. The combined effect of the above-mentioned features not only destroys all possibility of finding in favour of such a presupposition: it also throws such light on other aspects of the final League proceedings [4] as to render clear a contrary understanding on the part of the League Members, viz., that there would be no reporting, accounting or supervision pending "agreement" upon "other arrangements" as between each mandatory and the United Nations. In turn, this contrary understanding in itself effectively rebuts the presumptions or probabilities regarding effectiveness, as relied on in the majority's reasoning concerning the "general considerations" and the "purpose" of Article 80 (1) of the Charter [5]. For the majority of the League Members, including all mandatories except Japan, had been involved in the establishment of the United Nations and the agreement upon its Charter. Consequently their understanding at that time could hardly have been the opposite from what it was shortly afterwards at the dissolution of the League.

17. The last-mentioned factor, bearing on the tacit intent of the founders of the United Nations, is enhanced by the second set of facts not fully presented to the Court in 1950 and apparently not considered by it at all, i.e., the powers and functions sought to be granted in respect of mandates to the Temporary Trusteeship Committee and the Trusteeship Council itself. The two United States proposals designed to empower the Temporary Trusteeship Committee and, after its establishment, the Trusteeship Council, "to receive and examine reports submitted by mandatory powers with respect to such territories under mandate as have not been placed under the trusteeship system" were abandoned

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[1] It is instructive to note the close similarity between the wording of the presupposition or tacit understanding found by the Court, and the express terms of the first Chinese draft proposal. The 1950 majority opinion stated that the resolution presupposed that:

> "... *the supervisory functions exercised by the League would be taken over by the United Nations*". (Italics added.) (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.)

The Chinese draft proposal had considered:

> "... *that the League's function of supervising mandated territories should be transferred to the United Nations* ..." (Italics added.) (*Vide* Chap. VIII, para. 26 *(c)*, *supra*.)

[2] *Vide* Chap. VIII, para. 69, *supra* and earlier paragraphs to which reference is there made.

[3] *Vide* Chap. VIII, para. 70, *supra* and earlier paragraphs to which reference is there made.

[4] As dealt with in Chap. VIII, sec. C, *supra*.

[5] *Vide* para. 12, *supra*.

by their proposers, clearly because they did not prove acceptable to the other Members of the United Nations [1]. The Court did not even advert to the fact that there was an express proposal that the suggested Temporary Trusteeship Committee was to be empowered to "advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the mandates system [2]"—which proposal lapsed upon the rejection of the suggestion of a Temporary Trusteeship Committee, without the substitution of anything regarding possible transfer to, or assumption by, the United Nations of any "functions under the mandates system".

18. Finally, concerning the tacit intent of the founders of the United Nations as well as of League Members at its dissolution, regard must be had to a third set of facts not before the Court in 1950, i.e., the practice of States during the years 1946 to 1949 and reflected, *inter alia*, in written and oral statements made on behalf of a large number of States in a variety of circumstances and situations and within a relatively short time after the establishment of the United Nations and the dissolution of the League of Nations, when the events were still reasonably fresh in memory. These statements show unmistakably a general understanding amongst Members of the United Nations that no supervisory functions regarding mandates (not converted into trusteeships) had been taken over, and thus refute any suggestion of a general tacit intention to the contrary.

Had all the above facts been known to the Court in 1950, and the significance of their combined effect appreciated, it seems inconceivable that the Court could have arrived at its conclusion regarding an obligation on South Africa's part to submit to United Nations supervision.

C. Dissent from the 1950 Advisory Opinion concerning Supervision

1. Minority Opinions

19. Even on the basis of the facts before the Court in 1950, two of its Members, Sir Arnold McNair and Judge Read, were not prepared to subscribe to the finding that South Africa was obliged to submit to a supervisory power on the part of the United Nations, and they gave full reasons for their dissent [3]. As far as the South African Government is aware, these reasons and the conclusions drawn from them have invited no adverse criticism from writers on international law. On the contrary, they find considerable support in the critical comments of such writers—as will appear from paragraphs 20 to 27 below. Furthermore, the additional material now brought into consideration [4] confirms the correctness of the result arrived at in these minority opinions.

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[1] *Vide* Chap. VIII, para. 55, *supra*, and earlier paragraphs to which reference is there made.

[2] Doc. PC/EX/113/Rev. 1, p. 56. *Vide* Chap. VIII, para. 55, *supra*, and earlier paragraphs to which reference is there made.

[3] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 159-162, 166-173.

[4] *Vide* paras. 15 to 18, *supra*, and earlier paragraphs to which reference is there made.

II. Opinions of Writers

20. Even before the 1950 Advisory Opinion, Hall, in dealing with the effect of the dissolution of the League upon Mandates, stated, *inter alia*:

> ". . . the supervisory functions of the League had come to an end before the supervisory functions of the United Nations could begin to operate, especially since the plan for a temporary trusteeship committee had been rejected in the Preparatory Commission of the United Nations [1]".

In referring to the original draft resolution raised by the Chinese delegate at the last session of the League Assembly, which was not proceeded with, he quoted the Chinese delegate as saying that the Charter "made no provision for assumption by the United Nations of the League's functions" under the mandates *system* [2].

And he commented finally in regard to the League Assembly resolution of 18 April 1946:

> "The significance of this resolution of the League Assembly becomes clearer when it is realized that for many months the most elaborate discussions had been taking place between the governments as to the exact procedure to be adopted in making the transition between the League and the United Nations. It was the function of the Preparatory Commission and the committees succeeding it to make recommendations on the transfer of functions, activities, and assets of the League. All the assets of the League had been carefully tabulated. All its rights and obligations that could be bequeathed to the United Nations and which the latter desired to take over were provided for in the agreements that were made. But in the case of mandates, the League died without a testament [3]."

21. In January 1951, very shortly after the 1950 Advisory Opinion, Manley O. Hudson wrote as follows:

> "To support its additional conclusion that the Union of South Africa is obliged to submit to the supervision of, and to render annual reports to, the United Nations, the Court relied upon a resolution adopted by the final Assembly of the League of Nations on April 18, 1946, which was said to presuppose that the 'supervisory functions exercised by the League would be taken over by the United Nations'. This is hardly borne out by the text of the resolution, however. Nor is the succession of the General Assembly a necessary consequence of its competence under Article 10 of the Charter to which the Court refers [4]".

And,

> "The Court seems to have placed emphasis on the competence of the General Assembly to exercise supervision and to receive and examine reports. Such competence can hardly be doubted. Yet is does not follow from the conclusion that the General Assembly 'is legally qualified to exercise the supervisory functions previously exercised by the League of

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[1] Hall, *op. cit.*, p. 272.
[2] *Ibid.*, pp. 272-273.
[3] *Ibid.*, p. 273.
[4] Hudson, M. O., "The Twenty-ninth Year of the World Court", *A.J.I.L.*, Vol. 45 (January 1951), pp. 1-36; at p. 13.

Nations', that the Union of South Africa is under an obligation to submit to supervision and control by the General Assembly, or that it is obligated to render annual reports to the General Assembly [1]."

Regarding the applicability and effect of Article 80 (1) of the Charter he remarked:

"Article 80 (1) of the Charter seems to be the principal basis of the Court's conclusion that the Union of South Africa must report to the General Assembly. This article provided that, until the conclusion of Trusteeship Agreements, nothing in Chapter XII of the Charter should 'be construed *in or of itself to alter in any manner the rights whatsoever of any states or any peoples* or the terms of existing international instruments' (italics supplied). The text clearly shows an intention that Chapter XII should not effect any alteration of rights or terms. This intention was 'entirely negative in character'. The provision served an obvious purpose when Chapter XII of the Charter was drawn up: the Mandate was still in force at that time; as the League of Nations had not then been dissolved, any alteration of the existing situation was a matter for its consideration. Article 80 (1) was a precautionary provision designed to negative the accomplishment of any change in the existing situation by reason of Chapter XII 'in or of itself'. It is not surprising that Judge McNair found it 'difficult to see the relevance of this article'.

Yet the Court gave an affirmative effect to Article 80 (1), turning it into a positive 'safeguard' for maintaining the rights of states and the rights of the peoples of the mandated territory. This is the more notable because at a later stage the Court stressed the 'entirely negative' character of Article 80 (2), declining to say that the latter imposed a positive obligation on the mandatory even to negotiate with a view to the conclusion of a Trusteeship Agreement.

No attention was paid by the Court to the fact that certain States, which as Members of the former League of Nations may have 'rights' under Article 22 of the Covenant and under the Mandate itself, had no responsibility for the Charter and have never become Members of the United Nations. For example, Finland, Ireland and Portugal, which were represented at the final session of the Assembly of the League of Nations in 1946, are in this category. If their rights are 'maintained' by Article 80 (1) of the Charter, they have no voice in the supervision to be exercised by the General Assembly [2]."

22. In August 1951, followed an article by Joseph Nisot [3]. The learned author stated, *inter alia*:

"Now, what, in actuality, were the rights derived by peoples from the Mandate and from Article 22 of the Covenant? They were not rights to the benefit of abstract supervision and control. They consisted of the right to have the administration supervised and controlled by the *Council of the League of Nations*, and, in particular, the right to ensure that annual reports were rendered by the mandatory Power to the *Council of the*

[1] Hudson, *op. cit.*, p. 14.

[2] *Ibid.*, pp. 14-15.

[3] Nisot, J., "The Advisory Opinion of the International Court of Justice on the International Status of South West Africa", *S.A.L.J.*, Vol. 68, Part 3 (August 1951), pp. 274-285.

League of Nations, as it was, and the right to send petitions to the *Secretariat of the League of Nations*. What has become of these rights? They have necessarily disappeared as a result of the disappearance of the organs of the League (Council, Permanent Mandates Commission, Secretariat).

The Court could not correctly conclude that such rights had been maintained by Article 80, except by contending at the same time that for the purposes of the Mandate for South West Africa, the said organs had survived the dissolution of the League. . . . Being unable, and for good reasons, so to contend, the Court creates *new* rights. To the Court, the rights of peoples 'maintained' by Article 80 is linked to the *United Nations Organisation* . . .

According to its thesis, it is because Article 80 'maintains' the rights of peoples that these, though linked to the League, must now be deemed linked to the United Nations! To infer this from a text worded as is Article 80 amounts to assuming that, with respect to the mandates system, the United Nations stands as the legal successor of the League, an assumption inconsistent with the discussions of San Francisco and with the very fact that the Charter provides for the conclusion of trusteeship agreements [1]."

Regarding the resolution of 18 April 1946, of the League Assembly, he continued:

". . . one fails to see how this statement can provide any support for a suggestion that it was the Assembly's opinion that a mandatory Power, though not bound by a trusteeship agreement, was under an obligation to submit to supervision and control by the United Nations.

This was no more the opinion of the Assembly of the League of Nations than that of the General Assembly of the United Nations, which, by its resolution of 9th February, 1946, urged the conclusion of trusteeship agreements, implying that no implementation of the principles of the trusteeship system—therefore, no supervision or control—was possible in the absence of such agreements [2]".

In the final portion of this part of the article, Nisot referred to the failure of the authors of the Charter—

". . . to provide for international supervision with respect to the obligations incumbent on a mandatory State, should it elect not to conclude such an agreement" (i.e., Trusteeship Agreement).

He concluded:

"This lack of foresight has resulted in the present situation, which the Court attempts itself to redress, stepping out of its role as interpreter of the law to assume that of legislator [3]."

23. Georg Schwarzenberger commented, *inter alia*, as follows:

". . . the World Court was faced with the issue of whether the United Nations had become responsible for the discharge of the supervisory function which the League had formerly exercised in relation to the only still surviving mandate. In support of a positive answer, the Court could neither rely on any general principle of succession between international

[1] *Ibid.*, p. 279.
[2] *Ibid.*, p. 280.
[3] *Ibid.*, p. 281.

persons nor any relevant transaction between the two collective systems.... The still missing link with the United Nations was provided by the Court's interpretation of Article 80 of the Charter of the United Nations. It was admitted in the majority Opinion that 'this provision only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments'. Still, with the assistance of a somewhat debatable presupposition and 'obvious' intentions, the last gap was bridged. It is not surprising that Judge McNair should have found it 'difficult to see the relevance of this Article'.

Having filled the legal void which separated the supervisory functions of the League of Nations from those of the United Nations, the Court proceeded with its self-imposed task of 'judicial legislation'[1]".

24. Professor R. Y. Jennings in a paper on "The International Court's Advisory Opinion on the Voting Procedure on Questions concerning South West Africa[2]" said, with reference to the 1955 separate opinion of Judge Lauterpacht:

"This attempt by Judge Lauterpacht to explore the legal no-man's-land between the Covenant and Charter takes us, I think, to the nub of the difficulty in this case: the virtual impossibility of finding any safe legal bridge between the League Council and the General Assembly of the United Nations in respect of the supervisory functions. This is evidently felt by Judge Lauterpacht when he says that 'there may be an element of artificiality' in some of the voting procedures suggested 'inasmuch as they must of necessity leave out of account the differences in the composition of the General Assembly and the Council of the League' [*Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67].

It will be remembered that in the 1950 Opinion there were powerful dissents from Judges McNair and Read on this very point. Judge McNair said:

'I cannot find any legal ground on which the Court would be justified in replacing the Council of the League by the United Nations for the purposes of exercising the administrative supervision of the Mandate and the receipt and examination of reports. It would amount to imposing a new obligation upon the Union Government and would be a piece of judicial legislation. In saying this, I do not overlook the competence of the General Assembly of the United Nations, under Article 10 of the Charter, to discuss the Mandate for South-West Africa and to make recommendations concerning it, but that competence depends not upon any theory of implied succession but upon the provisions of the Charter' [*International Status of South West Africa, Advisory Opinion, I.C.J. Reports, 1950*, pp. 161-162].

The attempts of the 1955 Judges to discover that 'legal ground' and then to compare in terms of degree, supervision by two bodies utterly dissimilar in kind, seems to be only to demonstrate the soundness and the wisdom of the 1950 dissents[3]."

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[1] Schwarzenberger, G., *International Law* (3rd ed.), Vol. I, pp. 101-102.
[2] Published in the *Transactions of the Grotius Society*, Vol. 42 (1956), pp. 85-97.
[3] *Ibid.*, pp. 96-97.

25. Writing on "Succession in International Organizations[1]", Hungdah Chiu analysed the Court's majority opinion in 1950 and stated:

> "It would appear . . . that the Court's findings would support the theory that the transfer of functions between international organisations need not be expressed; but, under some conditions, can be implied. For the convenience of presentation, this theory will be hereinafter referred to as the 'implied transfer theory'[2]."

In discussing the merits of the "implied transfer theory" he said the following:

> "The theory of implied transfer is open to several criticisms. First, it lacks support in the practice of international organisation succession. Except in the case of *International Status of South-West Africa*, there has been no other instance of the functions of a predecessor organisation being impliedly transferred to the successor organisation. Secondly, the predecessor organisation and the successor organisation are the product of multilateral treaties, the parties to which are not identical, so that they are legally two separate and distinct entities. It is true that legal continuity between the two entities can be achieved, but it must be based on an express agreement. In fact, one of the fundamental policy reasons for creating a new international organisation to replace the one already established and serving similar or identical purposes is to achieve a fresh start with a new organisation, having no legal connection with the one currently functioning. Under such circumstances, the functions can be transferred only by express agreement between the two organisations. In case of doubt, it must be presumed that no transfer is intended for the same policy reason stated above. Thirdly, it is highly doubtful that this theory would work in practice. Soon after the case of *International Status of South West Africa* in 1950, the UN General Assembly faced the question as to how such impliedly transferred function was to be exercised; and in 1955, it had to request another opinion from the ICJ. Again in 1956, the General Assembly had to ask the Court for an opinion on the scope of the function impliedly transferred. Thus, in a single case where this theory has been applied, its application incurred a series of resorts to international judicial procedures. Consequently, in addition to its theoretical shortcomings, it would appear that this theory is not convenient in practice[3]".

26. David A. Rice, in commenting on the 1962 Judgment on the Preliminary Objections in the *South West Africa* cases[4], considered, *inter alia*, the validity of the "succession theory" which "postulates that the United Nations is the successor to the mandate powers of the League of Nations[5]"; in other words, the theory which "was accepted by the Court in the 1950 Advisory Opinion on the Status of South-West Africa[6]".

In this regard he wrote as follows:

> "The deliberations of the League Assembly, the United Nations Con-

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[1] *International and Comparative Law Quarterly*, Vol. 14 (1965), pp. 83-120.
[2] *Ibid.*, pp. 105-106.
[3] *Ibid.*, pp. 108-109.
[4] "Parties in Interest", *Columbia Journal of Transnational Law*, Vol. 4, No. 47 (1965), pp. 71-85.
[5] *Ibid.*, pp. 80-81.
[6] *Ibid.*, footnote 58, p. 80.

ference on International Organization, and the United Nations General Assembly lend no credence to the succession theory. The resolution of the League Assembly, passed in its final session in 1946, called attention to the expressions of intent by the mandatories to administer the mandated territories in accordance with the mandates, and to the trusteeship provisions of the United Nations Charter. It is quite clear, however, that the resolution concerning the mandates contained no provision which expressly delegated supervisory powers to the United Nations.

The Spender-Fitzmaurice dissent quotes from a mysterious 'Chinese draft' resolution concerning the post-League status of the Mandates System. This 'Chinese draft' resolution does not appear in the Official Journal of the League. However, it seems significant that the Chinese delegate expressed his appreciation in the First Committee, following the passage of the recorded resolution which is compared with the 'Chinese draft' by the joint-dissenters, for the acceptance of the Chinese resolution concerning the future of the Mandates System. The joint-dissenters conclude from their comparison that the League Assembly considered an express delegation of the supervisory powers to the United Nations as provided in the 'Chinese draft' and rejected this course of action. Such a legislative history, could it be shown, would make it quite clear that succession was not intended. However, it is submitted that other evidence makes it equally clear.

The action taken by the United Nations confirms the conclusion that succession *per se* was not contemplated by the League Assembly. The General Assembly passed a resolution on February 9, 1946, which took note of the expressed intentions of the Mandatories, including the Union of South Africa, and called upon them to submit proposed trusteeship agreements 'not later than during the second part of the first session of the General Assembly'. The implication of this resolution confirms the expressions in Articles 77 and 79, both noting that mandated territories fall within the scope of the trusteeship provisions and that the methods of dealing with each case are a matter of subsequent agreement among the parties concerned[1]."

And his ultimate conclusion was that—

"... a decision resting on the theory of succession is precluded by the hesitancy and refusal of the League and the United Nations to provide for the United Nations' assumption of the League's role in the Mandates System[2]".

27. Judge Sir Gerald Fitzmaurice, in a paper entitled "Judicial Innovation —Its Uses and its Perils[3]" discussed, *inter alia*, the 1950 majority opinion, which, he considered, afforded—

"... an instance of a matter in which although, in the present writer's view, the Court reached a mistaken conclusion on a certain question as such, it nevertheless had an opportunity—but failed to take it—of making an innovatory clarification of the law relating to international organisations in a manner that would have pointed to some interesting and impor-

[1] "Parties in Interest", *Columbia Journal of Transnational Law*, Vol. 4, No. 47 (1965), pp. 81-82.

[2] *Ibid.*, p. 85.

[3] *Cambridge Essays in International Law* (1965), pp. 24-47.

tant developments. Instead, the Court gave a decision which, in the opinion of Lord McNair, amounted to 'a piece of judicial legislation'[1]."

After discussing the nature of the problem with which the Court was faced, and stating the manner in which the two dissenting judges had dealt with it, the learned author continued as follows:

"What, in the light of all this, was the actual basis of the Court's finding that the mandatory was accountable to the United Nations? It was in effect this: that since the exercise of supervision, and the performance of the reporting obligation were essential elements of the system—so that the obligation remained intact despite the disappearance of the original supervisory organ—and since there existed another entity, the United Nations, willing to exercise supervisory functions and not disqualified from doing so under its own Charter, *therefore* the mandatory was under a legal obligation to furnish reports to the appropriate organ of the United Nations.

This was of course, logically, a *non-sequitur* and amounted, as Lord McNair said, 'to imposing a new obligation' on the mandatory; for on this particular basis the latter would have been under an obligation to report to *any* entity which happened to be willing to act and was not debarred by its constitution from so doing. The essential logical link between an obligation, in the abstract, to report, and an obligation to do so to a particular entity, was missing from the argument; and the gap was not bridged by the willingness or capacity of that entity to act, or even by the fact (a good deal stressed by the Court) that in the analogous field of United Nations trusteeship, this entity was exercising on its own account functions of a broadly similar kind. Especially might this be said to be the case seeing that all the evidence went to show that the failure to make any express provision for the possibility that some mandated territories might not (as the hope and expectation was) be transferred to the trusteeship system, was no oversight but deliberate, probably precisely because of that hope and expectation; but obviously the mere non-realisation of the hope and expectation could not then itself be regarded as a legal ground on which the United Nations could proceed to exercise the deliberately non-assumed functions.

In support of its finding, the Court confined itself to relying on arguments which Lord McNair and Judge Read demolished with telling ease, namely a clearly incorrect or question-begging interpretation of Articles 10 and 80 of the Charter, and a very dubious interpretation of the final League of Nations resolution of April 18, 1946, in which the League recognised that its functions with respect to mandated territories were at an end. Merely to go on, as this resolution did, to 'note' that certain articles of the United Nations Charter 'embodied principles corresponding to' those of the mandates system, and that the various mandatories had declared their intention of continuing to administer the territories 'for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates', and 'until other arrangements have been agreed between the United Nations and the respective Mandatory Powers', was neither actually to make any such arrangements, nor to transfer the League's own functions to the United

[1] *Ibid.*, p. 35.

Nations. Indeed the language used virtually negatived any such transfer. As Lord McNair said, this resolution could not be construed 'as having created a legal obligation' for the mandatory 'to make annual reports to the United Nations' or 'to transfer to that Organisation the pre-war supervision of its Mandate by the League'. 'At the most', Lord McNair continued, the resolution 'could impose an obligation to perform those obligations of the Mandate . . . which did not involve the activity of the League'.[1]"

D. Advisory Opinions of 1955 and 1956

28. On 7 June 1955, and 1 June 1956, this Court gave Advisory Opinions interpreting the 1950 Opinion. The 1955 Opinion concerned voting procedures on questions relating to reports and petitions regarding the Territory of South West Africa[2]. The 1956 Opinion related to the admissibility of hearings of petitioners by the Committee on South West Africa[3].

In both cases this Court was asked only for an interpretation of the 1950 Opinion, and consequently its correctness was not considered.

The later Opinions are nevertheless significant in so far as they cast light on the majority opinion of 1950. The first feature of the 1950 Opinion which they emphasize is the difficulty in ascertaining the legal basis upon which it was decided[4]. The lack of clarity in the 1950 Opinion is shown not only by the fact that it required elucidation in two further Opinions (which is significant in itself) but also by the divisions among, and reasoning of, the Members of the Court in the subsequent Opinions. The 1955 Opinion proceeded upon a purely textual interpretation of the words of the 1950 majority opinion, and is accordingly of interest mainly for the fact that an interpretative Opinion was required, rather than for its contents[5]. In the 1956 Opinion, on the other hand, the Members of the Court also adverted to the legal basis of the 1950 majority opinion, with instructive results. The 1956 majority opinion (which was endorsed by eight Members of the Court against a minority of five) interpreted the 1950 Opinion as having been based on a transfer of supervisory powers from the League Council to the United Nations General Assembly, apparently by agreement amongst the interested parties. Thus it stated that the Court had held "that the obligations of the mandatory were those which obtained under the mandates system[6]" and it referred to the finding (in 1950) "regarding the *substitution* of the General Assembly of the United Nations for the Council of the League of Nations in the exercise of supervision[6]" (italics added). At various subsequent stages of its Opinion, the majority again referred to

"... the paramount purpose underlying the *taking over* by the General

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[1] *Cambridge Essays in International Law* (1965), pp. 37-39. Footnotes deleted.

[2] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67.

[3] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23.

[4] *Vide* the comments by Professor Jennings (para. 24, *supra*) and Hungdah Chiu (para. 25, *supra*).

[5] As regards the separate opinion of Judge Lauterpacht, however, see the comments of Professor Jennings in para. 24, *supra*.

[6] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 27.

> Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations [1]" (italics added),

and to the

> ". . . Court having determined that the General Assembly had *replaced* the Council of the League as the supervisory organ [2]" (italics added).

The interpretation of the 1950 Opinion by the majority in 1956 therefore apparently accords with that set out above by the South African Government, viz., that the Court in 1950 found that a replacement of supervisory organs had been effected by tacit agreement. Such a finding is essentially one of fact.

29. The minority in 1956 however, interpreted the 1950 Opinion in a different way. In the joint dissenting opinion of Vice-President Badawi and Judges Basdevant, Hsu Mo, Armand-Ugon and Moreno Quintana, the following attitude was expressed:

> "Resolution 24 (I) adopted by the General Assembly on February 12th, 1946, had made provision with regard to the method to be adopted for the examination of any request 'that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character'. *Here appeared the idea of a possible transfer of powers entrusted to the League of Nations. But the course indicated by that resolution was not followed. The Union of South Africa has not submitted to the General Assembly any request that the latter should assume the 'powers entrusted' to the Council of the League of Nations.* The Opinion of 1950 did not therefore place itself on the same ground as resolution 24 (I). On the contrary, it stated in its reasoning that 'the supervisory functions of the League with regard to mandated territories not placed under the new trusteeship system were neither expressly transferred to the United Nations nor expressly assumed by that organization'. The Opinion does not base itself on the idea of succession, on the idea of the transfer of powers.
>
> *The Court, unattracted by the idea of succession, of the transfer of powers, based itself on the objective elements of the situation—the importance of international supervision under the mandates system as well as the provisions of the Charter of the United Nations.* It was in these elements that the Court, in its Opinion of 1950, found 'decisive reasons' for the view that 'the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations'[3]." (Italics added.)

A similar view was expressed by Judge Winiarski [4].

It is apparent from the above-quoted passage that the minority did not consider that the 1950 Opinion was based upon the consent of the interested parties, and in particular, of South Africa as mandatory, to a transfer of powers

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[1] *Ibid.*, p. 28. The expression "*taking over*" appears again at p. 29.

[2] *Ibid.*, p. 29. Later there appear further references to the "General Assembly *replacing* . . . the Council of the League" (p. 29) and to "the fact that the Assembly had *replaced* the Council" (p. 30).

[3] *Ibid.*, pp. 65-66.

[4] *Ibid.*, p. 33.

to the General Assembly. It is, however, not clear how "the objective elements of the situation" could have effected a continuation of supervision without the consent of those concerned, save upon an extreme teleological approach which would warrant Judge McNair's description of "judicial legislation" [1].

30. Of the Judges who participated in the 1950 proceedings, seven were still on the bench in 1956 (Judges Hackworth, Badawi, Basdevant, Winiarski, Klaestad, Read and Hsu Mo). Of these seven, three, i.e., Judges Hackworth, Klaestad and Read, shared the majority view that the 1950 Opinion was based on a transfer of functions from the Council of the League to the General Assembly. On the other hand, the remaining four, i.e., Judges Badawi, Basdevant, Winiarski and Hsu Mo, were of opinion that the true basis of decision was to be found in the "objective elements of the situation". Such a sharp division amongst these Judges on the basic aspects of the 1950 majority opinion must by itself cast doubt on the authority thereof. The matter is placed beyond doubt however, when regard is had to the merits of the respective views of the two sides—the transfer of functions by agreement, which is the basis supported by the majority, is refuted by the overwhelming mass of evidence now available [2]; whereas the "objective elements of the situation" favoured by the minority could be relevant only on a theory of interpretation decisively rejected in present-day international law [3].

E. The 1962 Judgment and Opinions

I. General

31. Although the question whether the South African obligation to report and account to the Council of the League embodied in Article 6 of the Mandate survived the League's dissolution, was not *per se* an issue to be determined for the purpose of the Preliminary Objections in the *South West Africa* cases, it was extensively argued at that stage by both parties. This was done primarily because of the nature of the main argument advanced by Applicants on the issue whether there were still in existence any States competent to invoke the compromissory clause. That argument was to the effect that on dissolution of the League a succession was effected of the functions and rights of the League and its Members in favour of the United Nations and its Members, and that the right to invoke the compromissory clause was thus kept alive in favour of Members of the United Nations.

However, although eight Members of the Court held that the right of Members of the League to invoke the compromissory clause was not terminated by the dissolution of the League, it is significant that not one of them was prepared to accept Applicants' argument relating to a succession by the United Nations and its Members.

The reasoning of the Judgment and various opinions will be discussed below. As will appear from this discussion, a number of Members of the Court found it unnecessary to deal with the issue relating to Article 6 of the Mandate. However, four Members of the Court (Judges Bustamante, Spender, Fitzmaurice and van Wyk) expressed a clear view that Article 6 had lapsed on dissolution of the League. The other eleven Judges did not deal expressly with

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[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 162.

[2] *Vide* paras. 15 to 18, *supra*.

[3] *Vide* Chap. II, *supra*.

this point; but the findings or reasoning of seven of them are to a greater or lesser extent inconsistent with any survival of the Mandatory's obligations to report and account. They are Judges Alfaro, Badawi, Moreno Quintana, Wellington Koo, Koretsky, Jessup and Mbanefo. In respect of the remaining four Judges (i.e., President Winiarski and Judges Basdevant, Spiropoulos and Morelli) no indications are in this regard afforded by their opinions.

For convenience, the Judgment and opinions will be dealt with in more or less the order indicated above.

II. Separate Opinion of Judge Bustamante

32. Although Judge Bustamante held that the compromissory clause had survived the dissolution of the League, he made it quite clear that he did not thereby intend to convey that in his view any succession to the United Nations had taken place. In fact he explicitly stated:

> "The above findings do not in any way imply an intention to establish or to regard as established the principle of automatic or *ex officio* succession of the United Nations to the League of Nations. It has been sufficiently clearly shown, in the course of the written and oral proceedings in this case, that the theory of automatic succession is inconsistent with the historical background of the discussions and resolutions of the two great bodies during the transitional period in 1945-1946 [1]."

Dealing specifically with the Mandatory's obligations to report and account, he stated that "the tutelary organization's right of supervision over the exercise of the Mandate is an institutional rule in the mandates system", which is not just an adjectival or procedural formality, but an "essential element" [2]. The survival of this essential element was in his view provided for in the Charter, which imposed on the Mandatory the obligation to put into force a trusteeship agreement [3].

One of the grounds on which he based this conclusion was the very fact that in the absence of a trusteeship agreement there would be no international supervision in respect of mandates. This appears very clearly from the following passage:

> "In my opinion, this wording of paragraph 2, [i.e., Article 80 (2)] which is connected with that of Articles 77 (para. 1 *(a)*) and 81, clearly defines the obligation—the urgent obligation it might be said - of Mandatory States without delay to put into force a new Mandate agreement. *This interpretation is fully warranted by a logical reasoning since the intention of the authors of the Charter cannot have been to leave the mandated territories indefinitely to the unfettered discretion of the mandatory alone.* To have done so would have been to distort the character of this legal system as well as the intentions of its founders. It would have amounted to what has been called the 'freezing' of the Mandate, which would practically be equivalent to annexation [3]." (Italics added.)

It is not proposed to deal with Judge Bustamante's conclusion regarding an obligation to conclude a trusteeship agreement. This conclusion is contrary to

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 364.
[2] *Ibid.*, p. 358.
[3] *Ibid.*, p. 365.

the finding of the Court in the 1950 Advisory Opinion, which it is respectfully submitted, was a correct one. It is however important to note that Judge Bustamante's reasoning is based, *inter alia*, on the absence of supervision if no trusteeship agreement is concluded.

III. Dissenting Opinion of Judges Spender and Fitzmaurice

33. In their joint dissenting opinion, Sir Percy Spender and Sir Gerald Fitzmaurice clearly revealed that in their view the 1950 Opinion was wrong in finding that the League's supervisory functions in respect of mandates were, on the dissolution of the League, transferred to the United Nations. This first appears very explicitly from two footnotes. In the first of these they stated:

> ". . . we think that the view expressed by the Court in its 1950 Opinion, to the effect that the supervisory functions of the former League Council passed to the Assembly of the United Nations which was entitled to exercise them, was definitely wrong [1]".

The second footnote, referring to the original Chinese draft resolution raised at the final session of the League of Nations and later not proceeded with [2], reads as follows:

> "The contrast between the original Chinese draft and the one eventually adopted constitutes an additional reason why we find it impossible to accept the view taken by the Court in 1950, that the functions of the League Council in respect of Mandates had passed to the United Nations; for this was the very thing which the original Chinese draft proposed but which was not adopted [3]."

This view was again expressed in the following words after a thorough survey of events concerning the foundation of, and early proceedings in, the United Nations and the dissolution of the League:

> "They [i.e., both the United Nations and the League Assemblies] refrained equally from any attempt to adapt the Mandates to the situation arising from the termination of the League and of League membership.
>
> They not only 'refrained', but at least twice (proposal of the Executive Committee of the Preparatory Commission of the United Nations . . . and original Chinese resolution at Geneva) they *rejected* proposals for a transfer of League functions respecting Mandates to the United Nations. Acceptance of either of these proposals would naturally not, of itself, have got over the difficulty about cessation of League membership. It would probably have brought that question into the open, but this is not the point. Our concern here is simply to show that the two Assemblies were (except for Article 73 of the Charter) unwilling to provide in *any* specific way for the consequences of the termination of the League and its membership, or for a possible eventual failure to bring a mandated territory into trusteeship. In this lies the key to the whole matter.
>
> It is the key to the whole matter because it is strikingly evident that the two Assemblies (and the Applicant States were Members of both) relied,

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[1] *Ibid.*, p. 532, footnote 2.

[2] *Vide* para. 15, *supra*, and Chapter VIII, paras. 60-67, *supra*.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 535, footnote 1.

and *preferred to rely*, on the hope or expectation that the mandated territories would eventually be brought into trusteeship. Whether this was a reasonable assumption in the case of South West Africa, considering the declarations that were made on behalf of the Union Government, is another matter. The fact remains that it *was* relied upon, in the full knowledge of facts from which it was manifest that the expectation might not be realized, and of the fact that the Mandatory was under no legal obligation in the matter.

It seems to us fairly clear as a matter of reasonable inference, that an important part of the reason for this attitude was the desire to avoid even the suggestion that any mandated territory might not be brought into trusteeship; or, by providing for the situation that might arise if that was not done (and if the League had in the meantime been dissolved) to appear to be countenancing such a situation by providing for it, or to be giving grounds on the basis of which any Mandatory could contend that, express provision having been made for continuing the Mandates *as* Mandates, no further action was required.

In short, given the view that they took of the whole matter, those concerned thought it unnecessary to provide for this situation and better policy not to. This course having been chosen, and the possible consequences it entailed accepted, there is no legal principle which would enable a court of law to put the clock back and, by judicial action, make provision for a case which those concerned elected not to deal with, for reasons which appeared to them good and sufficient at the time [1]."

34. Apart from the value of this finding as support for the submissions set out herein, the manner in which it was reached is also of significance. In the passage quoted above, after a thorough and comprehensive review of the facts, Judges Spender and Fitzmaurice again emphasized two facts previously considered by them.

These facts were:

(a) the content of the proposal of the Executive Committee of the Preparatory Commission of the United Nations, which proposal was rejected; and

(b) the inability of the Chinese representative to secure acceptance of his original draft resolution.

These two facts were thus singled out for special emphasis in reaching a conclusion which was at variance with that reached by the Court in 1950. It is significant therefore that these are both facts which were not before the Court in 1950 or to which it did not advert [2]. Their importance further appears from the treatment given to them in other parts of the Opinion. Thus the history of the proposal of the Executive Committee of the Preparatory Commission was dealt with at page 536. The Chinese draft resolution was dealt with at page 535, where the second footnote quoted above appears. Thereafter it was again considered at page 538 in the following terms:

> "The contrast between the original draft Chinese resolution, presented by the representative of China but not proceeded with, and the eventual resolution of the League Assembly is so glaring and revealing, that we set out both resolutions verbatim in a footnote."

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[1] *Ibid.*, pp. 539-540.

[2] *Vide* paras. 15 to 17, *supra*.

IV. Dissenting Opinion of Judge van Wyk

35. After a full and systematic treatment of the question whether Article 6 survived the dissolution of the League, Judge van Wyk reached the following conclusion:

> "The above considerations compel me to conclude that those provisions of the Mandates which depended for their fulfilment on the existence of the League of Nations were not impliedly amended in any respect, and accordingly ceased to apply on the demise of the League [1]."

He thereafter proceeded to deal with the 1950 Advisory Opinion and discussed fully the respects in which he disagreed with the findings of the majority regarding the succession of the United Nations to the supervisory functions of the League [2].

V. The Judgment of the Court

36. The Judgment of the Court did not deal expressly with the question whether the League's supervisory functions regarding mandates passed to the United Nations on the dissolution of the League. A detailed analysis of its reasoning also does not provide any clear conclusion as to the probable view of its authors in this regard. A consideration of the Court's findings and reasoning in regard to the survival of the compromissory clause (Article 7 (2) of the Mandate) indeed appears to provide strong support for a conclusion that the Court must have considered that Article 6 had lapsed on dissolution of the League; but doubt is again cast thereon by the actual treatment of Article 6. These two aspects will be dealt with in turn below.

37. *The Court's findings regarding the survival of Article 7 (2).*

As has been pointed out above [3], Applicants relied in their Observations on the Preliminary Objections on a so-called "doctrine of succession". This suggested "doctrine" entailed that all rights and functions in respect of mandates would have passed from the League and its Members to the United Nations and its Members, which would have meant, *inter alia*, that the supervisory functions of the League would have been transferred to the United Nations, and that the competence to invoke the compromissory clause would have passed from Members of the League of Nations to Members of the United Nations.

The Court did not accept this argument in its application to the compromissory clause but, on the contrary, held that on dissolution of the League the competence to invoke the compromissory clause remained vested in those States that were Members of the League at its dissolution. Thus the Court not only declined to accept the "succession" argument raised by the Applicants, but its conclusion seems entirely inconsistent with any transfer of League supervisory functions to the United Nations. As stated previously the supervisory functions could conceivably have passed to the United Nations as a result of implied agreement concluded in 1920; or by agreement (express or implied) in 1945-1946 or thereafter; or by some rule of objective law. It seems inconceivable that any agreement, whether express or implied, and whether concluded in 1920 or in 1945-1946 or thereafter, would have separated the obligations to report to the Council of the League from the obligations owed to

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 640.

[2] *Ibid.*, pp. 640-653.

[3] *Vide* para. 13, *supra*.

Members of the League—in the sense that the former would relate to a new international organization and the latter to ex-Members of a different and defunct organization. If the interested parties intended to replace the Council of the League by the General Assembly of the United Nations for purposes of administrative supervision, the logical course would have been to replace the Members of the League by Members of the United Nations for compulsory jurisdiction purposes. Otherwise anomalous complications may arise from the difference in composition between the two groups of States, i.e., those entitled to participate in the "administrative supervision" and those entitled to invoke the compromissory clause. Thus, for instance, if, as the Court found, the provisions of the compromissory clause were inserted in the Mandate largely to enable the will of the authority exercising administrative authority to be imposed on the mandatory [1], it would be anomalous to provide that only some members of the body exercising administrative supervision (and indeed, on the present membership of the United Nations Organization, only a relatively small proportion of its Members) would be able to invoke the Court's jurisdiction. And, it would be equally or even more anomalous to confer the competence to implement the "judicial supervision" on States that need not be members of the organization exercising administrative supervision, and which may even have been expelled from such organization. Such anomalies could never have been intended at any stage.

Similarly, if the concept of devolution through an objective rule of international law should be applicable at all to the circumstances of this case (which is disputed), one cannot conceive of the existence of a rule which would have the effect of separating in the sense aforestated the devolution of these two obligations, particularly on the Court's finding that they were designed towards achievement of one and the same purpose, viz., enforcement of the mandatory's "sacred trust" obligations.

38. *The Court's reasoning regarding the survival of Article 7 (2).*

Not only was the Court's *finding* in regard to Article 7 (2) inconsistent with a substitution of supervisory organs, as demonstrated above, but its *reasoning* in reaching this finding equally tended to negative the possibility of such a succession.

Thus the Court relied largely, if not solely, on an agreement among Members of the League of Nations in April 1946. This portion of the Judgment pointed out that the Members of the League had full knowledge in April 1946 of the contents of the Charter of the United Nations, as also of the fact that the United Nations had already begun to operate. The purpose of the agreement that was concluded was, therefore, in the words of the Court:

> "... to provide for the continuation of the Mandates and the Mandates System 'until other arrangements have been agreed between the United Nations and the respective mandatory Powers' [2]."

When defining the ambit of the agreement held to have been entered into in April 1946 for the purpose set out above, the Court, it is submitted, rendered it clear that such agreement did not comprehend any obligation to report and account to the United Nations. Thus the following language was used:

> "... obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different

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[1] *Vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 336 *et seq.*

[2] *Ibid.*, p. 338.

Mandates *as far as it was practically feasible or operable* with reference to the obligations of the Mandatory Powers and therefore to *maintain the rights of the Members of the League*, notwithstanding the dissolution of the League itself [1]". (Italics added.)

The Judgment proceeded to state that discussions were held "to find ways and means of meeting the difficulties and *making up for the imperfections as far as was practicable* [2]". (Italics added.) Later the agreement was said "to maintain the status quo *as far as possible* in regard to the Mandates[3]". (Italics added.) At page 341, the agreement was stated to be as follows:

> "It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined *although the dissolution of the League, in the words of the representative of South Africa at the meeting, 'will necessarily preclude complete compliance with the letter of the Mandate', i.e., notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing*. In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, *however imperfect the whole system would be* after the League's dissolution, and *as much as it would be operable*, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates." (Italics added.)

39. From the above discussion of the contents of the agreement, two points emerge clearly:

(a) The interim arrangement comprised in the agreement would enable the Mandate to operate only in an "imperfect" manner, meaning thereby, *inter alia*, incomplete ("as much as it would be operable"). In the last-quoted passage such imperfection is related directly to the disappearance of the organs exercising administrative supervision. If this supervision had been transferred to the United Nations, the imperfection would naturally have been cured. It is, therefore, difficult to imagine that the Court could have considered that there had been such a transfer to the United Nations either by the agreement under discussion or by any other agreement between Members of the League of Nations at its final Session in April 1946, or any agreement at the previously held conference resulting in the foundation of the United Nations. Indeed, even disregarding the specific reference to the League's supervisory organs, it would, in view of the Court's finding that the compromissory clause survived the dissolution of the League, be difficult to imagine in what respect the operation of the Mandate could at all be said to be "imperfect" in the above sense unless the administrative supervision had fallen away.

(b) The purpose of the agreement was, in the Court's view, not to create new rights, but merely to "maintain the status quo" or "maintain the rights of Members of the League". Whereas an agreement with this content could conceivably serve to perpetuate in favour of States, in their individual capacities, the competence to invoke the compromissory clause which had previously vested in them in their capacities as Members of the League, it obviously

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 338.

[2] *Ibid.*, p. 339.

[3] *Ibid.*, p. 342.

could not have the effect of providing a new body to exercise administrative supervision. By analogy, the highest effect it could possibly have had, would have been to continue in favour of the States which constituted the Council at the dissolution of the League the rights of supervision which had previously vested in the Council. But obviously individual Members could never exercise the functions of a body which had been dissolved, quite apart from the practical difficulties created by the disappearance of the Permanent Mandates Commission and the Secretariat.

40. The same conclusion seems to follow from two further reasons (apparently subsidiary to the one dealt with above) assigned by the Court for the survival of Article 7 (2). The first was that "*judicial protection of the sacred trust* . . . was an essential feature of the mandates system [1]". This essentiality was said to arise from the need to provide a form of supervision which could be invoked to overcome cases of deadlock caused by the unanimity rule applicable to proceedings of the League Council. It is not clear whether this essentiality was regarded as an element which, independently of any consent by the mandatory, caused the survival of Article 7 (2) (which, it is submitted, would be an untenable proposition) [2] or whether it was considered to provide a motive for the agreement which the Court found to have been concluded in April 1946. Whatever the position might be, the "essentiality" was linked to the need to overcome a possible stultification of administrative supervision caused by the particular procedures applied by the League organs. It would accordingly be irrelevant to any possible functioning of the mandates under the régime of the United Nations where the General Assembly could pass valid resolutions by a two-thirds majority [3]. The only basis therefore upon which the survival of Article 7 (2) could be regarded as "essential" after dissolution of the League, would be on the premise that administrative supervision had been stultified, not by a unanimity rule (which was not applicable to the United Nations General Assembly) but by the lapse of the supervisory organs.

41. The second subsidiary feature was described as follows:

> ". . . the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, *whatever might happen to or arise from the machinery of administrative supervision* [4]". (Italics added.)

As with "essentiality", this feature of "reliability" was presumably not regarded as something which could have had an independent legal effect in providing for a continuation of "judicial protection", but rather as a factor which would probably have induced the Members of the League to make provision for such continuation by agreement amongst themselves. In this respect also it is significant that the reliability was directly related to inadequacies (or possible inadequacies) in the machinery of administrative supervision. It is difficult to see what these inadequacies would or could have been unless the Court was of opinion that the supervisory functions of the League had not been transferred to the United Nations.

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[1] *Ibid.*, p. 336.

[2] *Vide* Chap. II, paras. 14 to 18, *supra*, and para. 57, *supra*.

[3] It was indeed accepted by the Court that judicial supervision was not essential in the trusteeship system for this very reason—*vide South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 342.

[4] *Ibid.*, pp. 337-338.

To sum up, both the conclusion and the reasoning of the Court regarding the survival of Article 7 (2), provide strong indication that Article 6 must, in the Court's view, have lapsed.

The Court's actual treatment of Article 6

42. There is, to the contrary, a passage in the Judgment which may possibly be read as signifying that in the Court's view the obligation to report and account, as imposed on South Africa by Article 6, has in some form or another survived the dissolution of the League [1]. The meaning of the passage is, however, far from clear, and the South African Government must respectfully confess to being wholly uncertain as to what the Court intended to convey thereby regarding possible survival or otherwise of Article 6. The uncertainty arises not only from the fact that the expressions "international supervision" and "the obligations connected with the Mandate", as used by the Court [2], are for the purposes under consideration imprecise and somewhat obscure, but also and particularly from the context and manner of treatment of the subject in the Judgment. Thus:

(a) It is striking that the Court at no stage dealt specifically with the problems arising from the disappearance of the League's supervisory organs, and that no reference was made at any stage to the suggestion that supervisory functions were, after April 1946, to be exercised by the United Nations. In fact, the impression is created that any such reference was intentionally avoided. This appears particularly from the passage quoted from the 1950 Opinion at pages 333 and 334 of the Judgment, where every reference to the United Nations was deleted [3].

(b) The passage under discussion concluded with the following words:

> "That the League of Nations in ending its own existence did not terminate the Mandates but that it definitely intended to continue them by its resolution of 18 April 1946 will be seen later when the Court states its views as to the true effect of the League's final act of dissolution on the Mandates [4]."

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[1] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 333-334.

[2] *Ibid.*, p. 334.

[3] The complete text of the passage is given below. The parts deleted in the quotation are italicized:

> "The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the mandates system. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. *The authors of the Charter had in mind the same necessity when they organized an international trusteeship system. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the mandates system.* It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, *when the United Nations has another international organ performing similar, though not identical, supervisory functions.*" (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 131.)

[4] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 334.

In the later discussion referred to in this quotation, the Court held that the intention of the Members of the League at its final Session was merely to continue the mandates in so far as they would be operable after the dissolution of the League. In view of the Court's finding that the compromissory clause survived the dissolution of the League, the only respect in which there could in its view have been inoperability after such dissolution, was, as has been demonstrated above [1], in that the provisions relating to administrative supervision fell away. The reference in the above quotation to the intention of the League of Nations in April 1946 would therefore appear to indicate that the Court did not in the passage under discussion [2] mean to express the view that the provisions relating to administrative supervision somehow survived the dissolution of the League.

43. In the result, in view of the above-mentioned uncertainties, no clear inference can be drawn as to the Court's view on the question whether the League's supervisory functions regarding mandates have been taken over by the United Nations—although, for the reasons advanced, it is submitted that on balance the reasoning is inconsistent with such succession.

VI. Separate Opinion of Judge Jessup

44. Judge Jessup did not deal expressly with the survival or otherwise of Article 6. He found in regard to Article 7 (2) that the competence conferred upon Members of the League remained available to ex-Members of the dissolved League. The argument set out above [3], relating to the logical inconsistency between such a finding, and a finding that the United Nations Organization had succeeded to the supervisory functions of the League, would therefore also apply to this Opinion.

45. The reasoning whereby the learned Judge reached his conclusion regarding Article 7 (2) (irrespective of its soundness, with which we are not at the present stage concerned) is either inapplicable to the question whether Article 6 likewise survived the dissolution of the League, or tends positively to contradict any possibility of a succession by the United Nations to the supervisory functions previously performed by the Council of the League. The survival of Article 7 (2) was firstly based by Judge Jessup on an interpretation of the Article, and in particular, of the expression "another Member of the League of Nations". In effect he followed Sir Arnold McNair (in his dissenting opinion in 1950) in holding that these words did not impose a condition, but were merely descriptive of individual States, which acquired rights in their individual capacities. It will be observed that this reasoning sought to find, by a process of interpretation of the expression "another Member of the League of Nations", an entity capable of surviving the dissolution of the League. Such entity (or entities) existed during the lifetime of the League in the individual States concerned in their individual capacities. By no process of interpretation, however, can the expression "Council of the League of Nations" in Article 6 be interpreted in a sense which could have referred, during the existence of the League, to any other entity than the Council itself; and thus the learned Judge's line of reasoning with regard to Article 7 (2) cannot be applied to Article 6.

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[1] *Vide* paras. 38 and 39, *supra*.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 333-334.

[3] *Vide* para. 37, *supra*.

46. Secondly, Judge Jessup relied on a statement made on behalf of South Africa on 9 April 1946 relative to the continuation of its obligations under the Mandate. This statement contained the following sentence:

> "The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate [1]."

Judge Jessup held that this reservation did not affect Article 7 (2), in that:

(a) The Permanent Court had by express agreement been replaced by the new Court prior to this reservation, and therefore its disappearance did not preclude complete compliance with Article 7 (2);
(b) The reference to "another Member of the League" in Article 7 (2) was not affected by this reservation, because the Members of the League were not "organs of the League" [2].

For present purposes it suffices to say in this regard:

As to (a) *above*

That the Council of the League had not, by agreement or otherwise, been replaced, prior to the reservation, by any other body; and

As to (b) *above*

That the Council *was* one of the "Organs of the League" and was expressly mentioned as such in the reservation contained in the South African statement of 9 April 1946.

It follows, therefore, that the statement could not have played any role in effecting a substitution of the supervisory organs mentioned in Article 6. On the contrary, it showed a clear contemplation of the absence of such a substitution.

47. In certain portions of his opinion the learned Judge seemed to accept that there was a distinction between the frustration caused by the dissolution of the League in regard to, on the one hand, Article 7 (2) (where the new Court was already in existence) as against Article 6 (where there had been no substitution of supervisory organs) [3].

VII. Separate Opinion of Sir Louis Mbanefo

48. Sir Louis Mbanefo equally did not deal with the effect of the dissolution of the League on the obligations of the Mandatory to report and account. As in the case of the other majority judges, his conclusion that ex-Members of the League would continue to be entitled to invoke the compromissory clause was, as pointed out above, inherently inconsistent with the concept of succession by the United Nations to the functions of the League. And his reasoning seems to emphasize the inconsistency. Thus he said:

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[1] *L. of N., O.J.*, Spec. Sup. No. 194, p. 33; Chap. VIII, para. 26 *(b)* (ii), *supra*.
[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 418-419.
[3] *Ibid.*, especially pp. 413-414.

"Although the League was dissolved, the Mandate still continues and the rights and obligations embodied in it became, as it were, maintained at the level at which they were on the dissolution of the League. It is on this ground that the Respondent can justify its right to continue to administer the territory and those States who were Members of the League at the time of its dissolution the right to continue to invoke the compromissory clause of Article 7. The right to invoke Article 7 remained vested in those States who were Members of the League at the time of its dissolution, and continues notwithstanding the termination of the League's functions [1]."

49. Irrespective of the cogency of this argument, nobody would be able to say that the rights and obligations regarding supervision "became, as it were, maintained at the level at which they were on the dissolution of the League". As a result of the dissolution of the League the said obligations could not be "maintained": there could be further supervision only pursuant to a new obligation, relating to a new supervisory organ. In particular, any suggestion that in respect of such obligations the organs of the United Nations replaced those of the League would involve, not maintenance of existing obligations, but creation of new obligations—and in fact different obligations in view of the difference in composition, procedure and approach as between the organs of the League and those of the United Nations [2].

50. The probable attitude of Judge Mbanefo also appears from his specific endorsement [3] of the following words from the dissenting opinion of Judge Read in 1950:

"The disappearance of the régime of report, accountability, supervision and modification, through the Council and the Permanent Mandates Commission, might weaken the Mandates System; but it would not bring it to an end. As a matter of fact, the record shows that the paralysis of those agencies during six war years had no detrimental effect upon the maintenance of the well-being and development of the peoples [4]."

VIII. Dissenting Opinions of President Winiarski, Judges Basdevant and Morelli and Declaration of Judge Spiropoulos

51. None of the above-mentioned Judges dealt specifically with the question relating to the survival of Article 6, and no inference can be drawn from their opinions as to their views in that regard.

52. Taking the Judgment and opinions on the Preliminary Objections as a whole, therefore, it is submitted that they tend to support the South African contention that there was no succession by any organ of the United Nations to the functions formerly exercised by the Permanent Mandates Commission and the Council of the League of Nations in regard to mandates not converted into trusteeships.

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[1] *Ibid.*, p. 445.

[2] *Vide* Chap. VII, paras. 49-51, *supra*.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 444.

[4] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 165.

F. The 1966 Judgment and Seperate Opinions

I. General

53. In the *South West Africa* cases [1] one of the issues between the Parties was whether the supervisory functions in respect of the Mandate for South West Africa had passed from the League of Nations to the United Nations. This issue was very extensively canvassed [2]. Because of the Court's decision to dispose of the case on a preliminary issue, no final pronouncement was made by the Court on this aspect. There is, however, much of relevance to this matter in the reasoning and conclusions of the Court and of the Judges who delivered separate or dissenting opinions. Indeed, the indications are that had the Court been called upon to decide the issue, the decision would have been in South Africa's favour. For convenience, the Judgment and separate concurring opinions will first be considered, and thereafter attention will be given to the dissenting opinions which dealt with this topic. As will be seen, the combined effect of the Judgment and opinions is as follows:

(a) In the Judgment the indications seem unmistakable that in the view of its authors (Judges Spender, Winiarski, Spiropoulos, Fitzmaurice, Morelli, Gros and van Wyk) the supervisory functions in respect of mandates had lapsed on dissolution of the League. This was expressly so held in a separate opinion by Judge van Wyk.

(b) Judges Wellington Koo and Tanaka held that United Nations succession had taken place, and gave their reasons for this finding. These were in direct conflict with one another. Judge Wellington Koo decided on the basis of his interpretation of the mandate documents combined with a finding of fact that South Africa had agreed to a substitution of supervisory organs. Judge Tanaka, on the other hand, was satisfied that no agreement by South Africa had been established, but decided this aspect on a principle of teleological or sociological interpretation operating independently of specific consent.

(c) Judges Jessup, Padilla Nervo and Mbanefo decided that a transfer of supervisory functions had occurred but assigned no reasons of their own for this finding. Judge Mbanefo gave no reasons at all, and the first-mentioned two Judges merely abided by earlier pronouncements of the Court (and, in particular, the 1950 Opinion).

(d) Judges Koretsky and Forster did not deal with this topic at all and gave no indication of their attitude. Their opinions will consequently not be dealt with below.

II. The Judgment of the Court

54. Although, as noted above, the Court did not expressly decide the question now under consideration, its reasoning and findings lead, it is submitted, inevitably to the conclusion that the mandatory's obligations to report and account to organs of the League lapsed on the dissolution of that organization. Indeed, this appears to have been implicitly recognized by the Court, as will be shown hereafter. The following elements of the Court's Judgment, are, it is submitted, of particular significance.

[1] *Ethiopia and Liberia* v. *The Republic of South Africa*.
[2] *Vide* footnote to para. 4, *supra*.

(a) *The Court's analysis of the Mandates in the context of the League system*

55. For the purposes of this analysis, the Court considered that it should—

> ". . . place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant [1]."

56. On the basis of an examination of the mandate instruments, the Court then concluded that supervisory functions in respect of mandates were vested only in the specific League organs to which reference was made in the said instruments (i.e., Article 22 of the Covenant and the individual mandate declarations). Thus the Court emphasized:

> "The effect of this recital [in the third paragraph of the preamble to the instrument of Mandate for South West Africa], as the Court sees it, was to register an implied recognition *(a)* on the part of the mandatory of the right of the League, acting as an entity through its appropriate organs, to require the due execution of the Mandate in respect of its 'conduct' provisions; and *(b)* on the part of both the mandatory and the Council of the League, of the character of the Mandate as a juridical régime set within the framework of the League as an institution. *There was no similar recognition of any rights as being additionally and independently vested in any other entity, such as a State, or as existing outside or independently of the League as an institution; nor was any undertaking at all given by the mandatory in that regard* [2]." (Italics added.)

Later the Court stated pertinently as follows:

> "The Permanent Mandates Commission alone had this advisory role [i.e., that conferred by Article 22 (9) of the Covenant] just as the Council alone had the supervisory function [3]."

And:

> "This right [i.e., the right to require the due performance of the Mandate] was vested exclusively in the League, and was exercised through its competent organs [4]."

It is true that these passages in their context were directed primarily towards distinguishing between the roles played by the League as an institution on the one hand, and on the other, by the individual Members of the League. Nevertheless the Court's analysis of the mandate instruments and conclusions thereon would at the same time serve to refute any contention that the mandatories were from the inception subject to any form of supervision other than supervision by the particular organs of the League as a specific organization.

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 23.
[2] *Ibid.*, p. 24.
[3] *Ibid.*, p. 25.
[4] *Ibid.*, p. 29.

And the Court must have been fully aware that its findings, couched in the wide language quoted above, would have this additional effect, since the nature and extent of the mandatory's duty to report and account were, as noted, extensively argued before it.

(b) *The Court's view as to the events in the transitional period 1945-1946*

57. The Court did not deal comprehensively with the question whether any fresh agreement concerning supervision of mandates not converted into trusteeships had been concluded in the transitional years of 1945-1946 which could have served to effect a transfer of supervisory functions on the dissolution of the League. The Court did, however, say in regard to the argument of "necessity" (i.e., the argument that judicial supervision was a necessary element of the mandates system because administrative supervision was liable to be frustrated by the unanimity rule applicable to the Council of the League [1]):

> ". . . such a theory was never officially advanced during the period of the League, and probably never would have been but for the dissolution of that organization and *the fact that it was then considered preferable to rely on the anticipation that Mandated territories would be brought within the United Nations trusteeship system* [2]". (Italics added.)

This, can on analysis, only mean that there was, at the time, no agreement providing for future supervision of mandated territories. The words "considered preferable" must connote that the course adopted was deliberately chosen in preference to one or more alternatives. In the present context, the possible alternatives were measures which would have created a factual situation rendering any "necessity" argument superfluous, i.e., a factual situation in which there would have continued to be an effective system of supervision of mandated territories. The Court was thus saying that, at the dissolution of the League, the parties, rather than make any specific arrangement that would have ensured continued supervision in respect of mandates, relied on the anticipation that mandated territories would be brought under the trusteeship system. This accords with views expressly stated by two of the subscribers to the 1966 Judgment, Judges Spender and Fitzmaurice, in their 1962 joint dissenting opinion [3].

(c) "*Whether the Court is entitled to engage in a process of 'filling in the gaps'*"

58. The Court's attitude was firmly that it was not entitled to engage in any such process. In this regard it said, immediately after the passage quoted in the preceding paragraph:

> "It is these subsequent events alone, not anything inherent in the mandates system as it was originally conceived, and is correctly to be interpreted, that give rise to the alleged 'necessity'. But that necessity, if it exists, lies in the political field. It does not constitute necessity in the eyes of the law. If the Court, in order to parry the consequences of these events, were now to read into the mandates system, by way of, so to speak, remedial action, an element wholly foreign to its real character and structure as originally contemplated when the system was instituted, it would be engaging in an *ex post facto* process, exceeding its functions as a court

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[1] *Vide* para. 40, *supra*.
[2] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 47.
[3] The relevant passage is quoted in para. 33, *supra*.

of law. As is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it [1]."

Later the Court remarked:

"It may be urged that the Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should [2]."

(d) *Conclusion to be drawn from the Court's approach*

59. To sum up, it emerges from the Court's reasoning that, in its view, the Mandate as originally framed contained an obligation to report and account only to specific organs of the League, which organs obviously did not survive the dissolution of the League itself; that no provision was made for the substitution of supervisory organs at the time of the League's dissolution, and that no principle exists which would now enable the Court in effect to make such provision. The result of these factors considered in combination must be that the obligation to submit to supervision has lapsed. The correctness of this conclusion appears to have been accepted by the Court in the following passage:

"Another argument which requires consideration is that in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the Mandate, it must be unacceptable. Without attempting in any way to pronounce on the various implications involved in this argument, the Court thinks the inference sought to be drawn from it is inadmissible. If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law [3]."

III. Separate Opinion of Judge van Wyk

60. In the 1966 proceedings Judge van Wyk again considered whether the supervisory functions of the League of Nations in respect of the Mandate for South West Africa had been transferred to the United Nations, and, after a full review of the relevant facts and the respective contentions of the Parties, came to the conclusion that no such transfer had taken place [4].

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 47-48.
[2] *Ibid.*, p. 48.
[3] *Ibid.*, p. 36.
[4] *Ibid.*, pp. 82-137.

IV. Dissenting Opinion of Vice-President Wellington Koo

61. In his dissenting opinion Judge Wellington Koo found that South Africa's obligations to submit to supervision was transferred to the United Nations as follows:

(a) In terms of the Mandate, South Africa was, as Mandatory, subject to an "obligation of international accountability".

(b) This obligation became latent after the disappearance of the Council of the League and the Permanent Mandates Commission [1].

(c) South Africa acknowledged the General Assembly as the competent international organ in the matter of the Mandate for South West Africa, by South Africa's conduct in undertaking to submit to the General Assembly, and actually submitting, a report on the Territory [2].

(d) By this acknowledgement, the latent "obligation of international accountability" was reactivated as an obligation to report and account to the General Assembly of the United Nations [2].

62. This line of reasoning, it is respectfully submitted, is unsound for the following reasons:

As to (a)

For the reasons stated above [3] the mandatories' obligation was, it is submitted, not one of "international accountability" in the abstract but one to report and account to specific organs of a particular organization.

As to (b)

It follows from what was said immediately above that the mandatories' obligation relating to supervision was not capable of surviving the dissolution of the League.

As to (c)

On this aspect it must be emphasized that the conduct relied upon by Judge Wellington Koo as constituting acceptance by South Africa of the General Assembly as the new supervisory organ, was the undertaking to submit, and actual submission, of a report on the Territory. Although he also referred to the 1946 proposal for incorporation, he did so for a different purpose—this proposal, in his view, was an attempt on South Africa's part to conclude an arrangement in terms of paragraph 4 of the final League resolution on mandates [4], which attempt failed because the United Nations would not agree thereto [5].Thereupon, he held, South Africa entered into a new arrangement involving accountability towards the United Nations, as stated, by the undertaking to submit information and actually doing so.

There is, it is respectfully submitted, a basic flaw in this line of reasoning. Postulating, as the learned Judge did [6], the necessity of agreement on the part of South Africa to a substitution of supervisory organs, one would have to

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 235.
[2] *Ibid.*, pp. 236-238.
[3] Chap. VII, paras. 47-60, *supra*.
[4] Quoted in Chap. VIII, para. 26 *(f)*, *supra*.
[5] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 237.
[6] *Ibid.*, pp. 235-236.

determine whether in fact any agreement was reached, and, if so, the exact content of such agreement. This would involve an enquiry into the South African acts and expressions of intention concerning the submission of information to the United Nations. Judge Wellington Koo accepted that South Africa's action in submitting the reports was expressed to be "voluntary on its part and for information only such as provided for by Article 73 *(e)* of the Charter of the United Nations regarding non-self-governing territories [1]". This statement (which, it is respectfully submitted, is clearly correct) must by itself negative any conclusion that South Africa intended to, or did, subject itself to any obligation to report and account under the Mandate to the General Assembly of the United Nations [2]. Nevertheless Judge Wellington Koo continued to state that:

> ". . . the legal effect of its [i.e., South Africa's] declaration and act acknowledging the General Assembly as the competent international organ in the matter of the Mandate for South West Africa, in view of its obligation of international accountability under Article 6 of the Mandate, obviously cannot be determined unilaterally by it alone [3]".

This reasoning begs the question, which is precisely whether South Africa *did* acknowledge the General Assembly as the competent international organ in the matter of the Mandate for South West Africa. As stated above, on Judge Wellington Koo's own finding of facts the answer must clearly be in the negative, and he reached a different result only by assuming what required to be established.

In conclusion it may be noted that Judge Wellington Koo did not seek to reconcile his dissenting opinion of 1966 with the Judgment in 1962, to which he was a party [4].

V. Dissenting Opinion of Judge Tanaka

63. Judge Tanaka also reached the conclusion that the United Nations had succeeded to the supervisory functions previously exercised by the League, but on a different basis. He stated:

> "*This conclusion cannot be derived from the express or tacit intent of the parties to the mandate agreement and those concerned, because at the period of the inception of the Mandate an event such as the dissolution of the League surely could not be foreseen by them, and because the intention of the parties and those concerned, and the surrounding circumstances at the period of the dissolution of the League are susceptible of diverse interpretations.* There was a lacuna in the mandate agreement which should be filled by the theoretical or logical interpretation by the Court [5]." (Italics added.)

It will be noted how explicitly Judge Wellington Koo's finding is rejected by the underlined words.

Later Judge Tanaka made the following observation: "In this case, we

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[1] *Ibid.*, p. 236.

[2] *Vide* Chap. VIII, para. 71, *supra*.

[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 236.

[4] On the effect of the 1962 Judgment, *vide* paras. 36-43, *supra*, and *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 156-161 (Counter-Memorial).

[5] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 275.

cannot deny that the necessity created the law independently of the will of the parties and those concerned [1]".

It is respectfully submitted that this approach, which involves "some degree of creative element in . . . judicial activities [1]" and renders it "a very delicate and difficult matter" to determine the borderline between legislation and adjudication [1], does not accord with the principles of interpretation accepted in international law and applied by this Court [2] and should accordingly not be followed.

Judge Tanaka's ultimate conclusion on the aspect of United Nations succession to supervision of the Mandate for South West Africa was that—

> ". . . the difference of opinions on the questions before us is in the final instance attributed to the difference between two methods of interpretation: teleological or sociological and conceptional or formalistic [3]".

This comment must be read in the light of the finding, quoted above, that the facts on record did not establish any *agreement* (in 1920 or in 1945-1946) whereby a substitution of supervisory organs was effected. Judge Tanaka's preference for the teleological or sociological approach to interpretation is therefore not of merely academic interest in the present case—had he applied the traditional "conceptional or formalistic" methods (which, it is submitted, are firmly established in international law) [4] he would have arrived at a different conclusion.

It is, moreover, interesting to speculate whether Judge Tanaka intended to suggest in the passage quoted immediately above that other minority judges who reached the same conclusion as he did, did so by applying the same interpretative process. Any such suggestion would be of particular importance since some of these judges did not give any independent reasons for their conclusions in this regard, or relied only on the 1950 Opinion, which may itself have been an example of the application of an extreme teleological approach [5].

VI. Dissenting Opinion of Judge Jessup

64. In his dissenting opinion, Judge Jessup did not give any consideration to the merits of the question whether the supervisory functions of the League were transferred to the United Nations, although he dealt at great length with certain of the other issues raised between the Parties (and some which were not raised). The reasoning in Judge Jessup's separate opinion in 1962 seemed to negative the possibility of any substitution of supervisory organs [6]. This apparent effect of the opinion was pertinently drawn to the Court's attention in the South African pleadings [7]. The absence of any comment on this aspect, or any reasoning inconsistent with the South African contentions concerning the lapse of supervision in respect of South West Africa, would appear to indicate that the interpretation placed in the South African pleadings on the effect of Judge Jessup's opinion in 1962 could not be faulted.

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 277.
[2] *Vide* Chap. II, *supra*.
[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 278.
[4] *Vide* Chap. II, *supra*.
[5] *Vide* the views expressed by the minority judges in the 1956 Opinion to which reference is made in para. 29, *supra*.
[6] *Vide* paras. 44-47, *supra*.
[7] *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 161-163.

The only respects in which Judge Jessup touched upon the South African contentions concerning administrative supervision, were the following:

(a) By emphasizing the continued authority of the 1950 Opinion.
(b) By minimizing the effect of the so-called new facts [1].

These aspects will be dealt with in turn.

65. *The authority of the 1950 Opinion.*

At the outset it must be noted that the learned Judge did not state that the 1950 Opinion was, in his view, correctly decided in the respect now under consideration [2]. He contented himself with saying that the Court (in 1966) as a result of rejecting the Applicants' claims *in limine*,

> "... has not decided, ... that the Mandatory's former obligations to report, to account and to submit to supervision had lapsed upon the dissolution of the League of Nations.
>
> The Court has *not* rendered a decision contrary to the fundamental legal conclusions embodied in its Advisory Opinion of 1950 supplemented by its Advisory Opinions of 1955 and 1956 and substantially reaffirmed in its Judgment of 1962 [3]."

Later in the opinion, Judge Jessup emphasized the persuasive weight to be attached to advisory opinions in general [4].

Judge Jessup's approach was thus a purely formalistic one, and he was concerned merely to emphasize that the Court in 1966 did not by formal pronouncement overrule the 1950 Opinion. This is of course true as far as it goes, but it does not detract from the incontestable fact that the persuasive weight of the 1950 Opinion has been reduced to a minimum, if not wholly destroyed, by the large number of factors mentioned above [5], including the presentation of additional facts, the inconsistent findings in 1962 and 1966, the criticism of acknowledged experts in the field of international law and even the admissions by Applicants' counsel in the *South West Africa* cases [6].

66. *The so-called "New Facts".*

At all stages of the *South West Africa* cases, South Africa contended that certain facts not presented to the Court in 1950 demonstrated that the 1950 Opinion was incorrectly decided *in holding that the United Nations had succeeded to the supervisory functions in respect of South West Africa previously exercised by the League* [7].

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[1] He also attempted to refute the South African contention that South Africa "had agreed to accept only a very specific kind of supervision" (p. 397). This part of Judge Jessup's opinion was, however, concerned with the rights and interests of individual Members of the League as against those of the League as an organization, and he does not appear to have drawn any conclusions which are of direct relevance to the matter now under discussion. Some of his comments or factual allegations do nevertheless seem to be inconsistent with certain contentions advanced in this written statement, and were for that reason dealt with in Chap. VII, para. 63, *supra*.

[2] It is submitted that this omission is in itself not without significance.

[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 331.

[4] *Ibid.*, pp. 337-338.

[5] *Vide* para. 4, *supra*.

[6] E.g., regarding the effect ascribed to Art. 80 (1) of the Charter in the 1950 Opinion *vide* para. 12, *supra*.

[7] *Vide*, e.g. *I.C.J. Pleadings, South West Africa*, Vol. I (Preliminary Objections), pp. 312-350, particularly at pp. 344-346; Vol. VII (Oral Proceedings on the Prelimi-

As the case proceeded, further enquiry and research extended the ambit of such facts, but the purpose for which they were adduced remained unaltered. In particular, it was not suggested that these new facts had any direct relevance to the finding in 1950 that the Mandate as an institution had survived the dissolution of the League. The South African attitude was that, even if the Mandate did survive, no substitution of supervisory organs had taken place, and it was towards establishing this latter proposition that the "new facts" were adduced. The effect of the "new facts" on the lapse or otherwise of the Mandate as an institution could only have been an indirect one in the sense that, if it were accepted that the obligation to submit to supervision had lapsed, the question would have arisen whether the Mandate was capable of survival in such a truncated form. This would have raised questions of severability, on which the "new facts" also had no significant bearing.

In the light of this, Judge Jessup's approach to and treatment of these "new facts" is, to say the least, surprising. He commenced his consideration of this topic by stating that some of these facts "bear on the issue of the survival of the Mandate, an issue which cannot be ignored in this opinion [1]". As regards Preparatory Commission proceedings [2], Judge Jessup stated that South Africa—

> ". . . seemed to attach importance to this alleged 'new fact' in connection with its arguments that the Mandate lapsed on the termination or dissolution of the League of Nations and that the United Nations refused to accept any responsibilities or authority in connection with the territories which had been administered as mandates [3]".

And later:

> "The thrust of Respondent's argument . . . is that this omission proved that it was agreed that the United Nations had no responsibility in regard to mandated territories [4]."

Judge Jessup consequently sought to show in this part of his opinion, firstly, that the new facts did not detract from the existence of an understanding amongst States that the Mandate as an institution had survived the dissolution of the League and, secondly, that there was wide agreement that the United Nations had responsibilities in respect to mandated territories under Chapter XI and/or XII of the Charter [5]. Since the presentation of the "new facts" had not been directed to either of these issues, and since neither of them arises for consideration in the present written statement [6], it will not be necessary to consider whether the conclusions reached are in any event correct. Moreover, as will have appeared from the treatment of this topic in this written statement [7],

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nary Objections), pp. 67, 97-99; Vol. II (Counter-Memorial), pp. 141-148, 152, 155-156; Vol. VIII (Oral Proceedings), pp. 547-562. Substantially the same contention is advanced herein—*vide* paras. 15-18, *supra*.

[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 339.

[2] Discussed in para. 17, *supra*.

[3] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 341.

[4] *Ibid.*, p. 342.

[5] *Vide*, e.g., p. 344.

[6] *Vide* Chap. I, *supra*, concerning the question whether the Mandate as an institution lapsed on dissolution of the League.

[7] *Vide* paras. 15-18, *supra*, and earlier passages to which reference is there made.

Judge Jessup's consideration of these "new facts" is a highly selective and very incomplete one [1].

For the foregoing reasons it will suffice to say that such consideration as Judge Jessup has given to the so-called "new facts" does not in any way weaken the conclusions reached thereanent in this written statement.

VII. Dissenting Opinion of Judge Padilla Nervo

67. In his dissenting opinion, Judge Padilla Nervo endorsed the conclusions reached in 1950 and 1962 without presenting any additional or independent reasoning in support thereof [2]. It will therefore suffice to say that, for the reasons stated above, it is submitted that the 1950 Opinion should not be followed in the respect now in question.

VIII. Dissenting Opinion of Judge Mbanefo

68. Judge Mbanefo stated his conclusion that South Africa "is accountable to the United Nations for the proper discharge of its obligations under the Mandate and that the United Nations has a corresponding right of supervision [3]". As in the case of other conclusions, he did not give any reasons for this finding but confined his reasoning to the points on which he disagreed with

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[1] Judge Jessup's discussion of the suggested additional paragraph in a statement made by Dr. Smit on 11 May 1945 (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 339-341), is another example of treatment by him of something not relied upon by South Africa. This matter was raised by South Africa in its Preliminary Objections (*I.C.J. Pleadings, South West Africa*, Vol. I, p. 345) but was described as early as 4 October 1962 by the South African counsel as "not really important" (*ibid.*, Vol. II, p. 97) and "really unimportant" (*ibid.*, p. 102) because "there is implicit in the body of the statement . . . the same as is conveyed explicitly in this further paragraph" (*ibid.*). Still Judge Jessup found it necessary to devote more than a page of his opinion in 1966 to this matter, which had not been relied upon by South Africa since 1962, although, like South African counsel, he considered that "it is doubtful whether this extra paragraph adds much to what is said in the last three paragraphs of the statement as admittedly made by Dr. Smit" (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 340). In the light hereof it is difficult to understand the significance attached by Judge Jessup to the question whether Dr. Smits' memory was at fault when he wrote that he had in fact read out also the additional paragraph.

A second puzzling feature of this part of Judge Jessup's opinion is the suggestion that the South African contentions, both as regards the Preparatory Commission proceedings, and as regards the first Chinese proposal at the final meeting of the League Assembly, had been "stimulated by the 1962 joint dissent" (*ibid.*, pp. 341, 347). In fact, the South African contentions on these aspects were advanced in the same way in the Preliminary Objections (i.e., preceding the 1962 joint dissent) as in the Counter-Memorial (i.e., after the 1962 joint dissent). Compare in this regard the Preliminary Objections (*I.C.J. Pleadings, South West Africa*, Vol. I, pp. 345-346 and earlier passages there cited) with the Counter-Memorial (*ibid.*, Vol. II, pp. 146-147 and earlier passages there cited). Moreover, it is difficult to see why it should give rise to any comment if a party were to adopt arguments in its favour which were first advanced by judges in earlier stages of the proceedings (which in fact happened in some instances in the *South West Africa* cases although not those mentioned by Judge Jessup).

[2] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 450, 456, 458, 460-461, 470-471.

[3] *Ibid.*, p. 490.

the Court's Judgment [1]. Accordingly he also did not attempt to reconcile his dissenting opinion in 1966 with his separate opinion in 1962 [2]. It will accordingly again suffice to submit that his conclusion regarding United Nations supervision was incorrect.

G. Conclusion

69. For the reasons aforestated, it is contended that the Court should not follow the 1950 majority opinion but should hold that the said Opinion was incorrectly decided in the respect now in question. In particular it is submitted that the Court should now hold positively that the supervisory powers relative to mandates which had been vested in the Council of the League of Nations were not transferred to the United Nations General Assembly, and that South Africa's obligation to report and account in respect of the Mandate for South West Africa, lapsed on dissolution of the League.

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[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 490.
[2] As to which, see paras. 48-50, *supra*.

CHAPTER X

THE VALIDITY AND LEGAL EFFECT OF GENERAL ASSEMBLY RESOLUTION 2145 (XXI)

A. Introductory

1. In the present Chapter it will be assumed, despite the arguments advanced to the contrary in the preceding chapters, firstly, that in its Advisory Opinion of 11 July 1950, this Court correctly decided that—

> "... the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory ..." [1]

and, secondly, that the powers of the League in this regard included the power to revoke the Mandate for South West Africa.

In what follows, however, it will be submitted that even on the basis of these assumptions the General Assembly was not itself authorized by the terms of the Charter to revoke the Mandate and that therefore its resolution 2145 (XXI), by which it purported to do this, was *ultra vires* and of no legal effect.

In this connection the origin and ambit of the powers of the General Assembly will first be considered; next, the nature and scope of those powers will be examined in so far as they relate to the present question; and thereafter resolution 2145 (XXI) will be analysed in the light of the conclusions arrived at.

B. The Origin and Ambit of the Powers of the General Assembly

2. It has been pointed out in connection with the Security Council that the competences of the various organs of the United Nations are derived exclusively from and limited by the provisions of the Charter [2]. Thus whatever the nature and extent of the powers of the General Assembly, they can be ascertained only from the terms of the Charter itself [3]. In the words of one eminent authority, commenting upon the supposed presumption that action by the United Nations Organization which "may be regarded as expedient from the standpoint of one of the purposes of the UN" is not *ultra vires* the Organization:

> "As the Soviet member of the World Court, V. Koretskii, correctly noted in this regard, such a presumption would mean a return to a formula long since condemned: 'the end justifies the means.' Professor Ch. Chaumont of France emphasizes that 'states-founders of an organization conclude an agreement *not only on the nature of its goals, but also on the means for attaining them*' [4]." (Italics added.)

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[1] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.

[2] Chap. III, para. 2, *supra*.

[3] *Vide Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 184 (separate opinion of Judge Sir Percy Spender).

[4] Tunkin, G. I., "The United Nations: 1945-1965 (Problems of International Law)", *Soviet Law and Government*, Vol. IV, No. 4 (1966), p. 6.

Dealing with international organizations in general and the United Nations in particular, the same authority points out that:

> "The charter of an international organization, in this instance the UN Charter, defines the authority of the international organization as a whole and that of its organs, the rights and duties of its member-states, their interrelationships with the organization, etc. It follows from the principle *pacta sunt servanda* that states must fulfil conscientiously their obligations under the charter of the international organization and, at the same time that more cannot be required of states than is stipulated in the charter [1]."

Moreover, as this Court has said in regard to the very question now being considered:

> "It is to be recalled that the Court, in its previous Opinion, stated that 'The competence of the General Assembly of the United Nations . . . is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations'. *Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa* as a mandated Territory *is based on the provisions of the Charter*. While, in exercising that supervision, the General Assembly should not deviate from the Mandate, *its authority to take decisions in order to effect such supervision is derived from its own constitution* [2]." (Italics added.)

If, then, the powers of the Assembly are derived from and based upon the Charter, it cannot act outside the Charter. It follows that the Assembly could not have revoked the Mandate for South West Africa unless the Charter conferred upon it powers wide enough to effect such a revocation. Whether or not the Charter did so is the next question to be considered.

C. The Powers of the General Assembly in Relation to the Present Question

3. The powers of the General Assembly cover a wide range and may be very broadly classified as either "political" or "organizational" in nature, though it will sometimes be difficult to draw a line between the two. The former category embraces the Assembly's powers of discussion and recommendation; the latter, such powers as those in regard to membership of the Organization, the election of members of various organs, budgetary and financial matters, the control and supervision of subordinate organs, the administration and supervision of certain trust territories, and the amendment of the Charter [3].

Of these powers the only ones which can be considered relevant to the present question are those political powers conferred in Articles 10, 11 and 14. The terms of Articles 10 and 14 are wide enough to bring the question of South

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[1] Tunkin, G. I., "The United Nations: 1945-1965 (Problems of International Law)", *Soviet Law and Government*, Vol. IV, No. 4 (1966), p. 8. (Footnotes omitted.)

[2] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 76.

[3] *Vide* in this connection Ross, A., *Constitution of the United Nations* (1950), pp. 59-60; Goodrich, L. M. and Hambro, E., *Charter of the United Nations* (2nd ed.), p. 25; Verdross, A., *Völkerrecht* (5th ed.), p. 520.

West Africa within the purview of the deliberative and recommendatory powers of the Assembly and the same would be true of Article 11, paragraph 2, if this question were one involving the maintenance of international peace and security. For in terms of Article 10 the Assembly may discuss and make recommendations on "any questions or any matters within the scope of the present Charter"; in terms of Article 11, paragraph 2, it may do the same in regard to "any questions relating to the maintenance of international peace and security"; and in terms of Article 14 it "may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations . . .".

However, since it has been shown that the Assembly purported to adopt resolution 2145 (XXI) by virtue of powers vesting in it as successor to the supervisory powers of the League of Nations [1], and since the competence to exercise these powers has been held by this Court to derive from the provisions of Article 10 of the Charter [2], and since, moreover, the nature of the powers conferred in Articles 10, 11 and 14 are the same, i.e., deliberative and recommendatory, consideration of the powers of the Assembly can for purposes of the present question be confined to the consideration of those conferred in Article 10 [3].

4. What then are the nature and the extent of the powers bestowed upon the General Assembly in Article 10 of the Charter? That Article reads as follows:

> "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

When regard is had to the plain meaning of the words used in this Article it is clear that it confers upon the Assembly only two powers—the power to *discuss* and the power to *recommend*. It does no more than that, though obviously the power to discuss must "also include the power to make decisions which either sum up the statements made or in which the Assembly as such sets forth its opinion, in so far as this has not the character of a recommendation [4]". The language of the Article certainly cannot be construed to give the Assembly the power to make a decision having binding effects. It is impossible to infer such a power from the competence to "discuss", while, as was shown with reference to the powers of the Security Council, a "recommendation" can by its very nature have no binding effects [5].

5. If the language of the Article is clear, so is the intention of those who framed the Charter. It is apparent, both from the comments and proposed amendments submitted by States in regard to Chapter V, section B, paragraph 1, of the Dumbarton Oaks Proposals (the forerunner of the present Articles 10 to 15 of the Charter) and from the records of Commission II and its Committee II, that the delegates to the San Francisco Conference accepted without

[1] *Vide* Chap. VI, *supra*.

[2] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.

[3] The conclusions in regard to the powers conferred in Article 10 will apply equally to those conferred in Article 11, para. 2, and in Article 14.

[4] Ross, *op. cit.*, p. 61.

[5] *Vide* Chap. V, para. 52, *supra*.

question that the political and security powers of the General Assembly were to be merely deliberative and recommendatory and not in any sense binding [1]. Indeed, the only delegate who expressly adverted to the question took this to be a matter of course. He said:

> "... there is no limit on the power of recommendation save the one mentioned in the text [this is an apparent reference to the exception contained in the present Article 12, paragraph 1], and the Assembly may make recommendations on these matters to the United Nations. *Of course those recommendations will have no operative effect* in any country ... [2]". (Italics added.)

And at no time during the course of the relevant discussions was this interpretation called into doubt.

The views of the framers of the Charter as to the nature of a recommendation are also illustrated by a ruling of the President of Commission II in connection with Chapter V, section B, paragraph 4, of the Dumbarton Oaks Proposals, dealing, *inter alia*, with the power of the Assembly "to elect, upon recommendation of the Security Council, the Secretary-General of the Organization"—as the following excerpt from the records of the first meeting of Commission II will show:

> "*Mr. Evatt:* Mr. President, on behalf of Australia I support the request of the Netherlands, but we also think it is implied clearly from the words used—and I would like your ruling on that, Sir—*that the Assembly has the right, after the recommendation reaches it*, to say 'yes' or to say 'no' ... I think that it is implied from the words used, that if a recommendation reaches the Assembly *it can reject it* ...
>
> *President:* [in giving his ruling] ... All, therefore, that the Security Council does is to make a recommendation. *It is no* [*sic*] *mandatory at all.* It is simply a recommendation. The General Assembly cannot elect without having before it such a recommendation, *but they are not bound by such a recommendation. It seems to me the plain meaning of the recommendation*, and I think, that being the case, we need not pursue the matter further [3]." (Italics added.)

That representatives accepted this ruling on the nature and effects of a recommendation as being correct is shown by the fact that it was never contested, then or later.

6. It has been pointed out in connection with the powers of the Security Council that a recommendation of the Council can assume a binding character only if some or other provision of the Charter operates to invest it with such a character [4]. That is equally true of a recommendation of the General Assembly. But in the case of the Assembly there is no article of the Charter which might even suggest that its recommendatory powers under Articles 10, 11 and 14 can ever be transformed into those of binding decision.

Moreover, there is ample authority in the pronouncements of Members of this Court and of publicists of repute, or at least of those of them who do not

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[1] *Vide* UNCIO docs., Vols. III, VIII (pp. 195 *et seq.*), and IX.

[2] UNCIO docs. Vol. VIII, p. 208. (Statement of the Australian representative at the fourth meeting of Commission II.)

[3] *Ibid.*, pp. 32-33.

[4] *Vide* Chap. V, para. 52, *supra*.

follow a teleological approach to questions of Charter interpretation [1], for the proposition that recommendations of the Assembly are not obligatory and that Assembly resolutions in general, are not binding upon States. In the words of Judge Klaestad:

> "Some [of the decisions of the General Assembly] are decisions with a final and binding effect, such as, for instance, the election of members of the various organs of the United Nations or decisions approving the budget of the Organization by virtue of Article 17. Some other decisions are recommendations in the ordinary sense of that term, having no binding force. Recommendations adopted by virtue of Article 10 concerning reports and petitions relating to the Territory of South-West Africa belong in my opinion to the last-mentioned category. They are not legally binding on the Union of South Africa in its capacity as mandatory Power [2]."

Professor Tunkin is to the same effect where he says:

> "Resolutions of the UN General Assembly are, as a matter of principle, recommendations. Only resolutions on a comparatively narrow range of questions, chiefly on organizational and financial matters, are binding upon the states. . . . However, with respect to the fundamental questions of its activity, which bear upon relations of states with the UN or of states with each other, the General Assembly can only adopt recommendations, as is stipulated in Article 10 of the Charter [3]."

Ross, too, points out that the powers of the Assembly in terms of Articles 10 to 16 can never assume "a higher degree of authority than that of a recommendation. The Assembly can *never legislate, never order or command, but only submit, recommend, propose* [4]". (Emphasis in original.) El Erian states that Assembly resolutions under Chapter IV of the Charter "are limited to the discussion and adoption of recommendations which by their very nature are not binding on member states [5]". Another eminent authority puts the matter this way:

> ". . . validity is one thing, binding force is another. This is clearly and easily seen in connection with resolutions of the General Assembly. Resolutions relating to the internal economy of the Organization, such as admission to membership, appointment of the Secretary-General, budget and many other matters, have legally binding force if they are formally valid. Resolutions relating to the maintenance of international peace and security calling for some action by the Members have no legally binding force even if they are formally valid [6]."

There is abundant other authority to the same effect [7].

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[1] It has been submitted in Chap. II, *supra*, that the teleological approach to treaty interpretation must be rejected.

[2] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 88.

[3] Tunkin, *Soviet Law and Government*, Vol. IV, No. 4 (1966), p. 5.

[4] Ross, *op. cit.*, p. 60.

[5] Sørensen, M. (ed.), *Manual of Public International Law* (1968), p. 88.

[6] Gross, L., "Voting in the Security Council", *A.J.I.L.*, Vol. 62 (1968), p. 330.

[7] *Vide* for instance: *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, pp. 115-116 (separate opinion of Judge Lauterpacht); *South West Africa*,

7. The conclusion is clear. Under Article 10 of the Charter the General Assembly can discuss and can make recommendations on a very wide variety of subjects. But there its powers end. Its recommendations are not binding upon the States to which they are addressed and it cannot, therefore, impose its will upon States. Apart from its organizational competences, it is, in fact, only a body "to discuss, to consider, and to recommend, but not to take action [1]". Action, in a proper case, is the prerogative of the Security Council.

D. The Nature and Legal Effect of General Assembly Resolution 2145 (XXI)

8. The crux of General Assembly resolution 2145 (XXI) is operative paragraph 4 in which the Assembly:

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

In their essential nature the other paragraphs of the resolution constitute either the reasons giving rise to the decisions embodied in operative paragraph 4 or the measures taken in consequence of those decisions and in order to implement them, and, as such, these other paragraphs are legally irrelevant to the question of the competence of the Assembly to adopt operative paragraph 4.

9. It is manifest from the language of paragraph 4 that it does not purport to be recommendatory in character. It embodies three separate but related decisions by which the Assembly purports to terminate the Mandate for South West Africa; to make a legal finding to the effect that therefore South Africa has no right to administer the Territory; and to place the Territory under the direct responsibility of the United Nations. The validity of the second and third of these decisions depends in the first instance upon the validity of the decision to revoke the Mandate. If the latter decision is invalid, so are the others and so then are all the measures taken in resolution 2145 (XXI) to implement them.

Second Phase, Judgment, I.C.J. Reports 1966, pp. 50-51; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 233 (dissenting opinion of Judge Winiarski), and pp. 250-251 (dissenting opinion of Judge Moreno Quintana); Dahm, G., *Völkerrecht* (1961), Vol. 2, p. 27; Johnson, D. H. N., "The Effect of Resolutions of the General Assembly of the United Nations", *BYBIL*, Vol. XXXII (1955-1956), pp. 97 *et seq.*; Brierly-J. L., *The Law of Nations* (6th ed.), p. 110; Goodrich and Hambro, *op. cit.*, pp. 151, 152; Dugard, J., "The Revocation of the Mandate for South West Africa", *AJIL*, Vol. 62 (1968), p. 94; Kelsen, H., *The Law of the United Nations* (1951), pp. 193 *et seq.*; Bentwich, N. and Martin, A., *A Commentary on the Charter of the United Nations* (1951), p. 33; Vallat, F. A., "The Competence of the United Nations General Assembly", *Recueil des cours*, Vol. 97, No. II (1959), pp. 230-231; Di Qual, L., *Les effets des résolutions des Nations Unies* (1967), p. 11; Bindschedler, R. L., "La délimitation des compétences des Nations Unies", *Recueil des cours*, Vol. 108, No. I (1963), p. 345; Verdross, *op. cit.*, p. 522; Schwarzenberger, G., *A Manual of International Law* (5th ed.), p. 289.

[1] Goodrich and Hambro, *op. cit.*, p. 150. Or as Dolivet, L., *The United Nations* (1946), p. 28, puts it: "It is clearly the intention of the Charter to make the Assembly the great moral and political platform of the world, *but not to let it take direct action*." (Italics added.)

The decision by which the Assembly purported to terminate the Mandate is one by which it sought to impose its will—to make a political disposition with binding and far-reaching legal effects *erga omnes*. It has, however, been shown that under Article 10 of the Charter the Assembly cannot do more than make recommendations, that these recommendations have no binding effect and that consequently the Assembly can never impose its will upon States. The conclusion is obvious—the Assembly's "decision" to revoke the Mandate for South West Africa is altogether beyond its authorized powers and thus has no legal effect at all [1].

10. It is, moreover, significant that of the few writers who, to the knowledge of the South African Government, have dealt with the question none has attempted to justify the legal validity of General Assembly resolution 2145 (XXI) while several have doubted or denied its validity [2]. Carrillo Salcedo appears simply to accept the fact that the question of South West Africa is a political one and that the Assembly in purporting to terminate the Mandate has proceeded in a political way [3]. According to Rahmatullah Khan and Satpal Kaur:

> "It is one thing to say that the Mandate subsists; that the UN succeeds to the supervisory functions of the League; and that South Africa cannot alter the Status of South-West Africa unilaterally, and it is another thing to claim for the UN the authority to terminate the Mandate as a sanction against the mandatory's misuse, or ineffective performance of the obligations over the mandated territory . . . [4]"

The authors then continue, with reference to the general competence of the United Nations in relation to "territorial administration" and after citing the cases of the Free Territory of Trieste, the Partition of Palestine and West Irian:

> "The burden of all these three precedents is that the UN can assume responsibilities of territorial administration in the event of *full consent* amongst the powers concerned. [Emphasis in original.] The legal authority for such activity may not be an insurmountable obstacle, but consent is of crucial importance.
>
> Thus, one cannot help being sceptical about the legal validity of the termination resolution [i.e., 2145 (XXI)] both on the basis of the World Court's advisory opinions and judgments on the subject and on the basis of the UN competence in general. The only possible legal explanation would be that the International Community which created the Mandate in its League of Nations incarnation might be supposed to have the power

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[1] Unless the "decision" may be regarded as in the nature of a recommendation to States, including South Africa, which seems, however, to be impossible since it is addressed to nobody and by its nature postulates no choice of action.

[2] *Vide*, for instance, Rousseau, Ch., "Chronique des faits internationaux", *Revue générale de droit international public*, No. 2 (1967), p. 384; Bastid, S., "L'affaire du Sud-Ouest Africain devant la Cour internationale de Justice", *Journal du droit international*, Vol. 94 (1967), p. 573; Higgins, R., "The International Court and South West Africa: The Implications of the Judgment", *Journal of the International Commission of Jurists*, Vol. VIII, No. 1 (1967), pp. 29-33.

[3] Carrillo Salcedo, J. A., "Un Caso de Descolonización: El Territorio del Sudoeste Africano", *Revista Española de Derecho Internacional*, Vol. XX (1967), pp. 418-419.

[4] "The Deadlock over South-West Africa", *Indian Journal of International Law*, Vol. 8, No. 2 (1968), p. 184.

to terminate the same through its new institutional reflection, i.e., the United Nations. This, apart from being a far-fetched *explanation*, however, serves as no real *justification* . . . [1]" (Emphasis in original.)

Even Dugard, who considers that it "may at first appear to be ridiculous" to conclude that resolution 2145 (XXI) did *not* have the desired effect of terminating the Mandate, concedes, after enquiry, that this conclusion "flows logically from an examination of the powers conferred upon the General Assembly by its own Charter [2]" because:

"It is trite law that resolutions of the General Assembly not concerned with its own internal management are not legally binding upon states. . . . Such resolutions are only recommendatory in their effect . . . [3]"

E. Conclusion

11. The conclusion, then, is that the "decision" in resolution 2145 (XXI) to revoke the Mandate for South West Africa was *ultra vires* the General Assembly and of no legal effect at all. And since the remainder of that resolution depends upon that decision for its validity, it follows that the whole resolution is without legal effect.

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[1] "The Deadlock over South-West Africa", *Indian Journal of International Law*, Vol. 8, No. 2 (1968), p. 185.

[2] Dugard, *AJIL*, Vol. 62 (1968), p. 95.

[3] *Ibid.*, p. 94. (References to footnotes omitted.)

CHAPTER XI

THE FACTUAL ISSUES

A. Introductory

1. In previous chapters the South African Government has contended, *inter alia*, that the United Nations did not succeed to the supervisory powers of the League, and that the General Assembly was not legally empowered to revoke the Mandate for South West Africa. In this final chapter it will be demonstrated firstly that, even if it were to be assumed that the General Assembly was so empowered, there existed no factual basis which could have justified the revocation of the Mandate, and that the representatives of States which supported the adoption of resolution 2145 (XXI)[1] either were not concerned whether such a factual basis existed, or did not apply their minds to the facts available to them, with the result that they were under a complete misapprehension as to the true factual position, and more especially the nature of South Africa's administration of South West Africa. Secondly, it will be demonstrated that if the demand for withdrawal of South Africa's administration were to be acceded to, it would have deleterious consequences for all the peoples of South West Africa[2]. It will consequently be submitted that even if the contentions advanced in the previous chapters were not to be accepted by the Court, the said resolution is, in any event, invalid for the reasons set out herein. Moreover, even if the resolution were to be regarded as a valid recommendation, it will be shown that compliance therewith would be detrimental to the interests of the inhabitants of South West Africa.

2. It will be recalled that the "decision" to revoke the Mandate embodied in resolution 2145 (XXI) was sought to be based on the ground "that South Africa has failed to fulfil its obligations in respect of the administration of the mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa, and has, in fact, disavowed the Mandate . . .[3]"

It is not clear what was meant by the phrase "has . . . disavowed the Mandate". Presumably the authors of the resolution had in mind assertions on the part of South Africa to the effect that the Mandate had lapsed. Whilst it is true that the South African Government contends that the Mandate did lapse on the dissolution of the League of Nations, it has consistently expressed an intention to administer the Territory in the spirit of the Mandate[4]: in other words, to carry out, as a moral duty, its erstwhile substantive obligations as if the Mandate still existed. The resolution under consideration did not purport to rely on the "disavowal" of the Mandate as a separate ground for revocation thereof, and, in the light of South Africa's declared intent, its legal contentions regarding the lapse of the Mandate cannot, it is submitted, constitute such a separate ground.

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[1] *Vide* Chap. VI, para. 1, *supra*.

[2] As to the requirements of justice in an enquiry of this nature, *vide* Chap. V, para. 43, *supra*.

[3] *Vide* Chap. VI, *supra*.

[4] *Vide, e.g., GA, OR*, Second Sess., Fourth Comm., 31st Meeting, pp. 3-4; *I.C.J. Pleadings, South West Africa*, Vol. IV, p. 201.

As has been demonstrated above [1], the revocation of the Mandate cannot be justified on the basis of a breach of a treaty or agreement existing between the United Nations and South Africa, and, indeed, in adopting resolution 2145 (XXI) the General Assembly purported to act *qua* supervisory organ not *qua* contractual party. And as a purported supervisory organ, the United Nations must surely have been concerned with the manner in which South Africa administered the Territory, rather than with views expressed by South Africa as to the legal position. It is consequently only South Africa's alleged failure to ensure the moral and material well-being and security of the indigenous inhabitants of the Territory which is relevant for present purposes [2].

3. In the succeeding sections (B and C) it will be shown that the whole issue of South West Africa must be seen in its context as part of a political campaign designed to secure the independence of South West Africa as a single political unit; that majorities in the General Assembly, although ostensibly concerned with the material and moral well-being of the inhabitants of the Territory, were in reality intent on attaining their political ends irrespective of all other considerations; that relevant resolutions were adopted as a result of the existence of a belief (real or simulated) that South Africa's administration of the Territory is oppressive of the indigenous inhabitants; that, in so far as this belief may have been genuinely held, it can be attributed largely to demonstrably false allegations made by petitioners; and that certain representatives in the United Nations have not only ignored expositions of the true facts but, on the contrary, have eagerly accepted allegations from obviously untruthful sources.

Section D will be devoted to a consideration of the proceedings leading up to the adoption of resolution 2145 (XXI), and will demonstrate that the above-mentioned political motivations, coupled with a failure by delegates to have regard to all the information available to them, played a decisive role in the relevant proceedings of the General Assembly. Section E will contain a resumé of subsequent events which fortify the conclusions flowing from the previous sections, and in section F the South African Government will give an exposition of recent information concerning the Territory from which it will appear that it would be detrimental to the interests of the inhabitants if South Africa were to withdraw therefrom in the light of the increased progress and well-being shown in all spheres of life.

B. The Political Background to the Adoption of Resolution 2145 (XXI)

4. In its Counter-Memorial in the *South West Africa* cases the Government of South Africa demonstrated that it was only after the outbreak of the Second World War that the impetus of anti-colonial feeling in Africa gathered momentum [3]. The demand for an ever-increasing share in the governments of their countries found growing support among the politically conscious Africans, and was strongly influenced by events in other parts of the world, particularly

[1] *Vide* Chap. VI, paras. 5-15, *supra*.

[2] It is true that operative paragraph 3 of resolution 2145 (XXI) referred to South Africa's failure to fulfil its obligations *and* to ensure the said well-being and security, but from the context it appears reasonably clearly that it was precisely the obligation to ensure the well-being and security of the indigenous inhabitants which South Africa was alleged to have failed to fulfil. This is borne out by the attacks, during the debates preceding the adoption of the resolution, on the application of the policy of separate development to the Territory.

[3] *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 431-438.

Asia. The result of this awakening African nationalism or anti-colonialism forms a part of contemporary history and it is accordingly not necessary to give a full account thereof in this written statement. It was reflected, *inter alia*, in the constitutional development of the various territories in Africa, south of the Sahara [1]. There are, however, certain aspects of the anti-colonial movement which are of relevance for present purposes, and which will consequently be dealt with in the succeeding paragraphs.

5. The development of participation by Africans in the central government of their countries continued to be a gradual process up to approximately the 1950s, after which it moved at an ever-accelerating pace. This reflected not only the results of a strengthened demand for independence on the part of the peoples of the territories concerned, but also the effects of increased pressure in international life, particularly by the newly independent States of Africa and Asia.

The result was that, whereas up to the early 1950s it was generally accepted that many or most of the territories in Africa would not be granted independence for a generation or more, most of them attained self-government or independence before the end of that decade, or within the first few years of the next. This accelerated political progress reflected, *inter alia*, a significant change in attitudes towards the state of advancement required for self-government or independence. The earlier attitude had been that independence or self-government should not be granted before a territory had reached a reasonably advanced stage of economic, social and political development. The colonial and former colonial peoples were, however, progressively less prepared to accept the validity of this attitude. In this regard, for instance, the representative of Guinea is reported to have said in 1961:

> "Irrespective of the state of development of a particular Territory, its full independence based on territorial integrity was the *sine qua non* for rapid progress in all fields [2]."

Many similar statements were made in various United Nations organs as from the latter years of the 1950s [3].

6. This view found increasing support in world politics. In 1960 the well-known Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by the United Nations General Assembly by 89 votes to nil with 9 abstentions (all African members, who were present, voting with the majority; the Colonial powers and administering authorities generally abstaining) [4]. It contained, *inter alia*, the following paragraphs:

> "1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 3. *Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.*

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[1] *Ibid.*, pp. 509-527.
[2] *GA, OR*, Sixteenth Sess., Fourth Comm., 1186th Meeting, 26 Oct. 1961, p. 186.
[3] *Vide I.C.J. Pleadings, South West Africa*, Vol. II, pp. 444-445.
[4] *GA, OR*, Fifteenth Sess., 947th Plenary Meeting, 14 Dec. 1960, pp. 1273-1274. This resolution is reproduced as Annex A to Chap. VI, above.

. . . . . .

5. *Immediate steps shall be taken*, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, *without any conditions or reservations*, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, *in order to enable them to enjoy complete independence and freedom* [1]." (Italics added.)

Reference was made to this declaration, and reliance placed thereon, in numerous subsequent resolutions.

7. There are two aspects of the process of decolonization which require emphasis at this stage. The first, which has already been noted, is its unexpected swiftness. The other, which is probably both a cause and an effect of the rapidity with which the leaders of the decolonization campaign attained their major ends, is the great deal of emotion engendered by this issue. Amongst many people, particularly in the newly independent States, there developed an intense desire to eliminate the last vestiges of colonialism (or what seemed to them to amount to colonialism). Examples thereof will be given below, where it will be shown that South Africa's policies have frequently been stigmatized as amounting to colonialism [2].

8. The South African Government resents statements to this effect. It is not opposed to the basic principle of self-determination (as distinguished from the manner in which some States seek to apply it), and it does not question the soundness of the principle that guardianship and trusteeship exercised over peoples unable to stand by themselves, are inherently intended to be terminated upon attainment by the "wards" of a stage of maturity which enables them to decide upon their own future. If, upon reaching such a stage, the wards strongly desire self-government and independence, there can be no question about a moral right on their part to attain such ideal, nor about the soundness of the policy of allowing them to do so—in both instances, however, subject to due consideration of adjustments to be made, and of a balance to be struck between competing or conflicting claims of comparable moral potency on the part of others.

As far as South West Africa is concerned, the South African Government has clearly pledged itself that the objective of its administration is self-determination for all the peoples of South West Africa. Thus, in his statement before the General Assembly on 12 October 1966, the South African Foreign Minister spoke of "the advancement of the peoples concerned to their self-determination and self-realization" as "a principle to which [the South African] Government is completely committed [3]".

On 14 December 1967 the South African representative in the General Assembly repeated this objective in the following words:

> "The principle of self-determination to which the South African Government is committed leaves the way open for unlimited possibilities compatible with the choice which each population group might eventually

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[1] *GA*, resolution 1514 (XV), 14 Dec. 1960, in *GA*, *OR*, Fifteenth Sess., Sup. No. 16 (A/4684), p. 67.

[2] *Vide e.g.*, Mr. Dugersuren (Mongolia), *GA*, *OR*, Nineteenth Sess., 1306th Plenary Meeting, 17 Dec. 1964, p. 9; Mr. Achkar (Guinea), *GA*, *OR*, Nineteenth Sess., 1308th Plenary Meeting, 21 Dec. 1964, p. 14.

[3] *GA*, *OR*, Twenty-first Sess., 1439th Plenary Meeting, 12 Oct. 1966, p. 21.

wish to make. The South African Government's approach to the whole question of self-determination was outlined by various members of my Government. For instance, the former Prime Minister stated in 1964 in the South African Parliament that . . .

> '. . . the basic principles of justice require that we should not allow the development of one imperialistic group but that each group should be able to enjoy its full rights: the Whites, the Ovambos, the Hereros, the Okavangos, the Namas, the Damaras and the Basters' [1]."

9. The charges that South Africa pursues colonialist policies and that it denies the inhabitants of South West Africa any progress towards self-determination, are based upon the mistaken premise that self-determination in any given territory must necessarily follow a particular pattern, namely universal adult suffrage of the population as a whole within a single territorial unit. There is no justification for such a premise, which entirely ignores the fact that circumstances may differ from one territory to another, and that such a predetermined pattern may not be suitable at all in the circumstances of a particular territory. No such premise was contained in the objectives of the mandates system, nor is it embodied in the principles enunciated in the Charter of the United Nations. On the contrary, the very provisions of Article 73 of the Charter refute such a proposition. This Article speaks of the recognition of the principle that the interests of the inhabitants of Non-Self-Governing Territories are paramount and requires that their advancement is to be ensured "with due respect for the culture of the peoples concerned". It proceeds to proclaim in explicit terms the "ideal to develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples in their varying stages of advancement".

For present purposes it is of no consequence whether South West Africa is or is not a Non-Self-Governing Territory within the meaning of Article 73. In promoting progress towards self-determination it must be a principle of universal application that the interests of the peoples concerned are paramount, that due account should be taken of their political aspirations, and that proper regard should be had for the circumstances of each territory, its *peoples* and their varying stages of advancement.

10. The proceedings brought against South Africa by Ethiopia and Liberia in this Court, as well as the adoption of various relevant resolutions by organs of the United Nations culminating in the adoption of General Assembly resolution 2145 (XXI), are to be seen as part of the political campaign aimed at independence for South West Africa (upon the basis of universal franchise within a unitary system) as an overriding objective to which all other aspects and indications are to be subordinated. This feature appears clearly from debates at, and resolutions of, conferences of certain States and organs of the United Nations, which will be dealt with in the succeeding paragraphs.

11. In July 1959, a conference was held at Sanniquellie, Liberia, between the Presidents of Liberia and Guinea, and the Prime Minister of Ghana. In a joint communiqué the leaders of the said three States stated in regard to South West Africa:

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[1] UN doc. A/PV. 1632 (14 Dec. 1967), pp. 89-90.

> "We maintain that this Territory is in fact a Trust Territory of the United Nations, and as such the United Nations cannot relinquish its legal and moral responsibilities to the indigenous inhabitants who are entitled to the same treatment given to other Trust Territories. Consequently, we will request the United Nations to give further consideration to this question, declare the Territory not a part of South Africa and fix a date for the independence of the Trust Territory of South West Africa [1]."

It is to be noted that the composite aims of trusteeship as set out in the Charter, viz., to promote the advancement of the inhabitants of the territories in a number of different respects, had, in the minds of the authors of the communiqué, been reduced to the one single aim, namely the speedy attainment of independence irrespective of other considerations.

12. As was demonstrated in the Counter-Memorial in the *South West Africa* cases, the same attitude towards dependent territories, and particularly South West Africa, permeated the proceedings of the Monrovia Conference of Foreign Ministers of Independent African States held later in the same year [2], and of the Second Conference of Independent African States in 1960 [3]. At this Conference, a resolution was adopted which appealed to the United Nations "*to fix a date for the independence of the territory of South West Africa* [4]". (Italics added.) This point of view was again embodied in a resolution taken by the Summit Conference of independent African States at its Meeting in Addis Ababa on 22 to 25 May 1963, and in which the *South West Africa* cases were considered to be part of a concerted effort to advance the process of "decolonization" towards the "unconditional attainment of national independence" of all African territories [5].

13. Also in the United Nations, action relative to South West Africa was considered to be an aspect of "decolonization". In 1961 the General Assembly adopted resolution 1702 (XVI) which, recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples, decided to establish a United Nations Special Committee for South West Africa whose task would be to achieve, in consultation with South Africa, *inter alia*, the following objective:

> "*(e)* Preparations for general elections to the Legislative Assembly, based on universal adult suffrage, to be held as soon as possible under the supervision and control of the United Nations [6]."

During its next session in 1962 the General Assembly adopted resolution 1805 (XVII) in which resolution 1702 (XVI) was recalled and re-affirmed. The Secretary-General of the United Nations was requested, *inter alia*, "to take all necessary steps to establish an effective United Nations presence in South West Africa [7]". According to a statement of Mr. Purevjal of Mongolia the relevant draft resolution was sponsored by the Afro-Asian group [8].

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[1] "Joint Communiqué", in *The First West African Summit Conference held at Sanniquellie*, 15-19 July 1959, issued by the Liberian Information Service, p. 30.
[2] 4-8 Aug. 1959. *Vide* Legum, C., *Pan-Africanism* (1962), p. 165.
[3] *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 447-478.
[4] Legum, *op. cit.*, p. 168.
[5] Official text, resolutions, in *Summit*, C.I.A. S/Plen.2/Rev.2, pp. 4-5.
[6] *GA, OR*, Sixteenth Sess., Sup. No. 17 (A/5100), p. 40.
[7] *Ibid.*, Seventeenth Sess., Sup. No. 17 (A/5217), p. 39.
[8] *Ibid.*, Fourth Comm., 1386th Meeting, 15 Nov. 1962.

C. The Attacks on South Africa's Administration of the Territory

I. General

14. This section is devoted to an examination of the quality and sources of the attacks which have been made on South Africa's administration of South West Africa as a part of the above-mentioned political campaign. In this regard it will be shown that the campaign has been characterized by emotional outbursts rather than by any attempt at an objective assessment of the true facts, and that the most fantastic assertions have been used as a basis for violent attacks upon South Africa's policies as applied in South West Africa; that such attacks flowed from a complete misapprehension or disregard of the true nature of these policies and the eager acceptance of allegations from obviously untruthful sources; and that although South Africa's policies in general have been condemned in United Nations resolutions, this was done on the basis of a conception that these policies amounted to an oppressive system, discriminating against some groups for the benefit of others.

In the course of the campaign for the so-called "decolonization" of South West Africa available sources which set out the true beneficial nature of South Africa's policies, or which refuted specific allegations of violations of the original obligations under the Mandate, were completely ignored. In the succeeding paragraphs a few examples will be given to illustrate the attitudes adopted by some representatives at the United Nations.

II. The Quality and Sources of the Criticism against South Africa's Policies

15. South Africa's policies have often been summarily stigmatized as being inhuman, oppressive and aimed at the domination of the Whites over the non-Whites; the members of the South African Government have been referred to as fascists or nazis, and there have been repeated references to supposed murders and massacres of the indigenous inhabitants of South West Africa.

During 1961 Mr. Yifru of Ethiopia said in the General Assembly:

> "The Union Government, in violation of the mandate, had made South West Africa in recent years a prison cell by garrisoning armed forces on all the frontiers of the land so as to continue its unhindered massacre, imprisonment and, in short, wholesale suppression of the innocent inhabitants of the international territory [1]."

This statement was echoed as follows by Mr. Grimes of Liberia:

> "The abominable and iniquitous policy of apartheid practised by the Republic of South Africa remains a cruel and stubborn problem and a cancerous blight on the continent of Africa. African States will not relent in their efforts to bring about the end of this repressive system . . . the injustice, pain, misery, suffering and death inflicted on innocent Africans by a horrible system . . . are bound to have serious repercussions [2]."

Other representatives have spoken in much the same vein. Thus, Mr. Singh of India has said: "The Government of South Africa is blindly stepping from one heinous act to another [3]", and Mr. Ramani of Malaysia spoke of the

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[1] *GA, OR*, Sixteenth Sess., 1020th Plenary Meeting, 2 Oct. 1961, p. 177.
[2] *Ibid.*, Nineteenth Sess., 1300th Plenary Meeting, 11 Dec. 1964, p. 20.
[3] *Ibid.*, p. 13.

"sacred cause of ridding humanity of the shame of apartheid", which he described as "this crime against humanity [1]".

16. The sources of the above statements, in so far as they are not mere statements of political attitudes, and in so far as they purport to have any factual basis at all, are to be found in allegations made by petitioners.

It is impossible to understand the true nature of the proceedings in the United Nations organs relative to conditions in South West Africa unless one has regard to the role which petitioners and petitions have played in the deliberations of such organs. Persons with real or imaginary grievances against the South African administration in South West Africa commenced, in the early 1950s, to petition the United Nations. The oral hearing of petitioners by the organization was approved by this Court in 1956 [2]. Thereafter, in course of time, a class of professional petitioners came into being, which played a big role in the activities of the United Nations, as will be shown.

17. In their Memorials in the *South West Africa* cases the Applicants (Ethiopia and Liberia) relied on a number of extracts from petitions (both oral and written). They referred to "the cumulative effect and thrust of the petitions, received from so wide a variety of independent sources", and advanced the proposition that the extracts quoted by them illustrated "the manner in which the daily lives of the inhabitants are affected [3]". South Africa dealt thoroughly with this aspect in its Counter-Memorial [4] and demonstrated that, on the whole, the petitions relied on by the Applicants had emanated from a relatively small group of biased professional petitioners. Furthermore, each and every extract was fully dealt with, the true facts were set out and the gross distortions and pure fabrications in the extracts were exposed. It was also shown that a large percentage of the petitioners (who in any event constituted a small body of men) were not even resident in South West Africa, and that their activities were actuated by political ambition. In their Reply the Applicants did not controvert this demonstration; indeed, the Reply was totally silent on this point.

During the course of the oral proceedings in the *South West Africa* cases the Applicants admitted as true all South Africa's factual allegations in the pleadings [5]. This meant, *inter alia*, that South Africa's statements concerning the petitioners, which proved the utter unreliability of their allegations, stood admitted. Indeed, the agent of the Applicants was compelled to state: "The

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[1] *GA, OR*, 1306th Plenary Meeting, 17 Dec. 1964, p. 11. The aforesaid emotional approach is further illustrated by statements made by the following representatives: Mr. Tchichelle (Congo, Brazzaville), *GA, OR*, Sixteenth Sess., 1037th Plenary Meeting, 16 Oct. 1961, pp. 459, 460; Mr. Puplampu (Ghana), *GA, OR*, Seventeenth Sess., 1143rd Plenary Meeting, 5 Oct. 1962, p. 345; Mr. Mazigh (Libya), *GA, OR*, Nineteenth Sess., 1296th Plenary Meeting, 9 Dec. 1964, p. 3; Mr. Dualeh (Somalia), *GA, OR*, Nineteenth Sess., 1290th Plenary Meeting, 4 Dec. 1964, p. 7; Mr. Mahmoud Riad (UAR), *GA, OR*, Nineteenth Sess., 1298th Plenary Meeting, 10 Dec. 1964, p. 4; Mr. Kambona (Tanzania), *GA, OR*, Nineteenth Sess., 1298th Plenary Meeting, p.15; Mr. Chalmers (Haiti), *GA, OR*, Nineteenth Sess., 1304th Plenary Meeting, 16 Dec. 1964, p. 3; Mr. Karunatilleke (Ceylon), *GA, OR*, Twelfth Sess., Spec. Pol. Comm., 56th Meeting, 31 Oct. 1957, p. 71.

[2] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23.

[3] *I.C.J. Pleadings, South West Africa*, Vol. I, p. 67.

[4] *Ibid.*, Vol. IV, pp. 1 *et seq.*

[5] *Ibid.*, Vol. IX, p. 21.

Applicants have not relied upon the accuracy of statements in such petitions . . . [1]"

And, after this concession had been made, the South African counsel said:

". . . we know, and we have demonstrated on the pleadings already, that no reliance can be placed upon [the] evidence [of the petitioners]. We would consider quite seriously, if my learned friends should wish to call them, whether we ought not to offer to pay their witness fees so as to allow us the privilege of cross-examining them [2]."

The Applicants did not react to this invitation.

18. In his evidence given in the course of the oral proceedings Mr. Dahlmann confirmed South Africa's demonstration that the petitioners constituted a small body of men with political ambitions [3]. As regards the veracity of the petitioners, Mr. Dahlmann said the following:

"To us in South West Africa, it is sometimes very hard to understand these petitions. Many of them, whether they come from within South West Africa or from abroad, contain false statements and serious distortions and exaggerations of the real situation. Only to name a few which are made very often, for example, that there is a large scale of militarization in South West Africa, there is a missile tracking station, that the non-Whites within the territory live in conditions of slavery, that genocide is committed against the non-Whites, that they are being exterminated or murdered, that they have no schools, no hospitals [4]."

The Applicants did not even attempt to attack this evidence in cross-examination, nor did they call any witness to contradict Mr. Dahlmann. It is clear, therefore, that in the *South West Africa* cases it was conclusively established that no reliance could be placed on the evidence of the petitioners. In the succeeding paragraphs it will be shown to what extent, by contrast, reliance was placed on their evidence in organs of the United Nations.

19. A most cursory reading of statements made during relevant debates renders it clear that the greatest importance was attached to the allegations of the petitioners before United Nations organs, that even the most fanciful allegations were unquestioningly accepted as establishing the truth, and that the heavy reliance which was placed on the said evidence played an extremely important role in the nature of the resolutions which were adopted by the various Committees of the United Nations and also by the General Assembly itself. This is hardly surprising in view of the common purpose of certain States and the petitioners to impose a particular type of political settlement on South West Africa.

The manner in which this common purpose functions in practice, can best be illustrated by showing how certain fantastic statements readily appear in the evidence of the petitioners, and how they are accepted and echoed and acted upon in United Nations organs, paving the way for acceptance of a resolution condemning South Africa's administration of South West Africa. Space does not permit the drawing of a full picture. In the emotional and biased setting of the campaign against South Africa with which both the petitioners and certain delegations to the United Nations were associated, the attacks on South Africa

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[1] *Ibid.*, p. 42.
[2] *Ibid.*, p. 110.
[3] *Ibid.*, Vol. XI, pp. 455 *et seq.*
[4] *Ibid.*, p. 480.

and its policies bristle with factual inaccuracies, with distortions and with baseless accusations. It is proposed to deal only with a few categories of charges which regularly dominated the discussions.

20. Allegations which describe South Africa's policies as being policies of genocide, or equal to genocide, occurred with monotonous regularity. South Africa's policies were characterized as racial extermination and as having the objective of the physical destruction of a nation. These allegations are so preposterous that they require no refutation—indeed, they were not even raised by the Applicants in the *South West Africa* cases.

In the report of the Committee on South West Africa to the 16th Session of the General Assembly in 1961, Mr. Ngavirue of the South West Africa National Union (SWANU) was quoted as follows:

> "Mr. Ngavirue stated that while it was obvious that there was a great need for welfare services, one could not expect philanthropy from the ruthless South African Government which was bent on the task of doing anything possible that would directly or indirectly exterminate the indigenous population. Hence, there was absolutely nothing done to promote the general welfare of the indigenous population . . . [1]"

Mr. Kerina, who was at the time the President of the Ovamboland Peoples' Organization, referred in October 1959 to artificial conditions which had been created, with the drought as pretext, "in order to put hundreds of thousands of human beings at the mercy of the Government and to wipe out a race [2]"; and on 8 May 1964, Mr. Mbaeva of SWANU, with reference to the Odendaal Commission Report [3], stated:

> "The Commission was appointed to devise means through which a large number of Africans or non-Whites should be exterminated through starvation under the guise of being developed . . . unless the United Nations takes immediate action to prevent Verwoerd and his gang from carrying out their programme for racial genocide, there will be a serious danger that may be beyond the control of this Organization [4]."

21. The next category of accusations often made by petitioners is to the effect that South Africa herds the non-White population into concentration camps, that the non-Whites are treated like animals, that they have been reduced to sub-human status and that conditions of naked terror exist. Thus, Mr. Kozonguizi in his oral statement to the Committee on South West Africa said that the South African Government "had transformed our country into a huge concentration camp and our people into slaves in the name of its exclusive policy of white supremacy [5]", and Mr. Kerina stated before the Fourth Committee that Natives were "herded into concentration camps [6]".

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[1] *GA, OR*, Sixteenth Sess., Sup. No. 12 A (A/4926), p. 17.

[2] *Ibid.*, Fourteenth Sess., Fourth Comm., 909th Meeting, 14 Oct. 1959, p. 136.

[3] *Vide I.C.J. Pleadings, South West Africa*, Vol. IV, p. 201.

[4] UN doc. A/AC.109/PV.225 (15 July 1964), pp. 26-27.

[5] *GA, OR*, Fourteenth Sess., Sup. No. 12 (A/4191), p. 41.

[6] *GA, OR*, Eleventh Sess., Fourth Comm., 571st Meeting, 11 Dec. 1956, p. 11. Statements in similar vein were made by the following petitioners: Mr. Nujoma, *GA, OR*, Fifteenth Sess., Fourth Comm., 1052nd Meeting, 15 Nov. 1960, pp. 312, 313; Rev. Markus Kooper, *GA, OR*, Fifteenth Sess., Fourth Comm., 1050th Meeting, 14 Nov. 1960, pp. 302, 303; Mr. Kuhangua, *GA, OR*, Fifteenth Sess., Fourth Comm., 1052nd Meeting, 15 Nov. 1960, p. 311; Mr. Kuhangua, *GA, OR*, Sixteenth Sess., Fourth Comm., 1219th Meeting, 21 Nov. 1961, p. 390.

22. The third category of accusations comprises allegations which are often levelled and also reflected in the reports of the Committee on South West Africa, to the effect that South Africa is depriving the non-White population in South West Africa of "the richest part of the Territory" and confining them to "desert-like" or "unhealthy" areas to make way for white settlers.

These charges were also made by the Applicants in the *South West Africa* cases. For example, in their Memorials they alleged that "the mandatory has progressively reduced the proportion of farm land available for cultivation or pastoral use by the 'Native' population . . . [1]". And in their Reply the Applicants stated that " 'non-White' inhabitants are confined to the poorest areas of the Territory . . . [2]". These charges were later abandoned by the Applicants, and the untenability thereof, and the falsity of the allegations contained in the extracts which will be cited hereunder, are demonstrated by a reference to the true facts as set out in South Africa's pleadings in the *South West Africa* cases [3], and also the evidence of Professor Logan given during the oral proceedings [4].

23. On 16 November 1960, Mr. Kozonguizi stated before the Fourth Committee:

> ". . . the reservations in which the African population lived were in the most infertile part of the Territory, for example in the Kalahari Desert. If any good water were found in a reservation, the area was handed over to European farmers and the Africans were forced to move away [5]."

Mr. Nujoma, another petitioner, stated that the South African Government had intended "to eliminate all Native reserves in the Police Zone in order to enable new settlers to come to the country [6]", and that "the Africans had already been forced to leave their homes for a desert area without sufficient water or pasturage for their cattle [7]".

24. Many examples may be given of how the petitioners' allegations were simply echoed by representatives of certain States. Thus, Mr. Baghdelleh of Tanganyika, now Tanzania, referred to the South African "policy of genocide [8]"; Mr. Gassou of Togo alleged that the people in South West Africa "had been dying of hunger or had been murdered in concentration camps [9]"; and Mr. Diallo of Mali said in 1962 that "the indigenous population were herded into reserves consisting of the least fertile land [10]".

25. The last category of allegations to which reference is made by way of illustration, comprises allegations relating to the alleged militarization of South West Africa. In this regard it is pertinent to note that in the Memorials in the *South West Africa* cases the Applicants alleged that South Africa had established and maintained three military bases within South West Africa [11]. This allegation, which had its origin in United Nations resolutions based on the

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[1] *I.C.J. Pleadings, South West Africa*, Vol. I, p. 118.
[2] *Ibid.*, Vol. IV, p. 464.
[3] *Ibid.*, Vol. VI, pp. 255-266.
[4] *Ibid.*, Vol. X, pp. 367-363.
[5] *GA, OR*, Fifteenth Sess., Fourth Comm., 1053rd Meeting, 16 Nov. 1960, p. 317.
[6] *Ibid.*, Seventeenth Sess., Fourth Comm., 1371st Meeting, 2 Nov. 1962, p. 275.
[7] *Ibid.*, 1374th Meeting, 6 Nov. 1962, p. 292. *Vide* also the statement made by the Rev. Markus Kooper at the same meeting, p. 291.
[8] *Ibid.*, Spec. Pol. Comm., 328th Meeting, 10 Oct. 1962, p. 1.
[9] *Ibid.*, Fifteenth Sess., Fourth Comm., 1076th Meeting, 6 Dec. 1960, p. 457.
[10] *Ibid.*, Seventeenth Sess., Fourth Comm., 1385th Meeting, 15 Nov. 1962, p. 373. For further examples, *vide I.C.J. Pleadings, South West Africa*, Vol. XII, pp. 116-124.
[11] *I.C.J. Pleadings, South West Africa*, Vol. I, pp. 181-183.

evidence of petitioners, was refuted in South Africa's Counter-Memorial, where it was pointed out that a full explanation, showing an absence of militarization, had been given in 1959 to the Fourth Committee by South Africa's representative [1]. Eventually, the Applicants admitted, for the purposes of the proceedings, South Africa's denial of the existence of military bases and did not attempt to contradict the evidence of General Marshall to the effect that he had not seen anything in South West Africa that could be regarded as a military base, and that the Territory was less militarized and more under-armed than any territory of its size he had ever seen in the world [2]. Indeed, the Applicants' agent referred to General Marshall as "a recognized military authority and widely read as such in our native country, [i.e., the U.S.A.] [3]" and said concerning the inspection which the General had conducted in South West Africa: ". . . I may say that this is the first inspection of which the United Nations will have heard and this information will be transmitted to them [4]."

26. Despite the above, more or less identical allegations continued to be made. In this regard the 1965 report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, dated 19 August 1965, is illuminating. According to this report Mr. Nujoma of SWAPO stated that "in violation of the Mandate, South Africa had established military bases in Windhoek, Walvis Bay and at Katima Mulilo in the Eastern Caprivi Zipfel [5]", and Mr. Kuhangua said that it was the Committee's duty to seek effective ways to put an end to "the *apartheid* régime's military ventures in the international territory of South West Africa". He also referred to the "heavy military build-up in South West Africa [6]". Another petitioner, Mr. Kerina, felt it fit to state that "South Africa had established numerous military bases in South West Africa . . . [7]".

But this was not all—Mr. Make, of the Pan-Africanist Congress, who had never set foot in South West Africa, testified that "as part of its military activities, South Africa was now building nuclear reactors in its own country and in South West Africa [8]". Mr. Kerina said that "the people of South West Africa were not surprised to see . . . that a nuclear reactor had been built in their country [9]"; and Mr. Kuhangua stated "that the greatest danger to South West Africa lay in the Federal Republic of Germany's decision to establish a rocket station in the Namib Desert [10]".

These allegations were intended to refer to the Max Planck Institute for Aeronomy at Tsumeb. It is therefore pertinent to note that in the oral proceedings during 1965 General Marshall testified that he had visited the institute at Tsumeb and that it had no military function whatsoever [11].

27. Once again the petitioners' allegations were unhesitatingly accepted. The representative of Tanzania is reported to have said:

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[1] *I.C.J. Pleadings, South West Africa*, Vol. IV, p. 60.
[2] *Ibid.*, Vol. IX, pp. 21 and 235; Vol. XI, p. 587.
[3] *Ibid.*, Vol. XI, p. 587.
[4] *Ibid.*, p. 588.
[5] UN doc. A/6000/Rev. 1, para. 77, p. 126, in *GA. OR*, Seventeenth Sess., Annexes (addendum to agenda item 23).
[6] *Ibid.*, p. 130.
[7] *Ibid.*, p. 133.
[8] *Ibid.*, p. 127.
[9] *Ibid.*, p. 134.
[10] *Ibid.*, p. 128.
[11] *I.C.J. Pleadings, South West Africa*, Vol. XI, p. 585.

"Turning to the military build-up in South West Africa, his delegation had been greatly disappointed by the role of West Germany and the United States of America in nuclear development in South West Africa as disclosed by the petitioners. . . . The United States must understand that South Africa's policy was to exterminate the Africans and that it would never hesitate to use atomic bombs for that purpose [1]."

Before the Disarmament Committee, the same representative of Tanzania alleged in 1965 that the South African Government had established an atomic testing centre at Tsumeb [2].

According to the above-mentioned report the representative of Yugoslavia stated:

". . . it was impossible to disregard the testimony of the petitioners concerning South Africa's military preparations, the installation of military bases in the Territory of South West Africa, as also the secret chemical and nuclear research in which certain circles in Western Europe, particularly the Federal Republic of Germany, were participating . . . [3]"

And the representative of Ethiopia, notwithstanding the admissions of his Government's counsel in this Court [4], stated that "by establishing military bases in the Territory, it [South Africa] had committed a serious breach of Article 4 of the Mandate [5]".

28. The above exposition illustrates the manner in which wild and fantastic assertions by petitioners shape the judgment and resolutions of the organs of the United Nations involved. If space had permitted, it would have been possible to demonstrate that the same had happened in respect of each of the major untruths which form the petitioners' favourite themes, such as that South Africa's policies amount to genocide, that it is tantamount to slavery, that the best land is stolen from the Natives, that they are herded on to inferior land and into concentration camps, that education is aimed at keeping them inferior, that they are denied medical assistance, etc.

For present purposes it suffices to note that the above references to speeches made by certain representatives, clearly show that they voted for relevant resolutions of the United Nations in the belief (real or ostensible) that the testimony of the petitioners was true [6].

29. One of the clearest indications of the influence exerted by the statements of petitioners in the deliberations and decisions of United Nations organs, is afforded by the following extract from a statement made by Mr. Busniak of Czechoslovakia before the Fourth Committee during the Fourteenth Session of the General Assembly:

"The petitioners, in particular, contributed essential elements to the debate, and it was often on the basis of the direct information they provided that delegations decided what position to adopt [7]."

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[1] UN doc. A/6000/Rev. 1, p. 138.
[2] *DC, OR*, 82nd Meeting, 17 May 1965, p. 12.
[3] UN doc. A/6000/Rev. 1, p. 137.
[4] *Vide* para. 17, *supra*.
[5] UN doc. A/6000/Rev. 1, p. 140.
[6] During the oral proceedings of the *South West Africa* cases South Africa demonstrated the extent to which reports of the Committee on South West Africa had been greatly influenced by the testimony of petitioners. *Vide I.C.J. Pleadings, South West Africa*, Vol. XII, pp. 129-132.
[7] *GA, OR*, Fourteenth Sess., Fourth Comm., 914th Meeting, 19 Oct. 1959, p. 161.

30. Although the South African representatives never attended the hearing of petitioners, because of South Africa's contention that the Committees concerned were not competent to grant such hearings, they did at times give clear factual information concerning the statements of petitioners, and corrected untrue and erroneous evidence given by them. Unfortunately, the reactions of representatives of other States were often to dismiss the statements of South Africa's representative and to confirm their implicit faith in the allegations of the petitioners. Thus, Mr. Achkar of Guinea said:

> "The representative of Australia had suggested that the report of the Committee on South West Africa might not be fully in accordance with the facts, since that Committee had not visited the Territory; the petitioners, however, were all from South West Africa and, while there was no reason to doubt their statements, there were innumerable reasons for doubting those of the Mandatory Power [1]."

And Mr. Carpio of the Philippines stated:

> "He wondered whom the Committee was expected to believe: the petitioners, who came from the Territory and asserted that the Native reserves were fenced, or the Minister for Foreign Affairs, who had probably never been to the Territory and who maintained that that was not the case [2]."

It is consequently not surprising that every year since 1955 the General Assembly has passed resolutions taking note of statements made by the petitioners [3].

31. It is submitted that the exposition in the preceding paragraphs justify the following conclusions: firstly, that the allegations by petitioners on matters of fundamental importance regarding South Africa's policies and actions have been patently false; secondly, that such allegations have nevertheless been repeated consistently and systematically, and, unfortunately, have been accepted by a large number of representatives of States and by Committees and organs of the United Nations; thirdly, that the attitudes of a large number of delegations have been influenced by the allegations of petitioners; and fourthly, that the factors mentioned clearly played a major role in the adoption of United Nations resolutions condemning South Africa's administration of the Territory.

The last conclusion is fortified by the fact that in the debates preceding the adoption of the aforesaid resolutions, most of the statements made in support thereof were merely repetitive of the petitioners' allegations [4].

III. Reactions to Expositions of the True Facts

(a) *The Visit of Mr. Carpio and Dr. Martinez de Alva to South West Africa*

32. General Assembly resolution 1702 (XVI), adopted on 19 December 1961, contained the following:

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[1] *GA, OR*, Sixteenth Sess., Fourth Comm., 1247th Meeting, 13 Dec. 1961, p. 587.

[2] *Ibid.*, Fifteenth Sess., Fourth Comm., 1053rd Meeting, 16 Nov. 1960, p. 318.

[3] *Vide*, e.g., GA resolution 1360 (XIV), 17 Nov. 1959, in *GA, OR*, Fourteenth Sess., Sup. No. 16 (A/4354), p. 29; *GA* resolution 1567 (XV), 18 Dec. 1960, in *GA, OR*, Fifteenth Sess., Sup. No. 16 (A/4684), p. 32; GA resolution 1703 (XVI), 19 Dec. 1961, in *GA, OR*, Sixteenth Sess., Sup. No. 17 (A/5100), p. 40.

[4] *Vide I.C.J. Pleadings, South West Africa*, Vol. XII, pp. 142-153.

"*Noting with increased disquiet* the progressive deterioration of the situation in South West Africa as the result of the ruthless intensification of the policy of *apartheid*, the deep emotional resentments of all African peoples, accompanied by the rapid expansion of South Africa's military forces, and the fact that Europeans, both soldiers and civilians, are being armed and militarily reinforced for the purpose of oppressing the indigenous people, all of which create an increasingly explosive situation which, if allowed to continue, will endanger international peace and security [1]."

This resolution proceeded to provide for the appointment of a Special Committee on South West Africa and charged it, *inter alia*, to attempt to secure "evacuation from the Territory of all military forces of the Republic of South Africa [2]".

33. During May 1962, the Chairman, Mr. Carpio and the Vice-Chairman, Dr. de Alva, of the Special Committee on South West Africa visited the Territory as guests of the South African Government. In the Rejoinder in the *South West Africa* cases full details were given of this visit and of the joint communiqué issued by the visitors and the South African Government in which the former stated, *inter alia*, that they had found no evidence and heard no allegations that there was a threat to the peace in South West Africa, and that there were no signs of militarization in the Territory or that the indigenous population was being exterminated. It was shown that the visitors were at liberty to see what they wished and to speak to whomsoever they desired in South West Africa, and that Mr. Carpio was in fact a party to the issuing of the communiqué [3].

It was furthermore shown that, notwithstanding overwhelming evidence to the contrary, Mr. Carpio later adopted the attitude that he had not been a party to the issuing of the communiqué and that Dr. de Alva maintained that the opposite was true; that at the eighth meeting of the Special Committee on South West Africa on 24 July 1962, the Chairman at that meeting stated that the joint communiqué had come as a "disagreeable shock"; that at the thirteenth meeting of the Committee, and in reaction to Dr. de Alva's reiteration of the role played by Mr. Carpio, the Chairman stated that his delegation regarded Mr. Carpio's statement that he had had no part in the drafting or publication of the communiqué "as an authoritative statement"; and that eventually the communiqué was not included in the evidence forwarded to the "Committee of Seventeen" and was consequently not considered by the General Assembly of the United Nations [4].

34. Many delegates to the United Nations had, prior to the issue of the joint communiqué in 1962, concentrated on the following three charges: a threat to the peace, genocide, and militarization. The main charge was that international peace was being endangered as a result of the alleged situation in the Territory. No less than 31 delegations had during 1960-1961 made that charge, on which heavy reliance was placed because it could be used in the Security Council as a ground for taking action against South Africa. The admission by the two emissaries of the United Nations disposed of the main charge, as also the other two serious charges. If these delegations, or the members of the Special Committee had the interests of the inhabitants of the Territory at heart, one would have

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[1] GA resolution 1702 (XVI), 19 Dec. 1961, in UN doc. A/5100, p. 39.
[2] *Ibid.*, para. 2 *(b)*, p. 40.
[3] *I.C.J. Pleadings, South West Africa*, Vol. V, pp. 5-9.
[4] *Ibid.*, pp. 9-11.

expected that the contents of the joint communiqué would have been a great relief to them. Instead, but perhaps not surprisingly, the general reaction was that "that Communiqué had come as a disagreeable shock . . . [1]".

The point of immediate importance is that, despite the evidence of Dr. de Alva and that of members of the Secretariat who accompanied the visitors, the Special Committee refused to give recognition to the joint communiqué to which Mr. Carpio and Dr. de Alva were parties, for the very reason that the declarations in the said communiqué relevant to conditions in South West Africa were in conflict with what the majority of the Committee wished the world to believe.

(b) *Further Reaction to Evidence proving the Absence of Militarization*

35. Reference has already been made to the fact that allegations of militarization of South West Africa continued to be made even after the Applicants in the *South West Africa* cases had admitted South Africa's factual averments demonstrating, *inter alia*, an absence of such militarization [2]. Even General Marshall's uncontroverted evidence to the same effect [3] failed to make any impression on the leaders of the campaign against South Africa, and their allies. General Marshall gave evidence before this Court in October 1965. During the period 22 November to 9 December 1965 the Fourth Committee heard petitioners, discussed the so-called question of South West Africa, and eventually adopted a draft resolution which ultimately became General Assembly resolution 2074 (XX). Operative paragraph 7 of this resolution called upon the Government of South Africa "to remove immediately all bases and other military installations located in the Territory of South West Africa and to refrain from utilizing the Territory in any way whatsoever as a military base for internal or external purposes . . . [4]".

36. Notwithstanding the evidence of General Marshall the petitioners again alleged the existence of military bases and militarization in general in South West Africa. Mr. Kuhangua of SWAPO stated that his organization had recently drawn the attention of the United Nations "to the malicious intentions of the Federal Republic of Germany, which had established a rocket station in the Namib desert [5]". Mr. Kerina of NUDO alleged that "South Africa had several military bases and camps in South West Africa [6]", and Mr. Nujoma (SWAPO) testified that the Committee "should fully understand that measures such as the construction of military bases near the Zambian frontier were a threat directed not only at the people of South West Africa, but also at the people of Zambia itself . . . [7]".

37. As had happened in the past, the allegations of petitioners were uncritically repeated by representatives of certain States. Thus, Mr. Thiam of Mali expressed the view that the General Assembly "should demand that South Africa remove all its military bases in South West Africa forthwith and refrain from using the Territory in any way for the concentration of weapons

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[1] *I.C.J. Pleadings, South West Africa*, Vol. V, p. 11.
[2] *Vide* para. 26, *supra*.
[3] *Vide* para. 25, *supra*.
[4] GA resolution 2074 (XX), 17 Dec. 1965, in *GA, OR*, Twentieth Sess., Sup. No. 14 (A/6014), p. 61.
[5] *GA, OR*, Twentieth Sess., Fourth Comm., 1564th Meeting, 22 Nov. 1965, p. 272.
[6] *Ibid.*, 1565th Meeting, 23 Nov. 1965, p. 279.
[7] *Ibid.*, 1567th Meeting, 24 Nov. 1965, p. 295.

or armed forces [1]"; Mr. Dimitruk of the Byelorussian SSR stated that the South African Government, with the help of West German specialists, "had constructed a rocket base in the Namib Desert [2]"; Mr. Malecela of Tanzania said that "the establishment of military bases and the construction of arms factories in South West Africa were violations of the Charter [3]", and Mr. Gbeho of Ghana stated that his delegation "vehemently condemned the presence of military installations in South West Africa, which were a threat to the peace and security of the area . . . [4]".

38. Not one of the representatives who referred to the existence of military bases or militarization in South West Africa made any mention of the evidence given by General Marshall [5]. Eventually the South African representative, Mr. Hattingh, in dealing with the charges of militarization, referred to a letter dated 15 September 1965 [6], in which the South African Permanent Representative to the United Nations had denied the existence of so-called military bases, to a letter dated 6 July 1965 from the Federal Republic of Germany [7] in which it had been pointed out that the alleged rocket launching site at Tsumeb was actually an observatory for ionospheric research belonging to the Max Planck Institute, and to the evidence given by General Marshall [8].

39. The reaction of certain representatives to the speech of the South African representative is illuminating. Miss Brookes of Liberia, speaking on a point of order, questioned the propriety of citing before the Committee testimony on which the International Court of Justice had to pass judgment [9]. Mr. Hattingh disagreed and said that he was surprised to find that the Liberian representative had become a protagonist of the *sub judice* principle, which was not in line with her earlier position in the Fourth Committee, and said that in any event he saw no reason why the information could not be given [9]. Miss Brookes replied that it was for the International Court of Justice, and not for the Fourth Committee, to pronounce upon the testimony brought before it by South Africa [9], and Mr. Mbaye of Guinea stated that he agreed with the representative of Liberia. Mr. Thiam of Mali went further in saying that the members of the Committee felt no need to listen to what Mr. Hattingh had to say. He continued:

> "The Committee's task was to defend the rights of peoples, and the South African representative's testimony was of no use to it in that connection [10]."

Mrs. Mohammed of Nigeria urged that the South African representative's speech should be declared out of order [10], and Mr. Adan of Somalia expressed the view that it was improper to cite testimony submitted to the International Court of Justice and said that if the South African representative continued to

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[1] *Ibid.*, 1568th Meeting, 25 Nov. 1965, p. 302.
[2] *Ibid.*, 1569th Meeting, 26 Nov. 1965, p. 315.
[3] *Ibid.*, 1570th Meeting, 26 Nov. 1965, p. 327.
[4] *Ibid.*, p. 329. *Vide* also the statements made by Mr. Abdel-Wahab (UAR), at the 1571st Meeting of the Fourth Comm., p. 333.
[5] *Vide* para. 25, *supra*.
[6] UN doc. A/5993 (23 Sep. 1965), pp. 1-3.
[7] UN doc. A/AC.109/142 (23 Sep. 1965).
[8] *GA, OR*, Twentieth Sess., Fourth Comm., 1581st Meeting, 9 Dec. 1965, p. 414.
[9] *Ibid. Vide* the attitudes adopted by the representatives of Liberia and South Africa in e.g., the Fourth Committee, *GA, OR*, Fifteenth Sess., 1051st Meeting, 15 Nov. 1960, p. 1.
[10] *Ibid.*, p. 415.

do so, the delegation of Somalia would also withdraw [1]. At the next meeting of the Fourth Committee Mr. Bhabha of Pakistan said:

> "The South African Representative had referred to a General Marshall in his statement. That person was not known to the Committee and the Committee had not been given any information regarding his qualifications [2]."

This attitude was in marked contrast to that of the Agent for Ethiopia and Liberia to which reference was made above [3], and is difficult to reconcile with the undertaking that had been given to transmit the information contained in General Marshall's evidence to the United Nations [3].

(c) *The* South West Africa *cases*

40. Probably the most important part of the *South West Africa* cases was that in which the Applicants alleged violations by South Africa of its fundamental trust obligation under the Mandate, which was to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory [4]". Certainly by far the major portion of the pleadings and oral proceedings on the merits was devoted to this charge.

Annex A [5] contains a summary of the allegations originally made by the Applicants and of the manner in which they eventually changed the basis of their whole case regarding the aforesaid alleged violations. It was shown that whilst the charge made in the Memorials was one of deliberate oppression of the Native population of South West Africa, the factual exposition in South Africa's pleadings and other circumstances (including a proposal by South Africa that the Court conduct an inspection *in loco* in South West Africa) eventually compelled the Applicants to admit *all* the factual averments in these pleadings and to amend their submissions so as to delete all references to allegations of oppressive conduct [6].

41. These developments were of special significance in view of the fact that in its Counter-Memorial South Africa had dealt with some basic aspects of its policy of separate development. It was shown that the policy was not one of domination, but its very antithesis, viz., one which sought by an evolutionary process to bring about the termination of the guardian's supremacy and the emancipation of the wards; that the aim of the policy was justice for all, on a basis of potential equality and freedom; that in principle the policy accorded with the basic concepts underlying the thinking of integrated, multi-racial States, in that its moral outlook and idealistic objectives rested on modern concepts of human rights, dignities and freedoms irrespective of race, colour or creed, and did not run counter to them; and that the policy was not based on any concept of superiority or inferiority, but merely on the fact that people differed, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development [7].

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[1] *GA. OR*, Twentieth Sess., Fourth Comm., 1581st Meeting, 9 Dec. 1965, p. 415.
[2] *Ibid.*, 1582nd Meeting, 9 Dec. 1965, p. 418.
[3] *Vide* para. 25, *supra*.
[4] Art. 2 of the Mandate.
[5] *Vide* para. 61, *infra*.
[6] Annex A, pp. 142-145. *Vide* also D'Amato, A. A., "Legal and Political Strategies of the South West Africa Litigation", *Law in Transition Quarterly* (1967), pp. 8-43. The author is said to have been "retained by Ethiopia and Liberia to write portions of the Applicants' brief". (*Ibid.*, p. 8.)
[7] *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 473-474.

It was furthermore shown that for various reasons, e.g., the existence of ten major population groups in the Territory [1], differing vastly as regards background, ethnic descent, culture and general way of life, the policy of separate development was the only feasible one which an administering authority could apply in South West Africa. It was a solution which sought to eliminate the conflicts and the struggle for supremacy inherent in any other course, and to bring about free self-governing communities which could by their own agreements determine whether and in what manner they wished to combine or co-operate in matters of mutual interest. This approach allowed different groups to advance to self-determination at different rates and at different times, not necessarily simultaneously. Thus, unnecessary delay in the case of the more advanced groups could be avoided without premature abandonment of responsibility towards backward groups [2].

42. For present purposes it suffices to emphasize that in their original pleadings the Applicants started off by making the same charges against South Africa's administration of the Territory as had been made year after year in the United Nations and on which the various resolutions pertaining to South West Africa were based, viz., charges of oppression of the indigenous inhabitants for the benefit of the Whites. Realizing that what was eagerly assumed as true in the United Nations could not, in the light of South Africa's full exposition of the true factual position, be proved in a court of law, the Applicants had no other choice but to abandon all charges of oppression. The whole basis on which South Africa had been condemned in the United Nations consequently fell away.

43. In the light of these developments, and especially the fact that the said factual exposition was there for all to read, one would have expected a new appraisal of South Africa's policies in the United Nations. In the event this expectation turned out to be groundless; most representatives were obviously not interested in the true facts. They consequently, and apparently deliberately, closed their eyes to the new developments, and continued to cling to their preconceived false notion of the nature of South Africa's administration of the Territory.

44. During the Twentieth Session of the United Nations the same charges as before were repeated with monotonous regularity. Thus, Mr. Kapwepwe of Zambia stated that South Africa had "extended its oppressive policies to South West Africa [3]"; Mr. Mudenge of Rwanda referred to the "threats, acts of violence, imprisonments, massacres and acts of brutality of all kinds which the puppet government of Mr. Verwoerd [was] inflicting on our African brothers in South Africa and South West Africa [4]"; and Mr. Malecela of Tanzania alleged that South Africa was "pushing back" the indigenous inhabitants of South West Africa "to the poorest and worst areas and selling or leasing large tracts of land in the richest regions of the Territory to foreign financial groups [5]". The following representative statement was made by Mr. Gbeho of Ghana:

"... South Africa was merely seeking, under various pretexts, to keep

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[1] The Eastern Caprivi peoples, the Kavango peoples, the Ovambo, the Bushman, the Dama (or Bergdamara), the Nama, the Herero, the Rehoboth Basters, and the White and Coloured groups.

[2] *I.C.J. Pleadings, South West Africa*, Vol. II, pp. 473-474.

[3] *GA, OR*, Twentieth Sess., 1339th Plenary Meeting, 28 Sep. 1965, p. 2.

[4] *Ibid.*, 1360th Plenary Meeting, 13 Oct. 1965, p. 4.

[5] *Ibid.*, Fourth Comm., 1570th Meeting, 26 Nov. 1965, p. 327.

> the population of South West Africa in a state of perpetual subjugation. By means of police brutality, South Africa was trying to apply its policy of apartheid in the Territory and to perpetuate the master and servant relationship by denying the Africans any form of justice in the land of their birth [1]."

Allegations of the existence of concentration camps, torture, massacres and genocide continued to be made. Mr. Dashtseren of Mongolia alleged that South Africa was forcing the indigenous population of the Territory "to live in labour concentration camps [2]"; Mr. Golovko of the Ukrainian Soviet Socialist Republic referred to South West Africa as "a huge police torture-chamber [2]"; Mr. Azimov of the Union of Soviet Socialist Republics spoke of the African reserves or homelands as "concentration camps" and "living cemeteries [3]"; and Mr. Shevchenko of the Ukrainian Soviet Socialist Republic said:

> ". . . the South African racists are continuing to apply the inhuman policy of apartheid in the Territory and introducing racist practices worthy of the Middle Ages. The policy of the white racists is aimed at wiping out the indigenous inhabitants or turning them into slaves of the white settlers in perpetuity [4]."

45. Most of these, and other identical or similar statements were made after the oral proceedings in the *South West Africa* cases had been completed; certainly all were made after the Applicants had abandoned all charges of oppression. However, not a single reference was made to the true factual position as it emerged from the South African pleadings and amplified by oral testimony. This could not have been due to any respect for the *sub judice* rule since South Africa's protestations that issues which were before the Court should not be discussed went unheeded for many years, and the General Assembly in fact adopted, before Judgment was given, resolution 2074 (XX) in which South Africa's policies, and apartheid by name, were again condemned because they allegedly constituted "a crime against humanity [5]".

46. Of special significance is the reaction to statements made by the South African representative in the Third Committee in 1966. After Mrs. Dmitruk of the Ukrainian Soviet Socialist Republic had referred to "the monstrous consequences of colonialism and racialism in . . . South West Africa" and had alleged that "apartheid was depriving the Africans of all human rights and all fundamental freedoms by forcing them to live in miserable conditions, by herding them into reservations . . ., by forbidding them any family life . . . [6]", the South African representative strongly objected "to the ready belief which seemed to be given to the allegations made against his country, according to which the policy of his Government in South West Africa was one of oppression in violation of human rights and fundamental freedoms [7]". He pointed out that the Applicants had originally based their accusations on the erroneous assumption that South Africa was oppressing the indigenous population of

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[1] *GA, OR*, Twentieth Sess., Fourth Comm., 1570th Meeting, 26 Nov. 1965, p. 328.
[2] *Ibid.*, 1569th Meeting, 26 Nov. 1965, p. 311.
[3] *Ibid.*, 1385th Plenary Meeting, 30 Nov. 1965, p. 8.
[4] *Ibid.*, 1389th Plenary Meeting, 6 Dec. 1965, p. 12.
[5] GA resolution 2074 (XX), 17 Dec. 1965, *GA, OR*, Twentieth Sess., Sup. No. 14 (A/6014), operative para. 4, p. 60.
[6] *GA, OR*, Twenty-first Sess., Third Comm., 1382nd Meeting, 4 Oct. 1966, p. 35.
[7] *Ibid.*, p. 2.

the Territory; that one of the main sources on which the allegations that South Africa's policies constituted a violation of human rights were based, was the "evidence" of a group of petitioners, and that in the *South West Africa* cases the unreliability of the petitioners' evidence had been exposed to such an extent that the Applicants had stated explicitly that they did not rely on the truth of that evidence, and in the end had been compelled to withdraw all the charges of oppression [1].

The only reaction of Mrs. Soumah of Guinea was the expression of the hope "that the Committee would give no credence to the untrue statements which had just been made concerning South West Africa [2]".

After a number of other representatives had spoken, the South African representative exercised his right of reply. Before he did so, Mrs. Soumah "speaking on behalf of the African group, said that the African delegations wished to be considered morally absent while the representative of South Africa was making his statement, which they hoped would be disregarded by other delegations [3]".

47. Only one inference can be drawn: the leaders of the campaign and their allies studiously refrained from referring to the evidence contained in South Africa's written pleadings as well as the oral testimony offered by witnesses and experts, since any evidence demonstrating the lack of an oppressive element in South Africa's policies would be politically unacceptable.

D. The Adoption of General Assembly Resolution 2145 (XXI)

48. During the Twentieth Session of the General Assembly in 1965 suggestions were already being made that the Mandate for South West Africa, which was assumed to be still in existence, should be revoked forthwith. Such suggestions were made, *inter alia*, by *Miss Smellie* (Jamaica) [4], *Mr. Siclait* (Haiti) [5], and *Mr. Borja* (Ecuador) [6]. It is accordingly clear that these representatives were prepared to take drastic action without awaiting the outcome of the *South West Africa* cases. They were possibly influenced by a statement by a petitioner, Mr. Mbaeva of SWANU, who is reported to have said:

> "He was convinced that the cause of South West Africa would triumph at the International Court of Justice. In the unlikely case of a different outcome, he wished to inform the Committee that SWANU would not abide by any decision of the Court which was not consistent with the Resolutions of the United Nations on the matter [7]."

49. There are further indications that, prior to the Judgment in the *South West Africa* cases, a number of States had already decided that the Mandate should be revoked, irrespective of the findings of the Court. The Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples

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[1] *Ibid.*, p. 2.
[2] *Ibid.*, p. 37.
[3] *Ibid.*, 1383rd Meeting, 5 Oct. 1966, p. 45.
[4] *GA, OR*, Twentieth Sess., Fourth Comm., 1570th Meeting, 26 Nov. 1965, p. 328.
[5] *Ibid.*, Fourth Comm., 1571st Meeting, 29 Nov. 1965, p. 334.
[6] *Ibid.*, p. 336.
[7] *Ibid.*, 1565th Meeting, 23 Nov. 1965, p. 285. *Vide* also statement made by Mr. Batchi (Congo (Brazzaville)), 1388th Plenary Meeting, 3 Dec. 1965, p. 17.

considered the question of South West Africa at its meetings held in March and May-June 1966 [1].

The representative of the USSR stated that there was no justification for waiting for the judgment of the Court and that his delegation supported the proposal that the Mandate should be terminated [2]. The representative of Afghanistan is reported to have said:

> "His Government was anxiously awaiting the decision of the International Court of Justice . . . but the legal aspect was one of secondary importance. The main issue was political: the termination of the Mandate and the accession of South West Africa to independence, in accordance with the provisions of General Assembly resolution 1514 (XV) [3]."

The following further representative statements are in point:

The representative of Poland:

> "In his delegation's opinion, there could be no exception regarding the implementation of General Assembly resolution 1514 (XV) and the United Nations should not allow legal technicalities to prevent the people of South West Africa from attaining independence [4]".

The representative of Tunisia:

> "The legal arguments adduced by certain delegations, which had taken refuge behind the final decision to be taken by the International Court of Justice, should not stand in the way of the recommendations made by the majority of States Members of the United Nations that the Mandate for South West Africa should be withdrawn from South Africa [4]."

The representative of Sierra Leone:

> "The current legal proceedings in the International Court of Justice should not obscure the Special Committee's political responsibilities [5]."

50. The representatives who advocated the revocation of the Mandate did not attempt to indicate any legal basis for such a revocation, and it is clear from their statements in the Special Committee that most of them were concerned not so much with the well-being of the population of South West Africa as with the immediate independence of South West Africa as a single political unit, to the exclusion of all other considerations.

51. On 15 September 1966, i.e., after the Judgment of this Court on 18 July 1966, the Special Committee adopted the report of its Sub-Committee on South West Africa [6]. In this report it was stated that the Sub-Committee was of the unanimous opinion that the problem of South West Africa was a political and colonial issue, the solution of which had to be sought in terms of "fundamental human rights and the principles of the Charter, particularly those contained in Article 73, and General Assembly resolution 1514 (XV) of 14

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[1] The Committee again heard petitioners who in essence, made the same allegations as before. *Vide* UN doc. A/6300/Rev.1, in *GA*, *OR*, Twenty-first Sess., Annexes (agenda item 23), pp. 268-273.
[2] *Ibid.*, p. 275.
[3] *Ibid.*, p. 276.
[4] *Ibid.*, p. 279.
[5] *Ibid.*, p. 282.
[6] *Ibid.*, p. 296.

December 1960 [1]". It was alleged that South Africa had "extended its inhuman policies of racial discrimination to the Territory of South West Africa [1]", and it was recommended that the Mandate should be revoked [2].

52. The report of the Sub-Committee on South West Africa, as adopted by the Special Committee, was considered by the General Assembly in Plenary Session when resolution 2145 (XXI) was adopted. The South African representative, Mr. de Villiers, in addressing the General Assembly, gave a resumé of what had happened in the *South West Africa* cases. He pointed out that the Applicants had originally alleged that "apartheid" was a system whereby the indigenous inhabitants of the Territory were deliberately oppressed for the benefit of the White minority, but that even at the outset, some of the more outrageous allegations which had regularly been made in United Nations committees and organs, such as allegations of genocide, had not been raised by the Applicants; that the charges which the Applicants did make, were refuted in South Africa's written pleadings and oral evidence; that the testimony of the petitioners, as relied upon by United Nations bodies and by the Applicants, was shown to be wholly unreliable and that during the oral proceedings, the Applicants were indeed invited to call the petitioners as witnesses but that they had failed to respond to this invitation; and that the Applicants eventually amended their submissions so as to abandon all charges of oppression [3]. To counter the allegations of militarization, attention was drawn to the evidence of General Marshall and to the findings of the three Judges who dismissed the Applicants' allegations relating to militarization of South West Africa [4].

At a later stage, the South African Minister of Foreign Affairs, Dr. Muller, in developing an argument that South African Governments had never felt that they had anything to hide or to be ashamed of concerning the administration, policies or objectives in South West Africa, stated that, given the necessary effective co-operation, South Africa would give the most serious and constructive consideration to providing information, on a voluntary basis, regarding anything that might improve knowledge and understanding relative to the situation in South West Africa [5].

53. The information provided by the South African representatives, fell on deaf ears. Allegations of oppressive and brutal conduct continued to be made. Thus, concerning South Africa's treatment of the indigenous population of South West Africa, there were references to "inhuman and criminal policies [6]"; "the shameful and discredited system of the exploitation of man by man [7]"; "the inhuman treatment by the South African Government [8]"; "the irrational inhuman denial of the Government of South Africa of these sacred rights by a brutal policy of iron and blood [9]"; "the untold tyranny imposed on the Africans, spoiling the most fertile parts of their land, subjecting them to compulsory cheap labour [10]"; "the merciless colonial exploitation and racial discrimination against the people of South West Africa"; an adminis-

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[1] *Ibid.*, p. 298.
[2] *Ibid.*, pp. 298-299.
[3] *GA, OR*, Twenty-first Sess., 1417th Plenary Meeting, 26 Sep. 1966, pp. 4-8.
[4] *Vide* paras. 17 and 40-42, *supra*.
[5] *GA, OR*, Twenty-first Sess., 1439th Plenary Meeting, 12 Oct. 1966, pp. 21-23.
[6] *Ibid.*, 1417th Plenary Meeting, 26 Sep. 1966, p. 15.
[7] *Ibid.*, p. 16.
[8] *Ibid.*, 1419th Plenary Meeting, 27 Sep. 1966, p. 10.
[9] *Ibid.*, 1431st Plenary Meeting, 5 Oct. 1966, p. 9.
[10] *Ibid.*, p. 10.

tration involving "a peculiar mixture of the most retrograde features of all systems of exploitation known to history: slavery and feudalism, economic exploitation and social and political oppression [1]"; "a state of constant political and economic servitude [2]"; and "cruel repression marked by arbitrary measures, terrorism and mass killings of the African population, which have resulted in veritable genocide [3]".

54. As in previous years, reliance was again placed on the evidence of discredited petitioners, and allegations of militarization of the Territory continued to be made. Apart from the fact that the allegations of oppressive conduct, even of genocide, were repetitions of allegations made in previous years and which, as has been shown [4], can be traced back to the untruthful evidence of the petitioners, statements were made in which representatives relied in so many words on allegations of the petitioners. Thus, in alleging that South Africa had established military bases in South West Africa, the representative of the Ukrainian Soviet Socialist Republic stated:

> "Representatives of various political parties [the petitioners] of South West Africa, speaking before the Committee of Twenty-Four, provided irrefutable evidence on that score [5]."

After certain petitioners had given evidence before the Fourth Committee and had repeated the allegations they had made in previous years [6], Mr. Thiam of Mali, on 4 October 1966, said "that petitioners' statements gave a clear idea of the situation in South West Africa [7]". At the same Meeting Mr. Nyirinkindi of Ruanda "assured the people of South West Africa of the sympathy and support of his Government" and stated that "he had no questions to ask, since the situation was plain and the petitioners had described it well [8]".

55. These statements were made after the South African representative, on 26 September 1966, with reference to the *South West Africa* cases had said:

> ". . . only three members of the Court in individual opinions, dealt with the question of alleged militarization. One of them was on the side of the Court, and the other two on the side of the dissentients . . . it came as no surprise that all three of them firmly rejected the Applicants' claim as unfounded. One of the dissenting Judges [9], . . . used particularly strong language, saying that 'the testimony of one of Respondent's witnesses satisfied me that this charge of the Applicants was completely without foundation' [10]".

And:

> "Following on our treatment in the pleadings [in the *South West Africa*

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[1] *GA, OR*, Twenty-first Sess., 1427th Plenary Meeting, 3 Oct. 1966, p. 9.
[2] *Ibid.*, 1425th Plenary Meeting, 30 Sep. 1966, p. 7.
[3] *Ibid.*, 1448th Plenary Meeting, 19 Oct. 1966, p. 2.
[4] *Vide* paras. 16 *et seq.*, *supra*.
[5] *GA, OR*, Twenty-first Sess., 1431st Plenary Meeting, 5 Oct. 1966, p. 8. *Vide* also statement made by the representative of Yugoslavia, UN doc. A/6300/Rev. 1, in *GA, OR*, Twenty-first Sess., Annexes (agenda item 23), p. 293.
[6] *Vide* paras. 20-25, *supra*.
[7] *GA, OR*, Twenty-first Sess., Fourth Comm., 1603rd Meeting, 4 Oct. 1966, p. 39.
[8] *Ibid.*, p. 41.
[9] Judge Jessup. *Vide* his dissenting opinion, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 330.
[10] *GA, OR*, Twenty-first Sess., 1417th Plenary Meeting, 26 Sep. 1966, p. 10.

cases] of the subject of petitioners, the Applicants' Agent Mr. Gross, explicitly stated in open court that the 'Applicants have not relied upon the accuracy of statements of such petitioners'. We could hardly believe our ears, we said, 'But please call these petitioners'. We said that in open Court, and we added that if that were done we would seriously consider paying their witness fees, so that we could have the privilege of cross-examining them. There was no response [1]."

56. The reason why the true facts concerning South West Africa were ignored, is not difficult to find. By this time the leaders of the campaign against South Africa, and their allies, had lost any interest which they formerly might have had in the question whether South Africa had promoted the well-being of the inhabitants of the Territory. They would not have been satisfied with anything less than the immediate independence of South West Africa as a single political unit, subject to a short period of United Nations administration of the Territory. Any evidence to the effect that South Africa had in fact promoted the said well-being, was consequently disregarded. Although certain representatives still justified, or purported to justify, the revocation of the Mandate on South Africa's failure to fulfil its obligations, other representatives made it clear that this factor was of no importance or only of secondary importance. Thus, Mr. Kapwepwe of Zambia said:

"The United Nations itself is not endowed with the right to obstruct the wishes of the indigenous people of South West Africa. Neither the United Nations nor any other forum has any authority whatsoever to divert *the fundamental issue, which is freedom and independence*, to that of a legal drawn-out exercise over the technicality of a mandate granted to one race over another race . . .

. . . . . .

The indigenous people of South West Africa had no say in the drafting of the mandate that is now used as a cover to perpetuate their enslavement. As such, *the people of South West Africa are not bound by any mandate* formulated from above or from outside . . .

. . . *the League of Nations Mandate for South West Africa is not the fundamental issue here*. The issue, at its bedrock, is that of the inalienable right of the indigenous people of South West Africa to self-determination, freedom and independence [2]." (Italics added.)

And Mr. Achkar of Guinea stated:

"South West Africa is a Non-Self-Governing Territory under the domination of South African racists . . . Our reaction should be equally as simple: as a Non-Self-Governing Territory, *whether Mandated or not*, South West Africa comes under the provisions of the Declaration on the Granting of Independence to Colonial Countries and Peoples. There can be no equivocation on that point [3]." (Italics added.)

The following are further examples of representative statements:

Mr. Banjar (Mongolia):

"In accordance with its policy of unfailing support for the countries

[1] *Ibid.*, p. 8.
[2] *Ibid.*, 1425th Plenary Meeting, 30 Sep. 1966, pp. 2 and 4.
[3] *Ibid.*, 1414th Plenary Meeting, 23 Sep. 1966, p. 15.

and peoples which have taken up the struggle for their freedom and independence, the Mongolian People's Republic is strongly in favour of allowing the people of South West Africa to exercise their inalienable right to self-determination at once . . .[1]"

Mr. Georgescu (Romania):

"South West Africa, the people of South West Africa, must become independent immediately, in accordance with the principles of international law and the United Nations Charter and in conformity with the resolutions adopted by the General Assembly. We intend to vote in that sense. . . . *But Romania's action should in no way be interpreted as meaning that we consider any legal action whatsoever to be required*, on the part of the United Nations or any other forum, before the people of South West Africa can have the right to be master in their own country[2]." (Italics added.)

Mr. Lopez (Philippines):

"The United Nations cannot allow this situation to continue. The inalienable right of the people of South West Africa to freedom and independence is enshrined in the Charter and in the Declaration on the Granting of Independence to Colonial Countries and Peoples . . . Decolonization has reached a point where we cannot allow any country—in this case, South Africa—to reverse this historical process[3]."

Mr. Shevel (Ukrainian Soviet Socialist Republic):

". . . no decision of a court, no intrigues, or machinations of the colonialists can deprive the people of South West Africa of their right to independence and self-determination. Freedom they must have, and obtain it they will . . . My delegation therefore fully supports the demands of the Afro-Asian countries that the Mandate of the Union of South Africa over South West Africa should be revoked . . . We advocate the granting of independence to the people of this Territory without any delay. Like other socialist countries, the Ukrainian SSR takes its stand on the principle of the sovereignty and the equal rights of all countries and peoples[4]."

57. The above-quoted statements fully justify the following comments of Rosalyn Higgins on the strategy and motivation of some of the African States:

". . . while on the one hand the Africans sought a judicial determination on the proper implementation of the Mandate, *what they really wanted was no Mandate at all*. This dichotomy between what they thought prudent to seek from the Court—the effective carrying out of the Mandate—and what they at heart ultimately hoped for—independence for South West Africa—became inevitable after the passing of General Assembly resolution 1514 in 1960, on the Granting of Independence to Colonial Peoples. In other words, the point had already been reached by 1966 whereby the weight of African political activity was directed towards independence, *and not towards the full and effective implementation of the Mandate*.

But the Court's Judgment—even if it had gone completely in favour of

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[1] *GA, OR*, Twenty-first Sess., 1429th Plenary Meeting, 4 Oct. 1966, p. 7.
[2] *Ibid.*, 1439th Plenary Meeting, 12 Oct. 1966, p. 4.
[3] *Ibid.*, 1417 Plenary Meeting, 26 Sep. 1966, p. 21.
[4] *Ibid.*, 1431st Plenary Meeting, 5 Oct. 1966, p. 9.

Ethiopia and Liberia—would have provided no legal grounds for a demand for independence for the territory [1]." (Italics added.)

58. The exposition contained in the preceding paragraphs leads, it is submitted, to the following conclusions:

(a) The adoption of General Assembly resolution 2145 (XXI) is to be seen as the culmination of a political campaign as far as South West Africa is concerned, in the course of which the question whether South Africa had promoted the well-being of the indigenous inhabitants of the Territory became of no or secondary importance; the only objective being the attainment of independence for South West Africa as a single political unit, irrespective of all other considerations.

(b) Because of this objective the majority in the General Assembly, prior to the adoption of the said resolution, not only failed to ascertain objectively whether South Africa had violated its obligations, but in fact did not direct their minds to this question.

(c) In so far as it was alleged in the debates preceding the adoption of resolution 2145 (XXI) that South Africa had failed to fulfil such obligations, such allegations were based on the pre-conceived idea that South Africa's policies are oppressive of the indigenous inhabitants of the Territory, and on a failure to have any regard to the evidence to the contrary.

As will be shown in the succeeding paragraphs, subsequent events fortify these conclusions.

E. Subsequent Events

59. During the third Meeting of the *Ad Hoc* Committee for South West Africa [2] on 26 January 1967 suggestions were made that more information should be obtained about South West Africa for the purposes of the work of the Committee [3].

In its further consideration of the question between 10 February and 6 March 1967, the *Ad Hoc* Committee had before it a working paper containing information on the Territory, prepared by the Secretariat in accordance with a decision taken by the Committee at its third meeting [4]. The working paper purported to furnish information on South West Africa under the following headings: Land and People; Government; Public Finance; Economic Development; Social and Educational Conditions.

The working paper did not disclose all the sources from which the information was culled. However, parts of the working paper indeed contained information which was substantially correct although out of date and incomplete, and therefore misleading. Be that as it may, what is of particular significance is that in the deliberations of the Committee virtually no reference was

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[1] Higgins, R., "The International Court and South West Africa", *Journal of the International Commission of Jurists*, Vol. VIII, No. 1 (Summer 1967), p. 28.

[2] Established in terms of operative paragraph 6 of General Assembly resolution 2145 (XXI) "to recommend practical means by which South West Africa should be administered, so as to enable the people of the Territory to exercise the right of self-determination and to achieve independence . . ."

[3] *Vide* the statement by the United States representative, United Nations General Assembly, Summary Record of the third Meeting of the *Ad Hoc* Committee for South West Africa, UN doc. A/AC. 129/SR. 3, 9 Mar. 1967, p. 7.

[4] UN doc. A/6640, 7 Apr. 1967, para. 43.

made to the working paper at all and no attempt was made to view the Committee's task in the light of the information contained in the working paper. With few exceptions members of the Committee simply continued to express what can only be considered as their governments' political attitudes and objectives to press for action to realise those objectives.

60. As far as the working paper was concerned, the representative of Italy at the fifth Meeting of the Committee expressed the view that, if United Nations machinery was to be set up, a better knowledge of the existing situation would be required. He thought that the *Ad Hoc* Committee should therefore try to complement the information provided by the Secretariat with information from other sources [1].

Similarly the representative of Canada at the sixth meeting agreed that some information additional to that provided by the Secretariat might be necessary, "because the General Assembly would undoubtedly expect the Committee to express its views on the practicability of the various proposals it had examined [2]".

Mr. Rogers, the United States representative at the seventh Meeting of the Committee, is reported to have stated—

> "... that in his statement on 26 January 1967 he had drawn attention to the South African Government's announced intention of furnishing interested Governments and organizations with information on certain aspects of South West Africa and he had expressed the hope that methods could be devised for the receipt of such information by the United Nations, so that the Committee could make use of it. He continued to believe that the provision of that information would be helpful and that the Committee should explore ways of obtaining it.
>
> In reviewing the discussion of the question of South West Africa at the last session of the General Assembly, he had had occasion to reread the statements made by the representatives of South Africa in the debate. In the statement he had made on 12 October 1966, Mr. Muller, the Minister of Foreign Affairs, had said:
>
> > 'The principles upon which my Government approaches this matter involve that the better informed the international community can be, including this Organization, the better for all concerned. Its aim is the best objective ascertainment of true fact, and the best possible international understanding. The problem has been, and will continue to be, the fitting of appropriate means to this end, in a manner avoiding the pitfalls of the past. This would require effective co-operation from responsible Members of this Organization who may have the same objectives in view.' (A/PV. 1439, para. 206.)
>
> Mr. Rogers was sure that the Committee had noted with interest—as he had—the stated willingness of the South African Government to ensure that the facts regarding the problem were known to all concerned. The Committee, and indeed the United Nations as a whole, had everything to gain by trying to obtain the fullest possible information with respect to conditions in the Territory and by exploring all methods for obtaining it" [3].

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[1] Report of the *Ad Hoc* Committee for South West Africa, United Nations *General Assembly, Fifth Special Session*, UN doc. A/6640, 7 Apr. 1967, p. 18.

[2] *Ibid.*, p. 19.

[3] *Ad Hoc* Committee for South West Africa, Summary Record of the Seventh Meeting, UN doc. A/AC. 129/SR.7 (21 Mar. 1967), p. 67.

These suggestions for a full and impartial consideration of the facts came to naught. Even in the body which had been established to recommend practical means for the administration of the Territory, correct information was regarded as less important than the preconceived political notions of the majority of the delegates. The same picture emerges from the reaction to further steps taken by the South African Government.

61. By letter, dated 23 March 1967, the Acting Permanent Representative of South Africa transmitted to the Secretary-General of the United Nations a publication entitled *South West Africa Survey 1967*. This document set out, *inter alia*, geographical and historical features of South West Africa and contained a resumé of the legal proceedings in the *South West Africa* cases and of the evidence given during the oral proceedings. It furthermore contained a brief exposition of the beneficial intent and effect of South Africa's policies as applied in the Territory, and set out recent developments in the spheres of government and administration, economy, education, health and housing, showing increased progress and well-being of *all* the inhabitants of South West Africa. The Survey is attached to this Chapter as Annex A [1].

61. During August 1967 the President of the United Nations Council for South West Africa, established by virtue of General Assembly resolution 2248 (S-V) of 19 May 1967 [2], addressed a letter to the Minister of Foreign Affairs of the Government of South Africa in which attention was drawn to the aforesaid resolution as well as resolution 2145 (XXI) of 27 October 1966, and in which the Council requested an indication of the measures which the Government of South Africa proposed to take in order to facilitate the transfer of the administration of the Territory to the Council [3]. In response to this letter a communication from the Foreign Minister of the Republic of South Africa was forwarded to the Secretary-General of the United Nations [4]. This communication sets out the reasons why the Government of South Africa considered the adoption of resolution 2145 (XXI) to be invalid, and why, apart from its invalidity, the resolution also "lacked any semblance of economic or social worth because it completely ignores the disastrous consequences which would inevitably follow from the course which it sets. It attempts to force upon South Africa a course of action which, far from promoting the progress and well-being of the inhabitants of the Territory, cannot but destroy many of them, throwing the remainder back into the cruel conditions of the past and bringing untold misery upon all [5]". A copy of this communication is attached to this Chapter as Annex B.

62. In response to the transmission of the text of Security Council resolution 269 of 12 August 1969 [6], South Africa's Minister of Foreign Affairs addressed a letter, dated 26 September 1969, to the Secretary-General of the United Nations. This letter dealt with the more substantive legal and factual aspects of the said resolution. Reasons were given why both General Assembly

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[1] Reference to the Survey was made in the 1967 report of the Special Committee on the situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. UN doc. A/6700/Add. 2 (31 Oct. 1967), para. 26. *[Not reproduced.]*

[2] GA resolution 2248 (S-V), UN doc. A/L. 516/Rev. 1.

[3] *Vide* UN doc. A/6897, Annex I, in *GA*, *OR*, Twenty-second Sess., Annexes (agenda item 64 *(b)*), p. 4.

[4] *Ibid.*, Annex II.

[5] *Ibid.*, Annex II, p. 8.

[6] UN doc. S/RES/269 (1969), 12 Aug. 1969.

resolution 2145 (XXI) and Security Council resolution 269 were considered to be invalid, and attention was drawn to the expressed and implied accusations and misconceptions contained in the substantive parts of the latter resolution. Finally, the view was expressed that compliance with this resolution would not serve the interests of the inhabitants of South West Africa but would on the contrary lead to disastrous results. A memorandum was attached which, when read with the *South West Africa Survey 1967*, demonstrated the significant developments which had taken place under South Africa's administration of the Territory in all spheres of life, and which would come to an end if South Africa were to sever its ties with South West Africa, resulting in chaos which would not be limited to South West Africa but could easily spill over into other parts of Southern Africa. The said letter and memorandum are attached to this Chapter as Annex C.

63. The debates in organs and committees of the United Nations during the Twenty-second and later Sessions show that little, if any, notice was taken of the aforesaid documents submitted by the South African Government. There is certainly no evidence of any objective appraisal of the facts set out therein. Thus, the representative of Zambia in the Security Council summarily dismissed the communication, Annex C hereto, as "a volume of distortions and fallacies [1]".

64. The apparently deliberate refusal to take notice of these expositions of the true factual position went hand in hand with repetitions of charges of oppressive conduct and of militarization of South West Africa, which were said by certain representatives to constitute a threat to the peace. In the Plenary Meetings of the General Assembly during its Twenty-second Session references were made to a "system of terror [2]", to an intensification of "criminal acts and terrorist measures against the population of this Territory [3]", to "tens of thousands of African patriots" who were "languishing in prisons and concentration camps [4]", to "slavery" which was "the lot of the Africans [5]", to the minority Whites who "thrived on the sweat and blood of the indigenous Africans [6]", and to South Africa's actions, methods and laws which were said to be "disruptive", "criminal" and "oppressive [7]".

As regards militarization, it was alleged that a military base had been established in the Caprivi Strip [8]; that at the so-called Tsumeb base in South West Africa, preparations were being made for testing long-range rockets [9]; that South Africa had transformed South West Africa into a "tremendous military police camp [10]"; that the Territory had been transformed "into a strategic base against the national liberation movements of other territories and peoples in Africa [11]", and that South Africa "had established military bases and installations on all of the Territory of South West Africa [12]".

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[1] UN doc. S/PV. 1527 (28 Jan. 1970), p. 31.
[2] UN doc. A/PV. 1625 (11 Dec. 1967), p. 47.
[3] UN doc. A/PV. 1628 (13 Dec. 1967), pp. 13-15.
[4] *Ibid.*, p. 32.
[5] UN doc. A/PV. 1632 (14 Dec. 1967), p. 36.
[6] *Ibid.*, p. 37.
[7] *Ibid.*, pp. 38-40.
[8] UN doc. A/PV. 1628 (13 Dec. 1967), p. 7.
[9] *Ibid.*, p. 31.
[10] *Ibid.*, p. 32.
[11] UN doc. A/PV. 1632 (14 Dec. 1967), p. 16.
[12] *Ibid.*, p. 17.

During the 1968 and 1969 sessions of the General Assembly similar allegations, which would be tedious to repeat, were made [1]. Mr. Simbananiye of Burundi went perhaps a little bit further than anybody had ever done before by alleging that children were "snatched away from their parents [2]".

65. The same mis-statements of South Africa's policies and disregard of the true facts, which were readily available, appear from the Security Council debates preceding the adoption of resolutions 264 (1969), 269 (1969) and 276 (1970). Mr. Mwaanga of Zambia alleged that the application of apartheid had "enabled the three million bloodthirsty whites of South Africa to bar by every possible means including brutal force the economic, social and political advancement of the people of Namibia [3]"; Mr. Boye of Senegal said that South Africa wished "if not to exterminate, at least to eliminate a major portion of an entire race, after having debased it and reduced it to the level of beasts of burden [4]"; and Mr. Malik of the Union of Soviet Socialist Republics referred to "African reservations resembling ghettos [5]."

Charges of militarization of the Territory were coupled with wild allegations, not supported by any factual statements whatsoever, that South Africa intended to use its forces in South Africa and South West Africa against independent Black African States. Mr. Azzout of Algeria referred to the "continuation of the military occupation of Namibia by South Africa" which was said to be in itself "a serious violation of the fundamental principles of the Charter" and "a typical case of direct armed aggression against a territory and against a people which must enjoy the natural and inalienable right to freedom and self-determination [6]"; Mr. Turbay Ayala of Colombia stated that the Security Council "should not simply allow the armed forces of South Africa illegally to continue occupying the Territory of Namibia [7]"; and Mr. Mwaanga of Zambia said that South Africa would use its weapons "against black Namibians, black South Africans and all the independent African countries which are determined to make the whole of Africa truly independent [8]".

It will thus be seen that, as in the General Assembly, no attempt was made to analyse documents containing full expositions of the true factual position in South West Africa, or to make an objective appraisal of South Africa's policies.

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[1] *Vide*, e.g., UN doc. A/PV. 1730 (29 Nov. 1968), pp. 17 and 22; Twenty-fourth Sess., Fourth Comm., *Provisional Summary Record* UN doc. A/C. 4/SR. 1825 (17 Oct. 1969), p. 20; *ibid.*, UN doc. A/C. 4/SR. 1826 (17 Oct. 1969), p. 14; *ibid.*, UN doc. A/C. 4/SR. 1829 (20 Oct. 1969), p. 4; *ibid.*, UN doc. A/C. 4/SR. 1830 (20 Oct. 1969), p. 3; *ibid.*, UN doc. A/C. 4/SR. 1831 (22 Oct. 1969), pp. 4, 11; *ibid.*, UN doc. A/C. 4/SR. 1833 (22 Oct. 1969), p. 21.

[2] UN doc. A/PV. 1819 (1 Dec. 1969), pp. 24-25.

[3] UN doc. S/PV. 1464 (20 Mar. 1969), pp. 28-30.

[4] *Ibid.*, p. 37 and UN doc. S/PV. 1494 (6 Aug. 1969), p. 12.

[5] UN doc. S/PV. 1528 (29 Jan. 1970), pp. 48-50. *Vide* also UN docs. S/PV. 1464 (20 Mar. 1969), pp. 23-26, 28-30, 34-36, 42; S/PV. 1465 (20 Mar. 1969), pp. 63-65; S/PV. 1492 (30 July 1969), pp. 16 and 18; S/PV. 1494 (6 Aug. 1969), p. 16; S/PV. 1495 (8 Aug. 1969), p. 3; S/PV. 1527 (28 Jan. 1970), p. 37; S/PV. 1550 (29 July 1970), pp. 8-10.

[6] UN doc. S/PV. 1464 (20 Mar. 1969), p. 12.

[7] UN doc. S/PV. 1492 (30 July 1969), p. 12.

[8] UN doc. S/PV. 1527 (28 Jan. 1970), p. 38. *Vide* also statement made by Mr. Zakharov (USSR), UN doc. S/PV. 1494 (6 Aug. 1969), pp. 18-20.

F. The Latest Progress

I. General

66. In previous chapters full reasons have been given for the South African Government's contentions that both General Assembly resolution 2145 (XXI) and Security Council resolution 276 (1970) are void of any legal effect. In the preceding paragraphs it was furthermore shown that there was no factual basis for the adoption of the former resolution. The purpose of this section is to demonstrate why, even if it be assumed that either or both of the said resolutions could be regarded as valid recommendations, the South African Government must decline to give effect thereto [1].

Mention has already been made of the letter, dated 26 September 1969, addressed to the Secretary-General of the United Nations by the Minister of Foreign Affairs of South Africa [2]. In this letter reasons were given why, in the view of the South African Government, it would not be in the interests of the inhabitants of the Territory to sever their ties with South Africa. A memorandum attached to the letter, read with the publication *South West Africa Survey 1967*, showed the significant progress which had taken place in the Territory under South Africa's administration in all spheres of life, and which would come to an abrupt end if the said ties were severed.

In the succeeding paragraphs details will be given of the latest progress in South West Africa in some of the more important spheres of life, affecting *all* the inhabitants. This will show, it is submitted, not only that the reasons set out in the letter still hold good, but indeed that it is at present more necessary than ever before that South Africa continue to administer the Territory.

It will be noted that in many instances no sources are cited for statements made in the next paragraphs. In such instances the information was derived from government departments, and will, if the Court so desires, be verified by *viva voce* evidence or affidavit.

II. Population and History

67. The facts about the peoples of South West Africa and their histories are fully documented [3]. As it is of vital importance to understand and evaluate properly the nature and purpose of South Africa's administration in South West Africa, the salient features are recapitulated for the sake of convenience.

68. It is generally accepted that the inhabitants have never formed a homogeneous entity, but themselves wished to retain their identities. There is in the Territory no single entity which can be described as "the *people* of the Territory". The population is in fact made up of a number of disparate peoples, each conscious of its own identity. Different parts of the Territory of South West Africa have to a large extent for generations been occupied by these peoples themselves.

69. By far the majority of the population groups of South West Africa live in the homelands they chose for themselves long before there was a United

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[1] The facts set out will at the same time serve as further refutation of the false notion on which South Africa's administration of the Territory has been condemned by majorities in the United Nations.

[2] *Vide* para. 62, *supra*.

[3] *Vide I.C.J. Pleadings, South West Africa*, Vol. II (Counter-Memorial), pp. 311-380, and *South West Africa Survey 1967*, pp. 16-32.

Nations, and long before the South African Government's administration of the Territory began. Anyone acquainted with the history of South West Africa knows that a century or two ago the *Ovambo* tribes themselves chose the area they now inhabit for its rainfall and the relatively good grazing it afforded for their cattle and for its relative suitability for crops. This is true also of the peoples of the *Kavango* and the *Caprivi*, and to a lesser extent of *Kaokoland*.

The peoples of these four regions account for 58.3 per cent. of the total of all the population groups of South West Africa. These regions have always resembled four independent countries, each with its own political, economic and social organization. Their peoples were largely unaffected by contact with the German administration, or with one another or with the population groups to the south. Only the southern "Police Zone [1]" was under direct German control. The northern sector outside this zone was not subject to German control at all (except to a limited extent Kaokoland). The Eastern Caprivi Zipfel occupied an intermediate position, German control being exercised in an indirect way by making use largely of the traditional tribal authorities.

Neither the Ovambo, nor the Kavango, nor the East Caprivi peoples had ever occupied or attempted to occupy or laid claim to those parts of the Territory where other population groups now live. The territory of the East Caprivi people, by a mere accident of history, had been artificially made an appendage of South West Africa of which their area was not geographically a natural part.

70. In the "Police Zone" there were various population groups which had been in contact with each other for at least a century when South Africa's administration of South West Africa began. This contact had not led to the creation of a common society. On the contrary, tribal and group differences, and conflicting claims to land, had led to continual bloodshed, resulting in the subjugation, or even virtual extermination, of the weaker by the stronger.

71. All these groups also differed materially in ethnic origin, languages, customs, cultures and levels of development. For instance, the *Bushmen* were a nomadic people living entirely from hunting and gathering of wild plants of the veld. They kept no cattle and planted no crops. They lived in a state of continual enmity with other, more powerful, tribes who deprived them of the best hunting grounds, and whose cattle they raided. The Bushmen constitute about 2.8 per cent. of the total population of South West Africa.

72. The *Nama or Hottentots* are classified with the so-called Khoisan group of peoples and they are amongst the earliest inhabitants of South West Africa. It is thought that they owe their origin to a mixture of Bushmen with early invading peoples of Hamitic stock from whom they also acquired certain distinctive linguistic and cultural features. They were nomadic pastoralists who did not practise agriculture, but depended on their herds—cattle, fat-tailed sheep and goats—and, to a certain extent, also on hunting. The Nama constitute about 4.4 per cent. of the total population.

73. The *Damara* (also known as Bergdama) are a mystery to students of ethnology. In appearance they are a short-statured, negroid people, differing entirely from the Nama on the one hand and from the Bantu tribes inhabiting southern Africa on the other. The earliest records show the Bergdama as practising either a primitive hunting and collecting economy, or, more fre-

[1] So called because under German administration the police and other officials controlled the area. German authority was never effectively extended beyond the "Police Zone".

quently, as enslaved by the Nama whose language they had adopted, resulting in the complete disappearance of their own. The Damara are about 8.5 per cent. of the total population.

74. The *Herero* are a Bantu people, though distinct from the other Bantu tribes of northern and eastern South West Africa. They were exclusively pastoral nomads, and for a considerable period had lived in the Kaokoveld, an inaccessible region in the north-west. Towards the end of the 18th century the greater part of the group continued its migration southward, leaving behind in the Kaokoveld some Hereros and related tribes (Himba and Tjimba) which in time came to form a distinct population group.

The social organization of the Herero is unusual in that it is based on a system of double descent, an individual belonging to two social entities, namely the *oruzo* of his father and the *eanda* of his mother. This system of bilateral descent is unknown amongst any of the other population groups of South West Africa. The Herero take an exclusive view of their national or ethnic group, membership being derived normally from birth. The Chief's Council of the Herero represents only the Herero nation, constituting 5.8 per cent. of the total of the population groups of South West Africa.

After the southward migration of the Herero during the first decades of the 19th century, war between them and the Nama became inevitable, since both groups coveted the same grazing, and in the early clashes the Herero were on the whole victorious; but the Nama were soon strengthened by the Hottentot groups (the Orlams) which had by now returned from the Cape Province whence they had earlier migrated and where they had learnt the use of fire-arms and acquired horses. Their superior arms enabled them to defeat the Herero in a number of bloody battles, and thereafter, for some decades, the Herero lived in total subjection to them. By the 1860s, however, Herero in the service of the Nama had themselves learnt to use fire-arms; and, after a successful rebellion, there followed some years of intermittent warfare in which the Herero were generally successful. The introduction of German rule in South West Africa in 1884 did not of itself end hostilities. It was only after the general uprisings during the years 1903-1907 that peace came to the central and southern parts of the Territory. The years of warfare had a catastrophic effect on the Nama, Herero and Damara. The loss of life was immense, the peoples were scattered leaving many areas empty.

75. After the inception of the Mandate it was the South African Government's task to rehabilitate these peoples by safeguarding and extending their homelands so that they could consolidate their social and political structures. The *White* population, then about 20,000 strong, had just begun to develop a modern economy. Today they constitute about 12 per cent. of the total population.

76. There was another group which has not yet been mentioned: the *Rehoboth Basters*. Of mixed Nama-European descent, they left the nothern Cape in South Africa during the latter half of the 19th century and moved northwards into South West Africa. In 1870 they settled at Rehoboth, where they have lived ever since. They constitute about 2.1 per cent. of the total population. Their language is predominantly Afrikaans and their form of government consists of a Council, applying their traditional laws.

77. The members of the Coloured group who for the most part are relatively recent immigrants from the Republic of South Africa, constitute about 3.8 per cent. of the total population.

78. Finally there are about 17,000 *Tswana* and others. The Tswana are related to the citizens of Botswana. This group constitute 2.3 per cent. of the total.

79. It is thus fallacious to speak of the "people" of South West Africa in the singular as if they were a single cohesive entity.

Population growth

80. A population census was conducted in South West Africa on 6 May 1970 [1]. The preliminary results, compared with the results of the 1960 census, are shown in the following table:

Population Group [2]	*1970*		*1960*	*Percentage increase*	
	Number	*Percentage of total of all groups*	*Number*	*1960-1970*	*Per annum*
Ovambo	344,000	45.9	239,363	43.7	3.8
Whites	90,000	12.0	73,464	22.5	2.3
Damara [3]	64,000	8.5	79,159 [3]	22.5	2.1
Nama [3]	33,000	4.4			
Kavango	50,000	6.7	27,871	79.4	6.3
Herero	43,000	5.8	35,354	21.6	2.1
Coloureds	28,000	3.8	12,708	120.3	8.5
East Caprivians	25,000	3.3	15,840	57.8	4.8
Bushmen	21,000	2.8	11,762	78.6	6.2
Kaokolanders [4]	18,000	2.4	9,234	94.9	7.2
Tswana and other	17,000	2.3	9,992	70.1	5.6
Basters	16,000	2.1	11,257	42.1	3.7
Total	749,000	100.0	526,004	42.4	3.7

81. The percentage increases shown in the table above in respect of the Ovambo, Kavango, Coloureds, East Caprivians, Bushmen, Kaokolanders, Tswana and other for the period of nearly ten years between the dates of the two censuses (September 1960, and May 1970), cannot be attributed to natural growth rates only (excess of births over deaths).

The 1970 census must be considered to be the most complete and accurate census of the population groups that has yet been conducted, particularly in the northern homelands where the largest increases are reflected.

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[1] Coinciding, as far as the year is concerned, with population censuses in most countries of the world, as part of the world census of population which was recommended by the United Nations.

[2] 1970: Population groups as enumerated at census.
1960: Population groups based partly on census results and partly on estimates.

[3] Census enumeration was made according to home language in 1960. Damara and Nama were grouped together under home language Nama. As has been shown in para. 73, *supra*, the Damara had adopted the Nama language to the complete disappearance of their own. Figures for Damara and Nama previously shown separately for 1960, represent *estimated* apportionment of census total between the two groups. The figures for 1970 represent the first separate enumeration of Damara and Nama.

[4] Estimate.

The first population census in the northern homelands was conducted in 1960. All earlier population figures were largely based on estimates. Intensive planning and organization for the 1970 census, as well as the actual enumeration, were substantially aided by the progress and advancement which have taken place in the northern homelands since 1960, notably extensions in the road network, improved communications and the spread of education.

These factors resulted in large increases for 1970 compared with 1960 in the groups in the northern areas, for example: Ovambo 43.7 per cent.; Kavango 79.4 per cent.; East Caprivians 57.8 per cent.; Kaokolanders 94.9 per cent. These increases are larger than could be accounted for by natural increase and migration, although these two factors must have played a role.

It is, however, reasonable to assume that the natural rate of population growth has been higher during the past decade than ever before. Everywhere birth rates have remained high, whilst death rates have declined as a result of public health measures and better standards of living.

82. Even when due consideration is made for the factors mentioned above, the growth rates reflected in the table above compare favourably with growth rates elsewhere in Africa, as will appear from the following table:

AFRICA: ANNUAL RATE OF POPULATION INCREASE, 1963-1968 [1]

Country	*Per cent. p.a.*
Libya	3.7
Somalia	3.3
Rwanda	3.1
Zambia	3.1
Botswana	3.0
Burundi	3.0
Dahomey	2.9
Equatorial Guinea	2.9
Kenya	2.9
Morocco	2.9
Sudan	2.9
Algeria	2.9
Lesotho	2.9
Swaziland	2.8
Guinea	2.7
Malawi	2.7
Niger	2.7
Nigeria	2.5
Togo	2.5
Uganda	2.5
United Arab Republic	2.5
United Republic of Tanzania	2.5
Mauritius	2.4
Ivory Coast	2.3
Congo (Dem. Republic of)	2.2
Tunisia	2.2

[1] *Vide* United Nations, *Demographic Yearbook 1968*, pp. 85-89. According to a general note in this source, the figures are estimates of questionable reliability, except in the case of Mauritius.

Country	*Per cent. p.a.*
Central African Republic	2.1
Gambia	2.1
Ghana	2.1
Senegal	2.1
Upper Volta	2.1
Cameroon	2.0
Mauritania	2.0
Liberia	1.9
Mali	1.4
Gabon	1.8
Chad	1.5
Sierra Leone	1.5
Congo (Brazzaville)	1.4
Ethiopia	1.4
Angola	1.3

III. Government and Administration

83. A brief exposition of the broad lines of policy which the South African Government is pursuing in South West Africa is given in the *South West Africa Survey 1967* [1]. Thereafter follows a discussion of the major aspects of government and administration in the Territory [2]. In his letter to the Secretary-General of the United Nations dated 26 September 1969 [3], the South African Foreign Minister also dealt with some of the more important political aspects under the heading "'Territorial Integrity' and 'Political Sovereignty'" and "The Alleged 'Struggle' of the Peoples of South West Africa [4]".

Since 1969 further important progress was made in the political development of the peoples of South West Africa when the Kavango nation achieved a greater measure of self-government in October 1970. With this event three of the major population groups, the Ovambo, the White group and the Kavango, amounting in all to about 65 per cent. of the total, are now self-governing pursuant to constitutional arrangements approved by the South African Parliament. In addition the Rehoboth Basters constituting about 2.1 per cent. of the total of the population have enjoyed a measure of autonomy ever since their arrival and settlement in South West Africa in 1870.

84. In Annex C [5] the South African Government demonstrated to what extent political advancement has been made in Ovamboland during the last few years. After the promulgation of enabling legislation in June 1968, public meetings were held for the purpose of consulting each community in Ovamboland in regard to the recognition of the community government and the determination of its powers, functions and duties, and the establishment of a Central Legislative Council as well as an Executive Council for Ovamboland as a whole. The meetings were attended by the leaders of each community, as well as by a representative number of male adults, including members of professional groups, and at each meeting Ovambo spokesmen expressed their full support for the recommended developments.

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[1] Annex A to this Chapter, at pp. 42-49. *[Not reproduced.]*
[2] *Ibid.*, pp. 50-58. *[Not reproduced.]*
[3] Annex C to this Chapter. *[Not reproduced.]*
[4] *Ibid.*, pp. 25-49. *[Not reproduced.]*
[5] At pp. 29-34. *[Not reproduced.]*

It was furthermore shown that the formal deliberations and consultations on the constitutional issues, which lasted 19 months, culminated in proclamations issued by the State President of the Republic of South Africa in October 1968 which established a Legislative Council and Executive Council for Ovamboland, Administrative Departments, and rules of procedure and financial regulations for the Legislative Council. In accordance with the wishes of the delegations representing the seven Ovambo communities, which had met at Ondangua on 30 September 1968, it was provided that the Legislative Council would function on a federal basis, each of the seven Ovambo communities to be represented by six representatives.

The first session of the first Ovamboland Legislative Council was formally and ceremoniously opened by the responsible South African Cabinet Minister on 17 October 1968.

The Legislative Council elects a Chief Councillor, who is the head of the Executive Government, from among the Councillors nominated by each community. Initially the following Government Departments were established: Authority Affairs and Finance; Community Affairs; Works; Education and Culture; Economic Affairs; Justice and Agriculture.

The Chief Councillor, in consultation with the Executive Council, assigns the control of the various departments to the members of the Executive Council. An officer, styled the Chief Director, is the Administrative Head of a department of Authority Affairs and Finance and co-ordinating officer of all the departments administered by the Executive Council; and an officer, styled a Director, is the Administrative Head of one or more of the remaining departments. All the posts in the Ovamboland Public Service will as soon as possible be filled by Ovambos, but the South African Government will assist by providing officials where trained Ovambo officials are not yet available.

The Second Session of the Ovamboland Legislative Council was held early in 1969. Its first enactment was approved by the South African State President on 13 June 1969.

In a radio message to the Ovambo people on 29 September 1970, the Chief Councillor, Chief Ushona Shiimi, again emphasized his nation's right to self-determination and to plan its own destiny and future. He said it seemed odd to the Ovambos that the Security Council in New York had asked the World Court for an advisory opinion on South Africa's presence in South West Africa.

"It is our right as a fully pledged nation to make our own choice . . ." he said. "The Ovambo Nation has chosen, and nothing has happened to make it change its mind."

85. Preliminary consultations as to their future constitutional development were held with the representatives of the Kavango communities as from the latter part of 1968 onwards.

Following upon the preliminary meetings, the representatives of the five communities indicated their desire for statutory consultation as provided for in the enabling legislation of 1968 (Act No. 54 of 1968). Public meetings of the leaders and the adult male members of each community were accordingly convened by the South African Government's administrative representative in the Kavango for the purpose of consulting each community separately in regard to—

(a) the recognition of the community government and the determination of its powers, functions and duties;

(b) the establishment of a central Legislative Council as well as an Executive Council for Kavango as a whole and the manner in which such Councils should be constituted.

As in the case of the Ovambo peoples, suitable notices of the date, venue and purpose of each meeting were extensively given throughout the area of each community. The meetings were held as follows—

Geiriku	15 June 1970
Mbunza	16 June 1970
Mbukushu	17 June 1970
Sambyu	18 June 1970
Kwangali	19 June 1970

The meetings were attended by the leaders as well as by a substantial number of male adults of each community. At each meeting those present were invited to express their views on the matters scheduled for discussion, resulting in spokesmen of the particular community expressing their group's support for the envisaged new constitutional arrangements.

In regard to the Legislative Council and Executive Council it was decided that the details could best be worked out at a general assembly of delegates of each community.

The delegations met at Rundu in the Kavango on 22 July 1970. Draft proclamations relating to the establishment and constitution of the Legislative Council and the constitution of an Executive Council were discussed in detail with the delegations and approved by them. So were other matters like the Rules of Procedure for the Legislative Council. Effect was given to these arrangements in proclamations issued by the State President of the Republic of South Africa in July and August 1970. These established a Legislative Council and an Executive Council, administrative departments, as well as rules of procedure and financial regulations for the Legislative Council. The Legislative Council would function on a federal basis, each of the five tribes being represented by six representatives. Thus the full Council consists of 30 members. There must be a session of the Legislative Council at least once in every year, and the Chairman and Deputy Chairman are to be elected by the Council. For the rest, the arrangements correspond to those agreed upon for Ovamboland.

The First Session of the Kavango Legislative Council was opened on 22 October 1970. On the previous day various symbols of authority, including a mace, the symbol of authority of the Kavango Legislative Council, were presented to the Kavango Government by the Minister, Mr. M. C. Botha, representing the South African Government.

In his address at the opening ceremony, the Minister said:

> "On behalf of the State President and the Government of the Republic of South Africa, I wish to congratulate you, the leaders and the people of Kavango, on the important decision you have taken to proceed with the establishment of your own territorial government.
>
> . . . . . .
>
> The step that you are now taking will be natural and understandable to all honest men, for surely it is the aim of every people to exist and be recognised as a specific group so that it can live in peace, true to its own cultural traditions and institutions.
>
> These aspirations will now take tangible shape through the establishment of your own government, for you can preserve and develop your identity as a people only if you are enabled to do so yourselves. This decision you have taken is therefore also a message to other peoples that the people of Kavango have set out upon the road to nationhood."

In reply the Chief Councillor of the Kavango said:

"I speak on behalf of this Legislative Council and the peoples of Kavango when I say that the Republic of South Africa is our best friend. It is our profound wish and desire that these bonds will from today on become still stronger. That which is taking place here today is but the beginning of a matter of great importance. The people of Kavango are also eager to take their place amongst the people of the world. We desire to accomplish this in peace and friendship. In order to achieve this we definitely need the assistance and guidance of a good friend. That good friend is the Republic of South Africa who will help us on the road to progress. I therefore now, on behalf of the government and the people of Kavango, request you and your government that, as in the past, you will also assist us in the future . . . We learn that our affairs here in South West Africa are still being discussed in the United Nations Organization. We have also heard that a case in regard to our affairs will again be heard in the International Court. We, the government and the people of Kavango wish to state our point of view in this regard very clearly. The people of Kavango have always lived in the territory of Kavango and we have no desire to obtain any land or have authority in any other part of South West Africa. Our land has great development potentialities and the government of Kavango intends to make it our aim and task to undertake this development. It is our desire to live here in peace as a separate people and to lead our land and our people to progress. In South West Africa, in the Republic of South Africa, in Africa and the world peoples will be found who exist in their own right. Why cannot the people of Kavango, just as other people, exist in their own right? Must we then be herded as cattle and goats into one kraal by other people who know nothing of our aspirations? That is definitely not what the people of Kavango desire. It is for this reason that we today address a request to the other peoples in Africa and in the world that they too will recognise and accept the right of the people of Kavango, to their own existence just as they recognise their right to their own existence and desire that it be accepted.

We have a good friend in South Africa who has never yet occasioned us any harm. We know that the Republic of South Africa, as a good friend, will help us."

86. The above account of the constitutional development of Ovamboland and the Kavango illustrates the South African Government's approach to the principle of self-determination and the methods by which that principle is being implemented in the circumstances of South West Africa where the various groups have never formed an integrated unit. As indicated elsewhere, this approach is entirely in line with that envisaged by the mandates system, and was fully recognized as proper in terms of the Charter of the United Nations. Indeed, the British Cameroons, British Togoland and Ruanda-Urundi, all three former mandated territories later placed under trusteeship, were eventually divided on an ethnic basis [1].

IV. Summary Review of General Economic Development

87. As indicated in South Africa's Pleadings in the *South West Africa* cases [2]

[1] *Vide* Annex C, pp. 34-36. *[Not reproduced.]*

[2] *I.C.J. Pleadings, South West Africa*, Vol. II (Counter-Memorial), pp. 289-310.

and in *South West Africa Survey 1967* [1], the natural environment of South West Africa is basically unfavourable for economic development. It displays great diversity resulting in special problems of administration and development. The Territory has an area of 824,269 square kilometres including the area of Walvis Bay (measuring 1,124 square km.), which is part of the Republic of South Africa [2]. It constitutes nearly 3 per cent. of the total area of Africa while its 749,000 inhabitants represent only about 0.2 per cent. of the total population of Africa. It has one of the lowest population density figures in the world. Topographically South West Africa can be divided into three regions:

(i) *The Namib* an extremely arid and desolate desert region stretching along the entire coast-line to a width of between 80 to 130 km. The major portion of the Namib receives an annual rainfall of less than 50 mm. per annum.
(ii) *The Central Plateau* is the region lying to the east of the Namib. It varies in altitude between 1,000 and 2,000 metres and offers a diversified landscape of rugged mountains, rocky outcrops, sand-filled valleys and plains.
(iii) *The Kalahari* covers the eastern, north-eastern and northern areas of South West Africa. The dominant feature of this region is its thick cover of terrestrial sands and limestones [3].

In terms of land area only 32.1 per cent. of the Territory receives an average annual rainfall of more than 400 mm. The rainfall over the plateau area improves steadily from south-west to north-east. Ovamboland, Kavango and the Caprivi are situated in the highest rainfall region of South West Africa. These areas are favoured not only by a larger annual amount of precipitation but also by a rainy season of longer duration.

In common with other arid regions of the world, the effectiveness of the South West African rainfall is even less than that indicated by the average rainfall because of the high variability of rainfall and the high rate of evaporation.

Dense vegetation is confined to the north and north-east of the Territory. The areas to the west of the escarpment are so barren as to preclude any form of agricultural exploitation. In the central region the vegetation changes gradually from an arid shrub variety to an open thorn savannah and scattered trees towards the north.

Agricultural and industrial development in South West Africa is seriously hampered by a severe lack of water. As a result of the low and erratic rainfall, normal dry-land cropping can be practised over only 1.1 per cent. of the Territory's surface. The grazing areas have an extremely low carrying capacity.

In Annex A [4] it was shown that the two basic physical factors of South West Africa's economy are recurrent cruel droughts and the vast distances which separate human settlements. Almost all the needs of the modern sector of the economy must be imported: all fuel for power and transport, machinery, equipment, cement and many other building materials, most consumer goods, and even a great deal of food. Indeed, these conditions, coupled with the danger of fluctuating prices for its few primary export products, make the economic growth of South West Africa seem almost miraculous. This can to a great ex-

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[1] Annex A at pp. 7-15. *[Not reproduced.]*

[2] *I.C.J. Pleadings, South West Africa*, Vol. II (Counter-Memorial), para. 1, p. 289, and para. 50, pp. 364-365. There are also a number of islands off the coast of South West Africa which are part of the Republic of South Africa.

[3] *I.C.J. Pleadings, South West Africa*, Vol. II (Counter-Memorial), p. 293.

[4] At p. 59. *[Not reproduced.]*

tent be ascribed to the intimate commercial, financial, technical and personal interrelationships with South Africa's economy.

88. Despite the limiting factors inhibiting economic progress, the Territory's 1969 Gross Domestic Product (G.D.P.) of R368.9 million was two-and-a-half times as high as in 1960 when it amounted to R145.6 million. Even when changes in the price level are eliminated, the Territory's G.D.P. has doubled during the decade as appears from the following table:

GROSS DOMESTIC PRODUCT AT CONSTANT (1958) PRICES, 1954-1969 [1]

(Gross Domestic Product at factor cost)

Year	*Current Prices*	*Constant Prices*	
		R million	*R per head*
1954	103	109	230
1955	127	131	268
1956	143	145	288
1957	141	141	273
1958	136	136	256
1959	138	135	247
1960	145.6	140.1	249
1961	160.4	151.8	262
1962	170.8	160.5	269
1963	205.7	189.1	308
1964	237.1	213.2	338
1965	287.0	248.7	383
1966	327.7	274.0	410
1967	335.9	273.1	398
1968	340.9	267.8	379
1969	368.9	278.0	382

89. Real income per head of the population rose by no less than 53.4 per cent. during 1960-1969, i.e., from R249 to R382. The average annual increase in real G.D.P. per capita amounted to 3.65 per cent. during 1963-1969 as against 2.07 per cent. per annum in 1957-1963. This may be compared with the rate of 1 per cent. attained by Africa as a whole (except South Africa) during 1960-1966.

As the following table shows, with the exception of Libya with its abundant resources of oil, South West Africa's per capita income of R491 or $687 was the highest in Africa in 1966, higher even than that of South Africa ($569) and respectively ten and three times as high as that of Tanzania and Zambia.

90. Viewed in longer perspective, it appears that South West Africa's real G.D.P. has doubled not only during the 1960s but also during the decade 1950-1959, and even during the four-year period 1946-1950, when it rose from R36 million to R72 million. (See table on p. 768.)

The fact that rates of growth of G.D.P. of more than 10 per cent. per annum at current prices were achieved over lengthy periods (1952-1957 and 1963-1969) with a rate of 6.5 per cent. in the intermediate years, is, it is submitted, an indication of the soundness of the administration of the Territory. (See table on p. 768.)

[1] Republic of South Africa, Department of Statistics.

GROSS DOMESTIC PRODUCT AT FACTOR COST PER CAPITA: INTERNATIONAL COMPARISON [1]

(U.S. dollars)

Country	*1963*	*1966*	*Country*	*1963*	*1966*
Algeria	200		Mauritius	271	219
Angola	68		Morocco	168	168
Botswana		94	Mozambique	68	
Burundi	46		Niger	74	83
Cameroon	109	124	Nigeria	71	75
Central African Rep.	100		Portuguese Guinea	69	
Chad	62		Réunion	280	
Comoro Islands	89		Rwanda	33	
Congo (Brazzaville)	161		Senegal	183	197
Congo, Dem. Rep. of [2]	156	98	Sierra Leone	123	144
Dahomey	69		Somalia	65	
Ethiopia	46	59	South Africa, Rep. of	466	569
Gabon	325	406	Southern Rhodesia	207	210
Gambia	72		South West Africa	470	687
Ghana	207	289	Sudan	94	96
Guinea	96		Swaziland		195
Ivory Coast	179	223	Tanzania, United Rep. of	64	67
Kenya	96	112	Tanganyika	60	67
Lesotho		78	Zanzibar and Pemba	102	
Liberia	238	272	Togo	86	118
Libya	421	1,056	Tunisia	200	184
Madagascar	92	101	Uganda	68	85
Malawi	50	57	United Arab Republic	143 [2]	167
Mali	68		Upper Volta	43	44
Mauritania	100		Zambia	165	236

91. These figures reflect the substantial improvement in the material well-being of South West Africa s peoples.

Indicative of progress as these figures are, they do not imply that the economy of South West Africa is comparable with that of a country as advanced industrially as the Republic of South Africa. The Territory's economy is in its infancy, and in the foreseeable future will be unable to sustain its progress without the closest links with the Republic of South Africa. Its Gross Domestic Product is less than 4 per cent. of that of the Republic, and some five years ago its national income was put at 1.9 per cent. of that of South Africa. Such a small market does not permit of substantial manufacturing, while exports are largely precluded by the high cost of power and fuel, and particularly by the great distances separating local industries from both their suppliers of raw materials and their customers. For these reasons, the economy must remain dependent for the foreseeable future on primary production—livestock, fishing and mining—which account for about one-half of the Territory's Gross Domestic Product, and must therefore remain vulnerable to fluctuations in demand and to climatic and other natural factors.

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[1] United Nations, *Statistical Yearbook 1969*, pp. 557-558. Every year covers the period of 12 months commencing 1 July.

[2] Data not strictly comparable with those for subsequent years.

COMPARATIVE DATA ON G.D.P., 1946-1953 [1]

Percentage contribution of major sectors to the G.D.P.				*Gross Domestic Product at 1958 prices*	
Year	*Agriculture forestry and fishing*	*Mining and quarrying*	*Manufacturing*	*R million*	*R per head*
	%	%	%		
1946	37.6	12.4	3.9	36	97
1947	41.4	15.4	3.2	48	125
1948	37.8	21.5	2.8	57	143
1949	33.9	26.5	3.0	58	142
1950	34.5	30.4	3.3	72	171
1951	30.0	37.9	2.3	91	211
1952	27.9	37.6	3.3	95	213
1953	28.2	34.7	4.1	101	220

GROWTH RATES (ANNUAL AVERAGE GEOMETRIC RATES) OF G.D.P. [1]

Years	*G.D.P. at current prices*	*G.D.P. per head at current prices*	*Real G.D.P. per head*
	%	%	%
1946-1952	25.74	21.90	14.10
1952-1957	10.35	7.13	5.04
1957-1963	6.50	3.51	2.07
1963-1969	10.23	7.14	3.65

In short, South West Africa's economy is not only small in size; it is highly vulnerable to factors beyond its control. It is also dualistic, like all economies in their early stages of development; for side by side with the investment-intensive and highly productive economy, traditional subsistence cropping, pastoralism and food gathering persist at various levels of development. The small modern economy alone cannot support the high cost of educational, health and other services for all inhabitants and is therefore heavily dependent upon the Republic of South Africa.

V. Banking and Financial Services

92. As indicated in Annex C hereto [2] South West Africa forms a part of the Rand monetary area which, apart from the Republic, also includes Botswana, Lesotho and Swaziland. The Territory shares in the common pool of gold and foreign exchange reserves of the area which are administered by the South African Reserve Bank operating, *inter alia*, as the Territory's Central Bank. The Territory is entitled to make use of South African capital resources and

[1] Republic of South Africa, Department of Statistics.
[2] At p. 66. *[Not reproduced.]*

may draw from the common pool of gold and foreign exchange reserves, subject to the same conditions as are applicable to residents of the Republic of South Africa. This has in fact contributed very appreciably to the economic advance of South West Africa.

VI. Mining

93. In respect of mining operations, conditions in South West Africa make particularly great demands on modern technology, and since all mines must still provide their own water, power, housing and civic amenities, and bear the considerable costs of skilled and other personnel, only highly capitalized and technically proficient companies can conduct operations on a scale to make mining profitable. Vast distances from suppliers of stores, spares, food, etc., are additional complicating factors.

Of the variety of minerals known to exist in the Territory, only diamonds and a few base minerals are at present being extracted on a major scale. Apart from diamonds, only 9 larger mines were in operation in 1969 whilst there were 13 smaller, and 34 small mining and quarrying ventures. A few new mining propositions are approaching the production stage, and others are being explored.

In 1969, mining and prospecting employed about 17,000 persons, paying them R14.8 million in cash alone, apart from the appreciable benefits in kind. The industry contributed between one-third and two-fifths to the Territory's G.D.P. (38.6 per cent. in 1965), and approximately R14 million to public revenue in the form of export duty and profit tax.

Total investment in mining was estimated at R58.3 million in 1966.

(a) *Diamonds*

Diamond mining involves the stripping of vast quantities of overburden (20.7 million cubic metres in 1969, including 2.8 million cubic metres in respect of foreshore activities). Consolidated Diamond Mines, the principal producer, operates a huge fleet of earth-moving vehicles, reputed to be one of the largest in the world.

(b) *Base minerals*

The Tsumeb and Kombat mines of Tsumeb Corporation Ltd. produced the Territory's total output of blister copper, refined lead, lead/copper/zinc concentrates, cadmium, and white arsenic in 1969. The Tsumeb Corporation Ltd.'s smelters and ancillary plant can produce 36,000 tons of blister copper, 100,000 tons of refined lead, and 90 tons of cadmium metal per year. In 1969, 595,298 tons of ore were milled.

The Matchless Copper Mine was brought into operation in 1970 by Tsumeb Corporation Ltd. in an area 16 miles west of Windhoek.

The South West Africa Company Ltd. operates the Berg Aukas Mine near Grootfontein and the Brandberg West Mine. The former supplies concentrates of zinc silicate, zinc/lead sulphide, lead/vanadium, and the latter concentrates of tin/wolfram.

The South African Iron and Steel Industrial Corporation Ltd. ("ISCOR") brought its zinc mine at Rosh Pinah into full production in 1969, milling a total of 236,944 tons of ore. At Uis, the Corporation works a large body of low-grade tin-bearing pegmatite.

Situated in the Baster country of Rehoboth, south of Windhoek, the Klein Aub Kopermaatskappy Bpk. started working in 1966 a copper deposit of

appreciable size. Concentrates of approximately 53 per cent. copper are being produced.

Considerable benefits are derived by the Baster community from the operation of this mine. Attention may be drawn here to the corresponding advantages accruing to the people of Damaraland from the Uis and Brandberg West mines lying in their homeland, and the Rössing mine located on its border (50 miles from Swakopmund).

Reference may also be made to the large-scale production of salt (130,769 tons in 1969) by evaporation of sea water in large pans seven miles north of Swakopmund. A product of high purity, suitable for the chemical industry, is being obtained.

VII. Agriculture [1]

94. Although agriculture now contributes no more than about one-eighth of the Territory's Gross Domestic Product, it constitutes the country's economic basis and will remain so in the foreseeable future. Yet drought, epidemics of stock disease, and marketing conditions abroad—factors largely beyond local control—render this industry liable to severe setbacks. Several such setbacks have occurred in recent years, the latest one being a serious drought in 1970, and only farm management of a high order, substantial support from the authorities, and the expansion of local meat-canning facilities have limited stock losses and saved the industry from utter ruin.

95. In 1968/1969, animal husbandry accounted for 98.1 per cent. of the total gross value of commercial agricultural output which was estimated at R58.6 million as compared with R44.4 million in 1965. Cattle alone contributed 60.1 per cent. of the total, and sheep, mostly Karakul, 34 per cent.

ESTIMATED GROSS VALUE OF AGRICULTURAL PRODUCTION 1968/1969 [2]

Product	*Rand*	*%*
	(1,000)	
Animal husbandry		
Cattle		
Slaughter stock	31,715	54.1
Dairy products	3,521	6.0
Sheep		
Karakul pelts	15,533	26.5
Wool	499	0.9
Slaughter stock	3,894	6.6
Pigs		
Slaughter stock	311	0.5
Other animal husbandry	2,025	3.5
Field crops—total	765	1.3
Horticulture	361	0.6
Total	58,624	100.0

[1] *Vide* Annex A, pp. 62-68, and Annex C, pp. 55-57. *[Not reproduced.]*

[2] Republic of South Africa, Department of Agricultural Economics and Marketing.

(a) *Cattle*

96. Due to the Territory's extremely low carrying capacity, only extensive cattle farming is possible, and this entails considerable capital outlays on the fencing of farms and their subdivision into camps. The provision of water has a critical bearing on the economics of cattle raising, not to mention the vast distances to markets [1].

Livestock statistics covering the years 1966 to 1969 show that cattle (and also goats, Karakul and other sheep) showed a substantial increase—24 per cent. within three years.

The large majority of commercial herds produce beef. Milk is almost entirely incidental and secondary, except for fresh-milk producers near the towns. The Territory's small population can absorb only a fraction of the meat produced (7.9 per cent. in 1969 as compared with 7.4 per cent. in 1965 and 10.3 per cent. in 1962). For the remainder, external markets have to be found.

Unfortunately, however, the extensive methods of stock-raising necessitated by the physical environment, cannot yield regular supplies of high-grade beef for the very competitive overseas markets. The animals must depend almost entirely on natural grazing because additional fodder cannot be grown locally whereas importation from the Republic or elsewhere is practically ruled out by very appreciable transport costs. Altogether 2,853.1 tons of beef were exported overseas or to other African countries in 1969 as against 389.6 tons in 1965.

On account of the industry's high cost structure, all exports to overseas markets entail financial losses, and for all practical purposes, the Territory's cattle industry will be doomed unless the Republic of South Africa continues to purchase the bulk of the beef marketed. During the period 1965 to 1969, the Republic bought between two-thirds and four-fifths of the total animals marketed, that is, from 240,000 to 260,000 a year. Around 27,000 are slaughtered for local consumption, and most of the rest is canned—again mainly for sale in South Africa.

At present, the bulk of the cattle is railed on the hoof to markets in South Africa. If this market were to fall away, the only alternative would be to slaughter the animals locally, and to try and sell the carcasses or canned meat overseas. As the Territory's costs of production are high despite the scientific methods applied in the modern sector, chilled or frozen beef could only be sold at a considerable loss. The canning factories could process at best one-third of the 350,000 to 400,000 animals that are available for sale every year.

It has been established that the herd of cattle of the three northern homelands (Ovamboland, Kavango and Kaokoland) can be raised from the current 844,500 to approximately 1.5 million once more watering points are available. At an output of 20 per cent., these homelands alone could then produce 300,000 head a year, about half for local consumption and the rest for export [2].

(b) *Dairy industry*

97. The production of cream and the manufacture of butter represent the main dairying activities. The industry's output is particularly susceptible to

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[1] Thus, to name just one example, scientific study has established that oxen railed from South West Africa to Cape Town for slaughter, lose approximately 10 per cent. more in live weight than those sent to be slaughtered *within* the country. *Vide* Hirzel, R., Louw, D., and Heydenrych, F., *Loss of Weight in Transit of Oxen Travelling by Rail from South-West Africa to Cape Town* (1949), table I.

[2] *Vide* Louw, D. J., *Future Potential of Animal Production in South West Africa* (1968), p. 4.

climatic conditions, and also relies on the Republic of South Africa as a market for its surplus butter and dried buttermilk.

Local butter consumption has been rising steadily over the past few years, from 2,382,932 lb in 1960/1961 to 3,030,218 lb in 1968/1969. As total production has shown a falling trend over the same period, exports to South Africa have decreased accordingly. The 1968/1969 export figure of 68,400 lb was exceptionally low and compares with an annual average of about 1,612,000 for the previous three years.

Overseas sales of surplus butter are possible only at a loss because of high production and transport costs, and the Republic's willingness to purchase the Territory's surplus, albeit at a higher price than that of New Zealand butter, is of substantial value to South West Africa.

(c) *Sheep and other small stock*

98. Those parts of the Territory with an average rainfall of less than 10 inches (254 mm.) a year, which comprises virtually the whole of the southern half and portions of the north-western region, are reasonably well adapted to small stock farming. The hardy Karakul sheep in particular has proved able to stand up to the arid environment of these parts where most of the 3 million head are kept.

The rising proceeds realized by exports of Karakul pelts has provided some welcome relief amidst the problems besetting agriculture. Despite the severe climatic conditions, the number of pelts exported rose from 2.24 million in 1965 to 3.74 million in 1969, thus increasing total value from R14.03 million to R22.21 million.

Thus, although the industry is progressing, it is not without its problems, producing as it does a commodity, the demand for which depends on fashion and is sensitive to economic fluctuations in overseas countries. The light weight and the specific curls of the South West African pelt give it a competitive advantage over those from other sources. However, these advantages were achieved as a result of continuous research and experimentation, and only by constant care in respect of the intricate breeding techniques will it be possible to maintain the high standards and the competitiveness of the industry.

Regular specialized courses for Karakul breeders are well attended. Advertising campaigns are being intensified, and the growing interest of overseas buyers has vindicated the large sums spent on sales promotion (R610,000 in 1968/1969 as against R502,000 in 1964/1965).

Nowadays Burghers (citizens) of the Rehoboth Gebiet are buying regularly at auctions of stud rams, are registering as breeders, and are improving their knowledge of techniques. In 1969, no less than 128,667 Karakul sheep were recorded in the Rehoboth Gebiet—more than three times as many as in 1967.

(d) *Crops*

99. Owing to lack of water, grain growing can play only a minor role in the southern sector, where 63,000 bags of maize and 16,400 bags of other grains were reaped in 1965. In good years, the northern territories are self-sufficient in grains, but in bad years the Administration provides large quantities at heavily subsidized prices. In short, the southern sector must regularly get the bulk of its maize from the Republic, while the north has to do so intermittently. Imports amounted to 858,008 bags in 1964/1965 and 424,370 bags in 1965/1966. Furthermore, about 75 per cent. of the southern sector's requirements of fruit and vegetables come from the Republic –approximately 6,860 tons a year at a total cost of R453,000.

Field crops estimated at R765,000 and horticultural products valued at

R361,000 were produced in 1968/1969, that is, only 1.9 per cent. of the aggregate value of all agricultural products.

The production of maize is closely associated with climatic conditions and varies considerably. Whereas about 125,000 bags were reaped in 1967, the figure for 1969 amounted to approximately 234,000 and in 1970—for which year a figure is not yet available—output can be expected to have shrunk considerably because of drought.

AGRICULTURAL PRODUCTS [1]

Product	*Unit*	*Year ended 30 June*	*Total*
Maize reaped	bags (200 lb)	1966	85,130
		1967	124,668
		1969	234,216
Wheat and other grains reaped [2]	bags (200 lb)	1966	27,153
		1967	30,341
		1969	264,960
Wool shorn	lb	1966	8,557,416
		1967	7,034,114
Hides sold	number	1966	46,438
		1967	195,176
Skins (sheep and goat) sold [3]	number	1966	219,984
		1967	264,373

In respect of the first nine months of 1970, well over 300,000 bags of maize had to be imported from the Republic of South Africa in order to cover the shortfall between local production and actual needs. The recurrent droughts would inevitably lead to famines of serious dimensions if it were not for the ready availability of emergency supplies from the Republic of South Africa and the special measures taken to distribute these supplies.

(e) *Distress Relief*

100. The whole of South West Africa is at present listed as a drought-stricken area, and on 1 July 1970 extensive relief measures were announced. Farmers in South West Africa are granted more favourable conditions than those in South Africa. In April 1969 the Government had already announced certain discounts on the transport of maize by rail to the Territory (37.5 per cent.) and as from 1 July 1970, all feed transported to the Territory for drought relief qualifies for a rail rebate of 75 per cent.

The following amounts were spent on distress relief in the Territory:

	Subsidy	*Rebate*
1.4.69-31.3.70	R180,906	R192,148
1.4.70-30.9.70	R537,044	R264,163

[1] Republic of South Africa, Department of Statistics.
[2] Includes millet, cultivated mainly in northern homelands.
[3] Excluding Karakul pelts.

Furthermore, arrangements were made to slaughter cattle at Okahandja and Otavi in addition to those at the Windhoek abattoirs. From May 1970, approximately 450 cattle were slaughtered daily at the Windhoek abattoirs—an increase of almost 100 per cent. on the normal figure.

101. A table showing comparative data on meat production in a number of African countries follows.

MEAT PRODUCTION, 1968
COMPARISON WITH A NUMBER OF AFRICAN COUNTRIES [1]

(Beef, Veal, Mutton and Lamb)

Country	*Population (in 1,000)*	*Production (in metric) tons)*	*Production metric tons per 1,000 of population*
South West Africa	709	62,000	87.4
Republic of South Africa	19,167	550.000	28.7
Swaziland	395	12,000	30.4
Botswana	611	17,000	27.8
Uganda	8,133	153,000	18.8
Rhodesia	4,940	69,000	14.0
Ethiopia	24,212	327,000	13.5
Tanzania	12,590	162,000	12.9
Central African Republic	1,488	13,000	8.7
United Arab Republic	31,693	234,000	7.4
Morocco	14,580	107,000	7.3
Cameroon	5,562	32,000	5.8
Algeria	12,943	70,000	5.4
Sudan	14,770	74,000	5.0
Senegal	3,685	18,000	4.9
Chad	3,460	16,000	4.6
Zambia	4,080	14,000	3.4
Niger	3,806	12,000	3.1
Kenya	10,209	31,000	3.0
Angola	5,362	14,000	2.6
Nigeria	62,650	160,000	2.6
Upper Volta	5,175	13,000	2.5
Ghana	8,376	17,000	2.0
Mozambique	7,274	10,000	1.4
Mali	4,787	6,000	1.3

Conclusion

102. Six basic features of the Territory's agricultural economy stand out:

first, its vulnerability to climatic factors and stock disease;
second, its dependence on cattle and Karakul sheep;
third, the inability of South West Africa's meat and dairy products to compete regularly on international markets, and, because of the small internal market, their reliance on sales to the Republic;

[1] Republic of South Africa, Department of Statistics; United Nations, *Statistical Yearbook 1969*, pp. 206-212.

fourth, agriculture's inability to supply a significant proportion of the inhabitants with grain, vegetables and fruit, so that large quantities have to be purchased from South Africa;
fifth, the high standards of farm management required to combat a harsh and arid environment and marketing problems, and to make farming pay under such conditions;
sixth, the inherent limitations which the semi-desert environment in the southern sector imposes on the growth of agriculture.

However, despite these adverse circumstances, agriculture is today a flourishing industry, due to the capability of the farming community, the sound policy of the authorities and the vital support given by the Republic of South Africa.

VIII. Veterinary Services

103. In Annex C hereto [1] an exposition is given of the problems encountered in South West Africa as a result of ever-threatening animal diseases. As South West Africa is dependent on the export of animal products, the Territory is extremely vulnerable to epizootic diseases. The exposition referred to above shows to what extent free use is made of facilities and services which are available in the Republic of South Africa, thus saving South West Africa much expense and the difficulty of duplicating highly trained staff.

Thus, during emergencies when local staff is unable to cope with the volume of work, veterinarians and other trained staff are sent from the Republic to assist and because of their knowledge of local conditions they can take the field without delay. Similarly when investigations are called for, which are beyond the local staff, officers with the necessary specialized knowledge and experience are drafted temporarily from institutions such as Onderstepoort in the Republic.

Research work of a specialized nature, for which facilities do not exist locally, is referred to the Council for Scientific and Industrial Research, the South African Bureau of Standards, the Medical Research Institute or Onderstepoort Veterinary Research Institute, etc. Many of the vaccines used in South West Africa are prepared in the Republic.

It is, therefore, evident that the health of livestock and, as we shall see later of man also is dependent on close liaison between the government officers in the field and a number of highly developed specialist institutions in the Republic. It is essential that this link should be maintained in the interests of the Territory as well as those of her neighbours.

IX. Fishing [2]

104. The fishing industry is centred mainly on Walvis Bay, a harbour which is part of South African territory. Activities based on Lüderitz are on a much smaller scale. At Walvis Bay a project to the value of R1.5 million is currently in progress to improve harbour facilities for the fishing fleet. Further improvements to the value of approximately R2.5 million are in the planning stage.

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[1] At pp. 93-98. *[Not reproduced]*.
[2] *Vide* also Annex A, pp. 68-69, Annex C, pp. 68-69. *[Not reproduced]*.

Opportunities to expand fishing operations further to the north will be provided by the development of harbour facilities at Möwe Bay, about 170 miles (270 km.) south of the Cunene River mouth.

During the past two decades, commercial fishing has grown to be one of the Territory's principal industries. Total capital investment amounts to over R20.5 million, about R13 million thereof in buildings, machinery and housing, and more than R7.5 million in fishing vessels.

The industry is providing direct employment for about 3,300 persons, and a further 720 are employed as crews on fishing vessels. In 1968, about R2.5 million was paid in salaries and wages to factory personnel, and a further R9 million was earned by boat owners and their crews from the fish catch.

105. The total catch for the inshore pelagic fish factories during 1969 amounted to 954,082 tons as compared with 527,000 in 1958. It is anticipated that the catch for 1970 will not exceed 820,000 tons. After reaching a record total of R49.3 million in 1966, the industry's sales have declined since then, reaching R35.9 million in 1969.

The fishing industry's high standards of quality and its efficient operating and marketing techniques, together with the powerful financial and technical backing given it by South African fishing companies, have placed the industry on a sound commercial basis.

A serious threat to the long-term existence of the industry is being posed, however, by the activities, just outside territorial waters, of trawlers and factory ships from non-African countries. The withdrawal of a collective annual quota of 156,000 tons pelagic fish from inshore factories can be attributed mainly to the fishing activities of these vessels. It need hardly be emphasized that the livelihood of thousands of persons of all population groups and their dependants is thus being jeopardized.

For their part, the responsible South African authorities are doing everything possible to safeguard the continued existence of this industry. Intensive as well as extensive research programmes are being carried out, and are to be expanded further, under the guidance of the Marine Research Laboratory of the Republic of South Africa.

Although the fishing industry exports a large portion of its products, it is experiencing a rising demand for its canned and other products in South and South West Africa. It is above all the lesser developed population groups who appreciate these highly nutritive but yet low-cost products.

X. Construction [1]

106. In 1962/1963, the building industry reached its lowest ebb of the decade but was booming a year later, and has done so ever since, largely as a result of the Administration's construction programmes which have deliberately maintained a high level of activity during a period when drought and foot-and-mouth disease seriously affected the Territory's economy.

As administrative and commercial capital, Windhoek mirrors the Territory's economic life, and the value of building plans approved by the Municipality of Windhoek is particularly significant in this context. In 1962 these amounted to R1,661,000 and rose by an annual average of R924,000 to R4,432,000 in 1965. During the next three years, the average annual increase amounted to no

[1] *Vide* Annex A, pp. 72-73 and Annex C, p. 69. *[Not reproduced.]*

less than R2,134,000 and in 1969, the total value of building plans approved amounted to a record of R11,084,000 —a figure two-and-a-half times as high as in 1965. The inhabitants almost doubled from 44,000 in 1965 to 80,000 in 1969 while the value of rateable property rose more than threefold from R55 million to R183 million.

The growth of building and construction is equally apparent from the Territory's consumption of cement. In 1962/1963 this was only 76,138 short tons, and rose by an annual average of 11,022 tons to 131,247 tons in 1967/1968. In each of the following two years, consumption increased by almost 34,000 tons, bringing the total to 198,811 tons in 1969/1970.

Practically all cement used in the Territory is brought in from the Republic, the bulk thereof by rail. The building industry's absolute dependence on these supplies being produced in South Africa and carried by the South African Railways was vividly demonstrated in the latter half of 1970 when no cement reached Windhoek for one week because all available trucks were needed for emergency marketing of cattle necessitated by the serious drought. All building activities in the town came to a complete standstill.

For many years the pace in the industry was set by the Administration but as of late the private sector has become no less important than the public one. That is not to say that the latter sector's spending has levelled out or even declined—quite the contrary.

Compared with R11.80 million spent by the Administration on its principal construction activities in 1962/1963, the figure had almost trebled by 1966/1967 when it stood at R33.17 million. In 1969/1970, the Administration's activities reached a record figure of R41.68 million, more than one-half thereof for road construction.

Currently, buildings to a total value of R19.96 million are under construction for the South West Africa Administration alone, that is, excluding departments of the other governmental agencies. In addition, a number of major projects are being erected or will be commenced in the near future. These include five new hospitals at a total estimated cost of R29.61 million.

Furthermore, and apart from the considerable construction activities in the northern and other homelands, housing is being provided by local urban authorities in the south for the non-White peoples. Thus 846 houses have been built for urban Coloured people during the period 1967 to mid-1970 at a cost of R2.27 million (including single quarters for 350 persons at Lüderitz). At the same time, R2.03 million was spent on urban houses for other non-Whites as well as R1.9 million for single quarters. In September 1970, there were 195 houses for Coloureds under construction, 175 thereof at Windhoek; the rest at Swakopmund.

At present, the Territory is being served by 150 building and construction firms, 33 electrical and 12 plumbing contractors, as well as the following other specialist contractors: steam installations, 12; mechanical services, 8; and heating, ventilation and air-conditioning, 7.

In 1960/1961, a total of 116 firms in private construction were recorded as against 151 seven years later. Whereas total employment doubled during the period, from 4,303 to 8,514, the number of White employees declined slightly while the number of Coloureds almost trebled and Bantu about doubled. The net value of output rose from R5 million in 1960/1961 to R12.7 million in 1967/1968.

XI. Commerce [1]

107. Levels of activity in the foregoing sectors, particularly in the livestock industry, substantially affect commerce. Nevertheless, even severe setbacks, such as droughts and epidemics of stock diseases have not repressed economic advance in South West Africa.

The vast infrastructural and other development projects undertaken in the Territory by the Government of the Republic of South Africa, have acted as a powerful stimulant not only to Construction but also to Commerce. Experience in 1970 has shown again that those projects and their secondary effects constitute an important economic stabilizer when agriculture is hit by crises. Hence all available indices point to a persistent long-term economic growth.

G.D.P. at current prices increased at an average annual rate of 10.23 per cent. between 1963 and 1969.

Sales of motor spirit rose from 16.8 million in 1964 to 24.9 million gallons in 1968. At present, sales run at an annual rate of 29.4 million gallons.

A total of 7,183 new motor vehicles were registered in 1969 bringing the total of all vehicles registered at the end of 1969 to 55,476.

The turnover of the Territory's retail trade establishments amounted to R55.8 million in 1966/1967 as compared with R40.7 million six years earlier (1960/1961).

Despite the rapid expansion of the past few years, consumer price indices increased only moderately compared with some other African States. Thus food prices rose by only 15 per cent. between 1960 and 1968 as compared with an increase of 45 per cent. in Zambia and 237 per cent. in the Democratic Republic of the Congo.

XII. Manufacturing [2]

108. The scope for manufacturing and processing industries is severely restricted by three factors. Firstly, the limited aggregate local demand from a small, widely scattered population; secondly, the nature and limited supplies of locally produced agricultural and other raw materials; and, thirdly, the high costs of transportation, power, water and personnel which, together with the aforementioned factors, render most of the Territory's manufactures uncompetitive on world markets. Therefore, the manufacturing sector is largely confined to the processing of perishable products for consumption in the Territory and in the Republic, to finishing and assembling materials obtained from South Africa, or to specialized repair and relatively small-scale production work.

109. The growth of this sector is largely dependent upon developments in agriculture, fishing, construction and, to a lesser extent, mining. It has little prospect of becoming a leading and growth-promoting sector, although low-cost hydro-electric power from the Cunene scheme could change the whole situation.

Of the 217 industrial establishments recorded in 1967/1968, no less than 100 were concerned with the manufacture or processing of agricultural, sylvicultural and marine raw products. The remainder was made up mostly of a large diversity of small establishments ancillary to the needs of the population.

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[1] *Vide* Annex A, pp. 73-75, and Annex C, pp. 69-70. *[Not reproduced.]*

[2] *Vide* Annex A, pp. 71-72 and table on p. 73, Annex C, p. 69. *[Not reproduced.]*

The development of the manufacturing industry during the period 1960/1961 to 1967/1968 gave rise to a 57 per cent. increase in aggregate employment. However, Coloureds, who play a particularly important role as skilled and semi-skilled workers in manufacturing and construction, doubled in number while their total salaries and wages more than trebled.

In 1967/1968, the 8,910 employees of all population groups in manufacturing earned a total of R8.8 million as compared with R3.7 million earned by all employees in 1960/1961. The net value of output rose by an average of R2.53 million annually, reaching R30.8 million in 1967/1968.

XIII. Railway, Road Transport, Harbour and Air Services [1]

(a) *Railway services*

110. As was stated in Annex A [2], the heavily subsidized services provided by the South African Railways and Harbours constituted a major factor in the development of the Territory's economy. Vast distances and a very small population, coupled with a serious water shortage and the absence of local fuel, result in disproportionately high capital investment and financial losses. Yet, South West Africa is by far the best equipped on the African continent in rail and road transport facilities, measured in distance run per 10,000 inhabitants. The latest available figures are given in the table on page 780.

111. The railway system in South West Africa has the benefit of all research conducted by the South African Railways, and a great many other centralized facilities. For instance, the civil and electrical staff establishment in the Territory is limited to the minimum required for the maintenance and renewal of equipment. This is made possible by the large engineering establishment in the Republic of South Africa, expert in fields such as research, harbours, structural design, bridge and permanent way engineering, soil mechanics, organization and methods and the design and purchase of equipment.

Technical resources, personnel, equipment and stores are transferred from the Republic to the Territory for major constructional work. These are readily available, as are communication equipment, electrical sub-station equipment, power cables, spares for construction and bridge steelwork and permanent way material required for ordinary maintenance and the restoration of the washaways which occur in the Territory [3].

Interchangeability of staff between the two countries is also an important factor, because, due to loneliness and other problems, South West Africa is a difficult area for Railway personnel to work in. About 7,700 persons are employed by the Railways in the Territory, and under the Railways housing scheme more than 2,000 houses have been purchased and erected for Railway employees. The housebuilding programme costs approximately R550,000 per annum.

1,453 miles of railway line supplemented by a few hundred miles of loops and sidings have been laid, as compared with the Republic's total track mileage of 19,436. Thus, although the South West Africa system is very large in relation to the population it serves, it constitutes only a small fraction of the total network operated by the South African Railways and Harbours. Improve-

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[1] For background information see Annex A, pp. 79-83, and Annex C, pp. 57-59. *[Not reproduced.]*

[2] At p. 79. *[Not reproduced.]*

[3] For further details *vide* Annex A, pp. 79-83, and Annex C, pp. 57-59. *[Not reproduced.]*

COMPARATIVE DATA ON LENGTH OF RAILWAYS 1964 [1]

Country	*Length of railways in km.*	*Population (in 10,000)*	*Length of railways in km., per 10,000 of the population*
South West Africa	2,338	63	37.1
Republic of South Africa	19,635	1,746	11.2
Congo (People's Republic)	800	83	9.6
Mauritania	675	90	7.5
Angola	2,776	508	5.5
Liberia	518	104	5.0
Mozambique	3,218	687	4.7
Tunisia	2,012	457	4.4
Algeria	4,248	1,098	3.9
Sudan	4,479	1,318	3.4
Congo (Democratic Republic)	4,979	1,530	3.3
Togo	493	160	3.1
Senegal	1,035	340	3.0
Zambia	1,038	360	2.9
Sierra Leone	597	220	2.7
Dahomey	579	230	2.5
Tanganyika	2,352	999	2.4
Guinea	825	342	2.4
Libya	362	156	2.3
Kenya	2,085	910	2.3
United Arab Republic	4,780	2,890	1.7
Morocco	2,029	1,296	1.6
Ivory Coast	558	375	1.5
Uganda	1,044	737	1.4
Madagascar	864	618	1.4
Mali	645	449	1.4
Ghana	948	754	1.3
Upper Volta	615	475	1.3
Malawi	508	390	1.3
Cameroon	517	510	1.0
Nigeria	2,865	5,640	0.5
Ethiopia	1,090	2,220	0.5

ments are in hand at a cost of R13.66 million of which more than R1.88 million will be spent during the 1970/1971 financial year.

The Railway Administration is at present giving consideration to the inclusion of an item in the 1971/1972 Capital and Betterment Estimates to provide for the erection of an aerial co-axial cable over the entire section of railway line between De Aar in the Republic and Windhoek in South West Africa—a distance of approximately 382 miles—to rehabilitate the existing old open-wire route. Apart from the manifold advantages of a co-axial cable it will facilitate the installation of automatic telephones at railway outstations where no power is available. The estimated cost of the project will be of the order of R3 million.

[1] Republic of South Africa, Department of Statistics; *South African Railways and Harbours, Annual Report*, 1968/1969.

112. The upward trend of recent years in the economy is clearly seen in the rising freights handled by road, rail, harbour and air services, as well as in passenger traffic, as reflected in the following table:

RAILWAYS: PASSENGER AND GOODS TRAFFIC, 1962/1963-JUNE 1970[1]

Financial year	*Passengers journeys (number)*	*Tonnage conveyed (tons)*	*Livestock conveyed large (number)*	*small (number)*
1962/1963	446,968	2,680,610	575,456	1,157,641
1963/1964	358,059	2,792,890	1,075,536	1,183,766
1964/1965	457,072	3,488,370	665,302	1,561,410
1965/1966	519,111	3,840,070	713,918	1,604,471
1966/1967	397,238	3,874,841	646,975	1,464,314
1967/1968	376,387	3,906,276	603,520	1,432,697
1968/1969	369,236	3,852,530	577,739	1,807,780
1969/1970	386,557	4,312,424	606,831	1,515,879
April-June 1970	97,764	1,069,543	278,759	424,536

Most of the incoming traffic is from South Africa, mainly the Transvaal, and consists of consumer goods manufactured in, or obtained from, the northern part of South Africa. The return load is chiefly livestock, requiring a different type of wagon. Thus both types of trucks are hauled empty in one direction over a distance of about 1,000 miles. This is costly but inevitable. In the same way fish, fruit and refrigeration trucks are returned empty in one direction, thus adding to operating costs and the losses of South African Railways from its operation in South West Africa. A similar situation exists in the conveyance of ores for shipment at Walvis Bay, and in the carriage of livestock from remote farming areas to the meat-canning factories.

Truck loadings for the financial year 1969/1970 amounted to 236,276 short trucks compared with 225,523 for the previous year.

113. Up to 31 March 1970, it had cost South African Railways and Harbours R207 million to build up its present assets in South West Africa. This figure would be much higher if past costs were to be expressed at today's prices. The total spent in capital works, improvements and renewals up to March 1970, amounted to R98.03 million: R61.26 million was for permanent ways and works, R17.42 million was for diesel locomotives and R13.56 million for railway and harbour installations at Walvis Bay. Rolling stock for passenger transport in the Territory was valued at R8.98 million, and goods vehicles at R36.80 million.

The system is run at a loss which, for the period April 1922 to March 1970 totalled R63.08 million. Again the figure would be far higher at present-day prices. The reason for the loss must be sought chiefly in the economic structure and the low population density of the Territory, which involve long hauls through arid, unproductive regions. The loss would have been much greater had the system not been integrated with that of the Republic of South Africa.

[1] South African Railways and Harbours

(b) *Road transport services*

114. Road transport services are run at a loss which for the eight years ending 1969/1970 totals R1,599,434. These services are, however, essential to the welfare of the peoples, particularly in times of severe droughts, such as occurred in 1959/1960 and during 1970 when the situation was saved by the daily flow of foodstuffs brought by the Railway road vehicles to the stricken areas. Ovamboland is the major beneficiary.

No fewer than 71 points inland are served weekly by schedule and special trips, and during 1969/1970 a total of 3,978,380 vehicle-miles and 3,736,183 trailer-miles were covered. During the same period a total of 169,575 passengers were carried, and 313,577 tons of goods, 88,753 gallons of cream and 183,640 units of livestock were transported. The plant in service comprises 29 dual-purpose vehicles, 13 passenger vehicles, 60 ten-ton goods vehicles, 16 heavy haulers and 167 trailers based at 17 depots.

(c) *Harbours*

115. South African Railways also run the harbours at Lüderitz and Walvis Bay. The former can only berth coasters up to 18 feet draught, and is therefore of limited use. Walvis Bay has become South West Africa's gateway to the outside world. However, this is South African territory, and was never part of German South West Africa, or of the area under Mandate [1]. This means that South West Africa's only effective outlets by rail and ship are through South African territory.

The tremendous increase in traffic since the Second World War has necessitated extensive improvements at Walvis Bay which now has 4,600 ft. of deep water quays, three times as much as in 1929 [2]. There is also a tanker berth for vessels up to 630 ft. length. There are 29 wharf cranes; 5 are shortly to be replaced by modern equipment and 4 additional long-jib wharf cranes are on order. There is over 110,000 sq. ft. of floor space in covered storage sheds; one cargo shed is at present being modernized and rebuilt and a new mechanical workshop has been erected. A modern signal station is in course of erection. Facilities are adequate for present needs but planning is in hand for developments to meet anticipated future needs. Operational losses during the nine years 1961/1962 to 1969/1970 averaged R150,000 per annum.

(d) *Air Services*

116. During the 1969/1970 financial year 49,383 standard class passengers and 13,065 Skycoach passengers were conveyed on the services to and from the Republic, involving a total of 47,719,521 passenger miles, as well as 885.39 tons of freight and 184.85 tons of mail; and 6,528 passengers, 95,629 kilos of freight and 7,272 kilos of mail were conveyed on international routes.

The revenue derived from the standard class services between Johannesburg and Windhoek during this period amounted to R2,074,249 as against expenditure of R2,086,538. Revenue from Skycoach services amounted to R500,756 and expenditure to R995,092, reflecting a loss of R494,336 which is absorbed by the South African Railways and Harbours.

The total capital cost of airfields amounted to more than R13 million.

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[1] Nor, for that matter, were a number of islands off the coast of South West Africa which form an important centre of the guano industry.

[2] During 1969/1970, 1,441,089 tons of cargo were handled compared with 905,313 tons in 1961/1962.

XIV. Official Transport

117. Civil administration of the distribution of stores is dependent on transport. For this and other purposes the various administration branches have a fleet of more than 2,000 vehicles of various types operating in the Territory, with maintenance and repair facilities at fully equipped garages at a number of centres [1].

XV. Roads [2]

118. Impressive advances have been made in constructing roads, bridges and airfields, despite the formidable problems posed by the Territory's geographical, physical and geological nature, notably its low population density and the vast distances between towns and settlements.

119. Good progress is being made towards the objective of connecting border points from south to north and from west to east by bitumen roads. From Oshakati in Ovamboland in the north through Grunau in the south to Nakop on the south-eastern border, the road has been bitumenized, and also the road from Grunau to Vioolsdrift on the Orange River. From west to east through the central part of the Territory, the road has been bitumenized from Swakopmund through Okahandja and Windhoek to the J. G. Strijdom Airport. The construction of a bitumen road from this airport to Gobabis is to be completed by August 1971. The construction and improvement of roads in other sections of the general network continue without interruption.

Two large bridges have been completed. The one over the Swakop River, 2,156 feet in length, at Swakopmund was completed during 1969. Another, 1,762 feet in length was constructed over the Nossob River on the main road close to Leonardville.

The following are some of the achievements in 1969:

153 miles of bitumen road completed;
twenty-one bridges as well as 2 low-level bridges constructed or improved by the Roads Branch of the Administration, as well as a large number of box culverts, slabs and retaining walls;
a total of 13 bridges completed by contractors, including the 3 large bridges mentioned above and also 5 road-over-rail bridges;
576 miles of gravel road constructed and re-gravelled;
maintenance of gravel roads carried out over 18,989 miles [3].
The Keetmanshoop Aerodrome was completed during 1969, and so was the Kamanjab Airfield where work had started only at the beginning of the year.

120. The following major projects were under construction in September 1970:

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[1] *Vide* further, Annex C, pp. 65-66. *[Not reproduced.]*

[2] *Vide* Annex A, pp. 83-84, and Annex C, pp. 63-65. *[Not reproduced.]*

[3] This comprises 774 miles of trunk roads, 5,723 miles of main roads, 12,283 miles of district roads and 209 miles of game reserve roads.

Project	*Cost (Rand)*	*Date of completion*
1. *(a)* Dual carriageway: Windhoek—Kupferberg road *(b)* Eros Airport	1,380,733	End 1970
2. Swakopmund-Walvis Bay-Rooikop road	3,745,982	End 1970
3. Otavi-Grootfontein road	2,946,846	First half of 1971
4. Kamanjab-Ruacana road (Northern homelands)	6,538,757	First half of 1971
5. *(a)* Ondekaremba-Gobabis road	5,055,823	End 1971
(b) Bridges on Gobabis road	445,155	First half of 1971
6. Tsumeb-Grootfontein-Berg Aukas road	3,796,857	Latter half of 1971
7. Hardap-Stampriet road	2,042,723	First half of 1971
8. Windhoek-Keres road	2,581,320	First half of 1972
9. Otjiwarongo-Outjo-Pforte road	748,492	Recently completed
10. *(a)* Otjiwarongo-Kalkfeld road	2,200,000	Latter half of 1972
(b) Bridges	500,000	Latter half of 1972
Total	R31,982,688	

A road from Keetmanshoop to Bethanie, expected to cost approximately R8.3 million (including bridges), and scheduled for completion in 1974, was put out on tender in September 1970.

121. The following projects were in the planning stage:

Project	*Approximate cost (Rand)*	*Expected date of completion*
1. *(a)* Kalkfeld-Epako road	2,700,000	1974
(b) Bridges on this road	500,000	
2. Omaruru-Damaraland homeland road (all-weather road)	1,000,000	1974
Total	R4,200,000	

The following further projects appear on the Road Branch's programme:

Project	*Approximate cost (Rand)*	*Expected date of completion*
1. Pforte-Okaukuejo road	4,500,000	1974
2. Okaukuejo-Namutoni road	1,100,000	1974
3. Lüderitz-Aus road	4,500,000	1974
4. Western Link Road (Freeway) Komas Hochland Interchange to Brakwater Interchange	10,000,000	1974
5. Flood protection works, Mariental	1,100,000	1974
6. Keetmanshoop-Aroab road	6,000,000	1974
7. Stampriet-Aranos road	3,500,000	1974
8. Aiais-Fish River Canyon road	3,000,000	1974
9. Windhoek-Keres road (first 30 miles)	3,700,000	1974
10. Ondangwa-Oshikango road (Ovamboland)	2,600,000	1974
Total	R40,000,000	

122. The extreme variations in climatic conditions and geological formations pose considerable problems in the construction of roads. Most of the specific local problems encountered during construction work are dealt with by the staff of the Roads Branch, but where necessary the assistance of the National Institute for Road Research of the South African Council for Scientific and Industrial Research is enlisted.

The following are a few examples of the problems encountered:

On the coastal road between Swakopmund and Walvis Bay, the problem of sand encroachment was studied in detail by the National Institute for Road Research, and after conducting wind tunnel experiments the Institute was able to recommend construction methods that reduce the formation of sand dunes on the new road.

On the Usakos-Swakopmund road, the presence of gypsum in the road building gravel presented serious difficulties. Stabilizing the local gravels with cement was technically unsatisfactory and also too costly. By blending various soils found on the works, the gypsum content eventually was reduced to a tolerable margin.

In Ovamboland, the non-availability of gravel posed a major problem. Special techniques including aerial photography in prospecting for the very few gravel deposits had to be employed. Eventually, materials were hauled over long distances after it had been established that bitumen stabilization of local sands would be too costly.

Most of the professional and technical manpower needed in conjunction with these projects, must be drawn from the Republic of South Africa while the aid of research organizations in the Republic is playing a crucial role too. Progress is however being made in training local persons to play a more active role in road construction.

This is particularly the case in the northern territories inhabited by the indigenous population groups. The training is concentrated on the operation of modern complex machines and work in survey teams.

123. The Territory's economy is benefiting in many ways from the vast improvements made to the roads system during the past few years. Travelling times and above all maintenance costs for vehicles have been reduced drastically.

XVI. Postal and Telecommunications Services [1]

124. As the Post Office renders essential services to all population groups, its revenue figures can serve as a reasonably reliable standard for measuring the rate of the Territory's development and the progress of its peoples. The revenue earned by the Post Office in South West Africa increased from R65,015 in 1920 to R4,126,452 in 1969/1970. Even now, when telephone facilities are available in almost every part of the vast Territory, it is no easy task to keep abreast of the ever-increasing demand for telecommunication services.

125. The value of telephone, telegraph and radio installations in South West Africa amounted to R24,044,190 on 31 March 1970. If the value of buildings and other equipment were added the amount would be considerably higher. Postal and telecommunication buildings at a total estimated cost of R2 million were in the course of construction in the second half of 1970.

The particulars of capital expenditure on the development and renewal of telecommunications during the last three years are as follows:

[1] *Vide* Annex A, pp. 84-85, and Annex C, pp. 60-63. *[Not reproduced.]*

	1967/1968	*1968/1969*	*1969/1970*
	R	*R*	*R*
Trunk lines	564,353	528,757	821,867
Farm lines	439,248	509,088	421,512
Cables	200,563	350,701	297,201
Carrier installations	454,138	465,546	594,808
Exchange connections	176,417	285,467	352,143
Switchboards and exchanges	393,020	605,833	805,185
Telegraph services	159,496	159,576	212,190
Radio services	67,636	99,575	77,921
Tools and equipment	62,218	96,201	78,216
Transport	—	—	179,325
Total	2,517,089	3,100,744	3,840,368

126. Mail is conveyed throughout the Territory and from the Territory to the Republic by rail, road and air. Internal airmail is conveyed by Suidwes-Lugdiens and air-mail to the Republic by South African Airways. The expenditure on conveyance amounted to R311,813 during the financial year 1968/1969. In 1969/1970 altogether 2,713,372 parcels and registered articles were handled.

There are at present 32,122 telephone connections in South West Africa compared with 22,000 five years ago. This represents an increase of approximately 30 per cent. and is an indication of the rapid growth of communication facilities.

In August 1970 seven automatic exchanges and 55 manual exchanges were in operation.

Renters of telephone connections in towns made 23,500,000 local calls during the past year, while another 2,500,000 local calls originated from farm-line telephones.

The number of trunk calls increased from 2,800,000 in 1964 to 4,414,032 in 1969/1970.

Physical trunk routes now installed in South West Africa total 11,860 miles and carrier circuits installed 76,565 miles compared with 8,500 miles of physical trunks and 38,600 miles of carrier circuits six years ago.

The following radio stations exist in South West Africa at present:

Post office stations	13
Very high frequency stations	440
Private fixed stations	149
Private mobile stations	213
Ship stations	179
Aircraft stations	88
Amateur stations	62
Total	1,144

The vastness of the Territory necessitates the extensive use of motor transport. The Post Office owns a fleet of well over 300 vehicles, ranging from light sedans to ten-ton trucks. Many of the heavier types are equipped with cranes and other mechanical aids to facilitate the handling of heavy equipment.

During the financial year 1969/1970 a total mileage of 2,872,519 miles was covered; and transport costs, including depreciation, amounted to R442,277 in 1969 compared with R280,469 the previous year.

TELEPHONES IN USE, 1968 [1]

Country	*Number of telephones (in 1,000)*	*Population (in 1,000)*	*Number of telephones per 1,000 persons*
South West Africa	29.9	709	42.2
Republic of South Africa	1,397.7	19,167	72.9
Spanish North Africa	10.5	162	64.8
Réunion	12.4	426	29.1
Rhodesia	125.8	4,940	25.5
Mauritius	16.0	810	19.8
Libya	31.7	1,803	17.6
Tunisia	61.9	4,660	13.3
Algeria	156.0	12,943	12.1
Zambia	47.7	4,080	11.7
United Arab Republic	365.0	31,693	11.5
Swaziland	4.5	395	11.4
Morocco	160.3	14,580	11.0
Congo (Brazzaville)	9.3	870	10.7
Gabon	4.3	480	9.0
Senegal	26.2	3,685	7.1
Kenya	65.4	10,209	6.4
Ivory Coast	24.4	4,100	6.0
Botswana	3.0	611	4.9
Angola	23.0	5,362	4.3
Ghana	36.0	8,376	4.3
Madagascar	24.0	6,500	3.7
Liberia	3.6	1,130	3.2
Uganda	25.9	8,133	3.2
Mozambique	22.6	7,274	3.1
Sudan	45.1	14,770	3.1
Portuguese Guinea	1.5	529	2.8
Sierra Leone	7.0	2,475	2.8
Malawi	10.2	4,285	2.4
Tanzania	29.3	12,590	2.3
Lesotho	1.8	910	2.0
Central African Republic	2.8	1,488	1.9
Dahomey	4.8	2,571	1.9
Somali	4.8	2,745	1.7
Guinea	6.6	3,795	1.7
Togo	2.9	1,769	1.6
Mali	7.8	4,787	1.6
Ethiopia	36.0	24,212	1.5
Congo (Dem. Rep.)	23.9	16,730	1.4
Nigeria	75.9	62,650	1.2
Chad	4.0	3,460	1.2
Burundi	3.2	3,406	0.9
Cameroon	5.0	5,562	0.9
Niger	3.2	3,806	0.8
Upper Volta	3.0	5,175	0.6
Rwanda	1.4	3,405	0.4

[1] United Nations, *Statistical Year Book 1969*, p. 464, and Republic of South Africa, Department of Statistics.

127. South West Africa's vast expanses and its sparse population divided among small communities up to 150 miles apart, pose unusual problems in the construction, installation and maintenance of telecommunications. These are being tackled with great ingenuity by the Post Office engineers and their aides, the telecommunication technicians and telephone mechanics. The task of this group of officers is to provide and maintain as efficiently and economically as possible a modern communications network between all communities in every part of the country, no matter how remote, and, as will appear from the following tables, this network compares favourably with those elsewhere in Africa. (See table on p. 787 and below.)

MAIL TRAFFIC, 1968 [1]

Country	*Number of mail items sent or received, domestic and foreign [2] (in 1,000)*	*Population (in 1,000)*	*Number of items per person*
South West Africa	41,420	709	58.4
Republic of South Africa	1,294,347	19,167	67.5
Ghana	270,672	8,376	32.3
Zambia	124,813	4,080	30.6
Gabon	12,507	480	26.1
Libya	38,745	1,803	21.5
Mauritius	16,791	810	20.7
Swaziland	6,090	395	15.4
Tunisia	69,080	4,660	14.8
Madagascar	93,200	6,500	14.3
Ivory Coast	45,790	4,100	11.2
United Arab Republic	301,673	31,693	9.5
Algeria	115,824	12,943	8.9
Angola	43,311	5,362	8.1
Malawi	33,269	4,285	7.8
Morocco	103,466	14,580	7.1
Mozambique	41,491	7,274	5.7
Liberia	4,210	1,130	3.7
Nigeria	167,562	62,650	2.7
Niger	7,607	3,806	2.0
Rwanda	3,499	3,405	1.0
Burundi	1,937	3,406	0.6

XVII. Economic Advancement of the Indigenous Peoples of South West Africa [3]

128. The growth of educational facilities and the raising of educational standards are having a profound influence on the economy. Of special significance in the present context is the tremendous progress amongst the indigenous

[1] Republic of South Africa, Department of Statistics; and United Nations, *Statistical Year Book 1969*, pp. 453-454.

[2] The figures cover letters (airmail, ordinary and registered mail), postcards, printed matter, merchandise samples, small packets and phonopost packets. They include mail carried without charge, but exclude ordinary parcels and insured letters and boxes.

[3] *Vide* Annex A, pp. 89-102, Annex C, pp. 70-76. *[Not reproduced.]*

population groups in recent years. Their former lack of interest in modern education tended to confine them largely to tasks not demanding a high level of skill and prolonged training. But the picture is rapidly changing, particularly because of the increased use of the vocational training facilities provided at Windhoek and at Onguediva in Ovamboland, the rising demand for skilled manpower in the homelands and the numerous opportunities for in-service-training created by the growth of the Territory's economy.

129. In the urban area of Walvis Bay the *average* wages and allowances (including benefits in kind) of members of the indigenous groups are as follows:

Clerks	R58 per month
Municipal workers:	
clerks and cashiers	R104 per month
lorry drivers	R75 per month
maintenance artisans	R88 per month
nurses	R88 per month
caretakers	R89 per month
ordinary labourers	R48 per month
Labourers in industry	R72 per month
Labourers in commerce	R74 per month

As noted in Annex C [1], an ever-increasing number of workers from the indigenous groups are availing themselves of the opportunities for gainful employment and, in response to economic incentives, improving their qualifications and performance. Thus, a wide diversity of skilled or semi-skilled work is at present being carried out by them. For instance, of 46,672 indigenous employees in 1970 in the public sector, mining, industry and commerce, 4,222 were skilled workers (including a number of clerks); 10,683 were semi-skilled; and 31,767 were unskilled. To these should be added about 24,000 farm employees and 4,800 domestic servants, of whom virtually all the latter and a large proportion of the former can be regarded as semi-skilled.

The wages of workers from the indigenous nations in South West Africa compare favourably with, and in many cases are considerably higher than, wages in other African countries. This is particularly true of unskilled labourers, who form the bulk of wage earners in Africa. Apart from wages, the immediate supplementary benefits of employment in the modern sector of the economy are obvious and important: better housing, food and clothing; improved health; a generally higher standard of living, and a more secure existence.

130. As was pointed out in Annex A [2], there are also less tangible results which markedly influence the worker's motivation, habits, aptitudes, and outlook on life generally, and so have a profound effect on the rate and the direction of further economic and social development. It is in this climate of an increasingly enlightened understanding that the South African Government is introducing further measures to promote material and moral well-being. In view of the great diversity and the widely differing stages of development to be found amongst the indigenous peoples, such measures are correspondingly diverse and flexible.

As has been shown above, in terms of the policy of self-determination for every population group, more effective and meaningful political machinery

[1] At p. 71. *[Not reproduced.]*
[2] At p. 93. *[Not reproduced.]*

has been created. Vast areas have been added to the existing homelands to provide a sound basis for political and economic development. Farm land, to an extent of 3,076,155 hectares and valued at more than R25 million, has already been purchased by the Government for this purpose since such additions, consisting as they do of developed farms, are a particularly valuable form of aid, in that the indigenous groups will derive immediate benefit from good water supplies, fencing and the like. And, as appears from Annex C [1], the areas of the indigenous peoples enjoy climatic conditions and water resources vastly superior to those in the White farming areas.

As far as some of the southern homelands are concerned, the position is that after decades of intensive efforts to combat animal diseases and to improve the quality of stock, auctions and sales have been regularly held during the past few years in the Herero, Damara and Nama homelands. These have raised substantial amounts as is shown below:

Year	*R*
1966	1,116,000
1967	979,000
1968	1,611,000
1969	1,218,000
Total for four years. . .	4,924,000

131. The South African Bantu Investment Corporation is playing an increasingly important role in the economic development of the homelands of South West Africa. Its objectives are:

(i) to create on its own, and through the agency of others, avenues of employment in order to increase the percentage of economically active persons in the homelands;
(ii) to develop all available resources or to make possible the development and utilization thereof;
(iii) to ensure rising *per capita* incomes in the face of population increases;
(iv) to strive at all times to realize maximum profits and/or minimum costs in respect of existing or proposed ventures *with a view to these ventures' eventual takeover by the developing peoples themselves*;
(v) to do everything within its power to prepare and motivate the indigenous groups towards *self-development*, notably by means of on-the-job-training, specialized aid and advice;
(vi) to undertake basic and applied research with regard to existing and proposed ventures.

The corporation commenced its activities in the homelands of South West Africa in November 1964. During its first year of operation, the gross turnover of all ventures amounted to R196,000. The expected total turnover during the 1970/1971 financial year is approximately R11 million.

The Corporation has drawn up an economic development programme with the object of creating 5,800 employment opportunities for the indigenous groups by April 1975. This development programme entails the further development of existing ventures, and the establishment of new ventures in the following fields of economic activity: manufacturing, construction, services, trade and finance. These are additional to the development activities of other State agencies.

[1] At p. 72. *[Not reproduced.]*

A capital investment by the Corporation of R18.2 million during the next five years is called for by this development programme. The amount of R18.2 million presupposes the investment of a further R36 million in respect of infrastructure (water, power, roads, housing, etc.) which are in fact being planned and implemented by various governmental agencies.

As pointed out in Annex C [1], there are, at present, about 1,500 Ovambo traders who own rural stores, and who can receive advice about consumer requirements, purchases, stock controls, calculation of costs, sales techniques, store management, etc. Courses in commerce are also offered which are attended by as many as 200 to 300 Ovambo traders at a time.

The Building Department of the Corporation is at present constructing buildings to the value of R4.5 million. These buildings comprise factory and commercial premises, office blocks, housing for personnel, etc. Government buildings such as schools, hostels, clinics, hospitals, offices, housing, sewerage installations, etc., are also undertaken under contract. It is estimated that the Corporation will be engaged in the construction of buildings to the value of approximately R6 million towards the end of 1970. Construction works offer opportunities for in-service training in a large variety of trades. Employees are trained to become masons, plasterers, carpenters, plumbers, painters, electricians, etc. When they reach the necessary degree of proficiency they are organized into sub-contractor groups. These groups are then given sub-contracts in the building works of the Corporation and operate for their own account under the guidance of the Corporation. If necessary, they are also assisted financially.

The Corporation's building activities make it possible for the citizens of the homelands to participate in the physical development of their own countries and in so doing, to earn a living and improve their standard of living.

These operations help to retain income and profits from building activities in the homelands in which they have been earned. They create a market for the products of homeland manufacturing ventures such as wood processing factories, light steel industries, brickworks, etc. The building industry in the South West Africa homelands does, in fact, stimulate homeland manufacturing industries in many ways.

Since the Corporation commenced building operations in 1965, its labour force in the building department has grown steadily to the present level of 1,314 indigenous workers of whom 300 have reached a fair degree of proficiency in various trades. According to merit, these tradesmen earn from 20 cents to R1 per hour.

A number of mechanical work-shops and petrol filling stations are being operated by the Corporation which provide valuable training opportunities in the mechanical field. Furthermore, the Corporation's wholesale establishments and distribution depots are playing a significant role in the development of sound retail shops. The annual turnover of these wholesale concerns has been rising at an average annual rate of R0.5 million over the past few years.

Retail businesses are run by the Corporation only where the community concerned is not satisfactorily served by existing ventures. Where retail businesses are operated, intensive in-service training is provided in order to prepare entrepreneurs to take over the business in which they are employed.

The Corporation is developing a banking and insurance organization which

[1] At p. 75. *[Not reproduced.]*

eventually will render a complete banking and financial service, owned by the inhabitants of the homelands.

The wood-processing factory at Oshakati in Ovamboland produces a large variety of furniture and building requirements. School desks and benches, office furniture, bedsteads, tables and components for prefabricated houses are some of the major lines.

TOTAL EXPENDITURE ON ROADS AND AIRPORTS IN HOMELANDS AS AT 31 MARCH 1970

A. Roads	*Rand*
Bushmanland	664,283
Damaraland	519,226
Namaland	1,943,208
Kavangoland	818,072
Ovamboland	8,850,128
Rehoboth Gebiet	434,386
Sub-total	R13,229,343
B. Airports and airfields	
Ondangwa	1,351,545
Ruacana	540,896
Rundu	489,149
Tsumkwe	111,839
Katima Mulilo	775,015
Sub-total	R3,268,444
Total	R16,497,787

XVIII. Water Resources [1]

132. In Annex C it was demonstrated that one of the major problems of South West Africa is the scarcity of water and the sparseness, irregularity and, therefore, the ineffectiveness of rainfall. However, ingenuity, effort and money have been injected into water development to such an extent that although the total assured yield of both surface and underground resources is estimated at no more than 500 million cubic metres per annum, some 330 million cubic metres (or 66 per cent. of the available assured supply) is already being utilized to supply water for human, animal and industrial consumption and, on a limited scale, also to supply water for irrigation [2]. These schemes have been expensive to construct and operate, as is evidenced by the fact that in order to

[1] *Vide Annex A*, pp. 77-78, and Annex C, pp. 76-81. *[Not reproduced.]*

[2] The mean annual run-off of the internal rivers of South West Africa exclusive of the northern rivers is estimated at 1,500 million cubic metres of water a year. Of this, some 250 million cubic metres or 16.7 per cent. of the available resources are currently being utilized in the various supply systems of the country. The flow of the *internal* rivers in South West Africa is so irregular, often being limited to only a short stretch of the river, and evaporation from river beds and storage dams so high, that assuming storage can be provided economically, it is likely that no more than 350 million cubic metres can be obtained annually on a reasonably long-term basis.

achieve even this level of development it has been necessary to expend a total of no less than R81 million of government funds over a period of 20 years as indicated in the table hereunder. This expenditure is exclusive of expenditure by local authorities and private enterprise which may well be of the same order of magnitude.

ANNUAL EXPENDITURE ON WATER DEVELOPMENT [1]
(In Rand)

Financial year	*Department of Water Affairs*	*Other agencies*	*Total*	*Cumulative total*
	R	*R*	*R*	*R*
1950/1951	131,832		131,832	131,832
1951/1952	182,014		182,014	313,846
1952/1953	524,443		524,443	838,289
1953/1954	699,729		699,729	1,538,018
1954/1955	619,038		619,038	2,157,056
1955/1956	608,320		608,320	2,765,376
1956/1957	690,928	150,000	840,000	3,605,376
1957/1958	458,458	150,000	608,458	4,213,834
1958/1959	702,266	160,000	862,266	5,076,100
1959/1960	945,922	180,000	1,125,922	6,202,022
1960/1961	2,259,449	200,000	2,459,449	8,661,471
1961/1962	3,854,607	200,000	4,054,607	12,716,078
1962/1963	2,773,243	200,000	2,973,243	15,689,321
1963/1964	2,282,541	200,000	2,482,541	18,171,862
1964/1965	3,413,619	248,850	3,662,469	21,834,331
1965/1966	3,211,337	660,079	3,871,416	25,705,747
1966/1967	5,623,600	537,381	6,160,981	31,866,728
1967/1968	6,205,867	1,345,206	7,551,073	39,417,801
1968/1969	8,833,793	374,779	9,208,572	48,626,373
1969/1970	12,637,023	712,332	13,349,355	61,975,728
1970/1971	13,000,000	6,080,000	19,080,000	81,055,728

133. Water development to date has generally been in the form of supply schemes which by their very nature not only require relatively high unit capital investments but in addition entail considerable effort in the investigation, planning, design and construction thereof. As of 1970 there were no less than 177 domestic water supply schemes constructed and operated by the State throughout the Territory, supplying water to towns, villages, mission stations, country schools and community centres, centralized cattle watering points and hospitals. These schemes do not include the vast numbers of boreholes which are equipped with handpumps, windmills and power-heads to supply water for humans and cattle in outlying areas but which, because of their simple installations, are not regularly serviced and maintained by the central Service and Maintenance Group attached to the Department of Water Affairs.

In order to give some idea of the magnitude of the task of water supply from the above-mentioned 177 schemes the numbers in various categories are listed in the following table:

[1] Republic of South Africa, Department of Water Affairs.

CLASSIFICATION OF WATER SUPPLY SCHEMES ACCORDING TO SUPPLY CAPACITY IN CUBIC METRES PER ANNUM

	33,333 to 0	100,000 to 30,001	200,000 to 100,001	400,000 to 200,001	700,000 to 400,001	1,000,000 to 700,001	2,000,000 to 1,000,001	4,000,000 to 2,000,001	4,000,001 and over
Municipalities		1	1	1	2	1	2	2	3
Village management boards		5	5	3	2				
Mines					1	1	1		
Tourist camps	2	7	1						
Rural areas	12	11	2						
Homeland areas	56	49	6						
Total	70	73	15	4	5	2	3	2	3

The total capacity of the 177 schemes amounts to 36,000,000 m³.
Source: Republic of South Africa, Department of Water Affairs.

In spite of the magnitude of the task as indicated by the statistics quoted, it has always been official policy to supply water to consumers for primary purposes, i.e., for drinking, cooking and essential health services, at highly subsidized rates. Whereas members of the White group are expected to pay as much as 34 cents per cubic metre in the urban areas in the south, non-Whites enjoy consumption of water for domestic use free of charge in all the homelands as well as in most other areas. Where cattle-watering points are serviced, the cost of the service is defrayed from official funds.

134. For several years new economic developments and the rapid increase in population have combined to change the pattern of the country's economic life. One effect of this change has been a compound influence on water demand. Not only is it necessary to provide for an increased water demand because of an overall increased standard of living but in addition water requirements for mining, industry, recreation and other uses which cannot be regarded as vital to human existence, but nevertheless are part and parcel of economic development, now compete with primary water demands.

These additional demands have become so insistent that schemes such as that which was intended to supply Windhoek with adequate water for at least 15 years, is known—even before it is commissioned—to be inadequate to meet future demands for more than 10 years at the most. Schemes which only 5 years ago were considered adequate for at least 10 years are already supplying water at maximum designed capacity and more.

Throughout the Territory, growth rates and consequent increases in the demand for water are continually exceeding even the most liberal predictions.

It is against this background that the following projections of water demand have been set up, bearing in mind that even these, judging by past experience, are likely to be highly conservative.

During recent investigations it was found that developmental activity in South West Africa is likely to accelerate so that the population will grow and water demands will increase more or less in accordance with the figures set down in the table below.

ESTIMATED WATER REQUIREMENTS FOR SOUTH WEST AFRICA[1]

(in million cubic metres per annum)

	1970	1985	2000	2015
Population all groups	749,000	1,071,000	1,528,000	2,181,000
Consumption (including consumption for industrial and mining development purposes)	44	96	214	477
Large-stock units	2,400,000	2,750,000	3,500,000	4,000,000
Consumption	88	100	128	146
Small-stock units	5,400,000	6,000,000	6,500,000	7,000,000
Consumption	39	44	47	51
Irrigated area in hectares	6,500	25,000	100,000	200,000
Consumption	163	625	2,500	5,000
Total consumption	334	865	2,889	5,674

From this table it is clear that the peoples of South West Africa will require water from the northern rivers in the very near future. As shown in Annex C [2] an agreement was concluded in January 1969 between the Governments of Portugal and South Africa, for the benefit of the Territory, in terms of which South Africa has been granted the right to abstract as a first phase up to 6 cumecs of water from the Kunene River at Calueque in Angola, and to take this water across the border into South West Africa. The construction of a pumping scheme and a canal to the border, as well as an interim power station at the Ruacana Falls, at a total cost of some R6 million is at present under way. These funds are being provided entirely by South Africa. It is hoped that discussions can be continued between the Governments of South Africa and neighbouring countries on the use, for mutual benefit, of the waters of the Okavango and Kwando Rivers in which the Kavango, Caprivi, Herero and Bushman peoples have a special interest.

However, the problem of finance looms large in all projects to carry water from distant natural occurrences to the areas where it is needed.

The average cost of capital works to supply an assured flow of an additional one cubic metre of water a year in bulk (exclusive of distribution costs) to consumers in South West Africa is of the order of R2 at 1970 prices. This unit cost is conservative with regard to future schemes because the better schemes have already been fully developed and in addition it is increasingly necessary to draw water from more remote sources of supply.

In addition to the cost of *supply*, the cost of major *distribution* systems adds a further R1 to the cost of the water when used for general purposes such as domestic, municipal, mining, industrial and stockwatering purposes.

A further consideration is the consumption of water for irrigation use. At present, very little of the water available in South West Africa can be spared for irrigation. Once water becomes available from the northern rivers, however, the economics of moving large quantities of water become attractive quite apart from the fact that the production of food and fodder crops will by then also assume greater importance.

From an analysis of the cost of providing water for irrigation through the Vanderkloof Scheme in the Republic of South Africa as well as the Hardap

[1] Republic of South Africa, Department of Water Affairs.

[2] At p. 79. *[Not reproduced.]*

Scheme in South West Africa, and taking into consideration the Territory's physical nature, it would seem that the cost of distributing water for irrigation will be of the order of R5,000 per hectare.

135. The capital cost of providing the additional water which is estimated to be required in South West Africa by the year 2000 will be about R2,667 million as indicated in the table hereunder. No allowance has been made in these costs for operation and maintenance of the various schemes.

CAPITAL COST OF PROVIDING WATER TO SOUTH WEST AFRICA TO THE YEAR 2000 [1]

	Quantity of water million m³	*Capital cost to supply one m³ Rand*	*Total capital cost million R*
Water for domestic, municipal, mining, industrial and stock-watering purposes	389	3	1,167
Water for irrigation	2,500	0.40	1,000
Total			2,167
	Area—hectares	*Rate per hectare (Rand)*	
Capital cost of distribution of irrigation water	100,000	5,000	500
	Grand total cost		2,667

136. The magnitude of the task of providing water to the Territory and its peoples, is fully appreciated by the South African Government, and the South West Africa Branch of the Department of Water Affairs has made special efforts to produce water supply plans for the various homeland areas in South West Africa. The first of these plans—that for Ovamboland—has been accepted by the Government and others are in various stages of preparation. The estimated costs of the plans for the following areas are as follows:

Ovamboland	R60 million
Hereroland	R110 million
Damaraland	R100 million
Kaokoland	R90 million
Kavango	R50 million
Bushmanland	R35 million
Rehoboth Gebiet	R80 million
Namaland	R40 million
Total	R565 million

137. In the present context, it is relevant to consider a few further factors related to the financial aspects of the task. Expenditure during the next ten

[1] Republic of South Africa, Department of Water Affairs.

years can be expected to grow from the current R20 million per annum to around R30 million per annum in 1975 and to about R42 million per annum in 1980. For purposes of comparison it may be mentioned that the budget of the Food and Agriculture Organization of the United Nations in respect of the years 1966 to 1969 was about R42.5 million ($59.86 million)[1] whereas loans and credits granted by the World Bank (IBRD) and the International Development Agency (IDA) for water and sewerage schemes throughout the world totalled R40.19 million ($56.60 million) in respect of 1967/1968 and 1968/1969 together[2]. In the year 1968/1969, the two organizations jointly granted R45.72 million ($64.40 million) to the whole of Africa in respect of agricultural projects[3]. For the previous year, the corresponding figure was R10.81 million ($15.20 million)[4].

The above estimates are based on what might be expected in the moral course of development in South West Africa. Experience has shown, however, that water demands are continually "pushing" water supplies and the estimates may thus be conservative.

Furthermore, the vast sums needed for water development, represent a social rather than an economic investment. In other words, the prospective returns on the capital are minimal and these schemes would probably not be considered by banking or other commercially orientated institutions.

138. A master water plan for the various regions of South West Africa is currently in the process of evolution with the object of ensuring that the overall cost in money, labour and equipment of developing water resources will yield the optimum socio-economic benefits to the peoples of South West Africa. As plans stand for the present, the main supply schemes alone will involve several pipelines of upwards of one metre in diameter and well over 1,200 km. in length, with the necessary pumping stations to lift the water against static heads of up to 1,500 metres. Only the availability of ample power will bring these requirements into the realms of possibility. Only thus will it be possible to ensure that economic development, in particular that of the homelands, is achieved efficiently, effectively and expeditiously.

XIX. Power[5]

139. As was shown in Annex C, the relatively high cost of electrical power in South West Africa is an inhibiting factor in the economic development of the Territory. While coal-fired thermal power stations, which are relatively long-lived, are comparatively cheap sources of power in countries well endowed with coal deposits, this advantage is not enjoyed in the Territory, which imports its coal requirements from the Republic of South Africa, involving a haul of some 1,300 miles to Windhoek. Other power generating systems operating on petroleum fuels are necessarily expensive to run but are the only practical alternatives where the demand is relatively small. At present, local authorities and most large consumers such as mines, have to provide their own power.

140. As was also shown in Annex C, negotiations have been conducted with the Government of Portugal to develop the hydro-potential of the Cunene River as a source of power for South West Africa. These negotiations have cul-

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[1] *Whittaker's Almanac 1970*, p. 813.

[2] International Bank for Reconstruction and Development, International Development Association, Annual Reports, 1968, p. 9 and 1969, p. 11.

[3] IBRD, Annual Report 1969, p. 10.

[4] IBRD, Annual Report 1968, p. 8.

[5] *Vide* Annex A, pp. 78-79, and Annex C, pp. 81-83. *[Not reproduced.]*

minated in the final Agreement of January 1969 which formulates the basis on which the hydro-potential at the Ruacana Falls be developed in a first phase.

The Government has called upon the Industrial Development Corporation of South Africa Limited, a statutory body experienced in helping to bring new industries into viable existence, to undertake the financing of a private company formed in South West Africa under the title of "South West Africa Water and Electricity Corporation (Pty.) Limited" (SWAWEK), with the object of exploiting as far as practicable the power and other potentials of the Cunene River. It was initially intended to proceed immediately with the establishment of a hydro-electric power station on the Cunene. In addition a pumping station built on the river bank would make possible the abstraction of water from the Cunene River for the benefit of the peoples of South West Africa.

Since the joint plan for the first phase development of the resources of the Cunene River Basin in terms of the Agreement between Portugal and South Africa could not be implemented in time to meet the growing demand for power, as a result of the rapid growth in the territory's economy, it was decided to build a thermal power station with a capacity of 90 mW. at Windhoek.

This initial scheme is expected to be in operation by mid-1972 and will be followed three or four years later by the first stage of the proposed hydro-electric scheme at Ruacana on the Cunene River, now planned to a capacity of 160 mW., feeding into the same basic transmission system presently in the course of construction.

According to the latest estimates, the 90 mW. thermal power station now under construction at Windhoek will cost in excess of R20 million and if the first stage of the transmission grid, estimated to cost over R16,500,000, and staff housing, are included, the cost of SWAWEK's first major power generating project, to be completed in 1972, will be of the order of R38 million. The expenditure involved in extensions to the transmission system, which already appear necessary, and of further housing, will bring the total cost of this 90 mW. system, extending over 625 route miles (1,000 km), to some R40 million by the middle of 1973.

According to estimates, based on present-day prices, the first phase development of the power potential of the Cunene River in respect of which planning is already far advanced, calls for the following revised capital expenditure:

I. First stage involving generation of 160 mW., provisionally planned for completion by 1975

	R
Dam at Gove	8,125,000
Dam at Calueque	5,350,000
Hydro-power station at Ruacana	31,600,000
Transmission system tying in with that based on the thermal station	10,200,000
Sub-total	55,275,000

II. Second and third stages, involving increase in generating capacity to 320 mW. (to be completed by 1985)

Further regulation dam	6,000,000
Extensions to power station at Ruacana	4,800,000
Extensions to transmission system	14,000,000
Sub-total	24,800,000
Total	80,075,000

It will be seen, therefore, that SWAWEK's programme for power generation over the next 15 years involves capital expenditure of the order of R120 million.

XX. Education

141. The educational system of South West Africa is directly in line with the modern approach to education in Africa, viz., the emphasis on the importance of African cultures in the education of African youth. Once it is agreed, for example, that the Ovambo youth is entitled to receive educational instruction in Ovamboland in the Ovambo language, it is difficult to see why the same does not apply to every other people in the Territory.

The Secretariat of the Economic Commission for Africa, jointly with the United Nations Division of Social Development, the International Labour Organisation, the Food and Agriculture Organization, the World Health Organization, the International Children's Emergency Fund and the Government of Niger, sponsored a Regional Meeting on Youth Employment and National Development in Niamey, Republic of Niger, from 21 to 30 May 1968. The following are two of the recommendations adopted by the Meeting in regard to education and training:

> "7. That the structures of the primary school curricula in Africa should be consistent with modern social and economic requirements. Significant adjustments, however, should be made in the style of what is being taught in order to encourage learning of, and sympathy with, *the nation's cultural heritage* and present-day policy objectives. *Also, material taught in classrooms should, wherever possible, use everyday African examples,* and give proportionate weight to history and geography relevant to African conditions and aspirations. Although the curricula should not be narrowly vocational where school gardens and school farms and handicraft teaching do exist, these should emphasize not only current practices but also innovation of techniques.
>
> 8. That every effort be made to bring modern educative influences to boys and girls who do not have the opportunity to attend formal classroom schooling (in fact, the majority of young people in most countries). In achieving this purpose, use should be made of mass media, such as the radio, *with vernacular language presentations.* Fuller use should also be made of familiar social and vocational groupings; and the topics taught should include both civics and training in vocations[1]." (Italics added.)

142. In South West Africa considerable advance has been made in the past few years both as regards the number of pupils, teachers and schools on the one hand and the quality and scope of the tuition offered. The total number of pupils of all groups in primary and secondary schools has increased from 59,000 in 1960 to 130,000 in 1970, 22,000 pupils being from the White group and the remainder from other groups. The number of teachers for all groups has increased from 1,941 in 1960 to 3,790 in 1970.

143. The opening of the Augustineum High School, Teachers' and Technical Training Centre at Windhoek early in 1968 was a milestone in the history of education of the indigenous peoples of the Territory. Since its modest be-

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[1] "*Youth Employment and National Development in Africa*", Social Welfare Services in Africa, No. 7, November 1968, United Nations Social Development Section of the Economic Commission for Africa (doc. E/CN.14/SWSA/7, pp. 35-36).

ginning in 1866 as a mission training school for teachers, at Otjimbingwe, the Augustineum has grown into an eminent centre of educational and technical training. It was established at Okahandja in 1922/1923.

Apart from the modern training centre at Ongwediva in Ovamboland, to which reference is made below, the Augustineum is the most important educational centre for the indigenous groups. Students are trained as teachers and for various trades, while there is also a large high school section.

The following new courses have been commenced recently:

(i) At the beginning of 1969 Physical Science was added to the curriculum of the High School.
(ii) In addition to the existing Lower Primary Teacher's Course, a new Primary Teacher's Course has been introduced.
(iii) In the technical training section a motor mechanical course was added to the existing courses in metal-work and joinery, tailoring and general building construction.
(iv) A special one-year course was instituted to give inadequately qualified teachers an opportunity to become fully qualified in order to improve the quality of teaching.

Instruction in indigenous languages has also become a feature of the training of teachers since the beginning of 1970.

The number of students of the Augustineum has varied and in 1970 was higher than ever before when 650 were enrolled. The annual figures are:

Year	*Students*
1960	259
1961	177
1962	170
1963	191
1964	267
1965	306
1966	400
1967	512
1968	432
1969	442
1970	650

The teaching staff numbered 33 in 1970 as compared with 23 in 1965.

The college, with extensions was built at a cost of R2.8 million. The buildings include: a hostel for 700 students; a high school for about 500 pupils; a teachers' training centre for about 150 students; a technical and trade centre for about 150 pupils; and a modern hall which accommodates about 1,000 persons and which can also serve as a gymnasium.

Adjoining the school hall is an amphitheatre. These two facilities are used for film shows, church services and other social occasions. The hostels provide accommodation for all the pupils attending the school.

The equipment in the school is modern and adequate. Besides a well-arranged library and science laboratory, a domestic science centre, a typing room and science lecture room, various technical aids are employed. These include, *inter alia*, sound projectors, tape recorders and overhead projectors.

Various types of sports are played, e.g., rugby, soccer, tennis, athletics, boxing and badminton. The necessary sports fields have been constructed on the campus.

The following are the results of examinations in 1968 and 1969:

Junior Certificate

1968: 21 candidates: 13 first class passes; 7 second class passes; 1 failure.
1969: 30 candidates: 11 first class passes; 15 second class passes; 4 third class passes; 0 failures.

Senior Certificate

1969: 8 candidates: 1 first class pass; 7 second class passes; 0 failures.

144. As from 1 April 1969, the Ovamboland Department of Education and Culture has carried the responsibility for the control and development of education in that territory. The following table illustrates the progress made in education in Ovamboland:

Total population 1970: 344,000

Year	*Government and Territorial schools*	*Pupils*	*Teachers*	*Mission schools*	*Pupils*	*Teachers*
1961	85	21,010	445	43	5,109	134
1962	121	25,442	557	28	2,758	98
1963	146	27,161	604	11	1,382	59
1964	155	31,484	646	12	1,463	49
1965	166	32,870	695	6	269	21
1966	176	39,223	776	5	406	22
1967	181	42,068	892	5	360	20
1968	194	46,601	966	5	414	18
1969	213	54,382	1,129	5	401	25
1970	214	57,140	1,201	5	420	30

145. The major portion of the new buildings of the Ongwediva educational and training institute constructed at a cost of about R4.5 million has recently been taken into use. This is an impressive complex comprising three institutions in one, namely a high school, a teacher-training centre and a trades centre. Ongwediva caters for an initial total of 600 students.

At present, the following courses are offered:

Educational (Teacher Training)

Lower Primary Education Certificate I; Lower Primary Education Certificate II; Primary Education Certificate.

High School

Form I; Form II; Form III; Form IV; Form V.

The teaching staff numbers 23 at present, 11 of whom possess university degrees, 1 a teacher's degree in commerce, and the remainder professional educational diplomas.

The new trades centre will open in January 1971. The following courses will be introduced:

(i) Concreting, bricklaying and plastering (two years).
(ii) Carpentry, joinery, and cabinet-making (two years).
(iii) Plumbing, sewerage and sheetmetal work (two years).
(iv) General mechanics and motor mechanics (three years).

The above-mentioned courses will be augmented later on by an electricians' course and any other course for which the demand may arise.

In 1969, 36 teachers completed their training, and it is expected that in 1971 the enrolment for teacher's training will more than double from the present 101 to 215. An initial enrolment of 100 is expected for the new trades school. The number of high school pupils is expected to increase to 380, as compared with 249 at present.

Tuition at Ongwediva is free. A voluntary contribution of R4 per annum per pupil towards the School Fund is, however, payable.

Numerous recreational and cultural activities are offered to students, including film shows, drama, music, debating, writers' and other societies. Sports facilities include athletics, soccer, netball, tennis, hockey, etc.

The entire complex at present comprises the following:

1 high school building with 15 classrooms and 5 laboratories;
1 training school building with 11 classrooms and 1 laboratory;
1 adminstrative block containing library, offices, store rooms and 2 personnel offices;
6 hostels with provision for 100 pupils each (4 per room);
28 houses for staff;
a kitchen and 2 dining halls.

The following are under construction:

a modern hall to accommodate 1,000 students;
a hall for arts and music;
4 workshops;
an administrative block for the trades school;
several sports fields.

Once larger numbers of teachers have completed their training at Ongwediva, it will be possible to realize to the full the educational programme which envisages a junior secondary school for every community in Ovamboland. These schools will in the foreseeable future accommodate all Form I-III classes so that eventually only Forms IV and V will remain at Ongwediva.

146. In the Kavango with a total population of 50,000 in 1970, education is also making rapid progress. The enrolment of pupils increased substantially during the past few years. Particulars are as follows:

	Pupils	*Teachers*	*Schools*
1969	8,720	214	77
1970	10,300	245	84

A new Secondary/Teachers' Training/Vocational Centre is being constructed as well as a hostel for 500 boarding students.

147. As regards the other indigenous peoples, similar progress has been made in education with the partial exception of the Kaokolanders and the Bushmen. As a result of their traditional nomadic customs the Kaokolanders have always viewed modern education with indifference. Persistent efforts have, however, been made to change their attitudes, and these efforts are now meeting with success. About 400 pupils are now enrolled and it is hoped that this figure will steadily increase. In the case of the Bushmen the years of patience and understanding which have been applied to this interesting hunter-people have

also brought some results. The number of pupils has risen from 20 a few years ago to about 120 at present.

148. A Language Bureau (which is assisted by eminent authorities on African languages) was founded in order to raise the different African languages to full status as school, written and cultural languages and to provide sufficient school, subject and literary reading matter so that the children have the opportunity of—

(a) studying their own languages as subjects up to secondary and later up to university level (the mother tongue serves later as a university entrance subject); and

(b) receiving their elementary education through the medium of their own languages.

After years of language research the first offical orthographies in seven of the indigenous languages have been published. The second task is to draw up a standardized series of readers for each of the languages, based upon the most modern reading methods but at the same time adapted to the individual characteristics of each language. The first reading books are accompanied by flashcards for the children to use for word and sentence building and in addition by a set of large flashcards for the use of the teacher. The following reading books have appeared in the languages indicated:

Ndonga: Sub A, Sub B, Std. I and Std. III.
Kwanyama: Sub A, Sub B, Std. I and Std. III.
Herero: Sub A, Sub B, Std. I and Std. II.
Kwangali: Sub A, Sub B, Std. I and Std. II.
Mbukushu: Sub A, Sub B, Std. I and Std. II.
Bushman: Sub A, Sub B.

The following publications will appear in 1971:

Ndonga: Std. II Reader; Std. I and Std. II Arithmetic books.
Kwanyama: Std. II Reader; Std. I and Std. II Arithmetic books.
Herero: Std. I and Std. II Arithmetic books.
Kwangali: Std. I and Std. II Arithmetic books.
Mbukushu: Std. I and Std. II Arithmetic books.
Nama: Sub A, Sub B, Std. I and Std. II Readers (Sub A and Sub B will already be in use in 1971) and the Nama Orthography.

It is planned to tackle the production of a language series for each of the languages in 1971. The initial work has already been completed. These "grammar books" are drawn up along modern lines and are linked to the reading series already published.

The purpose is that for at least the first few school years the child should receive instruction through the medium of his mother tongue.

English and Afrikaans are offered as subjects from the very beginning and the change-over to the foreign language as medium of instruction occurs at a stage when the pupil has become thoroughly accustomed to it.

149. In Annex C (pp. 112-115) [1] extracts were furnished from the prescribed syllabuses of the educational authorities of the developing peoples to illustrate what are considered to be suitable standards in a number of subjects such as Arithmetic, General Science, Physical Science, Biology, Typewriting and

[1] Not reproduced.

English. The following extracts, also from the prescribed syllabuses, illustrate the objects and scope of teaching in subjects of a more practical nature. For instance, the aims of agricultural teaching are stated as follows:

"*(a)* to foster a love for the soil, plants and animals;
(b) to develop the correct attitude towards agriculture, which provides for the community as a whole;
(c) to study the application of scientific principles to agriculture;
(d) to enable pupils to gain experience of practical agriculture which they may put to use in later life, even if only to a limited extent in their home gardens."

The prescribed syllabus deals with the following sub-divisions: soil science, plants, fruit growing, agronomy, forestry and animal husbandry. These subjects are further sub-divided into numerous related disciplines in order to bring home to the agriculturalist the importance of practising the best methods of tilling the soil, raising crops and breeding his animals. For instance the study of plants in Forms II and III comprises:

(1) *Composition of plants*

Water, organic matter (carbohydrates, fats, protein), minerals, or ash constituents.

(2) *Requirements for normal growth of plants*

(a) Air, light, water, temperature, absence of harmful substances.
(b) Nutrients:
(i) Ten macro-elements.
(ii) Micro-elements.

(3) *Plant nutrients and soil fertility*

(a) The influence of nitrogen, phosphorus and potash on plant growth.
(b) Supplementing plant nutrients with:
(i) Natural or organic fertilisers like compost, manure, green-manuring.
(ii) The value, use and effect of organic fertilisers on soil and plant growth.
(c) Artificial fertilisers. Properties, the influence on plant growth and the uses of two fertilisers from each of the following groups:
(i) Nitrogen: Sulphate of ammonium, limestone ammonium nitrate (nitromoncol); urea.
(ii) Phosphate: Superphosphate, super rock phosphate, rock phosphate.
(iii) Potash: Sulphate of potash (potassium sulphate), muriate of potash (potassium chloride).
(d) Fertiliser mixtures: advantages and disadvantages.
(e) Effects of agricultural lime on soil.
(f) Water supply and irrigation methods:
(i) Flooding method.
(ii) Chess board method or furrow method.
(iii) Spray irrigation.

Advantages and disadvantages of each method.

(4) *Practical work and demonstrations*

(a) Which requirements are essential for germination and which for normal growth. (Classroom experiment.)

(b) Fertiliser tests to show the influence of nitrogen, phosphorus and potash on different crops in the school garden.
(c) Demonstrate the influence of agricultural lime on soil.

150. Animal husbandry includes, *inter alia*, a study of the following:

(1) *Feeding of cattle*
- *(a)* Elementary discussion of alimentary canal of a ruminant.
- *(b)* Food nutrients:
  - (i) Water, fat, carbohydrates, proteins, minerals, vitamins.
  - (ii) Functions of these constituents in the animal body.
  - (iii) Main sources of each nutrient.
- *(c)* Roughage:
  - (i) Natural grazing: sweetveld, sourveld, etc.
    - (1) Value of and deficiences in veld grazing.
    - (2) Control of veld grazing.
  - (ii) Fodder crops suitable for grazing, hay and silage.
  - (iii) Properties and value of good quality hay and silage.
  - (iv) Fodder crops rich in carbohydrates and proteins for hay and silage making.
- *(d)* Concentrates:
  - (i) Concentrates rich in carbohydrates.
  - (ii) Concentrates rich in plant and animal protein.
  - (iii) Important requirements for concentrate mixtures (meal mixtures) with regard to its carbohydrate, protein, fibre and mineral content.
  - (iv) Balanced rations; main requirements for the composition of a balanced ration which includes grazing, hay, silage and concentrates.
  - (v) Mineral licks.

(2) *Dairy cattle*
- *(a)* The main differences between three important dairy breeds with respect to general appearance, milk production and butterfat content of milk.
- *(b)* Typical characteristics of a good dairy cow.
- *(c)* Feeding of dairy cows:
  - (i) Food required for functions like maintenance of growth, production and reproduction.
  - (ii) Feeding according to production.
- *(d)* Protection of dairy cows against ticks.
- *(e)* Injurious effects of ticks on cows.
- *(f)* Methods to control ticks.

(3) *Dairying*
- *(a)* The composition and nutritional value of fresh milk.
- *(b)* Hygienic production of milk:
  - (i) Causes of milk contamination: Milkers, cowbyre, food, dairy scullery, dairy utensils, water, flies, etc.
  - (ii) Diseases transmitted through milk.
- *(c)* Causes of tainting and odours forming in milk; the prevention thereof.
- *(d)* Factors to be considered when storing milk.

XXI. Health Services [1]

151. In 1969/1970 current expenditure on health services in South West Africa amounted to R5.84 million, as compared with R1.99 million seven years earlier, of which 74.5 per cent. was expended on behalf of the non-White population groups as against 25.5 per cent. for the White group. Capital expenditure in 1969/1970 amounted to R1,116 million of which 87.5 per cent. was devoted to facilities for the non-White groups as against 12.5 per cent. for the White group.

The 1969/1970 level of official expenditure on health services represents a *per capita* outlay of about R9.3. Comparable figures for the other African countries for the same year are not available, but the following table based on budget figures provides a guide to expenditure on health services in a number of those countries:

BUDGET EXPENDITURE ON HEALTH[2], AFRICAN COUNTRIES

Country	*Year ended*		*Population* [3]	*Currency (1,000)*	*Amount in million of unit*	*Amount converted into South African Rand million* [4]	*Per capita expenditure in Rand*
Ethiopia [5]	June	1968	24,212	Ethiopian dollars	23.90	6.93	0.29
Ghana [5]	Dec.	1968	8,376		21.50	15.27	1.82
	Dec.	1969	8,600	New/Cedis	19.30	13.71	1.59
Kenya [5]	June	1968	10,209	Pounds	5.13	10.26	1.00
	June	1969	10,506		6.11	12.22	1.16
Liberia [5]	Dec.	1968	1,130	Dollars	3.40	2.45	2.17
Sudan	June	1968	14,770	Pounds	5.54	11.47	0.78
Tanzania [5]	June	1968	12,590	Shillings	75.02	8.25	0.66
	June	1969	12,926		77.03	8.47	0.66
Togo [5]	Dec.	1968	1,769	CFA Francs	558.40	1.68	0.95
	Dec.	1969	1,815		507.70	1.52	0.84
Uganda	June	1968	8,133	Shillings	91.67	9.17	1.13
	June	1969	9,500		110.51	11.05	1.16
United Arab Republic	Jan.	1968	31,693	Pounds	32.90	53.96	1.70
	Jan.	1969	32,501		68.90	114.37	3.52

[1] *Vide* Annex A, pp. 121-132, and Annex C, pp. 98-105. *[Not reproduced.]*

[2] United Nations *Statistical Yearbook 1969*, table 191, pp. 590-607.

[3] *United Nations Monthly Bulletin of Statistics*, Sep. 1970, table 1, pp. 1-4.

[4] Foreign currencies converted into South African currency (Rand) in terms of rates of exchange given in *United Nations Monthly Bulletin of Statistics*, Sep. 1970, pp. 200-202.

[5] According to economic and functional classification of government expenditure.

152. There are at present 156 hospitals and clinics in South West Africa. Of these, 117 serve the indigenous and Coloured population groups, 22 render services to all population groups, and 17 serve the White population group.

There are 1,049 beds available for the White group and 5,602 beds for the other population groups giving a ratio of almost nine beds per 1,000 of all population groups. A few years ago the comparable figures for some other African countries were [1]:

Ethiopia	0.33 per 1,000
Tanzania	1.89 per 1,000
Mali	0.67 per 1,000
Liberia	1.37 per 1,000
Nigeria	0.54 per 1,000
Senegal	1.32 per 1,000

153. As was shown in Annex C [2], hospital fees for White patients are charged according to a fixed tariff based on income, while non-White out-patients are normally charged 10 cents for admission and in-patients 50 cents, irrespective of the duration of hospitalization, but only if they are able to pay; if not, they are admitted free of charge. All non-White patients are entitled to free treatment, including specialist treatment.

154. In September 1970, new services or improvements to existing services to a total value of R40.77 million were being actively planned or were about to be initiated. Of the total figure, R8.82 million were for services to Whites, R19.01 million in respect of non-Whites, whilst the remainder concerned projects serving all population groups.

155. There are 146 medical practitioners, dentists and specialists in the Territory (excluding the Eastern Caprivi). This gives a figure of one doctor to about 5,000 inhabitants. There are, probably, no countries in the African continent south of the Sahara with a more favourable distribution of physicians to population (except South Africa, with a figure of one doctor to 1,900 people). Recently the distribution of physicians in, for example, Burundi was one to 61,000; Ethiopia one to 65,000; Nigeria one to 31,000; Rwanda one to 57,000; Senegal one to 17,000; Liberia one to 11,000; Niger one to 56,000; Tanzania one to 36,000 and Mali one to 51,000 [3].

156. The strength of the nursing staff in 1970 was 1,846, of whom about 70 per cent. were members of the indigenous and Coloured population groups. There are eight training centres for nurses from these groups. They are taught by qualified professional nurses who are in possession of university teaching qualifications. For post-basic courses registered nurses go to the Republic of South Africa.

Additional training facilities have been made available at Windhoek and Oshakati in Ovamboland. The new State Hospital at Rundu in Kavango, has recently been authorized to establish a training school for male auxiliary nurses.

The total number of nurses in training in September 1970, was as follows:

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[1] These ratios have been calculated from statistics in the *World Health Statistics Annual, 1962*, Vol. III, Health Personnel and Hospital Establishments (1966). The statistics refer to various years and the ratios may have altered. (*Vide* Annex A, p. 124. *[Not reproduced.]*)

[2] At p. 99. *[Not reproduced.]*

[3] United Nations *Statistical Yearbook 1969*, table 198, pp. 673-677.

Windhoek:	General and auxiliary nurses	215
	Midwives	30
Oshakati:	General nurses	110
Onandjokwe:	Midwives	10
	Auxiliary nurses	89
Otjiwarongo:	Auxiliary nurses	39
Gobabis:	Auxiliary nurses	27
Keetmanshoop:	Auxiliary nurses	31
Oshikuku:	Auxiliary nurses	8
	Midwives	3
Rundu:	Training to commence in near future.	

157. The South West Africa health authorities are also responsible for the application of Public Health legislation and regulations which cover a very wide field and include malaria control. In the controlled areas of Ovamboland malaria used to vary from 6.5 per cent. to as high as 44 per cent., with an average incidence of 16.2 per cent. After years of effort the average incidence in the controlled areas of Ovamboland has dropped to 0.07 per cent.

During 1969 a total number of 884,254 dwellings and huts were sprayed to combat mosquitoes. Almost two-thirds of the Ovamboland area is at present under control. This is to be extended in an attempt to cover the whole of Ovamboland by the end of 1970. During 1968 tractor-trailer units were introduced, which are managed and controlled by Ovambo staff, for spraying of domestic structures. Malaria chemo-prophylactics have been supplied to the inhabitants on various occasions. Similar measures have been taken in the Kavango and the Eastern Caprivi [1].

158. Subsidies (including free medicines) to mission hospitals in Ovamboland and the Kavango over the last eight years have increased from R258,277 to R3,092,735. As from 1 April 1966, subsidies were increased to 100 per cent. of all current expenditure, as well as the cost of approved building and equipment.

XXII. Scientific and Technological Research and Services

159. As has been shown in other contexts, the natural environment of South West Africa is to a large extent unfavourable to man.

The collection of scientific data and their application to human activities are therefore of critical importance. The increase in population, especially in the major centres; huge construction and development projects in areas which present difficulties, physically and climatically; the growing need for improved communications —all call for specialized investigations and scientific planning.

All kinds of questions must be answered. Are the country's underground water resources being depleted? How can a road to carry heavy traffic be built without a gravel bed, where there is no gravel? Why do concrete structures of conventional design suddenly develop cracks? Are the lobster grounds in danger of exhaustion? Such are some of the problems being investigated by the institutes of the South African Council for Scientific and Industrial Research (CSIR) and by other organizations.

The following institutions are rendering invaluable services to the peoples of South West Africa:

[1] *Vide* Annex C, pp. 102,105. *[Not reproduced.]*

The National Institute for Water Research
The South African Institute for Medical Research
The South African Wool Textile Research Institute
The National Physical Research Laboratory
The National Building Research Institute
The National Institute for Road Research
The Namib Desert Research Station
The National Mechanical Engineering Research Institute
The Weather Bureau
The South African Bureau of Standards
Onderstepoort Veterinary Research Institute.

The scope and quality of the services of these technical and scientific institutions have been briefly described in Annex C hereto [1].

The assistance rendered by these institutions has become part of the developing world of the peoples of South West Africa. In many vital respects they render essential services to the Territory. In other respects, they contribute substantially towards the welfare of all the peoples of South West Africa and in particular towards the progress of the developing peoples of the Territory.

XXIII. Summary

160. An objective survey of South West Africa shows that the peoples of the Territory have made considerable progress in political, economic and social development despite numerous retarding factors due to the climatic and geographical features of the Territory. As indicated in Annexes A and C [2] and in this section, the progress achieved can be attributed in a large measure to the Territory's close ties with the Republic of South Africa. South Africa's support, as was stated in Annex C [3], is not only a matter of money, though this in itself is considerable, but it includes facilities such as railways, harbours, posts and telegraph services; trained and specialised manpower; technical and general public services; and knowledge and experience in numerous essential spheres. In all the more important aspects of administration, and in the scientific and technical fields, the Territory and its peoples can rely on staff with intimate experience of local conditions and of the most effective solutions to particular problems. In many instances it would be impossible to replace the contribution made by South Africa. In vital respects these stem from South Africa's special situation and role as an adjoining country administering South West Africa as an integral portion of its own territory. In fact South West Africa's economic progress is dependent on the present natural relationship not being disturbed.

G. Conclusion

161. For the reasons and in view of the facts set out above, it is submitted:

(a) that, apart from other grounds affecting its validity, resolution 2145 (XXI) is void of legal effect since the General Assembly did not properly apply its mind to the question whether there was a factual basis for the revocation of the Mandate (assuming that it was still in existence in 1966), and that there was indeed no such factual basis; and

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[1] At pp. 83-93, 95-97. *[Not reproduced.]*
[2] Not reproduced.
[3] At p. 49. *[Not reproduced.]*

(b) that even if this resolution, or Security Council resolution 276 (1970), can be regarded as embodying a valid recommendation addressed to South Africa, there are compelling reasons why the South African Government must decline to give effect thereto.

INTRODUCTION TO PHOTOGRAPHICAL PRESENTATION

The above exposition of the factual situation in South West Africa has shown the vast progress that, despite adverse conditions, has been made in the political, economic and social life of the Territory, and the high standards that have been attained. In the context, that survey has served to demonstrate, *inter alia*, that majorities in United Nations organs have misconceived or mis-stated conditions in the Territory, whether from ulterior motives or purely by reason of lack of knowledge.

The photographs reproduced in the present Section are intended to illustrate graphically what has already been stated verbally. They are presented in the full knowledge that any selection of photographs, particularly in black and white, can give but an inadequate impression of the unique and colourful physical and human features of the Territory.

This Section is to be regarded as supplementary to the photographs included in the *South West Africa Survey 1967* [1] which is annexed to this Chapter. For that reason the present selection of photographs does not purport in any way to cover all important aspects of life in the Territory. It is designedly concentrated on a relatively small number of features which were chosen either because they represent new developments, or because they are considered to be of particular significance or interest.

Despite its unavoidable limitations this Section might, it is hoped, nevertheless be of some assistance to the Court by providing a glimpse of the realities of South West Africa.

INDEX

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[1] Not reproduced.

Annex A

South West Africa Survey 1967
published by the Department of Foreign Affairs of the Republic of South Africa, March 1967

[Not reproduced]

Annex B

Report of the United Nations Council for South West Africa
(UN doc. A/6897, 10 November 1967)

[Not reproduced]

Annex C

South Africa's Reply to the Secretary-General of the United Nations (Security Council Resolution 269 of 1969)

published by the Department of Foreign Affairs of the Republic of South Africa, September 1969

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