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

VOLUME I

Requête pour avis consultatif, documents, exposés écrits

WRITTEN STATEMENT OF THE GOVERNMENT OF INDIA

INTRODUCTORY

1. The Security Council of the United Nations, in resolution 284 (1970) of 29 July 1970, has requested the International Court of Justice to give an advisory opinion on the following question:

> "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

2. It may be recalled that by General Assembly resolution 2145 (XXI) of 27 October 1966, the United Nations terminated the Mandate of South West Africa and assumed direct responsibility for the territory, now called Namibia, until its independence. By resolution 264 (1969), the Security Council recognized the termination of the Mandate and called upon the Government of South Africa immediately to withdraw its administration from the territory. By resolution 276 (1970), the Security Council strongly condemned the refusal of the Government of South Africa to comply with General Assembly and Security Council resolutions pertaining to Namiba and also declared 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". The Council declared further that "the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations". In that resolution, the Council decided to establish 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".

3. The President of the Security Council announced on 30 January 1970 that the *Ad Hoc* Sub-Committee would be composed of all members of the Security Council. In its report (S/9863), the Sub-Committee requested the Security Council to consider, *inter alia*, the possibility of requesting, in accordance with Article 96 (1) of the Charter, an advisory opinion from the International Court of Justice on "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)". The Security Council, taking note of this recommendation of the *Ad Hoc* Sub-Committee, has requested the advisory opinion of the Court on the question referred to earlier. The Council also decided that the opinion of the Court be "transmitted to the Security Council at an early date".

I. SCOPE OF THE QUESTION

4. It may be useful, at the outset, to define the scope of the question before the Court. Resolution 284 (1970) of the Security Council, which referred the

question to the Court, was adopted on the basis of a draft resolution sponsored by Finland (S/9892). Commenting on this draft resolution at the 1550th meeting of the Security Council, members of the Security Council expressed different opinions on the scope of the question transmitted to the Court. While the representatives of some members considered that the question was wide enough to enable the Court to look into the question of the legal foundations of the revocation of the Mandate by the General Assembly, others expressed different opinions. While introducing the draft resolution submitted by Finland, which was finally adopted by the Security Council, the representative of Finland expressed the following view:

> "First, an advisory opinion from the International Court of Justice would have considerable value in defining and spelling out in legal terms the implications for States of the contineed presence of South Africa in Namibia.
>
> Secondly, an advisory opinion would also be of value in defining more precisely the rights of Namibians—those staying in Namibia as well as inhabitants of Namibia residing abroad. In this way it could perhaps accord some measure of added protection to Namibians whose basic human rights are being suppressed through the application of South African repressive legislation.
>
> Thirdly, it is our expection that an advisory opinion of the International Court of Justice could underline the fact that South Africa has forfeited its mandate over South West Africa because of its violation of the terms of the Mandate itself, because South Africa has acted contrary to its international obligations, contrary to the international status of the territory and contrary to international law. It is important, in our view, to expose the false front of legality which South African authorities attempt to present to the world. This would help the United Nations and the Governments of Member States to mobilise public opinion in their countries—especially in those countries which have the power to influence events in Southern Africa in a decisive way." (S/PV. 1550, p. 18.)

The representative of Nepal stated:

> "The draft resolution in question is entirely based on the report of the Sub-Committee which recommends that the Security Council request the International Court of Justice to give an advisory opinion on:
>
> '... the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)'. (S/9863, p. 7.)
>
> In voting in favour of the draft resolution, it will be our understanding that the International Court limit the scope of its advisory opinion strictly to the question put to it, and not review or examine the legality or validity of the resolutions adopted by both the General Assembly and the Security Council." (*Ibid.*, p. 37.)

The representative of Syria commented as follows:

> "The International Court of Justice, as we see from the draft resolution, is not asked to rule on the status of Namibia as such; rather it is requested to elicit the scope of legal means at the disposal of States, which may erect a wall of legal opposition to the occupation of Namibia by the Government of South Africa. Accordingly, our understanding of the draft is that it seeks to add a valuable element to the range of actions that can be

taken by States in fulfilment of their obligations under the Charter and the resolutions of the Security Council." (*Ibid.*, p. 47.)

"On the basis of such understanding, and within this scope, my delegation will cast its vote affirmatively on the draft resolution of Finland and wishes to reiterate its gratitude to the representative of Finland for the initiative that may prove useful in its consequences." (*Ibid.*, pp. 48-50.)

The representative of Spain expressed the following view:

"The problem of Namibia has confronted us with one of the most serious questions the Organization has ever faced—that is, the behaviour of one of its Members in respect of failure to comply with the resolutions of one of the Organization's bodies. My delegation feels that it is therefore most appropriate to request a ruling from the International Court of Justice, for this would make it possible for us to be aware of the international legal consequences of a failure to comply with resolutions of a United Nations body—in particular, resolutions 264 (1969), 269 (1969) and 276 (1970) of the Security Council.

My delegation therefore supports this draft resolution, which was so ably presented by the delegation of Finland. We confidently expect this further action by the Security Council to contribute decisively to the achievement of the objectives the United Nations has set for itself on this question—that is, the defence of the interests and rights of the Namibians and respect for the decisions of the Organization in discharging its special responsibility toward the Territory of Namibia." (*Ibid.*, pp. 56-57.)

The representative of Burundi observed:

"... there is, however, always 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, world opinion of which was so much disenchanted, and also harmonizing the position of the Court with the position taken by the General Assembly in putting an end to South Africa's Mandate over Namibia." (*Ibid.*, p. 71.)

After the adoption of the draft resolution submitted by Finland, the representative of the United States of America stated:

"My government particularly welcomes the adoption of the resolution contained in document S/9892, which requests an advisory opinion of the International Court of Justice ... We believe that the international community has indeed a serious need for impartial and authoritative legal advice on the question of Namibia.

We recall that the Court, in its advisory opinions of 1950, 1955 and 1956, has already provided useful guidance to the Assembly on legal issues concerning Namibia, and we believe that the Court can and should now give the Council the benefit of its impartial and authoritative views both as to the duties of South Africa and the responsibility of other Members of the United Nations in light of resolution 276 (1970)." (*Ibid.*, p. 82.)

The representative of France said:

"We are among those who believe that the international status did not come to an end with the disappearance of the League of Nations and cannot unilaterally be modified by the administering Power, and that it is only when the people exercise their right to self-determination that this will

come to an end. On the other hand, it is doubtful that the United Nations, heir to the League of Nations, can have the powers which the League of Nations had. The Geneva Organization did not seem to be empowered unilaterally to deprive a country of its Mandate.

In view of these doubts, we were much interested in the initiative taken by the representative of Finland to request an advisory opinion on the question from the International Court of Justice. Of course, the—in our view—imperfect language of the request to the International Court may be a matter of regret. Without prejudging the opinion of the Court, it might be appropriate to leave it to the Judges in the Court to question the legal foundations of the revocation of the Mandate. It is, then, because we consider that it would make it possible for the International Court of Justice to clarify the legal position as regards the legality of the revocation that we have decided nonetheless to support the text." (*Ibid.*, pp. 86-87.)

The representative of the United Kingdom stated:

"In the *Ad Hoc* Sub-Committee the United Kingdom representative made it clear that my Government was quite willing to consider a request for an advisory opinion from the International Court of Justice. He did, however, add that our support for this depended upon the submission to the International Court of the issue of the Status of South West Africa as a whole. The question before us does not appear to do this. It is based on certain assumptions about the legal status of South West Africa which, in the opinion of my Government, ought themselves to be examined by the Court. These assumptions are not expressly stated in the question itself but they do clearly emerge from some speeches of the sponsors made in the *Ad Hoc* Sub-Committee and also today. In the first place, there is a question whether, having regard to all the circumstances, the General Assembly was competent to terminate the Mandate over South West Africa as it claimed to do by virtue of General Assembly resolution 2145 (XX). In the second place, if it were established that the General Assembly was so competent to terminate the Mandate, there would remain a question whether it was entitled to vest in the United Nations responsibility for the Territory. These questions pose complicated legal issues which have not hitherto been the subject of any decision or advisory opinion of the International Court. My Government regrets that the question which it is now proposed to submit to the Court is constructed in such a fashion that the Court might feel itself inhibited from pronouncing on the more fundamental issues concerning the present status of South West Africa. It is for these reasons that my Government has abstained on the request for an advisory opinion as expressed in the shorter draft resolution." (*Ibid.*, pp. 89-90, 91.)

5. These different opinions expressed in the Security Council by the representatives of the members of the Security Council on the scope of the question might prima facie, lend credence, to the view that the question put to the Court was drafted in, what the representative of France called, "imperfect language". It is submitted that this is not so and that the intention of the Security Council is clear and beyond any doubt. In its present formulation the question does not entitle the Court to express an opinion on the competence of the General Assembly to terminate the Mandate of South West Africa. A number of reasons justify this conclusion.

Firstly, Security Council resolution 276 (1970) is based on, what the representative of the United Kingdom called, "certain assumptions about the legal

status of South West Africa". These assumptions are that the Mandate of South West Africa was terminated and that the United Nations assumed direct responsibility for the Territory until its independence. These are valid assumptions and cannot be the subject-matter of review by the Court unless it is requested so to do by the competent organs of the United Nations. If this was not the correct interpretation, the Court could have been asked to express its opinion directly on the competence of the United Nations to revoke the Mandate of South West Africa.

Secondly, the words "notwithstanding Security Council resolution 276 (1970)" in the question put to the Court support the view expressed by us. It is precisely for this reason that the representative of France, who wanted the Court to question the legal foundations of the revocation of the Mandate, requested a separate vote on these words when the Security Council was considering the draft resolution submitted by Finland. A vote was taken on those words and the Security Council decided to retain them in the question as formulated. We may add that the position would not have been different even in the absence of these words. These words, however, place beyond doubt the intention of the Security Council. Their further purpose is indicated in the later portion of this statement.

Thirdly, the question should also be interpreted in the light of the circumstances that led the Council to put it to the Court. As stated earlier, the request to the Court for an advisory opinion was the result of a recommendation of the *Ad Hoc* Sub-Committee established by the Security Council to study "ways and means" by which the relevant resolutions of the Security Council, including resolution 276 (1970), could be effectively implemented in accordance with the appropriate provisions of the Charter and in the light of the flagrant refusal of South Africa to withdraw from Namibia. In its report, the Committee states as follows:

> "13. In the course of its deliberations, the *Ad Hoc* Sub-Committee has been guided primarily by the following three considerations:
>
> First, resolution 276 (1970) and the establishment of an *Ad Hoc* Sub-Committee of the Council is to be regarded as an interim measure, *the purpose of which is to help the Council make substantive decisions.*
>
> Second, the Security Council in resolution 276 (1970) has provided the *Ad Hoc* Sub-Committee with a broad enough mandate to allow it to examine all proposals and ideas for *such effective and appropriate steps as might be taken by the Security Council to implement its relevant resolutions on the subject.*
>
> Third, while recognizing that it is the prerogative of the Security Council to decide on any action with regard to Namibia, the *Ad Hoc* Sub-Committee considers that it could best serve the Council by drawing its attention to such proposals as would be likely to command sufficiently broad support to ensure effective implementation." (S/9863, p. 5.) (Emphasis supplied.)

It is clear that the *Ad Hoc* Sub-Committee recommended the present request to the Court as one of the "ways and means" by which the relevant resolutions of the Security Council could be effectively implemented. The consideration which led the Security Council to make the request for an advisory opinion has been stated in the following terms in resolution 284 (1970):

> "... 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*". (Emphasis supplied.)

This background constitutes an essential element in the proper appreciation of the scope of the question before the Court.

Fourthly, it is no gainsaying that the competent organs of the United Nations need not submit all their decisions for judicial review. It may be relevant to recall that at the San Francisco Conference, Committee IV/2- of the Commission on Judicial Organization adopted an important declaration on interpreting the Charter, the relevant part of which reads:

> "In the course of the operations from day to day of the various organs of the Organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers." (UNCIO, Vol. 13, p. 703 at p. 709.)

The General Assembly and the Security Council are not obliged to seek advisory opinions of the Court on all legal questions before them. The Charter only speaks in terms of competence of these organs to request the Court for an advisory opinion on any legal question. Article 96, paragraph 1, of the Charter states that: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." In other words, it is left to these organs to decide on which legal questions they may seek the opinion of the Court. Hence, the mere fact that competence of the United Nations to terminate the Mandate of South West Africa involves a legal question should not create a presumption that the Court would have been asked in the present request to give an opinion on it. The Court cannot obviously give its opinion on a question, which is not referred to it, on the basis of presumptions which are not validly drawn.

The records of the United Nations clearly indicate that, notwithstanding some doubts expressed by representatives of some Members of the United Nations, the General Assembly or the Security Council never entertained any doubt about the competence of the United Nations General Assembly to terminate the Mandate of South West Africa.

The question of the competence of the Council of the League of Nations or of the General Assembly of the United Nations, in this regard, has not hitherto been the subject of any judgment or advisory opinion of the Permanent Court of International Justice or the International Court of Justice. Nevertheless, if the Council of the League of Nations had been possessed of the right to terminate the Mandate, the General Assembly should be deemed to possess the same right, consequent to what the International Court of Justice said in its Advisory Opinion of 1950 on the *International Status of South West Africa* 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". (*I.C.J. Reports 1950*, p. 137.) It is stated in the Mandate for South West Africa that the Mandatory, in agreeing to accept the Mandate, had undertaken "to exercise it on behalf of the League of Nations". And as pointed out by the International Court of Justice in its Judgment in the Second Phase of the *South West Africa* cases, the League had the right:

> ". . . in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust' . . . To put

this conclusion in another way, the position was that under the Mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League—in particular to its Council." (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 29.)

It also flows from the relevant provisions of the Mandate as well as from the practice of the League of Nations that the Council, on whose behalf the Mandatory had undertaken to exercise the Mandate and to whom the Mandatory was responsible for the conduct of the Mandate, was also competent to terminate the Mandate. In a statement submitted to the Court in 1950 in connection with the Advisory Opinion of the Court of 1950 on the *International Status of South West Africa*, the representative of the Secretary-General of the United Nations had observed as follows:

"At this stage, I should like to recapitulate some of the principles which may be adduced from the practice of the League of Nations with regard to a change in status of a mandated territory during the active lifetime of the League . . . *Fourth, the possibility of revocation in the event of a serious breach of obligation by a mandatory was not completely precluded.*" (*Pleadings, Oral Arguments, Documents, International Status of South West Africa, Advisory Opinion* of 11 July 1950, pp. 233-234.) (Emphasis supplied.)

Judge Alvarez indicated the legal position thus:

"It may happen that a mandatory State does not perform the obligations resulting from its Mandate. In that case the United Nations Assembly may make admonitions, and if necessary, revoke the Mandate." (*I.C.J. Reports 1950*, p. 182.)

According to an informed writer on the subject,

". . . the right of revocation must be regarded as an implied part of the mandates system, as the obligation of accountability by a mandatory to the League for the administration of its 'sacred trust' (contained in both Article 22 of the Covenant and the individual mandates) must surely be seen as including the sanction of revocation as the ultimate deterrent against abuse of the trust". (John Dugard, "Revocation of the Mandate for South West Africa", *American Journal of International Law*, Vol. 62, p. 85.)

It is thus seen that the General Assembly, as successor to the Council of the League, could terminate the mandate in case the mandatory concerned does not perform the obligations resulting from the mandate. And the General Assembly of the United Nations, as the competent organ, in the words of Judge Lauterpacht, "to pronounce a verdict upon the conformity of the action of the administering State with its international obligations", considered in its resolution 2145 (XXI) of 27 October 1966 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", and affirmed "its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory". In the same resolution, the General Assembly declared 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."

Pursuant to this declaration, the General Assembly decided:

> "The Mandate conferred upon His Britannic Majesty to be exercised on 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."

The termination of the Mandate thus effected by the General Assembly, and also recognized by the Security Council in its resolution 264 (1969), is, therefore valid and irrevocable. We need not elaborate this point further in the light of the fact that the question before the Court does not in any way call for the opinion of the Court on the competence of the General Assembly to terminate the Mandate.

II. ISSUES BEFORE THE COURT

6. What then are the issues which fall to be decided by the Court within the framework of the question submitted to it by the Security Council? The words "the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)" in the question are crucial for a proper appreciation of the scope of the question before the Court. It is submitted that the Court should take as its starting point what the Security Council declared in resolution 276 (1970) on the continued presence of South Africa in Namibia and express its opinion on the obligations of States under the Charter of the United Nations, the relevant resolutions of the United Nations and international law to further the objectives the United Nations is seeking.

7. In discharging this task, the Court might well recall what Judge Azevedo said in the *Peace Treaties* case:

> "[T]he Court, which has been raised to the status of a principal organ and thus more closely geared into the mechanism of UNO, must do its utmost to co-operate with the other organs with a view to attaining the aims and principles that have been set forth." (*I.C.J. Reports 1950*, p. 82.)

Shabtai Rosenne makes the following pertinent observation:

> ". . . in general, it cannot be doubted that the mutual relations of the principal organs ought to be based upon a general theory of co-operation between them in the pursuit of the aims of the Organization. This approach opens the way to a functional conception of the task of the Court in its capacity of a principal organ of the United Nations, according to which, subject to overriding considerations of law (including judicial propriety), *the Court must co-operate in the attainment of the aims of the Organization and strive to give effect to the decisions of other principal organs, and not achieve results which would render them nugatory.*" (*The Law and Practice of the International Court*, Vol. I, 1965, p. 70.) (Emphasis supplied.)

8. After having reaffirmed the relevant resolutions of the United Nations which terminated the Mandate and called upon the Government of South Africa immediately to withdraw its administration from the territory, the Security Council, in resolution 276 (1970) declared, in relation to the continued presence of South Africa in Namibia, as follows:

"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."

What has been declared by the Security Council should, as has already been said, form the starting point in the determination by the Court of, what the question before the Court calls, "the legal consequences for States of the continued presence of South Africa in Namibia".

III. LEGAL CONSEQUENCES FOR STATES

9. Following the termination of the Mandate by the United Nations and also the assumption by it of the direct responsibility for the Territory until its independence, the General Assembly and the Security Council decided upon several measures which all States were to adopt in furtherance of the objectives the United Nations is seeking. Reference may be made, in particular, to Security Council resolutions 245 (1968), 246 (1968), 264 (1969), 269 (1969), 276 (1970), and 283 (1970), and also to General Assembly resolutions 2145 (XXI) of 27 October 1966, 2324 (XXII) of 16 December 1967, 2248 (S-V) of 19 May 1967, 2325 (XXII) of 16 December 1967, 2498 (XXIV) of 31 October 1969 and 2527 (XXIV) of 1 December 1969. It is not necessary to summarise here what has been said in these resolutions. The obligations which these resolutions, read with the relevant provisions of the United Nations Charter and also the applicable principles of international law, created for States, are obvious.

10. It is submitted that the decision of the General Assembly in its resolution 2145 (XXI) of 27 October 1966, by which the United Nations terminated the mandate and assumed direct responsibility for the Territory until its independence, is fully binding on all Members of the United Nations. The binding nature of this decision revoking the Mandate flows from the particular circumstances of this case.

11. To recall what the Court said in its Advisory Opinion of 1950, "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". These supervisory functions exercised by the Council of the League included the right to revoke the Mandate—a right which the General Assembly inherited. Connected with this is the fact that all decisions of the Council of the League were binding. As the successor to the Council of the League, the General Assembly should be considered as having the same competence as the Council had in relation to the taking of binding decisions with regard to the revocation of the Mandate. To argue that, while the Council could take a binding decision with regard to the revocation of the Mandate, the General Assembly is empowered only to make a recommendation, not binding to the same extent as a decision of the Council of the League, runs counter to what the Court itself has stated in its Advisory Opinions. Besides, this argument leads one to the conclusion that there is no international

organization which is competent ever to take a binding decision revoking the Mandate. This goes against the basic philosophy of the Mandate which envisaged that in case of failure on the part of the mandatory to fulfil its obligations in respect of the administration of the mandated territory, an international organization, on whose behalf the mandate is exercised, should, if necessary, even terminate the Mandate.

12. As the Court pointed out, "the Mandatory was to observe a number of obligations and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled". How can the General Assembly, the successor to the Council of the League, discharge this task without having the competence to take decisions binding on the Mandatory? The nature and scope of international supervision and its necessity continue, notwithstanding the fact that the League had ceased to exist. As the Court said in its Opinion of 1950:

> "Some doubts might arise from the fact 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. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question.
>
> 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." (*I.C.J. Reports 1950*, p. 136.)

If the General Assembly does not enjoy the right to take a decision which is binding on South Africa, the Mandatory could, at will, disregard the provisions of the Mandate or even disavow the Mandate, while the organization remains impotent to take any action.

13. It is true, as the Court said in its Opinion of 1955, that "it is from the Charter that the General Assembly derives its competence to exercise its supervisory functions". It is also true that the General Assembly could exercise all the powers which the Council enjoyed with regard to the Mandate. The fact 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 did not prevent the Court from expressing the view that the General Assembly took over the supervisory functions in respect of the Mandate for South West Africa. The taking over by the General Assembly was held by the Court to be justified by "the necessity for supervision" and the need to "safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the mandated Territory". The same considerations, among others, dictate that the decision of the General Assembly on the revocation of

the Mandate should be treated as binding on Member States by what the Court in the *Reparations* case held, would follow by "necessary implication as being essential to the performance of its duties".

14. Accordingly, it is not permissible, in the absence of express provisions to the contrary in the Charter of the United Nations, to attribute to the decision of the General Assembly terminating the Mandate a meaning which would not be in conformity with these paramount considerations. It may be relevant to recall what the Court said in its Opinion of 1956:

> "There is nothing in the Charter of the United Nations, the Covenant of the League, or the Resolution of the Assembly of the League of April 18th, 1946, relied upon by the Court in its Opinion of 1950, that can be construed as in any way restricting the authority of the General Assembly to less than that which was conferred upon the Council by the Covenant and the Mandate; nor does the Court find any justification for assuming that the taking over by the General Assembly of the supervisory authority formerly exercised by the Council of the League had the effect of crystallizing the Mandates System at the point which it had reached in 1946 . . . *It followed that the General Assembly in carrying out its supervisory functions had the same authority as the Council. The scope of that authority could not be narrowed by the fact that the Assembly had replaced the Council as the supervisory organ.*" (*I.C.J. Reports 1956*, pp. 29-30.) (Emphasis supplied.)

How can the General Assembly have "the same authority as the Council" unless it could also take decisions which would be binding on South Africa? As the Court itself has stated in the *Expenses* case not all decisions of the General Assembly are hortatory.

15. Besides, the exercise of this right by the General Assembly would also serve to promote the purposes of the United Nations, namely the promotion of "respect for the principle of equal rights and self-determination of peoples", and the promotion and encouragement of respect "for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

16. The fact that rules governing the making of decisions in the Council of the League were different from those governing the making of decisions in the General Assembly should not make any difference in this connection, for, as the Court itself has pointed out in its Opinion of 1956, "in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council". It may be noted that General Assembly resolution 2145 (XXI) of 27 October 1966 was adopted by more than two-thirds majority of the members present and voting. What is more, in its resolution 264 (1969), the Security Council recognized that the General Assembly terminated the Mandate of South West Africa and assumed direct responsibility for the Territory until its independence. This recognition was reiterated and reaffirmed in subsequent resolutions of the Security Council on this question. Such a record of reiterated consideration, confirmation, approval and ratification by the Security Council, of the decision of the General Assembly, is a matter which the Court should also take into consideration.

17. It therefore follows that the decision whereby the United Nations terminated the Mandate and assumed direct responsibility for the Territory until its independence is equally binding on South Africa, the Mandatory, as well as the other Members of the United Nations. Consequently, they are bound to

consider that the continued presence of South Africa in Namibia and all acts done by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and constitute persistent violations of the mandatory obligations arising out of the United Nations decisions.

18. Furthermore, as the Security Council decided in resolution 269 (1969), "the continued occupation of the territory of Namibia by the South African authorities constitutes *an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the politica sovereignty of the people of Namibia*". (Emphasis supplied.) Since the United Nations is the authority which is directly responsible for the Territory until its independence, States are legally required not to have dealings of any sort with the Government of South Africa nor any contacts with it which would imply recognition of the authority of the South African Government over Namibia. Such dealings or contacts would be in direct conflict with the obligations of States under the established principles of international law, and the Charter of the United Nations under which Member States have pledged themselves to take joint and separate action in co-operation with the Organization for the promotion of respect for the principle of equal rights and self-determination of peoples and also respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. As the obligation to respect these principles was imposed upon member States by the Charter itself, it follows that any violation of them is a violation of the provisions of the Charter.

19. Equally important is the consideration that the Security Council, in its resolution 276 (1970), called 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". Operative paragraph 2, as referred to earlier, declared 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". Resolution 283 (1970) of the Security Council also called upon all States to take certain specific measures by which the relevant resolutions of the Council could be effectively implemented. It needs hardly to be stated that in Article 25 of the United Nations Charter the Members of the United Nations agreed to "accept and carry out the decisions of the Security Council in accordance with the present Charter", an article to which reference has been made by the Council itself in its resolution 269 (1969).

20. Although there is in the Charter no express undertaking to accept recommendations of the General Assembly similar to the agreement in Article 25 to accept and carry out decisions of the Security Council, "it cannot be said that the Charter specifically negates such an obligation, and it may be possible to deduce certain obligations from the Charter as a whole which it would be impossible to establish from an express undertaking". (F. Blaine Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", *British Year Book of International Law*, Vol. XXV, p. 14.) This is *a fortiori* true in respect of a decision of the General Assembly on matters connected with the direct and special responsibility of the United Nations for Namibia until its independence and the inalienable right of the people of Namibia to self-determination and independence, in conformity with General Assembly resolution 1514 (XV) of 14 December 1960. In assessing the legal consequences arising out of the relevant General Assembly resolutions, the Court should take into account that they embody in them, what Judge Jessup called,

"the pertinent contemporary international community standard". (*I.C.J. Reports 1966*, p. 441.)

IV. CONCLUSION

21. In conclusion it is respectfully submitted that the Court may be pleased to answer the question referred to it by the Security Council in the following manner:

(i) The decision of the United Nations by which the Mandate of South West Africa was terminated and by which the United Nations assumed direct responsibility for the territory until its independence is binding on all States.

(ii) Every State is bound, under well-established principles of international law, irrespective of considerations flowing from other sources as for example decisions of the United Nations subsequent to the termination of the Mandate, not to recognize any authority exercised by South Africa on behalf of, or concerning, Namibia, in relation to which Territory, South Africa has ceased to have any *locus standi* with the termination of the Mandate, and the exercise of which authority would amount to an unlawful encroachment on the legitimate rights of the United Nations as the Administering Authority. This obligation on the part of every State is further reinforced by the decisions of the Security Council which Members of the United Nations agreed to "accept and carry out" under Article 25 of the United Nations Charter.

(iii) Since the Charter of the United Nations commits all States to the principle of equal rights and self-determination of peoples, towards which they pledged themselves to take joint and separate action in co-operation with the Organization, and since the United Nations is the competent authority having direct responsibility for the Territory until its independence, States are legally bound to take joint and separate action in co-operation with the United Nations for the achievement of the inalienable right of the people of Namibia to self-determination and independence.

(iv) States, pursuant to Article 25 of the Charter, are bound to implement all decisions of the Security Council on the question.

(v) The decisions of the General Assembly, in so far as they pertain to the role of the United Nations as an administering authority, occupy a *sui generis* position, and have, therefore, to be implemented by States in good faith as embodying "the pertinent contemporary international community standard".

WRITTEN STATEMENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

INTRODUCTORY

The Question

On 29 July 1970, the Security Council, "Reaffirming the special responsibility of the United Nations with regard to the terrritory and people of Namibia", adopted resolution 284 (1970) requesting the International Court of Justice to give an advisory opinion on the following question:

> "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

Issues Presented

The Government of the United States believes that, apart from some preliminary and incidental questions, the following legal issues need to be discussed in connection with this request:

(1) Whether the rights and authority of South Africa with respect to Namibia (South West Africa) were validly terminated by United Nations action.
(2) Whether South Africa is in illegal occupation of Namibia.
(3) The legal consequences for South Africa and other States of South Africa's continued presence in Namibia.

Jurisdiction of the Court

The jurisdiction of the Court derives from Article 96, paragraph 1, of the Charter of the United Nations:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

The statute of the Court, in Article 65, paragraph 1, authorizes the Court to respond to such requests:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

Both the Charter and the Statute of the Court require that a request for an advisory opinion concern a legal question. The statute also provides that the giving of an advisory opinion is a matter for the Court's discretion. The United States believes that the Court should give an opinion on the important legal question submitted to it by the Security Council.

In its most recent Advisory Opinion, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, page 151, the Court noting that its power was discretionary, reaffirmed what it had previously stated in the *Interpretation of Peace Treaties* case, namely that "the

reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused". (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J Reports 1950*, p. 65, at p. 71.) The Court also cited *The Administrative Tribunal* case where it said only "compelling reasons" would justify a refusal to give a requested advisory opinion. (*Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 77, at p. 86.) Indeed, in no case has the International Court of Justice declined a request to give an advisory opinion on a legal question referred to it in accordance with Article 96 of the Charter.

The question now before the Court by its very terms is a legal one: "What are the *legal consequences* for States of the continued presence of South Africa in Namibia . . . ?" (italics added). The Security Council has requested the Court to assist it by clarifying the legal consequences of an illegal situation. This request clearly falls within the advisory jurisdiction of the "principal judicial organ of the United Nations".

PART I

Statement of Facts

South Africa's Administration of South West Africa under the League of Nations Mandate

South West Africa was annexed by Germany in 1884. On 9 July 1915 the Territory was surrendered to forces of the Union of South Africa. Under Article 119 of the Treaty of Versailles Germany renounced all her rights and titles over the Territory in favour of the Principal Allied and Associated Powers. Representatives of the Principal Allied and Associated Powers decided that the Territory should be placed under the League of Nations mandates system as a Class "C" Mandate. Following the entry into force of the Covenant of the League of Nations, that organization, acting under the terms of Article 22, defined and confirmed the terms of each of the Mandates. On 17 December 1920, under an agreement with the Council of the League, His Britannic Majesty, acting for and on behalf of South Africa, agreed to accept the Mandate and "to exercise it on behalf of the League of Nations" in accordance with the provisions of that agreement. The Court in the *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, after having recalled that the twin pillars of the mandates system were "the principle of non-annexation and the principle that the well-being and development of [the] peoples formed 'a sacred trust of civilization'", observed that under the terms of the Mandate—

> "... the Union of South Africa (the 'Mandatory') was to have full power of administration and legislation over the Territory as an integral portion of the Union and could apply the laws of the Union to the Territory subject to such local modifications as circumstances might require. On the other hand, the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled." (*I.C.J. Reports 1950*, pp. 131, 132.)

The League supervised South Africa's administration of the Mandate until 1940. Although it did not exercise its authority during the Second World War, the League retained supervisory power until its dissolution in 1946. In Chapter XI of the Charter of the United Nations, which had meanwhile entered into force in 1945, the Members which had assumed or which were later to assume responsibilities for the administration of territories whose peoples had not yet attained a full measure of self-government recognized the paramountcy of the interests of the inhabitants of those territories and accepted as a sacred trust the obligation to promote to the utmost the well-being of those inhabitants. In Chapter XII the Members of the United Nations established an international trusteeship system which incorporated principles corresponding to those in Article 22 of the Covenant.

On 18 April 1946, a date subsequent to the entry into force of the Charter, the Assembly of the League of Nations in paragraph 3 of its final resolution on mandates specifically noted that Chapters XI and XII of the Charter embodied those principles. (League of Nations *Official Journal* (21st Sess., Plenary) (1946), p. 58.) In paragraph 4 it referred to 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".

Paragraph 2 of Article 80 of the Charter, of course, suggests that the arrangements which the League Assembly envisioned would be promptly negotiated and concluded. In any event, the saving clause in paragraph 1 of that Article was intended to preserve the rights of the inhabitants of mandated territories and the terms of existing international instruments" applicable to such territories until agreements placing the territory under the trusteeship system had been concluded.

The Court in its Advisory Opinion on the *International Status of South West Africa* found that, by adopting its resolution of 18 April 1946,

> "... the Assembly [had] manifested its understanding that the Mandates were to continue in existence until 'other arrangements' were established". (*I.C.J. Reports 1950*, p. 128, at p. 134.)

Indeed, as it points out later in its opinion: the resolution presupposed "that the supervisory functions exercised by the League would be taken over by the United Nations". (*Ibid.*, p. 137.)

The Court also found that South Africa had recognized the continuance of its obligations under the Mandate. The letter of 23 July 1947 from the South African Legation to the Secretary-General is of particular interest in this regard since it referred to a resolution of the South African Parliament in which that body declared "that the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate". (*Ibid.*, p. 135.) South Africa did, in fact, submit such reports for a time. In addition, she had already at the second part of the first session of the United Nations asked the Assembly to approve the incorporation of South West Africa into South Africa. The Assembly declined. When the matter was considered again in 1947 at its second session, the Assembly reiterated its previous stand. In 1948 South Africa changed its position. The South African representative to the United Nations asserted that the Mandate was no longer in force and contended that South Africa was not accountable to the United Nations for any action in South West Africa. In 1949 South Africa informed the Secretary-General by letter that it would submit no further reports to the United Nations respecting the territory. (See UN doc. A/929, 13 July 1949.)

The 1950 Advisory Opinion

On 6 December 1949 the General Assembly decided in resolution 338 (IV) to ask the Court for an advisory opinion on the general question of the status of the Territory and on a series of subsidiary questions relating, *inter alia*, to the obligations of South Africa under the Mandate.

On the general question as to the international status of the Territory the Court was unanimously of the opinion that South West Africa was a territory under the international Mandate assumed by the Union of South Africa on 17 December 1920.

One of the subsidiary questions was: "Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are those obligations?" The Court, by 12 votes to 2,

replied that South Africa continued to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, as well as the obligation to transmit petitions from the inhabitants of that Territory. The Court went on to say that the supervisory functions with respect to those obligations were to be exercised by the United Nations. South Africa was obligated to submit to the United Nations the annual report provided for in Article 6 of the Mandate and to transmit to it the petitions of the inhabitants, which she had been required to furnish to the League under rules adopted by the Council in 1923. Finally, the Court stated that the reference in Article 7 of the Mandate, which provided for submission of unresolved disputes between the mandatory and another Member of the League relating to the interpretation or the application of the provisions of the Mandate, to the Permanent Court of International Justice should be replaced by a reference to the International Court of Justice, in accordance with Article 37 of the Statute of the Court. (*I.C.J. Reports 1950*, p. 143.)

In discussing the supervisory role of the United Nations the Court observed that the "degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the mandates system, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". (*Ibid.*, p. 138.)

In reply to another subsidiary question, the Court unanimously expressed the opinion that the Union of South Africa acting alone did not have the competence to modify the international status of the Territory. (*Ibid.*, p. 144.)

By resolution 449 (V) of 13 December 1950 the General Assembly adopted the Court's Opinion as the basis for its supervision of the administration of the Territory.

The 1955 Advisory Opinion

Despite the Court's 1950 Advisory Opinion, which specified certain of her obligations with regard to the supervisory functions of the United Nations, South Africa continued to decline to submit annual reports on the administration of the Territory and to transmit petitions from the inhabitants. The General Assembly took note of this fact, *inter alia*, in its resolution 749 (VIII) of 28 November 1953.

After what the Court described as "prolonged and unfruitful negotiations" (*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, at p. 71), between representatives of South Africa and an *ad hoc* committee of the General Assembly on modalities of supervision of the administration of the Territory, the General Assembly, by the same resolution 749 (VIII) established the Committee on South West Africa and requested it to:

> "*(a)* examine, within the scope of the Questionnaire adopted by the Permanent Mandates Commission of the League of Nations in 1926, such information and documentation as may be available in respect of the Territory of South-West Africa;
>
> *(b)* examine, as far as possible in accordance with the procedure of the former Mandates System reports and petitions which may be submitted to the Committee or to the Secretary-General;
>
> *(c)* transmit to the General Assembly a report concerning conditions in the Territory taking into account, as far as possible, the scope of the reports of the Permanent Mandates Commission of the League of Nations;
>
> *(d)* prepare, for the consideration of the General Assembly, a procedure

for the examination of reports and petitions which should conform as far as possible to the procedure followed in this respect by the Assembly, the Council and the Permanent Mandates Commission of the League of Nations."

The Committee on South West Africa, acting pursuant to this resolution, prepared two sets of rules, one of which prescribed the procedures to be followed by the General Assembly in its consideration of the report and observations of the Committee. Rule F of this set provided that decisions of the General Assembly with regard to reports and petitions were to be made by a two-thirds majority vote. Rule F was specifically adopted by the General Assembly as part of resolution 844 (IX) of 11 October 1954.

Because some Members of the Assembly had questioned the correctness of this particular rule, the General Assembly asked the Court whether the adoption of such a rule was consistent with its 1950 Advisory Opinion on the *International Status of South West Africa.*

In its Opinion of 6 June 1955 the Court concluded that Rule F was compatible with the language in its 1950 Advisory Opinion that "the supervision to be exercised by the General Assembly should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". (*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, at p. 77.) The Court recalled that:

> "[I]n the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council . . . [t]he expression 'as fas as possible' was designed to allow for adjustments and modifications necessitated by legal or practical considerations." (*Ibid.*, p. 77.)

The 1956 Advisory Opinion

In 1955 the Committee on South West Africa found itself handicapped in examining petitions because it lacked South Africa's observations on the petitions and the supplementary factual information that would have been provided had South Africa decided to co-operate with the Committee. Therefore, the Committee requested the General Assembly to decide whether or not it would be permissible for the Committee to grant oral hearings to petitioners. Before deciding on the matter, the General Assembly requested an advisory opinion from the Court. (General Assembly resolution 942A (X).) The Court accepted the request and on 1 June 1956, having reaffirmed the obligations of the mandatory and of the General Assembly with respect to the administration of the Territory, advised that "*provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision for the administration of the Mandated Territory . . .*" the grant of oral hearings to petitioners who had already submitted written petitions would be consistent with its 1950 Opinion. (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 32 (italics added).)

The Contentious Cases

On 4 November 1960, Ethiopia and Liberia instituted proceedings before the Court against the Union of South Africa. They sought declarations by the Court to the effect that South West Africa remained a territory under the Mandate, that in a number of respects South Africa had breached its con-

tinuing obligations under the Mandate, and that South Africa was bound to continue to comply with the provisions of the Mandate relating to international supervision, with respect to which the functions formerly exercised by the League of Nations had been taken over by the General Assembly of the United Nations. South Africa raised objections to the Court's jurisdiction on the basis that Ethiopia and Liberia had no *locus standi* in the matter. In its 21 December 1962 decision on the Preliminary Objections, the Court concluded that Article 7 of the Mandate which conferred jurisdiction on the Court as to disputes between the mandatory and another Member of the League was "a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court" and decided, by 8 votes to 7, that it had jurisdiction to adjudicate upon the merits of the dispute. (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 347.)

But in the second phase of the proceedings on 18 July 1966, by the President's casting vote—the votes being equally divided—the Court found that Ethiopia and Liberia "cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them". (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 51.)

General Assembly Resolution 2145 (XXI) and Subsequent General Assembly and Security Council Resolutions

On 27 October 1966 the General Assembly adopted resolution 2145 (XXI), in which it recalled that the Court's three advisory opinions on South West Africa as well as its judgment of 21 December 1962 had established the fact that South Africa continued to have obligations under the Mandate and that the United Nations as the successor to the League of Nations had supervisory powers in respect of South West Africa. Having studied the reports of the various committees which had been established to exercise the supervisory functions over the administration of the mandated Territory, the Assembly expressed the conviction that the administration of the Territory by South Africa had been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights.

Having further considered that all the efforts of the United Nations to induce the Government of South Africa to fulfil its obligations had been of no avail, the Assembly reaffirmed the international status of South West Africa; declared that South Africa had 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 had, in fact, disavowed the Mandate; and decided 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".

The General Assembly, having thus terminated South Africa's rights and authority under the mandate, resolved that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa. It established an *Ad Hoc* Committee for South West Africa 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. The Assembly also called 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". The resolution was adopted by a vote of 114 to 2 (Portugal and South Africa), with 3 abstentions (France, Malawi and the United Kingdom).

The General Assembly considered the report of the *Ad Hoc* Committee for South West Africa at its fifth special session in 1967. Acting upon the recommendations in that report, the General Assembly adopted resolution 2248 (S-V), which included a number of measures designed to implement the decisions taken in resolution 2145. Sections II and IV established a United Nations Council for South West Africa to be responsible to the General Assembly for the administration of the Territory and outlined steps to be taken by the Council leading to the transfer of the Territory to the authority of the United Nations and the withdrawal of South African administration. The Council endeavoured to comply with the Assembly's directive that it proceed to South West Africa to take over the administration of the Territory, but South Africa rather than facilitating the transfer of administration relied on its effective control over the Territory to deny the Council entry. Subsequently in resolutions 2325 (XXII), 2372 (XXII) and 2403 (XXIII), the General Assembly in increasingly firm tones called for South Africa's withdrawal.

On 20 March 1969 the Security Council in resolution 264 recognized the General Assembly's termination of South Africa's rights under the Mandate, stated that the continued presence of South Africa in Namibia was illegal, and called upon South Africa to withdraw its administration from the Territory. In addition, the Council "recalling" that the General Assembly in resolution 2145 had called upon South Africa to refrain from "any action . . . which will in any manner whatsoever alter or tend to alter the present international status of South West Africa", declared that South Africa had no right to enact the "South West Africa Affairs Bill", then pending before the South African legislature. That Bill, enacted as the South West African Affairs Act, 1969, defined and extended powers of the Government in Pretoria in areas in which the Administration in the Territory had previously exercised authority and further implemented South Africa's scheme for the creation of "homelands".

Thereafter, on 12 August 1969, the Council condemned South Africa for refusing to comply with resolution 264 (1969) and for its "persistent defiance" of the authority of the United Nations. (Security Council resolution 269 (1969).) The Council again called upon South Africa to withdraw immediately its administration from Namibia, and set a deadline of 4 October 1969. On 26 September 1969 South Africa's Foreign Minister informed the Secretary-General that his Government regarded General Assembly resolution 2145 (XXI) and subsequent United Nations resolutions dealing with Namibia, including Security Council resolution 269, as invalid.

The Security Council subsequently discussed trials of Namibians under the South African Terrorism Act of 1967, the application of which extended to Namibia. Following that discussion the Security Council adopted resolution 276 (1970) in which it reaffirmed 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"; characterized the continued presence of South African authorities in Namibia as "illegal" and the acts taken on behalf of or concerning Namibia by those authorities subsequent to the termination of the Mandate as "invalid"; and called upon States to refrain from any dealings with the Govern-

ment of South Africa inconsistent with the illegal character of that presence.

Two final resolutions relevant to this case were adopted by the Security Council on 29 July 1970. Resolution 283 requested States to refrain from any relations—diplomatic, consular or otherwise—with South Africa implying recognition of the authority of the South African Government over the territory of Namibia and called upon States maintaining diplomatic or consular relations with South Africa *(a)* to issue a formal declaration to the Government of South Africa to the effect that they do not recognize any authority of South Africa with regard to Namibia and that they consider South Africa's continued presence in Namibia illegal, and *(b)* to terminate existing diplomatic and consular representation as far as they extend to Namibia and to withdraw any diplomatic or consular mission or representative residing in the Territory. The resolution further called upon all States to take various economic measures with respect to Namibia and requested them to review bilateral treaties between them and South Africa which contain provisions applicable to Nambia. The Secretary-General was requested to undertake a similar study with respect to multilateral treaties which might be considered to apply to Namibia.

Resolution 284 requested the Secretary-General to transmit to the Court the request for an advisory opinion on the question now before it.

PART II

Statement of Law

CHAPTER I

THE UNITED NATIONS VALIDLY TERMINATED SOUTH AFRICA'S MANDATE OVER THE TERRITORY OF NAMIBIA

Section 1

Scope of the Question

The question submitted to the Court relates to the "legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)". The purpose of this question was explained as follows by the delegation of Finland which introduced the resolution requesting this advisory opinion:

> "First, an advisory opinion from the International Court of Justice would have considerable value in defining and spelling out in legal terms the implications for States of the continued presence of South Africa in Namibia.
>
> Secondly, an advisory opinion would also be of value in defining more precisely the rights of Namibians—those staying in Namibia as well as inhabitants of Namibia residing abroad. In this way it could perhaps accord some measure of added protection to Namibians whose basic human rights are being suppressed through the application of South African repressive legislation.
>
> Thirdly, it is our expectation that an advisory opinion of the International Court of Justice could underline the fact that South Africa has forfeited its mandate over South West Africa because of its violation of the terms of the mandate itself, because South Africa has acted contrary to its international obligations, contrary to the international status of the territory and contrary to international law . . ." (S/PV.1550, p. 18.)

On a previous occasion, the delegate of Finland stated that an advisory opinion—

> ". . . would dispel doubts, *inter alia*, about questions relating to diplomatic or consular relations which might be construed to imply recognition of South Africa's authority over Namibia and the question of amending or revising bilateral and multilateral treaties between States and South Africa to the extent that they contained provisions applying to Namibia. In the event that such agreements and treaties did not contain explicit provisions regarding their application to Namibia, the question of their applicability to the Territory would have to be determined on the basis of the relevant provisions of international law." (S/AC.17/SR.12, p. 3.)

Other delegates asserted that the Court should elicit the scope of legal means at the disposal of States for constructing a wall of legal opposition to the occupation of Namibia by the Government of South Africa and rule on the international legal consequences of a failure to comply with resolutions of a United Nations body. (Delegates of Syria and Spain, S/PV.1550, pp. 47, 56.)

It might be suggested that the phrase "notwithstanding Security Council resolution 276" means that the validity of that resolution is to be assumed. However, application of the basic rule of interpretation that terms are to be given their ordinary meaning in context militates against such an interpretation. The ordinary meaning of "notwithstanding" when used as a preposition is "in spite of" or "despite". (See *Webster's New International Dictionary of the English Language, Second Edition, Unabridged*, 1957, p. 1669; and *The Shorter Oxford English Dictionary*, Vol. II, 1944, p. 1341.) The French text used the word "nonobstant" as the equivalent of "notwithstanding". The word generally means "Qui n'empêche pas". When used as a preposition it means "malgré, sans égard à". (*Le Nouveau Petit Larousse*, 1950.)

Resolution 276 declares the continued presence of the South African authorities in Namibia illegal. In context the question is what are the legal consequences of South Africa's continuing its presence in Namibia despite the illegality of that presence. An analysis of the debate on the resolution confirms that the Council used "notwithstanding" to denote "despite" or "regardless".

During the debate in the Security Council, several of the delegations voting for the resolution stated that the Court should limit the scope of its advisory opinion strictly to the question put to it, and should not review or examine the legality or validity of the resolutions adopted by both the General Assembly and the Security Council (Delegate of Nepal, S/PV.1550, p. 37); or that the Court is not asked to rule on the status of Namibia as such (Delegate of Syria, *ibid.*, p. 47). Concern was also expressed that the Court may raise in its opinion doubts about General Assembly resolutions 2145 (XXI) and 2248 (S-V) (Delegate of Zambia, *ibid.*, p. 53).

On the other hand, representatives of France and the United Kingdom stated that it would be desirable for the judges of the Court to consider the legal foundations of the revocation of South Africa's Mandate and to examine certain assumptions about the legal status of Namibia. In particular, questions were raised:

(a) whether, having regard to all circumstances, the General Assembly was competent to terminate South Africa's Mandate; and

(b) whether the Assembly was entitled to vest in the United Nations responsibility for the Territory. Those representatives abstained from voting because their Governments thought that the question submitted to the Court was constructed in such a way that the Court might feel itself inhibited from pronouncing on the more fundamental issues concerning the present status of Namibia (*ibid.*, pp. 87, 91).

The delegation of Finland, which was responsible for the suggestion that an advisory opinion should be sought from the Court, emphasized throughout the debate that "the purpose of requesting an advisory opinion was not to call into question the basic decisions taken by the General Assembly and the Security Council terminating the mandate of South Africa over Namibia". (See, for instance, S/AC.17/SR.17, p. 8.)

Taken as a whole, the debate in the Security Council affords support for the view that the Council considered that the Court could render an advisory opinion on the question presented without examining the validity of General Assembly and Security Council resolutions relating to Namibia. Nevertheless, the former mandatory has challenged the validity of the termination of its Mandate (see, especially *South West Africa Survey 1967*, p. 41), and some members of the Security Council have expressed doubts as to the validity of General Assembly resolution 2145 (XXI). Because the Court may, accordingly, consider

it essential to deal with the validity of the termination, the United States proposes to examine this important issue in this Part of its Statement.

The United States has previously expressed its views in the political organs of the United Nations that, given the international supervisory responsibilities of the United Nations with respect to the territory described in the Mandate as South West Africa and the breach by South Africa of its obligations under that instrument, the General Assembly was legally entitled to declare the termination of South Africa's Mandate in resolution 2145 (XXI), which action was subsequently recognized by the Security Council in resolutions 264, 269 and 276. In this part of its statement the United States will detail the legal arguments which lead to the conclusion that the United Nations validly terminated South Africa's rights and authority under the Mandate.

Section II

The Mandate as a Treaty in Force

The Court has consistently regarded the Mandate as a treaty in force containing obligations for South Africa. In its 1950 Opinion the Court, after referring to Article 37 of its Statute, observed that there was a provision in Article 7 of the Mandate providing for the reference of disputes to the Permanent Court of International Justice and expressed the "opinion that this clause in the mandate is still in force and that, therefore . . . South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions". (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at p. 138.) Nothing in either the 1955 or 1956 Advisory Opinions, which dealt with the compatibility with the 1950 Opinion of certain supervisory functions which the General Assembly proposed to exercise, suggests that the Court had ceased to regard the Mandate as a treaty in force.

In the course of proceedings before the Court in 1962, counsel for South Africa submitted the following amended preliminary objection to the jurisdiction of the Court, which had been invoked on the basis of Article 7 of the Mandate:

> "[T]he Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this Submission being advanced—
>
> *(a)* with respect to the Mandate as a whole including Article 7 thereof; and
> *(b)* in any event, with respect to Article 7 itself."
>
> (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319, at p. 330 (italics omitted).)

In its Judgment, which is binding on South Africa, the Court rejected the amended preliminary objection and explained: "The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention." (*Ibid.*, p. 330.) The Court continued:

> "[T]his Mandate, like practically all other similar Mandates, is a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement consisting in the conferment and acceptance of a Mandate for South West Africa, a provisional or

tentative agreement on the terms of this Mandate between the Principal Allied and Associated Powers to be proposed by the Council of the League of Nations and a formal confirmation agreement on the terms therein explicitly defined by the Council and agreed to between the mandatory and the Council representing the League and its Members. It is an instrument having the character of a treaty or convention and embodying international engagements for the mandatory as defined by the Council and accepted by the mandatory." (*Ibid.*, p. 331.)

Before bringing to a close its discussion of the South African preliminary objection the Court cited the language from its 1950 Opinion, quoted above, and remarked:

"The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continued to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950." (*Ibid.*, p. 334.)

It concluded its rejection of the objection with the following sentence:

"The validity of Article 7, in the Court's view, was not affected by the dissolution of the League, just as the Mandate as a whole is still in force for the reasons stated above." (*Ibid.*, p. 335.)

Section III

There Is a Legal Obligation to Observe Treaties in Good Faith

In 1969 the United Nations Conference on the Law of Treaties brought to a successful close more than 15 years' work within the Organization relating to the codification of treaty law. The Convention that was produced by the combined efforts of the 110 States participating in the Conference, although it is not yet in force, constitutes a primary source of reference for determining what are the customary principles of treaty law applicable to the Mandate.

Article 4 of the Vienna Convention on the Law of Treaties provides that the Convention applies only to treaties which are concluded by States after entry into force of the Treaties Convention with regard to such States. However it specifically preserves the applicability to all treaties of rules of customary treaty law that are contained in the Convention. Many of the provisions of the Convention codify pre-existing customary law. In this regard the Legal Counsel of the United Nations has pointed out that the debates and decisions of the Conference—

". . . may show the opinions of governments about what the present rules are, and thus may furnish evidence of existing customary international law. If a rule was adopted by a very large majority and with a general understanding that it represents existing law, it may be taken to formulate such law." (Letter of 11 May 1970 from the Legal Counsel (Stavropoulos) to Secretary-General (Twight), International Civil Aviation Organization.)

Two articles of the Treaties Convention which both on the basis of their content and according to the criteria laid down by the Legal Counsel of the United Nations may be taken to formulate existing law are those relating to *pacta sunt servanda* (Art. 26) and to the consequences of breach of a treaty (Art. 60).

Article 26 provides that a State is bound to carry out in good faith its treaty obligations. The International Law Commission described the rule as "the fundamental principle of the law of treaties". (*Reports of the International Law Commission on the Second Part of its Seventeenth Session and on Its Eighteenth Session, GA, OR, 21st Session,* Supplement No. 9, p. 42.) The formulation of this principle proposed by the Commission was adopted without any negative vote at the second session of the Conference.

The Preamble to the Charter of the United Nations affirms the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained". Paragraph 2 of Article 2 expressly provides that Members "shall fulfil in good faith the obligations assumed by them in accordance with the . . . Charter".

International tribunals have also affirmed the principle of good faith performance of treaty obligations. In the *North Atlantic Coast Fisheries* case, a tribunal of the Permanent Court of Arbitration declared: "Every State has to execute the obligations incurred by treaty *bona fide* . . ." (UN, *Reports of International Arbitral Awards,* Vol. XI, p. 186.) A former Judge and distinguished commentator on the Permanent Court observed: "The assumption runs throughout its jurisprudence that States will in good faith observe and carry out the obligations which they have undertaken." (M. O. Hudson, *The Permanent Court of International Justice 1920-1942* (1943), p. 636.)

In *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957,* page 53, Judge Lauterpacht stated: "Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."

Commenting on this statement Sir Gerald Fitzmaurice declared:

> "Action in good faith is an international law obligation . . . and accordingly action not in good faith must be considered as a breach of international law . . ." ("Hersch Lauterpacht—The Scholar as Judge: Part II", 38 *Brit. Yr. Bk. of Int. Law* 9 (1962).)

Section IV

A Material Breach of a Treaty Entitles the Other Party to Suspend its Operation in Whole or in Part

A second relevant rule of treaty law, codified in Article 60 of the Convention, deals with termination or suspension of the operation of a treaty as a consequence of its breach. Paragraph 3 of that Article restricts its application to cases of material breach, which is defined as:

> "*(a)* a repudiation of the treaty . . ., or
> *(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

The basic principle embodied in the Article is that a material breach of a treaty on one side may give rise to a right on the other side to abrogate the treaty or suspend its operation in whole or in part. The commentary to the corresponding article in the Harvard Draft summarizes traditional international law doctrine regarding breach and demonstrates that the principle has been recognized in municipal courts since late in the eighteenth century. (29 *American*

Journal of International Law Supplement, pp. 653, 1078 (1935).) The International Law Commission's 1966 Commentary on its Draft Articles on the Law of Treaties stated that "the great majority of jurists" recognized the principle expressed in Article 60. (*I.L.C. Report, Eighteenth Session, GA, OR, 21st Session*), Supplement No. 9, at p. 82.) At the Conference on the Law of Treaties, in which South Africa participated, no delegation denied the principle in the rather extensive debate in the Committee of the Whole; no delegation voted against the adoption of the article in the Plenary. The foregoing evidence is more than sufficient to establish that the principle in Article 60 may be regarded as representing existing law.

The fact that the Mandate is not a treaty between States does not affect the applicability to it of the treaty law contained in the Treaties Convention. Article 3 of the Convention provides that any of the rules set forth in the Convention may be applied to treaties between States and international organizations where such rules would be applicable "under international law independently of the Convention".

The rule relating to material breach, like that relating to *pacta sunt servanda*, was recognized before the adoption of the Convention as applying to all treaties, not only to those between States. Indeed, each of the Special Rapporteurs on the Law of Treaties, Brierly, Lauterpacht, Fitzmaurice and (in his second report) Sir Humphrey Waldock, proposed an article on breach which would have applied to all written treaties without regard to the nature of the parties. It was only later, in 1965, in order to simplify the drafting of certain of the articles, principally those relating to the conclusion of treaties, that the International Law Commission removed from the scope of the Convention treaties to which one or more international organizations were parties.

The rules relating to *pacta sunt servanda* and to material breach have been shown to be formulations of the law as it existed independently of the Treaties Convention; they are properly applicable to the Mandate. Therefore, if South Africa was in material breach of its obligations under the Mandate, the United Nations was entitled to terminate her rights and authority under the Mandate.

Section V

The League of Nations Had the Right to Terminate Rights Under a Mandate in the Event of a Material Breach of its Obligations by the Mandatory Power

During the League of Nations period a number of modifications and terminations of mandates took place. As the representative of the Secretary-General of the United Nations (Mr. Kerno) informed the Court in his statement of 17 May 1950: "The normal method by which modification or termination could occur appears to have been with the consent of both the Council and the mandatory Power." (Italics omitted.) (*I.C.J. Pleadings, Status of South West Africa*, p. 266.) The statement suggests the question with which we shall now deal; namely whether during the League period there was any other method by which the Mandate might have been modified.

The genesis of the mandates system may be traced to a pamphlet entitled "The League of Nations: A Practical Suggestion", published in 1918 by General Smuts, who later served as representative of South Africa at the Paris Peace Conference. The Smuts proposal served as the point of departure for subsequent discussions of the mandates system. As he conceived the system all authority and control over the overseas territories placed under the mandates system

would vest in the League, which would exercise it either directly or through mandatory powers acting on its behalf. As to the possibility of modification of mandates, he wrote:

> "[I]n case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate, and entrusting it to some other state, if necessary ..."

Although the Covenant of the League as finally adopted did not include a provision of that character, there is support in subsequent discussions in the Permanent Mandates Commission for the proposition that if the mandatory breached its obligation under a mandate the League could revoke the mandatory's rights. See *I.C.J. Pleadings, International Status of South West Africa*, page 230, for representative citations to the Permanent Mandates Commission discussions. Given the absence of a case of material breach raised before an appropriate organ of the League the Permanent Mandates Commission had no occasion to grapple squarely with the problem.

While there was little official consideration of the possibility of modification of a mandate by the League in consequence of violation by the mandatory power of its international obligations, the question was thoroughly examined by jurists during the League period. The work of the Institute of International Law, which culminated in the adoption of a resolution on International Mandates, affords valuable and persuasive evidence that in the view of the leading jurists of the day the League had the power to modify a mandate when the mandatory power breached its international obligations under a mandate agreement.

The Institute's consideration of mandates began in 1921 when Sir Thomas Barclay filed a preliminary report in which he made the following statement:

> "Les territoires des mandats, même quand il s'agit des mandats 'C', ne forment partie du domaine souverain du mandataire qu'autant que ce dernier remplisse certaines conditions. Mais, s'il ne les remplissait pas, il pourrait être privé de son mandat par la Société des Nations." (28 *Annuaire de l'Institut de droit international* (1921), 28.)
>
> "The territories under mandate, even when they are Class 'C' mandates, do not form part of the sovereign domain of the mandatory unless he complies with certain conditions. But if he does not fulfil these conditions the League of Nations may take away his mandate." (Translation.)

The Institute subsequently asked Professor Henri Rolin to serve as rapporteur on mandates. Rolin, who had served as Legal Adviser to the Belgian delegation to the League of Nations, submitted his report in 1928. In that part of his treatment of "Termination" which deals with revocation he stated:

> "[I]l y a pour le Mandataire un droit acquis qui ne peut être révoqué que dans le cas où le Mandataire lui-même aurait gravement contrevenu à ses obligations.
>
> . . . . . .
>
> [C]'est au Conseil seul qu'appartiendrait de prononcer une révocation.
>
> . . . . . .
>
> Il est inutile d'insister sur l'improbabilité qu'une Puissance Mandataire s'expose jamais à pareille sanction." (34 *Annuaire de l'Institut de droit international* (1928), 46, 47, 48.)
>
> "The mandatory has an acquired right which can only be revoked in a

case in which the mandatory himself has gravely violated his obligations.

. . . . . .

It is for the Council acting alone to revoke a mandate.

. . . . . .

There is no need to dwell on the improbability that a mandatory Power will ever expose itself to such a sanction." (Translation.)

Professor Rolin circulated his report, a questionnaire, and a draft resolution to his colleagues on the Commission in 1928. Although some of his colleagues were not in agreement with all his conclusions, none expressed disagreement with any of the points set out above.

At its Cambridge Session in 1931 the Institute devoted three meetings to a discussion of Professor Rolin's report. In his oral presentation Rolin stated that the Commission had concerned itself with four basic points. The sole point which is here relevant is the fourth, which concerned the conditions under which a mandate is brought to an end and the powers of the League of Nations in that regard. On 30 July, 1931, the Institute debated the following revised proposal on that subject:

"Les fonctions de l'Etat mandataire prennent fin par démission ou révocation du mandataire, par les modes habituels d'expiration des engagements internationaux et aussi par abrogation du mandat et reconnaissance de la collectivité sous mandat comme indépendante.

La démission n'a d'effet qu'à partir de la date fixée par le Conseil de la S. D. N. pour éviter toute interruption dans l'assistance donnée aux collectivités sous mandat.

La révocation de l'Etat mandataire et l'abrogation du mandat sont décidées par le Conseil de la S. D. N. ; l'abrogation peut résulter aussi de l'admission de la collectivité sous mandat comme Membre de la S. D. N." (36 *Annuaire de l'Institut de droit international* (1931), II, p. 60.)

"The duties of the mandatory State shall be terminated by the resignation or discharge of the mandatory, by the usual terms governing the expiration of international commitments, and also by the annulment of the mandate and recognition of the independence of the community under mandate.

The resignation shall not become effective until the date stipulated by the Council of the League of Nations in order to prevent any interruption in the assistance given to the communities under mandate.

The discharge of the Mandatory State and the annulment of the mandate shall be decided by the Council of the League of Nations; the annulment may also result from the admission of the community under mandate to membership in the League of Nations." (Translation.)

The debate immediately focused on the question of revocation. Professor Rolin argued that the right of revocation derived from the supervisory powers of the League, that it was a necessary element of this power, but that the right could be used as a sanction only with respect to serious derelictions on the part of the mandatory. (*Ibid.*, p. 55.) In response to the suggestion that if a difference arose between the Council and a mandatory's obligation it was for the Permanent Court of International Justice rather than the Council to decide whether to revoke a mandate, Professor Rolin replied that the instruments constituting the mandates provided for recourse to the Court in cases of differences between a mandatory and another Member of the League. In his view, revocation went to the essence of control; in accepting responsibility for administering a territory under the control of the League of Nations a mandatory implicitly accepted

the sanction of revocation by decision of the Council. Professor Verdross expressed the opinion that such action would be the equivalent of unilateral termination of a treaty in response to breach by the other party of its obligations. In such circumstances, unilateral termination was permitted by the general principles of international law.

When Professors Borel and Politis asked for deletion of the term "révocation" from the proposed text, Rolin insisted that the Institute clearly resolve the issue; rejection of the word "révocation" would signify that the Institute denied that the Council had the power to revoke the rights of a mandatory. In a separate vote on the word "révocation" the Institute decided by a substantial majority to retain Rolin's text (*ibid.*, at p. 60). In a subsequent roll-call vote on the resolution as a whole, no member of the Institute cast a negative vote.

A number of other jurists have also concluded that the League of Nations had the power to revoke the rights of a mandatory Power which was in breach of its obligations. Professor J. H. W. Verzijl in an article originally published in Dutch in the *Telegraaf* of 16 April 1933 stated:

> "As far as revocation by the League is concerned, the ground for this can consist . . . in the fact that a mandatory Power has ceased to deserve its maintenance as such (for example, owing to neglect of its specific obligations as a mandatory) . . ." (Reprinted in English in *International Law in Historical Perspective*, 1970, Vol. III, p. 458.)

J. Dugard in "The Revocation of the mandate for South West Africa" (62 *American Journal of International Law* (1968), 78, 86), cites the following commentators as having accepted during the League period the possibility of revocation: Wright, Stoyanovsky, Bentwich, Wessels, Feinberg and Hales. (For a contemporary view, see J. F. Crawford, "South West Africa: Mandate Termination in Historical Perspective", 6 *Columbia Journal of Transnational Law* (1967), p. 91, at p. 114).

In view of the nature of the mandate, the supervisory role of the League with respect to the obligations under that instrument, the recognition in the discussions of the League of the possibility of termination of a mandate and the opinions of the jurists recited above, there is no basis for holding that, had a material breach of a Mandate occurred during the League period, the Council of the League would have been unable as a matter of law to exercise its supervisory authority by revoking the rights it had conferred on the mandatory Power.

Section VI

The United Nations Succeeded to the Right to Terminate South Africa's Mandate in the Event of a Material Breach

The supervisory authority of the League of Nations, including the power to terminate a mandate, now rests with the United Nations. In its 1950 Advisory Opinion the Court stated that the supervisory functions of the League were to be exercised by the United Nations, and that South Africa was obliged to submit the annual reports provided for in the Mandate and to transmit petitions from the inhabitants of the Territory to the General Assembly. The Court pointed out, however, that the "degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". (*International Status*

of South West Africa, Advisory Opinion, I.C.J. Reports 1950, p. 128, at p. 138.)

Subsequent Advisory Opinions in 1955 and 1956, which dealt, respectively, with *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa* and *Admissibility of Hearings of Petitioners by the Committee on South West Africa* reaffirmed the mandatory's obligations and the General Assembly's supervisory role. In the latter opinion the Court observed:

> "... the obligations of the mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations and that the organ of the United Nations exercising these supervisory functions, that is, the General Assembly, is legally qualified to carry out an effective and adequate supervision of the administration of the Mandated Territory, as was the Council of the League.
>
> . . . . . .
>
> The general purport and meaning of the Opinion of the Court of 11 July 1950 is that the paramount purpose underlying the taking over by the General 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 was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory.
>
> . . . . . .
>
> There is nothing in the Charter of the United Nations, the Covenant of the League, or the Resolution of the Assembly of the League of April 18th, 1946, relied upon by the Court in its opinion of 1950, that can be construed as in any way restricting the authority of the General Assembly to less than that which was conferred upon the Council by the Covenant and the Mandate; nor does the Court find any justification for assuming that the taking over by the General Assembly of the supervisory authority formerly exercised by the Council of the League had the effect of crystallizing the Mandates System at the point which it had reached in 1946." (*Admissibility of Hearings of Petitioners on the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at pp. 27-29.)

The early practice of the United Nations supports the conclusion that it has the competence to terminate mandates established by the League of Nations. (UN doc. A/64, p. 13.) With respect to the Palestine Mandate established in 1920, the General Assembly, in 1947, subsequent to the dissolution of the League, adopted resolution 181 (II) which included the language: "The Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948." The records of the Assembly show that 33 States voted in favour of the resolution, 13 against, with 10 abstentions, including the United Kingdom, the mandatory Power.

After this decision was taken the Government of the United Kingdom announced that the Mandate would be terminated on 14 May 1948. (*Hansard, Commons*, 11 December 1947, col. 1218.) The United Kingdom representative stated in the Security Council on 24 February 1948 that his Government was bringing to an end the discharge of its reponsibilities under the Mandate and was "leaving the future of that country to international authority". (*SC, OR*, 3rd Year, 253rd Meeting, p. 272.) A few days later, the representative of the United Kingdom recognized that it was for the United Nations to decide what procedure to adopt "with a view to assuming responsibility for government of

Palestine on 15 May". (*SC, OR*, 3rd Year, 260th Meeting, p. 402.) Judge Jessup pointed out that in submitting the future of Palestine to the General Assembly, the United Kingdom Government "recognized the authority of the United Nations to bring about a change in the status of a mandate". (*South West Africa, Second Phase, Judgment* [dissenting opinion of Judge Jessup], *I.C.J. Reports 1966*, p. 6, at p. 351.)

A second precedent supports the authority of the appropriate organ of the United Nations to terminate without the consent of the mandatory Power a mandate granted by the League of Nations.

At its 124th meeting on 2 April 1947 the Security Council, acting under Article 83, paragraph 1, of the Charter, unanimously approved a trusteeship agreement with the United States for the former Japanese mandated islands. The right of the United Nations to take this action was based on its succession to the League. As the delegate of the United States explained at the 116th meeting of the Security Council, it was the view of the United States—

> ". . . that Japan never did have sovereignty over these islands and that so far as the trusteeship is concerned, any interest of the *cestui que trust* was represented by the predecessor of the United Nations, namely, the League of Nations, and, as the successors of the League of Nations, it is in our hands. If there is any entity which can properly represent that aspect of the life of these islands, it is the United Nations." (*Official Records of the Security Council*, 2nd Year, No. 23, p. 471.)

At the time the agreement was concluded Japan had not renounced its obligations or rights under its Class "C" Mandate of 17 December 1920. Although the agreement does not purport to terminate the Mandate (the preamble merely stating that "Japan, as a result of the Second World War, has ceased to exercise any authority in these islands") the conclusion of the agreement effectively extinguished the Mandate. Japan later renounced her rights under this Mandate and accepted the action of the Security Council in Article 2 *(c)* of the Treaty of Peace signed at San Francisco on 8 September 1951. (136 *UNTS* 45.) This power to terminate a mandate necessarily includes the power to terminate the rights and authority of a mandatory as was done in respect of South Africa by General Assembly resolution 2145 (XXI).

In addition to the general question dealing with the international status of South West Africa and the international obligations of South Africa arising therefrom which the General Assembly submitted to the Court for an advisory opinion in 1949, there were three subsidiary questions. The last of these, Question *(c)*, was:

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

The Court replied that South Africa acting alone did not have the competence to modify the international status of the Territory, and that "the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations". (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at pp. 141, 144.)

The Court's answer to Question *(c)* in its 1950 Advisory Opinion on the *Status of South West Africa* may be asserted to support the argument that despite South Africa's breaches of the Mandate the United Nations did not have

the competence to revoke South Africa's mandate without her consent. Such an argument could only be based upon a misconception as to the scope of that part of the Court's opinion. As the Court explained, Question *(c)* related solely to "modification of the international status of Territory". The underlying concern of the Court was with the competence to effect "any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System". (*International Status of South West Africa, Advisory Opinion, I.C.J.Reports 1950*, p. 128, at p. 142.) The revocation of South Africa's mandate did not change the international status of the Territory. It follows that the Court's answer to Question *(c)* is not pertinent to a revocation based upon the General Assembly's supervisory powers, which the Court affirmed in its answer to Question *(a)*. The Court's appreciation of this distinction is illustrated by the following language:

> "Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with the powers of supervision in respect of the administration of the Mandates. In accordance with the reply given above to Question *(a)*, those powers of supervision now belong to the General Assembly." (*Ibid.*, p. 141. Cf. dissenting opinion of Judge Alvarez, *ibid.*, pp. 182, 184.)

Thus, it may be concluded that the League of Nations could have terminated the Mandate in case of a grave violation and that the General Assembly's exercise of that power would be within the language and the spirit of the previous advisory opinions of the Court on this subject and would be consistent with prior United Nations practice.

Section VII

South Africa Has Been in Material Breach of Its Mandate Obligations

A. By Refusing to Submit Reports, Transmit Petitions, and Otherwise Recognize the Authority of the United Nations

Despite the Court's Advisory Opinion of 11 July 1950 affirming the duty of South Africa under the Mandate to submit reports as required by Article 6 of the Mandate and to transmit petitions of the inhabitants of the Territory to the General Assembly, South Africa has refused to perform its treaty obligations or to recognize the supervisory authority of the United Nations in respect of South West Africa.

The cardinal purpose of the mandates system described in Article 22 of the Covenant was the establishment of a "sacred trust of civilization" to be administered on behalf of the international community by mandatories who would be accountable to an international supervisory authority. The very purpose of requiring the mandatory to submit an annual report was to ensure that accountability. By substituting unilateral assertions of continuing to administer the territory "in the spirit of the . . . Mandate" (letter of 23 July 1947 from Legation of South Africa to Secretary-General of the United Nations, cited in *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at p. 135) for international supervision of that administration, South Africa has "severely reduced" the degree of international supervision provided for in the Mandate (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 45 [separate opinion of Judge Lauterpacht]) and directly deprived the United Nations of

the information necessary for effective supervision of the administration of the Territory. Such action constituted a material breach by South Africa of its obligations under the Mandate and a violation of the principle of *pacta sunt servanda*.

B. By Systematic Rejection of the Recommendations of the General Assembly and the Security Council.

South Africa has also failed to comply with resolutions of the General Assembly and the Security Council relating to its administration of the Mandate. In his separate opinion on 7 June 1955, on the question of *Voting Procedure on Reports and Petitions Concerning South West Africa*, Judge Lauterpacht touched on the possible legal consequences of continuing failure of the Mandatory to recognize the supervisory authority of the United Nations:

> "Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line, between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction." (*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, at p. 120.)

The persistent disregard of more than 70 resolutions relating to the administration of the Territory adopted over nearly two decades by the principal organs of the United Nations constituted a violation of South Africa's duty to act in good faith in accordance with its duties under the Mandate toward the supervisory authority.

C. By Application of Apartheid in Namibia

Article 22 (1) of the Covenant made applicable to all mandates the fundamental principle that "the well-being and development of such peoples forms a sacred trust of civilization". Article 2 of the Mandate for South West Africa required that—

> "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."

An examination of the institutions which South Africa has introduced into Namibia and their practical effect upon the inhabitants of the Territory is essential to any discussion of whether South Africa has complied with its basic obligations under those instruments.

South Africa which administers Namibia as an integral part of South Africa

has established apartheid as the principle for administering the Territory as well as for South Africa itself. Since 1950 the General Assembly has expressed concern over the policy of apartheid. In General Assembly resolution 1248 (XIII), the General Assembly declared again that:

> "... in a multiracial society, harmony and respect for human rights and freedoms and the peaceful development of a unified community are best assured when patterns of legislation and practice are directed towards ensuring equality before the law of all persons regardless of race, creed or colour, and when the economic, social, cultural and political participation of all racial groups is on a basis of equality; ..."

In General Assembly resolution 2145 (XXI), which terminated South Africa's rights under the Mandate, the General Assembly reaffirmed General Assembly resolution 2074 (XX) of 17 December 1965 and expressly referred to the condemnation of apartheid in Namibia in that resolution.

The most telling evidence that apartheid as applied to the inhabitants of Namibia is a violation of the Mandate may be found in the arguments of the South African Government itself. In a publication of the Department of Foreign Affairs, *South West Africa Survey 1967*, the South African Government's policy is set forth as one of "separate development" or apartheid, namely that "the White nation of South Africa and South West Africa must stay as a White African nation" (*ibid.*, p. 163). Such a policy with respect to a territory in which, according to the 1960 census, 81.47 per cent. of the population is African, 4.5 per cent. coloured, and 13.91 per cent. European, is a flagrant contradiction of the Mandatory's obligations to the inhabitants. South Africa frankly declared its rejection of the norm or standard of universal adult suffrage. In disregard of its obligations under the Mandate to the Territory as a whole and to the people as a whole, South Africa adopted a policy of apartheid and rejected "every policy which suggested the giving of limited rights to the various groups inside one political structure" since such policy "had the prospect of one man one vote as an unavoidable end result, with its easily predictable consequences" [the end of minority control]. (See *South West Africa Survey 1967*, pp. 46-47.)

The basic premise of apartheid, to preserve the control of the white minority in all of Southern Africa and to prevent self-determination by the majority, is antithetical to the obligations of South Africa under the Mandate, namely "to promote to the utmost the material and moral well-being and the social progress of the inhabitants".

According to a study of the International Commission of Jurists:

> "The latest official estimate, made in 1960, of the population of South-West Africa (there has been no census since 1951) places the total at 554,000, of which 464,000 are African, 69,000 are European and 21,000 are Coloured. For administrative purposes, the Territory is divided into two zones, an arrangement inherited from the former German Administration. Lying to the south and comprising nearly two-thirds of the whole country is the European settler area, called the Police Zone, which also contains small, enclosed reserves of Africans who live and work there. These areas are completely segregated and the residential areas of the Europeans and Africans are separated by 500-yard buffer-strips. The rest of the population, that is, the majority of the Africans, lives in the Tribal Areas in the north, comprising the remaining one-third of the total area." (International Commission of Jurists, *Apartheid in South Africa and South West Africa* (1967), pp. 19-18.)

The study also shows exclusive white control of basic policy for the whole territory.

> "Since 1951, South-West Africa has been represented at the National Parliament at Pretoria by ten European South African nationals, six of whom sit in the House of Assembly and four in the Senate. The Legislative Assembly of the Territory consists of eighteen Europeans, all of them South African nationals living in South-West Africa. The South African Government exercises complete administrative and legislative control over the following internal matters of South-West Africa: Africa affairs, customs and excise, railways and harbours, police, external affairs, immigration, civil service, health, agriculture, lands, mining, commerce and industry." *(Ibid.)*

Administration of non-white affairs is shown to have been centralized in the Government at Pretoria. Indeed, under the South West Africa Affairs Act of 1968 this centralization has become more complete.

Under the Act, the State President may amend existing proclamations applicable to the Territory and "if he considers it to be necessary, declare any such amendment to be of retrospective effect".

The Study of the International Commission of Jurists also shows the wide power vested in the discretion of the Administrative officials over the lives of Africans and other non-whites.

> "The Tribal Areas, where there are no European settlers, are ruled indirectly through traditional chiefs, who function under the authority of the Administrator of South-West Africa. The President of the South African Republic is the declared Supreme Chief of all Africans, in which capacity he has drastic and almost unlimited powers to appoint and remove chiefs, divide or amalgamate tribal communities, deport and banish individuals and groups. He can order the removal of any person from one part of the Territory to another without allowing any form of access or appeal to the courts. Africans do not possess even the most rudimentary political power, and have no participation at all in the making of the laws which govern their lives completely, and which carry rigid sanctions. All independent attempts at political organization are forcibly suppressed, as are those involving trade union activities. No intention to change this situation has ever been manifested by the South African Government." (*Ibid.*, p. 19.)

Since 1967, under the Homelands Act, provision has been made for native authorities and non-white localized self-government. However, the power and resources of such local authorities are limited and are terminable at the pleasure of the State President, that is, the Government at Pretoria. (Clauses 5 (2) and 14 of the Act.)

In the application of apartheid, Namibians have been systematically subjected to legal discrimination and deprivation of fundamental rights and freedoms on the basis of race in violation of South Africa's obligations.

Under South African administration certain basic rights and freedoms of Namibians have been limited by legal restrictions imposed on the grounds of race. The following six subsections discuss those limitations.

1. Freedom of Movement

The report of the Special Rapporteur of the Commission on Human Rights on the "Study of Apartheid and Racial Discrimination in Southern Africa"

(UN doc. E/CN.4/949/Add.1), states in Part I, Chapter II, a comprehensive study and treatment of the laws of South West Africa:

> "The freedom of movement of Africans is severely restricted by a complex pass system to be found in the Native Administration Proclamation, 1922, the Extraterritorial and Northern Natives Control Proclamation, 1935 and the Natives (Urban Areas) Proclamation, 1951." (*Ibid.*, para. 652. The General Assembly in Resolution 2439 (XXIII) endorsed the recommendations of the Special Rapporteur that South Africa be required to repeal, amend or replace laws cited in paragraph 1547 of the Report (E/CN.4/949/Add.4).)

Paragraph 5 of Proclamation No. 11 of 1922 (*Official Gazette*, 1 April 1922) provides:

> "5. No native shall save as is herein excepted travel within or leave the Territory unless he be in possession of a pass duly issued for that purpose by an authorized person. Any person contravening the provisions of this section shall be liable on conviction in the case of a first offence to a fine not exceeding one pound or in default of payment to imprisonment with or without hard labour for a period not exceeding fourteen days and in case of a second or subsequent offence to a fine not exceeding three pounds or in default of payment to imprisonment with or without hard labour for a period not exceeding one month."

2. Freedom of Residence and Right to Own Land

Strict limitations on the residence of Africans in reserves, police zones, and in urban areas are imposed by the Extraterritorial and Northern Natives Control Proclamation, 1935, and the Natives (Urban Areas) Control Proclamation, 1951, as amended by section 3 of Ordinance No. 25 of 1954. (See para. 662-675 of the Report to the Human Rights Commission.) The South West Africa Affairs Act of 1968 strengthened legal restrictions on the right of Africans to own or occupy land.

3. Freedom of Employment

Restrictions on freedom of employment and on conditions of employment, including the place, nature, duration, remuneration, and disability and workmen's compensation exist in Namibia. The study made for the International Commission of Jurists on "Apartheid in South Africa and South West Africa", 1967, states at pages 24-25:

> "The system of recruitment of African workers operating in South-West Africa today is unique in its organized and efficient application of conditions that are akin to slavery. Workers are recruited, under contract, in the Tribal Areas by the South African Government-sponsored South-West African Native Labour Association (SWANLA), which classifies the male population into working categories A, B and C, suitable respectively for work in the mines, on land and on the agricultural and livestock-breeding farms of the Europeans. These letters are produced on the clothes of the workers, which they have to provide for themselves. Once having been chosen by SWANLA contractors, the men are transported to their areas of work. The workers have to pay a government tax on each contract of employment. There is no other way of obtaining work or earning a wage except through the SWANLA contract-system, which provides the employers in the mines and farms with the amount and quality of labour that

> they require. Once under contract, the worker may not leave the area of employment and may not cancel the contract. No African trade unions are recognised, the workers are excluded from all systems of collective bargaining and strikes are a criminal offence."

See also paragraphs 756-763 of the above-cited study made for the Human Rights Commission.

As an example of the differences on the basis of race in the amount of compensation paid to survivors under the law applied by South Africa in Namibia, compare sections 40 and 86 of the Workmen's Compensation Act, No. 30 of 1941, on benefits to dependants in case of death of a worker. See also Social Pensions Ordinance, No. 2 of 1965 (*Official Gazette Extraordinary*, 26 March 1965) which provides for different old-age, disability and blindness pensions for White and Coloured and has no provision for Africans.

4. Right to Participate in Government

The Study for the Human Rights Commission recites the barriers to any participation by Africans in the central Government which controls their affairs:

> "575. The European inhabitants of South West Africa are represented both in the Parliament of the Republic of South Africa and in the Legislative Assembly of South West Africa. The non-Europeans are represented in neither.
>
> 576. By Chapter III of the South West Africa Affairs Amendment Act, 1949, provision is made for the election of six representatives to the South African House of Assembly by registered European voters of South West Africa. By virtue of section 34 of the Act, all European citizens over the age of 18 are entitled to vote. Similarly, by section 29, only Europeans are entitled to stand for election. The Act also provides for four senators from South West Africa to sit in the South African Senate. Two are nominated by the State President (one must be selected mainly on the ground of his thorough acquaintance with 'the reasonable wants and wishes of the coloured races of the territory') and two are elected by members of the Legislative Assembly of South West Africa and the members of the South African House of Assembly elected for the territory of South West Africa.
>
> 577. The Legislative Assembly consists of 18 members elected by the registered European voters. Qualifications of voters and of candidates for election are the same as those given in the preceding paragraph for the House of Assembly."

Ordinance No. 34 of 1961 established a Coloured Council for the Territory with advisory functions with respect to "economic, social, education and cultural matters affecting the interests of the coloured population of the Territory". (*Ibid.*, sec. 6.) As pointed out in paragraph 589 of the Report to the Human Rights Commission "native affairs" are reserved to the Government of South Africa by the Constitution of South West Africa.

5. The Right to Family Life

The Human Rights Commission Report states in paragraph 639:

> "Again as in South Africa, the policy of allowing Africans to enter European areas to work only as 'single' men on a contract basis has the result of splitting up families and interfering with the family life of men whom economic necessity compels to seek work away from the reserves."

Under the Native (Urban Areas) Proclamation, Proclamation No. 56 of 1951 (*Official Gazette Extraordinary*, 29 October 1951), there are strict limitations on the residence of women in proclaimed areas (areas "in which natives are congregated in large numbers for mining or industrial purposes"). Paragraph 22 of this Proclamation authorizes the administrator:

> "... to prohibit any female native from entering the proclaimed area for the purpose of residing or obtaining employment therein after a date to be specified in any such notice, without a certificate of approval ...".

Such certificate could be issued only if the applicant has produced satisfactory proof that her husband (or father) "has been resident and continuously employed in the said area for not less than two years".

See also the requirement specified in paragraph 17 of Proclamation No. 65 of 1955, *Official Gazette*, 31 March 1955, that:

> "17. *(a)* Every female native resident in the proclaimed area, other than the wife, minor child or *bona fide* dependant of a native in employment in such area—
>
> (i) shall not later than the seventh day of each and every month produce proof that she is in *bona fide* employment to the location superintendent (for the information of the registering officer) by means of a certificate from her employer ...;
>
> (ii) shall be deemed to be out of *bona fide* employment if she fails to produce the proof mentioned in item (i) within the period indicated in that item;
>
> (iii) may be required in writing by the registering officer to depart from the proclaimed area and not to return thereto within a specified period, if she shall be out of *bona fide* employment for a continuous period of fourteen days."

6. The Right to Education

Under South African administration of Namibia, education is compulsory for the white child but not for the coloured or African child. By 1966, 46 years from its acceptance of the Mandate, South Africa had brought only a handful of Africans—and Africans constituted four-fifths of the population—to college admission level. Replies in Parliament by the South African Minister of Bantu Education (*Hansard Assembly*, 11 March 1969, No. 6, pp. 2253-2254) show that, from among the 500,000 Africans of Namibia, only 14 students entered for the matriculation examination at the end of 1968 and, of these 14, only 3 or 0.0006 per cent. obtained a university entrance pass.

The figures given by the South African Government on expenditures for education in South West Africa show that for 1965/1966 the total expenditure on white education was R2,675,557 for a 19,893 white pupil total, a total expenditure for coloured education of R680,000 for a 9,402 coloured pupil total, and a total expenditure of R1,333,879 for a 45,402 African pupil total.

Limitations on the liberty of Namibians, such as those referred to above are imposed on the basis of race; in many cases their application has been subject to the arbitrary and unfettered discretion of the relevant Minister in Pretoria, and the infringement of these regulations is often a criminal offence. For example, Section 1 *(d)* of Proclamation No. 15 of 1928 vested in the Administrator (these powers are now held by the Minister) the power "whenever he deems it expedient in the general public interest" to "order the removal of any tribe or portion thereof or any Native from any place to any other place within

the mandated Territory upon such terms and conditions and arrangements as he may determine". Section 2 of the Proclamation provided:

> 2. The Administrator shall not be subject to any court of law for or by reason of any order, notice, rule or regulation professed to be issued or made or of any other act whatsoever professed to be committed, ordered, permitted or done in the exercise of the powers and authority conferred by this Proclamation.

And Section 3 (2) provided:

> (2) Any Native who neglects or refuses to comply with any order issued under paragraph *(b)*, *(d)* or *(e)* of section one shall be guilty of an offence and liable on conviction to a fine not exceeding ten pounds or to imprisonment for any period not exceeding three months.

The obligation to promote the well-being and social progress of the people of Namibia is violated when the mandatory implements a systematic policy, as described in part above, to effect political, economic, social and educational repression.

Although the Court in 1966 disposed of the *South West Africa* cases without discussing the Applicants' contention that South Africa's application of the policy of apartheid in the Territory was inconsistent with its obligations under Article 2 of the Mandate, six Judges dealt with the matter. Five of those Judges Wellington Koo, Tanaka, Padilla Nervo, Forster, and Judge *ad hoc* Mbanefo, found against South Africa on the question. The sixth, *ad hoc* Judge van Wyk, found for South Africa.

In an eloquent opinion, Judge Forster summarized "the multiplicity of impediments put in the way of coloured people in all fields of social life" by the application to Namibia of South Africa's policy of apartheid:

> "Barriers abound: in admission to employment, in access to vocational training, in conditions placed on residence and freedom of movement; even in religious worship . . ." (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 482.)

He concluded:

> "Creating obstacles and multiplying barriers is not . . . a way to contribute to the promotion of the material and moral well-being and the social progress of the inhabitants of the territory. It is, on the contrary, a manifest breach of the second paragraph of Article 2 of the Mandate." (*Ibid.*, at p. 483.)

The injunction to prepare the peoples under Mandate to stand by themselves under the strenuous conditions of the modern world by its own terms sets a dynamic standard. Contemporaneously with the dedication of the United Nations to developing "friendly relations among nations based on respect for the principle of equal rights and self-determination" and to achieving "international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race", South Africa, though a United Nations member, embarked on a course designed to effectively frustrate self-determination for the people of Namibia and to deny the human rights of the people under its tutelage. South Africa instituted a system in which, in its own words:

"All the required measures necessarily involved the allotment of status, rights, obligations and privileges on the basis of membership of a group, rather than on grounds of individual quality, potential or merit." (*South West Africa Survey*, Annexure D, p. 171.)

The application of apartheid to Namibia is incompatible with the specific undertaking of the Mandatory in the Mandate to promote to the utmost the moral well-being and development of the inhabitants.

The application of apartheid to the people of Namibia constituted a material breach of the Mandate warranting termination of South Africa's rights under that instrument.

Section VIII

The United Nations Had the Right to Terminate South Africa's Authority Under the Mandate Because of South Africa's Material Breaches of its Mandate Obligations, and Such Termination Was a Reasonable Exercise of United Nations Supervisory Authority

On 27 October 1966 by resolution 2145 (XXI) the General Assembly, "*(c)onvinced* that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate . . .", declared that South Africa had "failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being of the indigenous inhabitants . . ." It decided "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".

The resolution further recites 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 had been of no avail". In the debate a number of delegates recalled that the prior resolutions of the Assembly on the subject (which then numbered more than 70) had had no measurable effect in inducing South Africa to fulfil its obligations.

Both the debates in the General Assembly and the text of resolution 2145 (XXI) evidence the pervasive and strongly held view that only by terminating South Africa's rights under the Mandate and assuming direct responsibility for the administration of the Territory could the General Assembly hope to achieve the purposes of the Mandate and bring to an end South Africa's continuing denial of the basic human rights of the inhabitants of Namibia.

In *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, the Court considered the compatibility with its 1950 Advisory Opinion of an early measure of supervisory authority taken by the General Assembly in consequence of South Africa's failure to transmit petitions. At that time the General Assembly authorized the Committee on South West Africa to grant oral hearings to petitioners, despite the fact that such an action constituted a modification of the procedures relating to petitions prescribed by the Council of the League. In allowing the modification the Court stated that the new procedure had become necessary—

"... because the mandatory had refused to transmit to the General Assembly petitions by the inhabitants of the Territory, thus rendering inoperative provisions in the Rules concerning petitions and *directly affecting the ability of the General Assembly to exercise an effective supervision*". (Italics added.)

The Court went on to state that the question on which it was giving an opinion "arose out of a situation in which the mandatory has maintained its refusal to assist in giving effect to the Opinion of 11 July 1950, and to co-operate with the United Nations by the submission of reports, and by the transmission of petitions in conformity with the procedures of our Mandates System". (*Ibid.*, pp. 31-32.)

In 1950 and, indeed, even in 1956 neither the Assembly nor the Court seems to have regarded South Africa's breaches of the Mandate as acts which had crystallized into an inflexible policy. The 1956 modification of procedures for hearing petitioners, which, it was hoped, would assist the Assembly in exercising the supervisory powers, as well as other practical steps calculated to achieve the same end adopted by the General Assembly during the ensuing decade, proved insufficient in light of South Africa's intransigence. Having exhausted all other means at its disposal without effect, the General Assembly decided in resolution 2145 (XXI) to rely on its ultimate supervisory power of revocation of South Africa's rights under the Mandate.

The reasonableness of the General Assembly's action in resolution 2145 (XXI) is demonstrated by the fact that it was taken only as a last resort after nearly two decades of lesser measures to induce South Africa to cease its material breaches of its obligations under the Mandate had failed. Indeed, it is difficult to see what other action the United Nations could have taken without having relinquished its obligations with respect to the Territory. The Security Council, by having consistently confirmed the validity of the General Assembly's action, has supported that view.

Section IX

The United Nations Has the Legal Capacity to Assume the Functions of the Mandatory Power

Since South Africa's rights under the Mandate were terminated, it fell to the General Assembly as the supervisory authority with respect to the Mandate to provide for the continuance of the sacred trust. Rather than appointing a State to discharge those functions it placed the Territory under the direct responsibility of the United Nations by operative paragraph 4 of its resolution 2145 (XXI). After having considered the 1967 report of the *Ad Hoc* Committee for South West Africa, it decided in resolution 2248 (S-V) to establish a Council for Namibia to exercise administrative authority over the Territory subject to the Assembly's supervisory authority.

The decision by the Assembly that the United Nations should administer Namibia is consistent with the basic structure of the mandates system and the international trusteeship system and the practice of the United Nations. The mandates system presupposes an administering authority. The League of Nations performed analogous functions in the case of the Saar through a Commission established pursuant to the Annex to Article 50 of the Treaty of Versailles. Indeed, as the discussion of "The League of Nations: A Practical Suggestion" in Section V of this Part points out, the original Smuts proposal

contemplated that mandatory functions might be exercised either directly by the League or by mandatories acting on its behalf.

Article 81 of the Charter specifically provides that the United Nations may be an administering authority of a trust territory. It may be recalled that the United Nations for a time administered the territory of West New Guinea (West Irian) on the basis of an Agreement between the Republic of Indonesia and the Kingdom of the Netherlands. (D. W. Bowett, *U.N. Forces* (1964), pp. 255-261.) By analogy the United Nations may assume responsibility for administering a territory under a mandate.

The Security Council by its resolution 264 (1969) recognized the action taken by the Assembly concerning responsibility for the administration of Namibia.

CHAPTER II

SOUTH AFRICA BY VIRTUE OF ITS CONTINUED PRESENCE IN NAMIBIA NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970) IS OCCUPYING NAMIBIA ILLEGALLY AND IS OBLIGATED TO TRANSFER ADMINISTRATION OF NAMIBIA TO THE UNITED NATIONS

Section I

South Africa Is in Illegal Occupation of Namibia

In the preceding chapter, it was demonstrated that the United Nations validly terminated South Africa's Mandate over the Territory of Namibia. This section examines various bases upon which South Africa might claim that its continued presence in Namibia is lawful and concludes that South Africa is in illegal occupation of Namibia.

South Africa's right to be present in and to administer Namibia derived solely from the Mandate. In commenting on the nature of those rights in 1962 the Court said:

> "The rights of the mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations." (*I.C.J. Reports 1962*, pp. 319, 328-329.)

The Court unanimously stated in the first of its Advisory Opinions relating to the Territory:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, . . . the latter's authority would equally have lapsed." (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 133.)

In the view of the United States the General Assembly correctly concluded in resolution 2145 (XXI) that South Africa's Mandate having been terminated, South Africa's right thereunder to presence in and administration of the Territory had terminated.

Apparently recognizing that, as the Court stated in its 1950 Opinion, the Mandate "did not involve any cession of territory or transfer of sovereignty to . . . South Africa", counsel for South Africa asserted to the Court on 27 May 1965 that "the legal nature of its rights [in the Territory] is such as is recognized in international law as flowing from military conquest" (*I.C.J. Pleadings, South West Africa*, Vol. IX, p. 478).

As indicated in the Statement of Facts, South West Africa, which had been annexed by Germany in 1884, was surrendered to forces of South Africa on 9 July 1915. Under Article 119 of the Treaty of Versailles Germany renounced all her rights and titles over the Territory in favour of the Principal Allied and Associated Powers. Subsequently, representatives of those Powers decided to place the Territory under the League of Nations mandates system. On 17 December 1920, the Council of the League, acting under Article 22 of the Covenant, defined the terms of the Mandate. The third preambular paragraph of that instrument recited the agreement of "His Britannic Majesty, for and on

behalf of the Government of the Union of South Africa . . . to accept the Mandate in respect of the . . . territory . . . and to exercise it on behalf of the League of Nations in accordance with" provisions which followed. It is obvious, therefore, that South Africa's administering authority over the Territory was based on the agreement with the Council of the League, not on conquest.

Even under traditional international law, conquest alone would not have afforded a legal basis for South Africa's claim to sovereignty. Conquest would have to have been followed by subjugation or cession. Germany was not *subjugated* and its cession of South West Africa was to the Principal Allied and Associated Powers. South Africa received not sovereignty, but a mandate subject to League supervision and the performance of obligations imposed by the terms of the Mandate and the Covenant of the League. Lauterpacht's eighth edition of *Oppenheim*, Volume I, page 567, states:

> "Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such, annexation makes the enemy State cease to exist, and thereby brings the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives title and is a mode of acquiring territory. It is, however, quite usual to speak of 'title by conquest', and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession."

Judge Jessup, after citing this statement in his 1966 dissenting opinion, took judicial notice of the facts "that Germany did not cede South West Africa to South Africa and that South Africa did not conquer the whole of the territory of Germany". (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, pp. 418-419.)

Prescription is another generally recognized mode of acquiring territory. Lauterpacht's *Oppenheim* defines prescription as—

> ". . . the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order". (*Op. cit.*, p. 576.)

It would be difficult to find a case in which a claim of prescription would be less appropriate than one made by a mandatory Power with respect to territory under its administration; the running of the prescriptive period could not have begun during the continuance of the Mandate.

In the 1962 contentious case South Africa asserted that in 1945 its representative at the San Francisco Conference had made a statement to the effect that it must be held not to have acquiesced in the continuance of the Mandate. South Africa may not rely on that statement in the prescription context since, as the Court affirmed in its opinion on the *International Status of South West Africa*, South Africa subsequently recognized the status of Namibia as an international territory in transmitting to the second part of the first session of the United Nations General Assembly a "Statement on the outcome of their consultations with the peoples of South West Africa as to the future status of the mandated territory and implementation to be given to the wishes thus expressed". (*I.C.J. Reports 1950*, p. 134.) That action bars South Africa from asserting

that she has as from 1945 exercised uninterrupted and undisturbed sovereignty over the Territory and thus acquired title by prescription. Moreover, the debates, reports and resolutions of the General Assembly, its committees and subordinate organs and of the Security Council relating to Namibia and the abortive attempt of the United Nations *Ad Hoc* Committee to visit the Territory are conclusive evidence that the continued occupation of the Territory by South Africa has not been undisturbed, all available peaceful methods of asserting its supervisory responsibility having been used by the United Nations. These facts demonstrate that such continued occupation is not regarded by the international community at large as "in conformity with international order".

The only other mode of acquisition of territory that could conceivably serve as a basis for a claim of title by South Africa is occupation of *terra nullius*, i.e., territory which under international law belongs to no one. South Africa's recognition of the international status of the Territory both before and after the establishment of the United Nations estops her from asserting that Namibia was *terra nullius* and that her occupation and control of the Territory under the Mandate afford a basis for a claim of title.

Is there any other basis on which South Africa's occupation could be legally justified? It is well established that the lawful authority of a territory may authorize a State to occupy part or all of the territory and to perform administrative functions in or for that territory. However, the present lawful authority with respect to Namibia, the United Nations, has not consented to South African occupation of Namibia. On the contrary, the United Nations has consistently opposed South Africa's attempt to thwart its supervision. In 1967 the General Assembly created a United Nations Council for Namibia and charged it to proceed to the Territory, base itself there, arrange transfer of administration from the South African authorities, take over administration and ensure the withdrawal of South African police and military forces and other South African personnel. Resolution 2248 (S-V) called upon the Government of South Africa "to comply without delay with the terms of . . . the present resolution and to facilitate the transfer of the administration of the territory of South West Africa to the Council". South Africa prevented the Council for Namibia from entering the territory. (See Report of the Council, UN doc. A/7088 and Corr. 1.) The General Assembly responded by adopting resolutions 2325 (XXII), 2372 (XXII) and 2403 (XXIII), in which in increasingly firm tones, it called for South Africa's withdrawal from the Territory.

Beginning in 1969 the Security Council in resolutions 264, 269 and 276 condemned the refusal of South Africa to comply with the General Assembly resolutions relating to withdrawal, called upon South Africa to "withdraw its administration from the Territory", and declared "the continued presence of the South African authorities in Namibia" as "illegal".

There is no legal basis for South Africa's continuing occupation of Namibia.

Section II

South Africa Should Have Transferred the Administration of Namibia to the United Nations

When the General Assembly in resolution 2145 (XXI) terminated South Africa's rights and authority under the Mandate for Namibia, it also decided that the Territory should come under the direct responsibility of the United Nations. Having established the United Nations Council for Namibia to administer the Territory, the General Assembly in resolution 2248 (S-V) called

upon South Africa to facilitate the transfer of the administration of the Territory to the Council. The Government of South Africa refused to co-operate with the United Nations in the implementation of these resolutions. (Communication of 26 September 1967 from the Government of South Africa, UN doc. A/6822.) Taking note of that communication, the General Assembly in resolution 2325 (XXII) called upon the Government of South Africa to withdraw from the Territory all its military and police force and its administration. South Africa again refused to co-operate.

The question of non-compliance with these resolutions was submitted to the Security Council in 1969, and in its resolution 264 (1969) the Council recognized that "the United Nations General Assembly terminated the mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence", and considered 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". A few months later, the Security Council in resolution 269 (1969) condemned the Government of South Africa "for its refusal to comply with resolution 264 (1969) and for its persistent defiance of the authority of the United Nations". Later, in resolution 276 (1970), the Security Council declared that "the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations". Finally, in resolution 283 (1970) the Security Council noted "the continued flagrant refusal of the Government of South Africa to comply with the decisions of the Security Council demanding the immediate withdrawal of South Africa from the territory", and called upon all States to take various measures with respect to South Africa and Namibia.

These resolutions of the General Assembly and of the Security Council proceed clearly on the assumption that the original General Assembly resolution 2145 (XXI) was legally effective. It is generally accepted that certain decisions of the General Assembly and some decisions made by the General Assembly on the recommendations of the Security Council are legally effective under the Charter of the United Nations. One can mention here the decisions relating to admission, suspension and expulsion of Members, the budget of the United Nations and the apportionment of expenses among the Members of the Organization, and the appointment of the Secretary-General. Moreover, as was pointed out in one of the previous sections of this statement, the Council of the League of Nations could have terminated a mandatory's authority under the mandate with a binding effect on that State. As successor to the Council, the General Assembly has also the power to make a legally effective decision in this limited area. If there were any doubt that the General Assembly alone could do so, surely the General Assembly and Security Council acting together, could make such a decision; both those organs have decided that South Africa's rights under the Mandate have been terminated.

CHAPTER III

FROM SOUTH AFRICA'S CONTINUED PRESENCE IN NAMIBIA FLOW CERTAIN LEGAL CONSEQUENCES FOR SOUTH AFRICA AND OTHER STATES

Section I

South Africa Has Certain Duties concerning Namibia Under International Law

International law establishes a number of duties with which South Africa must comply so long as she continues to maintain her illegal occupation of Namibia. This section discusses the nature of those duties; violation of certain of those duties is discussed briefly herein but is dealt with primarily in other sections of this statement. In the view of the United States, it would be desirable for the Court to affirm in its Advisory Opinion South Africa's duties under international law during her continued presence in Namibia.

A. The Duty Under the Mandate to Promote the Well-Being and Development of the Inhabitants Is Impressed Upon the Territory and Survives Termination of South Africa's Rights Under the Mandate

While annexation by the victors of territories detached from defeated States had been the traditional mode of dealing with colonies in general peace treaties prior to 1919, the Principal Allied and Associated Powers adopted a different method for dealing with the colonies and territories detached from Germany and Turkey at the end of the First World War. The new method was the establishment of a mandates system, the fundamental elements of which were embodied in Article 22 of the Covenant of the League of Nations, which provides, in part:

> "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.
>
> 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.
>
> 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.
>
> . . . . . .
>
> 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 civilization, or their geographical continguity 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.

In every case of mandate, the mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

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."

In Article 23 *(b)* the Members of the League undertook as well "to secure just treatment of the native inhabitants of territories under their control".

The Council of the League, acting under Article 22 of the Covenant, defined the rights and obligations of South Africa with respect to South West Africa in the Mandate of 17 December 1920. Article 2, paragraph 1, of that instrument conferred on the Mandatory "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 authority "to apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require". However, Article 2, paragraph 2, imposed the duty on South Africa to "promote to the utmost the material and moral well-being and the social progress of the inhabitants . . .". It follows that exercise of administrative or legislative powers inconsistent with that duty was not authorized by Article 2. Closely related to the general duty is the specific duty set forth in Article 3: "to see . . . that no forced labour is permitted . . ." Also relevant is Article 5 which provided:

"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."

In its 1950 Advisory Opinion the Court stated:

"The Mandate was created, in the general interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization . . . The international rules regulating the Mandate constituted an international status for the Territory . . ." (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 128, 132.)

Sir Arnold McNair, in his separate opinion, described the international institution in the following words:

"The Mandates System (and the corresponding principles of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. . . . What matters in considering this new institution is . . . what are the rights and duties of the mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate.

'The mandatory's rights, like the trustee's, have their foundation in his obligations; they are "tools given to him in order to achieve the work assigned to him"; he has "all the tools necessary for such end, but only those".' " (*Ibid.*, p. 150.)

McNair went on to observe:

"Article 22 proclaimed '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 the Covenant'. A large part of the civilized world concurred in opening a new chapter in the life of between fifteen and twenty millions of people, and this article was the instrument adopted to give effect to their desire. In my opinion, the new régime established in pursuance of this 'principle' has more than a purely contractual basis, and the territories subjected to it are impressed with a special legal status, designed to last until modified in the manner indicated by Article 22 . . ." (*Ibid.*, pp. 154-155.)

South Africa is not relieved of its obligations under the Mandate because the United Nations terminated South Africa's right to continue to administer the Territory. By virtue of the special legal status impressed by the Covenant and the mandates system on territory placed under mandate, any authority in the territory is bound to respect the rights of the inhabitants. Thus, while South Africa remains in illegal occupation of Namibia, it must promote the well-being and development of the inhabitants even though its rights under the Mandate have been terminated.

B. South Africa Has the Duty to Act in Conformity with Chapter XI of the United Nations Charter concerning Non-Self-Governing Territories

The Charter of the United Nations established in Chapter XI a special régime for all non-self-governing territories not subject to the trusteeship system. Article 73 of that Chapter provides in part:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. 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 and their varying stages of advancement; . . ."

Since the inhabitants of Namibia "have not yet attained a full measure of self-government", Chapter XI clearly applies to them.

The United States will refrain at this juncture from rehearsing the facts established before the appropriate organs of the United Nations with regard to South Africa's failure to discharge the sacred trust described in Article 73. How-

ever, it wishes to point out that so long as South Africa remains in Namibia it remains bound to discharge those obligations.

C. South Africa Has the Duty to Act in Conformity with Chapter IX and Other Provisions of the United Nations Charter

Additional obligations of South Africa to the people of Namibia flow from Chapter IX and from certain other provisions of the Charter. Thus, Article 2 (4) obligates South Africa to refrain from threat or use of force in any manner inconsistent with the purposes of the United Nations, including, in particular, the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Moreover, in Articles 55 and 56, all Members pledge to take *joint and separate* action in co-operation and, in particular, "to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

As the United States Representative said on 26 January 1967, in the *Ad Hoc* Committee for South West Africa: "With but one exception the community of nations speaks with unanimity in the rejection of the imposition on the Territory of the policy of apartheid." South Africa's application of that policy in Namibia is inconsistent with its Charter obligations under Chapter IX, as well as with its additional obligations under Chapter XI to recognize the paramount interests of the inhabitants and ensure their just treatment, and with the rights established for the inhabitants of Namibia under the Covenant and the Mandate.

D. South Africa Has the Duty Under General International Law to Adhere to Certain Standards in the Administration of Namibia as Occupied Territory

General international law prescribes rules governing the conduct of a belligerent occupant with respect to the inhabitants of an occupied territory. The humanitarian standards of Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (75 *UNTS* 287) are generally recognized to apply in all circumstances. By becoming a party to the Convention South Africa has recognized all the rules therein, including those in Part III, section III, which codify the law relating to belligerent occupation.

Article 1 of the Convention provides that the High Contracting Parties undertake to ensure respect for the present Convention in all circumstances. Although there is some authority for the proposition that a Party is bound to observe the Convention as a whole wherever hostilities in which it is involved occur, the more generally accepted view is that the Convention as such binds a party only vis-à-vis other parties. It is necessary to consider therefore, the consequences of the fact that neither Namibia nor the United Nations is a party to the Geneva Convention.

Section III of Part III of the Convention is primarily a refinement, expansion, and clarification of regulations annexed to Hague Convention IV of 1907 respecting the laws and customs of war on land. The 1907 Convention clearly applies only between the parties. However, the Contracting Parties to the 1907 Convention declared, in the preamble that in cases not included in the regulations, the inhabitants . . . "remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience". (100 *Brit. & For. State Papers* 338.) Many of the regulations relating to belligerent occupation have long since been transformed into cus-

tomary international law. As such, they impose obligations on South Africa with regard to the inhabitants of Namibia.

The fact that South Africa's occupation did not result from hostilities with the United Nations should not release her from the obligations of a humanitarian convention designed to protect the rights of persons in occupied territories. The territory is occupied by force against the will of the international authority entitled to administer it. Such occupation is as much belligerent occupation as the hostile occupation of the territory of another State.

E. The Preceding Duties Are Unaffected by the Fact that South Africa Is Occupying Namibia Illegally

As indicated in subsection A, the rights of the inhabitants of Namibia are impressed upon the Territory. In addition, it may be recalled that the Court has stated that Article 80, paragraph 1, of the Charter "maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System". (*I.C.J. Reports 1950*, p. 133.) The fact that South Africa is occupying Namibia illegally has no effect on those rights. *Nemo ex suo delicto meliorem suam conditionem facit.* Thus, so long as South Africa maintains her occupation of the Territory she must refrain from taking any measures with regard to the Territory or to the inhabitants which are inconsistent with their rights under international law and should withdraw any measures already taken which are inconsistent with those rights.

Section II

States Have Certain Duties Under International Law with Respect to Namibia, Among Which Are:

A number of important legal consequences for other States flow from South Africa's continued presence in Namibia. Relations between South Africa and other States relating to Namibia are affected in many ways. The United States has decided to deal in detail with two legal consequences which it considers especially important: *(a)* the duty of States to respect the direct responsibility of the United Nations for Namibia; and *(b)* the duty to apply certain legal rules with respect to treaties affecting Namibia. It recognizes, however, that there may be additional legal consequences.

A. To Respect the Direct Responsibility of the United Nations for Namibia

Notwithstanding the temporary inability of the General Assembly to exercise its lawful authority within the Territory, States must acknowledge its lawful authority and respect its competence to the extent that it can effectively exercise that authority despite its absence from Namibia.

In its 1950 Advisory Opinion on South West Africa, the Court said that it had "arrived at 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 . . .". (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 218, 237.) On 27 October 1966 the General Assembly decided to terminate South Africa's mandate over South West Africa and said 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 . . .". (General Assembly resolution 2145 (XXI), para. 5.)

It has been pointed out above that the General Assembly's revocation of South Africa's functions under the Mandate was legally valid. South Africa's corresponding rights having expired, it fell to the General Assembly as the supervisory authority with respect to the Mandate to provide for the continuance of the sacred trust. Rather than appointing a State to administer the Territory it placed the Territory under the direct responsibility of the United Nations by operative paragraph 4 of its resolution 2145 (XXI). After having considered the 1967 report of the *Ad Hoc* Committee for South West Africa, it decided in resolution 2248 (S-V) to establish a Council for Namibia to exercise administrative authority over the Territory subject to the Assembly's supervisory authority.

Since the United Nations is now responsible for the administration of the Territory, it has in law the same powers and obligations as any other administering authority, and all member States have a duty to assist it, in accordance with paragraph 5 of Article 2 of the Charter in any action it takes to discharge those duties. In accordance with Chapter IX of the Charter, States have an obligation to co-operate with the United Nations towards the realization of human rights and fundamental freedoms, without discrimination, for the people of Namibia.

The obligation to co-operate with the administering authority extends to those areas in which the United Nations is able to take effective action with respect to the Territory. While South Africa's illegal occupation continues, the United Nations will be able to take such action primarily in areas that can have immediate effect outside Namibia.

Although South Africa as the illegal occupant of the Territory has no right under international law to administer Namibia, it continues to prevent the lawful authority from effectively discharging its responsibilities to the people of the Territory. In determining whether or not to give effect within their own territories to particular acts of administration performed in Namibia by the illegal occupant, States should examine a particular act in light of the interest of the inhabitant or inhabitants of Namibia with respect to whom it was taken.

Thus, by way of illustration, it would seem that municipal courts should generally be permitted to admit into evidence birth, marriage or death certificates issued by South Africa in Namibia on the same basis as documents emanating from other territorial authorities despite the unlawful character of South Africa's occupation. Similarly, under conflict of law rules States should generally treat as valid marriages performed in Namibia if such marriages were valid under the law in fact applied in Namibia.

In the introduction to his Report on the Work of the Organization submitted to the Twenty-fifth Session of the General Assembly (UN doc. A/8001/Add. 1 (1970), para. 116), the Secretary-General noted the signing by certain African Governments of agreements with the United Nations Council for Namibia, which will enable it to issue travel and identity documents to Namibians. In the interest of the inhabitants of Namibia, States may wish appropriately to provide for according validity to such documents. States remain free to regard as invalid restrictions placed by South Africa on travel by Namibians and travel documents issued to Namibians by South Africa. In view of the *de facto* control of Namibia by South Africa, however, it would seem that States might in the interest of the bearers of the documents choose to accept such travel documents despite the illegal character of the issuing authority.

B. To Apply Certain Legal Rules with Respect to Treaties Affecting Namibia

A number of multilateral and bilateral treaties, to which South Africa is a party, applied to Namibia on the date of the General Assembly's termination of South Africa's mandate. In this section we shall examine the legal consequences of that termination on the continuing applicability of those treaties and on the present legal competence to modify or terminate the applicability of treaties extended to Namibia by South Africa or otherwise applicable to the Territory.

A review of standard collections of treaties and of the publication *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions* indicates that a number of multilateral treaties were applicable to Namibia on the date of the termination of South Africa's mandate. Among the subjects with which they deal are control of opium and other dangerous drugs, traffic in women and children, obscene publications, health, transportation and communications, economic statistics and slavery. These treaties, which are closely related to the purposes of the United Nations and fully compatible with the mandates system, should continue to be applicable to Namibia.

The final clauses of many multilateral treaties, including those in respect of which the Secretary-General performs depositary functions, deal with applicability of treaties to other than metropolitan territories in two general ways. Those dating from the League of Nations period generally provide that treaties will be applicable only to the dependent territories, including Mandates, to which they are specifically extended by the Metropolitan power. Those concluded since the establishment of the United Nations frequently provide that they will be applicable to all territories for the international relations of which the parties are responsible unless at the time of ratification a party otherwise declares. The latter formula is assumed under existing international law in the absence of some indication to the contrary.

Article 29 of the Vienna Convention on the Law of Treaties provides:

> "*Territorial scope of treaties.*
> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

As the International Law Commission's commentary mentions:

> "State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the view that a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty." (*Report of the International Law Commission, 1966, GA, OR*, 21st Session, Supplement No. 9, p. 45. See also materials cited by Commission, *ibid.*, fn. 104.)

It follows from the general rule enunciated in Article 29 that a number of South Africa's multilateral treaties which contain no provisions concerning territorial applicability in the final clauses, e.g. the Geneva Conventions of 1949, were applicable to Namibia. What is the present status of those conventions?

Although the substitution of the United Nations for South Africa as the Administering Authority with respect to Namibia is not a case of State succession, the practice of States with regard to succession to treaties provides guidance as to the principles which should be followed. The practice generally includes a statement by a new State that it will continue to apply treaties formerly applicable to the Territory during a period of review of such treaties. Following that

review, the new State notifies depositaries of the attitude it wishes to take with respect to multilateral treaties.

In his third report on "Succession in respect of Treaties", Sir Humphrey Waldock stated that—

> ". . . although modern State practice does not support the thesis that a new State is under any general obligation to consider itself a successor to treaties previously applicable in respect of its territory, it does appear to compel the conclusion that a new State has a general *right*, if it so desires, to be a party to certain categories of [multilateral] treaties in virtue of its character as a successor State". (UN doc. A/CN.4/224 at 28.)

He proposed formulating that rule in the following terms:

> "*Article 7*
>
> *Right of a New State to Notify its Succession in Respect of Multilateral Treaties*
>
> A new State, in relation to any multilateral treaty in force in respect of its territory at the date of its succession, is entitled to notify the parties that it considers itself a party to the treaty in its own right unless:
>
> *(a)* the new State's becoming a party would be incompatible with the object and purpose of the particular treaty;
>
> *(b)* the treaty is a constituent instrument of an international organization to which a State may become a party only by the procedure prescribed for the acquisition of membership of the organization;
>
> *(c)* by reason of the limited number of the negotiating States and the object and purpose of the treaty the participation of any additional State in the treaty must be considered as requiring the consent of all the parties."

Failure to treat multilateral treaties as continuing to apply to Namibia while under United Nations administration might deprive an independent Namibia of exercising its right as a new State to notify its succession in respect of multilateral treaties "in force in respect of its territory at the date of its succession". It would seem, therefore, that States should consider multilateral treaties applying to the Territory on 27 October 1967, the date of the adoption of General Assembly resolution 2145 (XXI), as continuing to apply to Namibia until such time as Namibia as a "new State" exercises the rights described in Article 7 or until the United Nations, as the Administering Authority, decides that it would be in the best interests of Namibia to terminate the application of one or more of those treaties. So long as South Africa continues to occupy Namibia other States have the right to require South Africa to perform the obligations of executory multilateral treaties applicable to the Territory.

With respect to accession to multilateral treaties not presently applicable to Namibia, the United Nations should be allowed, whenever possible, to accede to them on behalf of Namibia. There are many precedents for accession to multilateral treaties by an international territory under the administration of an international organization. During the League of Nations period, for example, both Danzig and the Saar became parties to treaties. Indeed, more than 30 treaty actions by the latter are recorded in the League of Nations *Treaty Series*.

Clearly the United Nations may accede on behalf of Namibia to existing international conventions which authorize such accession in their final clauses. Article 27, paragraph 3, of the Convention on Road Traffic of 19 September 1949 (125 UNTS 22) contains such a clause. There are other conventions with less-precisely drafted final clauses under which a depositary may accept an

accession on behalf of Namibia by the United Nations. Where the depositary merely notifies the parties of receipt of an instrument of accession under those conventions, it would seem that many States would not wish to reject treaty relations with respect to Namibia based on such an instrument.

There may, however, be existing multilateral treaties which would not permit the Administering Authority to accede on behalf of Namibia. In the unlikely event that South Africa should wish to accede to such a treaty on behalf of Namibia and the United Nations as the Administering Authority expressly or impliedly agrees, States might properly inform the depositary that, although they recognize the authority of the United Nations as the lawful administrator of the Territory, they will consider South Africa bound to apply the treaty to Namibia until termination of its illegal occupation. Such action would be consistent both with respect for the direct responsibility of the United Nations and the traditional international law rule which generally recognized the capacity of an occupant exercising *de facto* control over a territory to conclude treaties which will be applicable to the territory for so long as he remains in effective control.

If the Administering Authority does not agree that Namibia should be bound by a multilateral treaty not previously applicable to Namibia to which South Africa deposits an instrument of accession on behalf of Namibia, other parties to the treaty should refuse to accept treaty relations with regard to Namibia. States may, additionally, wish to raise the question of South Africa's action in the matter in the appropriate organs of the international organization under whose aegis the subject-matter of the treaty falls. (See, e.g., Annex to ITU letter No. 3060/60/TT (30 June 1967) containing text of resolution of Administrative Council of ITU regarding the right of South Africa to represent the Territory within the ITU.)

A different rule should be applied to termination of an existing multilateral treaty applicable to Namibia. It follows from the termination of South Africa's rights under the Mandate that South Africa no longer possesses the legal capacity to withdraw from the inhabitants of Namibia the benefits they enjoy under multilateral treaties applicable to the Territory. It may be recalled that South Africa was required by Article 3 of the Mandate to see to it that the slave trade was prohibited and to control traffic in arms in accordance with the principles analogous to those laid down in the Convention on the control of arms traffic of 10 September 1919. In addition, South Africa undertook in Article 23 *(a)* of the Covenant to entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs and in Article 23 *(f)* to take steps in matters of international concern for the prevention and control of disease. It would be inconsistent with the purposes of the Mandate to permit South Africa as an illegal occupant to terminate the applicability to the Territory of conventions on such subjects heretofore applied for the benefit of the inhabitants. Having regard to these facts and to the responsibilities of the United Nations as the Administering Authority, other parties should treat a purported South African withdrawal of application of such treaties to Namibia as without legal effect.

The United States believes that the termination of South Africa's functions under the Mandate has different consequences as to bilateral than as to multilateral treaties. Regard for the administrative authority of the United Nations should generally preclude a State from entering into future bilateral treaties with South Africa applicable to Namibia. It would seem, however, that exceptionally such a treaty might be concluded should the lawful authority, the

United Nations, expressly or impliedly authorize a State to do so. As in the case of multilateral treaties, other States may require South Africa to continue to perform the obligations of executory treaties for so long as South Africa remains in occupation of Namibia.

States have recently been asked by the Security Council to review existing bilateral treaties applicable to Namibia. In conducting this review it would seem appropriate for States to consider whether in view of the change in the legal character of South Africa's presence in Namibia they should have recourse to the denunciation clause of any such treaty or notify both South Africa and the Administering Authority that they shall no longer consider one or more of those treaties applicable to Namibia.

PART III

Conclusions

On the basis of the foregoing review of the facts and of the principles of international law applicable to the question submitted to the Court by Security Council resolution 284 (1970), the Government of the United States of America submits that the Court could usefully include the following conclusions in its Advisory Opinion.

A. The United Nations validly terminated the rights and authority granted to South Africa under the Mandate of 17 December 1920. The Mandate was a treaty in force and South Africa was legally obligated to carry out its provisions in good faith. Although there was no case brought before the Council of the League alleging that a mandatory had breached its obligations, had such a breach been established during the League period, the Council would have had the authority to terminate the rights of the mandatory. The United Nations succeeded to this power. In a number of respects, namely by refusing to submit reports and to transmit petitions of the inhabitants of the Territory, by systematic rejection of recommendations of the General Assembly and the Security Council with respect to the administration of the Territory and by the application of apartheid in Namibia, South Africa materially breached its Mandate obligations. In light of the failure of other measures taken over nearly two decades to induce South Africa to cease its material breaches, the General Assembly reasonably exercised its power to revoke South Africa's rights and authority as mandatory by resolution 2145 (XXI). The Assembly was also competent to assume the functions of administration under the Mandate of 17 December 1920.

B. South Africa no longer has any rights in Namibia under the Mandate; there is no other legal basis for its continued presence in the Territory. South Africa is, therefore, in illegal occupation of Namibia.

The General Assembly and the Security Council have adopted resolutions confirming the illegality of South Africa's presence in Namibia and affirming its duty to transfer administration of the Territory to the United Nations. In accordance with Article 2, paragraph 5, of the Charter, South Africa has the duty to comply.

C. A number of important legal consequences flow from South Africa's continued illegal presence in Namibia. These consequences are of two general kinds. South Africa has certain legal duties which it must observe so long as it remains in Namibia. Other States also have certain duties under international law with respect to Namibia.

South Africa's duties include obligations: to promote the well-being and development of the inhabitants; to act in conformity with Chapter XI of the United Nations Charter concerning non-self-governing territories; to act in conformity with Chapter IX and certain other provisions of the Charter, and under general international law, to adhere to certain standards in the administration of Namibia.

Other States have the duty to respect the direct responsibility of the United Nations for Namibia and to assist it in exercising those responsibilities in the manner indicated in Part II, Chapter III, section II, A, of this statement. Other States also have a duty to apply the legal rules described in Part II, Chapter III, section II, B, of this statement, to treaties affecting Namibia.

WRITTEN STATEMENT OF THE GOVERNMENT OF NIGERIA

1. The Organization of African Unity wishes to begin by setting out the terms of resolution 284 (1970).

Adopted by the Security Council at its 1550th meeting on 29 July 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 the 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. In the *International Status of South West Africa* case, *I.C.J. Reports 1950*, page 128, the International Court of Justice held that the United Nations Organization is the lawful successor to the League of Nations in respect of the former Mandate granted to the Government of South Africa under Article 22 of the League Covenant under a special agreement entered into between the Government of South Africa and the League of Nations.

3. The Court accordingly held that the Government of South Africa is under an obligation under Article 73 *(e)* of the Charter of the United Nations to submit reports through the Trusteeship Council to the United Nations General Assembly in respect of ordinary trust territories and to the Security Council in respect of strategic trust territories. Namibia (the former South West Africa) is not in this sense a strategic trust territory.

4. The International Court of Justice, while holding that there was no legal

[1] S/9863.

obligation on the Government of South Africa to conclude a trusteeship agreement in respect of the territory held by her under a League of Nations mandate, nevertheless affirmed by a *unanimous vote* that the Union of South Africa acting alone was not competent to modify the international status of that territory and that the competence to determine and modify that status rested with the Union of South Africa acting with the consent of the United Nations. It was also held that the Government of South Africa continued to be bound by the international obligations laid down in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as by the obligation to transmit petitions from the inhabitants of that territory. The Court was also unanimous in holding that the *judicial* supervision continued and that, having regard to Article 7 of the Mandate and Article 37 of the Statute of the Court, reference to the Permanent Court of International Justice was to be replaced by a reference to the International Court of Justice.

5. The sovereignty of a trust territory such as Namibia is ultimately in the United Nations and not in the administering authority of such a territory. The Union of South Africa has only a primary sovereignty in so far as it is necessary to achieve the paramount object under Article 76 of the Charter "to promote the political, economic, social and educational advancement of the inhabitants of the trust territories".

6. This was conclusively established by a resolution of the first General Assembly in 1946 by which the attempt by the Government of South Africa to annex Namibia was clearly rejected not only as inconsistent with the trustee character of the obligation assumed by the Government of South Africa under the trusteeship system with the United Nations but also as incompatible with the goal and object of the entire trusteeship system which are to regard the trust territory as a "sacred trust of civilization" which should be helped to "develop ultimately to self-government and independence". The Assembly, however, recommended that the territory be placed under the United Nations system of trusteeship and invited the Government of South Africa to submit a trusteeship agreement for the territory [1]. The Government of South Africa refused to accept this resolution, but agreed to continue to administer the territory as an integral part of the Union in accordance with the principles laid down in the Mandate and to submit regularly to the Secretary-General of the United Nations, in accordance with Article 73 *(e)* of the Charter "for information purposes, subject to such limitations as security and constitutional considerations may require", statistical and other information of a technical nature relating to the economic, social and educational conditions of South West Africa. The General Assembly has, however, maintained since that day its original recommendation that South West Africa be placed under the trusteeship system established by the United Nations Charter [2].

7. The General Assembly of the United Nations, as the legal authority having joint power of supervision with the Trusteeship Council asserted its right to demand the submission of annual reports on Namibia by the Government of the Union of South Africa and, in default of that Government's general obligations as a trustee power under the Charter of the United Nations, adopted resolution 2145 (XXI) on 27 October 1966, by which it revoked the trust vested in the Government of South Africa. Operative paragraph 4 of that resolution is in these words:

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[1] *UN Journal*, No. 63/A, p. 679; also *ibid.*, Nos. 30 and 33.

[2] Second General Assembly doc. A/422; resolution 570A and B (vi) of 1951.

"*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."

8. By the same resolution, the General Assembly also established an *Ad Hoc* Committee for Namibia to recommend ways and means for the successful implementation of the said resolution in the implementation of which all States were requested to extend their whole-hearted co-operation and to render assistance.

9. It is clear beyond doubt that the United Nations has, in virtue of its authority under the Charter, properly exercised its power to revoke the trust delegated to the Government of South Africa under the trusteeship system. As Oppenheim has said:

"Although the majority of Trusteeship Agreements provide that the territories in question shall be administered as an 'integral part' of the Administering State, it was made clear at the time of the approval of the Agreements that that phrase does not imply any claim to sovereignty over the trust territories. *That fact of delegation implies also the ultimate power of revocation in case of abuse or failure of the trust vested in the Administering State* [1]."

10. There are two points that arise from this passage for comment. The first point is as follows. The French and Belgian delegates to the General Assembly of the United Nations said that "it was the interpretation of their Governments that the words 'as an integral part' were necessary as a matter of administrative convenience and were not considered as granting to the Governments of Belgium and France the power to diminish the political individuality of the Trust Territories". The British delegate said that the use of the words "as an integral part" in the Trusteeship Agreement for Togoland and the Cameroons under the British administration "did not involve administration as an integral part of the United Kingdom itself and did not imply British sovereignty in these areas [2]". Also, the United States representative in the Security Council said that the Government of the United States took the view that the Trusteeship Agreement (in respect of the former Japanese mandated territories), is "in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other" [3]. These various statements must be taken as an accurate expression of the legal position on this aspect of the matter.

11. The second point is in respect of the power of revocation. Judge McNair, in his separate opinion in the *International Status of South West Africa* case, while acknowledging with the majority that it is "not possible to draw any conclusion by analogy from the motions of mandate in international law or from any other 'corresponding' legal conception of private law [4]", went on to refer to "rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions". Surely, the idea of delegation of powers by the United Nations to an administering authority as well as the concomitant obligation of accountability are general

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[1] *International Law*, Vol. I, Seventh Impression, 1963, pp. 237-238.
[2] General Assembly doc. D. A/258, 12 Dec. 1946, p. 6.
[3] Security Council, *Official Records*, Second Year, No. 23 (1947), p. 476.
[4] *I.C.J. Reports 1950*, p. 132.

principles of law applicable in both municipal and international law. It must not be forgotten that the International Court of Justice held, *inter alia*, that a mandatory, especially in the case of the "A" and "B" Mandates, was under an obligation in the sphere of economics to adopt the policy of the "open door", that is to say, that the mandatory must ensure to the nationals of all States Members of the League the same rights in respect of commerce and trade as were open to the nationals of the mandatories (South West Africa belongs to category "A"). Under Article 76 *(d)*, however, in contrast to the corresponding provisions of the League Covenant, the duty of the mandatory to ensure equal treatment for all Members of the United Nations and their nationals in social and economic matters is made subject to the obligation to safeguard the interests of the inhabitants.

12. The Government of South Africa has continued to refuse to propose a trusteeship agreement under the Charter or to submit reports on the administration of South West Africa. It even went further to enact the South West Africa Affairs Amendment Act, 1949, for "a closer association" of South West Africa with the Union. The General Assembly nevertheless adopted two resolutions at its Fourth Session held in 1949, the first reiterating in their entirety its previous resolutions and calling upon the Union Government to submit reports on the administration of South West Africa, while the second resolution decided to submit the question to the International Court of Justice for an advisory opinion. As is already well known, the International Court of Justice gave its judgment in the manner already indicated in preceding paragraphs.

13. In view of the persistent breaches of the Mandate entrusted to the Government of South Africa, the General Assembly of the United Nations decided to terminate South Africa's trusteeship over Namibia, and appointed an alternative Administering Authority to take over and administer the territory in accordance with the provisions of Chapter XII of the United Nations Charter.

14. The Government of South Africa has, however, persistently refused entry to the United Nations body thus charged with responsibility for the administration of Namibia, threatening that the United Nations Council on Namibia would not only be refused entry but that, if it did enter, the Government of South Africa could not guarantee the safety of the members.

15. The action thus taken by the United Nations General Assembly raises a fundamental issue as to the competence of the Assembly to revoke unilaterally the Mandate of the Government of South Africa over South West Africa. The points await an authoritative determination by the International Court of Justice in the light of Article 7 of the mandate instrument and Article 37 of the Statute of the International Court of Justice. The question does not appear to have been settled during the existence of the League of Nations, but the writings of publicists would seem to indicate that the League which granted the mandate and "on whose behalf" a mandatory held the territory must inevitably have the power to abrogate it for breaches of the conditions of the Mandate. Thus, Wright wrote in his *Mandates Under the League of Nations*, 1930, as follows:

> "Whether the League can appoint a new mandatory in case one of the present mandatories should cease to function has not been determined. Nor has it been decided whether the League can dismiss a mandatory though both powers may be implied from the Covenant assertion that the mandatories act 'on behalf of the League', and members of the Permanent Mandates Commission have assumed that they exist. Furthermore, it would seem that the mandate of a given nation would automatically come to an end in case the mandatory ceases to meet the qualifications stated in

the Covenant and that the League would be the competent authority to recognize such a fact . . . Since the areas subject to mandate are defined in Article 22 of the Covenant, it would seem that the League whose competence is defined by the Covenant, could not withdraw a territory from the status of mandated territory unless its recognition with the conditions there defined no longer exist in the territory." (Pp. 440-441.)

16. Since the International Court of Justice has in its Advisory Opinion of 1950 declared the international legal status of South West Africa (Namibia) and since the United Nations has been declared to be the successor to the League of Nations in respect of mandated (now trust) territories, there does not appear to be any international organ or authority other than the United Nations to revoke the South African Government's trusteeship of Namibia. If the League had the power to revoke the Mandate, the United Nations must be the only competent authority extant which is capable of exercising the right of revocation of the former power of trusteeship exercisable by the Government of South Africa.

17. When the Assembly of the League of Nations adopted its resolution of 18 April 1946, it was envisaged that the future of mandated territories would be regulated by *agreed* arrangements between the United Nations and the mandatory powers who had all made declarations of their intentions to discharge their international obligations with respect to the Mandate. Where these understandings have later been ignored or deliberately breached and where internationally binding provisions of the Charter have been set aside by a mandatory, it does not seem that there is room for doubt that the only competent international body, namely the United Nations Organization, should, consistently with its responsibility for international peace and security, stand idle while the Government of South Africa continues to defy not only the World Court regarding its ruling in its 1950 Advisory Opinion, but also the Organization itself regarding its various resolutions in relation to Namibia.

18. Accordingly, the continued presence of the Government of the Republic of South Africa in Namibia since the General Assembly resolution 2145 (XXI) of 27 October 1966, revoking its trusteeship of South West Africa is illegal and *ultra vires*.

19. Considering the long history of open and uncompromising defiance of United Nations resolutions by the Government of South Africa and considering the contemptuous attitude of that Government towards the majority of Members of the United Nations regarding its obligations under the international trusteeship system, especially in the field of economic and social activities, the Government of South Africa has forfeited any claim it might have had to discharge the international obligations of a mandatory in accordance with the provisions of the Charter of the United Nations. The vast majority, not only of the Members of the United Nations Organization, but also of the human race no longer have any confidence in the ability of the Government of South Africa to fulfil the role envisaged under the mandates system as well as the relevant provisions of the Charter of the United Nations. Its record of breaches of treaty obligations, particularly under the Charter of the United Nations, does not entitle it to continue its presence in Namibia.

20. The Security Council resolution 276 (1970) adopted at its 1529th meeting on 30 January 1970 reads as follows:

"*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."

21. The General Assembly resolution 2145 (XXI) of 27 October 1966 was criticized at the time on the two main grounds *(a)* that the Assembly was not competent to discuss the matter, much less adopt a resolution on it, and *(b)* that there was no revocation clause in the original League instruments creating the Mandate for the Union of South Africa. In this connection, Article 10 of the United Nations Charter provides:

"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."

Hans Kelsen has quite rightly pointed out that "there is hardly any international matter which the General Assembly is not competent to discuss and on which it is not competent to make recommendations". (*The Law of the United Nations*, Praeger, 1950, pp. 198-199; see also Goodrich and Hambro, *The Charter of the United Nations*, 1949, p. 152.) The other argument about lack of express stipulation for revocation in the mandate instruments must be regarded as sufficiently met by Lord McNair's dissenting opinion already quoted at paragraph 11 above. Power of revocation is necessarily implied in the use of the terms *trust*, *mandate* and *tutelage*, terms featuring the three domestic legal régimes of the Anglo-American Common law, the Roman law and the Civil law systems of the world.

22. Even if the General Assembly resolution 2145 (XXI) were to be regarded as defective by itself, it has acquired the force of a Security Council resolution by its adoption and reaffirmation by and in the following Security Council resolutions:

"*Declares* that the continued presence of South Africa in Namibia is illegal and contrary to the principles of the United Nations and is detrimental to the interests of the population of the territory and those of the international community." (Resolution 264 (1969), operative para. 1.)

"*Decides* that the continued occupation of the territory of Namibia by South African authorities constitutes 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." (Resolution 269 (1969), operative para. 3.) This resolution also "called upon the Government of South Africa to withdraw its administration from the territory immediately and in any case before 4 October 1969".

By resolution 283 (1970) of 29 July 1970 the Security Council requested "all States to refrain from any relations—diplomatic, consular or otherwise—with South Africa implying recognition of the authority of the South African Government over the territory of Namibia". It urged all States having such relations with South Africa to discontinue them. Finally, the resolution called upon all States to discourage their nationals, including trading companies, from obtaining concessions from South Africa with respect to Namibia.

23. Security Council resolution 276 (1970) has reiterated and reaffirmed all the resolutions enumerated in the immediately preceding paragraph 22.

24. It is now necessary to summarize the principal legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970) as follows:

(i) Since the creation by the United Nations of the Council for Namibia as the legitimate Administering Authority for the territory, that is, as its *de jure* government, the continued presence of the Government of South Africa in the territory constitutes a concurrent *de facto* but illegal government for the same territory. The avowed purpose of the *de jure* government was and remains the governance of Namibia until the inhabitants achieve

political independence within the shortest possible time under United Nations auspices, while the declared intention of the Government of South Africa which is in illegal occupation is and remains the incorporation of Namibia in the Republic, thereby frustrating the fundamental objective of the Mandate and the trusteeship system for Namibia as "a sacred trust of civilization" until it can stand on its own. Moreover, the co-existence of two competing administrations, the one legal and the other illegal, within the same territory and jurisdiction poses for States critical problems of choice, not only as regards which of the two governments to deal with, but also as regards the crisis of confidence created by the intransigence and the obnoxious policies of the Government of South Africa.

(ii) Yet, the member States of the United Nations are under an inescapable duty under Article 25 of the Charter which provides:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Now by its various resolutions, the Security Council has reaffirmed and adopted the revocation of the Mandate of South Africa over Namibia, has called upon South Africa to withdraw from Namibia and has requested all member States to discontinue all their existing relations with South Africa with respect to Namibia. Not to comply with these *decisions* of the Security Council must clearly put every member State, including the Government of South Africa, in clear breach of Article 25 of the United Nations Charter. The World Court has an equally clear and inescapable duty to make a declaration to this effect as a matter of law based upon a correct interpretation of an unambiguous treaty provision in the United Nations Charter.

(iii) There is a real sense in which it can be said that the various decisions of the Security Council against South Africa in respect of Namibia have called for the "taking of preventive or enforcement action" against South Africa. All member States shirking their responsibility in this regard would be in breach of their treaty obligations assumed under Article 2 (5) of the Charter as follows:

"All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."

For a State to continue in any form of relationship with South Africa in respect of Namibia after the Security Council resolutions that such relationship be forthwith discontinued would constitute the giving of assistance to South Africa against which the United Nations is taking action as contemplated in Article 2 (5) of the Charter.

(iv) Nor can any member State seek to evade this its clear obligation under the Charter by pleading in extenuation that it was already bound under a pre-existing treaty, whether bilateral or multilateral, to do or to refrain from doing certain things for South Africa in respect of Namibia. Article 103 of the Charter defines the legal position in these words:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The Security Council has quite rightly called upon member States to make public declarations in terms of Article 103.

(v) The current legal situation in Namibia clearly threatens international peace and security in the sense of Articles 39 and 76 *(a)* of the Charter, and South Africa's continued defiance and blatant disregard of the General Assembly and Security Council resolutions on Namibia deserves an authoritative determination of the World Court in accordance with both the letter and the spirit of the United Nations Charter.