The reason for the 1962 Judgment relating to legal righ tor interest of the applicants served in 1966 as a ground for the Court's decision to dismiss the claims of the Applicants, finding that Applicants could not be considered to have established any legal right or interest in the subject-matter of their claims. The Court closed its door to the Applicants by the same key with which it opened its door to them in 1962. We are disappointed, but the Court's 1966 Judgment does in no way affect the Applicants, claims and assertion in the subject-matter of the case. It must further be pointed out that the 1950 Advisory Opinion of the Court and its 1962 Judgment remain intact and valid.

Thus, in the South West Africa case States are left without legal remedy against a clear breach of international obligation. In this case the United Nations General Assembly was and remains the real disputant with South Africa. Yet the United Nations can obtain only an Advisory Opinion, not a Judgment with respect to this legal issue. Here is one of many lacunae in the development of international law of today.

On 27th October, 1966, the General Assembly adopted a resolution terminating the South African mandate on South West Africa, and placing the territory under the direct responsibility of the United Nations. Thus, the United Nations General Assembly, as successor of the League of Nations, as supervisory organ of the League's mandatories system, stepped in. International law, now or in the future, cannot be substituted for international politics. Now that the United Nations General Assembly, the highest organ of international politics, taking into full consideration the legal aspect of the problem, is moving forward towards the early realization of self-determination of the people in South-west Africa, the Asian-African nations should remain confident in the final success of the United Nations and act together in implementing the measures taken or may be taken by the United Nations General Assembly for the purpose.



In Chapter VII concerning "Ways and Means of solving the Dispute" two suggestions are presented, viz. (a) to seek the Court's Advisory Opinion on the question of the legal validity of termination of the Mandate by the United Nations General Assembly, and (b) to institute by former members of the League a contentious proceeding before the Court against South Africa asking two declarations identical with those sought by Ethiopia and Liberia, and an order requiring the withdrawal of South Africa from the territory.

Point (a) is covered by the Court's 1950 Advisory Opinion and point (b), it is feared that in view of the Court's 1966 judgment, it may be waste of time and money. At any rate, we are sceptical about these two suggestions.

The last question which our Committee should discuss is, as justly indicated by the Study, the problem of how to restore confidence in the International Court of Justice, because no world legislature exists, the International Court of Justice, unique organ of the sort which we have today, can and must contribute enormously to the development of international law. So long as Asian-African nations aspire for the world governed by rule of law, the Court should be maintained and strengthened. Our confidence in the Court should at all costs be maintained and enhanced.

The Court's Judgment of 1966 has certainly shaken the confidence of Asian-African nations. There is no doubt about that. Our confidence in the Court should be restored. But how? Generally speaking, the world confidence in the Court and the moral and legal prestige of the Court have been diminishing since World War II. The Court being the product of States, the causes of that phenomena should be found on both sides of Court and States. States have been in recent times notoriously reluctant to submit their controversies with other States to the Court. Their fears, in part, stem from their own blatant nationalism and, in part, from a genuine doubt

and concern about 15-man Court of 15 different nationalities which, without the guidance of a legislature or a fully acceptable legal code, may create a new law even as it presumably interpreted the existing law. Reciprocally, the Court also has been timid in exercising its jurisdiction over international litigation, being reluctant to awaken either national charges of political bias or accusations of usurping legislative powers. In the contentious cases before it, the Court has had strong tendency to stick to narrowly clarifying the law and had no boldness to mark its decision with judicial innovation to develop international law. This was manifest in the present case of South West Africa. Setting aside for the moment the problem on the side of States, and, with due regard to the 15-man Court of Justice—all of whom are men of wisdom and probity, a certain number of suggestions for rendering the Court more efficient, more sensitive to changes of life, circumstances and of community standards in which law functions and more worthy of confidence of nations, are presented. Chapter VIII of the Study treats them.

(A) Amendment of the Statute of the Court to allow the United Nations organs to be a party before the Court in certain contentious cases; (B) to increase the number of Judges and (C) the application of the Statute to realise more rational representation of the main forms of civilization and of the principal legal systems of the world.

The study, after examining the changes in recent years in the personnel constituting the 15-man Court, points out that the situation has become a little more equitable for Asian-African nations in 1967 than it was in 1966. It is hoped that these suggestions will be studied carefully and objectively.

In concluding this statement, I would like to stress one thing, that is, the Asian-African nations should act in concert within the United Nations, and should command enough votes to influence the personnel construction of the Court so that it



suits better the requirements of the changing character of international community. Thank you.

## PAKISTAN

I strongly subscribe to the view that the Judgment of 1966 reversed the findings recorded at an earlier stage of the proceedings in 1962, and this was impermissible under the Statute of the Court vide Article 38.1. (C), which says, that "when applying the law, the Court has to follow general principles of law recognised by civilised nations". Now the principle of *res judicata* is so general that it is applied everywhere without exception. It is well settled that any decision taken at an earlier stage of a proceeding is binding for all subsequent stages. The Court certainly overlooked its mandatory provisions in their own Statute and the Charter. And furthermore, the plea was not taken in writing on behalf of the Respondent, notwithstanding that the Court took notice of it and allowed it. This was also certainly impermissible under the provisions of the Statute requiring that the pleadings shall be in writing. It makes a distinction between oral and written pleadings and this was a matter covered by the written procedures.

After everything is said and done, the discussion is anyhow at the moment of an exploratory nature and the question really is : what is it that we can do about? Considering that the Mandate has been revoked by the United Nations, it is not possible to think of or to take any proceedings arising from the Mandate itself. It no more exists. The matter, therefore, lies within the framework of the United Nations Charter, and situated as the case is, there is no legal proceeding that can be taken within the framework of the Charter. All that could be done was that the United Nations may on an executive level take a decision and enforce it. This it did not do. We, as an important body of lawyers and jurists, can pass a resolution supporting the stand taken by the United

Nations and the measures that it proposes to take. That way we can express our mind and lend support to the measures taken by the United Nations.

The other question of practical importance is that we may convey or personally record our view in regard to the composition of the Court in order to avoid recurrence of such cases. So, that is all, we as a legal body can do. The rest is the matter belonging to the political field, and constituted as we are, I am afraid, we cannot do anything about it. But before concluding, I must express may concurrence with the views and criticisms expressed by my learned friends from Ceylon, India, Japan, Iraq and other countries.

## UNITED ARAB REPUBLIC

The decision of December 21, 1962, disposing of the preliminary objections presented in the proceedings brought by the two Powers against South Africa for violation of obligations imposed upon South Africa by the Mandate, that the Court is competent to hear the dispute on the merits, was terminated 3½ years later after extensive hearing on the merits involving 99 sessions devoted to oral evidence and the hearing of testimony of 14 witnesses, and the Court without expressing an opinion on the substantive question involved has, by its decision rendered on July 18, 1966, held that the two complaining Powers cannot be considered to have established any legal right or interest in the subject-matter of their claims and has accordingly rejected them.

I must point out that, in my capacity as a Judge, I have not the slightest idea of touching the judicial impartiality of the International Court, neither the faith of the Justices who rendered the decision. It is true that in international affairs, law and politics are very closely interwoven, but the standing of the Judges working in such a high level of international



jurisdiction must denote complete non-submission to political pressure. We are all aware that it is against judicial ethics to speculate as to what occurred behind closed doors, but I must confess that this decision has attracted more public interest than any other case that has come before the Court, and the reaction to it—outside of South Africa—has been largely hostile and has excited much comments from laymen no less than lawyers. I do not want to repeat what the other delegates have said while analysing this Judgment. But I would like to ask whether the preliminary verdict is compatible with the second or not. The Court, in its opinion, addressed itself not to the merits of the case but to two questions : the continued existence of the Mandate, and, secondly, the right or interest of the Applicants in the legal subject-matter of their claims. Approaching the question of legal interest, which the Court characterised always as a question of the merits of the dispute, the Court examined the various categories of Mandates and evolved a distinction between what it described as general conduct provisions and special interest provisions, and then reached a conclusion that the right of calling the mandatory to account did not accrue to the individual Member States.

As regards the proper solution of this problem, I think that the outcome of our discussion will lead us to a proper solution, and I support the suggestion brought out by the distinguished delegate of Pakistan that this question needs a vast campaign through international spheres and circles and specially in the U.N. General Assembly, which can probably give a solution to this matter. Legally, in my opinion, I think, it would be hazardous to come again to the International Court of Justice. Thank you.

## MR. JUSTICE HIDAYATULLAH

It appears to me that the problem now before the Committee is to find out the ways and means in the matter of

South West Africa. To give a start to your discussions at which I am only assisting, I broke up the subject into five headings. The first heading is : "The legal action open to the Member States of the United Nations" ; the second is : "Legal action possibly open to the Republic of South Africa" ; the third heading is : "Political action open to the Governments of Member-States" ; the fourth heading is : "Partition"; and the fifth is : "Direct Action". In addition, I have summarised the position as it exists today. In other words, what is being done in opposition to what may be done. With your permission, Mr. President, I will now run through each of these and explain what will happen if a particular kind of action is taken to resolve this deadlock.

I said that the first heading is : "Legal action open to the Member States of the United Nations". Now, one of the actions open is, of course, an advisory opinion from the Court which can be obtained by the General Assembly or the Security Council. You know that under Article 34 of the Statute of the Court, only the States can be parties, and it is not open to the General Assembly or the Security Council to pose as contesting party. So, the only legal action, which appears to me, is to ask for advisory opinion. There can be no contentious suit or action because of certain difficulties which I have summarised by showing that no party will be available. In any case, any party which wishes to go to the Court again will have to prove its legal standing and that legal standing by the 1966 decision has been denied in respect of the Mandate Agreement to the Member States. Further, there is the difficulty that the Mandate itself has now come to an end, in the sense, that South Africa does not recognise that the Mandate subsists and the United Nations General Assembly by its resolution has put an end to it. So no action can really be based on the basis of the Mandate Agreement. And this, added to the fact that the General Assembly and the Security Council cannot go as parties before the Court and further that they can only ask for advisory opinion, is a stumbling block in the way of legal action. In any



case, I think the attitude of the States is that legal action now be replaced by political action.

Even if one were to go to the Court, what would be the subject on which the General Assembly or the Security Council may go? There are only two subjects which occur to me as possible. The first is *apartheid* compatible with Articles 55 and 56 of the Charter. Now, even if an advisory opinion be asked on this subject, there will be considerable difficulty. The difficulty is : who will give a finding as to whether there is or is not any racial discrimination in Africa? We all know that there is, but then a judicial finding is needed. And if a judicial finding is asked from the Court, it may choose to follow the *Eastern Carelia case*, wherein as you will remember Finland under a Treaty was bound to vacate and the Court declined to give an opinion because it said it will be solving a political question through judicial means. If the Court follows the *Eastern Carelia case*, which took place in 1923, then you will not have a decision from the Court and the Court may decline to answer this question.

The next is the enforcement of the General Assembly Resolution 1514 of 1960 by which granting of independence to colonial peoples is resolved upon. Here, the difficulties are that this was a 'C' class Mandate to start with and it was being administered under the terms of the Agreement as an integral part of South Africa. But the more important difficulty is that there is already a virtual annexation of the territory by South Africa and it is this annexation which has to be undone. So, there is no question of opening up the subject of granting independence to these colonial people. Now, these are the legal actions possible on the side of the General Assembly or the Security Council, or the Member States of the United Nations.

What is the legal action open to South Africa? Now, you must remember that South Africa would be interested in delaying matters and it will try to gain time so as to wean away

some of the countries from the *bloc* which is opposed to it, or at any rate, to weaken the antagonism to itself. And this it can do by bringing two actions before the Court. One would be in an indirect way through the assistance of its friends whether there could be a unilateral alteration of the status of South West Africa by the United Nations General Assembly. Here you will remember that the Mandate Agreement never provided for its termination. In fact, it is significantly silent about it. Similarly, Article 22 of the Covenant of the League of Nations did not provide for this matter and the Mandate Agreement itself showed that this status could only be altered by South Africa in consultation or with the concurrence of the League of Nations. In other words, the move was to come the other way, whereas the move has come in a very different and in an opposite way. So there might be some legal action possible on the side of South Africa. That would be merely in aid of delaying the matter rather than in seeking a decision for itself. The delay is helpful in two ways. If you remember what the Odengal Commission has suggested about the resettlement of the population in South West Africa, the gaining of time will be useful to South Africa because during that time it shall have settled the native population, because it is in common use, in areas which are less favourably situated, or less favourably endowed by nature. In this way it will be breaking it up into two parts or into more than two parts and keeping the better areas to itself, which it will hold against all force. This action, if legal action is at all taken by South Africa, will be in aid of delaying tactics so that it can settle itself very securely in whatever it holds.

Then comes the question of political action. Now political action, as I said at my last appearance before you, means first, the formation of a parallel Government. The difficulties here would be enormous. Who would finance that Government ? What would be its personnel ? Where would it be located ? How will it gain control of administration ? And how will it constitute or convene a Constituent Assembly, because no



Government, parallel Government, formed by an outside agency—can ever pretend to represent the peoples it seeks to govern, it must have the support of the people. Now this is the first of the political actions which might be taken.

The second political action is amendment of Article 96 of the Charter to make advisory opinions enforceable under Article 94 of the Charter. This, as I suggested last time, is the only suitable means of starting something new. Now here there are many difficulties. Several Powers, including the Powers which are opposed to South Africa, will shy at this change, because no country would like an advisory opinion to be binding on itself, because today it is the case of South West Africa and to-morrow it may be the case arising out of some other quarter. Therefore many other countries will shy at this change. Then again the Court will be flooded with opinion cases, because political questions will be attempted to be solved judicially, instead of having a debate or negotiation or discussion. The easiest course would be to invite an advisory opinion from the Court aud hold it binding upon the losing party. And here again, as I said, the Court might very well decline to answer such advisory questions because of the *Eastern Carelia case*, There the Permanent Court did say that it would not answer a political question which should be decided politically.

Then comes the question of co-operation of all the parties required for making such an amendment. It is a drastic move and you cannot rely upon all the countries coming to your assistance in getting the article of the Charter altered. There is an alternative course and that is amending Article 34 of the Statute of the Court to make the General Assembly and/or the Security Council a party to a contentious proceeding. This appears to be more practical than the other one because the difficulty at the moment is that according to the 1966 decision, the States have no legal standing and less so now after the Mandate has come to an end. The only way in which the matter can ever go to the Court would be by having Article 34