merits. It is a matter of great regret that after a further lapse of about four years, the Court should have dismissed the applications on a preliminary point, namely, that the parties had no legal right or interest in the subject-matter of the dispute, a matter which, it appears to us *prima facie*, has already been disposed of by its Judgment of the 21st of December 1962. The Judgment of the Court delivered on the 18th of July 1966 was 7:7, and the President cast his second vote in favour of those holding that the parties (applicants) had no interest. The result was that the Court did not proceed to the merits, and after expending so much effort, energy and expense, the Asian and African nations are thus faced with the position that the crucial questions, whether the Union of South Africa was bound by the obligations imposed upon it by the Mandate Agreement and the League Covenant, whether by pursuing a policy of *apartheid* and taking other arbitrary and discriminatory measures South Africa had violated its obligations, and whether it had fulfilled its obligations towards the United Nations, remain unresolved.

Mr. President, my Government has expressed surprise at the outcome of this case and at this unfortunate judgment. The Indian Foreign Minister stated in the Parliament on the 2nd of August 1966 ". . . the Judgment is not likely to inspire confidence in the International Court or in the establishment of the rule of law in international affairs".

We, therefore, fully endorse the views expressed by the Distinguished Delegate of Ghana that this Judgment needs to be examined by our Committee, both with regard to its basis in International Law and with regard to its consequences. We feel that the Secretariat of the Committee should be requested to—

(1) prepare a background note on the question of South West Africa ;

(2) assemble the background materials relating to the case of South West Africa before the World Court ;

(3) examine the question whether it will be competent for the General Assembly of the United Nations to terminate the mandate over South West Africa and bring the territory within its direct supervision ; and

(4) prepare a note on the representation of the main forum of civilisation and of the principal legal systems of the world in the Court.

The matter may thereafter be discussed at the Ninth Session of the Committee. Thank you.

INDONESIA

Mr. President. The judgment of the International Court of Justice, which we are discussing now, is a lengthy document of learned words, but the result of that lengthy document is not satisfactory. The judgment does not answer any of the questions, namely the question whether South Africa is responsible to the United Nations and also the underlying explosive questions of *aparthied* in particular and the independence movement in general. Frankly speaking, Mr. President, the document is for me also *inter parties*, but because of the outcome, I am concerned that there is something wrong in it. To find out what is wrong in the logic of the judgment and to find a righteous solution based on the rule of law is the duty of this Committee. We can find comfort in the fact that the votes in the case were equally divided and that the negative decision was the result of the casting vote of the Australian President. The decision is a difficult one. We, should therefore, refrain from rash action, and we support the proposal of the Distinguished Delegate from Ghana to put the question on the agenda of the next Session.

IRAQ

Mr. President. I shall be brief on this question because I can speak in concert with the views of other Delegates who have expressed their views. The Government of Iraq have issued a

declaration in this matter. The declaration analyses the decision of the Court and condemns the judgment. I can't give you the precise text of this declaration because it is not with me, but I can give you some idea about it. It says in the declaration that this decision does not establish the rule of law and does not give confidence for a State in this organization. This decision is against freedom, justice and peace. This is the summary of the contents of this declaration, and we think that it is time to ask for amendment of the Statute of the International Court of Justice to have more members from the Asian and African countries who may be able to defend our interests and rights. Thank you.

JAPAN

With due respect to the highest authority of the World Court, the utmost which I can say at this moment is that the judgment in question was a disappointment and a surprise.

I must read and study carefully the full text of the judgment before formulating any further comments. Nevertheless, I think, there are two aspects to consider in this question : that is, the merit of the case, on the one hand, and, on the other hand, the constitution and function of the Court. On this second point, I cannot but recollect a personal experience. About forty years ago I visited *Palais de Justice de Dijon* in France. The guide, pointing at a tortoise in the garden, said :

"*Voila le symbol de justice. Ca marche lentement.*"

(There the symbol of justice. It goes slowly.)

If justice goes fast, the social order will always be upset. If justice goes slowly, the society will always be disappointed.

The problem before us, it seems to me, is how to make the World Court go on keeping pace with the march of the world society-not too fast and not too slow. Thank you.

PAKISTAN

Mr. President, Fellow Delegates, Distinguished President of the International Law Commission and Observer Friends. Let me at the outset thank my learned colleague from Ghana for having provided an opportunity to the members of this Committee to express their views on the Judgment of the 18th of July 1966 of the International Court of Justice. I was in my country when this judgment was reported in the papers and I must say that the people of Pakistan and my Government were thoroughly disappointed at the performance of that august body. I have not read the full text of the judgment but it is clear to all of us that the Court has dismissed the applications of Ethiopia and Liberia on a preliminary point that the two applicant countries had failed to establish in them a legal right or interest in the administration of South West Africa. Is it not shocking to the world conscience that an application made for such a laudable purpose as ensuring the right of self-determination for fellow human beings has been dismissed on a technical ground and what makes it worse is that this very Court in the year 1962 held by majorty that the applicants had such a right ? The principle of *res judicata* which is of universal application has also been convenienly ignored.

I feel ashamed to say that those seven judges who were in a minority at the time of the earlier pronouncement in 1962, took undue advantage of the absence of three judges. One of them Mr. Justice Badawi from U. A. R. having died while Mr. Justice Bustamente from Peru could not participate due to his illness and Mr. Justice Chaudhuri Zafrulla Khan from Pakistan was not allowed by the Chairman to sit on this bench on the ground that he at one time was nominated as an *ad hoc* judge by the applicant countries, although he never worked as such. When Mr. Justice Chaudhuri Zafrulla Khan pleaded that it was no disqualification, the Chairman told him that several judges shared his view and that it was not proper for him to sit in this case. Placed in this awkward position, he had no option left.

The accusation made by the press in a country that Mr. Justice Chaudhuri Zafrulla Khan deliberately avoided to sit in this case is false and if I may say say so malicious. I am surprised as to how could such eminent judges as the Chairman and seven other judges hold such a view that Mr. Justice Chauduri Zafrulla Khan was disqualified to sit on this bench. The judges appointed by their Governments 'have always heard cases against those Governments' and how could Mr. Justice Chaudhuri Zafrulla Khan be disqualified to hear this case only on account of having been nominated an *ad hoc* Judge by Ethiopia and Liberia which position he did not even occupy. The seven judges who were in a minority in 1962 became a majority with the casting vote of the Chairman. The result has been that for the time being the policy of *apartheid* which has been universally condemned as contrary to law and humanity by all civilised nations shall continue towards the people of South West Africa. May I say that this state of affairs is a challenge to all Governments who are dedicated to peace and respect for human rights. I, on behalf of my Government and the people of Pakistan, assure our brethren of South West Africa that we shall continue to give our whole-hearted support to their efforts to end the system of of oppression based on *apartheid* and to secure for them their inalienable human right of self-determination. It is time that the Security Council or the General Assembly of the United Nations ask an advisory opinion of this Court on the issues raised by the applicant countries in their application. In that event the Court will have to pronounce their opinion on the merits and I have no doubt that the unanimous verdict of the Court on merits must go in favour of the people of South West Africa.

Before I conclude I would like to say a few words about the paper issued by the Press Service Office of Public Information, United Nations, which was supplied to us yesterday. This is based on a statement issued from the Registry of the International Court of Justice. This gives support to the now majority view of the Court. The proper thing for the Registry would have been to also give a brief gist of the dissenting notes

of the other seven Judges. I have no status to take exception to this one-sided picture depicted by the Registry, but I must say that I, as an humble student of law, am unable to reconcile the view taken in 1962 with the view taken now. It has been remarked at page 6 that there was no contradiction between a decision that the Applicants had the capacity to invoke the Jurisdictional Clause and a decision that the Applicants have not established the legal basis of their claim on the merits in respect of the contention that the Jurisdictional Clause of the Mandate conferred a substantive right to claim from the Mandatory the carrying out of the conduct of the Mandate provisions. If this was the correct view of law, why were not the petitions dismissed in 1962 and kept pending for four years involving huge expenditure and wastage of the precious time of the Court. Probably the Court had no better work to do. If the Applicants had the capacity to invoke the jurisdiction of the Court, the only course open to the Court was to decide the matter in dispute on merits and to give a finding whether the Applicants were able to establish against the Respondent, South Africa, the various allegations of the contravention of the Mandate for South West Africa. I will close by saying that the judgment as it stands falls much too short of the expectation of my country.

THAILAND

Mr. President and Fellow Delegates—The Delegation of Thailand has followed with interest the South West Africa case. Although at this stage, it has not yet have time to consider the details of the decision, it is sufficient to make a few preliminary observations. This country, Thailand, supports the independence of all nations, particularly, Asian and African nations. Thailand opposes and does not tolerate the practice of *apartheid* wherever it may be adopted. Therefore, despite its respect for the International Court of Justice, it has learned with regret and dismay the substance of the decision which in effect, as my colleague from Japan has pointed out, would delay the turning

of the the wheel of justice in this particular instance. It is rather heartening to hear that criticisms of this decision have been from all quarters, not only from the African and Asian countries, but also from the Soviet Union, the United States of America and from eastern European countries, and even from Poland whose judge has pronounced in favour of this decision. We, in Thailand, strictly observe in good faith our obligations under the Charter of the United Nations and we would respect their decisions. But this is not the first time that we have been disappointed or dismayed by the decision of the International Court of Justice. Now, we are happier that there is a growing sense of dissatisfaction with the result of which it is a hope of my Delegation that there will be marked progress and improvement both in the standard of justice as well as to the speed with which justice can be expected, particularly in the international field. Thank you.

GHANA

Mr. President and Distinguished Delegates—Having heard the speeches of other Delegates, at least there is a hope that we in Africa and Asia and in fact all peace-loving countries have a consensus of mind on this subject. The various opinions expressed are in fact a confirmation of what is to be expected. One golden thread runs through the speeches of Honourable Delegates and that is, what affects Africa now gives serious consideration to the thoughts of Asia.

In our times, Mr. President, might counts and the weak has no effective voice in international politics. We cherish the independence of the International Court of Justice, but can we seriously say that the members on the panel are independent? It has often been said that the judges do not represent their countries. This becomes a fiction when one considers the mode of election. The national groups are constituted by individual governments. Judges are human beings and perhaps in trying to perpetuate their position will naturally be guided by national interests in making up their minds on a particular issue. The

Statute and the rules of procedure of the Court also admit election of *ad hoc* judges to represent the interest of States parties to a dispute. For these reasons, my Delegation feels that a time has come to press for the revision of the distribution of the seats of the Court. The United Nations Charter itself talks about equality of States, peaceful co-existence and denunciation of colonialism, and man's inhumanity to man. The plight of the people in South West Africa is an unhappy one. We, in Ghana, have once been under colonial domain, and we are aware of the pinch of colonialism. It is not a happy lot, let alone when mingled with barbarism.

My Delegation is happy to note that a serious consideration has been given to this matter and the next Session of the Committee will probably see concrete decisions being taken to improve our present position as far as the International Court of Justice is concerned. I thank all the Delegates for supporting this idea. Thank you very much.

(III) STUDY PREPARED BY THE SECRETARIAT OF THE COMMITTEE FOR ITS CONSIDERATION AT THE NINTH SESSION

CONTENTS

3. U. N. General Assembly Resolution of 9 February 1946.

4. U.N. General Assembly Resolution of 12 February 1946 regarding Transfer of Certain Functions, Activities, and Assets of the League of Nations.

5. Declarations made by the Representatives of Mandatories at the Final Meeting of the League of Nations.

6. Resolution of the Assembly of the League of Nations dated 18 April 1946.

7. List of Judgments, Advisory Opinions and Orders of the International Court of Justice on the question of South West Africa.

8. U. N. General Assembly Resolution 2145 (XXI) of 27 October 1966.

9. U. N. General Assembly Resolution 2248 (S-V) of 19 May 1967.

CHAPTER I

BRIEF HISTORY OF THE SOUTH WEST AFRICA CASES

1. *History of the territory.*
2. *Origin of the controversy.*
3. *Submissions of the Parties.*
4. *The 1962 Judgment on preliminary objections.*
5. *Proceedings on the merits.*
6. *Issues framed by the Court.*
7. *The 1966 Judgment.*
8. *Aspects of the case examined in the present study.*

1. History of the territory

The territory of South West Africa, before it became a mandated territory, was a German protectorate and was known as the thc Protectorate of German South West Africa (from 1892 to to 1915). On July 9, 1915, during the First World War, it was occupied by the forces of the Union of South Africa and martial law was established throughout the territory from that date.

The Treaty of Versailles was signed on June 28, 1919, and Article 119 of the of the Treaty provided that "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions." At the Peace Conference President Wilson of the U. S. A. presented his 14 Points replacing the concept of annexation of the conquered territories by the concept of sacred trust in the interest of their inhabitants. He even proposed a direct administration of such territories by the League of Nations which was opposed by other Allied and Associated Powers. As a result of conciliation by Lloyd George of the United Kingdom the concept of sacred trust crystallised into the mandate system provided for in Article

22 of the League Covenant. (See Annexure I of this Study). Under the system an advanced country was appointed as Mandatory for the purpose of carrying out the sacred trust, mainly to promote the well-being of inhabitants. Supervision of Mandatory was the responsibillity of the League, which acted on the advice of the Mandates Commission, to ensure that the terms of the mandate were being observed faithfully.

On December 17, 1920, the Mandate for the South West Africa was issued by the Council of the League of Nations. (For text, see Annexure II to this Study). The preamble referred to Articles 119 and 22 of the Treaty of Peace and recited that the Principal Allied and Associated Powers had agreed to confer on His Britannic Majesty, and that His Britannic Majesty for and on behalf of the Government of the Union of South Africa had agreed to accept, the Mandate in respect of German South West Africa. Since the area was sparsely populated and backward in respect to the stage of its development, it was classified as a 'C' Mandate. Article 2 of the Mandate was as follows :

> "(2) The Mandatory shall have full powers of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa, to the territory, subject to such local modifications as circumstances may require.
>
> The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

During the existence of the League, the Union of South Africa administered the territory under the supervision and control of the Council of the League of Nations, which acted under the advice of the Permanent Mandates Commission. The

Union extended its policy of *apartheid* to the territory of South West Africa. The Mandates Commission on one occasion and the individual members of the League on a few occasions were critical of such policies.

After the Second World War the United Nations came into being and its Charter provided for the trusteeship system parallel to the mandates system of the League. In terms of Article 77 of the Charter the trusteeship system applied to such territories held under mandates as may be placed thereunder by means of trusteeship agreements. Article 80 provides for continuation of "the rights whatsoever of any States or any peoples or the terms of existing international instruments of which Members of the United Nations may respectively be parties". Before the dissolution of the League, the representatives of South Africa on 9th April, 1946 declared before the League meeting that "the Union Government have deemed it incumbent upon them to consult the peoples of South West Africa, European and non-European alike, regarding the form which their own future government should take. On the basis of those consultations, and having regard to the unique circumstances which so signally differentiate South West Africa- a territory contiguous with the Union-from all other mandates, it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York to formulate its case for according South West Africa a status under which it would be internationally recognised as an integral part of the Union..... The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory." (See Annexure V to this Study).

On the day of its dissolution, viz. April 18, 1946, the League Assembly in a resolution recognised "that on the termination of the League's existence, its functions with respect

to the mandated territories will come to an end", but noted "that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;" and took "note of the expressed intentions of the members of the League now administering territories under mandates 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". (See Annexure VI to this Study).

2. Origin of the controversy

The Union of South Africa refused to place the territory under the trusteeship system and in the first General Assembly of the United Nations in 1946 it submitted a formal proposal of incorporation for approval. When this proposal was rejected, it, while expressing regret and disappointment, announced that it would continue to submit reports on its administration of the territory as it has done before *vis-a-vis* the League. Later, it discontinued to submit such reports to the General Assembly and went ahead with stricter application of its policies of *apartheid* and incorporation of the territory within South Africa.

On December 6, 1949, the General Assembly requested the International Court of Justice for an advisory opinion on the status of the territory after dissolution of the League. In its opinion of 1950 the Court stated "that the Union of South Africa continued to have the international obligations stated in Article 22 of the Covenant and in the Mandate;" "that the provisions of Chapter XII of the Charter are applicable to the territory of South West Africa in the sense that they provide a means by which the territory may be brought under the Trusteeship System;" and "that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the territory under the Trusteeship System".

On 4th November 1960, Ethiopia and Liberia, both of which had been members of the League, filed concurrent applications in the International Court of Justice, having regard to Article 80 of the U.N. Charter and relying on Article 7 of the Mandate for South West Africa, asserting the continued existence of the Mandate and making various allegations of contraventions of the Mandate by South Africa as the mandatory power. The two States sought a judgment of the Court to require South Africa to cease alleged violations and to carry out its obligations under the mandate. Article 7 of the Mandate provides:

> "The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

3. Submissions of the Parties

The specific claims of the Applicants were as follows:

In the Applications

"Wherefore, may it please the Court, to adjudge and declare, whether the Government of the Union of South Africa is present or absent and after such time limitations as the Court may see fit to fix, that:

A. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920; and that the aforesaid Mandate is a treaty in force, within

the meaning of Article 37 of the Statute of the International Court of Justice.

B. The Union of South Africa remains subject to the international obligations set forth in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, and that the General Assembly of the United Nations is legally qualified to exercise its supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory; and that the Union is under an obligation to submit to the supervision and control of the General Assembly with regard to the exercise of the Mandate.

C. The Union of South Africa remains subject to the obligations to transmit to the United Nations petitions from inhabitants of the territory, as well as to submit an annual report to the satisfaction of the United Nations in accordance with Article 6 of the Mandate.

D. The Union has substantially modified the terms of the Mandate without the consent of the United Nations; that such modification is a violation of Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite condition to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

E. The Union has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory; its failure to do so is a violation of Article 2 of the Mandate and Article 22 of the Covenant, and that the Union has the duty forthwith to take all practicable action to fulfil its duties under such Articles.

F. The Union, in administering the Territory, has practised *apartheid*, i.e. has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in

violation of Article 2 of the Mandate and Article 22 of the Covenant and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory.

G. The Union, in administering the Territory, has adopted and applied legislation, regulations, proclamations, and administrative decrees which are by their terms and in their application, arbitrary, unreasonable, unjust and detrimental to human dignity; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to repeal and not to apply such legislation, regulations, proclamations and administrative decrees.

H. The Union has adopted and applied legislation, administrative regulations and official actions which suppress the rights and liberties of inhabitants of the Territory essential to their orderly evolution towards self-government, the right to which is implicit in the Covenant of the League of Nations, the terms of the Mandate and currently accepted international standards as embodied in the Charter of the United Nations and the Declaration of Human Rights; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease and desist from any action which thwarts the orderly development of self-government in the Territory.

I. The Union has exercised powers of administration and legislation over the Territory inconsistent with the international status of the Territory; that the foregoing action by the Union is in violation of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty to refrain from acts of administration and legislation which are inconsistent with the international status of the Territory.

J. The Union has failed to render to the General Assem-

bly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly.

K. The Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of the League of Nations rules; and that the Union has the duty to transmit such petitions to the General Assembly.

The Applicant reserves the right to request the Court to declare and adjudge with respect to such other and further matters as the Applicant may deem appropriate to present to the Court.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Application, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations."

In the memorials

"Upon the basis of the foregoing allegations of facts supplemented by such facts as may be adduced in further testimony before this Court, and the foregoing statements of law, supplemented by such other statements of law as may be hereinafter made, may it please the Court to adjudge and declare, whether the Government of the Union of South Africa is present or absent, that:

1. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South

Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920;

2. the Union of South Africa continues 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 supervisory functions to be exercised by the United Nations, to which the annual report and the petitions are to be submitted;

3. the Union, in the respects set forth in Chapter V of this Memorial and summarised in Paragraphs 189 and 190 thereof, has practised *apartheid*, i.e. has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory:

4. the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described in details in Chapter V of this Memorial and summarised at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles;