The World Court's Decision on South-West Africa

A Symposium of the Section of International and Comparative Law

At the Annual Meeting in Montreal on August 8, 1966

Edward D. Re, Chairman of the International and Comparative Law Section, Washington, D. C., presiding

Moderator:

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Panelists:

John Carey, Chairman of the Committee on Coordination with State and Local Bar Associations, New York, N. Y.

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HARRY INMAN (Moderator): I think this is going to be a most interesting and stimulating debate, and I hope the people that are taking pro and con will say what they think and not have any regard to feelings. Clifford Hynning is going to play Sir Percy Spender and uphold the World Court in its decision of July 18 in the South-West Africa case.[1] The seven dissents will be supported by John Carey. Both Mr. Hynning and Mr. Carey are experienced international lawyers.

To give you an idea of the interest that this decision has generated, I have before me a July 31 newspaper, The Washington Post. One article says, "Court Judge explains abstention on S-W Africa. Sir Mohammed Zafrulla Khan of Pakistan has surprisingly revealed that he did not participate in the World Court judgment" because the President of the Court asked him not to. The Court threw out the suit brought by Liberia and Ethiopia on a technical point. Another article says, "Africans angered by U.S. lecture on International Court's Ruling."

This case concerns the continuing existence of the Category C

[1] See Case Comment, infra p. 134.

Mandate for South-West Africa which was created under the League of Nations, and the duties and the performance of the Mandatory, South Africa. The case was filed on November 4, 1960; preliminary objections were ruled upon on December 21, 1962; the objections were by South Africa which said that Liberia and Ethiopia, as applicants, had no authority and standing in the Court. These objections were dismissed on the grounds that the Court had jurisdiction.

The issues are extensive. Some of the main issues are whether the Mandate for South-West Africa was still in force and if so whether the Mandatory's obligation to furnish annual reports on its administration to the Council of the League of Nations had become transferred into an obligation to report to the General Assembly of the United Nations; whether the respondent had, in accordance with the Mandate, promoted to the utmost the material and moral well-being and the social progress of inhabitants of the territory; whether the Mandatory had violated the prohibition in the Mandate of the "military training of the natives," and the establishment of military or naval bases or the erection of fortification in the territory; whether South Africa had violated the provisions in the Mandate and in effect modified the conditions of the Mandate without consent of the League or the United Nations.

Before the Court dealt with the questions of substance, it examined two other questions—(1) whether the Mandate still existed, and (2) whether the applicants had a legal right or interest regarding the subject matter of the claim. The 8 to 7 decision on July 18, 1966, held that applicants had not established any legal right or interest in the subject matter of the present claim. Sir Percy Spender, how do you justify the decision of this Court?

CLIFFORD J. HYNNING (as Sir Percy Spender for the majority of the Court): One of the answers is that we had the votes; and then we had the reasons. I think that this discussion may be a little unfair possibly to Mr. Carey, who is going to take the other side, for he has about 300 pages to account for; whereas I only have 67. That is quite a difference in verbiage.

This issue of South-West Africa has been before the United Nations and has been before the World Court ever since the end of World War II. South-West Africa was originally a German Protectorate which was occupied by British and Afrikaner forces during World War I, and was made into a Class C Mandate to the Union of South Africa in 1920 under the League of Nations Covenant. So

I might just briefly explain what the A, B, and C Mandates are.[2] The A Mandate was a country that was expected to achieve independence shortly but needed a little administrative nursing. The B Mandate was a country that was expected to achieve independence but needed to be trained and educated over a fairly extended period of time. A Class C Mandate was one for which there was no present

[2] Article 22 of the Covenant of the League of Nations.

"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 civilisation 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.

"Certain communities formerly belonging to the Turkish Empire have reached a state of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

"Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

"There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

"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.

expectation of independence. There were in fact only two Class C Mandates—one was South-West Africa and the other the Pacific territories, a part of which the United States is now administering under a U.N. Trusteeship Agreement. When the United Nations Charter came into being, it contained provisions for trusteeship rather than mandates. The Charter did not provide for any automatic translation of the League of Nations Mandate into a U.N. trusteeship.[8] In a 1950 advisory opinion of the World Court it had been held there was no legal obligation on South Africa to negotiate a trusteeship agreement if it did not agree to do so. The outstanding characteristic of the C Mandate type was that the Mandated territory was to be administered, and I am now quoting from the League Covenant, "as an integral part of the territory of the Mandatory." There have been many, many resolutions in the General Assembly of the U.N. urging, requiring, demanding that South Africa place South-West Africa under a U.N. trusteeship.

There have been three advisory opinions by the World Court, each sought by an international body, namely, the General Assembly of the United Nations. An advisory opinion is not binding on either South Africa or on the General Assembly. The first one in 1950 held that South-West Africa territory still remained under an international mandate.[4] In its decision of July 18, 1966, the Court ex-

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"A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

The A Mandates technically included the "certain communities formerly belonging to the Turkish Empire;" the B Mandates were "especially those of Central Africa;" while the C Mandates included "South-West Africa and certain of the South Pacific Islands."

[8] *Article 77* of the UN Charter states:

"1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

"a. territories now held under mandate;

"b. territories which may be detached from enemy states as a result of the Second World War; and

"c. territories voluntarily placed under the system by states responsible for their administration.

"2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

[4] Advisory Opinion of July 11, 1950, on the International Status of South-West Africa. ICJ Reports, 1950, p. 128: 17 ILR 47 (1950).

pressly said that it withheld an opinion on that issue, since it did not think it had compulsory jurisdiction to decide any question on the merits. The 1950 advisory opinion also held that the General Assembly of the United Nations had succeeded to the supervisory functions of the Council of the League of Nations with one very important proviso added by the 1955 Advisory Opinion—that in exercising that supervisory function, the General Assembly must follow the voting procedures, not of the U.N. Charter, but of the League of Nations Covenant.[5] This important distinction was that any disagreement on any issue relating to a mandate was deemed to be "a significant question" which could be decided only on the basis of the principle of unanimity. Although South Africa may or may not have been a member of the Council of the League of Nations, which was a rotating body in some part other than the major allies, South Africa was entitled, if questions pertaining to its Mandatory responsibilities came up, to sit on the Council and could therefore, under the principle of unanimity, prevent the General Assembly of the United Nations from taking any action. The 1950 Advisory Opinion also held, as I think was the only conclusion possible under the language of the U.N. Charter, that there was no legal obligation on the part of any Mandatory to place a Mandated territory under a U.N. trusteeship. That was a matter for its own political choice. The World Court Advisory Opinion also held finally that South-West Africa, still being subject to an international regime of the League of Nations Mandate, could not have its territorial status unilaterally altered by South Africa without the consent of the United Nations. The third advisory opinion of 1956 said the General Assembly could hear petitions from persons representing the indigenous population of South-West Africa; and some such petitions were received.

These advisory opinions meant that South Africa was not being really called to account in a manner that was deemed satisfactory to many members of the United Nations, including practically all of black Africa. At various meetings and conventions and conferences that were held over a period of several years in the late 50's and early 60's it was decided that a suit should be brought under the adjudication clause of the 1920 Mandate Agreement between the League of Nations and South Africa and that this suit should best

[5] Advisory Opinion of July 7, 1955, on Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa. ICJ Reports, 1955, p. 68; 22 ILR 651 (1955).

be brought by the two African states which had been members of the League of Nations, namely, Ethiopia and Liberia. Such a suit was filed in 1960. A preliminary objection was overruled in 1962 by a close vote of 8 to 7,[6] with the judges who are now in the majority in the July 1966 opinion being the minority in 1962. The case then went on for hearing on the merits. Counsel were retained by Ethiopia and Liberia, Ernest Gross, a very distinguished New York lawyer as chief counsel, and several other Americans. The case was before the World Court for a period of five years and eight and a half months. There was built up a written record of almost 3,000 pages of evidence and pleadings and proceedings.

The only evidence that was submitted in the form of live witnesses was submitted to the World Court on behalf of South Africa, which presented 14 witnesses, including three professors from the United States, a professor from the University of London, and various people from Africa. In the course of that presentation of evidence it was shown that there was no question of any oppression of the indigenous population, that approximately 55 countries of the world, including Ethiopia and Liberia, had legislation on its books which distinguished between the legal rights and obligations of their citizens according to race, religion, and other social groupings.

Mr. Gross on May 19, 1965, conceded in a written submission to the Court that there were no factual disputes with South Africa. He withdrew any charges of oppression of the indigenous population and drew just one issue: whether the policy of *apartheid* or separate facilities, separate treatment of population on racial grounds, violated per se the clause of the Mandate which said that the Mandatory had a sacred trust for civilization and must do the utmost to promote the welfare of the inhabitants of the territory. Mr. Gross said he did not controvert in any manner any of the factual allegations or denials by South Africa. So the issue was in effect submitted on a motion for summary judgment, with the applicants admitting every factual defense of South Africa. I found this rather startling to read. I saw nothing about it in any of the newspapers, and as a matter of fact, it is not contained in the majority opinion of the Court. It is set forth in detail, quoting from the admissions by Mr. Gross both in written and oral statements, in the concurring opinion of the South African

[6] Judgment of December 21, 1962, on South-West Africa Cases. ICJ Reports, 1962, p. 330.

judge ad hoc.[7] But I think it is a very significant factual situation. This case was decided on a record which contained no allegations of any kind of mistreatment of the indigenous population but did contain the pattern of legislation of South Africa which is called *apartheid,* which provides for separate treatment of legal rights, public services and facilities, and private services and facilities. This was being done

[7] An agreement reached between the parties prior to the commencement of the oral proceedings was communicated to the Court in the following terms:

"SOUTH-WEST AFRICA CASES

"Agreement Regarding Factual Averments

"Subject to reserving their right to contest the relevance of facts contained in Respondent's pleadings, including the oral proceedings, Applicants agree that such facts—as distinct from inferences which may be drawn therefrom—are not contested except as otherwise indicated, specifically or by implication, in Applicants' Written Pleadings or in the oral proceedings.

"This agreement pertains also to factual averments in respect of which no documentary proof has been filed, including statements made upon Departmental Information."

On April 27, 1965, during the oral proceeding, the agent for Ethiopia and Liberia stated as follows:

"All facts set forth in this record, which upon the Applicants' theory of the case are relevant to its contentions of law, are undisputed. There have been certain immaterial, in our submission, allegations of fact, data or other materials which have been controverted by the Respondent and such controversion has been accepted by the Applicants and those facts are not relied upon. The Applicants have gone further in order to obviate any plausible or reasonable basis for an objection that the Applicants have not painted the whole picture in their own written pleadings. The Applicants have advised Respondent as well as this honourable Court that all and any averments of fact in Respondent's written pleadings will be and are accepted as true, unless specifically denied. And the Applicants have not found it necessary and do not find it necessary to controvert any such averments of fact. Hence, for the purposes of those proceedings, such averments of fact, although made by Respondent in a copious and unusually voluminous record, may be treated as if incorporated by reference into the Applicants' pleadings." (C.R. 65/22 at p. 39.)

Also note that all references in the original memorial of the applicants to "oppressive" policies or conduct of South Africa were subsequently abandoned by the agent for Ethiopia and Liberia. Judge Van Wyck summarized the above as follows:

"Applicants' final attitude was that there existed no dispute of fact between the Parties, inasmuch as Applicants had accepted all Respondents' averments and denials, and had stated clearly their whole case was based on the existence of the alleged norm or standards. In the words of the Applicants' Agent:

"The issue before the Court, accordingly, is whether the processes of the organized international community have or have not eventuated in international standards or an international legal norm, or both." (C.R. 65/31. p. 32.)

under an international agreement which expressly authorized the Mandatory to administer the territory "as an integral part" of its own territory.

The threshhold question of any law suit is how does the Court get jurisdiction? We are dealing here, of course, with a World Court which must affirmatively show it has jurisdiction. It can get jurisdiction in only one manner, through some document of consent. The document here is the adjudication clause of the Mandate Agreement of 1920. When you look at the adjudication clause of the Mandate Agreement, you think Ethiopia and Liberia have a rather cogent case, because the language is sweeping. If we were to follow a process of literal interpretation I think that Sir Percy Spender and the majority would be in trouble. The language is in the Mandate Agreement, and I am quoting now,

> 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 to the Covenants of the League of Nations.

The Statute of the International Court of Justice contains an express provision that any adjudication clause referring to the Permanent Court shall be construed as meaning the International Court of Justice.

The Court, in a very cogently written opinion, concluded that this sweeping adjudication clause has to be looked at in terms of the purposes and circumstances of the Mandate Agreement. It concluded that if during the life of the League of Nations, Ethiopia and Liberia could not have brought an action under this clause they have no greater rights after the League of Nations has gone out of existence. How has the Court reached the conclusion that Ethiopia and Liberia could not fall within this adjudication clause? It did so by saying that the Mandatory could only have agreed to submit to the jurisdiction of the Court if the complainant had a "legal right or interest" in the particular proceeding. The Court said it was preposterous—or the language is that it "affronts all the probabilities"—to assume that an individual member of the League of Nations has a greater right to hold South Africa accountable than the Council of the League of Nations. The Court said that the duties and obligations of a mandatory under the mandate system of the League of Nations fell into two

classes. One class it referred to as "conduct" or "political"—these were obligations that the Mandatory was assuming with respect to the treatment of the population of the Mandated territory in terms of oppression, in terms of the development of the indigenous population. In this respect the Court said that the Mandatory was accountable only to organs of the League of Nations. It was not accountable to an individual member of the League of Nations. On the other hand, the Mandate Agreements contained provisions similar to provisions on rights of establishment, treatment of investment and persons in our commercial treaties, and clauses on treatment of missionaries in which specific tangible rights were recognized in terms of the inhabitants of other countries. It was only in connection with these specific legal and material interests that a Mandatory could be said to have agreed to submit to the jurisdiction of the World Court under the adjudication clause.[8] It so happens that the Mandate Agreement on South-West Africa contains no provisions with respect to trade and contains only a provision with respect to missionaries. This would mean that under this construction the only kind of legal accountability that can be demanded of South Africa in the World Court under the compulsory jurisdiction clause of the Mandate Agreement relates to the possible mistreatment of missionaries. Everything else is political and does not fall under this clause. It seemed to the majority of the Court fantastic—as it seems to me—that an individual country—during the League days that would have been one country out of 50 or so—could hold up in a compulsory proceeding in the World Court a mandatory state to accountability when the organs of the League of Nations could not. You could have had then a multiplicity of suits. This may be an argument of horrors, which may not be too significant, but it seems to make sense to me in giving the proper construction to the adjudication clause. The Court uses some words which may affront a lot of people—but I think they are wrong—in talking about moral principles. It says that a court functioning in an international arena under a legal system with consensual jurisdiction can take into account moral principles only in so far as they are given expression

[8] The only prior case in the jurisprudence of the World Court was the Mavronnatis Palestine Concession Case, Series A/B 9 (1924) and A/B 23 (1927), which involved a claim by Greece on behalf of one of its nationals holding a concession in the former Turkish territory of Palestine. In this case the Permanent Court of International Justice defined a "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (at page 11).

in legal form. The fact that the consequences seem to leave a gap in international control, well, that is the kind of gap that happens when you do not plan for the possible dissolution of an international organization.

A great deal of argument was made by Judge Jessup in his dissenting opinion that the Court was in effect overruling the 1962 opinion. The Court said it was not. This is the only part of the opinion that I have difficulty in following. I think the Court was overruling its Preliminary Objections Opinion of 1962, but in doing that it was not acting very differently from what our Supreme Court does in granting certiorari and later finding against the petitioner or, as it sometimes does summarily, noting that the petition for certiorari had been "improvidently granted." I do not see how it could possibly be argued on the basis of precedents that a ruling on a preliminary objection is *res judicata* on that objection. That doesn't make sense to me, but that is the burden of the argument of Judge Jessup. I can not follow his reasoning on how something preliminary becomes final in a *res judicata* sense.

The Court also speaks about teleological purposes in construing an international document. I had better read that exact language:

> It may be urged that the Court is entitled to engage in a process of "filling in the gaps," in the application of a teleological interpretation, according to which instruments must be given their maximum effect in order to insure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle, the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in the process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should.

I think that states very bluntly the attitude of the majority of the Court. The World Court therefore did not reach the question whether *apartheid* is in violation per se of international law. The Court has held it did not have jurisdiction to examine the matter.

MR. INMAN: John Carey, do you agree with this?

MR. CAREY: Well, I do think that Sir Percy Spender's *alter ego* is to be congratulated for the persuasive manner in which he presented the case for—we can't call it the majority of the Court because there were no more of them than there were judges who voted the other

way. They were both equal, only Sir Percy's side was more equal than the others.

Here in my hand is the decision, 540 pages including all of the separate opinions. I certainly would not presume to stand here and claim to be an expert on all of what is in here, but I have studied certain parts of it with great care and have some very definite feelings about it.

What in this decision has caused so much criticism? Why has the *Christian Science Monitor* in a lead editorial labeled it as "an unfortunate decision," [9] which in *Monitor* phraseology is strong language? Why did a representative of Guinea in the United Nations refer to the resulting "widespread disappointment" and to a "feeling of shock and bitterness" that this decision had caused? Why did the American member of the court, Judge Jessup, in the very first sentence of his 150-page dissent, the very first sentence, state that the decision is "completely unfounded in law." Why did Judge Jessup label the "majority opinion" as a "procedure of utter futility?"

Possibly more important than some of these more lurid reactions is this question: Is it true to say, as one nation did the other day, that "this ruling has dealt a severe blow on the principle of international peace through law?" [10] Never mind for the moment whether there is a widespread feeling of disappointment among people who might naturally, for emotional reasons, be expected to be disappointed. Never mind whether a member of the "minority" on the court has strong feelings about the opinion of the "majority." Let us decide as outside observers trained in law whether we agree with the criticism that this ruling has struck a blow against the principle of international peace through law.

Let us not talk this afternoon about the evils of *apartheid*. Let us not talk about what we may think for or against the government of South Africa. Let us just look at this decision and the reasoning used by that "majority" in arriving at its decision and see whether we think this is a blow for or against the principle of international peace through law.

I am sure we have all noticed in the corridors of this hotel in the last few days signs indicating discussions of the subject of respect for law and order. I am sure that all of us recognize from our own experience that one of the major factors which give or take away

[9] Issue of July 21, 1966, p. 16.

[10] Nigeria, U.N. Document A/6346.

respect for law and order is the quality of the reasoning used by a court in arriving at a particular decision. If a court arrives at a particular decision by a process of reasoning which, while we might not agree with it, at least seems to make a certain amount of sense, then we may feel bad if we are beaten in the case or if for some reason our sympathies are with the losing side, but we still have respect for law and order.

However, if the decision is arrived at by a tortuous process of verbiage that we do not find even to measure up to *that* minimum degree of persuasiveness, then a very dangerous stage has been reached in which we lose respect for the court that delivered the decision as an institution and for the members of the court as people. Then it is that if we are not trained in law and educated to having a duty to continue to sustain the standing of courts, if in other words we have nothing particular to gain from the principle of peace through law, we may very well be tempted to cast aside the law as an institution and as a means of maintaining peace, and seek other means. In the world today, I submit, it is extremely important that the principle of peace through law be nurtured by every possible means, including the means of judicial decisions that of their own nature command respect because their reasoning is, if not overpowering, at least up to a certain standard of persuasiveness.

I ask you to examine with me this particular decision to see if it measures up to that kind of standard, and then decide whether it has helped or hurt the principle of international peace through law, generated respect for law or, because of its internal weakness, generated disrespect for law. I want to reread the crucial language already quoted by Mr. Hynning which was being interpreted by the Court in this case. It is Article 7 of the Mandate over South-West Africa. It says the Mandatory, in this case the Government of South Africa, ". . . agrees that if any dispute whatever should arise between the Mandatory and another member of the League of Nations," Liberia or Ethiopia for example, "relating to the interpretation or the application of the provisions," (I emphasize that this word is plural, not singular) "of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice" provided by the League of Nations Covenant. As Mr. Hynning has explained, without any question that reference would now be to the International Court of Justice. I will read that once more with your indulgence.

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 [International Court of Justice].

Now what the Court had to do to reach the decision that it reached was, I submit, to legislate that language right out of existence. Mr. Hynning has done a good job in setting forth to you the process by which this was done. I will re-examine that process with you in the next few minutes and ask you to see whether you think the quality of the reasoning involved is such as to generate respect for law and order. Incidentally, Judge Jessup pointed out in his lengthy opinion that the basis on which the so-called majority proceeded was a basis that the respondent South Africa had not even raised in its final presentation of the issues in the case.[11]

Now a moment on the 1962 decision. There are two major points of dispute about the present case to my way of thinking, (1) the disregarding of the jurisdictional language by the Court, and (2) the disregarding by the Court of its decision in 1962. In 1962 certain preliminary objections were raised, and they were dismissed one by one by the Court. They all had to do with the interpretation of this same jurisdictional language. There were four points on which the Court ruled, dismissing one by one the four objections raised by South Africa, preliminary objections to this law suit.

First the Court held in 1962 that, contrary to the assertion of South Africa, there was a treaty or convention in force, namely, the Mandate. Secondly, the Court held in 1962 that Ethiopia and Liberia did qualify as "another Member of the League of Nations," in spite of the fact that the League of Nations had expired. Thirdly, the Court held that there *was* a "dispute" within the meaning of the use of that word in this context. And finally the Court held that the dispute was one which had not been settled by negotiation. Therefore, all four of the preliminary objections raised to the application of this jurisdictional clause had been dismissed one by one by the Court in 1962. Somehow or other in 1966 the Court found a fifth reason for dismiss-

[11] "The Court now in effect sweeps away this record of 16 years and, on a theory not advanced by the Respondent in its final submissions of 5 November 1965, decides that the claim must be rejected on the ground that the Applicants have no legal right or interest" p. 346 (mimeographed edition of judgment).

ing the case without reaching the merits, although the Court saw fit to label this fifth ground as a holding on the merits.

Before we go into these technicalities any more deeply I think a word is in order about some of the background of South-West Africa and the legal instruments that were before the Court in this case. South-West Africa was seized by Bismarck in 1889 on behalf of Germany. During World War I, the Union of South Africa seized it away from Germany. At the end of World War I, because of the principle of self-determination that was advocated by President Wilson and the accompanying principle of non-annexation, such territories were not permitted to be taken over but were instead placed in a system like trusteeship called "mandates."

At the end of World War II there was an interval between the organization of the U.N. and the subsequent final termination of the League of Nations. An orderly transfer of most Mandated territories to U.N. auspices took place before the League of Nations had technically expired. South Africa, however, never agreed to put South-West Africa into the category of a trusteeship territory. Through the intervening years since the World War II South Africa has, I think it is safe to say, increasingly incorporated South-West Africa into its own domestic regime, including the imposition in that territory of its unique system of apartheid, which is the fundamental basis for the objections that led to this law suit.

Now let us get clearly in mind the judicial background of the present decision, established in the three earlier Advisory Opinions going back to 1950. I would like to read a summary of the holdings of those, taken from a statement by the U. S. State Department a few days ago.

The principles governing the Mandate were the subject of Advisory Opinions of the International Court of Justice in 1950, 1955 and 1956, which the Court issued at the request of the United Nations Assembly. These Advisory Opinions established that the Mandate continues in effect and that South Africa cannot alter the status of the Territory without the consent of the United Nations, that South Africa continues to be bound under the Mandate to accept United Nations supervision, to submit annual reports and to forward petitions to the United Nations General Assembly, as well as to "promote to the utmost the material and moral well-being and the social progress of the inhabitants." The Judgment of July 18th has not diminished the legal authority of these Advisory Opinions.[12]

[12] U.S. Mission to the U.N., Press Release No. 4893.

Whatever concessions may have been made at the hearings in this case concerning the testimony given by witnesses for South Africa, the fundamental issue remaining was whether the policy of *apartheid* violated the duty imposed by the Mandate upon South Africa to ". . . promote to the utmost the material and moral well-being and the social progress of the inhabitants." [18] Mr. Hynning speaks as if, I think he said, there had been no oppression of the non-white people of South-West Africa. Whether *apartheid* constitutes oppression perhaps is a matter of opinion, but in any case it is easy to imagine that those who are on the wrong side of *apartheid* might feel oppressed and might very well feel that the government imposing that system upon them was not "promot[ing] to the utmost the material and moral well-being and the social progress" of those people on the wrong side of *apartheid.*

Now what were the issues in the case? Here they are, as framed by the applicants, Ethiopia and Liberia, in May of 1965. First that South-West Africa is a territory under a Mandate, that the Mandate still exists. This of course was already found to be the case in one of the Advisory Opinions. Second, that South Africa continues to have the international obligations provided in the Covenant of the League and the Mandate. The third submission by the applicant States was that South Africa practiced apartheid, that such practice was in violation of its obligation under the Mandate, and that it has a duty to cease the practice of apartheid in the territory. The fourth submission was that South Africa has, in the light of applicable international standards or international legal norms or both, failed to "promote to the utmost the material and moral well-being of the inhabitants." Fifth, South Africa has treated the territory in a manner inconsistent with its international status in violation of its obligations. Sixth, that it has established military bases within the territory. This assertion was officially withdrawn by Mr. Ernest Gross, the lawyer for the plaintiffs, in the course of the hearings. The applicants sub-

[18] The full text of Article 2 of the Mandate is as follows:

"The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

"The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate."

mitted that South Africa has failed to render to the General Assembly the required annual reports. There is no question about that; those annual reports were undeniably not submitted. The only question was whether South Africa still continued to have the duty to submit them which was established by the Mandate. These are the major legal issues that were before the court as viewed by the applicants.

Now let me read a few words from the opinion of the "majority" in, first of all, trying to dispose of the 1962 decision on the preliminary objections. Judge Jessup incidentally said that the 1962 decision in his view made *res judicata* the point on which the court based its decision.[14] Here is the Court's explanation of why the 1962 decision did not bind it in 1966: "The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection."

Of course that is all right if you concede that the question now before the Court is on the merits. If, however, you feel that the question before the Court is still a preliminary objection, you might not agree that there was any such distinction. By the way, the Court did not seem confident in labeling the point on which it went off as being one on the merits pure and simple. It said there were two kinds of questions on the merits, those purely on the merits and antecedent questions on the merits, and it labeled this particular question an antecedent question on the merits. Nevertheless, it was a question on the merits, and since it was a question on the merits, it had automatically not been disposed of on preliminary objections, even though there was some sort of overlapping of some kind. The Court noted that it may occur that a judgment on a preliminary objection touches on a point on the merits, but this it can do only in a provisional way to the extent necessary for deciding the question raised by the preliminary objections.

The Court went on to say that "to hold that the parties in any given case belong to the category of States specified in the clause," that is the jurisdictional clause, "that the dispute has the specified character—and that the forum is the one specified—is not the same thing as finding the existence of a legal right or interest relative to the merits of the claim." In other words, even though we say that Ethiopia

[14] "This [1962 holding] is a clear decision that Applicants have *locus standi* and the point is *res judicata*." p. 355. Judge Jessup also said that the court was "in effect reversing its Judgment of 21 December 1962." p. 348.

and Liberia fall squarely within Article 7, the clause of the Mandate allowing reference to the Court, there still must be something additional established on behalf of the plaintiffs. Otherwise they are not able to avail themselves of this jurisdictional clause. And in order to sustain that position the court indulges in what Judge Jessup calls, as I remember, an "artificial distinction." [15]

The Court said that within the terms of the Mandate there are two kinds of clauses, two kinds of provisions. One is what the Court called the "special-interest" provision and the only special-interest provision that the Court found in this mandate was the provision allowing missionaries from member countries, including of course missionaries from Liberia and Ethiopia, to go to South-West Africa and ply their trade. The Court said that if this had been a missionary case then Liberia and Ethiopia would have had the necessary standing that they must establish besides bringing themselves squarely within the language of the jurisdictional clause. What a shame, as Judge Jessup pointed out, that there were not some missionaries involved in this case, because if there had been, the applicants could have gotten past this jurisdictional hurdle and could have sort of incidentally gotten the determination at least of the question of whether the mandate still persisted.

The Court said that there were these special-interest provisions and then there was another category into which all other provisions fell, which they labeled as operational provisions. The Court said parties like Ethiopia and Liberia had no standing on operational provisions. In spite of this very simple and plain language, there had to be something more established. It was not enough for Ethiopia and Liberia to show that they were members of the League of Nations. They could not on that simple ground alone and solely exercise their right to go to the Court, because they had to show additional language

[15] "The Judgment accepts or rejects certain conclusions by the test of their acceptability as being reasonable. By this test I find it impossible to find that because the 'missionary' rights under Article 5 may constitute what the Judgment calls 'special interests' rights, or may have what it calls in some contexts a 'double aspect,' the Applicants' legal right or interest to prosecute a claim to judgment in regard to missionaries, must be admitted but that they have no such right or interest in regard to the practice of apartheid. This seems to me an entirely artificial distinction and, as I have shown, not supported by the history of the drafting. Because Applicants did not specifically invoke Article 5 in their Applications, the Judgment denies them the right to obtain a finding whether the Mandate—on which any such right would rest—still subsists." Jessup, J., pp. 452-453.

somewhere establishing more than that. The Court is not clear as to what more could have been said that had not already been said in Article 7, but something more had to be there, said the Court, and Ethiopia and Liberia simply had not found it. I suppose that if Article 7 had repeated itself, so as to lend emphasis to its terms, this might have been enough, but I submit that there is grave question whether the Court has not simply read this very plain and simple language right out of the Mandate.

Now, I don't want to have you merely take my views on this. I would like rather to quote a few words from the dissenting opinion of Judge Jessup, and then I'll finish up. Midway in his 150-page dissent Judge Jessup says the following:

> . . . the argumentation in the Judgment of this Court in this South-West African case, in challenging the right of any State to secure judgment of this Court in cases where the right of judicial recourse is granted by treaty but where the applicant State does not allege a particular substantive legal interest would—if it were correct—lead to the conclusion that the large body of the United States common and statutory law on the matter is almost a juridical impossibility. In the American jurisprudence there are cases which insist that the plaintiff should show direct injury to his interest, as in some of the taxpayers' suits. But this is by no means the universal rule. A "taxpayer, or *citizen and voter,* has such an interest in the form of government under which he lives as to be entitled to maintain the action for a declaratory judgment with respect to matters relating thereto," e.g. matters "relating to an amendment of the city charter with respect to the election of councilmen," citing 26 *Corpus Juris Secundum,* p. 271.
>
> A State, a member of the international community, has a stronger and even more direct interest in matters relating to the fulfillment of fundamental treaty obligations contained in a treaty which has what may fairly be called constitutional characteristics.[16]

There are many more provisions, sentences, phrases, from Judge Jessup's opinion that I would like to have you hear, but time is limited. The underlying basis for the Court's decision that something more has to be shown than the very clear language of Article 7 seems to be that, since there were quite a few members of the League of Nations, it would be administratively inconvenient if each one of them had the right to take South Africa to court. The ICJ makes this very clear when it says that South Africa would be put in an impossible position because it would be caught in a cross-fire of different viewpoints, if each and every member of the League of Nations in fact had the power to take it to court.

[16] Pp. 411-412.

But the gaping hole, to my way of thinking, in that reasoning is that each member of the League did *not* have the right to take South Africa into a *separate* court. There were not as many different courts as there were members of the League. There was only one court, the PCIJ and now the ICJ. While there might have been as many different views of *apartheid* as there were Members of the League, there is and was only one court into which objections to *apartheid* could be taken, so naturally there would only be one set of rulings on whether South Africa's conduct of the Mandate was adequate. Therefore, the administrative difficulty argument, the administrative difficulty reason for disregarding the plain language of the jurisdictional clause, seems to me to carry no weight whatsoever.

I for one am forced regretfully to the decision that the reasoning in this case, either on the question of the status of the 1962 decision or on the question of what Article 7 means, or both, is not of such compelling power that we can expect the world at large to be given a feeling of confidence in the ICJ. In fact I am afraid we must anticipate a wide-spread feeling of disillusionment which, for one thing, may very well result in a considerable drive in the coming session of the General Assembly to elect to the five places on the court that are up for election people who *prima facie* appear to be amenable to the wishes of the majority of the General Assembly. That in itself would seem to be an unfortunate development, purely apart from whatever harm may have been done to the principle of international peace through law in general. Thank you.

MR. INMAN: Thank you, John. We are going to open this up to questions, and I hope we do have many questions. But before that we have a request from Sir Percy for one minute or a half minute for a supplemental presentation.

MR. HYNNING: This is not by way of rebuttal. I think that the decision of the World Court should inspire confidence in the Court because it did not bow to tremendous political pressure in the name of race, because it decided that an international tribunal basing its jurisdiction on consent is not going to jump in and exercise that jurisdiction unless the record is clear that consent has been given to the kind of case or controversy presented to it. I think the Statute of the Court does not use our constitutional concept of "case or controversy," but I think that is the issue here: Did Ethiopia and Liberia present within

our legal concept a real case or controversy affecting a tangible material legal right or interest?

MR. INMAN: Do we have any questions from the floor?

QUESTION: I think the nub of the whole juridical point of view is the question of the character of the 1962 ruling on the preliminary objection and I would like, Sir Spender, (is that your name, Sir?) you to give us a little more on why the 1962 opinion that Ethiopia and Liberia had standing to file the suit *a fortiori* should not have the effect of *res judicata?*

MR. HYNNING: That is certainly the view of Judge Jessup. It is not my view. Nor was it the view of the Court. We have heard a lot of talk here about the plain meaning of the adjudication clause. I am not one who wants to make a fundamental argument on "plain meaning," because what is plain momentarily may be rather complicated and confused a little later. But it seems to me, nonetheless, that a preliminary objection to jurisdiction is not a final dispositive judgment on jurisdiction, particularly if the question is a double one. Is this a state that was on the proper roster of states that were members of the League of Nations? That is Question 1. Second, does the adjudication clause in saying that a dispute may be submitted mean a dispute involving a legal right or interest? I think the Court plainly said a dispute does not mean just a disagreement; it means a dispute affecting a legal right or interest.[17] For example, we have this same provision spelled out in a little more detail in possibly a more sophisticated international document dealing with the World Bank Convention on the Settlement of Investment Disputes. There it was explained that an investment dispute must affect a legal right and interest and not a political dispute. This was done about two years before this case was decided. I think this is basic to international jurisdiction of international tribunals. International tribunals cannot, should not, must not decide a case merely because it is politically desirable. That is not law—that is politics, and that is not the function of the tribunal. I don't know if I can say more to persuade you that the 1962 ruling cannot have been a final, irrevocable decision on the law between the parties. Even before this decision was announced, Great Britain had announced that it is not going to follow the rule of *stare decisis* automatically. Of course we do not do it in the United States anyway.

[17] *Cf.* definition of "dispute" in note 8 *supra.*

QUESTION: May I ask a question? I would like to hear Mr. Hynning comment on giving Sir Percy two votes.

MR. HYNNING: It certainly is not the rule that our distinguished chairman [Dr. Re] follows, although he may want to secure an advisory opinion. But this apparently is the unquestioned practice that a tie-vote is a second vote; not that the president abstains.[18]

CHAIRMAN RE: I would like to ask a question, if I may resort to the lofty status of member of the Section. I am impelled to ask it, Mr. Hynning, because I believe you said that the Court should not interfere if it seems politically desirable. First of all, I consider that a prejudicial way of phrasing the issue. The question is not one of interference; the question is, "was there jurisdiction?" This is a perfectly proper question, and one that most tribunals must pass upon in the first instance. Secondly, do you imply by the political reference that there is no such function which is proper for the court to pass upon? Is it not really a form of judicial statesmanship? Also, to what extent would you consider it improper for the Court to consider the moral question involved? You said earlier, that the Court implied, or said in the opinion, that a moral rule is not a norm to be followed at all unless it is expressed in the form of a rule of law. As I know my legal history, were not many rules of law initially moral norms? Do you think that the Court gave any consideration to the effect that the decision would have from the standpoint of world leadership? Regardless of what lawyers will say about the jurisdictional question [page 27], what is world opinion going to say of the role of the Court as to the substantive question of *apartheid?* Do you think that would be an improper consideration for an international tribunal, and, if it is a proper consideration, do you think that it was considered by the Court?

MR. HYNNING: I am not sure if I remember all these questions. I do not think that I was correctly quoted. I did not say that a court should not decide a political question. I said that I think it should be heartening to us here in the United States where we have frequently heard criticism of the World Court on the ground that it includes judges other than those of the common-law countries and particularly that it includes representatives of the Soviet or what we call the com-

[18] Article 55(2) of the ICJ Statute provides: "In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote."

munist system—I think it should be heartening to us that in a case where there are powerful political considerations, this Court refused to be rushed into the exercise of jurisdiction if it thought, on what I think are very substantial jurisprudential grounds, the Court did not have jurisdiction. It is not going to make a decision because it is politically desirable to make it. I think the Court was courageous here. The Court also thought that the issues of race relationships are going beyond the legal, and are getting into a political area and that it didn't want to do this, if it could avoid it. I think it tried to find a way out; I think it properly found itself out of jurisdiction.

With respect to the moral issue, you realize that unless the parties have submitted the case to be decided *ex aequo et bono,* it is confined to rules of law and not your beloved subject of equity. That is a clear distinction in the jurisprudence of the Court. I do not think moral considerations have the binding effect of law; they certainly are significant in the growth of the law; and the court certainly is not going to deny that. But the Court here is concerned with whether South Africa, in consenting to the jurisdiction of this Court or its predecessor in 1920, had agreed that any member of the League of Nations which did not like the policy it was following as a Mandatory, even though these policies did not impinge on any legal or material interests, nonetheless, could hail it under a compulsory jurisdiction clause before the World Court. Have I answered them all or did I skip some?

CHAIRMAN RE: I think perhaps we would like to hear what the Court actually said about the moral issue. When you spoke you referred to the language of the Court; that sounded extremely interesting; I would like to hear it again if I may.

MR. HYNNING: Now, if I can read my writing—yes, it is on page 37 of the mimeographed opinion. Unfortunately, only John Carey and I, and possibly Harry Inman, have page 37. It starts at the bottom of page 36:

> The court must now turn to certain questions of a wider character. Throughout this case it has been suggested directly or indirectly that humanitarian considerations are sufficient in themselves to generate legal rights and obligations and that the court can and should proceed accordingly. The court does not think so. It is a court of law and can take account of moral principles only insofar as these are given a sufficient expression in legal form. Law exists that it is said to serve a social need but precisely for that reason it can do so only through and within the limits of its own discipline, otherwise it is not a legal service that would be rendered. Humanitarian considerations may constitute the inspirational

basis for rules of law just as for instance the preambular part of the U. N. Charter constitutes the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to the rules of law. All states are interested, have an interest in such matters but the existence of an interest does not of itself entail that this interest is specifically juridical in character.

I may add my own view that if the World Court were to say it is operating on the principles of morals, I think the possibility of expanding its compulsory jurisdiction would be limited indeed.

MR. CAREY: I don't want to take too much time here but I do want to exercise a privilege at this point and respond to what has just been said. I think all this talk about morals, etc., is a beautifully contrived and elaborated straw man erected by the Court with great care, as though the other side were depending upon it, and then cut down straw by straw with such devastating effect that the reader is led to believe that the other side's case has been completely destroyed. But ladies and gentlemen, Ethiopia and Liberia were not asking the Court to apply *morals* in order to save their position. Ethiopia and Liberia were asking the court to apply *law*. They were asking the Court to apply the jurisdiction provision to which South Africa agreed those many years before. They were asking the Court to refrain from legislating Article 7 right out of the Mandate. I ask you to consider whether they did not actually so do.

Now I want to ask Sir Percy a question. Sir Percy, why did you not cast at least one of your two votes in favor of the following solution of this case? Namely, do away with all this, I won't use the word nonsense, choose your own word, about the parties not having standing in spite of their having been held in 1962 to have standing. Just let us set that aside and let us go a little bit into the merits, not terribly far, just to the point of holding what was declared in 1950 by the same Court in an advisory opinion. This much could have been held and no more.

It would not have been necessary to go further and get into the merits of the claim that *apartheid per se* violates the duties of the Mandatory, for the very sound reason that the applicants had asked the Court to so hold as a matter of law without putting on any evidence of their own. It would have been certainly adequate for the Court to have said, yes, the Mandate still is in existence as we said already back in 1950, but we do not get to the question of a possible violation of the Mandate because we do not so rule as a matter of law. We do not, as requested by the applicants, rule as a matter of law that there has

been a violation of the Mandate. We rule instead that this is a question upon which the applicants must put on their evidence.

MR. HYNNING: I think there is a very simple and I believe cogent answer to your question. You are all familiar with the story about the woman who said that she was only a little pregnant. The moment you say you are going to decide a little bit of the merits, where is the stopping point? I think the Court said it did not decide and it said so expressly, whether the Mandate continues or it does not continue, because that is a question on the merits. If it were to decide that question, I do not see any basis on which it could not then be held accountable in saying whether *apartheid* is per se in violation of international law. I think it is very plain that the Court did not say the Mandate did not exist. You have an Advisory Opinion in 1950 which says the Mandate continues to exist. I know that South Africa made the argument that the mandate had ceased. But there is nothing in this opinion which would give any support to that, and certainly our State Department in considering the effect of this case says that very plainly that part of the advisory opinion is still part of the advisory opinion, unaffected by this decision. I would say that what you are suggesting is that I do go down the primrose path.

QUESTION: Considering the nature of the so-called majority opinion, and considering the frustration which this decision is bound to cause in all the non-white countries of the world, I would like to ask whether the court did not realize that it should have indicated some way in which this question could be solved. If two African nations who are considered legitimate complainants were not within the adjudication jurisdiction, who could bring this issue before the court?

MR. CAREY: Well, I certainly agree with you, sir, that the Court would have done much better if it had been more constructive and shown some way out. The situation now is one of utter frustration, and the only way out that probably appears from the standpoint of the defeated interests is to pack the Court, and I should think they very well would pack the Court, which is too bad.

I think that our own Supreme Court, whatever your personal views may be as to the decisions since 1954 on school segregation, I for one feel that the Supreme Court showed great statesmenship in the procedural manner in which it has handled those cases, declaring initially that a certain principle was so, and then calling the parties to come back to it a year later with their own ideas on the proper

carrying out of that principle, and gathering all interested parties in from time to time for what almost reached the stage of being a kind of administrative procedure more than a judicial one. The Court in my opinion showed a very great imagination in the way those cases were handled in the first couple of years before the executive and legislative branches of the government really became involved.

I should think that this International Court could have done likewise, and I am sorry they did not. I am sorry, for example, that they did not accede to the invitation of South Africa to actually visit South-West Africa. I think that this would have done a great deal to alleviate the pressure within the U. N. for the establishment of a U. N. presence in South-West Africa. For some reason the applicants decided they did not like that proposal, but it would seem to me that if the Court had gone there, involved itself, even over a greater period of years than that during which it has already been involved in the solution, gradually from some place would have appeared a way out so that this dreadful feeling of frustration that now hangs over all parties would have not existed.

MR. HYNNING: The question assumes that an international tribunal has jurisdiction equal to the problems of the world. It does not. Its jurisdiction is limited to that which is conferred upon it by virtue of an international agreement or by some declaration of the parties. While there may be a need to which our own Supreme Court may respond, it is exercising an entirely different kind of jurisdiction under a constitution which gives judicial power over all cases and controverses arising under the Constitution. We did not have that here.

I submit also that if the original school segregation cases had been brought on behalf of some party far removed from the scene in terms of a tangible specific interest involving particular school districts or particular children—merely, let us say, by some social organization which did not like the principle of school segregation but did not have any children, I do not think under the cases-and-controversies doctrine of our courts there would have been jurisdiction.

I submit to you, tested by our own constitutional standards, do you think the fact that Ethiopia and Liberia do not like the doctrine of *apartheid* gives them a sufficient legal interest to invoke the compulsory jurisdiction clause under the Mandate? Is that a legal dispute? Or is that a political dispute which belongs outside the Court? I submit that there is a feeling of frustration because you do not like the

decision you got. But is that a reason for going against the Court if the Court does not have jurisdiction?

MR. INMAN: What we need is more missionaries.

QUESTION: I hate *apartheid.* I think it is a damnable doctrine. I am very sorry that there is no chance to have a judgment on it. But, hearing both the speakers or protagonists I have come to the conclusion that the so-called majority was right. I must, therefore, rise to defend Sir Percy Spender to say that the decision would have had to be the same as if he had not voted twice. At the same time I feel that this is only a jurisdictional decision. It is not a decision on the merits at all and if the Court had gone a little bit into the merits it would have been indulging in *obiter dicta.* The Court's personnel differ from what it was four years earlier. That kind of thing happens not infrequently. There is in our jurisprudence no such a thing as the law of the case. It is *res judicata* only when you have had a final definitive judgment, not merely an interlocutory order. An interest in the plaintiff, as distinguished from other people in the world, has always been regarded as necessary; and violation of the interest by the defendant is necessary that there may be an action. It is a very difficult question on the language of the Mandate as to whether anybody, any nation that is, that was a part of the League of Nations cannot have what I would think would be only a declaratory judgment. But that is an unusual thing. Now, as you see I went along with Mr. Hynning, but would like to see whether he would not admit that the so-called majority opinion is wrong when the Court tries to say that it has not decided against the 1962 opinion on the interlocutory order four years before. Now this court has changed its mind and it ought to have said so for the 1962 opinion did not bind the other now. Don't you agree with that Mr. Hynning?

MR. HYNNING: I thought I said in my opening remarks that the only part of the opinion I do not like is the characterization of the '62 opinion as not being overruled. I think that in this connection the observations of the *ad hoc* judge for South Africa are a little more forthright in saying that he thought the '62 opinion was being overruled with respect to the case or controversy or legal dispute nature of the case. And I think it possibly would have been better if the majority had said that. Perhaps I had not heard of the recent action of the House of Lords in abandoning the doctrine of *stare decisis* as

an invariable rule of decision. If I write this opinion again I will bear that in mind.

I would like, if I may, to say something about frustration. I was really startled when Mr. Ernest Gross declined to call any witnesses. Here we had had debates within the General Assembly of the U.N. stretching from 1946 until yesterday or today, and there has been a complaint they haven't had a forum in which to make charges against South Africa and to controvert the denials by South Africa that the maximum interests of the indigenous population were not being promoted. Here was a tailor-made opportunity in an international forum to present witnesses, to give oral testimony, to cross-examine. What a magnificent opportunity for the African states to make a case against South Africa! Then their counsel threw it away—by calling no witnesses, by saying he conceded everything South Africa has averred or has denied, and by not questioning it. Now I do not understand why that was done. The implication of course, is that the African states did not have the evidence to show that the indigenous population of South Africa was being oppressed or treated in a manner differently from certain indigenous populations in other parts of Africa. When South Africa invited the Court to come down for an on-site visit, it said the Court should also visit Liberia, Ethiopia and a few other countries in Africa. The Court refused.

QUESTION: My point was that there was nothing that needed to be talked over.

CHAIRMAN RE: It is with great pleasure that I express the appreciation of the Section to Harry Inman for having utilized the time devoted to his Division to bring us this fine and outstanding program. Harry, please accept our thanks.

HARRY INMAN: I think thanks should go to Cliff Hynning and John Carey for a wonderful presentation in which they both believe.