

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

SOUTH WEST AFRICA CASES

(ETHIOPIA *v.* SOUTH AFRICA;
LIBERIA *v.* SOUTH AFRICA)

VOLUME XII

1966

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRES DU SUD-OUEST AFRICAIN

(ÉTHIOPIE *c.* AFRIQUE DU SUD;
LIBÉRIA *c.* AFRIQUE DU SUD)

VOLUME XII



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LIBÉRIA *c.* AFRIQUE DU SUD)



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VOLUME XII



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The present volume contains the end of the evidence of witnesses and experts and of the oral arguments on the merits (26 October-5 November 1965), as well as the documents submitted to the Court after the closure of the written proceedings and the correspondence in the *South West Africa* cases. The beginning of the oral arguments on the merits and the evidence of witnesses and experts (15 March to 15 June 1965) is published in Volume VIII, pages 105-712, Volume IX, pages 1-658, Volume X, pages 1-558 and Volume XI, pages 1-708. The proceedings in these cases, which were entered on the Court's General List on 4 November 1960 under numbers 46 and 47, were joined by an Order of the Court of 20 May 1961 (*South West Africa, Order of 20 May 1961, I.C.J. Reports 1961*, p. 13). Two judgments have been delivered, the first on 21 December 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319), and the second on 18 July 1966 (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6).

Cross references correspond to the pagination of the present edition, the volume being indicated by a roman figure in bold type.

The Hague, 1966.

Le présent volume contient la fin des dépositions des témoins et experts et des plaidoiries sur le fond (26 octobre-5 novembre 1965), ainsi que les documents déposés après la fin de la procédure écrite et la correspondance, dans les affaires du *Sud-Ouest africain*. La première partie des plaidoiries sur le fond et des dépositions des témoins et experts est publiée dans le volume VIII, pages 105 à 712, le volume IX, pages 1 à 658, le volume X, pages 1 à 558, et le volume XI, pages 1 à 708. Ces affaires ont été inscrites au rôle général de la Cour sous les n^{os} 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

Les renvois tiennent compte de la pagination de la présente édition, un chiffre romain gras indiquant le numéro du volume auquel il est renvoyé.

La Haye, 1966.

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*held from 15 March to 14 July, 20 September
to 15 November and 29 November 1965, 21 March and on
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SECTION B

PLAIDOIRIES RELATIVES AU FOND

AUDIENCES PUBLIQUES

*tenuës du 15 mars au 14 juillet, du 20 septembre
au 15 novembre, le 29 novembre 1965, le 21 mars
et le 18 juillet 1966, sous la présidence
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24. HEARINGS OF THE WITNESSES AND EXPERTS (*concluded*)

AT THE PUBLIC HEARING OF 20 OCTOBER 1965

Mr. GROSS: Mr. Possony, in respect of your testimony directed to the point that attempted application of international standards—I will concentrate on that for the moment—relating to governmental policies of discrimination would, in many instances, have an adverse effect on the well-being and progress of the persons concerned, what significance or meaning do you attribute to the word “discrimination”?

Mr. POSSONY: In a line on page 493 of the Reply, **IV**, it is said that the terms are used in their prevalent and customary sense. According to the *Concise Oxford Dictionary* the word “discriminate” means “be set up or observe a difference between or distinguish from another, making a distinction”. Then there is a parenthesis which says “discriminate against, distinguish unfavourably, of taxes for example” or “observe distinctions carefully”. Now the dictionary here says essentially, as I understand it, that the word discriminate or non-discrimination is meant simply to describe a difference of fact, that you have a situation of differences in reality and you take those into account. It does not have, in the prevalent and customary sense, a meaning either of discriminate against, which is what the dictionary refers to, or discriminate for, in favour of, which would also be a meaning. That, I think, is the meaning of page 493, that discrimination is essentially a neutral term.

Mr. GROSS: So that your testimony with respect to the existence or attempted application of international standards, as defined on **IV**, page 493, assumed, if I understand you correctly, that the word “discrimination” was used in a neutral sense, that is, equivalent to meaning any distinction or differentiation, whether benevolent or otherwise?

Mr. POSSONY: Well, in line with page 493, as I understand it, the word “discriminate” is used neutrally in the sense that no laws should be passed or, as it says here: “Governmental policy and action should be undertaken in line with a discrimination concept”; that is, as is also stated in the paragraph, the laws should essentially refer to individuals as such. That is what I understand this to mean.

Now, in the argument supporting the norm, various texts are quoted which, most of the time, use the word “distinction”, but at other times they do not use this word and I think a good example of this is here at **IV**, page 505 of the Reply. It is said, on the last line of the text:

“The Declaration makes it clear that racial distinctions, be they called racial discrimination, segregation, separate development, or *apartheid*, are unacceptable.”

In the Draft Convention on the Elimination of All Forms of Racial Discrimination in one paragraph discrimination, as I pointed out yesterday in my testimony, is linked to evil racial doctrines and practices of Nazism in the past.

Mr. GROSS: If I may interrupt you there, what document are you referring to, Sir?

Mr. POSSONY: That is E/CN₄/873.

Mr. GROSS: What is the title of the document?

Mr. POSSONY: It is the Draft International Convention on the Elimination . . .

Mr. GROSS: I see, you had referred to a Convention. Please continue.

Mr. POSSONY: Now, summarizing this whole area of semantics, it would seem that we have here a word, or a set of words, which can be interpreted in an entirely neutral, objective sense, as observing or taking into account the factual differences, or we have an extremely pejorative sense like Nazism, which is essentially genocide. As between these various terms and these different meanings, I think this is one of the difficulties here, it is not quite clear which is meant at what particular time.

Mr. GROSS: Mr. Possony, we will endeavour to clear that up. Now, with respect to the use of the term, pejorative or otherwise, the Applicants believe that they know what they mean by the term. My question directed to you was not one of semantics at all. It was, if I may repeat, and perhaps you feel you have answered it, in your testimony, directed to the point I have mentioned, what meaning or definition did you attribute to the word "discrimination"?

Mr. POSSONY: Well, it depended on the context. I think this varied, because I had to quote many texts. If you would be kind enough to specify the precise point, I will try to answer it.

Mr. GROSS: Did you use the term "discrimination" in any context, in which it had what you described as a pejorative sense?

Mr. POSSONY: Undoubtedly.

Mr. GROSS: Now, with regard to your understanding on the points to which you have testified, as set forth in the letter, paragraphs (a) and (b), did you understand the content of the standards, contended for by the Applicants, to apply to any differentiation or distinction, whether or not such differentiation or distinction involved discrimination in a pejorative sense, to use your term?

Mr. POSSONY: As I tried to clarify a moment ago, IV, page 493, and I will have to read it for what it says, does not say "pejorative", or perhaps better terms would be "disabling" and "enabling", using some of the language from India for example, but it uses it neutrally in the sense that governmental policies should not be made that are allotting status, etc., to groups rather than individuals. That, I think, seems to me to be the gist of the second paragraph on page 493.

Mr. GROSS: So that the answer to my question, is or is it not, that your understanding of the phrases used and the context in which they are used, whether for good or ill, is that they refer to a neutral concept of any differentiation or any distinction irrespective of its quality or character? Is that your understanding?

Mr. POSSONY: My understanding is that the norm, or I should say the alleged norm or the norm which is under debate, as it was tried to be defined says, in essence, that the governmental action, let us say a law, drawn in terms of groups, classes or races is *ipso facto* discriminatory and would fall outside the norm as it is argued and that the concern of the law should be the individual person.

Mr. GROSS: Can you answer the question yes or no, Mr. Possony, or do you feel you have already answered it? In the latter case I will not

badger you with the point any longer. Can you answer the question yes or no: whether you understood the term "discrimination", as employed by the Applicants, to mean and refer to any differentiation or distinction irrespective of its quality or consequence? Can you answer that question, yes or no?

Mr. POSSONY: No, I cannot, because I think the usage varies. I think on page 493 that the answer would be yes. In other contexts I do not think that would necessarily follow.

Mr. GROSS: I am talking about the standards defined and described on page 493 and I thank you for your answer.

I should like to ask you whether you have familiarized yourself, in the course of your preparation for these proceedings, generally speaking, with the Respondent's written pleadings and I refer specifically to those discussions in the Respondent's written pleadings concerning the existence and the content of international standards concerning official or governmental discrimination? Have you had occasion, in preparing yourself for these proceedings, to consult or read the written pleadings of the Respondent in that respect?

Mr. POSSONY: If I may ask a question, Mr. President, does this refer to the pages following page 493?

Mr. GROSS: I beg your pardon, Sir; I should have, in fairness, identified what I meant by the Respondent's written pleadings: I am talking about the Counter-Memorial and the Rejoinder, and would refer you to III, page 529, as an illustration of the nature of the issues joined here, and refer particularly to paragraph (g), which reads:

"In more recent times policies have been devised in various parts of the world with the specific ideal, to which Respondent wholeheartedly subscribes, of eradicating, avoiding or reducing to a minimum all undesirable aspects and manifestations of such group reactions, such as unfair discrimination, domination of one group by another, and the like."

Now, in connection with the phrase "unfair discrimination", would you regard, Sir, or say, as a political and social scientist, that the term "discrimination", as used in this context which I have quoted, is used in what may be called a prevalent and customary sense connoting detriment or inequality of treatment or some other adverse effect upon the object of the discrimination? Would you say, Sir, that the word "discrimination" in this phrase "unfair discrimination" is used in a prevalent and customary sense, in a pejorative sense?

Mr. POSSONY: It is used in a pejorative sense, there is no doubt about it, but whether it is used in a prevalent sense I bow to the *Oxford Dictionary* on that.

Mr. GROSS: May I just . . . I thought you had finished, excuse me, Sir.

Mr. POSSONY: Well, I would like to say that they obviously have full freedom to use the word under the heading of unfairness, in which case we would have specifically to analyse the particular cases of unfairness that may be aimed at by a particular declaration or convention. The question, it seems to me, has to be handled in two steps: first of all, you have to decide whether, in line with your own argument, you can, should, or must, or should never, write a law that recognizes the existence or non-existence of groups, and whether you can draft a law only for individuals, as in the sense of the 19th-century State concept of *laissez-faire*,

let us say for simplicity; or whether you recognize groups as a valid object of legislation. Now, once this is decided—and this is brought up by your formulation on page 493—then, obviously—and I quoted many examples—there is always the question of doing something for or against, and the very facts, very powerfully, in my judgment, call for positive, constructive action. So then the question comes down to whether a particular discriminatory measure—discriminatory now in the sense of distinguishing or differentiating between two groups—is either fair or unfair, or is constructive or destructive.

Mr. GROSS: Now, Sir, keeping our attention focused on the point in issue, to which I am attempting to direct your attention for the benefit of the Court's clarification, with respect to your testimony, involving as it did the use of terms discrimination, distinction, differentiation, and other terms, I now ask you, Sir, whether in your studies of the Respondent's written pleadings you have come across Book IV of the Counter-Memorial, II, page 475—do you have that before you, Sir? In paragraph 33, I call your attention to the following language:

"It [that refers in the context, I think you will find, to the policy of separate development or apartheid as it is used interchangeably if these pleadings] avoids the possibility of members of one population group feeling themselves threatened by the . . ."

Mr. POSSONY: Just a second, Mr. President, I have not found that.

Mr. GROSS: Page 475, paragraph 33, about 21 lines from the bottom, approximately. Have you found that?

Mr. POSSONY: Yes, thank you.

Mr. GROSS: Now, that "It", as you will notice, in the context referred to the so-called policy of separate development or apartheid.

Mr. POSSONY: Yes.

Mr. GROSS: Now:

"It avoids the possibility of members of one population group feeling themselves threatened by the educational and economic development on the part of others. [I particularly call this next sentence to your attention:] It avoids, also, the processes of discrimination in the private economic sector which appear to be virtually unavoidable in all cases where attempts are made at encouraging . . . integration between groups as divergent as African Natives and Europeans." (II, p. 475.)

Without soliciting your opinion concerning the policy of separate development or apartheid as such—I understand that your testimony was not directed to that point—do you consider, in the context of your testimony, that the Respondent's reference to "discrimination", unqualified by the word "unfair" or other adjective, in the context just quoted, is consistent with the customary or prevalent use of the word in the political and social sciences?

Mr. POSSONY: Mr. Gross, I think in this particular instance the term refers to an entirely different phenomenon than the one we have been discussing so far: up to now, we have been discussing Government policy, but now in this particular case you find that the term refers to the factor of discrimination as between human beings, if I understand it right—I have not studied this particular text—but that seems to be the meaning: that in a factory or in a business firm people are behaving in a discriminatory fashion as a matter of social fact—that is

the sort of thing I was discussing yesterday in terms of the United States, and it was considered not to be relevant to the subject.

Mr. GROSS: Now, do you consider, Sir, as a political or social scientist or both, that the use of the term "discrimination" in this context has a different meaning than it would have in another context, based upon the fact that it refers here to social discrimination of a private nature rather than governmental discrimination; would you say that changes the character or meaning of the word, as you use it in your testimony?

Mr. POSSONY: But it is an entirely different phenomenon.

Mr. GROSS: I see, Sir, so that you consider that the allegation or the contention made, in terms of your testimony, which is what we are trying to analyse, not to debate or have word games, it is your understanding that the term, as used in the Applicants' formulation of the standards, relates to any distinction or differentiation, irrespective of its character, as beneficent, benevolent, detrimental, or what have you?

Mr. POSSONY: On IV, page 493?

Mr. GROSS: I am talking, Sir, about the formulation of the standards. Now, Sir, let me just clarify that point in terms of your comment: page 493 is not a self-contained page in these pleadings, as you know, Sir, the sources and content are generally described on page 493, but there is considerable discussion elsewhere concerning the nature and content intended to be carried by those words—you understand that, Sir, do you not?

Mr. POSSONY: Yes.

Mr. GROSS: I am not, therefore, talking about any particular set of words, I am talking about the meaning underlying the words, and this is what we are attempting to clarify in terms of your understanding. Now, in those terms, Sir, did you or did you not understand the concept or the standards, for which the Applicants contend in this case, to make impermissible any distinction or differentiation on the basis of race, sex, etc., irrespective of its character, quality or effect? Or have you answered that question already?

Mr. POSSONY: I think I answered it, and I have to go back to what I consider, and what has, apparently, come up again and again in the proceedings, the key paragraph or the key point, which is on page 493; and in that text, irrespective of what follows in other parts, it is a matter of governmental policy in terms of group legislation.

Mr. GROSS: And of any type of differentiation or distinction, is that what you mean to say?

Mr. POSSONY: I re-read that the terms refer to governmental policies and actions, and then I skip a few words because that is on the positive part, saying this essentially and referring to individual persons as such—that is my understanding. That the rest of the argument and that perhaps the motivations of the whole question are beyond that, is certainly true.

Mr. GROSS: So that if your understanding is clarified, Sir, with respect to the actual intent, and if it were the case that the Applicants contend for standards which do not make impermissible any distinction or any differentiation as such, would that alter the basis upon which your testimony was given, Sir?

Mr. POSSONY: I do not think so, for the simple reason that in that case I would have to have the text to know exactly what the criterion is on which the permissible—let us say discrimination, the enabling

discrimination, is being made. As I understand it, and leaving aside the question of South Africa or putting it in only as an example, I have, as a political scientist, to decide when I look at this case whether you have policies of the Nazi style, which are genocidal, and which would obviously be entirely impermissible as far as I am concerned, or whether you have policies which are of an enabling character—this seems to me to be the question when you go beyond the argument that you should not just legislate for individuals, but should take into account groups. Do you have a Nazi policy or do you have an enabling policy, do you have a policy which brings about the improvement, the strengthening, the integrity of these various ethnic groups? Now, that is my understanding of the policy intent, but once you raise the question whether there is a permissible discrimination or not, I would have to see exactly what are the criteria of permissibility or non-permissibility.

Mr. GROSS: Now, Sir, without attempting, and I will not pursue this line too much further, to defend the language used by the Applicants—no doubt better wisdom would have suggested better language—without asking you to comment about that, Sir, would it be fair to say that you were not really sure what the definition meant in terms of your testimony? What the phrase “discrimination” as used therein meant? Would that be a fair question to ask you to answer?

The PRESIDENT: Now, Mr. Gross, what particular part of his testimony are you referring to?

Mr. GROSS: I am talking of the use of the term “discrimination” and I am asking the witness whether it would be fair to say that he just was not sure what it meant in terms of his response.

The PRESIDENT: Whenever it is used at any time, no matter in what context?

Mr. GROSS: I am talking, Sir, about IV, page 493, the description and definition of the standards to which this witness's evidence is directed, as I understand it.

Mr. POSSONY: Mr. Gross, or Mr. President, I should say, on page 493 the language is very clear. I do not feel that I have any particular doubt—I can easily argue about the meanings of these things, but I think the meaning is quite clear.

Mr. GROSS: The meaning, Sir, as quite clear is that it is used to mean any distinction or differentiation. Is that correct, Sir? Is that your understanding?

Mr. POSSONY: In terms of group legislation. The meaning is, so far as I am concerned, the State should legislate, having in mind the individuals and not the groups. It says this: “which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race”, but may be this is wrong?

Mr. GROSS: Sir, I am making an effort, and perhaps I will pursue this far enough to have it as clear as possible in my own mind, and for the benefit of the Court, to clarify the meaning you attach to key-words and phrases in connection with your testimony. This is my sole effort and I do not support the language we use, nor am I now trying to interpret it, this is between the Applicants and the Court, no doubt, Sir. I am trying to clarify, in fairness to your own testimony and its understanding, what meaning you gave to the word “discrimination” as used, and I think perhaps you have answered that, Sir.

Mr. MULLER: Mr. President, the witness has answered that question.

I had put to him my understanding of the Applicants' case, and that is that the case was that you should not distinguish on a basis of group, class or race. I was then asked to read to the witness page 493, IV, which I did, so my learned friend must adhere to page 493 when he asks the witness questions like that, or he must abide by my interpretation of the case, and that is the basis upon which the witness has answered the question.

The PRESIDENT: I think it is not as simple as that, Mr. Muller. That is the reason why I asked Mr. Gross, when he referred to the use of this term, in what context did he use it, as it has been used at different times and in different documents, and may not have the same meaning in different documents. That is why I earlier said to you to put to the witness, and you did, the actual words at page 493 of the Reply. As is there indicated, appears a definition of the norm or standard relied upon by the Applicants. It is not a general description, it is a definition.

Mr. GROSS: Yes, thank you, Sir. Exactly, Sir. Now with respect to your testimony with regard to various United Nations actions and resolutions and so forth, I call to your attention, Dr. Possony, Article 55 of the United Nations Charter, which reads in relevant part, as you know:

"... the United Nations shall promote:

- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Now, Sir, did you, or did your testimony, with regard to the existence, or otherwise, of the application, or otherwise, of standards of non-discrimination, take into account the existence of Article 55 of the United Nations Charter?

Mr. POSSONY: Mr. President, in covering a large body of evidence, it is always extremely difficult to decide what you put in and what you do not put in, and we had trouble in the testimony on that very point, and I made the assumption that the one thing I can cut out is the discussion of the provisions of the United Nations, because the United Nations provisions, as quoted in the Applicants' text here are quite familiar. As to Article 55, I would say that . . .

Mr. GROSS: Mr. President, I asked the witness, if I may interrupt Dr. Possony, whether he had taken Article 55 into account in connection with his testimony, so if the witness wishes to elaborate his views with respect to the policies or substance of the matter, if the Court wishes, that is all right with me, but it is . . .

The PRESIDENT: That was the question, Professor, and it is important to be responsive to the question, and we would appreciate it. What you indicated was that in the course of your testimony you did not refer to this particular matter because it was already before the Court, and for that reason I understood you to say that you did not refer to it specifically in the course of the testimony.

Mr. POSSONY: That is correct.

The PRESIDENT: That is not the question which Mr. Gross put to you. The question as I understand it is, did you consider this in effect in preparing the general trend of your testimony, or did you omit it from consideration altogether?

Mr. POSSONY: I had considered it. I was just about to reply to it in detail, but the . . .

Mr. GROSS: Now, I should like to ask you, perhaps what you were about to comment upon, Sir, and that is: is it your understanding, or is it the basis upon which your testimony is given, *inter alia*, that Article 55, paragraph (c), of the Charter envisages or is directed toward the elimination of all differentiation between races, or sexes, or language groups, or religious denominations? Is this your understanding of the purport and effect of Article 55 (c)?

Mr. POSSONY: Not at all, Mr. Gross, the Article is under the heading of "International Economic and Social Co-operation" and paragraph (c) is the third subparagraph. The Article deals with the condition of stability and well-being, which are necessary for peaceful and friendly relations among nations, and these include respect of principle of equal rights and self-determination, so this is the general import of the full Article. The implementation of this general point calls for ensuring "higher living standards", "full employment", and so on, I will not read it all, to get into (this is under (b)) "health problems", "social problems", and under (c) it is said "human rights and fundamental freedoms" with "universal respect for, and observance of, human rights and fundamental freedoms . . .".

Now, it seems to me that it is self-evident that implementation should be done in this way, and I would certainly agree that this has a general meaning. It is, however, a repetition of a general principle applied to a specific problem.

Mr. GROSS: Sir, could you answer my question, yes or no, with such qualifications as you may think appropriate? Did your testimony reflect, or was it in whole or in part, based upon an assumption on your part that Article 55, paragraph (c), referring to "without distinction as to race", etc., purported to, or was directed toward the elimination of, or to encourage the elimination of, all differentiation, any governmental differentiation, on the basis of race or sex, etc. Do you understand this Article to mean that, Sir?

Mr. POSSONY: No, Sir, I do not think it has anything to do with that problem.

Mr. GROSS: You do not think the word "distinction" . . . I am sorry, Sir. May I focus your attention on the words "without distinction". Do you regard the words "without distinction" as used in that context to mean that there should be no differentiation of any kind between men and women, for example, or between groups, minors and persons of age, or between other groups?

Mr. POSSONY: Mr. President, I have difficulty in that I think Mr. Gross tries to interpret this particular passage in a general way and I interpret it in a specific way, and I interpret the language of Article 55 first of all within the context of Article 55. Now, to give an easy example, this Article talks about health and related problems, and I would interpret this to mean that in the application of what is done under the main paragraph of Article 55 and (a) and (b), no distinction should be made. For example, you find a new medical cure, well, it is self-evident that the medical cure be made available to everybody who needs it, regardless of race, sex, language or religion. The same thing applies to living standards; if living standards can be made to improve, then obviously there should be improvement for everybody, and there should not be a policy

which would have to be a negative group policy, saying our living standards have to increase and yours have to stay down. That would be impermissible under this heading. So I cannot but read this language as referring specifically to what the message of this Article is.

Mr. GROSS: I will endeavour to suggest methods by which perhaps shorter, more responsive answers might be given. It is my fault, I am sure, in the form of my questions, that they are not otherwise. I think, Sir, that the point I am attempting to elucidate is whether or not you consider, and it is part of the basis of your testimony, that the words used in Article 55 (c), the phrase "without distinction", whether that is taken by you to set forth a standard or principle which would prohibit any differentiation on the basis of race, or sex, or creed?

Mr. POSSONY: Of course not. But I did not write page 493 (IV).

Mr. GROSS: Thank you, Sir. Now, with regard to the existence, or otherwise, and the applicability of the standards contended for by the Applicants, did you take into account in your testimony that portion of the definition or description which appears on page 493, and which is as inherent a part of the definition or description as any other part? It reads:

"Stated affirmatively, the terms refer to governmental policies and actions, the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such."

My question to you, very simply, is—you can answer yes or no—did you take into account that term or portion of the definition in terms of any of your testimony?

Mr. POSSONY: No, Sir.

Mr. GROSS: Now, with respect to the question of equality of opportunity and equal protection of the laws, would it be within the normal and prevalent customary use of the term "discrimination" to refer to phenomena, political, social, economic phenomena, in which persons are denied equality of opportunity and equal protection of the law; would that be a prevalent and customary use of the term "discrimination" in the political and social sciences?

Mr. POSSONY: In the political and social sciences we can certainly use it this way, but whether it is prevalent or not I am not going to reply to this because it depends on the author. It would be a perfectly logical use.

Mr. GROSS: Yes, Sir. Now, with respect to the issue as joined, in terms of the content and application of the standards for which the Applicants contend, I call to your attention the Rejoinder, V, page 131, in which the Respondent discusses the Applicants' contentions regarding the norm and/or the standards, and specifically with reference to Article 55 of the United Nations Charter. I call to your attention, Sir, on page 131, Respondent's statement that, after quoting the relevant portion of Article 55, that is to say, sub-paragraph (c):

"Respondent is as desirous as any other Member of the United Nations to achieve the above-quoted purpose, but does not agree with the meaning attached to the provision by the Applicants. In Respondent's submission it would be entirely anomalous to suggest that any *differentiation* (as distinct from *unfair discrimination*)

between races, sexes, language groups or religious denominations would involve conflict or inconsistency with the said Article."

And then further down on the page, beginning at the last paragraph, it is stated:

"It is submitted, therefore, that the Charter did not purport to establish any obligation not to differentiate between members of various groups, but was concerned merely to prevent oppression and unfair discrimination."

And then it goes on to refer again to the Applicants; the version given in the written pleadings and later in the Oral Proceedings to the Respondent's interpretation of the Applicants' meaning, as distinguished from the Applicants' meaning.

Now, Sir, with respect to the terms "differentiation" and "discrimination", as used in the context on page 131—was your testimony based upon an assumption that those were synonymous concepts, or synonymously used terms, "differentiation" and "discrimination"?

Mr. POSSONY: Mr. President, I think I have this difficulty, that we have to decide whether I am supposed to interpret the United Nations Charter, or the interpretation of the Charter by the Applicants. In interpreting the United Nations Charter I am very certain—I do not think, at least—that the word "differentiation" is not meant, or let us say this particular paragraph 55 (c), is not meant to imply that distinctions between sexes, for example, should be disregarded. It would not be feasible and I do not think this ever occurred to the drafters.

The PRESIDENT: It is not for the witness to tell the Court what is the meaning of the Charter of the United Nations, that is a matter for the Court. But Mr. Gross is cross-examining you to ascertain your mental processes: it is not to get your interpretation, because Mr. Gross knows that that is something he cannot get. He is seeking to get your mental processes for the purpose of determining the weight to be accorded to your testimony.

Mr. POSSONY: In this case, of course, I have interpreted Mr. Gross' Submission on page 493, IV, and according to that, differentiation as such would not be allowed.

Mr. GROSS: Would not be what, Sir?

Mr. POSSONY: Would not be allowed, would not be admitted.

The PRESIDENT: That means the definition at page 493 of the Reply?

Mr. POSSONY: Differentiation as to groups would be ruled out.

Mr. GROSS: That is your understanding, Sir?

Mr. POSSONY: That is my understanding.

Mr. GROSS: And it was on the basis of that understanding that your testimony was directed. I think you have already said that, Sir, is that not correct?

Mr. POSSONY: If I may follow it up for one second I think I can show where the difficulty sometimes arises, and I call your attention to both the Declaration and the draft Convention on Racial Discrimination on IV, page 506 of the Reply. There, Article 2, sub-paragraph 3, says this:

"Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups."

Now the reference here is to the individuals; and we may have a third category—it is individuals and groups, and then there are “individuals belonging to groups”, according to this text. But then we go to IV, page 507, which prints the draft Convention, and sub-paragraph 2 of Article I talks of—

“... securing adequate development or protection of certain under-developed racial groups or individuals belonging to them”.

This is quoted in support of page 493. I cannot read this text on page 493 disregarding the support to the argument, and I think it stands out very clearly that this text makes the point that laws should be addressed to individuals.

Mr. GROSS: Mr. President, I am desirous to conserve the Court's time and yet in fairness to the witness I think perhaps it might be convenient, if the Court permits, to make clear again, without attempting to engage in a colloquy or argument with the witness, which would be unseemly, that my purpose is not to establish whether or not the Applicants use good, or bad, or clear, or unclear language, Sir. It is simply to ask the witness what his understanding was on the basis of his testimony, the point the honourable President made previously. But I think that if that is clearly understood, we can obviate the necessity, if the witness is agreeable, to justify his understanding or to refer to arguments made. I will assume that his understanding, whatever it is, is justified in his view, Sir, and not ask for his arguments in support of his views, because I just have one or two quick questions on this same point.

The PRESIDENT: It is a matter entirely for you, Mr. Gross. Your observations are noted, but you are cross-examining and if you wish to put questions to the witness you have not been prevented from doing so.

Mr. GROSS: Now, Sir, you have testified that in many instances the application of standards which—in terms of the definition on page 493, to which your attention has repeatedly been directed—as contended for by the Applicants, include, affirmatively, governmental policies and actions, the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such. You have testified, as I understand the point (b) of the letter read into the record, that the application of such standards would in many instances have an adverse effect on the well-being and progress of the persons concerned. Is that a fair rendering of your testimony, Sir?

Mr. POSSONY: Entirely correct: yes, Sir.

Mr. GROSS: Would you indicate to the Court, if you will please, Sir, one or more instances, if any, in which the application of a standard envisaging equal protection of the laws and equality of opportunity would have a detrimental effect upon the person or persons concerned.

Mr. MULLER: Mr. President, with respect, it is not only equal opportunity and equal protection, but it is to the individual as such.

The PRESIDENT: I notice that, Mr. Muller, and I expect the witness will too.

Mr. POSSONY: Yes, that was exactly the point. The question is again the absence or the existence of legislation referring to a group or not to a group, and I have given yesterday, and I was stopped short, on this very point, testimony with respect to the Negro situation in the United States and with respect to the Asian-Indian situation in East

Africa, which shows that the legal notion that all you have to do is to legislate in disregard of group differences and this will provide you with equality of opportunity—this is fictional. I think we have clear evidence, the Indians in America are another case, to show that this is fictional, and I . . .

Mr. GROSS: Now, Sir, . . .

The PRESIDENT: The witness has been invited to state instances and he should be entitled to state them at what length he desires to do so, but with reasonable brevity. Continue, will you, because you have said that you were prevented from making the observation and the question invites you now to give the instances.

You are invited by Mr. Gross to give instances—have you finished with them?

Mr. POSSONY: The instances of the Negroes in America, the Indians in East Africa, the Indians in the United States, and I think that should be enough because I testified on those.

Mr. GROSS: Now, Sir, is it then your testimony that with respect to the persons or individuals comprising the groups you have mentioned, that the application of governmental policies, the objective of which is to protect equality of opportunity and equal protection of the laws, has had, or does have, a detrimental effect upon the individuals as such in these cases? Is that your testimony?

Mr. POSSONY: Well, it depends on how you define the words "equality of opportunity being protected by the laws". My testimony would be that the laws that are in existence in these situations did not protect equality of opportunity. The equality of opportunity was not there to start out with, and legislation would have been needed to create this equality of opportunity. In the absence of such legislation enabling these groups to acquire the particular capabilities needed to compete, there was no equality of opportunity to protect—it did not exist.

Mr. GROSS: I am referring, Sir, as I think my question might have made clear, to the question whether or not it is your testimony that the existence of laws which protect the equality of opportunity and extend equal protection of the laws to the persons you have mentioned are examples of instances in which the governmental policies concerned visit a detriment, or have an adverse effect, upon the well-being and progress of the individuals concerned in your examples—I may add—as such.

Mr. POSSONY: Mr. President, I am at some pains to answer this, for the simple reason that the purpose of my statement is to make clear that the Negro situation in the United States is characterized by the fact that there is no *de facto* equality of opportunity and that this is due in large part to the absence of measures and legislation enabling the Negroes to reach the level on which they would have that equality of opportunity.

Mr. GROSS: Sir, I would like now . . . Incidentally, Sir, would you also refer to—I think you mentioned Indians in the United States and I think you mentioned certain persons in East Africa, did you not, Sir?

Mr. POSSONY: Yes, I mentioned them.

Mr. GROSS: Now, with respect to those two groups of individuals, as such, is it your testimony that governmental policy and actions, the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons, as such, have a detrimental

effect upon the persons concerned, in terms of the point to which your evidence was directed?

Mr. POSSONY: Mr. President, my testimony on the Indians in America was that up to 1933, or thereabouts, legislation in the United States considered the Indian as a person as such and that this legislation was extremely detrimental to the Indians and that after 1933, legislation was changed and that a new system was instituted which, looked at in detail, has many differences and many similarities with other systems we are discussing, but which, in essence, protects the Indian as a group. Of course, the American laws also protect the Indian as an individual, obviously, but the new feature, after many years of the Indians going down in many ways, was exactly that the lesson had been learned, and the new type of legislation was instituted.

Now, in the case of these Asians in East Africa, the Indians in East Africa, the fact of the matter is that—I testified not from personal knowledge but from literature—the Indians are leaving, are emigrating. Therefore, obviously, their opportunity is not being protected.

Mr. GROSS: Sir, is it correct to say that your testimony, to which you have now referred and related back to yesterday, is properly, fairly, construed to mean that you actually have not cited instances in which governmental policies, the objective of which is to protect equality of opportunity, have a detrimental effect upon individual persons, as such? Have you referred to any such instances, Sir, in any of your testimony?

Mr. POSSONY: Yes, we went over it a minute ago.

Mr. GROSS: And you think that your answer to me is that the Government policy in the United States, the objective of which is to protect equality of opportunity and equal protection of the laws to certain individuals comprising groups, is detrimental to their benefit? Is that your testimony, Sir?

Mr. POSSONY: My testimony is that the laws of the United States with respect to the Negroes, for example, are inadequate.

Mr. GROSS: Are detrimental to their benefit, Sir?

Mr. POSSONY: Well, if you take the evidence which I quoted yesterday, that the Negro situation is going down, which is based on a Department of Labor report, which came out a few months ago, on which the President talked—if a situation is going down, I do not see that this is to their advantage—it is detrimental.

Mr. GROSS: The point to which your evidence was directed, which I quoted at the outset of this series of questions, is that your testimony might be directed towards establishing that the application of the standards contended for by the Applicants would, in many instances, have an adverse effect on the well-being and progress of the persons concerned. I quoted from the letter read into the record, and I have asked you, Sir, and attempted to elicit as clearly as possible, your opinion whether or not, in the specific context we are now discussing, it is your view that the legislation in the United States, the objective of which is to protect equality of opportunity, let us say for certain citizens, in particular the Negroes to whom your testimony referred, and to extend to them equal protection of the law—is it your testimony that this is an instance of a governmental policy which has an adverse effect upon the persons concerned—the individuals, as such? Is that your testimony or is it not, Sir?

Mr. POSSONY: I will repeat it again, Mr. Gross. I have to use my own

language. My testimony is that the legislation presently on the books in the United States does not protect the equality of opportunity of the Negro, simply because it has failed, and still fails, to create the situation in which there would be such equality of opportunity.

The PRESIDENT: May I put a question to the witness, Mr. Gross, on this matter? Let it be supposed in any territory that there are different ethnic groups of the type that you have given evidence about and there is government policy or action, the objective of which is to ignore the groups but to protect equality of opportunity and give equal protection under the law to the individuals. If the groups were ignored by laying down such policy or action, would there be, in your view, in any instances that you know of, or in principle, detriment to the individual?

Mr. POSSONY: Mr. President, this would be true in many instances. It would not be true in all instances. It depends exactly on the concrete situation. There are ethnic differences where the ethnic differences, in essence, can be disregarded. There are ethnic differences which cannot be disregarded. In those instances, the oversight of legislating for the group will lead to detrimental effects.

Mr. GROSS: Now, Sir, one further question with respect to your testimony regarding the legislation in the United States which you cite, as I understand it, as an example of having a detrimental effect, or an adverse effect, on the well-being and progress of the Negroes. Is it your testimony, Sir, is it intended by your testimony in that respect, to do full justice to your meaning, that what you mean actually, Sir, is that the laws, the legislation and the policy does not go far enough in the direction of assuring equality of opportunity? Is that what you really mean, Sir?

Mr. POSSONY: No, I do not mean that. I mean it goes in the wrong direction.

Mr. GROSS: Well, Sir, the question of assuring equality of opportunity—we are speaking, here, about standards, are we not, Sir, a legislative policy, governmental policy, is that not what we are talking about, Sir?

Mr. POSSONY: I think so.

Mr. GROSS: And the policy of affording equality of opportunity and equal protection of the laws is, you would agree, would you not, the policy which underlies and is the foundation stone of the American legislation on this subject?

Mr. POSSONY: Similarly, Mr. Gross, the point to which I address myself is that there is an intellectual difficulty in Washington to understand the significance of the ethnic factor. This has been part of the national tradition in the United States, for perfectly good historical reasons, and that is the point which I think should be fully understood. It took the United States many, many years—over a century—to understand that point with respect to the Indians.

Mr. GROSS: But you do, Sir, agree or do you not agree with the validity, the soundness, the wisdom of the policy of assuring equal protection and equality of opportunity as a standard, as a policy, as a principle—you do agree with that, Sir, do you not?

Mr. POSSONY: In a sense absolutely, but each person is a member of a group. With this group and alone, he should be able to go as far as he can, of course.

Mr. GROSS: And your testimony, I take it, really is, am I correct in this, that you would re-write the laws, you would enact different types

of legislation to further this policy—is that a correct version of your testimony, Sir?

Mr. POSSONY: That is, with due respect, the impact. I am not the legislator of the United States, but I would add this observation to the last part of my testimony yesterday. I think that the United Nations, on reflection about this very type of problem, have finally come to realize that more research on these matters is necessary and that a lot of the texts which we have published immediately after World War II, under the psychological impact of World War II and Nazism, failed to take into account what the real facts of life are in multi-ethnic societies. I will not go beyond saying that in my judgment the legislation in the United States at the present moment is not responsive to the realities of multi-ethnic problems but I certainly am not going to propose any ameliorated legislation before the necessary research is made. The weight of the testimony is essentially that there are unsolved problems.

Mr. GROSS: You would I think agree, would you not, Sir, that from a standpoint of social science, political science, these problems never really will be solved in any real sense of the word? You would agree, Sir, that from now on, probably for ever more, society will be faced with the necessity of planning and analysing and indeed praying over the problems? You would agree with that, Sir?

Mr. POSSONY: Yes, Sir. I agree with that but I also would make the point that we have known a lot of these things 50 years ago but we have forgotten them and that was why I brought in some of the historical evidence.

Mr. GROSS: Now in the course of the Oral Proceedings on 19 October, that is in the verbatim record, XI, page 696, Counsel for Respondent, Mr. Muller, asked you and I quote: "Are there international agreements on the rights of individuals?" You responded at the same page: "No there are not." You then proceeded to discuss certain problems relative to the formulation of the Human Rights Covenant and Declaration; that is a correct version of your testimony, is it not, as set forth there?

Mr. POSSONY: The answer certainly is "yes".

Mr. GROSS: Now, Sir, in the course of your preparation for a testimony at these proceedings, you have, I think, already testified that you examined, correct me if I am wrong, and studied the pleadings and that you have, among other things, examined the sources of international standards, which were set out in the Reply, IV, pages 493 to 510. Have you incidentally also had occasion to read the Oral Proceedings, in which these points were elaborated, particularly, 18 May, IX, pages 325 and following?

Mr. POSSONY: That is your speech, Mr. Gross?

Mr. GROSS: That is part of the Oral Proceedings before the Court, Sir, also relating to supplementing and elaborating the argument on the content and existence of the international standards which we contend should govern the interpretation of the Mandate—you have considered that, Sir?

Mr. POSSONY: I have read it. I have not re-read it for the last two months or so.

Mr. GROSS: Well, Sir, I will not tax your recollection about it but in connection with your negative response to Mr. Muller's question as to whether international agreements exist "on the rights of individuals", to use his phrase, do you consider the United Nations Charter to be an

international agreement which, among things, embodies undertakings to promote human rights and fundamental freedoms of individuals—would you agree to that, Sir?

Mr. POSSONY: Yes, among other things.

Mr. GROSS: And do you consider the mandatory, trust territories, agreements to be international agreements "on the rights of individuals", to use Mr. Muller's phrase? Specifically I would refer to typical provisions cited in the Reply, IV, page 502, pursuant to which the administering authorities undertake to guarantee to the inhabitants of the territory certain enumerated rights and freedoms—for example, illustrations are cited at page 502 of the Reply—"without distinction as to race", and so forth. Do you regard these to be international agreements on the rights of individuals?

Mr. POSSONY: No, Mr. Gross. Those are international agreements on trusteeships. Let me make myself clear, those are not international agreements addressed directly to the question of human rights. After all, we do have a major effort in the United Nations going on which aims at writing such an agreement on human rights *per se*.

Mr. GROSS: By your answer then, by way of clarification, I take it that the short question and the short response in this respect, by that, in fairness to your testimony, you meant to refer to human rights conventions and similar documents or instruments—is that what you had in mind in responding to Mr. Muller's question, Sir?

The PRESIDENT: That must be the meaning of the question, Mr. Gross, which was: "Are there international agreements on the rights of individuals?" His reply was, I understood, "on the rights of individuals" no agreements.

Mr. GROSS: On rights of individuals?

The PRESIDENT: Yes, that was the subject-matter of the question.

Mr. GROSS: Does the President wish me to . . . ?

The PRESIDENT: No, except just to indicate that it is the witness's understanding of the question to which he replied when he said "no". He said he was referring to international agreements on the subject of rights of individuals.

Mr. GROSS: I wanted to elicit that for the Court, in fairness to the witness, Sir, to clarify what might otherwise be an obscure meaning that could be attributed to his testimony. With respect, however, to the distinction which you intended to draw in your response to Mr. Muller, do you consider the International Labour Organisation Constitution and Convention an international agreement on the rights of individuals? I refer particularly, for example, to the provisions cited and quoted in the Reply, IV, pages 508-509. Just for the sake of clarification of your response, would you regard the International Labour Organisation Convention and Constitution as international agreement on the rights of individuals in your sense of the term?

Mr. POSSONY: I do not know what the title of the convention is, I think it is the Constitution of the International Labour Organisation and, *inter alia*, it, of course, deals with human rights that are related to the whole subject-matter of labour. I would not consider that a human rights convention. The point is that human rights automatically will have to come up in many conventions but the convention is drawn for another purpose.

Mr. GROSS: Now specifically, Sir, with regard to the regional treaties,

which are referred to in the Reply; I refer, for example, to the European Convention for the Protection of Human Rights and Fundamental Freedoms, would you, Sir, in terms of your testimony regard that as an international agreement on the rights of individuals?

Mr. POSSONY: The European Convention—yes. It is regional, this is why I did not take it into consideration in the answer. Frankly, I have not looked it over recently exactly to see whether it refers exclusively to the matter but from the title, if this is the title which is given on page 290, “The Protection of Human Rights and Fundamental Freedoms”, then that would be a correct exception, in a regional sense. My answer was responsive to the effort going on in the United Nations to draft a convention on human rights on the basis of the Universal Declaration.

Mr. GROSS: I do not want to comment on the form of the question put to you by Mr. Muller but for the sake of clarity perhaps I should ask you one final question, if the President permits. May I continue, Sir, just this one question?

The PRESIDENT: Yes, certainly.

Mr. GROSS: What is the purpose, in terms of your testimony, in drawing a distinction between international agreements relating to human rights solely and international agreements which, *inter alia*, protect human rights? Is there any distinction you wish the Court to draw based upon that characterization?

Mr. POSSONY: I certainly do. The difference is that essentially in most of these treaties—we will leave out the European convention—human rights are mentioned as a matter of course. The meaning of these stipulations is vague, sometimes obscure. It is precisely in order to remedy this difficulty that the United Nations has started on the effort to straighten out the human rights problem by writing an international convention of which each Member of the United Nations could be a signatory, laying down language so clear that it could be introduced into statutory law and so that human rights in effect could be protected. It is the difference, I think, between a declaratory policy and positive law.

Mr. GROSS: May I ask one more question, to tax the President's patience?

The PRESIDENT: Certainly.

Mr. GROSS: Was it the purpose and purport of your testimony in response to Mr. Muller's question that you wished to draw the distinction between the Human Rights Declaration as such and the Human Rights Covenant as an international agreement—was that the purpose of your testimony in that regard?

Mr. POSSONY: The purpose of the testimony was to show that you have a process of drafting going on for many years now, close to 20 years. I quoted Mr. Malik, who is an expert on the subject-matter, that this process was started in the hope that an immediate or fairly early result could be achieved because all these things are so clear. Then, when the experts of the various countries sat down and tried to work out the texts, it turned out that there were many difficulties. Now there are, as I pointed out, intellectual difficulties which have not, in my judgment, been overcome even though there are drafts. The fact that the United Nations itself now initiates research seminars on multi-ethnic societies and so on would bear me out on this point. In addition to the intellectual difficulties of defining precisely what these human rights are and how

they could be applied, you have a very large area of political difficulties to which I just referred briefly.

Mr. GROSS: Dr. Possony, in your testimony you have made numerous references to constitutional and other legislative enactments relative to the general matter of equality of opportunity, equal protection of the laws, allotment of rights and burdens on the basis of membership in a group, etc.—that is correct, is it not? I should like to read certain constitutional provisions in respect of some of the States to which you have referred, and ask you to indicate whether or not you agree that such provisions as I shall refer to evidence a general or widespread constitutional practice of States envisaging equality before the law without discrimination on the basis of race or other group classification.

I should like to refer, for example (and my references will be to the work that you have cited as a source, which is Peaslee, *Constitutions of Nations*, which is the second edition of 1956), to the Federal Constitution of Austria, 1920, Article 7 (1): "All Federal citizens are equal before the law. Privileges based upon birth, sex, social position, class, or creed are abolished." This is quoted in Volume I, page 108. My preference would be, if the President permits, to refer to these and then ask the witness, when they have been cited, questions with respect to them.

The PRESIDENT: It is a matter for yourself, Mr. Gross, if it can be conveniently done that way.

Mr. GROSS: Thank you, Sir, Belgium . . .

Mr. POSSONY: Mr. President, may I interrupt? I don't think it is quite easy to remember all these Constitutions; I frankly would prefer to be asked the specific question on each case.

The PRESIDENT: I think that would be better, Mr. Gross. After all, if you ask the witness: "Having looked at these provisions in the context in which they are found, what is your conclusion in respect of them?", it would probably mean that you will have to go back over them individually.

Mr. GROSS: With respect, Sir, I rather thought not; in the introduction to my question I had indicated to the witness the purpose to refer to constitutional provisions in respect of numerous of the States which he has mentioned in his testimony and then, having called these to witness's attention, to ask whether, taken singly or collectively or both, they do in his opinion evidence a constitutional practice relevant to his testimony and in respect of the standards and/or the international legal norm for which the Applicants contend.

The PRESIDENT: If the witness finally says "I cannot give you an answer except by examining each one", then you would be back in the position in which you started.

Mr. GROSS: With respect to the Austrian constitutional provision, Article 7 (1), do you agree that this is an example of a constitutional standard with respect to the equality of protection of individuals regardless of race?

Mr. POSSONY: Mr. Gross, in the first place I did not discuss the Austrian Constitution; in the second place I agree that this is a protection, but I should add that Austria in 1920 was a uniform State, and the only meaning of this Article would have been, disregarding the abolition of the aristocracy, protection of some very small minorities in the southern part of Austria and the Jews. There is no question about the fact that

you do not have in these two cases a racial distinction of any significance, or let us at least put it this way, of any visibility. The language was essentially the same, and everything else was the same. It was a self-evident proviso after a very painful history, in the course of which the ethnic groups were split up.

Mr. GROSS: If you are aware, is it or is it not a constitutional practice of Austria that all citizens are regarded and stated to be equal before the law, and that privileges based upon birth, class, etc., are abolished—is that the constitutional practice of Austria today?

Mr. POSSONY: Correct. It is also the constitutional fact of Austria that it is a uniform national State.

Mr. GROSS: With respect to Belgium, I refer to the Constitution of Belgium of 1831, which is cited in Peaslee, Volume I, page 153, and read Article 6 which reads in relevant part as follows: "There shall be no distinction of classes in the State. All Belgians are equal before the law . . ." Do you accept this as constitutional practice which is relevant to the question whether or not international standards exist, or an international norm exists, with respect to the equal protection of the laws and the quality of opportunity?

Mr. POSSONY: I would think that this is a very good example to show that this norm, or alleged norm, is very vague and general. Obviously in Belgium, all the Belgians are equal before the law. But I testified—I understand that other witnesses have testified to the fact too, and I think we have here somewhere the documentation—that even though there is no question but that the differences between the Wallons and the Flamands are after all slight—certainly, no racial difference between them would be visible—troubles have arisen on account of language. Today, because this trouble has been going on for many years and has had weakening impact on Belgium in general, so far as I understand the history of Belgium—at the present moment discussions are under way and have led to a bill aimed at changing the representation of the two main groups. In other words, you have here a case where at first an attempt was made to disregard the group factor, to legislate purely in terms of the individual, an attempt which was very much in line with 19th century, early part, thinking; and now we come around to recognizing that this is not a very workable solution, and other ways are being looked for.

Mr. GROSS: If you are aware, does the constitutional practice of Belgium treat all citizens as equal before the law, irrespective of their race or national origin?

Mr. POSSONY: Of course it does.

Mr. GROSS: With respect to Burma, I refer to the Constitution of the Union of Burma of 1947, in particular Article 13 which is cited in Peaslee, Volume I, page 280:

"All citizens irrespective of birth, religion, sex or race are equal before the law; that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another."

Would you say that Article 13 from the Burmese Constitution which I have just read is evidence of the existence of a constitutional practice in Burma which supports the existence of an international legal norm or international standards with respect to the protection of individuals before the law, equality of protection?

Mr. POSSONY: I think we have a little difficulty here; I do not think this article has anything to do with the norm as laid down at IV, page 493. I have testified on the Burmese Constitution in line with my understanding of what the norm says, which, and I repeat, is that you should not differentiate according to group—I can read the exact paragraph.

Mr. GROSS: Would you be good enough, Sir, if I am not interrupting you, to refer to the language you have in mind when you use the word "differentiate", as I believe you did?

Mr. POSSONY: "On the basis of membership in a group, class or race."

Mr. GROSS: Would you mind reading the whole thing, please, Sir?

Mr. POSSONY: The whole paragraph?

Mr. GROSS: If you don't mind, Sir, if you attach importance to the point you are making, I would appreciate it.

Mr. POSSONY:

"... the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential ...".

As I stated, I interpret, and I can read on, the allegation to be that you do not distinguish on the basis of membership in a group, race or class. The Burmese Constitution does in certain features distinguish so on the basis of ethnic affiliation, not in a discriminatory sense, not in the sense of negative. In fact, I do not recall whether they have positive provisions in there—they probably have—saying that these various groups should be helped. But they certainly do provide in the sense that here is one group which ought to be given its own regulation politically, and here is another group which ought to be given *its* regulation. That was the purpose of the testimony on that point. For example, from what I read in this Constitution, if a Burmese, be he a Shan or a Kasen, if he is guilty of a crime, he will be punished in the same way as any other Burmese, except in those cases where perhaps a different definition of crime applies (I do not know whether this is the case in Burma or not). There are cases of this sort which I quoted.

Mr. GROSS: I will interject this parenthetically, because I do not think that I have brought it out before—I may be wrong—with respect to the definition or description of the terms used by the Applicants on page 493, IV, which you have just read in part, do you attach any significance in your testimony to the clause in the first part which reads "rather than on the basis of individual merit, capacity or potential"—do you attach any significance to that clause in the context in respect of your testimony?

Mr. POSSONY: Yes, I do.

Mr. GROSS: And do you understand that the intent, meaning, description attributed to these standards or this content suggest or force a choice on the part of a government with respect to protection of the individual as an individual or protection of the individual as a member of a group—did you understand these to be different or unrelated concepts?

Mr. POSSONY: In your thinking, Mr. Gross, or ...

Mr. GROSS: In your understanding of what we are trying to say in our pleadings, as distinguished from the way in which it has been put forward by the Respondent in certain of its pleadings.

Mr. POSSONY: My understanding of what you are trying to say is that one should not, under any circumstances, use the group, class or race classification for legislation.

Mr. GROSS: So that your understanding, if I may pursue this once more . . .

Mr. POSSONY: May I add to this that I had to read this in line with the supporting data which you have given and I have shown that, for example, in the Declaration on the Elimination of All Forms of Racial Discrimination the term was "individuals belonging to certain racial groups". In other words, legal measures should be taken to secure the adequate protection and development of the individuals.

Mr. GROSS: Now, with respect to the continuation of the constitutional practice in respect of the States that you have mentioned in your testimony, I refer to the Constitution of Chile. I beg your pardon, you did not cite Chile; I misread my notes. I will confine myself to those which you have cited and I may, with the Court's permission, refer to others which may be relevant to the question as well. For the moment I will confine myself to those you have cited.

Czechoslovakia: the Constitution of the Czechoslovak Republic of 1948, Volume I of Peaslee, page 692, Part I, section I, reads very simply: "All citizens are equal before the law."

Would you agree that this is evidence supporting a constitutional practice with respect to the principle or standard of equality of treatment of all individuals, irrespective of other considerations such as race or creed?

Mr. POSSONY: Again, Mr. Gross, the answer is yes. If you want to elicit from me the statement that many constitutions contain phrases of this general wording, I think we can save time by stipulating that this is true. Many constitutions have these phrases. My testimony is not directed toward disputing this. It would be foolish to dispute it. However, the case of Czechoslovakia is a very good case to illustrate the point I have been trying to make.

In the first place there was a multi-ethnic State and there were various attempts to set up or not to set up autonomous status for various groups. In one instance there was the policy by the Czech State to operate on the basis of integration. That was with respect to the Sudeten Germans. Actually, in order to save time, I cut out from the testimony a passage to the effect that the Czech Government of Mr. Masaryk and Mr. Benes were accused by the Nazis of having practised national oppression. This particular accusation was quite unfounded. I was often in Czechoslovakia at that time. Nevertheless, it impressed the Sudeten Germans and out of this situation—there were at least some elements there so that Nazi agitators could make a point—arose the Munich crises.

With the President's permission, I have given perhaps a longer answer to indicate that in line with the United Nations Charter, certainly the over-riding objective of the United Nations, in my reading, is the preservation of peace. In this particular instance the experiment with what you might call an integrationist ideology was one of the roots of World War II. Today Czechoslovakia is very much reduced. It is essentially a national State consisting of the Czechs and the Slovaks. But, today, the Slovaks, who are only slightly different from the Czechs, do have some sort of autonomous status. It is to that part of the problem that I address myself.

Mr. GRÖSS: Now I would like you to address yourself to my part of the problem, if you will?

With regard to Germany—the basic law for the Federal Republic of Germany—this is cited in Volume II of Peaslee, pages 30 to 31:

Article 3, paragraph 1: "All men shall be equal before the law."

Article 3, paragraph 2: "Men and women shall have equal rights."

Article 3, paragraph 3: "No-one may be prejudiced or privileged because of his sex, descent, race, language, homeland and origin, faith or his religious and political opinion."

Would you agree that this is evidence of a constitutional practice relevant to the question of whether or not an international standard and/or an international norm exists, of the sort contended for by the Applicants?

Mr. POSSONY: How can it be evidence of a constitutional practice if, with respect to the ethnic factor, there is no such problem in Germany?

Mr. GROSS: If what, Sir?

Mr. POSSONY: There is no such problem.

Mr. GROSS: Of equal rights before the law?

Mr. POSSONY: In terms of ethnic factor, there is no problem. Germany is a uniform national State, consequently one can put a provision into the Constitution and if you want me to confirm that this is in the Constitution I will gladly do so, because it is there. But it does not mean much.

Mr. GROSS: Thank you, Sir.

Now, with respect to India—the Constitution of India of 1949 is referred to, as I have cited, in Volume II of Peaslee, pages 225 and 226. The relevant parts are as follows. You testified, did you not, in the record at XI, page 678 and following, at some length with respect to the caste system, the scheduled castes and so forth? That is correct, is it not?

Mr. POSSONY: Yes, Sir.

Mr. GROSS: Now, with respect to the Constitution of India, which I have just cited in Peaslee:

Article 14 states:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15 (1) says:

"The State shall not discriminate against citizens on grounds only of religion, race, caste, sex, place of birth or any of them."

I will not read the lengthier paragraph which follows, as it is an elaboration of the same principle or standards.

Now, with regard to the use of the term "discrimination" here—"shall not discriminate"—would you say that the term is used in the sense of any differentiation whatever, so far as you understand the Constitution?

The PRESIDENT: I am sure that is a matter which the Court can work out. It is not for a witness to start to interpret the Constitution of India or any other constitution. You can ask him what his understanding is in respect of it.

Mr. GROSS: Yes Sir. That was the purpose of my question: if he has a basis for an understanding of it as a political scientist or other behavioural scientist. Do you wish to comment, or do you have a basis for an

opinion which you wish to express with regard to the use of the term "discriminate" in this context?

Mr. POSSONY: Mr. Gross, you read that it says "discriminate only" and I am not quite sure what that means.

Mr. GROSS: It says "not discriminate against any citizen on grounds only of religion, etc."

Mr. POSSONY: That I would say is a wording which I do not know how to interpret.

Mr. GROSS: That is a fair answer.

Mr. POSSONY: However, the Indian Constitution also has a number of provisions with respect to scheduled tribes and scheduled castes. I do not assert that these provisions are necessarily contradictory. However, I would like to mention that they could be contradictory. In any event, there is the social reality in India of a caste system which is taken for granted by the Constitution.

Mr. GROSS: Now, with respect to the Constitution of Italy, 1948, to which you referred in the record at XI, page 678, and cited in Volume II of Peaslee, page 482, Article 3 provides as follows:

"All citizens have equal social rank and are equal before the law without distinction of sex, race, language, religion, political opinion or social and personal conditions.

It is the task of the Republic to remove obstacles of an economic or social nature which, by materially restricting the freedom and equality of citizens, impede the complete development of the human personality and the effective participation of all workers in the political, economic, and social organization of the country."

Now, with respect to that constitutional provision which I have just cited, would you agree that this provision evidences a constitutional practice which is relevant to the standards and/or the norm of the nature contended for by the Applicants, as you understand it?

The PRESIDENT: Professor Possony, have you got a copy of the clause before you?

Mr. POSSONY: No.

The PRESIDENT: If you are asked to understand it I think you had better read it.

Mr. POSSONY: I think I can remember it, Mr. President.

Mr. GROSS: I will be glad to read it again, Sir.

The PRESIDENT: No, I do not think it is necessary to read it again, Mr. Gross. I simply asked whether he had a copy in front of him, that is all. I see the relevant volume is there.

Mr. GROSS: I do not want to tax the memory of the witness, Sir.

Mr. MULLER: May I just ask what is the page reference in the verbatim that my learned friend referred to?

Mr. GROSS: It is XI, page 678, in the verbatim record, according to my notes.

The PRESIDENT: There is a reference to Italy there, that is all.

Mr. GROSS: There is a reference to Italy there:

"There are various differential provisions for ecclesiastic persons in terms of incompatibility with the parliamentary mandate in such countries as Belgium, Israel, Luxembourg, Turkey, India, Italy, Egypt, Netherlands and Great Britain. This particular type of problem was worked up . . ."

That is the reference for learned Counsel.

Mr. MULLER: Thank you.

Mr. POSSONY: First of all, the reference to Italy is a very minor one and deals with one specific point.

Mr. GROSS: Do you wish to withdraw it, Sir?

Mr. POSSONY: No, it is a perfectly correct reference. Mr. Gross, you read Article 3 to me, is that correct?

Mr. GROSS: Yes, I read Article 3.

Mr. POSSONY: Well, I would say that this Article 3 is an Article which can be read in many ways and I certainly think it is a very interesting Article. It speaks of removing "obstacles of an economic or social nature". Now, in a country like Italy, where there is not much of a national problem—and I may add parenthetically that there is at least one ethnic problem which is in the news at this moment, namely the Southern Tyrol question, whether or not this situation calls for autonomy—leaving that on one side, what is meant by removing obstacles of a social nature?

Mr. GROSS: I do not know.

Mr. POSSONY: Well, I would certainly interpret this to mean that in a case of a multi-ethnic society—Italy does not have this problem—the removal of social obstacles is the thing one should do with respect to those ethnic groups which carry more than the usual burden of obstacles.

Mr. GROSS: Now, Sir, with respect to Lebanon, to which you made more than passing mention, did you not, Sir, in the verbatim record at XI, page 669? Now, in respect of Lebanon: the Constitution of Lebanon of 1926, cited in Volume II of Peaslee, at page 573—I refer to Article 7—reads as follows:

"All the Lebanese are equal before the law. They enjoy equally civil and political rights and are equally bound by public burdens and duties without any distinction."

Then, Sir, I refer, since you have it before you, to Article 12, which is on the next page, page 574 of Peaslee:

"All Lebanese citizens are equally admissible to all public posts on the basis of merit and competence, and according to the conditions established by the law."

Now, Sir, with respect to the latter part, you have testified, as the Court will be aware, of conditions imposed by law, for example, with respect to the group from which the President and the Vice-President might be taken—I think the Court will be well aware of the practice of Lebanon in that respect. However, I invite your attention, first, Sir, to Article 7, which I have read: "All the Lebanese are equal before the law. They enjoy equally civil and political rights and so forth." Do you agree, Sir, that this furnishes evidence tending to support the existence of international standards of a content described by the Applicants and defined in their pleadings, so far as you understand it?

Mr. POSSONY: No, Mr. Gross, I do not.

Mr. MULLER: That has been defined in the pleadings or at IV, page 493? That would be . . .

Mr. GROSS: Mr. President, I would respectfully submit that the Counsel's comment is irrelevant and the reason being, Sir, that page 493, important as it is, does not embody the case of the Applicants and, Sir, I think the impression as sought to have been created previously in these proceedings by Counsel that the language on page 493 must be interpreted

as if it were disembodied from the balance of the pleadings, not explained by the sources to which reference is made and elaborated and which explain the detailed content attributed by the Applicants to the standards and the norm contended for and, Sir, if the point in the implication of Counsel's question, or interposition, is that the Applicants may not refer to any provision or language in these pleadings other than page 493, the Applicants would very respectfully disagree.

The PRESIDENT: That is not the objection, though, Mr. Gross.

Mr. MULLER: May I reply to that, Mr. President, please?

The PRESIDENT: No, you may address the Court.

Mr. MULLER: Yes. I refer to the verbatim at IX, page 375, where, having reformulated their submissions, the Applicants made this statement:

"The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, in the sense described and defined in the Reply, IV, at page 493, and solely and exclusively as there described and defined—reference is made here to the same verbatim record already cited, at page 60, *supra*."

That is the record, at IX, page 60, where reference is made also—that is in an earlier stage . . .

The PRESIDENT: Mr. Gross, I think you might resume your seat whilst other Counsel is addressing.

Mr. MULLER: On April 30, Mr. President, in the verbatim, at IX, page 60, it is stated:

"The Court's attention is respectfully directed to the Reply, IV, page 493, in which the Applicants have attempted to formulate their description of the relevant international legal norm."

Now, Mr. President, if my learned friend wants to put to the witness what the norm of the Applicants is, he has never, up to yet, put to any one of the witnesses what his case is. He is very quick, Mr. President, to say that as we, the Respondent, interpret the case, we are wrong, but he has, up to now, not defined his case to any one of the witnesses; he merely refers to these cases set up in the pleadings. And I should like to know what he means when he asks the witness a question like that.

The PRESIDENT: At the present moment, the Court is asked to rule on the question of admissibility of a question being put to the witness. Mr. Gross, it is quite true that there is a distinction between a statement of the content of the norm and the statement of the content of a standard as distinct from the sources which are relied upon to establish the existence and content of the norm or standard. It is my recollection, but my recollection may be quite wrong, not only in relation to the references made by Mr. Muller but, more than once, throughout the presentation of the whole argument, from the transcripts, running from 13 to 24 May, not once, but more than once, you stated that the norm and/or standard upon which the Applicants relied were defined as stated at IV, page 493 of the Reply.

Now, if you say that that is not the case of the Applicants, then it seems to raise the question as to whether, having regard to the way in which the case is being presented by you, this is changing your case.

Mr. GROSS: May I respond as briefly as possible to that, Sir? The references which have been made and as to which an example is cited

by Mr. Muller, relate to the standards, and the norm of the same content, if it exists as a matter of international law, "defined and described" were the words used, I think the learned Counsel will find, on page 493. The sole point of my intervention, Mr. President, in response to the remarks made—and, if I may respectfully, in response to the honourable President's comment or question—is that no single words on page 493 may be taken as self-contained, fully explanatory of their intended meaning, Sir, and the one point that I should like to add, if I may, Sir, is the reference on page 493, among other things, to the fact that:

"The existence and virtually universal acceptance of the norm of non-discrimination or non-separation, as more fully described below, gives a concrete and objective content to Article 2, paragraph 2, . . ."

Sir, it has never been the Applicants' understanding or intention that the words set forth in this paragraph, to which so much attention has been called, and properly so, can be read and understood and evaluated without reference to the general context in which they appear and the explanations which have been made of their intended content and meaning. The very words used, as have been brought out by this witness and others, are concededly susceptible to comment and interpretation by their very generality. Reference has been made to Article 55, paragraph (c), of the Charter, to the word distinction. That states a standard or principle, but surely, Sir, if we relied on that, it would still be necessary, as we have tried to do in our pleadings and in our Oral Proceedings, to explain, to illuminate, to clarify the content and meaning of those broad words. Sir, that is the only point of my comment.

The PRESIDENT: Mr. Gross, it will be a matter for the Court to decide as to what was the case which the Applicants made out. It is not for me to comment upon it at all, but if you say it is still the same case which it was when you closed your case, it will be a matter for the Court to determine what was the case which you made out, but may I point out to you that it was to page 493 that you frequently, yourself, referred as indicating the basis of the norm and the standard upon which the Applicants relied. Now, if you look at the whole of 493, you will first find that in paragraph 2, it says:

"As is shown below, there has evolved over the years, and now exists, a generally accepted international human rights norm of non-discrimination or non-separation, as defined in the preceding paragraph."

Then the next paragraph; and which you referred to, says:

"The existence and virtually universal acceptance of the norm of non-discrimination . . . as more fully described below, . . ."

That, so it would appear, leaves it open to construction that that is a reference not to the content or the definition of the norm but to the sources, because, if you look at the last paragraph, you will find: "The sources which, severally and in their totality, comprise the generally accepted norm, described above, . . ." and so it would appear, on a reading of 493, that the definition of the norm was as stated in the first paragraph of 493 and that there was no other definition of the norm.

Mr. Gross: Mr. President, the Applicants, far from changing their case in any respect, re-affirm their reliance upon the international stan-

dards or alternatively, and cumulatively, the norm with the content contended for, and it is simply, Sir, the Applicants' submission that the meaning to be fairly assigned to the words and phrases used in the description are to be derived from the explanations made by the Applicants, the arguments made thereon and the sources to which they rely and which illuminate the significance of words and phrases used. It was not then, and is not, the intention of the Applicants in any way to withdraw or retreat from the arguments made before the Court with respect to the existence of international standards or objective criteria, on the basis of which the Mandate should be interpreted. These are of the content described and defined on IV, page 493, the meaning of which is to be, in our submission, understood, elucidated and arrived at by the honourable Court on the basis of the explanations made.

The PRESIDENT: I expressed no views on that at all, as you understand, Mr. Gross, I simply indicated that we are debating a matter here on the question of the permissibility of your cross-examination. I think, having regard to the discussion which has taken place, it is better to define precisely what you are speaking about when you address a question to a witness.

Mr. GROSS: Mr. President, I welcome the opportunity, I do indeed, Sir.

Now, Sir, I would not wish to burden the Court . . .

The PRESIDENT: Professor, you are being cross-examined.

Mr. GROSS: I would not wish to burden the Court with an indefinite series of references to similar constitutional provisions which are conceded by the witness to exist, but I should like, if I may, simply in the same way that he has made reference in his testimony to numerous constitutions, legislative enactments of various countries, in the context of his testimony, refer, in addition to those already cited, to the Liberian Code of Law of 1956, Volume II, pages 481, 482; the Political Constitution of the United States of Mexico of 1917, Article 3 in particular, II Peaslee, page 661; the Constitution of the Kingdom of the Netherlands 1947, II Peaslee, page 754, in particular Article 4 and Article 5; the Constitution of the Republic of Panama of 1946, cited in III Peaslee, pages 72-73, in particular Article 21, and to Article 94 of the same Constitution, cited at III Peaslee, pages 81-82; furthermore, the Constitution of the Republic of Peru of 1933, Article 23 in particular, cited in III Peaslee, page 137; similarly, the Philippines, the Constitution of the Philippines of 1935, Article 3, section 1, paragraph 1, cited in III Peaslee, page 166; the Constitution of the U.S.S.R., in particular Article 123, cited in III Peaslee, pages 498-499; the Constitution of the Federal People's Republic of Yugoslavia, particularly Article 21, cited in III Peaslee, page 760; and, with respect to the United States, I refer to the Fourteenth Amendment, that is, to Article 14, section 1, of the United States' Constitution as cited by III Peaslee, page 593.

The witness has made numerous references in his testimony and has referred to certain legislative or other provisions with respect to Moslem communities and Moslem States, Islamic States—these were cited by the witness in the verbatim of 18 October; for example, at XI, page 671. I refer to, with the Court's permission, the principles of the Interim Constitution of 1953, of Egypt, now the United Arab Republic.

The PRESIDENT: Is this the question you propose to put to the witness, Mr. Gross?

Mr. GROSS: Yes, Sir, to save the time of going through each of these *seriatim* and calling his attention to the existence of what I think he conceded to be, if I am not mistaken, Mr. President, constitutional provisions, similar to those which I have already read into the record regarding the equal protection of the laws, I am selecting those which are similar in content and which the witness, as I understood him, has conceded to exist. Is that correct, Mr. Possony?

Mr. POSSONY: This is correct, Mr. President, but I think the point under dispute is whether these provisions stand by themselves or are related to other provisions, and there is no question that these provisions occur in these constitutions—it is a matter of fact. The question is, what do they mean in a specific country, and what is the over-all regulation of the ethnic problem in the particular country—that is the matter to which I address myself.

Mr. GROSS: Now, Sir, I am addressing myself to the problem of the content of the standards, as distinguished, for the moment, from their applicability. You are aware are you, Sir, that there are two separate but related problems involved in the consideration of this matter; would you agree, Sir, that the question of the matter of content, and the question of applicability or application, are two different but related aspects of the problem?

Mr. POSSONY: That is correct.

Mr. GROSS: Now, Sir, with respect to the content, I refer again, hastily, simply by citation rather than by reading, in addition to Egypt, cited in Peaslee, Volume I, page 813—these are Islamic States, to which you referred—to the Constitutional Law of 1907 of Iran, Article 8, Peaslee, Volume II, page 404; of Iraq, the Constitution of 1925, particularly Article 6, cited in Peaslee, Volume II, page 415; and of Syria, the Constitution of 1950, Article 7, cited in Peaslee, Volume III, page 362.

Sir, these constitutional provisions, to which I have referred, are all, on my representation as Counsel, similar, in respect of the fact that they embody provisions which are substantially of the type already read into the record—that is constitutional provisions which state, in various forms of phraseology, that "All citizens shall be equal before the law in obligations, rights, dignity and social status"—I have just referred to the Syrian Constitution, Article 7, as an example—or the Iranian Constitution, Article 8, "The people of Iran enjoy equality of rights before the civil law . . .".

Now, Sir, with respect to these constitutional provisions, would you or would you not agree that they severally and collectively evidence a general constitutional practice, virtually universal, in which the equality of individual citizens before the law, and equality of opportunity, are guaranteed by the constitutional provisions? Would you agree that they are evidence of standards covering the same subject-matter, and evidencing international standards?

Mr. POSSONY: Mr. President, I think many problems are involved here; leaving aside the question of international standards, for a minute, equal protection of the laws can mean many things. There is no question about the fact that most constitutions have this phrase in them, but again, when equality before the law is linked to equality of opportunity, I think we have an entirely different problem. The constitutions less quickly analysed could produce much more diverse results.

But the main problem is: what do these constitutions state in addition

to that? This is very often a matter of mere phraseology. For example, in the Lebanon case, which Mr. Gross was citing a minute ago, of Article 12, which consists of two sentences, he read the first: "All Lebanese citizens are equally admissible to all public posts . . ." But then there is the second sentence, which reads as follows: "A special statute shall regulate the State officials according to the administrations to which they belong." The meaning of this, I think, is in line with the general arrangement in Lebanon, according to which jobs, positions in Parliament, and so on, are attributed on a group basis. I think the meaning of equality in the Lebanese arrangement is, above all, that each *group* enjoys equal rights—and then you have, undoubtedly, arguments about precisely what that means. In addition, it also says that all Lebanese citizens have equal rights—there is no question about that. The problem arises that you do have contradictory or, let us say, mutually complicating factors involved, which in each country are solved in a particular way.

Now, in testifying yesterday, I made a particular point in stressing that there are, under any norm, assuming a norm to exist, in all international texts that I know of, always clauses to allow for special conditions, and special situations. For example, in the I.L.O. Convention, Article 2, which is in the Reply and which, according to what Mr. Gross said a few minutes ago, leads to the explanation on page 493, IV—there is a phrase in there ". . . by methods appropriate to national conditions in practice . . ."—I could quote other examples, but I will not waste the Court's time.

The argument is, I think, whether the national conditions or the concrete circumstances call for a specific interpretation of a norm, assuming such a norm to exist—and this is the question which Mr. Gross also brought out a minute ago, saying it was a question of applicability. If the norm exists, which I do not believe it does, but assuming for argument's sake that a norm exists, then the question is: how binding is it in conditions where it is less applicable than it would seem? For example, on page 493, if this whole argument were couched in terms of a single or uniformly national State, this would be one matter; and if, like in Austria, this norm applied to States with one nationality, it could even be argued that it applies *ipso facto* and without change. But without taking into consideration the various concrete circumstances prevailing in countries with different nationalities—then I would say that if this were the interpretation, it would be self defeating in terms of the norm itself: the purpose of the norm could not possibly be achieved in the way in which it is laid down that that norm be applied.

Mr. GROSS: Sir, it might perhaps help your understanding of the point of my next question if I were to call to your attention page 519, IV, of the Reply. At the top of the page, you will notice that reference is made to ". . . 'international custom' outlawing discrimination and separation, as defined above . . ." and the reference is to page 493—I would call that to your attention.

Mr. POSSONY: Yes, that is right.

Mr. GROSS: And it continues:

". . . together with the wide introduction of such a norm into 'the general principles of law recognized by civilized nations', [that is from Article 38 of the Statute, as you may recall] warrants a determination that the policy of apartheid, which strikes at the heart

of the Mandate and of Article 22 of the Covenant of the League of Nations, is a violation of international law".

That, you may say, is the "norm argument", Sir, just so that you may follow my questions. Then you come to the next paragraph:

"Even in the absence of such a determination, however, it is submitted that the policy and practice of apartheid, or separate development, as defined and analysed in the Memorials and in this Reply, violates Respondent's obligations, as stated in Article 22 of the Covenant of the League of Nations and in Article 2, paragraph 2, of the Mandate, as measured by the relevant and generally accepted legal norms and standards described in the Memorials and in this Reply." (IV, p. 519.)

Now, Sir, I have called this to your attention so that you may, as responsively as you wish, if you wish, answer the following questions, Sir:

In respect of Article 22 of the Covenant of the League of Nations and of Article 2, paragraph 2, of the Mandate, has it been your intention, Sir, in respect of any aspect of your testimony, to relate the standards of the content described and defined to the Mandate—Article 2, of the Mandate?

Mr. POSSONY: No, Sir, the difference between the norms and the standards, content-wise, I understand to be non-existent.

Mr. GROSS: That is right, Sir.

Mr. POSSONY: I am not an international lawyer and therefore did not address myself to the question of the applicability of the legal commitment to the particular situation.

Mr. GROSS: So that when, Sir, the letter, which has been read into the record, states that—and I quote paragraph (b), as one of the points to which your testimony is to be directed:

"That the attempted application of such a suggested norm and/or standards would in many instances have an adverse effect on the well-being and progress of the persons concerned." (XI, p. 643.)

Do you have that language, Sir?

Mr. POSSONY: Yes, Sir.

Mr. GROSS: As a point to which your evidence is said to be directed do you consider that any evidence which has been led, as to which you have testified, is intended to include the policy or practice of apartheid or, generally speaking, the Mandate obligations, as relevant to the context of the statement, as an instance in which the application of such a norm and/or standards would have an adverse effect on the well-being of the people? Did you understand my question, rather tortuous and I am afraid very unclear, but do you think you understand it, Sir?

Mr. POSSONY: I think my understanding of your question would be that the purpose of my testimony has been to clarify the validity, or usefulness, of given legislation in South West Africa. It has not been to determine whether the Mandate is being faithfully or otherwise fulfilled by South Africa in the case of South West Africa. In other words, my testimony has no bearing on the question of the specific legal obligations of South Africa with respect to South West Africa, and the question whether they have fulfilled the wording of the Mandate.

MR. GROSS: Now, Sir, we understand and agree, of course, that the interpretation of the Mandate is obviously for the honourable Court, but I was anxious to have an understanding for the Court of the purport and direction of your testimony with respect to the matter of relationship, if any, which you perceive between the standards of the content described and defined and the interpretation of the Mandate; whether this was within the range of your intended testimony.

THE PRESIDENT: Its a little difficult for a witness—to ask what the range of his intended testimony is. The actual range of his testimony is determined by the questions put to him and the answers given. It is not for him to interpret his evidence.

MR. GROSS: Yes, Sir. I am making, I am afraid, a stumbling effort to try to clarify and understand the significance of the point in paragraph (b), stated by the Respondent as a point to which this evidence is directed. I do not understand it, Sir.

THE PRESIDENT: Well, if you do not, Mr. Gross, there is nothing you can do about it.

MR. GROSS: Very well, Sir. I am, however, diligent in my effort to pursue the thread, if I may. I shall, however, turn to other aspects of the witness's testimony, which I think are relevant to this general point. Nevertheless, let me ask you, Sir, to refer to your testimony at XI, page 702. You referred, did you not, to the United Nations draft Declaration on Elimination of All Forms of Racial Discrimination?

MR. POSSONY: That is correct.

MR. GROSS: Particularly to Article 5, which you characterized at that page but did not quote. Is that correct, Sir?

MR. POSSONY: That is correct.

MR. GROSS: It is true, is it not, that Article 5 of the Declaration reads as follows: "An end should be put without delay to governmental policies and" . . .

MR. POSSONY: I beg your pardon, that is the . . .

MR. GROSS: That is Article 5 of the draft Declaration, to which you referred.

MR. POSSONY: Of the draft Declaration—I have here the draft Convention.

MR. GROSS: Well, Sir, let us take the Declaration. I am talking about the Declaration to which you addressed your testimony, Sir. Do you have it?

MR. POSSONY: Yes, Sir; here it is.

MR. GROSS:

"An end should be put without delay to governmental policies of racial segregation, and especially policies of apartheid, as well as all forms of racial discrimination and separation resulting from such policies."

That is the text of Article 5 which you referred to but did not quote. That is correct, is it, Sir?

MR. POSSONY: That is correct.

MR. GROSS: Incidentally, just for the clarity of the matter, it is true, is it not, that when the draft Declaration was adopted, which it was, I think, unanimously, by the General Assembly, on 28 November 1963, in the form of resolution 1904. Eighteenth Session, that the same words (just quoted) were embodied in the final resolution, except that a phrase

was inserted so that the final text reads, of Article 5, of what is no longer a draft but a Declaration: "An end should be put without delay to governmental and other public policies of racial segregation . . ." and so forth, the rest remaining the same.

Mr. POSSONY: I do not have this here, I have only . . .

Mr. GROSS: Well, if you would be prepared to take my statement for it, as Counsel, and reading it from the resolution 1904.

Mr. POSSONY: I take your word for it, certainly.

Mr. GROSS: Now, I mention this insertion merely for the sake of accuracy, and not because I want to invite your attention to it particularly, unless you wish to comment on it. But referring to the draft Declaration, to which you testified, immediately following your reference to Article 5, at XI, page 7 2, of the same verbatim record, you expressed an opinion concerning the desirability, as I understood your testimony, of clarifying the Article in certain respects. Do you find that, Sir?

Mr. POSSONY: I do remember it, yes. That is correct.

Mr. GROSS: Was your testimony in this respect intended by you to reflect, one way or another, any judgment as to whether or not the policy of apartheid does, or does not, and I quote the language you use, "fall under the rubric of objectionable policies"? Were you intending by your statement there to imply a judgment one way or the other with respect to the relationship of apartheid to the problem you were addressing yourself to?

Mr. POSSONY: Of course, I was concerned with the fact that in the definitions in this text which you used to support IV, page 493, I may read the exact text to you . . .

Mr. GROSS: Yes, Sir, it is IV, pages 505 to 506 of the Reply.

Mr. POSSONY: "The Declaration makes it clear [these are the words in the Reply] that racial distinctions, be they called racial discrimination, segregation, separate development, or apartheid, are unacceptable." Now in the draft Convention—I apologize that I use the Convention, because I have it here and I have it marked—first of all, in one of the preambular paragraphs—"any doctrine", it is *any* doctrine, "based on racial differentiation or superiority". Now, we have a linkage with any doctrine of racial differentiation which would, in my reading, say that there are racial differences, or that there are different races, whatever it may mean, but this is linked to a doctrine of *superiority*; and *both* it says, would be scientifically false.

Then, in the next preambular paragraph, we have "evil racial doctrines" which are linked to the "practices of Nazism in the past".

Mr. GROSS: What Article are you referring to, Sir?

Mr. POSSONY: This is under "Considering . . .", "Convinced . . .", "Reaffirming . . .".

Mr. GROSS: I mean, what document are you referring to, Sir?

Mr. POSSONY: Draft International Convention on . . .

Mr. GROSS: Yes, you are talking about the Convention, Sir, but the question was addressed on the Declaration . . .

Mr. POSSONY: Yes, I apologize, but I could probably find it there, too.

Mr. GROSS: No, Sir, you will not find it there, unless I am mistaken: that is why I am inviting your attention to the thing we are talking about.

Mr. POSSONY: But there is other language in it which is similar.

Mr. GROSS: Well, would you please find that, Sir, so that we are talking about the same thing.

Mr. POSSONY: In the first "considering" paragraph we have a reference to the "doctrine of racial differentiation or superiority" as being "scientifically false" and "morally condemnable" and so on. Then it says, in the ninth preambular paragraph:

"Convinced that all forms of racial discrimination and still more so governmental policies based on the prejudice of racial superiority or racial hatred [we again enlarge the basis of the argument], besides constituting a violation of fundamental human rights, tend to jeopardise friendly relations . . ."

In Article 5 we have the specific reference to "racial segregation", which is then identified under, or at least linked under, "especially policies of apartheid, as well as all forms of racial discrimination and separation". Now, it seems to me that these things are all different. Specifically, as I tried to point out, I find it very difficult to understand why, in a declaration on racial discrimination which deals with future matters, there are two elements singled out, specifically, two State practices: one is Nazism and the other is apartheid.

Mr. GROSS: Where is Nazism referred to, Sir?

Mr. POSSONY: Nazism—I am sorry, again it is in the Convention.

Mr. GROSS: Yes, Sir. Would you stick to the Declaration, if you please, Sir?

Mr. POSSONY: Well, the Declaration and the Convention do belong together, but I will gladly oblige in this sense, that apartheid is the only specific policy which is identifiable in terms of a particular State . . .

Mr. GROSS: In the Declaration, that is right, Sir.

Mr. POSSONY: And it, however, is linked to policies based on racial superiority or hatred. I just do not conceive that things can be all put together under one heading. If there are no differences between those various factors, then this is one thing. Then we have essentially a policy in South Africa which would be one of racial hatred, racial superiority and, with due respect, though Mr. Gross wants to keep out the word "Nazism" taken from the Convention, nevertheless, Nazism. We have, thus, an identification of Nazism with apartheid. I submit, Mr. President, that this identification is one which is in the public mind, and is one—and perhaps the most important one—which is at the bottom of the opposition or the difficulties in which South Africa finds itself.

[Public hearing of 21 October 1965]

Mr. GROSS: Mr. President. Dr. Possony, in the Oral Proceedings yesterday, verbatim record of 20 October, I should like to draw your attention and the honourable Court's attention to pages 22 and 23, *supra*. I refer to the colloquy between us concerning your understanding as to whether or not the standards which the Applicants contend exist, which are defined and described at page 493 of the Reply, IV, suggest, in your understanding, or force a choice on the part of a government with respect to the protection or equal protection under the laws of an individual as such on the one hand, and/or the protection of the individual as a member of a group; in other words, I refer specifically to your reply to my question which I addressed to you on page 22, *supra*, as reflected in the verbatim record at page 23, which I quote:

"My understanding of what you are trying to say ['you' meaning us, the Applicants] is that one should not, under any circumstances, use the group, class or race classification for legislation."

Is this an accurate formulation of your intended response to my question?

Mr. POSSONY: Yes, I said this.

Mr. GROSS: Would you, if I may ask you this question, in any respect wish to alter your testimony, modify it or amend it in any way, if the true nature and content of the Applicants' standards for which we contend as described and defined on IV, page 493 were not accurately reflected in your response to my question but, let us say, instead refers to governmental policies which do not give weight to individual merit or capacity, but which allot rights and burdens on the basis of membership in a group which do not protect equality of opportunity and extend equal protection of the laws to individual persons as such; in other words, if this were the correct interpretation and understanding of what the Applicants' contention is, would you in any way wish to alter or amend your testimony in any material respect?

Mr. POSSONY: If I misinterpret the passages on page 493, and I can be convinced of that, then obviously I would change the testimony; however, I have, since this obviously is a crucial point, gone over this text again very carefully last night, and I am sorry, but I must say that my interpretation on further reflection and analysis seems to stand up, and with your kind permission I would like to explain why I said this.

For the sake of convenience let me distinguish three things: one I would call the no-allotment norm, as laid down on page 493; then, for the sake of convenience, and again this is over-simplified, but just to keep the argument manageable, I would talk about a no-unfairness doctrine or norm reflected in many of the statements . . .

Mr. GROSS: Excuse me, Mr. President, I am sorry to interrupt the witness, but would the President be kind enough to allow me to sit down while this answer is being given?

The PRESIDENT: You are not very well, Mr. Gross?

Mr. GROSS: I feel a little tired, Sir.

The PRESIDENT: By all means—I expect we all are, but sit down for a while.

Mr. GROSS: Thank you, Sir. This may be a lengthy answer.

The PRESIDENT: It may be. If you wish to sit down, by all means do.

Mr. POSSONY: I will try to keep it short. The second norm would be the no-unfairness norm which one can, I think, distil out of many of the documents that were published under United Nations aegis; and third, there is the factual question whether actually fairness is applied in South West Africa or not—these are three different things.

With respect to the no-allotment norm, I would like to call your attention to the fact that the wording is non-discrimination *or* non-separation, and it is quite clear that there is *one* norm; and furthermore in the paragraph before the last in this whole passage, before the chapter break, it is just called the "norm of non-discrimination". So I would deduce from this that the words non-discrimination and non-separation mean the same thing, in this context. Non-separation is a very neutral term; unlike non-discrimination, about which one can at least argue, according to the *Oxford Dictionary*, that there is a secondary meaning to it, which is positive or negative, non-separation is a purely neutral term—it has no such connotation.

This understanding is strengthened by going further to IV, page 498—this is farther down on the page, and is in the words of the authors of the Reply: "The legal obligation of Member States not to discriminate or distinguish . . ." Again, the word "distinguish" is a neutral term. And again, in the words of the authors of the Reply on page 500 in the second full paragraph, we have the words "prohibiting Member States from discriminating or distinguishing on the basis of race".

The PRESIDENT: I wonder whether you would just give me the reference?

Mr. POSSONY: Page 500, second paragraph, the last line—five words before the end is "distinguishing".

Furthermore if, on page 493, the thrust had been to oppose unfair treatment, that is discrimination in the meaning of unfair treatment, then I do not see why only groups were singled out. Obviously the thrust would have to be against *any* sort of unfair treatment, whether derived from a group distinction or from a distinction on any other basis, granting that the word "group" is a very broad term, almost an unmanageable term, but restricting it to "race", certainly then it would be clear that any discrimination other than race also would be illicit, any discrimination for example on an individual basis.

So much for my understanding of what the no-allotment norm of page 493 says. As to the derivation of the norm, which is the thrust of the text following page 493, there are cited many documents to give the basis for this norm. I would think that the sources do not support the norm. The sources, if anything, disregarding for example the quote by Professor Guggenheim which essentially says that it is not too clear what it means—leaving this aside completely—the sources that are cited would not lend support to a no-allotment norm.

With your kind permission, let me follow this up in one specific case to show that perhaps my interpretation of this is not just my own.

On page 501 of the Reply, IV, one finds that there is reference to the Draft Declaration on Rights and Duties of States, which was adopted by the International Law Commission in 1949 by 11 votes to 2. Article 6 of the Declaration is quoted, and it does contain the words "without distinction as to race, sex, language, or religion" at the end. I will read the whole paragraph, if I may:

"Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion."

In the first place, who dissented from the vote? The United States and the Soviet Union. So that would already cast considerable doubt on the force of this particular text. The American representative was Judge Hudson, who was a Member of this Court. I am quoting from "Report of the International Law Commission Covering its First Session 12 April -9 June 1949", *General Assembly, Official Records, Fourth Session, Supplement No. 10 (A/925)*, page 7. I will read the statement by Judge Hudson:

"Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations, and beyond international law at its present stage of development."

The other dissent was cast by the representative of the Soviet Union,

His Excellency Judge Koretsky. There were many points on which Judge Koretsky took exception, but there was one which has a bearing on this particular article, and it says, and I will quote the full text:

"Mr. Koretsky declared that he voted against the draft declaration because of its many shortcomings, including in particular . . . [and there follow four points and then No. 5] that the draft declaration ignored the most important duty of States—not to allow the establishment of any direct or indirect restriction of the rights of citizens or the establishment of direct or indirect privileges for citizens on account of their race or nationality."

This is not the full quote in No. 5 but I think this gives the gist of it in connection with this point.

Now, if I understand Mr. Koretsky correctly, I think the point was that Article 6, as drafted and as quoted in IV, page 501, does not say enough and in particular, it does *not* enjoin upon States "not to allow the establishment of any direct or indirect restriction on the rights of citizens", etc., "on account of their race". So when we read this I would say that the text as interpreted here does not support the norm.

There is, in my judgment, and again as an over-simplification, a no-unfairness norm contained in some of these documents. There is however, no no-unfairness norm stated at IV, page 493; there a no-allotment norm is stated.

But then when we go to the declaration or the convention against racial discrimination, then specifically the allegation would be that those forms of—I am using the term here as used in the declaration—discrimination which are based on, or reflect, or aim at racial hatred, racial superiority or generally speaking, involve oppression and genocide, those forms of distinguishing—if that be the word—are absolutely out of line with the spirit of the Charter. I do not think there would be any question about that.

Hence the question comes down to the material issue, whether or not the policies which are under discussion in this room fall under the rubric of oppression, genocide, etc. If they do not, and if I understand correctly what Mr. Gross laid down on 18 May, if I remember it correctly, then I do not think this is even under debate. Therefore, the question is whether or not the policy of apartheid, which I understand to be one of constructive purpose enabling rather than disabling in intent, is illicit, simply because it is based on a doctrine of no allotment between groups.

Mr. GROSS: Mr. President, may I resume cross-examination?

The PRESIDENT: Certainly.

Mr. GROSS: I had hesitated, Sir, to interrupt the very interesting argument just made but I should like, if I may, Mr. President, to go back to the question I asked and see if I can obtain an answer to it or if the witness considers that he has answered it. I have it written down so there is not my usual error or fault of misquoting myself after some interval. My question to you was: would you in any respect wish to alter your testimony if the true nature and content of the standards for which the Applicants contend, as defined at IV, page 493 and described there, is not accurately reflected in your analysis and your understanding, which you have now very interestingly and very ably explained to the Court, with appropriate reference to other pages in the Reply? Would you alter or amend your testimony, Sir, if the Applicants' true position

and contention were not as you understand it and as you have explained why you understand it the way you appear to, if the Applicants' true contention, the actual content of the standards—let us take the standards for interpretation of the Mandate now for a moment—refers to governmental policy and practices which do not give weight to individual merit or capacity but which allot rights, burdens and privileges on the basis of membership in a group and which do not protect equality of opportunity and extend equal protection of the laws to individual persons as such? If that were, Sir, a correct interpretation and meaning of the content of the standards for which we contend, would you in any respect wish to alter or amend your testimony? That, Sir, was my question—do you consider that you have already answered it?

The PRESIDENT: Any part of his testimony over the last two-and-a-half days?

Mr. GROSS: Any part of your testimony over the last two-and-a-half days?

Mr. POSSONY: Mr. President, this is hard to answer for the simple reason that I would have to see exactly what the case is which Mr. Gross is making in distinguishing the case from that on page 439. It is entirely possible that if another case were made that, of course, I would respond differently.

The PRESIDENT: Mr. Gross is putting to you that the interpretation which he places upon it, as he states it now, is not the interpretation you place upon it. So he asked you the question—would you wish to alter any part of your testimony over the last two-and-a-half days? If you are unaware of how your answer can be given, having regard to the length of your testimony, then perhaps Mr. Gross will clarify what particular part of your testimony he suggests your might alter.

Mr. GROSS: Thank you, Mr. President. May I clarify the point and purport of the question for the witness?

The PRESIDENT: No, I think, Mr. Gross, that it is much better if you ask the questions. It is the explanations of these things which rather get us into some difficulties.

Mr. GROSS: Yes, Sir. Would you please answer the question, I will reserve my remarks.

Mr. POSSONY: Well, I think I answered it just a minute ago, Mr. Gross.

Mr. GROSS: What was your answer, Sir, if you recall?

Mr. POSSONY: The answer is that I would have to see exactly what the amendment is to analyse it. I cannot, on so many points which are very technical, improvise an answer; this requires logical analysis.

Mr. GROSS: I understand that there might be difficulties of that sort, Sir. Are there any major points of outstanding importance, which you happen to recall in your testimony over the last two-and-a-half days, which you would single out, which would be relevant to my question?

Mr. POSSONY: The most important one is whether it is a no-allotment doctrine or not, in my judgment.

Mr. GROSS: I am not attempting to engage in a discussion or debate with you, Sir, it is obviously for the Court to decide and interpret the contentions of the Parties. My question to you, Sir, is not what you feel or think the standards mean or how they are defined, it is on the basis of the understanding which the Applicants attribute to their own language, Sir. This is, if I may say so, partially in response to the statement

made by Mr. Muller at page 27, *supra*, of the proceedings yesterday, in which he says that the Applicants have not:

"He is very quick [meaning the Applicants' agent] to say that as we, the Respondent, interpret the case, we are wrong, but he has, up to now, not defined his case to any one of the witnesses; he merely refers to these cases set up in the pleadings. And I should like to know what he means when he asks the witness a question like that."

Now, Sir, in respect of this comment by learned Counsel, I have attempted to place before you an interpretation of the meaning of the Applicants' words. I would, therefore, like to ask you again—if you do not wish to answer it or if it taxes your memory it of course ends that. Are there any major or important aspects of your testimony which you can recall from these two-and-a-half days which you would amend or modify, if the interpretation placed upon the content of the standards was the interpretation suggested in terms of my question to you, Sir?

Mr. POSSONY: Can I ask perhaps, Mr. President, that Mr. Gross's interpretation be read again and I will try and note it down?

The PRESIDENT: Mr. Gross does not put to you any specific matter which he thinks is inconsistent or which you might desire to alter, having regard to the interpretation which the Applicants say they place upon page 493. Perhaps the request can be put again but it can be put, I suppose, in much more direct way now that the whole field has been covered as to the purpose of the question, Mr. Gross.

Mr. GROSS: Yes, Sir. Would your testimony in any respect, major or otherwise, so far as you recall it, be altered or modified if the Applicants attributed to the standards for which they contend, as defined on page 493 and described there, that the reference is to governmental policies which do not give weight to individual merit or capacity, but which allot rights and burdens on the basis of membership in a group and which do not protect equality of opportunity or extend equal protection of the laws to individual persons, as such—on the assumption that that is the interpretation? My question, if I may repeat it, is whether or not you would in any material or major respects, as far as you can recall your testimony now, alter or modify it?

Mr. POSSONY: Mr. President, I fail to see that the formula differs from page 493 in any substantial aspect. It is a little hard to be accurate on an evaluation of this sort but on hearing it, I think this is just a restatement, in somewhat different sequence, of what page 493 says, and on that basis I would not change my testimony.

Mr. GROSS: Now I should like for further clarification of the matter to refer to the Rejoinder, V, page 131, to which I referred yesterday and from which I read certain extracts. The context relates to Article 55 (c) of the United Nations Charter but what is relevant to my series of questions to you is that portion of the paragraph on page 131, which reads as follows—I read the first sentence yesterday, I should like to complete the thought in the paragraph today. The Respondent says:

"In Respondent's submission it would be entirely anomalous to suggest that any *differentiation* (as distinct from *unfair discrimination*) between races, sexes, language groups or religious denominations would involve conflict or inconsistency with the said Article [that refers to Article 55 (c)]."

Then Respondent goes on to say:

Thus, on Applicants' argument, a Member of the United Nations would not be entitled to provide special protection or special public conveniences for women, or would not be entitled to grant separate public holidays for different religious communities on their respective religious days, or to establish different public schools for various language groups or even for the two sexes."

And then, later on in the page, the Respondent says:

"It is submitted, therefore, that the Charter did not purport to establish any obligation not to differentiate between members of various groups, but was concerned merely to prevent oppression and unfair discrimination. Insofar as Applicants attempt to establish the proposition that any differentiation on the basis of membership in a group (irrespective of when it says differentiation was introduced for the benefit of the group concerned) is contrary to the Mandate, the Charter, therefore, cannot assist them."

Now, having read this rather lengthy quotation, I draw your attention to the apparent characterization by the Respondent of the Applicants' case as one which suggests that any differentiation between races—I will just stop there—would involve conflict or inconsistency with the said Article, and then goes on to talk about group distinctions based upon sexes, etc., in the terms used.

Now, Sir, I cite this because I would wish to ask you whether your testimony regarding what is described in paragraph (a) of the points to which your evidence is directed, or was intended to be directed, or does it reflect an assumption on your part that the standards contended for by the Applicant are accurately reflected in the passage I have just read from the Respondent's Rejoinder?

Mr. POSSONY: Mr. President, the word standard was not used by me, but the word norm, and with that correction. I think that my testimony was certainly directed to the notion that differentiation is not allowed. In order to establish the fact that differentiation is a fact of life and necessarily is a common practice in States if I may enlarge on this for one sentence: I did not even enter into a discussion of the terms "group" or "class", but restricted my testimony essentially to the matter of "ethnic", interpreting the word "race" in a broad, perhaps not necessarily correct way. So the burden of my testimony was to establish that differentiation as to groups is a fact of legislation. "According to group" differentiation is common practice and has to be common practice. I think page 131 of the Rejoinder, V, which Mr. Gross just read, is a correct description of page 493, IV.

Mr. GROSS: Now, Sir, with reference to your statement, if I understood you correctly, and please correct me if I am wrong, your testimony was not directed towards standards but towards a norm, is that correct?

Mr. POSSONY: Yes.

Mr. GROSS: I refer, and I was referring, to paragraph (a) of the point to which your evidence was said to be directed by the Respondent, as read into the record of 18 October, at XI, page 643, which reads as follows, as one of the points to which your evidence is said to be directed—I will omit the preambular paragraph:

"(a) The absence of a general practice of a suggested norm

and/or standards of non-discrimination and non-separation as relied upon by the Applicants.”

Now, Sir, would you, if you will, clarify, for the benefit of the Court, what you meant when you said that you were not addressing yourself to the question of standards of interpretation for which the Applicants contend?

Mr. POSSONY: Mr. President, as I understand it, the norm and the standard are the same content-wise, but the legal effect of the norm is different from the legal effect of the standard; particularly the standard as applied in the particular case with respect to the Mandate. I was not testifying on the legal effects of the standard as applied to the Mandate.

Mr. GROSS: So your testimony, then, if I understand you correctly, was directed to the point of whether or not there exists, as a matter of international law, a norm, an international legal rule, prohibiting discrimination, as defined on page 493. Is this the point towards which your testimony is directed?

Mr. POSSONY: That is correct.

Mr. GROSS: And the sole point towards which your testimony is directed?

Mr. POSSONY: Certainly the main point, yes.

Mr. GROSS: Now, Sir, with respect to the question of the practice of suggested norm and/or standards—the practice—you would concede, would you not, Sir, that there are two separate, but related, questions involved: the existence of standards—I am now referring to standards—the existence of standards or otherwise and their application in practice are two different aspects of the problem, are they not?

Mr. POSSONY: Yes, Sir.

Mr. GROSS: With respect to the existence of standards, as distinguished from their application in one or more instances, was your testimony, or was it not, Sir, tended to be directed towards the question of whether the standards existed?

Mr. POSSONY: Yes. They do not exist. I should qualify, but for simplicity and time-saving purposes the purpose of the testimony was that the norm or standard, as laid down, is non-existent.

Mr. GROSS: Does not exist?

Mr. POSSONY: No. Other norms exist—and standards.

Mr. GROSS: Would you say, Sir, just to clarify this one notch further, let me take as an illustration the equal protection clause of the United States Constitution with which you and I are both generally familiar, Sir, are we not, and of which the Court will no doubt be aware. Would you say, Sir—you would obviously agree, Sir, that that exists as a principle or standard, or whatever way you would wish generally to describe it? That exists?

Mr. POSSONY: Certainly.

Mr. GROSS: You have testified with respect to certain of your views with respect to its application, or non-application, of particular context? That is correct, is it not, Sir?

Mr. POSSONY: That is correct.

Mr. GROSS: So that you would concede that there is a standard at least in the United States, on a Constitutional level, of equal protection of the laws, would you not, Sir?

Mr. POSSONY: Certainly, but, Mr. President, that is really not the point. The “equal protection before the law” norm or standard has been

in existence for many years. I do not know whether it started several centuries ago, but certainly as of 1920, which is a relevant date in these proceedings, that norm and standard was generally applied. Certainly we do not have to go further than to say it was being applied in France and Britain.

Now, the point in Mr. Gross's presentation, it seems to me, is that after the 1920 period, and notably in the United Nations period, a *new* norm has been developed. That is the question. That old norm, that it has been in existence, there is no question about it. This norm, I would say, was clearly recognized by all parties to the Mandate. I do not want to go further than this because it becomes a strictly legal problem but, speaking as an historian, I certainly would stand on the point that by 1920—and, in fact, Mr. Gross, yesterday was kind enough to read the Constitution of the Republic of Austria, which is dated 1920, and which was written by Professor Kelsen—certainly at that time, without going any further back in history, that was an accepted principle. However, the point here is that a new norm has been developed, as defined on page 493.

Mr. GROSS: Now, Sir, I should like, with the Court's permission, to turn to another aspect of your testimony. In the verbatim record of yesterday, at page 35, *supra*, you stated, Sir, among other things:

"We have, thus, an identification of Nazism with apartheid. I submit, Mr. President, that this identification is one which is in the public mind, and is one—and perhaps the most important one—which is at the bottom of the opposition or the difficulties in which South Africa finds itself."

Is that correct?

Mr. POSSONY: Yes, Sir.

Mr. GROSS: Now, might I ask you, Sir, with respect to the possible inferences which you might wish the honourable Court to draw from your testimony which I have just quoted: does this testimony reflect, or is it intended to reflect, the view, Sir, that South African policies and practices, which are in the record of these proceedings, is one of the instances, to use the word used in point (b) to which your evidence is said to be directed? "Is South Africa and its racial policies, the policies of apartheid or separate development, one of the instances in which the attempted application of the standards, or the attempted application of the norm that exists as a matter of law would have an adverse effect on the progress and well-being of the persons concerned? Is this one of the instances which are in your mind, Sir, by implication or otherwise?"

Mr. POSSONY: If I understand it correctly, Mr. President, the question is whether the policies pursued by South Africa have an adverse impact on the populations concerned?

Mr. GROSS: My question actually, Sir, is whether you, in your testimony which I have just read, had intended to convey the impression or sought to have the Court infer that this is one of the instances to which point (b) refers?

The PRESIDENT: Do you recall your evidence at page 35, *supra*?

Mr. POSSONY: Yes, I do.

The PRESIDENT: The question is did you intend the Court to infer, or was it in the back of your mind, that any attempted application of

the standard or norm stated at page 493 of the Reply would, in South West Africa, have an adverse effect on the well-being and progress of the people of that Territory? That is the question, is it, Mr. Gross?

Mr. GROSS: Yes, Sir, and specifically referring to paragraph (b) of the points to which your evidence is directed at XI, page 643, of the verbatim of 18 October.

The PRESIDENT: I think it is much better if you get the answer to that question. It is as I have already suggested, the addition of other matter, Mr. Gross, which frequently causes a difficulty.

Mr. GROSS: Sir, I hope I have not confused the witness by identifying the matter, I certainly did not wish to. Would you wish me to restate the question, Mr. Possony?

Mr. POSSONY: I will try and answer, Mr. President. My point here was simply that the Applicants used the Declaration on the Elimination of all Forms of Racial Discrimination as one item supporting their norm and this declaration, and more specifically, the draft Convention, which they also used, is linking apartheid with Nazism. The point that I wanted to make is that if Nazism and apartheid were identical or if apartheid were a modern form of Nazism—which is, in my mind, genocide, by and large—I certainly would not be standing here testifying.

It is clear from my reading that the draft Convention and the Declaration try to outlaw practices like Nazism. This does not *ipso facto* mean that they try to outlaw . . .

The PRESIDENT: The Court must interrupt you. It is important to be responsive to the question; I think the question has now been clearly put to you—I do not desire to put it again, but perhaps Mr. Gross will, and then you should be responsive to it.

The question is one limited to whether, having regard to that part of your testimony which appears at page 35 of yesterday's transcript, which you have read: did you intend to have the Court infer, or was it in the back of your mind when you made that statement in your testimony, that the suggested norm or standards, stated by the Applicants at page 493 of their Reply, IV, would, if applied to the Territory, have adverse effects on the well-being and progress of the people concerned? Now, that admits of a fairly brief response—would you be responsive to that question?

Mr. POSSONY: The answer is yes, Mr. President.

Mr. GROSS: That it would, Sir?

Mr. POSSONY: That it would be detrimental if the norm were applied.

Mr. GROSS: Now, Sir, in respect of your reference—at the same page and point, that is to say, page 35, *supra*—and comment that the identification of Nazism and apartheid has certain consequences or implications, I should like to ask you, Sir, whether you have had occasion to examine the 30-odd United Nations resolutions or any of them cited in the Reply at IV, pages 502 and 503, in the footnote, which specifically condemn racial discrimination, including apartheid, and also in certain non-self-governing territories. Are you familiar with those resolutions, Sir, or any of them?

Mr. POSSONY: I would not be able to tell you, Mr. President, I have read many of these resolutions, but I do not know which specific ones.

Mr. GROSS: Well, Sir . . .

Mr. POSSONY: I know that they are listed here, but I do not remember.

Mr. GROSS: On the basis of your reading of any of them, so far as

you recall, and obviously I would not want to tax your recollection, but on the basis of your recollection, Sir, of reading any of them or all of them, could you tell the Court whether there is any reference to Nazism in any of them, Sir?

Mr. POSSONY: I do not remember. I have the Draft Convention here, and it is . . .

Mr. GROSS: I am talking to you about the resolutions cited at the page, Sir, that does not happen to include . . .

Mr. POSSONY: This I do not know.

Mr. GROSS: . . . the Draft Convention, I see, Sir.

Now, have you read, Sir, as part of your study of the case in preparation for your testimony, the expression of official views of certain governments, which are set forth illustratively in the Reply, IV, at pages 296-302—have you had occasion to examine those, Sir?

Mr. POSSONY: Pages 296 to?

Mr. GROSS: Pages 296 to 302 of the Reply, under the heading "Views of Governments".

The PRESIDENT: It is pages 293 to 295, is it not?

Mr. GROSS: Oh, I beg your pardon, Sir.

I am sorry, Mr. Possony, I am afraid I have misled you, Sir. Pages 295 and following; page 293 is the introduction. The views begin at page 295, the United States, and they continue for some pages thereafter; I will not ask you to read them, unless you wish to, but have you had occasion to examine them?

Mr. POSSONY: No, I have not examined them.

Mr. GROSS: May I state, Sir, that, with the exception of the Norwegian statement, which is at IV, page 299 of the Reply, there is no reference in any of them which identifies Nazism with apartheid in any respect.

I take it, Sir, that, in respect of your comment that this identification is one which is in the public mind, and is perhaps the most important one which is at the bottom of the opposition or the difficulties in which South Africa finds itself, you would not then apply this statement to the views of governments or to the resolutions, so far as you are aware of their content?

Mr. POSSONY: Mr. President, the culmination, so far, of the drafting effort, has been the Draft International Convention on the Elimination of all Forms of Racial Discrimination. I do not know what happened in the last few months at the United Nations, so I would not say that this is the last effort under this over-all heading of human rights, but this is definitely the last product before the resumption of United Nations activities—and there it is, very clearly, Nazism.

Mr. GROSS: Sir, I do not have my question written down, I will not labour the point, but you have not responded to the intent of my question. Was it or was it not, Sir, to be inferred in your testimony, on page 35, *supra*, that the identification of Nazism and apartheid has been made in the resolutions, if you recall, which the Reply cites on the views of governments, other than the Norwegian statement—now, my question is: whether, in terms of your testimony, you are referring to identification of Nazism and apartheid in respect of anything other than the Draft Convention, to which you have referred? Perhaps I can put it that way.

Mr. POSSONY: No, I think this is a good enough source for the point.

Mr. GROSS: I see, Sir.

Now, in your testimony in the verbatim record, 19 October, at XI,

pages 703 to 707, you discussed, at some length, the proceedings of the Seminar on the Multi-National Society, held 8 and 21 June 1965, under the auspices of the United Nations, and you quoted statements from various participants, and certain conclusions, did you not, Sir?

Mr. POSSONY: That is correct.

Mr. GROSS: Now, the report of the proceedings states, at page 8, paragraph 23—I want to be sure I am citing the right page . . .

The PRESIDENT: Have you the report in front of you, Professor?

Mr. POSSONY: I know the reference which will be made, I am sure. Thank you very much.

Mr. GROSS: The paragraph to which I refer . . .

With the Court's permission, do you have a copy to follow me with?

Mr. POSSONY: I do not.

Mr. GROSS: I will read it, if I may, Mr. President, I have it carefully transcribed.

The PRESIDENT: Certainly.

Mr. GROSS: It reads, on pages 8 and 9, paragraph 23:

"Several participants stressed that the question of minority rights, important as it was, seemed currently overshadowed by the wholly abnormal situations prevailing in certain areas where a minority denied the most fundamental human rights to an overwhelming majority. Special attention was drawn to the discriminatory policies pursued by the Government of South Africa [several other governments are named, but focusing now on this], policies which, in the opinion of those participants, demanded international measures in that they violated the Charter of the United Nations, the Universal Declaration of Human Rights, and the instruments deriving from them."

In the first place, Sir, with respect to the views here expressed by "several participants" on the problem of "a minority denied" the enjoyment of "the most fundamental human rights to an overwhelming majority", would you agree, as a political and social scientist, that this is an aspect of the problem of human rights, that is, it is not merely a question of whether a minority is deprived of rights but whether a majority is deprived of rights? Would you say that both are relevant to a consideration of the problems to which you have addressed yourself?

Mr. POSSONY: That anybody is denied of rights.

Mr. GROSS: Incidentally, Sir, I would simply point out that, it is correct, is it not, in this excerpt there is no identification of Nazism with the policies of South Africa?

Mr. POSSONY: No overt identification, Mr. President. The very paragraph is worded so that it is obviously in the minds of those who made the observation that apartheid is an oppressive policy; it may not be as bad, maybe, as Nazism, there may not be an allegation of genocide involved here, but apartheid is, according to the people who made these statements, oppressive. The point at issue is precisely whether it is oppressive or not. These men in the seminar have assumed that it is oppressive but there is no evidence presented as to why they think so. There is a paragraph thrown in in the transcript of the proceedings, but there is no evidence whatsoever that the people who talked about the subject knew any of the facts.

Mr. GROSS: Now, Sir, with further reference to the proceedings of the

seminar, and the views expressed with regard to the problem of minorities, in your testimony in the verbatim record, 19 October at XI, pages 704-705—do you have that, Sir?

Mr. POSSONY: Yes, I have page 705, but which passage?

Mr. GROSS: You pointed out, did you not, "that the point was made repeatedly that group rights and individual rights do not necessarily coincide"?

Mr. POSSONY: That is correct.

Mr. GROSS: And that "both types of rights must be protected". You stated that on page 705, *supra*, is that not correct, Sir?

Mr. POSSONY: Yes.

Mr. GROSS: Now, you then cited and quoted from paragraph 36 of the seminar in this connection, did you not, Sir?

Mr. POSSONY: Yes.

Mr. GROSS: I should now like to call to your attention paragraph 35, of the same report, immediately preceding the paragraph you cited, and ask you whether you would agree or disagree with the views there set forth by the governmental representatives concerned.

Do you have a copy of the document? May I read it slowly? Paragraph 35 is on page 11:

"Other speakers raised in this connection [and the connection was the minority problem, generally speaking] the question whether the rights most requiring protection were vested in minority groups or in the individuals belonging to them. Some of these speakers contended that all political and most social rights could be extended only to an individual."

Pausing there, do you agree or disagree with that view?

Mr. POSSONY: Could you read it again? I did not hear the last part.

Mr. GROSS: Yes, of course, if the President permits.

"Some of these speakers contended that all political and most social rights could be extended only to an individual."

Would you agree with that view?

Mr. POSSONY: I do not know about "most" and "all". I would say that there are rights which can only be attributed to individuals and there are rights which must be attributed to groups.

Mr. GROSS: It depends, does it, if I may interject a question, on the point of view or perspective from which the problem is approached, since groups are, are they not, necessarily composed of individuals?

Mr. POSSONY: Yes, but I do not want to get into an argument about this because obviously that is one of the factual questions. I believe, just to give an answer to it, that many rights and obligations must be legislated through the group and the individual does not show up. I could explain this, for example, in terms of taxation, but I do not think that I should waste the Court's time with that. As Mr. Gross stated it, it is a generality and I will answer it with a general answer.

Mr. GROSS: Sir, my question to you was, I thought, rather axiomatic. Groups are, are they not, composed of individuals?

Mr. POSSONY: Yes, they are obviously composed of individuals, but that does not exhaust this problem.

The PRESIDENT: The first part of the response was the answer to the question, Mr. Gross put to you.

Mr. GROSS: To continue:

"The right to vote, for example, should be enjoyed by every citizen, but the recognition of special political rights to a group could even carry an element of risk, as the history of the inter-war period has shown."

Now, I am calling your attention here, in the context of this view expressed in the report which you have cited, to the phrase "the right to vote, for example, should be enjoyed by every citizen". Would you accept that as a principle?

Mr. POSSONY: I accept it, except for the normal exclusion clauses, but otherwise there is no question about it.

Mr. GROSS: In other words, as a principle or standard, you would agree that, subject to disqualifications—insanity, age and the normal disqualifications and qualifications—you accept the principle that the right to vote should be enjoyed by every citizen?

Mr. POSSONY: Yes.

Mr. GROSS: Next, continuing reading:

"The creation of privileged groups, particularly within concentrated areas, might create a local situation in which a minority discriminated against the majority."

Would you accept that as a fact and would you agree with that statement?

Mr. POSSONY: Yes. I would also agree to exactly the opposite statement. If I may follow up the "right to vote" with one sentence, it is not a question of the right to vote. I do not think there is any argument about that. The question is: to vote in what context? Similarly, a minority may oppress and a majority may oppress.

Mr. GROSS: Then, continuing the views expressed:

"Moreover a group enjoying special rights might abuse them to the point of hindering those of its members who prefer to seek total assimilation within the dominant current."

Would you accept that, if you understand it? I am not certain that I do.

Mr. POSSONY: I think I understand it. There are two sides to this, the group which may want to assimilate and the group that may or may not want that group to assimilate. In other words, you have to consider both elements of this equation. Assimilation means that one group wants to merge with another group. The other group may not want this. Whether this is oppression or not is, I think, a question which is hard to decide. It has often been stated that it is "oppressive", but I am not sure that this is correct and I do not want to waste time here.

Mr. GROSS: Continuing and concluding the reading of this paragraph, there is one more sentence:

"Separate group rights could thus only be envisaged as a rule in the linguistic, cultural or religious fields while elsewhere the rights of a group could not exceed the sum total of rights enjoyed by each individual therein comprised."

Now, unless you wish me to read it again, what I wish to call to your attention is the recurrence to the theme here, as I understand it, earlier mentioned, that "the rights of a group could not exceed the sum total of rights enjoyed by each individual therein comprised". As you understand that, would you agree or disagree with it?

Mr. POSSONY: I do not think that this statement is one which is too responsive to the problem we are discussing.

The PRESIDENT: First, could you answer the question of do you understand what Mr. Gross put to you? Do you understand the words which he used?

Mr. POSSONY: I understand this particular quotation, Mr. President.

The PRESIDENT: Whether it is concerned with the problem we are discussing is not the point. Counsel is asking your view of this statement, do you agree with it?

Mr. GROSS: As you understand it, do you agree or disagree?

Mr. POSSONY: That is what I wanted to express. I agree to it as an exercise in logic. I do not agree with the particular statement as a sociological analysis.

Mr. GROSS: Would you care to elaborate that, if the Court wishes or permits?

With regard to your testimony on the page I have cited, that is, the verbatim of 19 October, XI, page 705, you will recall that you referred to the fact that "both types of rights must be protected". The point was made repeatedly that "group rights and individual rights do not necessarily coincide and that both types of rights must be protected". That was your testimony.

I would like to ask you, Professor Possony, for your view, if you care to express it, as to whether or not the purpose of group protection, in the sense in which you use the language, is or is not precisely to protect the rights of the individuals composing the group so that they will not be hampered or adversely affected by reason of their membership in a group? Is that what you mean by the purpose of protecting the group?

Mr. POSSONY: The purpose of protecting the group, or group legislation, is to enable the individual to get his best chances. There is only one additional point, that in addition to the question of the individual's rights and hopes and so on, there are specific problems that must be handled, due to the existence of groups, which do not necessarily have a bearing on the question of individual and human rights.

Mr. GROSS: Now, of course we agree without any question or reservation that special problems arise by reason of membership in a group. I do not mean to imply anything else in my question to you. Proceeding from your response to me, as I understood you, that a fundamental purpose of a group is precisely to protect the right of the individual as a member of the group, would you go further and say that if it is possible, by natural circumstance, that is to say other than by reason of sex, or by reason of being blind or otherwise disabled, or a minor, to change group affiliation for any purpose sought by the individual, would you say that this is a right to be protected?

Mr. POSSONY: When a man is blind and he can regain his sight, obviously the right for him to do so should be protected. Generally speaking I agree with you that the right of an individual to select his own life is one that should be protected. The question in practice is to what extent there is a practical capability.

Mr. GROSS: Suppose, Sir, for example, a person—I am not drawing you in to South West Africa or South African policies any more than you wish or the Court permits you to go—but suppose, for example, a person classified as Coloured, let us say, wishes to enjoy certain rights which are granted by law only to persons classified as White: let us take

that as an example. Would you regard it as desirable social policy, legal, or economic, or political, or moral policy, or all of these, to allow or permit that individual (as an example) to say, "I do not wish to be classified or regarded as Coloured. I wish to have the rights which pertain to me as an individual and comparable to those enjoyed by a White person". Would you state that that is a right on his part which should be protected?

Mr. POSSONY: Mr. President, there are two questions—the right not to be classified and the question with respect to activities. Without going into the details of this I would say this depends on the over-all situation. If you have a situation where it is necessary to divide people by groups because they are in fact quite different, and this is a political issue in the political area, like in Cyprus, then the interests of the community as a whole, *not just the individual or the sub-community*, but the over-all community, take precedence. So the desire of the individual person is of no greater importance than the desire of the young recruit who does not want to be drafted into the military forces.

With respect to the reduction of his personal rights in terms of his career or so, it depends precisely on what the facts are. If he is disabled from making any career that is within his capability, then this would be a reduction of his rights. If, however, he is not so disabled, then his rights would not be curtailed.

Mr. GROSS: Would disablement in the sense in which you use the term include the inability, by law, to participate in the franchise, for example?

Mr. POSSONY: In any franchise?

Mr. GROSS: Any franchise you wish, Sir, that pertains to rights of citizenship. Let us say to vote for representatives in the central government, for example.

Mr. POSSONY: That depends on the situation, Mr. President. No one can participate in any franchise he wishes. You have to participate in the franchise of your group; it makes no sense to vote in a group to which you do not belong.

Mr. GROSS: And this depends then, Sir, on how you define the group, does it?

Mr. POSSONY: It depends, I think, if it is a valid definition, on what the actual social situation is.

Mr. GROSS: It depends on how the group is defined—would you answer that yes or no? It seems rather axiomatic, in terms of your earlier response.

Mr. POSSONY: If we understand that the definition would not be an arbitrary one, then the answer is yes.

Mr. GROSS: And would it matter also who establishes the group classifications? Would that be relevant?

Mr. POSSONY: It would be relevant. It would be more relevant if the group classifications were arbitrary as distinguished from group classifications that are just natural because there happen to be those groups.

Mr. GROSS: And would it make a difference, Sir, who makes the decision as to whether a particular classification is arbitrary or not?

Mr. POSSONY: It would matter if the decision disregarded the facts of history. I do not know, for example, whether in the establishment, let us say, of a system like in Cyprus or in Lebanon, people have gone through this sort of elaborating precisely how to define this point. Those

were given situations and arrangements generally were made on the basis of those given situations.

Mr. GROSS: Would you care to answer my question, or do you think you have answered it? Does it make a difference who decides whether a given classification is arbitrary or not?

The PRESIDENT: There are two questions there, Mr. Gross: one, who makes a definition, and the other one, whether it is arbitrary.

Mr. GROSS: Sir, I intend, if I may, to clarify and re-formulate, to ask one question. Does it make a difference who decides whether or not a given classification is arbitrary?

Mr. POSSONY: Frankly, I do not know how to answer this, Mr. President. Logically, I would say obviously it makes a difference; practically, I would say that there is no mechanism in existence by which this could be determined.

Mr. GROSS: Sir, you are not testifying with respect to the Mandate; that is understood, is it not?

Mr. POSSONY: No, no, I did not.

Mr. GROSS: Now, Sir, with regard to a further testimony, the report of the proceedings of the seminar to which you have made reference, paragraph 120 of the report reflected the view of some of the participants . . .

Mr. POSSONY: Do you have the page number, please?

Mr. GROSS: Yes, I do. Paragraph 120 is on page 29.

Mr. POSSONY: I mean the reference in the transcript, in the verbatim record.

Mr. GROSS: No, this is not a reference in the verbatim record. This is a reference to the report of the seminar. The references to the verbatim record which I have made are those in which you discussed the report of the seminar in other respects.

Page 29, paragraph 120, of the report of the seminar is a summarization of the debate, and the discussion leader suggested the following conclusions, *inter alia*, the one to which I shall refer:

"Some participants felt that the question had been somewhat wrongly approached [again the question here being the whole problem of minorities, multi-national State in the broadest context] since cultural rights were not special minority rights but an essential element of the freedom of the individual."

Would you agree that cultural rights were an essential element of the freedom of the individual, rather than minority rights, or do you think that that is an unrealistic distinction?

Mr. POSSONY: Both.

Mr. GROSS: You think that it pertains to both, Sir?

Mr. POSSONY: If you have a society where there are many different groups, and where, for that matter the strength of the particular cultures is quite different, one culture being stronger than the other, you have to keep in mind that the culture as such of the group has to be protected. In addition, of course, it is an element of personal freedom to have your own culture.

Mr. GROSS: Would you say, Sir, that as a matter of your belief or approach to this whole problem, that the group which we agree, I think, comprises individuals, is only a group because of individuals which comprise it? This is correct, is it not, Sir?

Mr. POSSONY: Mr. President, this raises an argument which has been dealt with in 100 years of sociological theory, so I just cannot answer this in terms of yes or no. This question does not lend itself to this sort of answer.

Mr. GROSS: If it is a question which is difficult or impossible to answer within reasonable time-limits, perhaps we could co-operate in my reformulating it.

Mr. POSSONY: Let me try a very fast answer with respect to language. You do not have language of an individual. Language presupposes a group. Without the group as such there is no language.

Mr. GROSS: Of course, Sir. Now, with regard to those who speak the language, they are individuals or does a group speak a language, Sir?

Mr. POSSONY: The group speaks the language and all the members of the group speak the language.

Mr. GROSS: Now, Sir, I just wanted to get a little clearer, for the possible benefit of the Court, your conception of the relationship between the group and the individual, since obviously, is it not true, Sir, that this is really the heart and soul of the purport of your testimony? You would agree with that, would you, Sir?

Mr. POSSONY: Not necessarily.

Mr. GROSS: Not necessarily. With regard to the minorities treaties, to which you referred, I refer specifically to the verbatim of 18 October, XI, at pages 655 and following.

At page 656, I shall read, Sir, from your testimony, the following paragraph:

"The minority treaties provided to each member of the minority the right to the nationality of the State exercising sovereignty. The treaties recognized the principles of strict equality between individuals belonging to the minority element and those belonging to the majority, notably equality of all persons before the law and equal treatment *de facto* and *de jure*."

Is this a correct version, an accurate version?

Mr. POSSONY: Except for the word *juris*, yes.

Mr. GROSS: Except for *de juris*. It should be *de jure*.

Now, Sir, with respect to this paragraph, first the statement that "minority treaties provided to each member of the minority the right to the nationality of the State exercising sovereignty". On the basis of your study or analysis of the minority treaties to which you referred, could you indicate your view concerning why that was regarded, if you know, as an important element for protection in the treaties?

Mr. POSSONY: Well, I have not addressed myself to this problem particularly, but I would venture to think that any person needs a passport; he has to have a right to be somewhere, to be recognized, and to come home if he wants to, and so on, and that is involved here.

Mr. GROSS: Do you think, Sir, that this is a fair interpretation of your answer; that it is essentially a matter of convenience rather than, for example, a matter of basic rights which normally go with citizenship?

Mr. POSSONY: I would think this is a basic right.

Mr. GROSS: And, therefore, now turning to the second sentence: "The treaties recognized the principles of strict equality between individuals belonging to the minority element and those belonging to the majority", etc. Now, with respect to that phrase in your testimony, would you

indicate to the Court your view concerning the importance, or otherwise, with any qualifications you may have, of the right of strict equality between members of groups, and what sense you attribute to that phrase in your own testimony? Equality in what respect, Sir?

Mr. POSSONY: Well, the treaties had this wording in them, this is point number one. The specifics varied not too much, but they did vary. The fundamental purpose was, of course, that in a multi-national State (most of those were European States where the ethnic differences are relatively minor) or where there are some religious problems, that each citizen of the State has equal rights in terms of voting, in terms of passports, in terms of whatever other rights that would be necessary and are possessed by any member of the other groups.

Mr. GROSS: And the "equality of all persons before the law and equal treatment *de facto* and *de jure*"; you would regard that, or accept that, Sir, as a standard or principle of general application in respect of the minorities treaties?

Mr. POSSONY: Yes, they all contain this phrase, or virtually all.

Mr. GROSS: And further in your testimony in the same verbatim record, but calling your attention to page 654, now you referred, did you not, Sir, to several ways of implementing self-determination? And in the course of your testimony you stated, and I quote from **XI**, page 654:

"In this context, I am using the term 'self-determination' as denoting the idea of national distinctiveness in the sense of Bluntschli, one nation-one State or one State-one nation. I am not discussing how and whether the will of the populations concerned is being determined."

Now, would you indicate to the Court, if you wish to, whether, in your view, the methods by which the will of the population concerned is ascertained and determined are factors relevant to the question of implementation of the principle of self-determination to which you referred?

Mr. POSSONY: The short answer to that, Mr. President, is yes.

Mr. GROSS: And, Sir, is this what you meant in your comment (this is for clarification), in the same verbatim record at **XI**, page 656, when you said, among other things:

"A mere minority treaty cannot provide the ethnic group . . . with the capability of participating as a more or less equal partner in decisions affecting its existence."

Did you mean, Sir, by that testimony "a mere minority treaty cannot provide the ethnic group", etc., that the achievement of the status of, what you so call, more or less equal partnership in decisions affecting the existence of a group is an important, or even a vital element of the problem of self-determination and equal rights?

Mr. POSSONY: I do not think these two points are too closely connected. The point on **XI**, page 654, was simply a methodological one. I was not going to discuss this problem in the framework of that particular argument. I was just talking about separations, partitions, and so on. The point on page 656 essentially is that a minority treaty provides some sort of protection to a group that finds itself in the usually difficult position of being in a State with which ethnically it is not identified. As a minority it will always, in one way or the other, stay under certain

handicaps which the minority treaties can mitigate, but the handicaps attendant to the status of minority will remain.

Mr. GROSS: I take it you would agree, would you not, Dr. Possony, that it is, let us say, a sound application of the principle of self-determination, in the context of your testimony, that what you have described as more or less equal partnership in decisions affecting its existence would be a desirable objective from the standpoint of effecting just and sound decisions in respect of self-determination? Would you agree with that, Sir?

Mr. POSSONY: Certainly.

Mr. GROSS: Do you agree that individuals composing an ethnic group in the situations you have in mind—or have you answered this already—should have an effective voice in decisions affecting the existence of the group? Do you consider that you have already answered that?

Mr. POSSONY: No, I do not think this was discussed before, Mr. President. I do not have any argument with this contention, in fact I agree with it wholeheartedly. Every group ought to have its own voice, its own self-determination in the sense of determining, on a day-by-day basis, its own destiny, and only if it does that can it be considered an equal partner. I think this is the fundamental objective, at least of some parts of the policies which are under critique. Now, the question of how you determine in a particular case a status—whether for example, through the plebiscite technique, and so on—that is another question. It is still another question entirely whether, at a given time, a particular group is ready for running its own affairs or running all of its own affairs. This is recognized in the United Nations Charter, and so I do not think I have to go into that.

Again, let me make this point, if I may, very clearly: there is no question as to what the ultimate objective would have to be, or at least there is no question in my mind as to the ultimate objective, that the various ethnic groups—and the word “ethnic” incidentally covers a very broad field of many sub-differentiations—all ought to be strong, self-reliant, progressive. In fact, every individual in each ethnic group is dependent upon the fate, the destiny and the strength of the group to which he belongs. This being the objective to which, I am sure, practically everybody agrees, then the question becomes one of methodology of how you would reach this objective. And I think this is the question under debate.

Mr. GROSS: I think, Sir, perhaps I might invite your attention to the question which was: do you agree that individuals composing an ethnic group, no matter how defined, in the situations you have in mind, any of them, should have an effective voice in decisions affecting the existence of the group? Do you agree that individuals composing the ethnic group should have some effective voice in decisions affecting the disposition or the destiny of the group of which the individuals are concerned?

Mr. POSSONY: Certainly, each individual should have an effective voice within his own group.

Mr. GROSS: Within his own group, Sir. Then this takes us back again to the question, does it not, of who defines the group?

Mr. POSSONY: History defines it for you.

Mr. GROSS: And in the case, Sir, of a particular government, whether a mandatory or not (we will leave that aside) does not the classification by groups depend in certain cases—I will refer specifically to South

Africa and South West Africa—by government fiat and legislation? Is that not correct, Sir, so far as you know?

Mr. POSSONY: You can have, and undoubtedly there are historic examples and I could quote a few, I think, arbitrary government fiats, as you call them. Those fiat decisions are not viable for a long time; they break down somehow sooner or later. A government classification of the groups is viable only if the groups are realities. By contrast, if the groups are realities and the government does not take that reality into account—which is one of the main points I tried to make—the particular governmental policy based on the ignoring of these groups also is not viable.

Mr. GROSS: Speaking as a social behaviour scientist, when you refer to reality in this context are you or are you not referring to any objective criteria on the basis of which a government, let us say, determines what is "reality" and what is "artificiality"?

Mr. POSSONY: This question of objective criteria can be pushed very far. Generally speaking, a government running a particular area knows pretty well what the reality is, and I do not think they have to call in the professors to tell them precisely what the criteria are of one group or the other. But there are some commonly accepted criteria, like language and like territory; if I may, I can give you a set of criteria which I think are self-evident.

Mr. GROSS: If I may interrupt without blocking your thought, is the answer to my question that there are criteria which you are now about to enumerate so I can follow, and the Court can follow, your testimony?

Mr. POSSONY: Of course there are such criteria. You can be as accurate in this matter as you want to be, but let me read such criteria: historical development, stability, language, territory, economic life, psychological makeup, community of culture. The criteria I quoted to you are by Stalin, from his book on nationalism written in 1913. You can have other criteria, I have written out many more, but all of those are self-evident criteria.

Mr. GROSS: When you say, as I believe you did, that the government of the area knows what is the reality—I believe substantially that is what you said, is it not?

Mr. POSSONY: That is substantially what I said.

Mr. GROSS: In respect of the government of an area knowing what is the reality, would you agree that it is relevant, and perhaps decisively relevant, who has an effective voice in the selection of that government, and who participates in that government, making such decisions as to what is the reality or otherwise?

Mr. POSSONY: As a general statement, of course this is correct.

Mr. GROSS: To approach the matter from still another point of vantage, but on the same general lines, at least in my intention—you might construe it differently—in your testimony in this same verbatim record, at XI, page 648, to which I invite your attention, you stated in a broad context, and if I am quoting it out of context I am sure you will be quick to point it out to the honourable Court, about the middle of the page, that "The diversity of mankind rests upon ethnic differences". Then you explained, I think, what you had in mind, at least in part, in that respect. Later on, towards the bottom of the same page, you stated, and I read just a sentence here: "Multi-ethnic societies presuppose the explicit recognition of ethnic difference." I should like if I may,

first, to take the sentence I have first quoted, "The diversity of mankind rests upon ethnic differences". Would you agree that the diversity of mankind likewise rests, and indeed in very important respects, also upon differences between individuals, irrespective of ethnic considerations? Would you agree with that?

Mr. POSSONY: Certainly I agree with it, Mr. Gross. The problem is that individual differences, in terms of history, are less important than differences between ethnic groups. If you look at art, for example, just as one manifestation, you do have a world civilization, but you also have national cultures; and the two terms are not entirely interchangeable. You have very great national cultures which are essentially by themselves and have no great interplay with the rest of world culture. What we call world culture, by and large, is based fundamentally on the Greco-Roman-European tradition. It is broadening out now, so in future this may change, but as of now it has not changed.

I certainly agree, and I hope this is not misunderstood, that the individual plays an enormously great role. I would not perhaps go as far as Carlyle in this, but he plays a great role. Therefore individual differences play a great role. But the individual—and that is the finding of the entire science of sociology for the last 125 years, since it was born—in many ways is a product of his society, and that means, his ethnic society. I am not stating anything which is not essentially agreed upon in the scientific area.

Mr. GROSS: I am sure that is right, but with respect to the perspective or approach or point of view with which a problem of the relationship between the individual and the group and the social order is analysed and examined, is it or is it not true, as a matter of history and of scientific observation, that emphasis on the group rather than on the individual, in terms of similarities or diversities or otherwise, may tend toward what is sometimes referred to as racist doctrines or concepts? Would you agree with that as a consequence which, as is frequently observable, flows from emphasis upon a group rather than upon the individual?

Mr. POSSONY: Yes, I grew up in a society where precisely this sort of thing happened, but at the same time, because disease happens it does not negate health. When you go into the whole intellectual history underlying the concept of nationhood—take Herder, or Rousseau, if you want to—you talk about a subject different from when you read Mr. Hitler. That a diversity that exists and a diversity which has never been eliminated, a diversity which has great advantages, can be abused, there is no question about that.

Mr. GROSS: So, if I understand you correctly, you would agree, would you not, that emphasis on group differences or superiority or any other aspect of group differences may lead and has often led to what is commonly regarded as racism? Is this a correct interpretation of your testimony?

Mr. POSSONY: No, I do not think that is quite correct. I think you can say that in the last, let us say, 50 years this would be a correct statement in some instances, but the emphasis on differences does not imply an argument as to superiority or not.

Mr. GROSS: I am not trying to put words in your mouth but, for example, one has heard, has one not, of expressions like—let me take one—"European blood", let us say? With respect to an expression of that sort, would you say that that type of expression reflects what may

fairly be called a racist concept of the relationship between the individual and the group and the social order?

Mr. POSSONY: That may be very bad language usage, and from the scientific point of view it is a pretty unacceptable phrase, but whether the phrase is a racist one or not depends on who the speaker is and what the context of his speech is. I cannot, Mr. Gross, give you a general statement on a hypothetical question of this sort.

Mr. GROSS: I concede that it might be difficult, but I am putting it to you on the basis of the perspective and of the inferences which you would wish, as an expert testifying here, the Court to draw as to the distinctions, as you perceive them, with respect to the emphasis on the individual, protection of his diversity, his individuality, and the emphasis on the protection of a group as an, if I may say, abstraction. Do you wish to comment on that?

Mr. POSSONY: Not as an abstraction.

Mr. GROSS: All right, Sir—as a group composed of individuals—would you accept that?

Mr. POSSONY: The difficulty again is that this is one of the problems which the sociologists really have been fighting for 100 years: precisely how do you define it?—and I do not think we can open this up, I must demur against identifying a group just as a sum total of individuals—it is more than that. What “more than that” means, I do not think we can go into without really wasting time.

Mr. GROSS: All right, Sir. Let me refer to you. You co-authored a book, did you not, with Mr. Nathaniel Weyl called *The Geography of Intellect*?

Mr. POSSONY: Yes.

Mr. GROSS: And this was published, was it not, by the Regnery Press in Chicago in 1963, is that correct?

Mr. POSSONY: That is correct—I am looking for your reference.

Mr. GROSS: Do you have the book, Sir?

Mr. POSSONY: I do not have the book, no.

Mr. GROSS: I presume you are familiar with it?

Mr. POSSONY: I am, yes.

Mr. GROSS: I should like to read page 284 in the context of our present discussion, where you state:

“A vast elite of European blood is being uprooted in tropical Africa. It is utterly fanciful to suppose that this elite can be supplanted by transient acrobats and reformers from the Peace Corps. The goal of the anti-colonialist crusade is to extrude from Negro Africa (since they obviously will not remain there as a downtrodden minority under Negro rule) four million people who are virtually the only persons with skills and technology, administration and the other disciplines of western civilization . . . There is nothing in the slothful and insecure progress of the Negro that suggests that he will be able to replace this elite in Africa from his own ranks at any time in the foreseeable future.”

Pausing there, would you say that the reference in your book to expressions such as “European blood”, and reference to “the Negro” would be examples or not of what might be regarded—I do not mean to use a term you will not accept, but might be reasonably regarded—as a point of view, shall I say, without characterizing it as racist or otherwise,

which reflects very heavily a concentration on the group as such—"the group", "the Negro", the "European blood"—would you agree with that as a fair interpretation of your writing in this respect?

Mr. POSSONY: In the first place let me say that this is a co-authored book.

The PRESIDENT: This is what?

Mr. POSSONY: I am only the co-author of the book, and the exact words were written by my co-author—I wrote the first draft. Without disassociating myself from it, however, the point simply here is that we are talking in this book about a very important matter. The same subject-matter came up in testimony two days ago with respect, for example, to the Indians in East Africa. The question simply is whether a particular group, *qua* group, that has provided (and this is the question in this particular paragraph) in Africa the main managerial talent, if that group is eliminated, what would happen to the land? This is the point we were discussing. I would say one other thing—the usage of "Negro", or whatever the word was . . .

Mr. GROSS: "European blood."

Mr. POSSONY: That was the other one.

Mr. GROSS: Yes, Sir. "The Negro."

Mr. POSSONY: That is not more objectionable than, for example, the term which is used all the time, "African personality".

Mr. GROSS: I am not commenting as to whether it is objectionable or not; I have my own personal views on that, but they are of no interest to the Court. What I am trying to establish is your view as an expert, as a behavioural scientist, with respect to the words used, the thoughts expressed, in terms of preoccupation or concentration on the group as such; I think you have answered the question to your satisfaction?

Mr. POSSONY: The group is important in this context, in fact it could be of overriding importance. If you take—and I just give you a European example which is, for that matter, mentioned in the book—the decline of Spain after the Inquisition and the extirpation of the Jews, you have the answer of what might happen. That is an example which is probably not quite as problematic as the one we are discussing now.

Mr. GROSS: This is not to quibble with you, but the extirpation of the Jews refers, does it not, to the extirpation of individuals who were classified or otherwise ethnically identified, or religiously identified with Judaism? Is that not correct? When you talk about the extirpation of the Jews, you mean of individuals, do you not?

Mr. POSSONY: No. I think the Jews were eliminated from Spain as Jews, on a religious ground.

Mr. GROSS: What do you mean by extirpation of the Jews as distinct from extirpation of individuals who are classified or who profess Judaism?

Mr. POSSONY: It was the Jewish group which was kicked out.

Mr. GROSS: Now, I would like to return to your second sentence, which I have quoted from page 15, that "Multi-ethnic societies presuppose the explicit recognition of ethnic differences". Would you agree that it is relevant to that statement that the question of what is ethnic difference is relevant in the use of your phrase? In other words, to what aspects of the social order, for example, is the ethnic difference relevant? That would be an important part of the problem would it not?

Mr. POSSONY: Yes.

Mr. GROSS: Would you be prepared to add to your comment that not only is recognition of relevant ethnic difference important, but also that protection is likewise important? As important as recognition?

Mr. POSSONY: Well, I really mean it in the sense of protection.

Mr. GROSS: And this, of course, also would be consistent with the Applicants' view. This leads me to ask the following question. Would you further agree that the methods by which such recognition and protection are regulated and the nature of the group or groups within a given society which exercise the power to regulate and make the determination, are relevant considerations? First, would you agree that the methods by which such recognition and protection are regulated is an important aspect of the problem?

Mr. POSSONY: Certainly.

Mr. GROSS: And would you not also agree that the nature of the group, or groups, within a society which make the decisions with regard to regulation and determination is also an important part of the problem?

Mr. POSSONY: You mean the decision makers? Certainly.

Mr. GROSS: And the nature of the composition of the decision-making group—that is important, is it not?

Mr. POSSONY: Certainly.

Mr. GROSS: Then would you conclude from that, or would you be prepared to agree that the conditions and the methods, the objectives if you will, of recognizing and protecting ethnic differences, should be the product of decision-making processes which are effectively shared by all concerned? Would you agree to that?

Mr. POSSONY: As a general proposition, yes. As a specific proposition, the sharing of decision-making is an ideal. It is not always a practical reality. It depends on the level attained by the different groups and the methods of selecting their representatives and so on.

Mr. GROSS: So that if there were individuals within a particular group as to whom there was no question of capacity or quality, intellectually or any other way, would you feel that, in light of the ideal to which you refer, that those individuals as such should not be denied participation in the decision-making process? Would you agree to that?

Mr. POSSONY: No, because what this means, if I read this correctly—and if I misread it, Mr. Gross, I hope you will correct me—it would mean, for example, in voting, that as soon as a person has reached a particular level he has the franchise and he can vote in an over-all society which is beyond his individual group. I would consider that to be wrong in certain instances, not always of course. Accordingly, I would say that it does not follow that the man at that point should essentially leave his group. The question is, does he stay with his group and does he contribute to his group?

Mr. GROSS: Suppose that he feels, "I want to stay with my group; I am desperately anxious to contribute to its benefit and I feel that the best way I can do this is to claim a voice in the decision-making which affects my group, of which I am proud". Now, if he is, by the hypothesis of my question, capable, qualified, sound and sane as an individual person, is it or is it not part of your ideal, to which you referred, that he should be granted his wish and allowed to participate in the decision-making process to which you referred, pertaining to the welfare of his group, the decision perhaps being made by a government? This

is what we are talking about—official action. Could you answer my question in those terms?

Mr. POSSONY: No, I cannot. The man ought to participate in the decision-making of his group. Then that group, in the ideal schematic way, will set up certain facilities or governmental organs by which this group handles its own affairs and those that are connected with the other group. If he participates in these organs as a representative of his group, this is exactly what he should be doing. If the implication is that he should go over to the other group and participate in the decision-making there, I do not think this is a very tenable proposition.

Mr. GROSS: I do not want to quarrel with you, but I do not think you can possibly understand my question. I am talking about a society in which there are numerous groups. I am talking about a society in which decisions are made by a government which affect the welfare and destiny of all of the groups. Do you follow me so far?

Mr. POSSONY: Yes.

Mr. GROSS: I am talking about the participation by a qualified member of any one of these groups, and you can pick any, in the decision-making process which affects his group's welfare, along with other groups. Do you understand my question? Is that, or is it not, relevant to or part of the ideal to which you referred a short while ago?

Mr. POSSONY: Absolutely.

Mr. GROSS: And you think he should be given that right?

Mr. POSSONY: I think the way to do it is essentially laid out in such cases as for instance in the Cyprus Constitution. Again, I am not going against history or the experience of history. I am saying, on the contrary, let us look at the experience of history and a case like Cyprus, which has had a difficult problem for many years, over nearly a hundred years, and which has been the subject of much international consideration, and they finally came up with this solution. It is not yet an ideal solution because they are still negotiating about re-defining the Statute that they have today.

That is the way in which I would approach the problem and it is I think the only way in which it can be approached.

Mr. GROSS: Are you then saying that the ideal of participation, effective participation, is applicable in all circumstances as an objective, a standard of equal protection of the laws? Would you agree to that formulation of your testimony?

Mr. POSSONY: Participation is necessary, yes. Participation is not always practical when you have groups. I may add that the Multi-ethnic Seminar has not come to grips with the whole depth of the problem. In addition to multi-ethnic problems you do have differences between "distant" ethnic groups (I will skip that one), and you also have enormous differences in cultural levels. The international legislation on these matters and the very existence of the mandate system or the trusteeship system, bear this out. There are different situations where this sort of participation is for the future.

Mr. GROSS: When you used the expression, as according to my notes you did, of the individual "not going beyond his group"—did you use that phrase?

Mr. POSSONY: I may have.

Mr. GROSS: In respect of that phrase, or a synonymous phrase, did

you mean to imply that the otherwise qualified individual, qualified as a person, should not be permitted to exercise the right of effective participation in a government on the grounds that, or because, his group as a whole is disqualified by legislative fiat? Is that what you meant by the phrase you used?

Mr. POSSONY: No. First of all, this is a general interpretation of a problem which has to be handled in specifics. What I mean to say is that if a man is qualified to be a decision-maker, he should be a decision-maker in his own group. How the particular group arranges its affairs with the other group is another question, but you asked about the individual. He can be a decision-maker in only his group.

Mr. GROSS: Now, lest we seem to be playing on words, and I am sure neither of us wishes to, in the case of a multi-group society, which is what I am talking about and to which I am inviting your attention, when you say that the individual otherwise qualified should exercise or participate in effective "decision-making within his own group", I take it that excludes him from decision-making participation in respect of the society as a whole. Do I understand you correctly?

Mr. POSSONY: No, because in that case you deal through indirect levels. Again, speaking of the ultimate, not speaking necessarily of the present transitory situation, the various groups in a society all have their representation. Let us take the example of Cyprus: you have the Greeks and you have the Turks, and these people form together a government, in one way or another, by which they decide, by joint agreement, what the decisions have to be for the whole community. They do not do this as individuals, they do it as representatives of the Turkish community and of the Greek community. It is essentially an international set-up within a one-State arrangement. I think that this explains it the easiest way.

Mr. GROSS: Would you regard the participation of an individual in a multi-group society in governmental decision-making, which affects the destiny and welfare of his group (I assume him to be qualified) to be a just and important aspect of decision-making in the multi-racial society? Can you answer that question or have you already done so?

Mr. POSSONY: That a person participates in government?

Mr. GROSS: In decision-making of the central government, decisions which affect the welfare of all the groups in this society, including his own. Do you regard such participation as relevant and/or important to the exercise of the ideal to which you referred?

Mr. POSSONY: Of any individual? No.

Mr. GROSS: Of any qualified individual, yes.

Mr. POSSONY: Certainly, if a man is qualified he should participate.

Mr. GROSS: In the process of the central government if that affects the welfare of his group, is that correct?

Mr. POSSONY: In the processes that are established; whether this is central government, or not, is an open question.

Mr. GROSS: Suppose the central government does take decisions affecting the welfare of the groups within the society. This would not be an unusual phenomenon, would it?

Mr. POSSONY: No.

Mr. GROSS: I am not trying to complicate the question but to simplify it. With respect to the decisions of a central government in a multi-national society, a multi-group society, which affect the welfare of the

groups, are you saying or not that the participation of the qualified individual in those essential decision-making processes is a relevant and even an important aspect of the exercise of equal protection of the laws? Would you agree with that?

Mr. POSSONY: I will state it in my own terms which is that any person qualified to participate in government should participate in the government that affects him. Now, the way in which this is done depends on the situation.

Mr. GROSS: I have just one more question, Sir, unless footnotes occur by reason of your response. Would you agree that the principle of governmental protection of equality of opportunity and equal protection of the laws is a virtually universally proclaimed standard, which is enshrined in most constitutions of civilized countries and in decisions and declarations of international organizations? Do you agree with that as a statement?

The PRESIDENT: I think there are about four questions in that, Mr. Gross.

Mr. GROSS: The one question I have, Sir, is whether you would agree that the principle of governmental protection of equality of opportunity and equal protection of the laws—do you understand me so far, Sir?

Mr. POSSONY: I am trying to put it down.

Mr. GROSS: . . . is a virtually universally proclaimed standard, enshrined in most constitutions and in the decisions and declarations of international organizations—have you written it down, Sir? Do you wish me to break it up if you regard it as a compound question, Sir?

Mr. POSSONY: Mr. President, it is a compound question because there is the question whether these points are in the constitutions and whether they also proclaim . . .

Mr. GROSS: You do not have to persuade me, Sir, the President has already indicated the fact of the matter, I just wanted to clarify . . .

The PRESIDENT: I simply indicated, Mr. Gross, not that it was compound but that it contained four questions and there is no doubt whatever that it does contain four questions. Now the witness might answer in his own way.

Mr. GROSS: Now, Sir, would you answer in your own way or, if you would prefer me to break it down, I would be glad to, Sir.

Mr. POSSONY: I only tried to save time. I think equal protection of the laws, there is no question about it, the question merely is, what it means. So far as I understand it, it means that a law that is in existence, depending on what the law says, it is applied without regard to the individual person; it is applied equally. Equality of opportunity, or to protect equality of opportunity, I think this is a more difficult proposition, but without going into the constitutional and normative parts of it, I think you cannot protect what you do not have. The material question is how you get this equality of opportunity and that is, I think, one of the problems which has often been overlooked and forgotten. Even if you had this as a clause, it would not mean much and it would have to be followed up by specific legislation to achieve it. I think you can easily follow this through and I will not. But just as an example—leaving out entirely the ethnic problem—in labour legislation, the problem was to achieve that equality of opportunity which, for one reason or the other, did not exist.

Finally, we have to assess whether there is a universally proclaimed

standard. I would say all constitutions basically are recognizing the equal protection of the laws, certainly; whether they recognize equality of opportunity, I do not think you can say this is a general situation. In decisions and declarations of international organizations, again I think I must distinguish between how the Applicants interpret norms and whether this is in line with the norm as stated at IV, page 493, or not. I think, as I read it, the United Nations declarations are by and large against unfairness. Now, you can probably go beyond this in analysing because they have, after all, made provisions for economic and social improvements, and so on, and these factors could be considered. Generally speaking, in line with the discussion we have had, the rule is: "no-unfairness".

Mr. GROSS: I have no further questions, Mr. President.

The PRESIDENT: Thank you, Mr. Gross. Does any Member of the Court desire to put a question to the witness? Sir Louis.

Judge Sir Louis MBANEFO: Mr. Possony, when you were discussing the question of self-determination and suffrage, you used the expression "if a group is ready to exercise the right of suffrage" in the context in which you were talking.

The PRESIDENT: Sir Louis, would you mind repeating it over again, the witness did not catch what you said.

Judge Sir Louis MBANEFO: You used the expression when discussing suffrage and self-determination "if a group is ready to exercise the right to participate in a decision in matters affecting the group". I believe you used the expression "if a group is ready"?

Mr. POSSONY: That is correct.

Judge Sir Louis MBANEFO: How do you determine the readiness of the group?

Mr. POSSONY: Mr. President, there are many ways in which this could be determined. It is quite clear that in the application of all standards there will be a matter of some arbitrary findings or judicial weighing of factors. You cannot be entirely objective throughout but I think you can lay down, and I believe there are criteria laid down in various international agreements which would allow you to do this. I would say that the extent of literacy, whether it exists in a substantive way or only in a formal way, would have a very great bearing. The particular range of interests of the group, whether they are interested in the overall affairs of their society or just interested in their own close society, also matters. I could go on, Mr. President, but I think the point is that there are criteria and the criteria, in my judgment, are fairly good; they could be certainly sharpened up, and this could obviously be a matter of agreement internationally.

Judge Sir Louis MBANEFO: Would the criteria apply to the group as a whole or to individuals in that group?

Mr. POSSONY: I believe, Mr. President, that when the criteria would show that a substantial portion of the group has gone beyond this criteria level, then obviously the group as a whole would follow. It is one of these dialectic inter-acting relationships. It is not necessary, let us say, that you have to have a literacy rate of 99.9 per cent. in order to say that the group is literate; you would consider a group literate at some lower level. I believe that you would have to take into account a fairly large number of factors. There is no implication I am making here that the way to decide this should be very restrictive. You can

under certain conditions certainly take chances, whereas under other conditions this might be more difficult.

Judge Sir Louis MBANEFO: Now, when you get a multi-racial society or group, would you regard the capacity of the individual to vote within his own group as relevant in determining his ability to vote in the federal structure?

Mr. POSSONY: If you have a federal structure which calls for federation-wide elections, where everybody votes for the federal government, this is one thing. If you have a federal structure which the members concerned of the federation would have to determine, which sets forth an electoral law where the individual votes within his electoral group, this is something else. I do not think that is connected with the ability of the individual himself, one way or the other, it is a matter of the political convenience between the membership groups as to how they want to set up their federation.

Judge Sir Louis MBANEFO: In answer to my other question you said "a substantial number of the group being literate"—what percentage would you consider as substantial?

Mr. POSSONY: I would say half is certainly a substantial number.

Judge Sir Louis MBANEFO: So that unless you have 50 per cent. literacy then the group would not be ready to . . .

Mr. POSSONY: I would not, Mr. President, put it in these terms. I used literacy as one example, there are many other factors you can use: the ability to use modern equipment, the awareness of modern facts and so on—some of those are hard to measure. I would say that in practical application, if you take some—the word "primitive" is rightly objected to by the anthropologists but to save time I will use it—very primitive groups, those are not ready for participation in a complex government dealing with modern technology, for example. On the other hand, if you have a group which is developing very fast, where education is making great progress, where they begin to understand what the problems of modern life are, obviously they are getting ready or are ready.

Judge Sir Louis MBANEFO: Finally, you spoke about Cyprus. Do you regard it as fundamental that the constitution of Cyprus is based on the consent of both the Greeks and the Turks?

Mr. POSSONY: Generally speaking, the answer to that is: yes, of course. However, in order to make a constitution of this sort work, it is often necessary—I do not know whether this happened in Cyprus—to make sure that a sort of viable arrangement is accepted regardless of whether the two groups concerned really like it. I take it that neither the Greeks nor the Turks are particularly happy with this statute, yet this seems to be the only one that is working and so, without really getting the question decided too clearly whether there is consent or not, I think the constitution has been put in operation. I can readily conceive that this is not a long-range viable solution, but at least a transitory solution it might be.

The PRESIDENT: Does any other Member of the Court desire to put any questions to the witness? If not, there are one or two questions I would like to put to you. It relates to the last portion of the first paragraph on page 493 of the Reply—what is being referred to is the definition of non-discrimination or non-separation. If you will just keep in mind the last portion of the definition, it is—

"stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such".

Having that in mind, I direct your attention to that part of your testimony which Mr. Gross cross-examined you upon this morning, which you gave on Tuesday, 19 October, XI, page 705, where you say:

"The point was made repeatedly that group rights and individual rights do not necessarily coincide, and that both types of rights must be protected—in fact, there was understanding that human rights and group rights are interrelated and cannot be considered in isolation from one another."

It is to that part of your testimony which I desire to put the question to you in relation to the final portion of the definition at IV, page 493. My first question is—if the rights of the individual and the rights of the group do not necessarily coincide, do they at times come into conflict?

Mr. POSSONY: Yes, Sir.

The PRESIDENT: And if they come into conflict, how then is there reconciled the rights of the individual, and rights of the group; or, to put it another way, the interests of the individual, and the interests of the group?

Mr. POSSONY: The State practice, I would say, is that the rights of the community predominate, and that this is done on the basis of generalized laws, and that as individual cases arise where on one or the other ground a hardship has been created, there are usually, but not always, ways by which hardship cases could be handled.

The PRESIDENT: But you have given evidence to the effect that since 1920, or about that time, the time when the Mandate was entered into, there was a norm or principle of equal justice before the law, for example; and you have also given evidence, if my recollection is correct, that in different countries of the world, where there are different ethnic groups, depending upon either religion, or upon the group, a different scheme of laws is in certain circumstances applicable, or different courts, in quality, administer the law. Is that correct?

Mr. POSSONY: That is correct.

The PRESIDENT: Well, then, if there is a conflict between the interests of the group in a society which is composed of a number of ethnic groups but at different stages of cultural development, or with different aspects of cultural development, can you throw any more light upon the problem as to how you serve the interests of the group without, in many cases, placing limitations upon individuals by allotment of rights, or duties, or status, in accordance with their membership of the groups and not as individuals as such?

Mr. POSSONY: The fundamental way in which this is done, I think, is laid down in many of the constitutions, which consists in allowing to a backward group resources which in the normal course of events, without such a provision, it would not receive. Then you have to follow through with practical programmes in the various fields, such as capital investment, education and so on. Then as the group progresses as the result of these investments and so on, or simultaneously, you try to organize the group as a group in the best way you can. The group, as it acquires its economic and educational potentials, also acquires its political potential; it has to be organized, it has to run its own affairs

on whatever level it is operating, and as the level goes up, as the achievements are higher, of course, it can branch out further.

I think the fundamental requirement in all this is to create in each group, or strengthen, an elite which can provide leadership; while the dissipation or dispersal of the available elite to other groups would basically spell the ruin of this particular group. So the fundamental point, in addition to the allocation of resources, is to ensure that the elite group is there, stays there, and that the capacity of the elite group is enhanced.

The PRESIDENT: That is all I wished to ask you.

Mr. Muller.

Mr. MULLER: Thank you, Mr. President. I have no questions in re-examination.

The PRESIDENT: Mr. Gross, do you desire the Professor to remain in attendance for any purpose?

Mr. GROSS: No thank you, Mr. President.

The PRESIDENT: Well, Professor, you are released from further attendance.

Mr. Muller, the next step is the continuation of the Respondent's address.

Mr. MULLER: That is so, Mr. President.

25. ADDRESS BY MR. MULLER

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARING OF 26 OCTOBER 1965

Mr. President, the oral testimony having been completed, I intend to indicate to the Court how the further argument will proceed from here. Before I do that, Mr. President, may I be permitted to advert to a matter relative to a part of the argument that has already been completed. I refer to the Applicants' Submission No. 2, which raises, *inter alia*, the question whether Article 6 of the Mandate is still in force and whether the United Nations has supervisory powers relative to South West Africa.

The matter which I wish to refer to, Mr. President, is the filing of two memoranda, one by the Applicants under cover of a letter addressed to the Registrar on 30 June, together with copies of certain documents referred to in the memorandum; and the second memorandum filed by Respondent on 21 October.

I do not wish to re-open the argument, Mr. President, but merely to indicate the relevance of the subject-matter dealt with in these memoranda, if I may be permitted to do so now.

The PRESIDENT: Very well.

Mr. MULLER: Mr. President, I think I should start by indicating that in the course of our argument on 24 May, relative to the Applicants' Submission No. 2, we filed certain documents. The first was a document marked P.C./T.C11, which contained a proposal by the United States of America that the proposed temporary Trusteeship Committee, and later the Trusteeship Council itself, should specifically be vested with supervisory powers in respect of mandates not converted to trusteeship; a second document, P.C./T.C30, being a verbatim record of a speech by the representative of the United States of America at the Ninth Meeting of Committee Four of the Preparatory Commission, held on 8 December 1945. These documents were referred to in the verbatim record, IX, at pages 401 and following.

Mr. President, we submitted these documents as being relevant to an argument previously advanced by the Applicants regarding the functions proposed for the temporary Trusteeship Committee. In replying to Applicants' argument, we referred to these documents and we drew certain conclusions which are stated at IX, pages 403 and 404 of the verbatim record to which I have just referred, that is, of 24 May.

Briefly, the conclusions which we drew were that the United States must deliberately have abandoned the proposal contained in document P.C./T.C11, and in all probability after having been informed of opposition thereto by other delegations.

Inasmuch as this came in our oral rejoinder, there was no normal opportunity for the Applicants to deal with the matter in argument. Apparently for this reason, Mr. President, the Applicants have since filed with the Registrar of the Court the memorandum to which I have just referred, as well as the documents annexed thereto; and they seek

in the said memorandum to demonstrate that Respondent's conclusions are erroneous.

Now, we have in reply thereto filed the written memorandum, that is the second one, to which I have referred, and which deals with the statements of fact and submissions made by the Applicants in their memorandum.

Our memorandum submits, Mr. President, that Respondent's conclusions, as stated in the argument in the oral rejoinder, are fully justified, and that Applicants' attempted demonstration to the contrary is erroneous and without substance. Our contention with regard to this aspect is fully dealt with in the memorandum and we do not wish to repeat the argument unless the Court requires us to do so, or to give any explanation. That is all I wish to say on this aspect of the matter.

Now, proceeding to the development of the argument which is now commencing, I must indicate that before going into the more detailed aspects of our argument I propose setting out briefly the purpose which was sought to be achieved by the leading of evidence, and then to indicate to the Court how the further argument will be developed with reference to such evidence and otherwise.

I propose first to make reference to the issues raised by Applicants' Submissions Nos. 3 and 4, to which nearly all the evidence was directed. In view of the frequent complaints made by Applicants during the course of the leading of evidence that their case is misrepresented by Respondent, it may, however, be convenient at this stage to sketch in outline the Applicants' formulations of their submissions and the explanations given by the Applicants with regard thereto.

The Applicants' Submissions Nos. 3 and 4, as amended on 19 May 1965, read as follows, and I refer in this regard, Mr. President, to the verbatim record, **IX**, at page 374; Submission No. 3 reads:

"Respondent, by laws and regulations, and official methods and measures, which are set out in the pleadings herein, has practised apartheid, i.e., has distinguished as to race, colour, 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 Respondent has the duty forthwith to cease the practice of apartheid in the Territory."

Submission No. 4, as now reformulated, and also in the same verbatim record, reads as follows:

"Respondent, by virtue of economic, political, social and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has, in the light of applicable international standards or international legal norm, or both, 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 Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles."

In the same verbatim record, Mr. President, at **IX**, page 375, the Applicants presented what they termed "*formal interpretations and*

explanatory comments" with respect to Submission No. 4. Now, the formal interpretations and explanatory comments read as follows:

"The formulation of Submission 4 is not intended in any manner to suggest an alternative basis upon which the Applicants make or rest their case other than the basis upon which the Applicants present in Submission No. 3 itself . . . the distinction between Submissions 3 and 4 being verbal only . . ."

On that follows another paragraph reading as follows:

"The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, in the sense described and defined in the Reply, IV, at page 493, and solely and exclusively as there described and defined . . ."

Mr. President, it is consequently clear that from the submissions, both on their wording and as read in conjunction with the "formal interpretations and explanatory comments", Applicants' whole case rests on the alleged existence of a norm and/or standards. The legal significance of formal submissions as defining the ambit of a party's case was raised by questions addressed to the Parties on 22 June, and I refer to the minutes, VIII, at pages 60 and 62. This topic was debated on 30 June and 1 July in the verbatim records.

The Applicants' attitude as there expressed was summed up in the following passage, and I read from the verbatim record of 30 June, X, at page 188:

" . . . it is the right and duty of the Court to interpret the obligations under the terms of the Mandate, as the organ vested with the function of serving as the final bulwark of protection of the rights of the inhabitants of the Territory against asserted breaches and abuse of the Mandate".

In reply thereto we contended, with reference to authority both in international and in municipal law, that in court proceedings the ambit of a dispute between the parties is defined by the submissions, and that the parties would not be entitled to canvass or debate matters falling outside such ambit. Similarly, the Court would not be entitled to come to any finding on matters falling outside the dispute as defined by the submissions.

We demonstrated also that this principle applied particularly to questions of fact. Parties to a case, we submit, are entitled to lead evidence only on matters falling within the definition of the dispute. It follows, therefore, that if any finding of fact were to be made on an issue extraneous to the proceedings, such a finding would be in respect of a matter on which the parties were not entitled to lead evidence, a course which clearly would prejudice the party against whom the finding was made.

Now, I do not wish to repeat our arguments, Mr. President. They appear in the verbatims, X, at pages 188-228.

Since we contend that the whole ambit of the case is defined by the pleadings and, in particular, the submissions, it follows, Mr. President, that all argument and evidence should be related to the issues raised in the pleadings. This, indeed, has been the governing consideration in our presentation of evidence and also in our argument. The legal argument which has been concluded was directed, firstly, towards showing that

the processes relied upon by Applicants as creating binding standards or norms are in law incapable of having such an effect.

It will be recalled that, according to the Applicants, the content of the alleged norms and the standards is the same. The only distinction between norms and standards is the extent of their applicability. Thus, the standards were said to have been laid down by the supervisory organs in respect of mandates and to be binding only on Respondent *qua* Mandatory, whereas the norm was said to be binding upon all States.

Applicants' argument as regards standards was met by us by showing not only that there are no longer any organs possessing supervisory authority in respect of the mandates since the dissolution of the League, but that even had such organs existed they would not have been entitled in law to lay down objective rules enforceable by law against the Mandatory.

With regard to Applicants' norm, they suggested that it had been created by acts of international organizations, either acting as quasi-legislative organs or as giving so-called "authentic interpretations" to their constitutive instruments.

We analysed these processes in legal argument and demonstrated that they could not in law create binding norms, at any rate as against a State which has always and consistently maintained its opposition to the imposition of any such norm against itself.

Mr. President, it is submitted that we showed clearly that no legally binding or enforceable rules of any description could have been created in the manner contended for by the Applicants.

In the second part of our argument, which led up to oral testimony, consideration was given to the question whether any standard or norm of the content relied upon by Applicants has been created by any legally valid process in international law. It was also as regards this issue that evidence has been led.

Now, before consideration is given to the effect and purpose of the evidence, it is necessary to advert to a matter which has given continuous trouble, and that is the question: what is the content of Applicants' norm or standards? It is, for the most part, as regards this aspect that Applicants' accusations of distortion have been levelled, and it is consequently necessary to give some attention thereto.

The authoritative definition of Applicants' case is, we say, in the submissions. Submission 3, as I have indicated, contains the allegation that Respondent has violated the Mandate, in that Respondent "has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory" (IX, p. 374).

The allegation, then, is that the mere act of distinguishing in the respects in question is illegal, irrespective of whether such an act were well-intended or produced beneficial results.

Mr. President, that this reading of the submission reflects the actual intention of its drafter is clear, we say, *inter alia*, from the wording of the submission, as it appeared originally in the Memorials, and from the change brought about in amending the submission to read as at present.

The Court will recall that in the Memorials the conduct objected to was defined as follows:

"Under apartheid, the status, rights, duties, opportunities and burdens of the population are determined and allotted arbitrarily on the basis of race, color and tribe, in a pattern which ignores the needs

and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority." (I, p. 108.)

It will immediately be apparent that the amendment effected a significant change in the meaning of the submission. Both the words and the concept of arbitrariness, or disregard for the actual "needs and capacities of the groups and individuals affected", or the subordination of such needs to the desires and conveniences of the minority were abandoned.

This same feature appears from Submission No. 4, as now amended. This submission was intended—we are so told by the Applicants—to cover exactly the same ground as their Submission No. 3, and, in the former as in the latter, all references to purpose or results of Respondent's policies have been carefully excised. Submission No. 4 rests only on an alleged norm or standard defined at IV, page 493 of the Reply.

Now, this definition, Mr. President, at page 493 reads as follows. It has been read a few times into the record but for purposes of analysis I would, if the Court permits me, read the relevant part again.

"... the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such".

Throughout the course of the oral presentation of their case, the Applicants made it clear that it was the norm and standards, as defined at page 493 of the Reply, and only as there defined, upon which they rested their case.

I can quote many passages, Mr. President, but I shall quote only two; one is in the verbatim of 17 May, at IX, pages 306-307. This is what the Applicants said:

"The Applicants now turn, Mr. President, with your permission, to an exposition of the evolution and the content, and the applicability of the international legal norm, and the international standards of non-discrimination or non-separation for which they contend, and which are defined in the Reply, IV, at page 493: It is the international standards and the legal norm, (thus defined by whatever label one chooses to describe it) upon which the Applicants rely and which represents the core of their case—the heart of their case."

The second citation I wish to make is in the verbatim of 19 May, at IX, pages 375-376—that forms part of the explanation given by the Applicants as to the reformulation of their Submission No. 4, and I shall only cite a few lines:

"The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, in the sense described and defined in the Reply, IV, at page 493, and solely and exclusively as there described and defined . . ."

Now, examination of the wording of the various formulations both in the submission and at page 493 of the Reply shows that the basic act to which Applicants object has been described as "distinguishing"—that appeared in Submission No. 3—or "discrimination" and "separation" which appeared in the Reply, at page 493, and are incorporated by reference in Submission No. 4.

These three words are used interchangeably by the Applicants and it is clear that their primary meanings are indeed closely related. The word "distinguish", Mr. President, is defined in the *Concise Oxford Dictionary* as meaning in its primary sense to "Divide into classes, etc.; be, see, or point out, the difference of . . . differentiate, draw distinctions".

The word "discriminate" is defined in the same dictionary as primarily meaning "Be, set up, or observe, a difference between . . . distinguish from another; make a distinction . . .".

The primary definition of "separate" in the same work is "Make separate, sever, disunite, keep . . . from union or contact, part . . . secede from, go different ways, disperse . . . divide . . . into constituent parts or sizes".

Now, on a number of occasions, Applicants have objected to their norm being described by us as a norm of non-differentiation. For convenience, therefore, I shall also give the dictionary meaning of the word "differentiate". It reads: "Constitute the difference between, of, or in; develop . . . into unlikeness, specialize . . . discriminate, discriminate between."

Analysing these dictionary meanings of the words "distinguish" and "discriminate", both used interchangeably by the Applicants, and the word "differentiate", to the use of which they object, one finds that these words are virtually defined in terms of one another. The word "separate" has a somewhat different meaning but not one of these words has an unfavourable primary meaning, although "discriminate" has a secondary meaning which is defined in the same dictionary as—"discriminate against, distinguish unfavourably, of taxes, etc."

In addition to these definitions in the dictionary, there are a number of indications, not only in the text of Applicants' definitions of the norm at IV, page 493 of the Reply, but also in their treatment of the sources upon which they rely as evidence of the existence of the norm, that they use the word "discrimination" in its primary sense and not in a derogatory or pejorative sense.

The following indications can be mentioned:

First, although the Applicants, in the first sentence of their definition at page 493 of the Reply, speak of an "analysis of the relevant legal norms", they clearly rely on *one* norm only, which is referred to as a norm of "non-discrimination or non-separation". In this regard I wish to refer to the paragraph just below the definition at page 493 of the Reply. This paragraph reads as follows:

"As is shown below, there has evolved over the years, and now exists, a generally accepted international human rights norm of non-discrimination or non-separation, as defined in the preceding paragraph."

Inasmuch, then, as the words "non-discrimination" or "non-separation" are used interchangeably by the Applicants to describe one norm, it

seems evident that discrimination in the context was not intended to be used in the pejorative sense of discriminating against.

The second indication to which I wish to refer, is that the Applicants state specifically that they use these terms, that is, non-discrimination and non-separation, in what they term "their prevalent and customary sense". This is also in the Reply, at IV, page 493.

A third indication, Mr. President, is that Applicants' definition of these terms as referring to:

"... the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race, rather than on the basis of individual merit ... [and their further definition] ... governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such" (IV, p. 493).

does not connote any discrimination in the pejorative sense.

Fourthly, it appears that Applicants specify a number of sources which they say "severally and in their totality, comprise the generally accepted norm". This is stated at page 493 and the Court will remember that from that page on they deal with the so-called sources. Now, in some of these so-called sources, the word "distinction" is used; in others, the words "discrimination", "separation" and so forth. These words may, in some of these documents, have been used in a pejorative sense, for example, to connote unfair discrimination. This, however, is not important. What is of importance is the meaning which Applicants assign to these terms when they seek support for the existence of *their norm* from the sources in question. Thus they say of the Charter of the United Nations, and this is at IV, page 498 of the Reply:

"The legal obligation of Member States not to discriminate or distinguish on the basis of membership in a group or race (whatever specific human right or freedom may be involved) is set out in Article 56 of the Charter."

I emphasize the use there of the words "not to discriminate or distinguish".

Applicants also say, and I quote from page 500 of the Reply:

"There is a body of case law which upholds the proposition that the human rights provisions of the Charter contain legally binding commitments prohibiting Member States from discriminating or distinguishing on the basis of race."

Those are the Applicants' words and I again emphasize "discriminating or distinguishing".

With regard to the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the Applicants quote Article 2 (3) of the Declaration. The quotation is at IV, page 506 of the Reply. That Article reads as follows:

"Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups."

The Applicants say, with reference to this clause that I have just read, that this clause is "of particular relevance, in so far as Respondent's policies in South West Africa are concerned", and this provision, in the Applicants' words at IV, page 506 of the Reply:

"... specifically prohibits the use of special measures of development as a justification for allotting rights and burdens on the basis of membership in racial groups. This is re-inforced by Article 5, which bans racial discrimination, segregation, separation and apartheid."

Mr. President, it is submitted that it is clear from the above, from the quotations I have just given and also the analysis of the definition on page 493, that the definition of the norm at that page can only be read as meaning that in the allotment of rights, duties, privileges or burdens by governmental policies or actions, there may be no differentiation on the basis of membership in a group, class or race. I say that the above analysis shows conclusively, in our submission, that Applicants, in reformulating their submissions, did not intend to rely on discrimination in the pejorative sense.

Submission 3, as I have indicated, charges Respondent with no more than having:

"distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory" (IX, p. 374).

and the charge in Submission No. 4 is said to rest on the same basis.

Likewise, the definition at IV, page 493 of the Reply is, as I have indicated, quite neutral and seeks to prohibit differential allotment of rights and duties irrespective of motive or result.

Indeed, Applicants have repeatedly emphasized that invocation of the norm does not require the allegation or proof of any improper intent on the part of Respondent. Similarly, they have stressed that their case does not depend on any ill results flowing from the differential allotment of rights, duties, etc. Indeed, they contended that such a differential allotment would be illegal, *even* if it were intended to operate, and did in fact operate, for the benefit of the inhabitants of the Territory. I refer in this regard to the verbatim record, X, at pages 209-224, also IX, at pages 563 to 573, where we dealt exhaustively with the various statements made by Applicants in this regard.

Therefore, Mr. President, both motive and result are excluded as irrelevant criteria. There can be no question of a charge of unfair discrimination or of discrimination *against* persons or groups. For discrimination can only be unfair, or be said to be discrimination *against* a person or persons, if (a) the intent of discriminating is to be unfair, or (b) if, irrespective of intent, the results of a policy of discrimination prove in fact to be unfair, or (c) if both of these apply.

From what I have stated, it is clear that when Applicants reformulated their submissions their norm was an absolute one, that is, that any differential allotment of rights, duties, etc., on the basis of group, class or race, would be a contravention of their alleged norm. They did so advisedly and deliberately in order to impress upon us and the Court that there was no need of a factual inquiry into purposes or results, a factual inquiry as we were offering, both by evidence and an inspection *in loco*.

When faced with the difficulties inherent in their proposition, particularly with examples such as the minorities treaties, Applicants distinguished them *ad hoc* and with reference to suggested points of distinction that were entirely immaterial to the elements of their norm as defined.

I refer in this regard, without reading, Mr. President, to the verbatim record of 9 June, IX, at pages 534-542 and X, at pages 53-57. In the result, and after strenuous attempts on our part to obtain clarity as to the exact content of the norm and the nature and extent of any qualifications thereto, we intimated that we would proceed to test the suggested norm and/or standards on a dual, alternative basis. We said in this regard, and I refer to the verbatim record, X, at page 57:

"First, we shall test on the absolute basis; we shall test on the basis of taking the Applicants at their word when they say that the alleged norm means that the allotment of rights and duties on the basis of membership in a race, class or group is impermissible everywhere and anywhere in the world. That they said, several times. That is, after all, the signification of their submissions; in No. 3 this signification appears from the wording of the submission itself, and in Submission No. 4 from the wording of the submission read with the formal explanation; and those definitions and that explanation contain no qualification whatsoever; it is differentiation *per se* in this defined sphere that is struck at by the suggested norm.

At the same time, Mr. President, and alternatively, we shall also consider the matter with reference to the factors which have been mentioned by the Applicants, not as clearly defined qualifications, but as possible factors which could distinguish permissible from impermissible differentiation—factors mentioned by them in relation particularly to their discussion of the case of the minorities treaties . . . it seems to us that the only fair way of doing this would be to assume that the qualifications involve that differential allotment of rights, etc., in the sphere as defined by the Applicants, would nevertheless be permissible if such differentiation could be said, firstly, to serve the purpose of protecting the individual rather than the group, and, secondly, if it could be said to avoid the consequence that the individual may suffer by reason of membership of his group, *inter alia*, by having regard to his facility, or otherwise, to quit the group."

This, then, Mr. President, was the basis upon which we proceeded to lead evidence. However, from time to time, we have been faced with complaints or objections by the Applicants to the effect that their case was being distorted. This commenced in a letter of 20 June, which appears at XII, Part IV, and orally in the same record, at page 104.

The complaint, or objection, was frequently repeated thereafter. I shall give the Court a few references only, without reading what was stated. In X, at pages 132, 138-139, 348, 523-524; XI, at pages 314-315, 600, 644-647.

For the most part, Mr. President, these objections were not reasoned or motivated, they made the bare assertion of distortion without further amplification. However, such attempts at amplification as are found, do not, in our submission, assist in removing the confusion in the Applicants' case. In some instances the objections were based on the allegation that the distinction between standards and the norm was being

ignored. Now, since Applicants have rendered it clear that there is no distinction as far as the suggested content of the norm and standards is concerned, this question does not arise for consideration at this stage—I shall, however, say something about it later on.

As far as the suggested distortion of the content of the norm and standards is concerned, I wish to refer to some pertinent passages.

In stating their objection to the evidence of Professor van den Haag, on 22 June, my learned friend, Mr. Gross, said in the verbatim record, X, at page 139:

“... if this or any other witness is competent to testify with respect to the practice of States, citing the official laws and regulations which, in his view, do constitute discrimination or separation by reason of group without regard to individual merit or capacity (which is the contention of the Applicants as to the content and nature of the norm and standards) . . .”

On 13 July, in X, at page 524, the topic under discussion was universal adult franchise. Now, whether and to what extent the Applicants contend—or have contended in the past—that Respondent is under an obligation to introduce universal franchise in South West Africa, are matters to which attention will be given at a later stage of these proceedings. At present, Mr. President, I am more concerned with the bearing which the discussion in the verbatim has on the general issue as to the content of the norm and standards.

In the said verbatim record, at page 524, my learned friend, Mr. Gross, is recorded as having said:

“But, without venturing to go into an elaborate argument, there are of course all sorts of qualifications upon the phrases used, ‘the institution of universal adult suffrage’ and the ‘participation on the part of all qualified individuals’. There is no absolute or mechanical standard which is applicable or not, without reference to the issue in this case, which is that *apartheid*, which denies all effective rights of participation—denies suffrage totally—is a violation of the Mandate. That has been, and remains, our case.”

Mr. President, the question immediately arises: what do these words mean? And I shall repeat them: “. . . which is that *apartheid*, which denies all effective rights of participation, denies suffrage totally, is a violation of the Mandate.” Is the Court, Mr. President, asked to determine whether the provisions, present or contemplated, for political participation of the various population groups, are, and I quote the word of the Applicants, “effective” or not? What factors are to be considered, and what criteria applied, in determining the “effectiveness” of rights of participation in the political life of the Territory? And, finally, is this suggested test of effectiveness to be a substitute for the all-embracing norm on which Applicants rely in their formal submissions? To put the matter concretely, if political opportunities are “effective”, would it matter if they were allotted on the basis of membership in a group, class or race, rather than on the basis of individual qualities? Perhaps, Mr. President, the explanation is that this was an *ex tempore* statement by my learned friend, Mr. Gross, and did not express what the Applicants really intended to convey. I only wish to say that, to us, it has no understandable connection with the Applicants’ norm and/or standards

contention, as previously explained by them, but perhaps we shall, at a later stage, have an explanation of what was meant.

The content of Applicants' norm and standards arose again within the context of the imposition of compulsory education. Mr. President, the Court will recall that, with regard to that aspect of the case, you, Mr. President, asked my learned friend, Mr. Gross, the following question:

"... there is compulsory education of the White people in what we call the White sector or the southern zone? . . ."

There is no compulsory education elsewhere. Do I understand that if there is no compulsory education imposed upon the peoples, take for example of the north, irrespective of the difficulty of policing it, irrespective of the question whether it is acceptable to the people, irrespective of any other circumstances, that is inherently inconsistent with Article 2 of the Mandate and *per se* a breach of the Mandate?" (XI, p. 315.)

The reply to this question, which was put by you, Mr. President, was the following, and I read from the same verbatim record, at the same page, where my learned friend replied:

"No, Sir, that would not be the Applicants' contention. The Applicants' contention in respect of the difference, standard or requirement of compulsory education on a strictly racial basis would be that that, standing alone, unsupported and unexplained, would violate the duty to allot rights and burdens, privileges and so forth on the basis of promotion of welfare and progress of all the inhabitants to the fullest practicable extent, and that it would seem to the Applicants that a system in which no compulsory education in any part of the Territory, irrespective of its economic development, is a practice or a policy, that this would be a factor relevant for the Court's consideration in connection with the significance of the educational aspect of apartheid seen in relation to all other aspects of the apartheid policy, of which this forms a part."

If one studies this explanation, Mr. President, one finds that there are several key concepts in the passage: the first is that differential allotment of an obligation of compulsory education on a group basis would violate Article 2 (2) *only when* "standing alone, unsupported and unexplained", and that it is only a "factor relevant for the Court's consideration in connection with the significance of the educational aspect of apartheid" and other aspects of apartheid.

It is difficult to imagine, Mr. President, a policy which is more clearly covered by Applicants' norm than the policy regarding compulsory education. The obligation or, looking at it from another view, the benefit of compulsory education is allotted to some of the inhabitants of the Territory purely on a group basis, and without regard to the individual qualities of the persons involved. In those circumstances, on Applicants' case as formulated heretofore, the policy is inherently and *per se* contrary to Article 2 of the Mandate. No explanation would be relevant or permissible, and the Court would not be entitled to accept any explanation—it could not, in the Applicants' own words, and I quote from IX, at page 246:

"... undertake the task of second-guessing the competent international organs responsible for the development of the norm".

Applicants now appear to suggest that it might be possible for Respondent to explain or support a differential policy of the sort that I have just referred to—a policy differentiating in the application of laws relative to compulsory education. The question then arises: what criterion should be applied in determining the validity of any explanation? What, in the Applicants' words, should be, and I quote a portion of the passage which I read previously—"... the significance of the educational aspect of apartheid seen in relation to all other aspects of the apartheid policy of which this forms a part" (XI, p. 315). Mr. President, no answer is given to this question, nor is it clear what the Applicants intend to convey by the words also contained in the passage that I read—"... would violate the duty to allot rights and burdens, privileges and so forth on the basis of promotion of welfare and progress of all the inhabitants to the fullest practicable extent ...". Mr. President, we do not understand what is intended to be conveyed by the words I have quoted.

The same comment applies, Mr. President, to the cross-examination of Professor Possony. It appears in his cross-examination to have been suggested that the word "discrimination" in Applicants' definition at IV, page 493 of the Reply, bears some unfavourable connotation. I refer in this regard to pages 5-8, *supra*, where, the Court will remember, Professor Possony was asked what interpretation he placed on the word discriminate. This witness, after some cross-examination as to his understanding of the word discriminate, said:

"... once you raise the question whether there is a permissible discrimination or not, I would have to see exactly what are the criteria of permissibility or non-permissibility" (*supra*, p. 8).

With respect, Mr. President, this rather obvious observation is one which we have been pressing for months. Applicants, however, have not explained their position to us, or to the Court, nor did they at the time, to Professor Possony.

As regards the suggestion that explanations for differential allotment of rights may be given by Respondent and accepted by the Court, on the basis of unspecified criteria, it may here be apposite, Mr. President, to refer back to previous statements made by Applicants, and, out of many, I wish to quote only a few. In the verbatim record, IX, at page 298, my learned friend, Mr. Gross, is recorded to have said the following:

"... the Respondent allots status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or quality. In the Applicants' submission, such a policy and practices are inherently incompatible with Respondent's obligations under Article 2 of the Mandate and Article 22 of the Covenant and constitute *per se* and *ipso facto* violations of Article 2, the interpretation and the application of which Article are governed by international standards and/or by an international legal norm, as described in the Reply, IV, at page 493.

In the Applicants' further submissions, no evidence or testimony in purported explanation or extenuation thereof is legally relevant to the issues joined in these proceedings."

Mr. President, I wish to underscore the words of the last sentence that I have read: that no explanation or extenuation would be permissible.

And, in a still earlier part of the Oral Proceedings, my learned friend, Mr. Gross, stated in the verbatim, **IX**, at pages 45-46:

"... any conception that would lead to a doubt or an inference or an assumption that promotion of the welfare and progress of an individual is compatible with the allotment of the rights, burdens, duties and privileges, upon the basis of his membership in a group rather than upon his quality, merits and potential as an individual person is impermissible, inconsistent and such a policy is repugnant to the legal norm which we assert covers the situation.

The condition of the individual's health, his happiness, ostensible happiness, or other factors which are frequently referred to, do not, in these circumstances, have a relevance to the validity and content of the norm if it exists, as the Applicants respectfully submit that it does."

In the same verbatim, at page 46, we find this statement, Mr. President:

"... in view of the inherent incompatibility of the practice and policy of apartheid, as defined in the written pleadings, as they appear from undisputed facts of record, there would be no basis [and I skip a few words] for an investigation of the factual situation whether by hearing evidence or by local inspection. That would be, again, inherently, a superfluous form of inquiry in either form. It would be superfluous because of the inherent, assertedly inherent, repugnance and incompatibility of the admitted and undisputed facts of record regarding the policy and practice of apartheid with the legal norm, for which the Applicants contend, and upon which their submissions rest."

Then I shall read only one more of the statements made by my learned friend, Mr. Gross, with regard to this aspect of the case, and I quote at **IX**, page 57:

"But [said Mr. Gross] on the basis of the submissions, as the Applicants intend and respectfully present them—on the basis of the undisputed facts of this record, the Applicants respectfully submit, and accordingly through the Court advise the Respondent, that the Applicants rest their case upon the propositions asserted, and that the acceptance of those propositions would make irrelevant, unnecessary, for all the reasons the Applicants have endeavoured to explain, the introduction of further evidence."

Mr. President, this very dogmatic attitude stands in sharp contrast not only to the above-quoted replies by the Applicants to questions put by you, Mr. President, relative to compulsory education, but also to a further incident when the following question was put, again by you, Mr. President, to Mr. Gross, during the testimony of Professor Possony. The question, recorded in **XI**, at page 690, was as follows—the question was put to the learned Agent for the Applicants:

"Is it your contention that if it is established that to apply the norm which you allege exists, would be contrary to the welfare, social progress and development of the people of South West Africa, that is wholly irrelevant to the Court?"

The answer given, recorded at that page, was "No, Sir."

Now, after this question was repeated, the reply, given the second

time by my learned friend, Mr. Gross, was amended to read as follows: "Well, Sir, I do not think I can answer yes or no."

I just quoted from **XI**, at page 691.

Mr. President, as regards the alleged content of the norm or standards, one further point calls for comment. Since the filing of the Reply, the content of the norm, with which the content of the standards was assimilated in the course of Applicants' oral reply, was stated to be as defined at **IV**, page 493 of the Reply. Now, this definition, which I have already quoted, contains two aspects. There is an affirmative aspect and a negative aspect. As is to be expected of a definition, the two aspects are to the same effect, namely a prohibition on the allotment of status, rights, duties, etc., on the basis of membership of a group rather than on individual qualities or, conversely, an injunction to allot rights, etc., on the basis of individual potential, quality, etc. Since the suggested norm as a whole is a prohibition rather than an injunction, as the name non-discrimination or non-separation indeed indicates, Applicants and also Respondent have normally referred only to the negative formulations at page 493. In this regard, reference may be made to the formulation on the first day of the oral argument, **VIII**, at pages 117 and 118, when my learned friend referred to the norm as defined at **IV**, page 493.

There are a number of examples. I do not wish to read them, I shall just give the Court an indication where they can be found—that is where the norm was referred to only in its negative definition. Those are **VIII**, at pages 246, 252, 262, 263 and 267; **IX**, at pages 45, 46, 48, 60, 245, 247, 248, 261, 282-283, 284, 298 and 306-307. Mr. President, I have noted quite a longer list but I think that is sufficient.

Towards the end of the oral evidence Applicants, however, attempted to escape the definition. It started while Professor Manning was giving evidence on 14 October—I refer in this regard to **XI**, at pages 607-609, where it was suggested that the definition at **IV**, page 493 of the Reply, was not conclusive—the Court will remember that Professor Manning was asked by my learned friend, Mr. Gross, whether in addition to having read the definition at page 493 of the Reply, he had also read all the verbatim records in which explanations were given. I would in this regard also refer to **XI**, pages 621-625. And, Mr. President, in the course of cross-examination of Professor Possony, Mr. Gross pertinently stated as follows at page 7, *supra*: "... page 493 is not a self-contained page in these pleadings". Later at pages 26-27, *supra*, of the same verbatim record he said—

"... page 493, important as it is, does not embody the case of the Applicants and, Sir, I think the impression has sought to have been created previously in these proceedings by Counsel that the language on page 493 must be interpreted as if it were disembodied from the balance of the pleadings, not explained by the sources to which reference is made and elaborated and which explain the detailed content attributed by the Applicants to the standards and the norm contended for and, Sir, if the point in the implication of Counsel's question, or interposition, is that the Applicants may not refer to any provision or language in these pleadings other than page 493, the Applicants would very respectfully disagree."

After some debate on the very same day, during which reference was made to the terms of Submissions 3 and 4 and the content of the definition at page 493 of the Reply, my learned friend, Mr. Gross stated:

"Mr. President, the Applicants, far from changing their case in any respect, re-affirm their reliance upon the international standards or alternatively, and cumulatively, the norm with the content contended for, and it is simply, Sir, the Applicants' submission that the meaning to be fairly assigned to the words and phrases used in the description are to be derived from the explanations made by the Applicants, the arguments made thereon and the sources to which they rely and which illuminate the significance of words and phrases used. It was not then, and is not, the intention of the Applicants in any way to withdraw or retreat from the arguments made before the Court with respect to the existence of international standards or objective criteria, on the basis of which the Mandate should be interpreted. These are of the content described and defined on IV, page 493, the meaning of which is to be, in our submission, understood, elucidated and arrived at by the honourable Court on the basis of the explanations made." (*Supra*, pp. 28-29).

On the very next day the Applicants reformulated their norm or standard to prohibit (and I quote from the verbatim, p. 36, *supra*; the definition was repeated on the same day at p. 39 and again at p. 40):

"... governmental policies which do not give weight to individual merit or capacity, but which allot rights and burdens on the basis of membership in a group which do not protect equality of opportunity and extend equal protection of the laws to individual persons as such".

Mr. President, we submit that this reformulation does not differ in any material respect from the definition of the norm given at page 493 of the Reply. The only difference would appear to be (a) a change of sequence in the negative formulation whereby the position of the individual is dealt with before that of the group, and (b) the substitution of the words "which do not give weight to individual merit or capacity" for the words "rather than on the basis of individual merit, capacity or potential" in the definition at page 493. It is submitted, Mr. President, the Professor Possony was quite correct when he said at page 40, *supra*: "Mr. President, I fail to see that the formula differs from page 493 in any substantial aspect."

In the same record, on analysis of the terms of the Reply, and the various sources relied upon for the creation of the norm or standards, Professor Possony demonstrated that the norm as interpreted by him and also by Respondent indeed represents the only possible interpretation of page 493 of the Reply. The Court will also recall that he demonstrated that a norm or standards of such content is not supported by the sources relied upon by the Applicants—this is found at pages 35-38, *supra*. Further reference will be made later in the argument to this aspect, Mr. President, when Professor Possony's evidence will be dealt with in more detail.

Applicants' present embarrassment with the definition of the norm as set out at page 493 of the Reply, Mr. President, stands in sharp contrast to their previous fondness for the phrases appearing on that page. This does not only appear from the references which I have already given and read but it also appears indeed from the very terms of Submissions 3 and 4. In this regard, I may also refer the Court to VIII, pages 117-118 and page 267, where the reference to norm is wholly as to the negative

part of the definition; IX, page 245, where the definition as is contained in the Reply at IV, page 493 is quoted; IX, pages 306-307, which I have already read to the Court this afternoon and where the Applicants stated that the label does not matter but that the norm is defined at page 493 of the Reply and that that is the core and the heart of their case.

Mr. President, from what Applicants have indicated in the course of oral testimony, and that is both by statements made and by questions put to witnesses, it would seem as if they are no longer content with the norm or standards defined at page 493 of the Reply. They appear to object to the norm being described as one of mere differentiation, that is, one prohibiting the mere allotment of status, rights, duties or burdens on the basis of a group, class or race. On the other hand, however, they do not state specifically what additional element is comprised in their norm and standards. If they now attempt to introduce a new element into the definition of a norm or standards, we submit that the position would be as follows:

- (a) that they would be attempting to make a new case;
I have already stated an additional element would relate to either purpose or effect, and that that would involve a factual enquiry which Applicants repeatedly and explicitly said was not necessary and
- (b) that in contending for any norm or standards other than a norm or standards as defined at page 493 of the Reply, Applicants must by necessary implication be considered to admit that their charge, as contained in their Submissions 3 and 4, would not succeed. In these submissions, the Respondent is charged with a violation of the norm and/or standards merely and solely because Respondent has—
“distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory”.
It must therefore follow that if the norm or standards contain an element other than, or in addition to, the element of distinguishing on the basis of membership in a group, class or race, the Applicants have not charged Respondent with having breached such a norm or standards. Indeed, they have not produced any evidence to show violation of such a norm or standards containing an additional element. They have, on the contrary, repeatedly informed the Court and they have informed us, that it is unnecessary and indeed irrelevant to the case brought by them for Respondent to bring any evidence to show non-violation of such a norm or standards.

Mr. President, I had been dealing with what I contend can be described as attempts on the part of the Applicants to reformulate their norm. I now wish to deal with a related matter, and that is the distinction between Applicants' norm and standards, which was also a matter raised in the various objections put forward by Applicants in the course of the oral testimony.

When the norm of non-discrimination or non-separation first reared its head in the Reply it was clearly a norm, or norms in the plural, but not a standard, or standards in the plural. I refer in this respect to the Reply, IV, at page 492 and the following pages. Although reference was made to standards in the Reply, they remained nebulous as regards both content and effect. Thus Applicants said: “The standards referred to in the Reply are of course of a political, moral and scientific character” (VIII, p. 247).

During the course, however, of the oral reply Applicants developed and expounded the concept of a binding standard. Now their argument was that Respondent had agreed in 1920 to apply standards laid down by the competent supervisory authority in respect of mandates, and that such a standard, with the same content as the norm defined at IV, page 493, had been created. In this regard I draw the Court's attention to what was stated by the Applicants in the verbatim record of 18 May, IX, at pages 315-320, and 243-244. At the same time Applicants sought to establish that the rule in question had attained the status of a norm or a legal rule binding on all States and not only on the Mandatory.

However, Applicants' enthusiasm for their norm seems to have waned with the passage of time. We find on 30 June, and I quote from X, at page 187, that Applicants then say:

"The Applicants, moreover, have contended that the condemnation of official discrimination is so firmly and universally enunciated as to be regarded as a rule of international law within the meaning of Article 38 of the Statute of the Court. . . . this, as the Court will be aware, has been asserted as an additional, cumulative argument which does not in any way affect or limit the principal argument with respect to the standards which the competent organs have applied to the practice of apartheid, and to whose views this Court is respectfully requested to accord due and authoritative weight."

Again, in XI, at page 647, the Applicants referred to their contention regarding a legal norm as "an alternative and, in effect, a subsidiary argument—an alternative and cumulative argument".

In this fashion the "norm of non-discrimination and non-separation" which was introduced in the Reply to meet the exigencies of the moment, and, in particular, the collapse of the original case, made by Applicants based on oppression, has in turn been superseded by the "standard of non-discrimination and non-separation" which later arose in the oral reply to counter, as we contend, the collapse of the legal norm. It is necessary to point out further that Applicants are apparently becoming doubtful also as to the basis of their standards. Thus they refer to—

"... their contention that Article 2 of the Mandate should be interpreted in the light of standards which concededly and undisputably exist, in the form of United Nations Charter, resolutions, other international instruments and so forth". (XI, p. 644.)

And in the same verbatim record, at page 647, they say:

"... Applicants' main argument with regard to the conceded existence of international conventions and so forth, which are contended by the Applicants to result in standards which should be applied in the interpretation of the Mandate".

They also say:

"We believe that the United Nations standards, as elaborated in the Reply, may be considered and should, with all respect, be considered by this honourable Court in interpreting the Mandate . . ." (X, p. 524.)

Mr. President, I do not propose re-arguing the legal issues of the case, but I would emphasize that these formulations of the Applicants' contention regarding standards differ entirely from their earlier version, according to which standards were (a) laid down by the administrative

supervisory organs, and were (b) binding upon the Mandatory and upon the Court. There was then no suggestion of standards which (to quote the words from my last quotation in the Applicants' oral argument) "may be considered" by the Court.

It would not, in our submission, be proper or necessary to consider whether these various formulations and re-formulations by the Applicants are consistent with their case as set out in the submissions. The submissions, we say, contain the authoritative definition of Applicants' case, and in the result we can do no more than repeat what was said on 1 July, and I quote from a statement by my learned friend, Mr. de Villiers:

"We do not understand that there is any case being made against us, outside of the ambit of the case explained so repeatedly by my learned friend to this Court, and which seems to be clearly incorporated in the submissions now before the Court. I have said repeatedly that we are prepared to meet any case that may be presented against us, provided that it is presented fairly—that is through the front door, not through a back door—so that we know what that case is, and that we are given timeous notice in order to adapt ourselves to that case.

My learned friend had his choice, and he exercised it with deliberation, at the stage before it came to the amendment of these submissions. He [that is, the Agent for the Applicants] then gave notice to us of this limited scope of his case. On the basis of that notice we have made arrangements totally different from what they were initially. We are calling our evidence now on this very much more limited basis of presentation of the case—very much more limited than it was before. We made new arrangements in regard to witnesses, disposing of some whom we had in mind and not negotiating any further with others whom we had in mind to call in regard to the issue as we initially understood it to be presented. We have limited ourselves in these various respects; we have added certain other witnesses, in order to meet this case and the sole case which the Applicants said they were making against us.

Mr. President, there must, in circumstances of that kind, surely be a limit to the extent to which a party can chop and change and then indicate a new attitude to the Court. There must come a time when the Court should say to a party: you have made your election and you must abide by it, because the case has been shaped on the basis of the election you made and you cannot now, at this late stage, alter it again." (X, p. 227.)

Applicants have not since the re-formulation of their submissions indicated any intent to alter their case and their submissions again. On the contrary, when asked about it by you, Mr. President, on 20 October they indicated that they did not contemplate any alteration. I refer in this regard to the verbatim record, at pages 28-29, *supra*.

Our evidence was led on the basis of Applicants' case as set out in the submissions as re-formulated. It fell into three main categories, in accordance with the scheme explained to the Court on 17 June (X, at pp. 76-77) and on 18 June (X, at pp. 77-78 and 82-87), the scheme being the following:

The first category: evidence which served as a basis for explaining

or illustrating the methods and proceedings in international organizations, which evidence is intended to be amplified in the further argument with reference to the readily available sources. The purpose of this evidence, and of the further demonstration to be added thereto, is to show that such methods and proceedings cannot be regarded as creating or applying standards or norms of a legal nature, or of the content relied upon by the Applicants.

The second category: evidence showing that no norm or standard as defined by Applicants at IV, page 493 of their Reply, is universally applied in the practice of States.

The third category: evidence showing that the application of the norm or standards in the circumstances of many countries, including South Africa and South West Africa, would lead to results inconsistent with the promotion of well-being and progress of the inhabitants.

The remainder of our argument on the issues raised by the Applicants' Submissions Nos. 3 and 4 will fall into the same three categories that I have just now mentioned, and it will follow the same sequence. In the course of argument we shall refer to the evidence given by the witnesses and the facts in the written pleadings which have all been admitted by the Applicants. In this regard I call the Court's attention to IX, at pages 20-21 and 43-44. The Applicants there indicated to the Court as follows, and I quote in particular a short passage in IX, at page 21:

"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."

We shall at an appropriate stage in the later course of our argument deal with the significance and legal effect of the admission by a party of pleaded facts, and with a related subject, namely the significance and effect of failure by a party to cross-examine witnesses on material aspects of their testimony.

In addition to the admitted facts, as we have indicated in the verbatim record, X, pages 77-78, 83-84, and later in XI, at page 456, we shall also refer to some United Nations documents in the first part of our argument that is, that part of the argument which will deal with an appraisal of the procedures and activities in international organizations, and, in particular, the United Nations.

The argument which I have sketched will conclude our contentions regarding Applicants' Submissions 3 and 4, subject of course to the right to reply on any comment made by the Applicants relative to the evidence. Submissions 1, 2, 7 and 8 have already been disposed of. That will then leave us with only Submission No. 5, which deals with unilateral incorporation, No. 6 (militarization) and No. 9 (unilateral modification of the terms of the Mandate). These Submissions Nos. 5, 6 and 9 were, I submit, but faintly pressed by the Applicants in their oral argument, and will be dealt with by us after we have concluded our argument regarding Submissions 3 and 4.

Mr. President, with the permission of the Court my learned friend, Mr. de Villiers, will now start to deal with the first portion of the first category of the argument that I have indicated.

26. ADDRESS BY MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARINGS OF 26 AND 27 OCTOBER 1965

My learned friend, Mr. Muller, has indicated to the Court in what category this portion of the Respondent's address will fall, and it is unnecessary for me, Mr. President, to repeat that.

I should like to begin by drawing attention to a large category of resolutions of international bodies upon which the Applicants rely for the purposes of their norm and standards contention. The Court will recall that they referred in their pleadings and in their oral addresses to the Court to a large number of such resolutions. The large majority of these, Mr. President, were resolutions of organs of the United Nations, and of that category again, the overwhelming majority were concerned specifically with South West Africa and South Africa, and it is this last-mentioned category which I want to isolate for the moment—that is the group of resolutions with which we wish to deal first.

We shall deal at a later stage of our address with the other resolutions falling outside this category, some still being United Nations resolutions, but not specifically referring to South Africa or South West Africa, and some not being United Nations resolutions at all.

The resolutions in question, with which I am going to deal now, are identified in the Applicants' written Reply, at IV, pages 502 to 504, and one will particularly find full references to the records in the United Nations in the relevant footnotes at those pages. We find again, Mr. President, reference to these resolutions in the verbatim record of 18 May, IX, at page 332, and I should like to read to the Court a portion of what was said there by my learned friend on that occasion. First, he quoted from the Reply at IV, page 502, this sentence:

"Since the founding of the United Nations, there have been more than thirty resolutions of the General Assembly specifically condemning racial discrimination or segregation, whether in South Africa itself, South West Africa, or generally in Non-Self-Governing Territories."

That was the end of the quotation from the Reply. My learned friend continued:

"Applicants have set out at page 502 of the Reply a list of such resolutions. Inasmuch as the purpose of citing such resolutions was to demonstrate the judgment of the organized international community with respect to separation or discrimination on the grounds of race or membership in a group, it is immaterial to the purposes of the present discussion that the resolutions apply to apartheid both as practised in the Republic of South Africa and in the Territory of South West Africa, as the pleadings make crystal clear and as is conceded by the Respondent. The fundamental policy and practices in force in the Territory and in the Republic are essentially the same in all respects relevant here." (IX, p. 332.)

Mr. President, let us attempt to attain clarity first as to the purposes

for which the Applicants relied upon these resolutions, this particular group of which I am speaking.

The purpose was, in the first instance, to show that these resolutions were part of the process of the creation of the norm as defined and relied upon by them, and/or as proof of recognition that such a norm exists. That was the first purpose as we understood it of the argument as relying upon these resolutions. Secondly, Mr. President, they relied upon these resolutions with the same purpose in view as far as their *standards contention* was concerned; in other words, as part of the process of creation or formulation of those standards, or as an indication of recognition that such standards exist and are intended by these organs to be applicable and binding upon the situation in South West Africa. Thirdly, Mr. President, the purpose was, as would appear from the passage which I have just cited to the Court, to show the judgment of the so-called organized international community that policies of the Respondent in the Territory offended against the norm and/or the standards.

I have stated the purposes in this order. No particular significance is attached, for the purpose of my argument, to the order. I have not given attention at all for purposes of my argument here to the Applicants' distinction as to what is their main contention and what is their alternative or subsidiary contention. It does not matter for my purposes because this argument will serve as a reply to all of those contentions.

It is particularly in this last-mentioned respect, Mr. President—in respect of relying upon these resolutions as constituting a judgment of the organized international community that policies of the Respondent offended against the norm and/or the standards—that the Applicants contended that these resolutions were binding also upon the Court; that the Court, in other words, was bound by these decisions and simply had to apply them. In the Applicants' words, which my learned friend, Mr. Muller, also recalled earlier this afternoon, there was to be no "second guessing" of the so-called "competent international organs" and there was to be no "veto" of their "judgments". The Court was simply bound to accept and to apply these so-called "judgments". My learned friend gave reference to the passages in that respect in the verbatim record of 9 June at IX, pages 543 to 545.

Now, in this last-mentioned respect also, it is clear that the Applicants could rely only on resolutions pertaining specifically to South West Africa and to South Africa. It would not be possible for this purpose to rely on other resolutions, and that is a factor which distinguishes this group of resolutions from the others relied upon by the Applicants.

Mr. President, that is not my main reason for isolating this group and for dealing with it first. Our main reason for that is that there are certain special reasons which we shall advance to the Court—special reasons in addition to the legal argument presented to the Court before—why these particular resolutions could not possibly support the Applicants' contentions as to their norm and/or standards. There are again special reasons, also additional to those advanced before, which similarly apply to the other group of resolutions, but they are different reasons and we shall come to deal with those at a later stage.

Now the grounds which we have already advanced, why these particular resolutions could not support the Applicants, have again been referred to earlier this afternoon by my learned friend, Mr. Muller, and I do not intend to make any detailed reference to them at all—it is unnecessary.

I merely want to identify those very broadly in order to contrast the argument which is now to be presented with what has gone before.

Broadly, we may say that, apart from jurisdictional aspects which we mentioned, we have demonstrated in our earlier argument that the proceedings in these bodies could not possibly have resulted in anything that would be binding upon the Respondent or upon the Court, that is, as a binding norm or as binding standards or as a binding judgment that the norm or the standards have been violated. That is the broad trend of the substantive portion of our argument as we dealt with it in the verbatim records of 10, 11 and 14-17 June (IX and X). Those arguments, Mr. President, were advanced by us quite independently of what these resolutions were, in fact, intended or what they purported to achieve.

Although that argument concentrated on the processes and the legal significance of the processes themselves—although that argument would have been entirely sufficient for our purposes—we promised that we would in addition, at a later stage, deal with the matter with reference to the content of the suggested norm and the suggested standards relied upon by the Applicants. We promised that we would then demonstrate in what light the activities in these international bodies were, in fact, to be seen, and in particular we promised to show, Mr. President, that the organs and the agencies of the United Nations in passing these judgments did not purport to have applied standards or a norm with the contents suggested by the Applicants, but, on the contrary, that they condemned the Respondent's policies on an entirely different basis—namely as being tainted with improper motives, or as being oppressive of certain groups. And we added that, as we would show, the findings were in any event to a large extent based on incorrect or distorted facts or assumptions or on deliberate misrepresentations.

Those indications the Court will find in the verbatim record of 18 June at X, page 84. And it is in this light, Mr. President, that we intend to continue the argument as from here.

It will be evident in my submission that if it can be shown that the organs, in condemning the Respondent's policies, did not apply standards or a norm of non-separation or non-discrimination, as defined, this would be an independent and an additional ground, quite apart from those already advanced, why the Applicants' case under consideration must necessarily fail, at least, of course, as far as it depends on these particular resolutions. It will, therefore, be highly relevant to examine very carefully the considerations which gave rise to these resolutions.

In some cases one finds that the wording of the resolution itself throws a reasonably clear light on what those grounds and what those motivations were, but that does not apply in all cases, and even in cases where the wording is enlightening one finds that it does not always tell the whole story in its full impact.

We therefore have to turn to what one might call the antecedents of these resolutions in order to find as accurately and as fully as possible the real motivations behind them—the real bases upon which they were adopted. These antecedents include views expressed by delegates who voted for those resolutions; they include the material and sources on which those views were based and they include other relevant evidence as to the motives with which that material and those sources were placed before the United Nations and its organs.

I consequently propose to embark upon this background inquiry, but let me first, Mr. President, by way of recapitulation and in order to have no misunderstanding at all, state very clearly what the purposes of this inquiry are. It will be done very, very concisely and even if it involves a brief measure of repetition, because we do not want to have any misunderstanding about this.

Basically, we propose to show that the resolutions on which the Applicants rely did not purport, and were never intended, to create a norm or standards of any kind or particularly of the kind as relied upon by the Applicants. That was not their function—not the creation of anything in the nature of a norm or standards—and in so far as it was a question of giving recognition to the existence of a norm and/or standards, that recognition was not accorded to a norm or standards of a content as relied upon by the Applicants.

We submit, Mr. President, that that appears in two ways. Firstly, because the resolutions were, to a very large extent, the outcome of a political campaign which was waged against the Respondent Government by a large number of States—a campaign which was based on political and particularly on emotional grounds, rather than upon objective grounds concerned with the well-being and progress of the peoples concerned. The objectives of the campaign, in our submission, are to procure the so-called “liberation of the people of South West Africa”, to secure the independence of the Territory on the basis of Black African rule and to secure the consequent ousting of the White group from the Government of the Territory or any part thereof, no matter what the effect might be on the interests and the needs of the population as a whole. That campaign, we submit, has culminated in these very proceedings in this Court, in which we submit that the Applicants act in a representative capacity, as representatives of some of the leaders of that campaign. That is the first part of the reasons, in other words, of the manner in which it appears that the purport and the intent of these resolutions were not what is claimed by the Applicants.

Secondly, we submit that the real purport appears from the grounds upon which the Respondent was attacked in the course of the campaign and upon which the resolutions in question were eventually based, and we find, on analysis, that these amounted to nothing else than alleged deliberate oppression of the indigenous population of the Territory. A suggested norm and/or standards of the kind defined by the Applicants and relied upon by them did not enter into the discussions at all.

In this last respect we shall indeed show that while consideration was given in special committees and other bodies of the United Nations to the prospect of litigation in this Court on the question of South West Africa, that is contentious litigation as was eventually instituted in these proceedings, at no stage whatsoever in those deliberations and in those recommendations was any suggestion made of bringing an action on the basis of standards or a norm of the kind now under discussion. It was purely and simply a case of an allegation of deliberate oppression of the indigenous population of the Territory.

Then there is a further feature, with a view to which we embark upon this background inquiry, this inquiry into antecedents, and that is that the resolutions were, in our submission, to a very large extent based on completely erroneous and distorted information, mostly derived from statements by petitioners from the Territory and derived from

them under circumstances in which their statements were not tested, but were indeed accepted and echoed without reservation.

Those, then, are the purposes for which we embark upon the inquiry.

I propose to deal first with the campaign and with related aspects of it. This seems to us to be a natural starting point and a natural background with a view to demonstrating both the unreliability of the allegations relied upon in support of the resolutions, and also the real nature of the purported grounds upon which South Africa's policies were attacked.

Now, when we speak of a campaign, let us be very clear, so as to avoid misunderstanding, as to what is meant. We shall speak in general of an anti-colonialistic campaign, but we shall speak also in particular of leading participation, which has come to be taken in that campaign over more recent years by the independent African States. When we speak of that participation by the independent African States, that leading participation, it does not mean that we suggest that criticism of South Africa's policies in South West Africa first started with the coming upon the scene of the African States, or that an anti-colonialistic campaign, for that matter, first started with the African States. It is common knowledge and we all know that it came much earlier. Nor do we suggest that in the furthering of this campaign over the last few years—a campaign culminating in these proceedings, and still running parallel with these proceedings, that the African States are standing alone and that they have no allies. Certainly, we all know that they have allies in that very campaign and that they are very strongly supported by various States and groups of States for various motivations, but our concern is not with what went before, with the motivations of other States which, sometimes enthusiastically and sometimes perhaps less enthusiastically, may act as allies and supporters of the African States in this particular respect.

Our purpose is, in particular, concerned with the leading participation taken by the African States over these later years, with a common purpose which the representatives of the African States have made in this respect with petitioners from South West Africa, and with the light which that feature throws upon the issues and upon the purposes and upon the objectives involved in this litigation.

The most careful reading of Applicants' pleadings does not reveal any practical reason why the Applicants particularly have come forward to institute these proceedings. The Applicants did, of course, express in their pleadings an attitude of being gravely concerned about the well-being of the indigenous peoples of South West Africa and they have gone further. Throughout the pleadings they have sought to create the impression that they have taken action solely in the interests of the inhabitants of the Territory. So we find, in the Memorials, at I, page 86, that each of the Applicants stated:

"The Applicant has repeatedly expressed grave concern concerning the violations by the Union of its duties with respect to the Territory and the well-being of its inhabitants."

Mr. President, there are, in the pleadings, some references, I might call them "legalese" references, to a so-called legal interest, or legal interests, on the part of the Applicants and on the part of other Members of the United Nations. But otherwise we find that the proceedings are

presented throughout as being directed to the benefit and the interests of the inhabitants of the Territory, and nowhere do the Applicants offer the least practical reason why they particularly have come to be the champions of the inhabitants of the Territory.

Now, a moment's reflection will show how strange and artificial this situation really is. There are no cultural, economic or other ties between the Applicant States and South West Africa. The Applicants have no direct contact with conditions in South West Africa and, as far as we know, no first-hand experience of conditions in South West Africa.

We found that both the Applicant States were Members of the League of Nations. The Respondent, as everybody knows, has, since the inception of the Mandate, applied policies of ethnic differentiation in South West Africa, but neither of the Applicants, nor for that matter, any other State, at any stage during the lifetime of the League of Nations sought to bring about a change in this state of affairs in the interests of the inhabitants of the Territory. In addition, as has been shown in the pleadings and it would now appear to be part of the undisputed and admitted facts, the standard of progress and achievement in South West Africa appears to be certainly not less favourable than in the Applicant States and in many cases higher or better than in the Applicant States. It is against this background that the Applicants now, without any special explanation, emerge as the self-appointed protectors of the inhabitants. It must be manifest, Mr. President, that there must be some practical reason or motive why this has come about and the Applicants' very persistent silence about this point becomes the more remarkable, especially in view of the fact that we have specifically challenged them about it in our pleadings.

The Court will recall that in our Counter-Memorial, II, at pages 446-449, dealt with what we described as—

“... the increasing pressure exerted by the newly independent African States to enforce the grant of self-government or independence to dependent territories and peoples in Africa”.

The quotation is from page 446 of that volume. Then we went on to say this, at the same page:

“The present proceedings against Respondent are to be seen as part of this political campaign designed to bring South West Africa (and eventually the Republic of South Africa itself) into line with the new governmental systems established in other parts of Africa, and to achieve for the Territory majority rule by the Native population—as an over-riding objective to which all other aspects and implications are to be subordinated.”

We did not make that as a rash and unsupported assertion. In support of the statement, we quoted from debates at conferences of African States and from resolutions at conferences of African States. That will be found in the same volume, on pages 446-449.

Without going into detail, I should like at this stage, particularly because of the reaction we had from the Applicants, to which I shall refer in a moment, to refer to some of the material on which we relied there in the Counter-Memorial.

We pointed out by way of background that the Presidents of Liberia and Guinea and the Prime Minister of Ghana made the following state-

ment in regard to South West Africa in a joint communiqué, dated July 1959. I quote from II, page 446, paragraph 31:

"We maintain that this Territory is in fact a Trust Territory of the United Nations, and as such the United Nations cannot relinquish its legal and moral responsibilities to the indigenous inhabitants who are entitled to the same treatment given to other Trust Territories. Consequently, we will request the United Nations to give further consideration to this question, declare the Territory not a part of South Africa and fix a date for the independence of the Trust Territory of South West Africa."

That is the end of the quotation, Mr. President in July 1959, somewhat more than a year before the institution of these proceedings.

In the next year, in 1960, the Secretary of State for Liberia, Mr. J. Rudolph Grimes, spoke of the "determination" of his Government (that was the word he used "determination") "on behalf of all the African States, to pursue further action to get this territory placed under the Trusteeship provisions of the Charter". The quotation is from II, page 447 of the Counter-Memorial, Mr. President, and it proceeds as follows: "We are pleased to know that in this we have the support and co-operation of other African States. This matter will be discussed at this conference and it is hoped that final decision for further action will be taken before we adjourn."

I should like to make two comments: one is that, as we point out in the Counter-Memorial, this was 1960, and, as we have demonstrated before, by 1960 trusteeship was considered as being merely a brief prelude to complete political independence. That is one comment. The other comment is that at this conference, as was foreshadowed by Mr. Grimes, resolutions were indeed adopted—at that conference and at other conferences.

We find that, as is also demonstrated in the Counter-Memorial at the pages in question, 448-449, at this particular conference it was decided "that the international obligations of the Union of South Africa concerning the Territory of South-West Africa should be submitted to the International Court of Justice for adjudication".

Next quotation from the same resolution, at the same page in our Counter-Memorial: "that the Governments of Ethiopia and of Liberia have signified their intention to institute such a proceeding." The purport of the quotation was that the resolution noted this fact. Then, there is this further rather significant paragraph which I quote, still from the same page: "that a Steering Committee of four African States, including the delegations of Ethiopia and of Liberia, should be established to determine the procedures and tactics incident to the conduct of the juridical proceedings in this matter" (II, p. 448).

Mr. President, we dealt also, in that portion of our Counter-Memorial, with the reasons why we assigned those particular objectives to the campaign. I shall leave those aside for the moment. I am coming back to that at a later stage. I merely wish to refer now to our conclusion which we stated at page 448, and which reads as follows:

"It will be apparent from the facts set out . . . that the Applicants in the present case are in substance only nominal parties to the proceedings, the real parties being the independent African States, and that the main purpose of this action is to secure political independence for the Territory."

Now, Mr. President, what was the reaction of the Applicants? We get that in their Reply, at **IV**, page 295, and we find that it was sharp and professedly indignant. They stigmatize our conclusion, which I have just cited to the Court, as "a sweepingly declaratory judgment". Then they go on to declare the following: "Applicants do not consider compatible with the dignity of this honourable Court, or with the gravity of the issues in dispute in these Proceedings, to reply to irresponsible and unwarranted comments of such a nature."

But, significantly, Mr. President, despite all this indignation, we find that the Applicants did not attempt to refute, or even to answer, any of the supporting material upon which we relied in the relevant portion of our Counter-Memorial—that we pointed out in our Rejoinder, **V**, at page 380. Nor, Mr. President, did the Applicants indicate any other practical reason why they particularly were now championing the cause of the inhabitants.

When we come to these Oral Proceedings we find that this line of indignation and disdain was maintained—again, Mr. President, without dealing in the least with the merits of what we had said, and, again, without taking this Court into their confidence about the real reasons for their concern about the well-being of the inhabitants. We find that they dealt with that in the verbatim record of 27 April, at **IX**, pages 8-11.

Mr. President, I need only point out that, on this question as to the representative capacity of the Applicants, they said nothing at all except to suggest, as they had done before, that they might be representing the United Nations, or the Members of the United Nations, and so to divert the trail. We find, for instance, on page 9 of this record they said: "In this very case, the United Nations General Assembly by an overwhelming majority has seen fit to refer to this pending litigation." Then they refer to the resolution in question. But, otherwise, we hear nothing about this question of who is being represented and we find at page 11 the following is stated:

"... Respondent levels against the Applicants accusations of improper motive in seeking judicial recourse.

Mr. President, it is distasteful to deal with charges which call more for disdain than for denial, but denial there must be of the charge and denial must justly be recorded at this point."

Now, I point out that this, therefore, is one of the exceptional instances in which the Applicants have qualified their admission in regard to facts. They indicated that they accepted as true all the facts in our pleadings except where they would indicate otherwise, and this is an indication to the contrary. Therefore, and also, Mr. President, because we rather resent the suggestion that we have drawn the dignity of this Court in issue by irresponsible statements, it is a matter which requires to be pursued further. But, before doing so, I should like to refer to this wording that "Respondent levels against the Applicants accusations of improper motive in seeking judicial recourse". That, Mr. President, was not the point why we raised this matter. It was not a matter of suggesting "improper motive in seeking judicial recourse". We were concerned with pointing out that there was a campaign with certain political objectives, and that this litigation was part and parcel of the methods being pursued in order to attain those political objectives, and we thought it as well, and very important, that the Court should be informed of that implica-

tion of this litigation. That was the purpose why we referred to this. Whether one would describe that as an "improper motive in seeking judicial recourse" is really immaterial. It is certainly a motive; whether it is improper or not would depend upon the extent to which it is true that, as we say, the Applicants are concerned more with the attainment of these emotional objectives than with the real interests and benefit of the inhabitants of the Territory. That is a matter which is not of the essence of this investigation.

Now, Mr. President, in pursuing the matter further, because we have been challenged on this, I should like to begin with the representative role played by the Applicants in the proceedings. I may say that we have really submitted sufficiently in that respect in the Counter-Memorial, especially in view of the fact that what we have submitted has not been countered at all.

But, Mr. President, in addition there are very pertinent speeches delivered by representatives of both the Applicant States themselves in the United Nations General Assembly.

I begin with Mr. Yifru of Ethiopia. The reference is to the *Official Reports of the General Assembly*, Plenary, 16th Session, 1020th Plenary Meeting, page 177, 2 October 1961. I quote from the paragraph numbered 134:

"The numerous violations of the terms of the Mandate held by South Africa over South West Africa have been taken jointly by Liberia and Ethiopia to the International Court of Justice at The Hague . . . We are happy to report that all the African States have participated in all decisions leading to this action . . . We feel that this co-operation augurs concerted action in other areas of common interest."

Next we come, Mr. President, to the same Mr. Rudolph Grimes of Liberia. This is at the 1964 Session, the 19th, in plenary. Unfortunately, all we have available, and I think all that is available in the records of this Court and in its Library up to the present stage, is the provisional record, at page 91:

"Since last I had the occasion to address the General Assembly, the African States, through the Governments of Ethiopia and Liberia have not relented in their efforts to obtain for the people of South West Africa that which is rightly theirs. We have sponsored and vigorously prosecuted the South-West Africa case almost through the pleading stage . . . As you are well aware, this case represents the efforts of a united Africa to ensure that South Africa does not further extend its racial policies to a helpless and defenceless people."

That is the end of the quotation, Mr. President, and the question arises whom are we to believe? Are we to believe the Ethiopian and Liberian representatives in the United Nations or are we to believe the indignant evasions which are proffered to this Court?

We find, Mr. President, that the Applicants' representatives at the United Nations were, on this point, very pertinently confirmed by a representative of another African State, namely the representative of Somalia. We find that in the *General Assembly*, Plenary, 17th Session, page 476. That was on 12 October 1962. The quotation is from a paragraph numbered 184. After this representative of Somalia had referred to this

Court's Advisory Opinion about South West Africa—apparently the 1950 Advisory Opinion—he proceeded as follows:

“We are also watching with interest the efforts of Liberia and Ethiopia on behalf of the African countries in their case against South Africa before the same judicial body.”

I repeat: “. . . the efforts of Liberia and Ethiopia on behalf of the African countries . . .”

That this is the true position is further confirmed, if any confirmation were necessary, by the fact, Mr. President, which was widely publicized in the world press at just about the time when this Court was assembling, that members of the Organization for African Unity are expected to contribute to the costs of these proceedings. Very shortly before these proceedings started, there were, as I say, reports freely in the press that the Council of the Organization for African Unity had required each member State of that organization to contribute \$13,378 towards the cost of this case by 15 April. I can refer the Court to a copy which we have of a Sapa-Reuter message of March 1965 to that effect. I can refer the Court also—I have it here—I shall hand it in to the Registrar—I have also a photostatic copy in duplicate—I could hand one copy to my learned friends if they wish—of a publication called *Africa Research Bulletin* published in the United Kingdom. I have here the issue for 1-31 March 1965. There is a photostatic copy of the title page and also the relevant page, which is 254, at which the report appears. It has been marked in the margin. I shall also hand these in.

Mr. President, in further support, again, if that were required, we could refer to numerous statements made by petitioners from South West Africa. From what was said in the Counter-Memorial, and not met at all in any subsequent pleadings by the Applicants, and from what was said in the evidence of Mr. Dahlmann on the subject of the petitioners, it will already be evident to the Court to what extent there is common cause between these petitioners and the representatives of other African States. We shall refer to this matter later in more detail and we shall also point out that in many respects the representatives of the African States at the United Nations and the petitioners from South West Africa speak as if with one voice. They do so, amongst others, with regard to the nature and the objectives of this campaign of which we are speaking, but for the moment we are concerned with the question of the representative role of the Applicants.

I refer to Mr. Kozonguizi in the Fourth Committee, Fifteenth Session, 1050th Meeting, 14 November 1960. I think it is page 302. I quote: “Liberia and Ethiopia, with the support of the other African States had started legal action against the Union of South Africa.”

In this same report, Mr. President, we find that there was a statement circulated in accordance with a decision taken by the Fourth Committee at the next meeting. We found this at page 4. I am not sure what the page of the previous one is. I could correct that in the record, if necessary.

“We appreciate very much that Liberia, with Ethiopia, has agreed to shoulder the responsibilities of legal action entrusted them by the African States.”

Next, we find Mr. Kerina, at one time also known as Mr. Getson, at the Fourth Committee, 1051st Meeting, 15 November 1960, p. 310. There, he spoke of: “the legal action taken by the Governments of

Liberia and Ethiopia on behalf of the African States." And in the Fourth Committee, 1372nd Meeting, on 5 November 1962, at page 277, he spoke more simply of: "the African States acting through the International Court of Justice."

So, Mr. President, having shown that the Applicants are appearing, in this case, as the mouthpiece of a United Africa, the way is now being cleared for taking a closer look at the nature and the objectives of this concerted action.

We have said already that the campaign is political in its nature. Let us begin with that element in itself and we shall see, Mr. President, that that is very forcibly demonstrated by the manner in which the attacks on South Africa by the African States, and their associates, in debates in the various organs of the United Nations, have been associated with the call for the "complete decolonization" of the African Continent, for the so-called "liberation" of the Africans, and for, according to the Africans, a right of self-determination, which, it is continually alleged, is being denied to them by the Respondent Government in South Africa and in South West Africa.

So we find, to mention just a few examples, Mr. President, that the policy of the South African Government is frequently referred to as "one of the worst forms of colonialism". I quote next: as "that hateful form of colonialism" and, thirdly, as "the worst legacy left by colonialism". The first quote is from Mr. Suleiman of the Sudan, in the Special Political Committee of the General Assembly, 16th Session, 284th Meeting, page 121, 9 November 1961; the second one is that of Mr. Achkar of Guinea, *Provisional Record of the Plenary Session of the General Assembly*, 1308th Meeting, 21 December 1964, at pages 78-80; and then the third one is that of Mr. Dugersuren of Mongolia, the 19th Session, *Provisional Record of the Plenary Meeting*, 1306th Meeting, 18 December 1964, at page 33.

Mr. President, we can quote many extracts from speeches providing typical examples of this approach. I do not intend to burden the Court unduly with these. I shall give one or two outstanding examples.

We have, again, representatives of the Applicant States taking a very strong part in this aspect of the demonstration. So, Mr. Yifru, the same one as before, of Ethiopia, in the Plenary Session of the General Assembly, 7 December 1964, 1293rd Meeting, at page 32 of the *Provisional Record*, stated:

"My Government earnestly hopes that the United Nations, true to its declared objectives, will continue to appeal to the conscience of nations in a position to exert influence in the abolition of colonialism and the policy of apartheid, a policy disgraceful both to man and to God."

Then we find representatives of other African States: Mr. Lozes of Dahomey said again in the *Provisional Records 1964 Plenary*, 1290th Meeting, 4 December 1964, page 41:

"We, the African peoples, today still call for the complete decolonization of our continent. What is involved is the right of self-determination of peoples, which certain States such as Portugal and South Africa refuse to recognize."

Then we come to Mr. Murumbi of Kenya, who stated in *Provisional*

Records of the 19th Session, 1293rd Meeting, at page 12, and again at pages 13-15 (this is also Plenary Session, 7 December 1964):

"Let me strike a note of restraint by saying that the time for total rejoicing for Africa will come only when all the African territories now under colonial subjugation are finally liberated. There are still millions of our African brothers in South Africa, Rhodesia, Angola, Mozambique, French Somaliland and the Spanish Colonies who are living under the worst forms of human oppression. They are denied the right of self-determination; the regimes imposed upon them by brutal force have stamped out their fundamental rights and freedoms [omitting somewhat and quoting again].

I would like to put it on record that Africa will no longer tolerate, or permit the existence of, colonialism and neo-colonialism, no matter in what form it is disguised or from what source it emanates . . ."

[Public hearing of 27 October 1965]

I was dealing at the adjournment yesterday with certain statements by representatives of African States identifying the Respondent's policies of apartheid, or separate development, with colonialism, or "that hateful form of colonialism", as it was called.

I wish to read one more extract from a statement on this subject because it is somewhat illuminating of the reasoning and the emotions that go into this identification. It is a reference to Mr. Botsio of Ghana's statement in the *Provisional Records of the General Assembly, Plenary, 19th Session, 1299th Meeting, at page 66—the date was 11 December 1964—which reads as follows:*

"The situation in Africa is naturally the immediate concern of Ghana and, indeed, of all Africa. While great strides have been made in recent years in the emancipation of the continent of Africa, there are still residual pockets of colonialism and racial discrimination which constitute an affront, not only to us Africans, but to all civilized humanity. The continued domination of the rest of Africa . . . including South Africa, Southern Rhodesia, South-West Africa, Angola, Mozambique, Portuguese Guinea, French Somaliland, Spanish Sahara, Spanish Equatorial Africa and other Spanish enclaves . . . continues to pose a serious threat to peace and racial harmony on the continent of Africa. For us in Africa, the issue is quite clear. We would like the transition from colonial domination to freedom and independence to be achieved peacefully and without bitterness on either side. However, if the imperialists persist in frustrating the rights of Africans to independence, then we will accept the challenge and we will use every available means to ensure the total liberation of Africa. [And, then, the speaker went on, Mr. President, to refer to apartheid and racialism as being] the handmaidens of imperialism and colonialism."

I think I have read enough on this subject to the Court. I shall merely give certain further references to the records of instances of similar statements.

The first is Mr. Mbazumutia of Burundi in the same *Provisional*

Records of the 19th Session, Plenary, 1305th Plenary Meeting, pages 86 and 87. Then, from certain other States than African States we find remarks to the same effect, for instance, from Mr. Muraywid of the Syrian Arab Republic; during the same Session, in the *Provisional Records*, 1306th Plenary Meeting, at pages 3-5. And then, there are three instances, all in the Special Political Committee during the 15th Session, 238th Meeting, the first was Mr. Loncar of Yugoslavia, at page 53 of the record A/SPC/SR 238, the next Mr. Krishna Menon of India, 241st Meeting at page 71 of that record, and the other one Mr. Galkin of the Byelorussian Soviet Socialist Republic, at page 71 of that record.

Mr. President, in all these cases the theme is the same. Apartheid or separate development is seen as a form or as a manifestation of colonialism at its worst. Different words are used to describe this situation but every time that is the theme, and, therefore, this policy requires liquidation as soon as possible in the course of the decolonization process. Now, once one has attained clarity on that identification, which was made in this campaign, then the real objectives of the campaign, as specifically applied to South West Africa, are not difficult to ascertain, nor the role which is visualized for this Court action in the whole of this campaign. We can, on that point, Mr. President, go back to some of the statements to which we have already referred on the point of the representative role of the Applicants. Some of those statements are most explicit also on the question of the objectives of the campaign.

We find in the statement of Mr. Grimes of Liberia, to which I referred yesterday, in the 19th Session, Plenary, 1300th Meeting, at page 91, that, still speaking in the context of the court action, of which, he said, that it represented efforts "to obtain for the people of South West Africa that which is rightly theirs", he went on and he said this:

"The irresistible surge of dependent people to freedom and independence is a movement which all freedom-loving and peace-loving people must support. We hope it will not be long before we see our brothers in Angola, Mozambique and other parts of Africa as well as the world take their rightful place in the international community."

Mr. President, the context of this passage is of extreme importance because it comes directly in line as a part and parcel of the statement by Mr. Grimes in regard to this action, which was being prosecuted by the African States, he said, through Liberia and Ethiopia. It came immediately after a passage which reads as follows, and which I shall quote to the Court:

"Consequently, we call upon all Members of the United Nations to stand firm in their determination to resist any attempt by the South African Government to undermine whatever decision the International Court of Justice may see fit to give."

After calling for consolidarity in that respect, he went on to this note of "The irresistible surge of dependent people" which was something which deserved the support of "all freedom-loving and peace-loving people".

I can refer the Court also to Mr. Kerina in the Fourth Committee, the 1051st Meeting, 15 November 1960. In a circulated statement at page 1 of that record he expressed gratitude to President Tubman, to

Liberia, to Ethiopia, "and the Independent African States" for bringing these proceedings. And then he said this:

"To us in South West Africa, this is a concrete expression of African solidarity and also a clear demonstration of purpose in ridding our continent of foreign domination and exploitation." (Verbatim statement as circulated.)

Now, Mr. President, that this purpose amounts to no more and no less than the establishment of black rule over the whole of Africa, including the whole of South West Africa, and the whole of South Africa itself, is made abundantly clear by numerous statements by representatives of African States, of which I shall quote some examples to the Court.

First in the Special Political Committee we have Mr. Wachuku of Nigeria, at the 15th Session, 236th Meeting, page 41, 30 March 1961. Mr. Wachuku there spoke of the "difficult position" in which "the rulers of South Africa" were finding themselves. And he said this:

"The final victory of the Africans, who were ready if need be to die rather than accept further humiliations, was certain. In five years' time perhaps, or ten at the latest, not an inch of African territory would remain under foreign domination."

Then we have Mr. Quaison-Sackey of Ghana at the 16th Session, 269th Meeting, still in the same Committee, at page 46, 25 October 1961, in a paragraph numbered 8, he "emphasized that Africa belonged to the Africans and that the Boers could remain there [that is, in South Africa] only on sufferance".

Then we come to Mr. Kane of Senegal, same Session, same Committee, 277th Meeting, at page 90, in a paragraph numbered 17, and I quote from the body of it:

"The movement for independence was sweeping over Africa like a tidal wave from north to south, and if the White South Africans wished to save their lives and their property they should accept the inevitability of its triumph while there was still time, for tomorrow would be too late."

Then there is Mr. Akakpo of Togo, same Session, same Committee, 282nd Meeting, at page 115:

"It [the South African Government] must realize that the wind of change which was sweeping over Africa would not spare enclaves of foreign rule in any part of the continent . . ."

Then Mr. Abedi of Tanganyika at the Eighteenth Session, same Committee, 383rd Meeting, page 31:

"The whole of South Africa like Tanganyika and the other former colonial territories, belonged to the African. The Whites there would have to bow to democracy and be satisfied with the status of citizenship accorded to all inhabitants of the country. Those who did not wish to do so should leave South Africa and return to their ancestral homelands."

Mr. President, bowing to democracy in this context very clearly means nothing else than submitting to black rule over the whole of South Africa. This was said explicitly by Mr. Eesaafi of Tunisia. That was on the very

next day in the same Committee at the 18th Session, 384th Meeting, page 37:

"The position of the African countries and of the African leaders in South Africa was clear. What they were asking for must necessarily and logically take the form of transfer of powers to the African population . . ."

I have only two more quotations on this matter before referring to a general list. They are both addresses by Mr. Wachuku of Nigeria in the General Assembly during the 16th and the 17th Sessions. First, the 16th Session, 1034th Plenary Meeting, page 400, paragraph 7: there Mr. Wachuku spoke of the White inhabitants of South Africa and he said that South Africa: ". . . has obviously made it clear that this microscopic minority which exists in South Africa is not fit to live on that continent". Then we have the next quotation in the 17th Session, 1153rd Plenary Meeting, at page 513, where he applied this philosophy to South West Africa. I quote from paragraph 125:

"As far as we are concerned, on the African Continent, whether it is decided one way or the other, there will be no question of legality or illegality about it. Our law is clear. South West Africa is an African territory.

Just to illustrate how these delegates and the petitioners from South West Africa speak as if with one voice, I may remind the Court of Mr. Kerina's statement in his letter to his associate John Muundjwa, dated 5 March 1959 and quoted by Mr. Dahlmann in his evidence in the verbatim record of 8 October, XI, at page 463. This is a quotation from the letter:

"Let the stupid Africans and Coloured agitators such as Klopers, etc., etc., encouraged by deceptive White settlers stop preaching multi-racial or partnership in South West Africa at the expense of the African people. We have had enough of these nonsense. Our position should be made clear to the Whites. We want South West Africa back no more no less."

I have further references to the petitioners but I am not going to weary the Court by reading them out. We have, in this exposition dealing with United Nations sources, several instances where we would like to give further references to the record but where it may be tedious to the Court just to listen to the references without any quotations. We have thought that it might be convenient in such instances, subject to your approval, Mr. President, to prepare a list on a loose sheet of paper, which we hand in, not as a document forming part of the documentation, but merely for the convenience of the Registrar, who will then hand it to whoever types the transcript of the evidence, for typing at a particular spot. We have an identification mark on each one of these lists and I propose at this stage, if it meets with your approval, to hand in list A, giving references to certain statements by Mr. Kerina, and the Reverend Markus Kooper without quoting from the statements at all. I have a copy also which can be handed to the Applicants. Would that be convenient?

The PRESIDENT: I think you should first hand it to the Applicants and then I shall ask Mr. Moore whether he has any objection to that course being pursued.

Mr. MOORE: Mr. President, Applicants find no objection to this.

The PRESIDENT: Let it be done.

Mr. de VILLIERS: So this one, then, is list No. A.¹ That list concerns the need and the desire to apply a so-called decolonization process in respect of South West Africa. Then we have list No. B² referring to statements by the petitioners Mr. Nujoma, Mr. Kooper, Mr. Kozonguizi, Mr. Kerina and Mr. Garoeb. That is list No. B which I hand in now.

The PRESIDENT: Will you hand a copy to the Applicants? Any objection, Mr. Moore?

Mr. MOORE: We find no objection to this, Mr. President.

Mr. de VILLIERS: Now, to revert to the link between all this and the Court action, we found that in the Colonialism Committee, at the 69th Meeting, 8 August 1962, at pages 38-40—for the record I may say that the document is numbered A/AC.109/P.V. 96—there, Mr. Oberemke of the Soviet Union referred to these proceedings and to “the extraordinary long time” taken by them. As I have said, the date was August 1962. He asked Mr. Kerina:

“What use will there be in further consideration of this question by the International Court of Justice?”

Mr. Kerina in his reply said, *inter alia*, the following:

“We do understand that the question of South West Africa is not only legal, but political. We also understand that the proceedings are now pending before the International Court of Justice; and should a decision be in our favour, it will be determined by political action, in view of the fact that such a judgment has to be referred to the United Nations, where we have been petitioning all the time . . . [I break the quotation there, but further on it continues] . . . Our position has always been that legal action must go hand-in-hand with political action, that both of them complement each other.”

Now, it will be obvious how well all this fits in with the statements by Mr. Grimes of Liberia, to which I have referred twice, to the effect that the action represents the efforts of the African States through the Governments of Ethiopia and Liberia to obtain for the people of South West Africa that which is rightly theirs.

Mr. President, this expression “that which is rightly theirs”, as contemplated by what one might call the sponsors of this litigation, has now been so clearly identified. It is Black African rule over the whole of South West Africa, no more and no less.

¹ Mr. Kerina: Fourth Committee, G.A., O.R., 16th Session, 1217th Meeting, 20 November 1961, A/C. 4/SE. 1217, p. 377, para. 32; p. 378, para. 41. Fourth Committee, G.A., O.R., 16th Session, 1241st Meeting, 7 December 1961, p. 549.

Rev. Markus Kooper: Colonialism Committee, 145th Meeting, A/AC. 109/P.V. 145, 9 April 1963, p. 32.

² Mr. Nujoma: Fourth Committee (17th G.A.), 1371st Meeting, 2 November 1962, p. 275. Mr. Kooper: Fourth Committee, 16th G.A. (1961), 1241st Meeting, p. 550; Fourth Committee (16th G.A.), 1241st Meeting, 7 December 1961, p. 550. Mr. Kozonguizi (SWANU): Fourth Committee, 16th Session, 1219th Meeting, 21 November 1961, p. 393, para. 44. Mr. Kerina: Committee on South West Africa (A/AC. 73/SR. 121) p. 4; A/AC. 73/3 (Seventh Session), 9 September 1960, p. 10 (Committee on South West Africa); Fourth Committee, 15th Session, 1100th Meeting, 10 March 1961; Fourth Committee, 15th Session, 1098th Meeting, 9 March 1961. Mr. Garoeb: Special Committee for S.W.A., 11th Meeting, 30 July 1962 (A/AC. 110/SR. 11).

I promised to revert on this subject to some of the material with which we dealt in the Counter-Memorial, in the passages to which I referred yesterday. I think it was about II, page 446.

I should like to refer to three of the items there, the first one being at II, page 447. This was a reference to the proceedings of the Monrovia Conference of Foreign Ministers of Independent African States held in 1959, at which both the Applicants were represented and we quote first from an opening address at this conference by the President of Liberia. There he said, amongst others:

"In our relationships with non-self-governing territories, what is most important to us is the independence of these territories. Any policy which tends to hinder the attainment of this aim is reproachful to the Liberian point of view."

Then, at this Conference, a resolution was adopted specifically on the question of South West Africa. The whole of it is given in the Counter-Memorial and I shall read only the third paragraph with the introduction, which says that:

"The Conference of Independent African States,
Deeply concerned by the situation in the territory of South-West Africa,

3. Appeals to the United Nations to fix a date for the independence of the territory of South West Africa."

That is the second matter to which I wish to refer. The third one is at page 448 of that volume. It is a reference to a resolution adopted at the Summit Conference of independent African States, which again included the two Applicants, at its meeting in Addis Ababa on 22 to 25 May 1963. Extensive portions of the resolution, in so far as relevant, are quoted in the Counter-Memorial, at II, page 448, and I do not propose to read all. I should like to read some of it for purposes of the present argument.

The heading is *Agenda item II: Decolonization* and it starts off by reading:

"The Summit Conference of Independent African States . . .

Having considered all aspects of the questions of decolonization.

Unanimously convinced of the imperious and urgent necessity of co-ordinating and intensifying their efforts to accelerate the unconditional attainment of national independence by all African territories still under foreign domination;

Reaffirming that it is the duty of all African Independent States to support dependent peoples in Africa in their struggle for freedom and independence;

[I omit some of the next paragraphs]

Having agreed unanimously to concert and co-ordinate their efforts and action in this field, and to this end have decided on the following measures:

[I propose to read to the Court the second and fifth of those measures]

2. *Invites* the colonial powers to take the necessary measures for the immediate application of the Declaration on the Granting of Independence to Colonial Countries and Peoples; and insists that

their determination to maintain colonies or semi-colonies in Africa constitutes a menace to the peace of the continent;

5. *Reaffirms* further, that the territory of South-West Africa is an African territory under international mandate and that any attempt by the Republic of South Africa to annex it would be regarded as an act of aggression; *Reaffirms* also its determination to render all necessary support to the second phase of the South-West Africa case before the International Court of Justice; *Reaffirms* [still] further, the inalienable right of the people of South-West Africa to self-determination and independence."

When we have regard to certain features of this resolution, the objectives and also the role seen for this court action become crystal clear.

We find in this last portion that the question of South West Africa is dealt with as part and parcel of the question of decolonization, which was considered by the Conference in all its aspects, and in respect of which the African Independent States decided to give their support, or rather acknowledge a duty to give their support to the struggle of the dependent people. So, that is the context in which this question of South West Africa is dealt with—part and parcel of the same question in the very same resolution.

Secondly, Mr. President, we find that support to be rendered in regard to this court action is seen as one of the measures decided upon as concerted and co-ordinated measures in this field.

Thirdly, Mr. President, the goal in respect of South West Africa is stated as being the inalienable right of the people of South West Africa to self-determination and independence. That by this is not meant the same as the concept which the South African Government has of self-determination and, if they so wish, independence for each one of the various peoples of South West Africa, is made very clear by several considerations. This is a different concept of self-determination and independence; it is a concept of handing over power to the indigenous population in respect of the whole Territory, as we have seen from other quotations before, but as is also clear from the context of this very resolution because, Mr. President, there is no reference to the peoples of South West Africa; this is spoken of as the inalienable right of the people of South West Africa; *secondly*, we find that the colonial Powers are invited to take the necessary measures for the immediate application of the declaration on the granting of independence to colonial countries and peoples, and this was the year 1963. Mr. President, that declaration, if the Court would recall, was adopted in 1960, and by 1963 rapid strides had been made in regard to the interpretation and the manner of application of that declaration in the further developments at the United Nations, very strongly supported and, in most instances, sponsored by the group of African States.

May I refer the Court to the declaration itself; it has been referred to before and is resolution 1514 of the 15th Session. I do not wish to read any portion of it except this, in paragraph 5 of the operative portion, in which the General Assembly declares that—

"Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those terri-

ories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom." (*G.A., O.R., Fifteenth Sess., Sup. No. 16 (A/4684), p. 67.*)

Whatever ambiguity there might be in this formulation, Mr. President, as to what exactly this concept of independence was, and self-determination as applied to the people of South West Africa, is surely removed altogether in the later phases of this matter at the United Nations; for instance, resolution 1702, of the next Session, deals specifically with the question of South West Africa, to which, the Court will recall, we have referred several times before, and is the resolution on the basis of which the Carpio Commission eventually went out to South West Africa. I shall read only two brief portions of it: the introductory words state that—

"*The General Assembly, recalling its resolution 1514 (XV) of 14 December 1960 entitled 'Declaration on the granting of independence to colonial countries and peoples' . . . [and recalling various other resolutions]*" (*G.A., O.R., 16th Sess., Suppl. No. 17 (A/5100), p. 39.*)

and then I skip the rest of the preamble, Mr. President, which we have referred to several times, and we come to the operative portion, paragraph 2:

"*Decides to establish a United Nations Special Committee for South West Africa . . . whose task will be to achieve, in consultation with the Mandatory Power, the following objectives:*"

and objective (e) reads:

"*Preparations for general elections to the Legislative Assembly, based on universal adult suffrage, to be held as soon as possible under the supervision and control of the United Nations;*" (*G.A., O.R., 16th Sess., Sup. No. 17 (A/5100), p. 40.*)

So, Mr. President, that is where we stand, and that is the light which is thrown on this resolution during the next year at the Addis Ababa Conference. I may point out that this resolution 1702, of the 16th Session, was known in the committee stages as draft resolution A/C4/L714/Rev. 4: it appears that this draft resolution was sponsored by no fewer than 37 States, in which the African group played a very prominent part, and that appears from a statement by Mr. Diallo, of Mali, in the Fourth Committee, 1245th Meeting, paragraph 4.

In the next year, Mr. President, there was resolution 1805, of the Seventeenth Session, again specifically on the question of South West Africa, and the only factor to which I wish to refer in this resolution is that the previous one, 1702, of the Sixteenth Session, was specifically recalled and reaffirmed in the general tenor of the resolution—I do not think I have to read further from that. Further concrete steps were proposed but this principle of demanding elections on the basis of universal adult suffrage in South West Africa stood. It appears that the draft resolution in this case was sponsored by the African-Asian group, according to a statement made by Mr. Purevjal of Mongolia, in the Fourth Committee, 1386th Meeting, paragraph 1:

"Mr. Purevjal (Mongolia), speaking as the chairman of the Afri-

can-Asian group, submitted draft resolution . . . [and the number is quoted] on behalf of that group. The Mongolian delegation entirely endorsed the text, which expressed the views of the members of the African-Asian group on the question of South West Africa . . ."

And then, in paragraph 2, we read:

"Mr. Arteh (Somalia), chairman of the drafting committee of the African-Asian group, introduced the draft resolution. The text was wholeheartedly supported by every member of the group . . ."

So, Mr. President, no doubt can remain about these objectives. This is the situation which we find at the United Nations; this is the situation which has led to this litigation, and that is the real motivation why these proceedings have been brought to the Court.

May I say, Mr. President, that when we speak of this campaign, in which the group of African States is so particularly active, we do not do so with any pleasure at all; it is not a pleasant matter to refer to; we do so because we have to. Despite everything that has happened in this campaign, the attitude of the South African Government has always been that it seeks friendship with other countries and, in particular, with other countries on the African continent.

The attitude of our political leaders has been expressed several times, and that that is the attitude of the South African people also would have become clear to the Court from the evidence which has been given here by witnesses from South Africa.

South Africa's attitude is not that it wants to dominate on the African continent—that the Prime Minister, Dr. Verwoerd, has said several times. He does not even like the phraseology of taking a lead or a leading role on the African continent because, he says, why should South Africa be claiming that situation for itself, it may affect the feeling of independence and the equal status of other countries on the African continent. But there is certainly a wish and a desire to co-operate in matters of common concern, matters of common interest; there is certainly a feeling that South Africa, in all humility, has a contribution to make in this respect, and, after the Court has heard the evidence, and observed the personalities of men like Dr. Eiselen, Dr. Bruwer, Mr. Pepler, and Dr. Van Zyl, to mention only a few, it will become quite clear that South Africa has people who should be able to make a contribution in that respect.

On an earlier occasion, Mr. President, I spoke of large quantities of goodwill waiting to be applied over the colour lines under situations where one group will not feel itself threatened or oppressed by another. I am quite sure, Mr. President, that from these witnesses the Court would have found some indication of the existence of that goodwill, and not only from them but also from the other witnesses from South Africa who are not in any way in the service of the Government, men like Mr. Cillie, the Rev. Mr. Gericke, Professor Krogh and Professor Rautenbach.

May I, Mr. President, read to the Court just a brief extract from an address on this particular subject by the Prime Minister, Dr. Verwoerd, on 16 May 1962: I am quoting from a work published in Afrikaans, *Verwoerd aan die Woord*. This is a collection of addresses by Dr. Verwoerd, made on various occasions. We have not previously cited directly from this volume because it is written in Afrikaans, and in referring to the original sources, particularly in *Hansard*, in Parliament, and so forth,

we could find official English translations or sometimes the original text was in English, so we quoted from those, but in this particular instance we have not got the original source because it was an address not made in Parliament, it was made to an export promotion convention held in Johannesburg in May 1962, this particular quotation is at page LV of the foreword, and it is in English:

"I am quite convinced in my own mind, that as time goes by and present feelings subside, the services which South Africa can render through its specialized knowledge of African conditions, and its proximity to African States, will prove more attractive than all the bad feelings which exist at present.

For that reason I am firmly convinced that we should retain proper self-control . . . In the course of time, change must come. The change will come but not through any words of ours . . . It will be the deed of progress here, the ever-remaining willingness to aid others . . . our preparedness to share our know-how of the particular conditions of Africa with African States—such factors, deeds—will ultimately change the attitudes with which we are faced today."

That is the attitude of the South African Government, Mr. President, and of the South African people. It was referred to also at the United Nations by Mr. Jooste, Head of the South African delegation, at the Eighteenth Session of the United Nations, at the 1236th Plenary Meeting, during the general debate on 10 October 1963. I do not wish to quote from it. I merely make the general reference to the subject, which is dealt with there quite extensively and very ably by Mr. Jooste.

Mr. President, it does not help, meanwhile, to close our eyes to reality and if one is to have a proper appreciation of what has happened at the United Nations in regard to these resolutions relied upon by the Applicants, if one has to have a proper appreciation of the real objectives and motivations involved in these proceedings, then one must look reality in the face.

At this point, I wish to hand over to a younger and abler man; with your leave, Mr. President, my learned friend, Mr. van Rooyen, will take over the further portion of this argument.

27. ADDRESS BY MR. VAN ROOYEN

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARINGS OF 27 AND 28 OCTOBER 1965

Mr. President, my learned friend, Mr. de Villiers, has dealt with the nature and the objectives of the campaign which is being waged against the Respondent Government and now this has been made clear we can proceed to examine the quality of the criticism which is levelled against Respondent as a part of this campaign as well as the factual sources on which such criticism is based.

As far as the quality of criticism is concerned, it will become evident during our treatment of this subject that the campaign is characterized by emotional outbursts rather than by any attempt at any objective assessment of the facts and that the most fantastic assertions of fact are utilized as a basis for violent attacks upon Respondent's policies and actions. For example, Respondent's policies are very often summarily stigmatized as being inhuman, oppressive, aimed at the domination of the Whites over the non-Whites; the members of Respondent's Government are referred to as Fascists or Nazis and there are repeated references to supposed murders and massacres of Africans in South West Africa. We proceed to give some illustrative quotations. With the exception of the first one, all the examples are taken from the 1964, 19th Session of the General Assembly.

As far as the Applicant States are concerned, first a quotation from Mr. Yifru of Ethiopia, from the 16th Session, document A/PV.1020, page 177, of 2 October 1961, in Plenary Sessions, paragraph 134:

"The Union Government, in violation of the mandate, has made South West Africa in recent years a prison cell by garrisoning armed forces on all the frontiers of the land so as to continue its unhindered massacre, imprisonment and, in short, wholesale suppression of the innocent inhabitants of the international territory."

The Court will find similar expressions used by the same speaker also in the *Provisional Record* of the 19th Session, document A/PV.1293, page 31, on 7 December 1964. I do not propose to read that but to pass on to Mr. Grimes of Liberia.

In the *Provisional Record*, 19th Session, document A/PV.1300, pages 83 and 84-85, of 11 December 1964, Mr. Grimes says the following:

"The abominable and iniquitous policy of apartheid practised by the Republic of South Africa remains a cruel and stubborn problem and a cancerous blight on the continent of Africa. African States will not relent in their efforts to bring about the end of this repressive system. [I skip a few words and continue] The injustice, pain, misery, suffering and death inflicted on innocent Africans by a horrible system which is indirectly supported and strengthened by the policies of some Members of this Organization are bound to have serious repercussions."

A few examples of the typical type of statement made by other African States follow:

Mr. Lozes of Dahomey, in the *Provisional Record* of the 19th Session, document A/PV.1290, pages 41-42, of 4 December 1964:

"At the Southern end of our continent an even more inhuman situation prevails. Three million white racists keep 10 million human beings under the abject system of apartheid. [He went on to refer to:] this institutionalized expression of contempt of certain men for others . . . [to:] misguided colonialists and racists [meaning the South African Government or people] . . . to prevent the inevitable bloody confrontations . . . [to:] the murders and tortures of African patriots that are deliberately and coldly perpetrated by the police Government of the Republic of South Africa . . . [to:] our horror at the unspeakable things . . . [and, finally, to extension by the Pretoria Government, of] its oppressive apartheid regime to the Trust Territory of South West Africa."

A few words out of the mouth of Mr. Odaka of Uganda, the same session, document A/PV.1293, page 81, of 7 December 1964 are cited:

"However, the biggest problem is posed by South Africa and its policy of apartheid. The Draconian laws, the massacres, the trumped-up charges, the trials and sentences of innocent people are unacceptable and are reminiscent of Nazi Germany. But the indifference, nay the tacit support, of the Western Powers for so atrocious a system is perhaps the most heinous of crimes committed against Africa since the days of the slave trade."

Mr. Avaro of Gabon, same session, document A/PV.1301, pages 67-68, of 14 December 1964 said:

"In South Africa, the apartheid policy of Dr. Verwoerd likewise becomes more and more savage . . .

So long as millions of human beings continue to be oppressed, despised and treated as pariahs, Africa will know no peace and the peace of the world will remain imperilled."

He went on to describe the so-called Pretoria Government's policy as "their insane and criminal policy".

This, Mr. President, is by no means the full 1964 list for speakers from African territories. I shall give references to a number of others, without quoting them, who speak in exactly the same vein; but first just two brief extracts from statements by representatives of allies of the independent African States in this campaign.

Mr. Singh of India, same session, document A/PV.1301, pages 57-58, of 14 December 1964 said: "The Government of South Africa is blindly stepping from one heinous act to another"; and Mr. Romani of Malaysia, same session, document A/PV.1306, page 43, of 18 December 1964, spoke of the "sacred cause of ridding humanity of the shame of apartheid", and went on to describe the policy as "this crime against humanity".

Now, Mr. President, I do not intend wearying the Court with further examples, statements in this vein but we have also prepared a list which I shall hand in as list C¹, containing statements of a similar nature.

¹ *General Assembly:*

Mr. Tchicelle (Congo, Brazzaville): *G.A., O.R.*, 16th Session, A/P.V. 1037, pp. 99, 103-104, 16 October 1961 (Plenary).

Mr. Puplampu (Ghana): *G.A., O.R.*, 17th Session, A/P.V. 1143, p. 345, 5 October 1962 (Plenary).

THE PRESIDENT: First hand it to Mr. Moore, the Agent for the Applicants.

Is there any objection, Mr. Moore?

MR. MOORE: Mr. President, the Applicants find no objection to that.

THE PRESIDENT: Thank you, Mr. Moore.

MR. VAN ROOYEN: Finally, Mr. President, an excellent example of what we submit is certainly a biased and emotional approach towards South Africa's policies is afforded by a speech delivered by Mr. Achkar, the representative of Guinea, during the Plenary Session of the General Assembly in December 1964. Mr. Achkar spoke in reply to a speech by Dr. Muller, the South African Minister of Foreign Affairs. Dr. Muller had given an exposition of the facts, the motives and the objectives of Respondent's policies in the same vein as that in which statements had been delivered and argued before this Court. The answer thereto by Mr. Achkar of Guinea is representative of the reaction of the African States to that exposition. In the *Provisional Record of the 19th Session, document A/PV.1308, pages 78-82 of 21 December 1964*, he said the following:

"We took note of the speech made this morning by a representative [that was Dr. Muller] who claims to be the representative of an African country . . . a speech in which the orator endeavoured to defend from this rostrum, with the audacity which characterizes the spokesmen of any fascist regime, a policy which has been condemned by the entire world. It is well-known that the General Assembly and the Security Council of the United Nations have constantly requested those who govern the South African settlers to respect the obligations incumbent upon them under the Charter, to renounce their policy of apartheid, and to put an end to the system of brutal repression practised against the adversaries of that abject and humiliating policy."

And so it went on and on, with references to: "the most Machiavellian tribalism"; to: "that hateful form of colonialism"; and to: "inhuman measures of unprecedented gravity with a view to intensifying racial discrimination and oppression . . ."

Now, Mr. President, the question immediately arises, on which sources are these allegations based? Surely, one can argue, these vehement charges

Mr. Mazigh (Libya): P.R., 19th Session, A/P.V. 1296, pp. 18-20, 9 December 1964 (Plenary).

Mr. Dualeh (Somalia): P.R., 19th Session, A/P.V. 1290, p. 28, 4 December 1964 (Plenary).

Mr. Mahmoud Riad (U.A.R.): P.R., 19th Session, A/P.V. 1298, pp. 28-30, 9 December 1964.

Mr. Kamboua (Tanzania): P.R., 19th Session, A/P.V. 1298, p. 76, 10 December 1964 (Plenary).

Mr. Rudabivi (Malawi): P.R., 19th Session, A/P.V. 1297, p. 26, 9 December 1964.

Mr. Chalmers (Haiti): P.R., 19th Session, A/P.V. 1304, p. 7, 16 December 1964 (Plenary).

Special Political Committee

Mr. Alemayehou (Ethiopia): G.A., O.R., 11th Session, A/SPC/SR. 113, p. 57, 15 January 1957.

Mr. Thiam (Mali): G.A., O.R., 15th Session, A/SPC/SR. 235, p. 37, 29 March 1961.

Mr. Karunatileke (Ceylon): G.A., O.R., 12th Session, A/SPC/SR. 56, p. 71, 31 October 1957.

of brutal oppression cannot be maintained year after year without some factual basis. We need not seek far for an answer. The violent attacks on Respondent's administration of South West Africa, in so far as they purport to have any factual basis at all, are mere echoes of the allegations made by the petitioners.

It is impossible, in our submission, to understand the true nature of the proceedings during the past 10 to 12 years in the United Nations organs relative to conditions in South West Africa without fully appreciating the role which petitioners and petitions play and have played in the deliberations of such organs. We have already shown the existence of a campaign against South Africa as well as the objectives of the campaign. It has been vigorously conducted in the United Nations organs and we shall, during the course of this address, demonstrate that the method by which it has been conducted has progressively centred more and more around the so-called evidence of the petitioners. It will appear clearly that they are intimately connected with this campaign and have played and still play a pivotal part in the propagation of the campaign in United Nations bodies.

A few points must therefore be made regarding the petitioners, their objectives, and especially the methods employed by them in striving after these objectives; firstly, who are they? The answer is that they constitute a small body of men, a large percentage of them not in South West Africa; this appeared clearly from our treatment in the Counter-Memorial, Book VIII, IV, and also from the evidence of Mr. Dahlmann. Secondly, what are their objectives? This was also dealt with fully in the Counter-Memorial, IV, pages 36-46, and in Mr. Dahlmann's evidence before this Court. It was, with submission, clearly demonstrated that their objective was to seize political power and achieve African rule over the whole of South West Africa. As regards objective there is a clear common purpose between the petitioners, on the one hand, and the leaders of the campaign on the part of certain States, on the other hand, as has already been demonstrated and as will more fully appear in the treatment as we continue. Respondent's exposition of fact in the Counter-Memorial was not controverted by the Applicants and today stands admitted. The cross-examination of Mr. Dahlmann on this particular aspect, that is, as far as the objectives of the petitioners were concerned, was very faint and this faint cross-examination resulted, in our submission, only in Mr. Dahlmann giving more proof in support of his evidence.

Then thirdly, when we ask this question: what are the methods employed by this group of petitioners in the propagation of this campaign, we find that this was also dealt with in the Counter-Memorial, IV, pages 38-46, and in Mr. Dahlmann's evidence which also stands uncontroverted. There are various methods by which the petitioners conduct their campaign but the one basically relevant to our present enquiry is described at IV, pages 45-46 of the Counter-Memorial, as follows:

"In order to influence international opinion, the leaders of the aforesaid campaign [that is referring to the petitioners] adopted a system of flooding the world in general, and the United Nations Organization in particular, with continuous allegations of suppression and atrocities allegedly committed by Respondent. This was done mainly by the submission of written and oral petitions to the United Nations Organization."

Now, Mr. President, it is especially in this field, this particular method by which the campaign is being conducted, that the common purpose and close association between the delegations of States and the petitioners, who are united in the campaign against Respondent, are strikingly in evidence. It will appear (a) that the petitioners are invited to give evidence as to conditions in the Territory; (b) that these petitioners are free to say whatever they want, even the wildest possible allegations, and that this evidence is then accepted unquestioningly and echoed unreservedly; (c) that any contradiction of this so-called evidence by the petitioners which casts doubt on the veracity of the evidence is silenced or ignored. In short, the petitioners are expected to supply and they do supply the ammunition, and the representatives of the States which take the lead in the campaign against South Africa carry it further from there, in order to achieve condemnation of South Africa on the basis of the petitioners' evidence as to what the conditions in South West Africa purportedly are. We shall proceed shortly to deal with these propositions more closely and we shall afford conclusive proof of the truth of these propositions, but before we proceed to this point the following question automatically arises: what measure of reliance can be placed on the evidence of this small group of petitioners? The answer, Mr. President, is singularly clear, after a due study of the Counter-Memorial, IV, pages 1-46, and Mr. Dahlmann's evidence, in the verbatim record, XI, and will become even more impressive as we continue. No reliance can be placed on their statements or their evidence.

Let us very briefly review the unfortunate experience of the Applicants in this case. They started off in the Memorials, Chapter VI, I, page 167 and further, by relying on a number of extracts from petitions. At that stage they relied, as they stated it: on "the cumulative effect and thrust of the petitions, received from so wide a variety of independent sources" (I, p. 167). At that stage they also advanced the proposition that the extracts quoted by them illustrated "The manner in which the daily lives of the inhabitants are affected" (*ibid.*). Respondent dealt thoroughly with this aspect in the Counter-Memorial, Book VIII, IV, and demonstrated that the petitions relied on by Applicants had emanated from a relatively small group of biased professional petitioners, actuated by ulterior motives, thus rendering the contents of their petitions highly unreliable. Furthermore, each and every extract relied upon was fully dealt with, the true facts were set out and the gross distortions and pure fabrications contained in the extracts relied upon were exposed. The Applicants did not controvert this demonstration in their Reply, indeed, the Reply was totally silent on this point.

Now, of course, at the present stage the Applicants have for purposes of this case admitted as true all Respondent's factual allegations in the pleadings, unless specifically denied, and nothing with regard to this exposition in the Counter-Memorial, IV, has been denied by the Applicants. It therefore stands admitted as true and common cause.

It follows, Mr. President, by necessary implication, that Applicants tacitly also admit for purposes of this case that many of the allegations of the petitioners are indefensibly false. There can be no middle ground. Many of the allegations of the petitioners dealt with in Book VIII of the Counter-Memorial are so diametrically opposed to the true facts set out by Respondent that once the truth of Respondent's factual exposition is admitted, and therefore common cause, the unreliability of the petitioners' statements is incontrovertible.

I am not going to weary the Court with an analysis of all the distortions and fabrications exposed in Book VIII of the Counter-Memorial. A mere reading of the volume from IV, pages 3-37 will suffice to make the point obvious. I wish to mention but one example—a case where some of the petitioners themselves apparently had very little faith, or very short-lived faith, in the soundness of their allegations. On pages 173-175 of the Memorials, I, Applicants quoted and relied on a statement allegedly coming and emanating from Chief Kutako and certain others regarding the alleged regulations applicable in Native townships such as in Katutura. There were numerous serious distortions, and even pure fabrications, contained in this quotation which were exposed and corrected in the Counter-Memorial, IV, from pages 23-31. Now looking at the petition, it appeared that the petition in question had been forwarded to the Committee on South West Africa by the Reverend Michael Scott, who stated "I am sending the statement to you direct as I am not sure whether you have received the original". The Reverend Mr. Scott's letter was dated 22 July 1958. The original did arrive. It was dated 29 July 1958, that is, it purported to have been written one week after the Reverend Michael Scott had forwarded the copy on which the Applicants relied. The original dated 29 July was identical with the copy which had been sent on by the Reverend Michael Scott, but only up to a point. An entirely new text had been substituted as far as the alleged township regulations were concerned, differing totally from the text of the copy which had been transmitted by the Reverend Michael Scott, and not containing all these pure fabrications. Now what could be the explanation, Mr. President, of this sort of occurrence? Perhaps Chief Hosea Kutako *et al.* had first drafted the petition, had then sent a copy of a first draft to the Reverend Michael Scott, and had thereafter felt that, after all, the portion dealing with the regulations was demonstrably untrue on its face, and had substituted it with a new section when posting the original—that might be one explanation. But there could of course also be another explanation: this could perhaps have been one of those petitions, to which Mr. Dahlmann referred in his evidence, which was not drafted in South West Africa, but which was drafted overseas and merely sent to South West Africa for signature; and it might be that the authors of this petition overseas were so sure that it would be signed as drawn up overseas that a copy was sent on in the meantime to the United Nations; but that when this petition arrived in South West Africa for signature by Chief Hosea Kutako it was felt that these allegations about the location regulations were going too far, and that a substitution had then taken place leading to this unfortunate difference between the copy and the original, which was dated a week later. However, that might be, the fact is that the false version was transmitted, and it impressed not only the Committee on South West Africa; it impressed the Applicants to a sufficient extent to make them quote it in their Memorials and rely on it in their Memorials. This whole matter was referred to, if the Court wishes to read in greater detail and refer to the documents concerned, in the Counter-Memorial, IV, on pages 30-31.

I have already mentioned that in the Reply the Applicants remained entirely silent as to the Respondent's exposure in the Counter-Memorial of what was going on in connection with the petitioners and the type of evidence they were transmitting. In the Oral Proceedings there was one reference to the petitioners. On 28 April 1965, IX, on page 49, the Applicants on one occasion referred to the petitions and said:

"Numerous petitions from time to time have been submitted to the United Nations agencies by inhabitants of the Territory. They illustrate the manner in which the daily lives of the inhabitants are affected by the systematic implementation of the apartheid policy. Examples are set out in the Memorials, I, page 167 and following."

Then follows this strange statement:

"The Applicants have not relied upon the accuracy of statements in such petitions; the Applicants have cited such petitions for the bearing they may have as confirmatory of the reasonably predictable consequences of the practices and policies which are undisputed."

Mr. President, it is indeed extremely difficult for us to understand how, if the accuracy of the statements is not relied upon, as said in this quotation—in other words, on the hypothesis that they are false—they could conceivably be viewed as confirmatory of anything. However, in view of the admission of all facts in Respondent's pleadings as true, and in view of the exposition in the Counter-Memorial, and in view of Mr. Dahlmann's evidence, I submit that it is quite clear that the Applicants have very good reason for asserting that they do not rely on the accuracy of statements in the petitions.

Mr. President, just before continuing, and reverting to these lists to which we shall refer from time to time and which we wish to hand in merely for the purpose of typing into the record and to save the time of tedious repetition, we have, over the adjournment, handed copies of all the lists to which we propose to refer, to the Applicants and also to the Registrar, and there is no objection to this procedure being followed. In future, therefore, I propose to refer merely to the list for purposes of identification.

Now, Mr. President, we were dealing with the measure of reliability of the resolutions, or rather of the petitions, and the statements by petitioners, before the adjournment, and we made the point that an exposition showing their unreliability is clearly to be deduced from Book VIII of the Counter-Memorial. If any further demonstration and confirmation is necessary, Mr. President, I need refer only to the evidence of Mr. Dahlmann and specifically to one passage in the verbatim record of 8 October at XI, page 480, where Mr. Dahlmann said the following:

"To us in South West Africa, it is sometimes very hard to understand these petitions. Many of them, whether they come from within South West Africa or from abroad, contain false statements and serious distortions and exaggerations of the real situation. Only to name a few which are made very often, for example, that there is a large scale of militarization in South West Africa, there is a missile tracking station, that the non-Whites within the territory live in conditions of slavery, that genocide is committed against the non-Whites, that they are being exterminated or murdered, that they have no schools, no hospitals."

It should be observed, Mr. President, that the Applicants did not even attempt to attack this evidence in cross-examination. The Agent for the Applicants merely asked Mr. Dahlmann whether he sought to have the Court infer that petitioners were deliberately telling untruths, to which Mr. Dahlmann replied at XI, pages 568-569, in the verbatim record:

"Mr. President, it is difficult to say which motive is behind this. I can only compare the petition and the true facts. That is the only thing I can say. What their motives are and whether they do this deliberately, or as professionals, I think this is too personal a view."

Mr. President, it was perhaps Mr. Dahlmann's sense of propriety as a witness which made him desist from expressing a view in this matter, for, if regard is had to the nature of the statements made by the petitioners, such as that genocide is being committed, that the Natives have been robbed of their land, that they live in the most infertile parts of the country, that there is a large scale of militarization, etc., it seems hardly possible that the petitioners could have been innocently mistaken.

Now this, Mr. President, then brings us to the next question, and that is: Now that it has been established that no reliance can be placed on the evidence of the petitioners, what reliance was placed on their evidence before the United Nations because, Mr. President, after all, *this is the crux of this enquiry*. The whole purpose of this treatment is that we intend to show to the Court that the factual basis on which condemnation of South Africa's policies in the Territory has been based, is one of erroneous fact and untrue assumptions, and that therefore the resolutions which were based on such assumptions and on such evidence cannot be relied on for any purpose whatsoever, and also cannot be relied on as establishing a norm and/or standards of the nature contended for by the Applicants in this case.

So this then brings us to the crux: What reliance was placed on the untrue evidence of the petitioners in the United Nations? And we shall find, Mr. President, during our treatment of this matter, that the greatest importance was attached to the allegations of the petitioners before United Nations organs, that even the most fanciful allegations were unquestioningly echoed as establishing true fact, and also that the heavy reliance which was placed on their evidence played an extremely important role in the nature of the resolutions which were adopted by the various committees of the United Nations and also by the General Assembly itself.

So much reliance was placed in the United Nations on this evidence by petitioners that there is a striking similarity between the ideas expressed, and the manner of expressing them in the debates on South West Africa in the various organs of the United Nations, that is, on the one hand, between the views as expressed by the petitioners and, on the other hand, the views expressed by the delegates within these United Nations organs. Indeed, in many respects, the representatives of the leaders of the campaign at the United Nations and the petitioners from South West Africa speak as with one voice. This, Mr. President, is, in our submission, not surprising, in view of the common purpose to which we have referred earlier.

Now, what we propose to do now is to examine how this common purpose functions in practice. We shall deal with this aspect by showing how certain fantastic statements readily occur in the evidence of the petitioners, and how they are accepted and echoed and acted upon in the United Nations organs, paving the way for acceptance of a resolution condemning Respondent's administration of the Territory. It is, of course, Mr. President, impossible to give a full picture. That would take days and days. In the emotional and biased setting of the campaign

against Respondent with which both the petitioners and certain delegations at the United Nations are associated, the attacks on Respondent and its policies bristle with factual inaccuracies, with distortions and with baseless accusations. We propose to deal shortly only with a few categories of charges which regularly dominate the discussions. We intend, first, to cite a few short statements of the petitioners as regards each category, and then to show how these have been repeated and echoed in the debates in the United Nations organs.

The first category relates to those attacks which characterize Respondent's policies as being a policy of genocide or equal to genocide.

We find these allegations occurring with monotonous regularity throughout the attacks on Respondent. Respondent's policies are characterized as racial extermination, as having the objective of the physical destruction of a nation, and that it is in fact plainly and simply a policy of genocide. These allegations, Mr. President, are so preposterous that they require really no refutation, especially in the light of the indisputable facts which appear from the voluminous pleadings handed down to this Court by Respondent and the uncontroverted evidence which has been delivered before this Court.

Now, I propose first to give some random examples of statements by the petitioners. First, Mr. Ngavirue of SWANU, quoted, and I might state parenthetically, quoted apparently with approval, in the report of the Committee on South West Africa to the 16th Session of the General Assembly in 1961—i.e., 16th Session, Supplement 12A, document A/4926 at page 17, paragraph 120:

"Mr. Ngavirue stated that while it was obvious that there was a great need for welfare services, one could not expect philanthropy from the ruthless South African Government which was bent on the task of doing anything possible that would directly or indirectly exterminate the indigenous population. Hence, there was absolutely nothing done to promote the general welfare of the indigenous population . . ."

Then, we have Mr. Kozonguizi, who should by this time be well known to the Court. He is the President of SWANU and is living at present in London. In a verbatim statement before the Fourth Committee of the United Nations, the 904th-906th Meetings, 14th Session, 1960 at page 19, he said—

"When South West Africa will have reached a stage where technical means of production replaces human labour, the present trend indicates that the deliberate annihilation of the entire African population will not be out of consideration." (Verbatim statement as circulated.)

Mr. Kerina, who was at that time the President of the Ovamboland Peoples' Organization, in October 1959, before the 4th Committee, the 909th Meeting of the 14th Session said:

". . . Artificial conditions were created—with the drought as pretext—in order to put hundreds of thousands of human beings at the mercy of the Government and to wipe out a race . . ."

And the same author, Mr. Kerina, at the 1051st Meeting of the Fourth Committee, 15th Session, 1960, page 5, said this:

"The South African Government has committed repeated crimes

against our people and humanity. There is no defence for their actions in our country. They claim Christianity and civilization, yet they have killed and are continuing with their systematic campaign of extermination of our people." (Verbatim statement as circulated.)

And finally, Mr. Mbaeva, of SWANU also, in a verbatim statement before the Colonialism Committee—i.e., the Committee of Twenty-four—at the 255th Meeting, on 8 May 1964, whilst referring to the Odendaal Commission report, stated:

"The Commission was appointed to devise means through which a large number of Africans or non-Whites should be exterminated through starvation under the guise of being developed. . . . Unless the United Nations takes immediate action to prevent Verwoerd and his gang from carrying out their programme for racial genocide, there will be a serious danger that may be beyoyned the control of this Organization." (A/AC/109/P.V. 255, pp. 26, 27.)

I think, Mr. President, that that is enough to illustrate the type of refrain of the allegation of genocide running through the allegations of the petitioners. Now, how is this reacted to within the organs of the United Nations?

First may I give a quotation from a representative of the Applicant States, Mr. Dasumu Johnson of Liberia, in *General Assembly, Official Records*, 18th Session, document A/SPC/SR 385, pages 40 and 41, which was in answer to a refutation by Mr. Jooste, the Chief Delegate of South Africa, on that occasion as far as the factual position was concerned. Mr. Dasumu Johnson had this to say:

"However, it would be a mistake to be lulled by Mr. Jooste's sweet words, which perhaps represented a stratagem designed to gain time to ensure the complete annihilation of the Africans in that explosive area."

Turning to the General Assembly, Mr. Yifru of Ethiopia, in *Provisional Records*, 19th Session, A/P.V. 1293, at page 31, of 7 December 1964, said this:

"Yet, oblivious to its obligations under the Charter, the numerous decisions of the United Nations urging it to abolish apartheid, and the condemnation of most of the rest of the world, *the South African Government cold-bloodedly pursues its policy which, in truth, is tantamount to racial extermination.*"

The following are a few examples of statements from other African States before the Special Political Committee: Mr. Baghdelleh of Tanganyika, now Tanzania, 17th Session, Document A/SPC/SR 328, 10 October 1962, paragraph 2, said—

"The Government of Tanganyika categorically rejected the policy of apartheid and was ready to support any draft resolution designed to expell South Africa from the Organization if it persisted in *its policy of genocide.*" (Italics added.)

And Mr. Sahnoun of Algeria, 17th Session, Document A/SPC/SR 339, 30 October 1962, page 69, stated—

"29. The South African Government, blind to everything save racism and fascism, was now preparing for a *war of extermination* by

building up its armaments with the aid of other countries . . ."
(Italics added.)

Mr. Bocoum of Mali, before the General Assembly, Document A/P.V. 1025, 4 October 1961, page 240, said—

"Mr. Verwoerd's Machiavellianism is now quite unambiguous: genocide has been officially announced as the programme of the South African National Party."

And then just to make it absolutely clear, I add a quotation from some of the Allies in the campaign, Mr. Peiris of Ceylon, Document A/C. 4/SR 1231, 30 November 1961, page 473, stated the following:

"20. There was also a genuine policy of genocide, because South Africa had imposed conditions of life calculated to bring about the physical destruction of a nation. The intention behind South Africa's gradual destruction of the indigenous peoples was to inherit their land . . ."

Mr. President, I feel that I have mentioned enough quotations. In this respect many more are to be found, I would refer to the list marked "D"¹.

That brings us, Mr. President, to the next category and that is that accusations are often made by the petitioners that Respondent herds the non-White population into concentration camps, that the non-Whites are treated like animals, that they have been reduced to a sub-human status and that conditions of naked terror exist. A few random examples of this type are given in the following excerpts: Mr. Kozonguizi, in his oral statement to the Committee on South West Africa, 1 May 1959, quoted in the Committee's report to the General Assembly, 14th Session, Supplement No. 12, Document A/4191, page 41, said:

"The South African Government has transformed our country into a huge concentration camp and our people into slaves, in the name of its exclusive policy of white supremacy."

Mr. Kerina in the Verbatim Text of the 571st Meeting, Fourth Committee 1956, page 11, said:

"The method has been and is, up to the present time, that of taking away African land and means of livelihood, denying them a voice in the government, preventing their social and cultural development, and applying brute force. Africans, except those work-

¹ Fourth Committee:

Mr. Gren (U.S.S.R.): *G.A., O.R.*, 17 Sess., A/C. 4/SR. 1378, pp. 317-318, 9 November 1962.

Special Political Committee:

Mr. Kozachenko (Ukrainian Soviet Socialist Republic): *G.A., O.R.*, 12th Sess., A/SPC/SR 54, p. 60, 29 October 1957.

Mr. Kizya (Ukrainian Soviet Socialist Republic): *G.A., O.R.*, 11th Sess., A/SPC/SR 13, p. 58, 15 January 1957.

Mr. Mendoza (Guatemala): *G.A., O.R.*, 17th Sess. A/SPC/SR 333, p. 33, 18 October 1962.

Mr. Shaka (Nepal): *G.A., O.R.*, 17th Sess., A/SPC/SR 336, pp. 50-51, October 1962.

Mr. Shukairy (Saudi Arabia): *G.A., O.R.*, 17th Sess., A/SPC/SR 338, p. 60, 29 October 1962.

Mr. Naco (Albania): *G.A., O.R.*, 18th Sess., A/SPC/SR (Provisional) 394, p. 12, 30 October 1963.

ing for Europeans, are herded into concentration camps known in South African terminology as 'native reserves'."

Mr. President, I do not wish to weary the Court with more quotations, I would refer to the list marked "E"¹, which contains references to numerous other allegations in the same vein.

Now once again, let me turn, Mr. President, to how this type of statement is accepted or portrayed within the United Nations by the delegations speaking there. Before the Fourth Committee, Mr. Gassou of Togo, during the 15th Session, 6 December 1960, A/C.4/SR. 1076, page 457, said—

"41. For fourteen years, while the representatives of the Union Government in the United Nations had engaged in their well-known manoeuvres, people in South West Africa had been dying of hunger or had been murdered in concentration camps. Oppression became heavier from year to year and measures such as different educational systems for Whites and for non-Whites, with the object of destroying the African intellect, were being introduced." (Italics added.)

Mr. President, I have quoted one example, there are many that are typical of that and references are to be found in the list marked "F"²

Not only are these statements, of course, reflected, Mr. President, in the speeches and statements of delegates, they are also reflected in the reports of the Committee on South West Africa to the General Assembly. For an example, I make reference to the following extract from the 1961 report concerning the Implementation of General Assembly resolutions 1568 (XV) and 1596 (XV), Document A/4926, page 14. After referring to the testimony by the petitioners, this report continues:

"102. From such testimony, it is obvious that, under the operations of *apartheid*, the Native African is a social outcast and a prisoner in his own country, denied all basic human rights and

¹Fourth Committee:

Mr. Nujoma: 1052nd Meeting, 15th G.A., 1960, pp. 3, 5, and 6; 1217th Meeting, 16th G.A., 20 November 1961, p. 379, para. 53; 1388th Meeting, 17th G.A., 16 November 1962.

Rev. M. Kooper: 1050th Meeting, 15th G.A., 14 November 1960, pp. 13 and 303.

Mr. Jacob Kuhangua: 1052nd Meeting, 15th G.A., pp. 1 and 4; 16th Session, 1219th Meeting, Fourth Committee, 21 November 1961, p. 390, para. 16.

²Fourth Committee:

Mr. Purevjal (Mongolia): *G.A., O.R.*, 17th Sess., A/C. 4/SR 1379, p. 326, 12 November 1962.

Special Political Committee:

Mr. Udovichenko (Ukrainian Soviet Socialist Republic): *G.A., O.R.*, 15th Sess., A/SPC/SR 241, p. 69, 4 April 1961.

Mr. Perera (Ceylon): *G.A., O.R.*, 16th Sess., A/SPC/SR 271, p. 58, 27 October 1961.

Mr. Kozachenko (Ukrainian Soviet Socialist Republic): *G.A., O.R.*, 12th Sess., A/SPC/SR 54, p. 60, 29 October 1957.

Mr. Aldunate (Chile): *G.A., O.R.*, 13th Sess., A/SPC/SR 88, p. 16, 14 October 1958.

Mr. Haseganau (Roumania): *G.A., O.R.*, 16th Sess., A/SPC/SR 274, p. 71, 31 October 1961.

Mr. Juarbe T. Juarbe (Cuba): *G.A., O.R.*, 17th Sess., A/SPC/SR 337, p. 56, 26 October 1962.

Mr. Arce (Bolivia): *G.A., O.R.*, 18th Sess., A/SPC/SR 383, p. 29, 14 October 1963.

Mr. Djerdja (Yugoslavia): *G.A., O.R.*, 18th Sess., A/SPC/SR 383, p. 33, 14 October 1963.

fundamental freedoms. As a human being, he is deemed and treated as an inferior, whose only purpose and role in life is to serve the White man. Thus he leads a bare, spare life with no incentive or sense of purpose."

I turn to the next category, Mr. President; it is also an accusation which is levelled with monotonous regularity against Respondent, and that is that Respondent's policies are rooted in racial hatred and animosity and in a doctrine of White superiority and African inferiority. A similar charge was made by the Applicants in this case; but of course, after Respondent had shown in its pleadings that such accusations were devoid of substance (in this respect I refer especially to the Counter-Memorial, II, pp. 470-471, and the Rejoinder, V, pp. 409-412), this charge has now in effect been abandoned by the Applicants as part and parcel of their abandonment of the charges of oppression, and of their acceptance of the facts as presented by Respondent. Nevertheless, accusations of this nature run like a refrain through the attacks on the Respondent at the United Nations. Once more, these wholly erroneous views of Respondent's policies appear to be based on "information"—on "evidence"—supplied by petitioners, as will appear from a reference to their statements, of which only one typical example need be quoted. I quote the statement of the Reverend Michael Scott, who has probably been the most frequent petitioner of all, dating back for many years, although he was present in the territory of South West Africa only for a few weeks during the year 1946. Before the Committee on South West Africa, 5th Session, 94th Meeting, Document A/AC. 73/SR. 94, 17 September 1958 (p. 4), he states this:

"Much of the havoc which had been wrought in the Territory could be attributed to religious and political bigotry. A large part of the problem derived from the fact that *white people had been taught that they had been placed there by God to rule over everyone else.*" (Italics added.)

And he also mentioned (pp. 4-5) that the "whole State structure and system of legislation [was] based on the assumption that one race was superior to another". Ultimately he also said (p. 5):

"It was a question of a tradition and philosophy in which the white population had been indoctrinated by preachers and politicians alike until they had come firmly to believe in the concept of superior and inferior races. The legislation which was designed to keep a whole people servile was based on that philosophy."

There are many more quotations which quite clearly and plainly level this accusation; a few of them can be found in the list marked "G"¹.

Now, how are these accusations taken up and portrayed or judged in the debates before the United Nations? Just a few quotations, first on the part of the Applicant States. Before the Special Political Committee, Mr. Petros of Ethiopia, Document A/SPC/SR. 88, page 15, of 14 October 1958, said—

¹ Committee for South West Africa:

Mr. Garoeb: 11th Meeting, A/AC. 110/SR. 11, 30 July 1962.

Fourth Committee:

Rev. Markus Kooper: 1372nd Meeting, 17th G.A., 5 November 1962

Mr. Kozonguizi: 904-906th Meetings, 14th G.A., 1959.

"... Ethiopia condemned not only the incidents which had taken place but above all *the theory of white supremacy upon which the policy of discrimination was founded*". (Italics added.)

Then Mr. Barnes of Liberia, 16th Session, A/SPC/SR. 272, page 61, 30 October 1961 stated—

"5. What exactly was 'apartheid'? A doctrine of racial superiority, which held that the Africans were mentally inferior to the whites."

And so, Mr. President, it goes on and on and further examples will be found in the list marked "H".

Then, Mr. President, coming to the next category, that is a charge that is often levelled and is also reflected in the reports of the Committee on South West Africa, that Respondent is depriving the non-White population in South Africa and in South West Africa of "the richest part of the Territory" and confining them to "desert-like" or "unhealthy" areas to make way for European settlers. The respective areas set apart for White and non-White occupation are very often totally misrepresented. In parentheses, we can point out that identical charges were also made by Applicants in their written pleadings. For example, in the Memorials, I, page 118, the Applicants alleged that—

"(i) The Mandatory has progressively reduced the proportion of farm land available for cultivation or pastoral use by the 'Native' population . . ."

And in the Reply, IV, page 464, Applicants stated that—"the 'non-White' inhabitants are confined to the poorest areas of the Territory . . ."

It is hardly necessary, Mr. President, to remind the Court that these charges have been abandoned by the Applicants, and the untenability of such charges, and the falsity of the allegations contained in the extracts which we shall cite, are demonstrated by a reference to the true facts as set out in Respondent's pleadings. I wish to refer to the Rejoinder, VI, pages 255-266, and references to the Counter-Memorial given

¹ *Special Political Committee:*

Mr. Petros (Ethiopia): *G.A., O.R.*, 14th Sess., p. 76.

Mr. Gabre Sellassie (Ethiopia): *G.A., O.R.*, 16th Sess., pp. 117-119.

Mr. Collet (Guinea): *G.A., O.R.*, 16th Sess., A/SPC/SR. 274, p. 74, 31 October 1961.

Mr. Daddah (Mauritania): *G.A., O.R.*, 18th Sess., A/SPC/SR. 388, p. 60, 21 October 1963.

Mr. Sharif (Indonesia): *G.A., O.R.*, 11th Sess., A/SPC/SR. 13, p. 56, 15 January 1957.

Mr. Allouni (Syria): *G.A., O.R.*, 11th Sess., A/SPC/SR. 14, p. 61, 16 January 1957.

Mr. Sheldov (Byelorussian S.S.R.): *G.A., O.R.*, 11th Sess. A/SPC/SR. 14, p. 63, 16 January 1957.

Mr. O'Brien (Ireland): *G.A., O.R.*, 12th Sess., A/SPC/SR. 54, p. 57, 29 October 1957.

Mr. Gashka (U.S.S.R.): *G.A., O.R.*, 13th Sess., A/SPC/SR. 89, pp. 20-21, 15 October 1958.

Mr. Ge-Farra (Jordan): *G.A., O.R.*, 15th Sess., A/SPC/SR. 229, p. 13, 23 March 1961.

Mr. Shahi (Pakistan): *G.A., O.R.*, 15th Sess., A/SPC/SR. 239, p. 58, 3 April 1961.

Mr. Benites Vinueza (Ecuador): *G.A., O.R.*, 15th Sess., A/SPC/SR. 238, p. 53, 3 April 1961.

Mr. Townsend (Peru): *G.A., O.R.*, 16th Sess., A/SPC/SR. 275, p. 82, 1 November 1961.

Mr. Launing (Denmark): *G.A., O.R.*, 17th Sess., A/SPC/SR. 336, p. 49, 25 October 1961.

Mr. Pudlah (Czechoslovakia): *G.A., O.R.*, 18th Sess., A/SPC/SR. 390, p. 69, 23 October 1963.

there, and also to the evidence of Professor Logan in the verbatim record of 8 July, X, on pages 367-368.

I give first just one or two examples of the misrepresentations from the mouth of the petitioners. First, Mr. Kozonguizi, before the Fourth Committee, the 1053rd Meeting on 16 November 1960 (p. 317), says:

“... the reservations in which the African population lived were in the most infertile part of the Territory, for example in the Kalahari Desert. If any good water were found in a reservation, the area was handed over to European farmers and the Africans were forced to move away.”

Mr. Nujoma stated before the Fourth Committee, the 1371st Meeting on 2 November 1962 (p. 275)—

“The Government also intended to eliminate all Native reserves in the Police Zone in order to enable new settlers to come to the country.”

And before the 1374th Meeting on 6 November 1962 (p. 292) he said:

“Under the Bantustan system the Africans had already been forced to leave their homes for a desert area without sufficient water or pasturage for their cattle.”

The Reverend Markus Kooper (the Court will recollect that, according to Mr. Dahlmann's evidence, he appeared on behalf of SWAUNIO which, according to Mr. Dahlmann, was practically non-existent in the Territory and had no real support) stated before the Fourth Committee at the very same meeting as the one just mentioned (p. 291)—

“It was therefore clear that, when Africans occupied good land, the Government tried to drive them out and replace them by Europeans.”

This type of allegation was also taken up and portrayed by the Committee on South West Africa; I take but two examples: the *Report of the Committee on South West Africa for 1959*, Supplement No. 12, Document A/4191, at page 21, paragraph 144 reads—

“The Committee recalls that the Territory has been divided by the Union Government roughly into two sections. The southern section, which is the richer and better developed portion, has been named the Police Zone. The northern section is the poorer and less desirable portion, where the 'Natives' are being relegated to 'Native' reserves. It is apparently the policy of the Administration gradually to remove the 'Native' reserves still remaining in the Police Zone to other sections of the Territory so as to make room for expansion of 'European' settlements in that zone.”

And in the 1961 *Report of the Committee on South West Africa Concerning the Implementation of General Assembly Resolutions 1568 (XV) and 1596 (XV)*, in Supplement No. 12A, Document A/4926, page 14, paragraph 103, the Committee states as follows:

“The general economic and social situation in the Mandated Territory may perhaps be pictured by quoting Mr. Ngavirue as follows: [it will be remembered that I have referred previously to Mr. Ngavirue's allegations of genocide and extermination whilst speaking on behalf of S.W.A.N.U.]

‘... If you look at the map of South West Africa today you will

realize that about 75 per cent. (93 million acres) of the land has been cut up into White people's farms. These White people are South African nationals brought for the sole purpose of displacing the Africans. The Africans have been crowded into small pieces of land called "Native Reserves". These cover only 10 per cent. (about 25 million acres) of the total land, half of which is desert area. In fact, the reserves were not meant to be of any economic value to the Africans but to be labour reservoirs from which cheap labour could be drawn for distribution on the farms and mines of the so-called master race."

That, Mr. President, then, is the opinion of the Committee on South West Africa.

There are many more examples of delegates speaking in the same vein; I do not feel that it is necessary to refer to them; I could just mention that Mr. Diallo of Mali, for example, in the 4th Committee, Report A/C4/SR. 1385, 15 November 1962, page 373, said that "the indigenous population were herded into reserves consisting of the least fertile land", and so it goes on and on, and there are certain further examples of this type of allegation referred to in list I¹.

The next category of regular allegations and regular attacks are in the field of education: it is regularly alleged that the object of the Bantu education system was to ensure that the education given to the non-White population should be inferior to that of the White groups, and to prepare the non-White groups for an inferior position in life. It is regularly said that there is no form of free public education on the elementary level, or any institution for higher learning in the Territory, and that Native children are taught only a few rudimentary subjects. The complete untruthfulness of these allegations appears clearly from the admitted information contained in Book VII of the Counter-Memorial, and from the evidence of Dr. Eiselen and Dr. Van Zyl before this Court—I refer to the verbatim records, X, pages 114-122, and XI, pages 252-268.

Here are examples of these allegations by the petitioners. Mr. Getzen (at that stage, of course, known as Getzen, now known as Mr. Mburumba Kerina) in 1956—that was on the first occasion of his oral petitioning, during the 11th Session, in the Fourth Committee at its 571st Meeting—said:

"A new factor which would adversely affect education in South West Africa was the Bantu Education Act, which had been passed by the South African Parliament in 1953. That Act . . . in general provided that the education given to Africans should be inferior to that of Europeans. The subjects were few and inadequately taught, limited to religious instruction, rudimentary arithmetic, and reading in Afrikaans. Such education was not calculated to bring a nation to a high level of advancement. In the North very little was done at all."

¹ *Special Political Committee:*

Mr. Shahi (Pakistan): *G.A., O.R.*, 15th Sess., A/SPC/SR. 239, p. 58, 3 April 1961.

Mr. Sobolev (U.S.S.R.): *G.A., O.R.*, 15th Sess., A/SPC/SR. 240, p. 64, 4 April 1961.

Mr. Kizia (Ukrainian S.S.R.): *G.A., O.R.*, 17th Sess., A/SPC/SR. 331, p. 24, 16 October 1962.

Mr. Verret (Haiti): *G.A., O.R.*, 17th Sess., A/SPC/SR. 337, p. 57, 26 October 1962.

Mr. Naco (Albania): *P.R.*, 18th Sess., A/SPC/SR. 394, p. 11, 30 October 1963.

Mr. Nujoma, who should also be well known to the Court by this time, the President of SWAPO, before the Fourth Committee, at the 1371st Meeting, during the 17th Session of the United Nations, said:

"In education, South Africa had introduced into South West Africa the backward and primitive system known as Bantu Education. African children were taught that they were inferior to white people . . ."

In a written petition sent to the United Nations by Chief Kutako, Chief Witbooi and SWAPO it was alleged:

"The object of Bantu Education is (a) to indoctrinate African children from childhood that Africans are inferior to Europeans, (b) that that *inferiority is a God created status* which no man has the right to change."

That was in a whole book of petitions which had been issued in 1961, Document A/AC.73/4 (1961), page 34. And so it goes on and on.

Turning once more to their acceptance in the United Nations, we find that these charges are not only accepted, they are echoed in remarkably similar wording. It suffices to quote only one or two examples of the many that are on record. Mr. Carpio of the Philippines in the Fourth Committee, 1115th Meeting, page 94, said:

"In the educational field, the system of 'Bantu Education' was designed to enclose the indigenous inhabitants in their tribal culture, immune from outside influences, and to prepare them to provide cheap labour for the whites. Consequently, the future facing the indigenous inhabitants was a lifetime of virtual slavery."

Mr. Sato of the Central African Republic, also in the Fourth Committee, 1387th Meeting, page 389, said:

"The retrograde system of Bantu education kept them [that is, the indigenous inhabitants of the Territory] in a state of ignorance, poverty and perpetual servitude."

These allegations in the educational field have also influenced the reports of the Committee on South West Africa, and by way of illustration I refer to only one summary in the Committee's 1961 Report concerning the Implementation of General Assembly resolutions 1568 (XV) and 1596 (XV), the document to which I have already referred, A/4926, paragraph 121. It states:

"According to the evidence of those who appeared before the Committee, the basic policy of the South African Government in the educational field is to restrict Natives to a rudimentary system of schooling and training designed to confine them to menial occupations in order to keep them in a state of subservience to the White minority. The policy is also to deny them access to higher education, thus keeping them from professional activities, from participation in the fruits of their native resources, and from contact with enlightened ideas which would cause them to aspire to better ways of life than their present unbearable conditions. Bad as the past system was, the system of Bantu education which entered into force in 1961 is worse."

The first sentence of paragraph 123 of the same report reads—

"Bantu education was described by Mr. Ngavirue as a system

aimed at teaching the Africans from childhood that they were inferior to the Whites and that the good things in life were meant for Whites only."

That is the opinion of the Committee on South West Africa as based on the evidence of these petitioners.

It will be remembered that in 1961 the Committee on South West Africa left on a so-called fact-finding mission to hear evidence from petitioners in various parts of Africa, and it was during that mission when petitioners such as Mr. Kerina, Mr. Kozonguizi, Mr. Nujoma, Mr. Kuhangua and various other representatives of SWAPO and SWANU gave evidence, that all these conclusions were arrived at.

I come, Mr. President, to the last field. As I said, we cannot deal with everything—I am just taking a few broad categories by way of example, and the last field in which we wish to illustrate the untruths emanating from the petitioners and the effect thereof in United Nations organs is that of militarization.

Now, although some of this material would be specifically relevant on the charges made by Applicants under Submission 6, relative to militarization, that is not the context in which we deal with it here. We are here concerned with the nature of the charges by which it was sought to condemn Respondent's policies and actions in the United Nations in the very resolutions on which Applicants now rely in substantiation of their alleged norms and/or standards.

At the present stage we are particularly concerned with the recklessness with which the charges were made and, indeed, still are being made today, and with the acceptance accorded to these charges at the United Nations.

Now, in order properly to evaluate the allegations of the petitioners in this field, let us, Mr. President, first consider the true facts. These can be stated shortly and simply, especially in view of the Applicants' admission of the truth of all the facts under this head in Respondent's pleadings.

In 1959 a full explanation of the facts, showing an absence of militarization, was given to the Fourth Committee of the United Nations by Respondent's representative. A reference to this will be found in the Counter-Memorial, IV, page 60. I propose to continue (because it is admitted fact at this stage) with further facts now common cause on the same page of the Counter-Memorial, that is, IV, page 60:

"... M. Carpio and Dr. Martinez de Alva, respectively Chairman and Vice-Chairman of the Special Committee for South West Africa, visited the Territory during 1962. They were given full opportunities of investigation, and were specifically requested to investigate allegations of militarization in the Territory. Their visit in fact included, *inter alia*, Windhoek, the Kaokoveld, Ovamboland and (in the case of Dr. Martinez de Alva) the Caprivi Zipfel—in other words, all the places mentioned by the Applicants in their allegations regarding militarization, except Swakopmund. At the end of their visit, in a Statement issued by Respondent's Prime Minister and Minister of Foreign Affairs and the Chairman and Vice-Chairman of the Special Committee, it was stated that:

'... in the places visited they had found no evidence and heard no allegations ... that there were signs of militarization in the territory'."

Further reference to this aspect is to be found in the Counter-Memorial, II, at pages 3-4, and in the Rejoinder, V, at pages 5-12.

I might just note, Mr. President, that despite a long history of controversy as far as these facts are concerned, Applicants now, for the purposes of this case, admit the truth of this rendering by Respondent which I have just read.

Furthermore, as far as militarization was concerned, the full facts were set out in the Counter-Memorial, IV, from pages 54-61, and amplified and reiterated in the Rejoinder. All these facts are now admitted by the Applicants as truth. In this connection, we refer the Court to the verbatim of 27 April, IX, page 21, and, referring specifically to militarization, the Respondent's factual exposition is admitted in the verbatim of 12 May, at IX, page 235.

Now, during the hearing of witnesses, the Court had the benefit of hearing General Marshall testify that he did not see anything in South West Africa that he could regard as a military base and that the Territory is less militarized and more under-armed than any territory of its size he had ever seen in the world. That will be found in the verbatim, of 14 October, XI, at page 587.

So, Mr. President, these are the facts. This, now, is the truth. Let us contrast it with the allegations made by the petitioners and the echo of these allegations in the United Nations.

I can summarize it in a few words. Year after year, the petitioners testify that the military build-up in the Territory is increasing, that troops are swarming throughout the Territory, that a number of military bases have been established. I mention but a few random examples.

In 1960 Mr. Sam Nujoma testified that there were three South African bases in the Territory of South West Africa. That was before the Committee on South West Africa, 7th Session, 1960, 132nd Meeting (A/AC 73/SR.132), page 7.

Before the Fourth Committee the following was noted—that is, in 1960, the 1054th Meeting on 16 November 1960, paragraph 11:

“Mr. *Atwan* (Iraq) noted that, according to Mr. Fortune, the South African Government had set up military bases at Windhoek in the Caprivi Strip near Okavango and in Ovamboland, and an emergency landing strip near Swakopmund. He asked what was the exact number and the purpose of those bases.”

Mr. Fortune, who was at that time described as the Secretary-General of SWAPO, replied that “there were five bases. They had been established in flagrant contradiction with the provisions of article 4 of the Mandate.”

In 1961 Mr. Ngavirue was quoted by the Committee on South West Africa as illustrating the general picture in the Territory. Mr. Ngavirue stated this:

“Military bases have been planted in the Mandated Territory, one in Ohopoho in the Kaokoveld [The Court will, no doubt, recall General Marshall's evidence as to the facilities at Ohopoho] and on the South West Africa Angola border, one at Windhoek, one at Walvis Bay, and the country is generally under martial law . . .” (Report of the Com. on S.W.A. concerning the Implementation of General Assembly Resolutions 1568 (XV) and 1596 (XV), 16th Sess., Supp. 12A (A/4926), p. 11.)

And, so, Mr. President, it goes on and on. In the same year (1961) Mr. Nujoma stated at the 1217th Meeting of the Fourth Committee, on 20 November 1961, page 379:

"In the middle of 1961, the South African white settler Government had sent more than 6,000 troops into South West Africa . . . New military bases had been established in the Territory, at Walvis Bay, in the Eastern Caprivi Zipfel, on the northern border between South West Africa and Angola, and at Windhoek."

And these charges were repeated in 1963 by Garoeb, also on behalf of SWAPO, at the 1455th Meeting of the Fourth Committee, paragraph 36, and by Mr. Kuhangua of SWAPO at the same meeting. I shall not quote this; I think I have done enough in that regard.

May I, then, further submit that one need only look at the contents of the three General Assembly resolutions quoted by Applicants on page 563 of the Reply, IV, and initially relied on by them to prove their charges relative to militarization, to see what results these untruthful statements of the petitioners led to. I may also note that two of these resolutions, that is, 1702 (XVI) of 19 December 1961, and 1805 (XVII) of 14 December 1962, are also contained in the list of resolutions on pages 502-503 of the Reply, IV, upon which Applicants rely as establishing their norms and/or standards.

But, Mr. President, this is not yet the end. The self-same allegations are made, not only again and again, but they persist up to the present day, even after Applicants have before this Court admitted Respondent's factual averments as being true.

Let us turn to the 1965 Draft Report of the Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, dated 19 August 1965. This is document A/AC. 109/L. 241. We must now contrast this with the evidence of General Marshall.

Mr. Nujoma of SWAPO stated on page 27 of this document, paragraph 77:

"In violation of the Mandate, South Africa had established military bases, in Windhoek, Walvis Bay and at Katima Mulilo in the Eastern Caprivi Zipfel."

Mr. Kuhangua, giving evidence, stated on page 41:

"It was the Committee's duty to seek rapid and effective ways to put an end to the apartheid regime's military ventures in the international territory of South West Africa."

And once more referred to "the heavy military build-up in South West Africa".

Mr. Kerina, on page 49, paragraph 152, found it fit to state: "In defiance of the Mandate, South Africa had established numerous military bases in South West Africa . . ."

But, Mr. President, this is not even the limit of fabrication in this sphere. Not content merely with repetition of the old allegations, the petitioners have now in this nuclear and missile age ventured also into allegations of nuclear and missile activities in South West Africa.

Mr. Make, of the Pan Africanist Congress, who has never set foot in South West Africa, stated on page 31 of this document, in paragraph 89:

"As part of its military activities, South Africa was now building nuclear reactors in its own country and in South West Africa."

Mr. Kerina, on page 51, paragraph 156, stated:

"After their experiences in the war, the people of South West Africa were not surprised to see . . . that a nuclear reactor had been built in their country."

And Mr. Kuhangua, on page 34, paragraph 103, stated:

". . . that the greatest danger to South West Africa lay in the Federal Republic of Germany's decision to establish a rocket station in the Namib Desert. He appealed to the Special Committee to call upon the Federal Republic to dismantle its rocket station immediately."

All these allegations, Mr. President, were intended to refer to the Max Plank Institute for Oronomy at Tsumeb. The Court will, no doubt, recall General Marshall's evidence relative to this installation.

Now, what reaction did all these statements elicit in the Committee? Acceptance, Mr. President, nothing but acceptance of every word the petitioners said.

I quote the representative for the United Republic of Tanzania. He said on page 63 of this document:

"Turning to the military build-up in South West Africa, his delegation had been greatly disappointed by the role of West Germany and the United States in nuclear development in South West Africa as disclosed by the petitioners."

And—

"The United States must understand that South Africa's policy was to exterminate the Africans and that it would never hesitate to use atomic bombs for that purpose."

Before the Disarmament Committee, in United Nations Document DC/PV. 82 of 17 May 1965, at page 48, the same representative of Tanzania said: "The South African Government has established an atomic testing centre at Tsumed, . . . in South West Africa."

Mr. President, it is unfortunate that so many delegations are misled by this type of statement.

The representative of Yugoslavia, on page 60 of the document, A/AC.109/L. 241, already referred to, stated:

". . . it was impossible to disregard the testimony of the petitioners concerning South Africa's military preparations, the installation of military bases in the Territory of South West Africa, as also the secret chemical and nuclear research in which certain circles in Western Europe, particularly the Federal Republic of Germany, were participating . . ."

The representative of the Ivory Coast, at page 64 of this document, said—"The petitioners had given the Committee clear proof that the situation was deteriorating from day to day."

And the representative of Ethiopia, on page 66, that is, after the admissions of his government's agent in this Court, stated:

". . . by establishing military bases in the Territory, it [meaning South Africa] had committed a serious breach of Article 4 of the Mandate".

And so it went on and on, many of the representatives referring to the clear and convincing statements of the petitioners.

What is the upshot of all this, Mr. President? A draft resolution is introduced by the representative of India, co-sponsored by 12 of the members of the Committee. In introducing it, the representative of India states the position of the co-sponsors and says, *inter alia*, on page 69, in paragraph 212:

“Certain representatives had claimed that the Special Committee had been too ready to accept the petitioners’ statements at face value. In the case of South West Africa, no discussion with South Africa was possible, so the Special Committee had no alternative but to accept what the petitioners had said as a true description of the situation in South West Africa. And it was no longer possible for the Special Committee or the United Nations to give the Government of South Africa the benefit of the doubt—its past and present deeds were there for all to see and observe.”

This was said in introducing the draft resolution, and this, months after the detailed information had been taken up in the Counter-Memorial and in the Rejoinder and had been available for all the world to read and, after all this detailed information, surely one of the instances of the most detailed information of the administration of any territory ever supplied by any government in the history of the world, had been admitted by the Applicants for the purpose of this case.

Nevertheless, we find that these falsehoods of the petitioners are accepted—they are echoed—and they ultimately shape the judgment and resolution of the organ involved. We have extracted, by way of illustration, only the allegations relevant to militarization from this 1965 document—August 1965, one might almost say the late harvest. It is possible to do exactly the same in respect of each of the major untruths which form the petitioners’ favourite themes, as also refuted by Mr. Dahlman, for example, that Respondent’s policy amounts to genocide, that it is slavery, that the best land is stolen from the Natives, that they are herded on to inferior land and into concentration camps, that education is aimed at keeping them inferior, that they are denied medical assistance, etc. These allegations are all in that document and they are all accepted. This is typical of what Applicants refer to as the judgments of the United Nations, on which they rely as so-called law-creating processes, which judgments this Court, in their submission, may not second guess.

Now, the unqualified acceptance of all these wildest allegations by the petitioners, and the direct influence thereof on the resolutions adopted, are important in view of the Applicants’ present attempts to minimize the effect of such statements by petitioners on the United Nations resolutions.

During cross-examination of Mr. Dahlmann Applicants attempted to illustrate that reports of the Committee on South West Africa and certain General Assembly resolutions had not been influenced by petitioners, or in any event, not to any marked degree. We find that attempt, during the cross-examination of Mr. Dahlmann, in the verbatim record, XI, pages 564-565 and pages 566-567, 13 October. *Inter alia*, an extract was read from the 1955 report of the Committee on South West Africa, page 8, paragraph 2, and the tenor of questions asked was to extract from

Mr. Dahlmann an admission that the petitioners had not really influenced the Committee and that the portion read to him was a typical or illustrative report in respect of the statements of the Committee concerning the sources of its information.

This stands in strange contrast indeed to the Applicants' attitude in the Memorials, when they were still relying on statements of petitioners, and when they prefaced their reference to such statements by stating on page 167, I, of the Memorials:

"... the Committee on South West Africa and the Applicant, as well, are constrained to gather information from other sources, including petitions".

But, we must take this a little further.

If we look at this 1955 report of the Committee on South West Africa, it becomes clear that considerable consideration was given to the contents of petitions by the Committee on that occasion. Pages 4-6 of the report deal with a number of petitions relating to the Territory of South West Africa and reference is made to the petitioners and the meetings during which the petitions were discussed. As from pages 37-49 there appear copies of petitions received and considered by the Committee. These include those of the Reverend Michael Scott, a most prolific petitioner; Mr. Kozonguizi, the President of SWANU; Chief Hosea Kutako and the Reverend T. H. Hamtumbangela. The Court will remember that in Mr. Kerina's letter to Toivo Ja Toivo of February 1959, which appeared in the evidence of Mr. Dahlmann, the Reverend Mr. Hamtumbangela had been proposed by Mr. Kerina as a possible president for the Ovambo-land Peoples Congress which he wanted to be formed.

Now, on the basis of the contents of these petitions, already before the Committee in 1955, the Committee proposed a number of draft resolutions which are also contained in this 1955 report, critical of Respondent's administration. When we turn to the General Assembly resolutions of the same year, 1955, we find that no less than five resolutions dealt directly with the petitions. These were resolutions No. 935 (X), 10th Session to 939 (X), 10th Session. To take but one example, the last resolution, 939 (X), dealing with Mr. Kozonguizi's petition, notes, *inter alia*, the petitioners' allegations that: "The indigenous people have suffered under oppressive legislation and have not developed in any sphere." It also notes the following allegation of Mr. Kozonguizi: "The enforcement of the Bantu Education Act . . . would virtually eliminate African education in the Territory . . ."

In resolution 943 (X) of the same year, 1955, the General Assembly having granted an oral hearing to the Reverend Michael Scott, who was alleged to be speaking on behalf of the Native inhabitants of South West Africa transmitted the petitioner's statement to the Committee on South West Africa for the Committee's study and consideration.

Even Applicants, if we look at the Memorials, were influenced by the contents of petitions annexed to this one particular 1955 report of the Committee on South West Africa, to a sufficient extent to quote and rely on an extract taken from one of them, namely a petition signed by Chief Hosea Kutako, in the Memorials at I, page 171. We find that an extract is taken from this 1955 Committee report and this is quoted as one of the alleged illustrations of the manner in which the daily lives of the inhabitants are affected.

It is thus clear, Mr. President, in our submission, that the Applicants' present attempt to minimize the influence of the petitioners and their petitions in the United Nations organs is without substance. It is true that before 1955 no oral hearings of petitioners took place, but it must be remembered that written petitions had been transmitted long before oral testimony of petitioners became the practice. In fact, the Applicants have quoted in the Memorials at I, page 178, a petition taken from the 1954 report of the Committee on South West Africa.

We have already demonstrated that the suggestion on the part of Applicants, during cross-examination of Mr. Dahlmann, to the effect that the statements of petitioners did not influence United Nations discussions and resolutions in 1955 is incorrect. But we must take this aspect still a little further.

It was also, in the question which was put, suggested that the portion read from the 1955 report was typical and illustrative of the Committee's sources of information and the extract which was read did not contain any reference to the petitioners or to petitions. Let us examine whether this is typical and illustrative of the approach of the Committee on South West Africa.

[Public hearing of 28 October 1965]

Mr. President, we were dealing yesterday with the nature and quality of the criticism levelled against Respondent in United Nations organs and the factual sources upon which such criticism was and is based. We made the point that the criticism was mostly based on emotional grounds and on the basis of incorrect factual assumptions. We also showed that a small group of petitioners had been largely responsible for supplying the incorrect factual information on which Respondent was condemned. Proceeding from there we demonstrated that no reliance could be placed on the evidence supplied by this group of petitioners as to conditions pertaining within the Territory of South West Africa or as to the quality of Respondent's administration.

Turning to the reaction within United Nations organs to the allegations regularly made by the petitioners, we demonstrated that practically everything that the petitioners said was accepted as true in such bodies by majorities and paved the way to the adoption of resolutions condemning Respondent's policies and its administration of South West Africa.

At the close of the session I was dealing with the suggestion on the part of Applicants during cross-examination of Mr. Dahlmann that the Committee on South West Africa had not been influenced by petitioners to a great extent in the drafting of its reports. An extract was read from the 1955 report by Applicants' Agent, which could have supported such a view. I then proceeded to demonstrate that not only the Committee on South West Africa, but also the General Assembly as well as the Applicants themselves, were influenced by statements of petitioners contained as annexes to the 1955 report of the Committee on South West Africa. In view of the possible suggestion on the part of Applicants that the extract read from the 1955 report of the Committee was typical and illustrative of the Committee's sources of information and that such sources did not include the statements of petitioners as a major source, I stated at the close of the proceedings yesterday that I would proceed to investigate the validity of such a suggestion.

Turning to the 1956 report of the Committee on South West Africa to the General Assembly, that is the 11th Session, Supplement No. 12, document A/3151, we find that petitions are mentioned on pages 3-4 of that report. On page 5 in the report, the Committee states, referring to the petitions received: "It [that is the Committee] has taken into account a number of communications received concerning the Territory."

In 1957 the Committee stated that it had drawn up its report on the basis of relevant information "including communications from inhabitants of the Territory". That was the report to the 12th Session of the General Assembly, Supplement 12, document A/3626, on page 5.

In its 1959 report, the Committee stated that it had drawn up its report, *inter alia*, on:

"Relevant information including, in particular, petitions and communications from inhabitants of South West Africa and other sources."

That was the report to the 14th Session of the General Assembly, Supplement 12, Document A/4191, page 5, and on page 3 of this report the Committee on South West Africa referred to a large number of petitions it had taken into account during its examination of conditions in South West Africa. The vast majority of these petitions emanated from Chiefs Kutako and Witbooi, the Reverend Markus Kooper and Mr. Toivo Ja Toivo—the Court will no doubt remember this name as it was mentioned by Mr. Dahlmann. This particular person was the recipient of numerous letters from Mr. Kerina in 1959 and he is also, to this day, a leading personality of SWAPO. Mr. J. Dausab, also mentioned in the Counter-Memorial, Book VIII, IV, and a supporter of SWANIO, and the Reverend Michael Scott were also petitioners.

By 1960, Mr. President, the Committee on South West Africa stated:

"The fifty-four petitions referred to below were taken into account by the Committee during its examination of conditions in South West Africa . . ."

That was on page 7 of the 1960 report and on page 13 of this report I quote:

"It drew up the present report to the General Assembly on the basis of the documents made available to it by the Secretary-General, supplemented by oral statements by petitioners, written petitions and communications from inhabitants of South West Africa and other sources, and reports in the territorial Press."

During 1960, when one examines the annexes to the report, it appears that the vast majority of petitions emanated from the Ovamboland Peoples' Organization, which was, as Mr. Dahlmann testified, formed in 1959, SWAPO, Chief Kutako, Chief Witbooi, Mr. Kozonguizi, SWANU, Mr. Nujoma, Mr. Kerina and the Reverend M. Kooper. It will also appear that in 1960 a whole subsidiary book of some 248-odd pages containing petitions had to be published as United Nations document A/AC. 73/3.

During 1961 the Committee on South West Africa left on a fact-finding tour of Africa and heard testimony of petitioners. These were mainly Mr. Kerina, Mr. Kozonguizi, Mr. Nujoma and other office bearers of SWANU and SWAPO. On the basis of their evidence, described by the Committee in its 1961 report as "informed views", one finds that the whole report is based on the allegations of these petitioners. The con-

clusions of the Committee were reached on page 20 of this report, which is the report to the General Assembly regarding the implementation of General Assembly resolutions 1568 (XV) and 1596 (XV), 16th Session, Supplement 12A, document A/4926. On page 20 of this report, the Committee said the following:

"From an objective study of the situation in South West Africa, through a careful analysis of the evidence given by petitioners, political leaders and refugees from the Territory, along with additional information from other available sources, including views of informed leaders for African unity and liberation, the Committee on South West Africa reached the conclusions outlined below";

and when the report is studied in detail it becomes clear that both the contents of the report as well as the conclusions are based practically exclusively on the evidence of these petitioners.

Mr. President, I feel I need not go further. One can illustrate it as from year to year and I shall make the submission that it should be apparent that any suggestion that the Committee on South West Africa was not greatly influenced by the evidence proffered in written as well as oral petitions by the petitioners, is without substance.

Quite apart from the foregoing, Mr. President, there is still further proof that written petitions and oral statements by petitioners play a most important part in United Nations discussions and resolutions relative to South West Africa. Delegates of various States have often shown by direct statements that they rely heavily on the evidence of petitioners, as the following random extracts will show.

Mr. Morse of the United States of America said, before the Fourth Committee of the 15th Session of the General Assembly, during the 1060th Meeting, page 350:

"The petitioners had spoken with clarity, dignity and remarkable moderation. Their eloquent and straightforward statements deserved the thoughtful consideration of the Committee."

Mr. Neklessa of the U.S.S.R. said in the Fourth Committee, during the 16th Session of the General Assembly at the 1241st Meeting, page 551:

"... he wished to thank the petitioners for their important statements. He felt that no delegation that was genuinely interested in the welfare of the people of South West Africa could fail to take them into account."

Mr. Purevjal of Mongolia said during the 1379th Meeting of the Fourth Committee, during the 17th Session of the General Assembly, page 326:

"It was clear from the statements of the petitioners that the South African administration was deliberately holding back the social development of the indigenous inhabitants in order to keep them in slavery."

Mr. Arteh of Somalia, during the 1454th Meeting of the Fourth Committee, 18th Session of the General Assembly, at page 131:

"... thanked the petitioners and assured them that the reason why his delegation was not asking any questions was not lack of interest in the problem of South West Africa but rather its feeling that after the long and serious discussions to which that problem had given rise and the clear and complete statements of the petitioners, the world was now fully aware of the situation in the Territory."

One of the clearest indications of the influence exerted by the statements of petitioners in the deliberations and decisions of United Nations organs, is afforded by an extract from the statement made by Mr. Busniak of Czechoslovakia, during the 14th Session of the General Assembly, before the Fourth Committee, 914th Meeting, at page 161, when he stated:

"The petitioners, in particular, contributed essential elements to the debate, and it was often on the basis of the direct information they provided that delegations decided what position to adopt."

Many more examples along the same lines can be provided, but I think, Mr. President, that these are enough to make the point which I am trying to make.

Now, Mr. President, although Respondent's representatives never attended the hearing of petitioners, because Respondent's contention was that the committees concerned were not competent to grant such hearings, Respondent's representatives at times gave clear factual information concerning the statements of petitioners, and corrected untrue and erroneous evidence given by them. Unfortunately, the reaction of delegates was often to dismiss the statements of Respondent's representatives and to confirm their implicit faith in the allegations of the petitioners. In this regard, I think I need give only two examples: Mr. Achkar of Guinea, during the 16th Session of the General Assembly, in the Fourth Committee, 1247th Meeting, said at page 587:

"The representative of Australia had suggested that the report of the Committee on South West Africa might not be fully in accordance with the facts, since that Committee had not visited the Territory; the petitioners, however, were all from South West Africa and, while there was no reason to doubt their statements, there were innumerable reasons for doubting those of the Mandatory Power."

Mr. Carpio of the Philippines said, before the same Committee, in the same year, at page 444:

"He wondered whom the Committee was expected to believe: the petitioners, who came from the Territory and asserted that the Native reserves were fenced, or the Minister for Foreign Affairs, who had probably never been to the Territory and who maintained that that was not the case."

Mr. President, perhaps the best example of suppression of information, favourable to Respondent's administration of the Territory, came after the visit by Mr. Carpio and Dr. Martinez de Alva in 1962 to the Territory: I am not going to enlarge on the facts, the full facts were dealt with in the Rejoinder, V, pages 5-12, and I might just state that these factual allegations are now common cause as they have been admitted by Applicants as true. Now, it will quite clearly appear, on reading these pages, that the chairman and the vice-chairman of the Committee on South West Africa visited the Territory, that they had complete freedom to visit whatever place they wanted, and that they had requested specifically to go into and investigate the allegations which had been made with consistent regularity in the United Nations—that the conditions in South West Africa constituted a threat to peace, that there was a large scale of militarization, and certain of the other allegations

which were regularly relied on in the United Nations organs to condemn Respondent's policies. After their visit, a joint communiqué was issued, which is also a United Nations document, and the result was, as quoted on page 8 of the Rejoinder, V, paragraph 3:

"At the request of the Prime Minister both the Chairman and the Vice-Chairman gave their impressions gained during their ten day visit to the Territory. They stated that in the places visited they had found no evidence and heard no allegations that there was a threat to international peace and security within South West Africa; that there were signs of militarisation in the territory; or that the indigenous population was being exterminated."

This communiqué, Mr. President, caused consternation at the United Nations. One would have assumed, Mr. President, that delegations, which had professed great concern about the conditions prevailing within the Territory of South West Africa, and about the welfare of the inhabitants, would have been greatly pleased at and pleasantly surprised by, this satisfactory information jointly concurred in by the chairman and the vice-chairman of the Committee on South West Africa; but to the contrary, we find that certain delegations expressed the view that this communiqué came as a disagreeable shock.

Furthermore, Mr. President, it is also clear from a reading of these pages that the communiqué did not go far in the United Nations organs, as far as its influence was concerned: the Committee on South West Africa out-voted the suggestion that this communiqué should be entered into the documentation of the Committee as an official document, and the communiqué, vastly important as it was, was not included in the documentation which was sent forward for consideration by the Committee on Colonialism, and was not included in the documentation available to the General Assembly when it reached its decision and its particular resolution 1085 of that year. I think I need say nothing further in regard to this incident.

Now, Mr. President, the influence of the statements of petitioners has obviously not been confined to the committees of the General Assembly—the Committee on South West Africa or the Fourth Committee. The General Assembly itself has consistently, for many years, adopted, endorsed and acted upon reports made and draft resolutions forwarded by the various committees which dealt with South West Africa and the petitions and verbatim statements of petitioners. In fact, Mr. President, it is officially part of the General Assembly procedure to act as far as possible on these reports and resolutions. In this respect, I wish to refer to resolution 844, during the 9th Session of the General Assembly, 11 October 1954. In this resolution the procedure was adopted which was to govern the examination of conditions in South West Africa, and in Special Rule B, as regards reports, the following appears:

"The General Assembly shall, as a rule, be guided by the observations of the Committee on South West Africa and shall base its conclusions, as far as possible, on the Committee's observations."

In Special Rule D, relating to the procedure with regard to petitions, the following appears:

"The General Assembly shall, as a rule, be guided by the conclusions of the Committee on South West Africa and shall base its

own conclusions, as far as possible, on the conclusions of the Committee."

We have already shown that these reports of the Committee on South West Africa, and the draft resolutions adopted there, were, to a large extent, based on an acceptance of the evidence of the petitioners, and we have quoted some pertinent examples in this regard.

But, Mr. President, it goes even further: the petitioners have even been allowed to take part in the discussions of the committees on draft resolutions. Let us take as an example the discussions in the Fourth Committee of the United Nations, which preceded the adoption of the resolution which ultimately became General Assembly resolution 1702 of the 16th Session—that was the resolution referred to by my learned friend, Mr. de Villiers, yesterday, as containing the broad outline of what is now expected in future. During the 1241st Meeting of the Fourth Committee, some seven petitioners were present when the different draft resolutions before the Fourth Committee were discussed, and they freely expressed their views as to which resolutions suited their purposes best.

So, in paragraph 36 of that meeting's record, we find Mr. Kerina, on behalf of SWAPO, saying that the petitioners had asked for a further hearing in order to state their views on the draft resolutions before the Committee.

In paragraph 37, he stated:

"Two of the draft resolutions were diametrically opposed to the desires and interests of those people. In their view they were clearly designed to delay and sabotage the process of decolonization in South West Africa."

I might state that the two draft resolutions opposed by Mr. Kerina were introduced by the United Kingdom and by Sweden and that both these draft resolutions were rejected at the final vote, after the petitioners had had their say.

In paragraph 40, Mr. Kerina continued:

"The petitioners regard draft Resolution A/C. 4/L. 714, [that is the one which was eventually adopted] as the only acceptable compromise with their own proposals."

Mr. Nujoma, in paragraph 52, is recorded as having stated: "The petitioners fully supported the . . . draft Resolution A/C. 4/L. 714."

In paragraph 53, Mr. Fortune, on behalf of SWAPO, associated himself with the statements made by the other petitioners concerning the draft resolutions.

Paragraph 55 refers to the Reverend Markus Kooper, who said:

"Draft Resolutions A/C. 4/L. 712 and A/C. 4/L. 713 Rev. 2 [those were the two resolutions proposed by the United Kingdom and Sweden] had their origins in that suggestion by South Africa [that was a suggestion that there was a possibility of partition]. Although the petitioners appreciated the motives of the sponsors, they could not ask the Committee to support those proposals which, in his view, should be withdrawn. The petitioners were not fully satisfied even with draft Resolution A/C. 4/L. 714, which did not meet their desires completely, but they could at least see that it would have some effect and meaning."

And so it followed on. There were a number of other petitioners who expressed views in similar vein.

The list, Mr. President, is not isolated; often in the Fourth Committee, when the draft resolution is adopted which goes to the General Assembly, supplementary hearings of petitioners are granted and they express their views. They were present during the deliberations of the Fourth Committee on the resolutions when resolution 1805 of the Seventeenth Session was adopted, as well as when resolution 1899 of the Eighteenth Session was adopted. I need not give further examples along that line. Just returning to one of the examples which I have given, which illustrates the procedure that was followed in the Fourth Committee before resolution 1702 was adopted, we find that before the petitioners had expressed these views, to which I have referred, Mr. Salamanca of Bolivia had stated he assumed that: "the petitioners had been consulted by the sponsors and their views taken into account." That was on page 534 of the record, referred to, of the same meeting. At page 547, Mr. Achkar of Guinea provided the answer, when he said:

"... The sponsors of draft resolution A/C. 4/L. 714 had taken into account the wishes of the people of South West Africa as expressed by the petitioners..." (4th Committee Meeting 1241.)

Now, turning to a slightly different point, it will appear from this last quotation that the wishes of petitioners were regarded as truly representative of the indigenous population of South West Africa. This erroneous assumption has often been made, as the following illustrative examples of statements in the Fourth Committee will show. Mr. Quaison-Sackey of Ghana, during the Fifteenth Session of the General Assembly, before the Fourth Committee, its 1053rd Meeting, page 318, said it was clear to his delegation:

"that the petitioners definitely represented the territory; thanks to their help and to that of the Reverend Michael Scott, his delegation had obtained the information which it required."

Mr. Diallo of Mali, during the Seventeenth Session, said before the Fourth Committee at its 1385th Meeting, page 372:

"The petitions included in the reports and the statements made before the Committee by the genuine representatives of the people of South West Africa furnished eloquent testimony of the violation of the Mandate by the South African Government, etc."

The same assumption even appears from resolutions of the General Assembly itself. Thus resolution 1056 of the Eleventh Session of 26 February 1957 explicitly reads as follows:

"The General Assembly, Having granted hearings to Mr. Mburumba Kerina Getzen, a petitioner from South West Africa, and the Reverend Michael Scott, a petitioner on behalf of African inhabitants of South West Africa,

1. *Takes note* of the statements of the petitioners on behalf of African inhabitants of the Territory of South West Africa under the administration of the Union of South Africa;

2. *Decides* to transmit to the Committee on South West Africa the statements of the petitioners for study and consideration."

In our submission, Mr. President, Mr. Dahlmann's evidence has clearly shown that the notion that the views and wishes of the petitioners represent those of the indigenous population of the Territory is without

substance. It will be recalled that Mr. Dahlmann testified that the first non-White political parties in South West Africa were formed mainly as a result of instigation by petitioners, notably Mr. Kerina, from overseas. That was in the verbatim record of 8 October 1965, XI, at page 459. He also testified that apart from the Chief's Council, today represented through the political front of NUDO, which is a purely Herero organization, the established political parties enjoy very little support amongst the indigenous population. That was in the same verbatim, on pages 470, *et seq.* and especially on page 477. He also testified that some petitions sent to the United Nations from the Territory were actually drafted by petitioners overseas (that is from pp. 464-465 of the same verbatim) and that the petitioners overseas are actually continuing with their campaign without much reference to their associates in South West Africa. To quote his own words, on page 478 of the same verbatim:

"They [that is the petitioners overseas] are issuing often policy statements which are unknown in South West Africa. One example, as I have already mentioned, is the Kerina petition to the United Nations about the political programme of NUDO. Kerina is in favour of one unit and Kapuu, the party president in South West Africa, stated that he is in favour of a federation, in favour of regionalism, and he said that his party knew nothing about this petition and he had not received a copy."

The question then arises how did the petitioners overseas come to be regarded as representatives of the whole indigenous population of South West Africa or at least as representative of the majority of them. It is not difficult to find the answer. Before 1959, the petitioners simply said that they were representing the indigenous population of South West Africa and they were believed. After 1959, one will notice on a reference to the records of the hearings that were granted to them and the petitions transmitted by them, that almost invariably they referred to themselves and were referred to as representatives of political parties. That, after all, Mr. President, was one of the main reasons why Mr. Kerina in 1959 had written to associates in the Territory to create political parties so that he would be able to represent himself as a representative of those parties at the United Nations, and he had said that that would strengthen his hand and afford him power at the United Nations.

Now, Mr. Dahlmann has shown in his evidence that the number of members claimed by these organizations is unreliable and incorrect. To refer to but one example: the Secretary-General of UNIPP—the Court will recall that Mr. Dahlmann gave evidence that UNIPP existed only on paper and was totally unknown in South West Africa—this Secretary-General, Isilima Sokugoina, claimed in a petition to the United Nations that his party represented 245,000 people. Reference to this is to be found at XI, page 500. And the petition concerned, which makes interesting reading also as far as the political objectives of this particular party is concerned, was referred to, which is document A/AC. 109/Pet. 279, Add. 3, page 2.

Moreover, Mr. President, when petitioners were asked, during hearings of the various committees, for information on the organizations represented by them, it often happened that a point of order was raised or that the Chairman stated that such questions should not be asked. By way of illustration, I quote just one excerpt from the records of

the Committee on South West Africa at its 133rd Meeting, pages 4-5. It states:

"Mr. Boeg of Denmark asked for information of the various organizations in South West Africa, in particular on the Ovamboland People's Organization and the South West Africa National Congress." (A/AC. 73/SR. 133.)

Mr. Kozonguizi started explaining and I am skipping that portion where he started explaining the position and then the record continues as follows:

"*Mr. Hailemariam (Ethiopia)*, speaking on a point of order, said that in his opinion representatives should abstain from asking petitioners to reveal information which might be prejudicial to them or injurious to their political organizations.

The Chairman endorsed the statement of the Ethiopian representative. He recalled that he had several times issued the same warning. He hoped that the petitioners would take due account of it."

In view of these facts, Mr. President, it is not surprising that the entirely erroneous notion was established that the petitioners are truly representative of the indigenous population of the Territory.

Finally, Mr. President, I am shortly reverting just to a few examples of General Assembly resolutions themselves. From the portion of resolution 1056 of the 11th Session which I have quoted a few moments ago to show that this notion exists, it would have been observed that note was taken of the statements of petitioners in this resolution. As a matter of fact, every year since 1955 the General Assembly has passed resolutions taking note of the statements of petitioners. I might state in passing that all the resolutions pertaining to South West Africa relied upon by Applicants for the substantiation of their alleged norm and/or standards were adopted after this date. The extent to which the statements of petitioners are used as a basis for specific resolutions of the General Assembly sometimes even appears from the text of the resolution itself. The following are just a few examples—the preamble of resolution 1360 of the 14th Session, which is one of the resolutions relied on by Applicants in their Reply, IV, pages 502-503, contains the following paragraph:

"*The General Assembly* having also heard the statements of petitioners which further corroborate the conclusions and opinions formed by the Committee on South West Africa concerning political, social, economic and educational conditions prevailing in the Territory,"

and then the resolution goes on from there. Resolution 1567 (XV) of the 15th Session referred in the preamble to the following:

"*Taking into account* the additional information contained in the report of the Committee on South West Africa and in oral and written petitions from inhabitants of the Territory."

Resolution 1703 of the 16th Session is also explicit; one of the paragraphs of the preamble reads:

"*Noting with the gravest concern*, as evidenced in the petitions, the unswerving determination of the Mandatory Power to intensify the application of its apartheid policy and of other policies contrary to the principles and purposes of the Mandate, and that any

attempts to protest or resist those policies have been met only by the dismissal from employment, arrest, deportation and exile of the persons, leaders and members of African political organizations concerned."

Resolution 1805 of the 17th Session, the preamble, once more referred to certain previous resolutions including 1702, which I have briefly discussed; it also referred to the reports of two Special Committees and continued—"bearing in mind the findings, conclusions and recommendations set forth in these two reports and having heard the petitioners, expressing its deep concern", etc.

Mr. President, this concludes our exposition of the background against which the adoption of the resolutions on which Applicants rely, must be viewed. It is possible to give many more instances of the erroneous premises and factual distortions contained in the attacks upon Respondent, but there is no need for us to try to be exhaustive. We have said enough in our submission to justify the following conclusions:

Firstly, that the allegations of petitioners to the United Nations on matters of fundamental importance regarding Respondent's policies and actions have been patently false.

Secondly, that such allegations have nevertheless been repeated consistently and systematically, and have been unfortunately accepted by a large number of delegations and by committees and organs of the United Nations.

Thirdly, that the attitudes of a large number of delegations—especially from the independent African States but also from certain others acting in this respect as their allies—have, we very much regret to say, been influenced detrimentally by the allegations of petitioners and have shown in the result also a taint of prejudice, emotion, distortion and ulterior political motivation, as far as Respondent's policies and actions are concerned.

Fourthly, that the factors mentioned clearly played a major role in the adoption of United Nations resolutions condemning Respondent's policies and actions.

Fifthly, that in the result this Court could not be safely guided by such resolutions for any purpose, let alone consider itself bound by them as processes whereby a norm and/or binding standards were created or whereby binding judgments were pronounced regarding violations of legal obligations.

This, Mr. President, brings me to the end of my address. There is still one aspect relating to the resolutions which must be dealt with and, with the President's permission, my colleague, Dr. van Heerden, will address the Court on that aspect.

28. ADDRESS BY MR. VAN HEERDEN

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARINGS OF 28 AND 29 OCTOBER 1965

Mr. President, my colleagues have already demonstrated that for several reasons stated by them no weight can be attached by this Court to the resolutions upon which Applicants rely, within the context of a norm or standards contention.

I turn now to yet another reason why, in our respectful submission, Applicants' contention, as based on the resolutions in question, cannot possibly succeed. This reason can be stated very simply, namely that the resolutions did not even purport to attempt to evolve or apply a norm and/or standards of non-separation as defined by Applicants.

The resolutions of the General Assembly relied upon by Applicants have already been identified by my learned senior Mr. de Villiers; they are referred to in the Reply, IV, page 502, footnote 4, and were again mentioned in the verbatim record of 18 May, IX. As already stated, nine of these resolutions applied to South West Africa and 16 to South Africa itself. These resolutions, Mr. President, were all General Assembly resolutions except for three Security Council resolutions which were concerned with South Africa itself.

Now, it is convenient to consider at the outset the grounds on which Applicants allege that the resolutions were concerned with the standards and/or norm. These grounds are to be found in the verbatim record of 18 May, IX, page 332, where Applicants said:

"The essential element linking all relevant reports, resolutions, communications, statements and conclusions of the United Nations bodies, including the specialized agencies directly concerned, is repudiation and condemnation of apartheid. This there is no room to doubt or dispute."

But a little bit further on at the same page the Applicants also said:

"Inasmuch as the purpose of citing such resolutions was to demonstrate the judgment of the organized international community with respect to separation or discrimination on the grounds of race or membership in a group, it is immaterial to the purposes of the present discussion that the resolutions apply to apartheid both as practised in the Republic of South Africa and in the Territory of South West Africa, as the pleadings make crystal clear and as is conceded by the Respondent. The fundamental policy and practices in force in the Territory and in the Republic are essentially the same in all respects relevant here."

Mr. President, there are obviously two key passages here: in this instance, Applicants say that the resolutions "[stand] in repudiation and condemnation of apartheid"; then, they say that they cite these resolutions for the purpose of demonstrating "the judgment of the organized international community" and not with respect to apartheid but with respect to "separation or discrimination on the grounds of race or membership in a group". One could here use Applicants' more usual phrase,

namely: the judgment of organized international communities with respect to the allotment of rights, duties, etc., on the basis of membership in a group rather than on the basis of individual merit. It will be seen, Mr. President, that Applicants here equate apartheid with separation or discrimination on the basis of membership in a group.

On analysis, the argument appears to amount to this: if a norm and/or standards as suggested by Applicants were in existence, apartheid would be in conflict therewith. The resolutions condemn apartheid, therefore, the resolutions must have been based on the notion of the existence and application of a suggested norm and/or standard. Mr. President, it will be obvious that such an argument involves a complete *non sequitur*.

Most of the resolutions indeed spoke adversely of, or even condemned, apartheid by name or Respondent's policies in general. But surely the important question is, what did the authors and supporters of the resolutions conceive to be the features of apartheid which deserved their condemnation? Did they conceive of apartheid merely as a policy which involves separation or differentiation on the basis of group or race, and regard that feature as being obnoxious in itself and requiring their condemnation, or did they think of apartheid as a policy which unfairly discriminates against a particular group for the benefit of another? It would be obvious that if the authors and supporters of the resolutions viewed apartheid, separate development, in this latter sense, that is, as involving unfair discrimination, then these resolutions cannot possibly assist Applicants' case regarding the standards or norm, and, Mr. President, it is of course purely for the purposes of a norm or standards contention that Applicants rely on these resolutions.

It is our purpose in this review to demonstrate that apartheid was condemned in these resolutions exactly on the basis of a conception that apartheid was an oppressive system, discriminating against some groups for the benefit of others, and not on the basis of a conception that any differential allotment of rights, duties, obligations, etc., on the basis of membership in a group rather than on the basis of individual merit, need, capacity, etc., must be regarded as a *per se* violation of international law and/or of standards intended to be laid down as binding by the United Nations.

We propose dealing first with the resolutions pertaining to South West Africa, and thereafter with those pertaining to South Africa itself. The former nine resolutions were all adopted during the 14th, 15th, 16th, 17th and 18th Sessions of the General Assembly—that was during the period 1959-1963—and they were all based on reports of the Fourth Committee. Since no or very little discussion took place in the General Assembly prior to the adoption of these resolutions, and since the resolutions were identical with the relevant draft resolutions which were adopted in the Fourth Committee, it is to the debates in the Fourth Committee that one has to look in order to ascertain the views of delegates who voted for the draft resolutions. But before proceeding to deal with the specific resolutions relied upon by Applicants, it is convenient to point to the influence of the annual reports of the Committee on South West Africa on the debates in the Fourth Committee. My colleagues have already shown that these reports were to a large extent influenced by written petitions and by oral statements of petitioners who were granted hearings by the Committee on South West Africa. These reports were annually submitted to the Fourth Committee, and, together with state-

ments made by petitioners who were granted additional oral hearings by the Fourth Committee served as the basis for the discussion that took place in that Committee. In other words, the basis for the discussion and the debates in the Fourth Committee was statements by petitioners and the reports of the Committee on South West Africa.

In view of the influence of the reports on these debates, from which we shall cite a number of extracts, it is important to observe that while the Committee on South West Africa condemned Respondent's policies, it did not do so on the basis of the existence of any norm or standard of non-separation or non-discrimination, but purely because the Committee viewed apartheid or separate development as a policy designed to oppress and subjugate the indigenous inhabitants of the Territory. We shall at a later stage, when dealing with the so-called question of legal action against South Africa, illustrate this thesis by citing extracts from the Committee's reports during the period 1954-1959. The Court will probably know that prior to the institution of the present action against Respondent studies were undertaken by organs of the United Nations relative to possible legal action which could be instituted against Respondent; it is when dealing with these studies that we shall cite extracts from the reports for the period 1954-1959.

For the present, however, our point can be sufficiently demonstrated by quoting some random examples of the views of the Committee contained in the 1960 and 1961 annual reports and the special report for 1961. I quote first from the 1960 report—the reference is *General Assembly, Official Records, 15th Session, Supplement No. 12 (A/4464)*. In this report, in its concluding remarks, the Committee stated:

“The Mandatory Power has continued to administer the Territory on the basis of a policy of apartheid and ‘White supremacy’ which is contrary to the Mandate, the Charter of the United Nations, the Universal Declaration of Human Rights, the advisory opinions of the International Court of Justice and the resolutions of the General Assembly.

For several years, particularly since the transfer of direct control over the administration of ‘Natives’ and ‘Native’ areas in the Territory to the Union Department of Native Affairs, the Committee has become increasingly concerned at the trend of the administration which subordinates the well-being and paramount interests of the ‘Native’ and ‘Coloured’ population to those of ‘Europeans’.” (P. 56.)

Here there are also two key passages. In the first instance the policy of apartheid is equated with the policy of White supremacy, and then it is said that the Administration subordinates the well-being and paramount interests of the Native and Coloured population to those of the Europeans.

In the 1961 special report the Committee, with reference to the economic life of the Territory, concluded that—

“the Native peoples have no share in the profits of trade, commerce and industry, or in the utilization or exploitation of their agricultural, fishing or rich mineral resources, their only role being as a cheap source of labour for the benefit of the Whites, with no right to own land, which has been alienated to the extent that only 26 per cent. of the total land area of the Territory has been reserved for

the Non-European majority. Neither have the Natives the right to practise the professions or to engage in general trade, commerce and industry . . .". (*General Assembly, Official Records, 16th Session, Supplement No. 12A (A/4926)*, pp. 20-21.)

In the same report, and as regards the field of education, the Committee stated:

"Under the present system of Bantu education, Natives are restricted to a rudimentary system of schooling and training designed to confine them to menial occupations in order to keep them in a state of subservience to the White minority." (P. 21.)

Here it is said that in the economic field apartheid ensures that the Natives have no share whatsoever in the resources of the Territory, their only role being one of a source of cheap labour, and then it is said that in the educational field apartheid ensures that this economic status quo is perpetuated—clearly allegations of suppression and oppression of the Native inhabitants of the Territory.

In the 1961 annual report the Committee, with reference to the special report, stated that two basic policies were consistently applied to the Territory; firstly, a policy of annexation, and secondly—

"the ruthless application of the policy of apartheid in all aspects of life of the Native inhabitants whereby their interests and well-being, which are paramount under the terms of the Mandate and the International Trusteeship System, have been completely subordinated to those of the White minority, thus depriving them of basic human rights and fundamental freedoms . . .". (*General Assembly, Official Records, 16th Session, Supplement No. 12 (A/4957)*, p. 30.)

There we have the same theme of subordination of the indigenous inhabitants to the interests of the White inhabitants.

In view of the nature of these and other statements and conclusions of the Committee on South West Africa, and of the evidence of petitioners, it was only to be expected that in the ensuing debates in the Fourth Committee condemnation of Respondent's policies was based on the alleged oppressive nature; that this was indeed the case I shall now proceed to show.

It will be realized that it is, of course, not feasible to quote the views of every delegate to the Fourth Committee who voted for the draft resolutions in question, but the passages which we shall cite, in our submission, provide sufficient examples to demonstrate that when speaking of apartheid or of Respondent's policies in general, delegates thought of the policy designed to oppress, and in fact oppressing, the non-White inhabitants of the Territory, and not of the policy involving mere differentiation or separation or discrimination on the basis of group or race.

We do not suggest that this appears positively from each and every statement to be found in the relative debates. Some statements, Mr. President, are colourless in the sense that they do not explicitly reveal why the speakers concerned spoke adversely of Respondent's policies. What we can say, however, is that we did not find a single statement which unequivocally showed that the speaker condemned Respondent's policies as being objectionable for the mere reason of allotment of rights, duties, on the basis of membership in a group, rather than on the basis of

individual merit, etc. We can also say that at least the majority of speakers in the debates positively based the opposition to such policies on the alleged oppressive nature.

We have already demonstrated the factual unreliability and inaccuracy of the sources upon which the statements of such speakers rested, as well as the lack of substance in the charges of oppression. In view, however, of Applicants' abandonment of the charges of oppression in these proceedings, and their acceptance of Respondent's exposition of the facts, it is unnecessary to pursue the aspect of factual inaccuracy in respect of each and every one of the statements made in the debates. Nor is it our concern for purpose of argument now being advanced. Indeed, it suffices to say that absence of further comment on the truth, or otherwise, of the statements to be cited is not to be construed as a concession of the correctness thereof.

It may also be pointed out that in the quotations to follow there may be some overlapping with the substance of extracts already stated for other purposes. This is regrettably unavoidable and we have endeavoured to reduce that to a minimum. It is a fact, Mr. President, that quotations made for other purposes have already, to a large extent, illustrated the point with which I am concerned in this argument. Consequently I need not cite so many passages as otherwise might have been necessary.

I turn now to the 14th Session of the General Assembly. During this session only one resolution pertaining to South West Africa was adopted: that was resolution No. 1360, the reference being: *General Assembly, Official Records, 14th Session, Supplement No. 16 A/4354*. Whilst the operative part of this resolution did not contain a condemnation of Respondent's policies, the preamble noted—

“... that the administration of the Territory in recent years has been conducted increasingly in a manner contrary to the Mandate, the Charter of the United Nations, the Universal Declaration of Human Rights...”.

And as has already been pointed out by my colleague, Mr. van Rooyen, the preamble also referred to—

“... the statements of petitioners which further corroborate the conclusions and opinions formed by the Committee on South West Africa concerning political, social, economic and educational conditions prevailing in the Territory”.

Reference to the debates in the Fourth Committee immediately makes it clear why it was thought that the administration of the Territory was conducted in a manner contrary to the Mandate, etc.

In the first place, Mr. President, I refer to a statement made in the 921st Meeting of the Fourth Committee, by Mr. Samsuri of Albania. This is a representative statement containing a number of elements echoed by other delegates. This speaker—

“... stated that the Union Government, flagrantly violating the principles of the United Nations Charter, had virtually transformed the Territory of South West Africa into a colony and reduced its African population to a state of slavery. The report of the Committee on South West Africa and the statements made by petitioners showed that the economic situation of the African inhabitants was steadily deteriorating, that they were looked upon by the Adminis-

tration as nothing more than a source of low-cost labour and that they were given no opportunity to develop skills which would enable them to rise above their present position. Whole communities of Africans were being forcibly removed from their traditional lands in order to make way for European settlers. Educational and health conditions among the African population were deplorable. The insincerity of the Union Government's efforts to convince world public opinion that the policy of 'apartheid' was consistent with respect for human dignity and human rights had been clearly demonstrated by the statements of the petitioners . . ."

At the same meeting, Mr. Kudryavtsev (Byelorussian S.S.R.) said that the Respondent—

" . . . practised a policy of racial discrimination and segregation which according to the Committee on South West Africa had been not only continued but intensified".

In support of this statement, he echoed that—

" . . . people were driven from their land and their homes, and families were separated, in order that the best land might be taken from the indigenous population and handed over to the Europeans . . . that Natives could be compelled to work for Europeans in conditions of virtual serfdom. They were denied the most elementary human rights."

Mr. President, this was from the 14th Session of the *Fourth Committee*, at page 204.

The same theme was repeated by other delegates, but I think that these quotations from the particular debate are sufficient to illustrate our point, namely that the theme was one of confining the Natives to poverty, of confining them to slavery, of forcibly expelling them from the lands to make place for European settlers. The same theme recurred with absolute monotonous regularity, as reference to our list marked "J"¹ will show.

Mr. President, I may say here that I shall refer to a number of other lists, all of which have been handed in to the Registrar and a copy has been handed to the Agent for the Applicants. I should like, however, to add two references to the list marked "J". I had intended to read these quotations, but did not find it necessary to do so. They are:

Mr. Rodriguez Fabregat (Uruguay): 922nd Meeting (pp. 211-212).

Mr. Abikusno (Indonesia): 920th Meeting (p. 201).

Mr. President, before the adjournment I cited some extracts from debates in the *Fourth Committee* during the Fourteenth Session of the General Assembly. I also referred to further references set out in our list marked "J".

But many more speeches could have been referred to: throughout

¹ *Fourth Committee:*

U Tin Maung (Burma): 916th Meeting (p. 178).

Mr. Kim Khoan (Cambodia): 918th Meeting (p. 186).

Mr. Shumada (Ukrainian S.S.R.): 918th Meeting (p. 189).

Mr. Caba (Guinea): 921st Meeting (p. 203).

Mr. Sidi Baba (Morocco): 916th Meeting (p. 177).

Mr. Adam (Ghana): 923rd Meeting (p. 216).

Mr. Grinberg (Bulgaria): 931st Meeting (p. 252).

these debates, as also in the debates of later sessions, statements made by delegates who voted for the draft resolutions left no doubt that they perceived apartheid to be an arbitrary and even brutal policy, designed to suppress and oppress the Native population and to benefit the White group.

I come, then, to the 15th Session of the General Assembly. During this session, four resolutions pertaining to South West Africa were adopted. One of these, No. 1567, dealt with a specific occurrence, that is, the riot in the Windhoek Native Area in December 1959; whilst another, No. 1565 (p. 31), was concerned with—

“Legal action to ensure the fulfilment of the obligations assumed by the Union of South Africa in respect of the Territory of South West Africa.”

A third resolution, No. 1596, related to Respondent's refusal to allow the Committee on South West Africa to enter the Territory; and the fourth one, No. 1568, was concerned more generally with the so-called question of South West Africa.

Resolution No. 1596 spoke in its preamble of the application to the Territory of “tyrannical policies and practices such as apartheid”. Resolution No. 1568 deprecated “the application, in the Territory of South West Africa, of the policy of apartheid”. In the first paragraph of the operative part of this resolution, reference was made to—

“... a policy which infringes the fundamental rights and freedoms of the indigenous inhabitants of South West Africa and imposes upon them disabilities of various kinds, hindering their political, economic and social advancement”.

It will be seen that the wording of these two resolutions already indicates clearly that disapproval of Respondent's policies was based on the notion that they oppressed the indigenous inhabitants. After all, Mr. President, the resolutions spoke explicitly of tyrannical policies, of disabilities imposed upon the indigenous population, and of infringement of the fundamental rights. At any rate, the debates in the Fourth Committee confirm this entirely. I shall cite only three passages to prove this point.

At the 1058th Meeting of the Fourth Committee Mr. Kuchava, U.S.S.R., said:

“In flagrant violation of the principles of the Charter, the General Assembly resolutions and the international commitments entered into by the Union of South Africa, the South African Government had transformed the Territory into a colony where the indigenous inhabitants had no rights, were deprived of the more fertile land they possessed, herded into reservations, subjected to forced labour, slavery and torture, and reduced to a state of wretchedness. The reports of the Committee on South West Africa, statements by petitioners, and articles in the Press, all testified to the shameless exploitation of an entire people by a minority of European settlers who were carrying out the ‘apartheid’ policy of the Union Government.”

The reference here is Fourth Committee, 15th Session, page 339.

At the 1062nd Meeting of the Committee, Mr. Maghera (Romania) at page 365, speaking of the policy of apartheid, said that—

"... under that policy the welfare and interests of the 'Native' and 'Coloured' populations were completely subordinated to the policy of 'white supremacy'. The examples of the implementation of that policy cited by the petitioners and in the report had filled the members of the Fourth Committee with indignation. Not only were the indigenous inhabitants confined to reserves deprived of all political rights and reduced to a condition of virtual slavery, not only were unarmed Africans at the mercy of armed 'Europeans', but the Administration had introduced Bantu education, which consisted in training Africans to resign themselves to the status of beasts of burden."

At the same meeting Mr. Lamani, Albania, virtually repeated the statement made by his colleague during the previous year—that was at page 367 of the relevant debates—and Mr. El Amin (Sudan), repeated portions of the statements made by Mr. Maghera of Romania, which I have just cited. As a matter of fact, Mr. President, the similarity in the language used by the speakers is truly remarkable, for Mr. El Amin of the Sudan also said that the Natives were prevented from resisting "apartheid" "under which their status would be that of animals". This is at page 369 of the relevant report.

Finally, Mr. President, I cite from a speech by U Tin Maung, Burma, at the 1116th Meeting of the Fourth Committee, page 101:

"What that policy (i.e., apartheid) amounted to was domination by the 'Whites' over the indigenous population in the economic, social and political fields."

There are many other speeches, Mr. President, which repeated this very same thing. We have made reference to some in our list marked "K"¹.

There will be found examples of similar characterizations of apartheid, which clearly show that the speakers concerned viewed the policy of apartheid as one of arbitrary and tyrannical oppression of the Native groups.

To the references in our list marked "K" I should like to add a few others, which I had first of all intended to read out to the Court. First, *Mr. Kudryavtsev*, Byelorussian S.S.R., at the 1115th Meeting, page 91, and *Mr. Gassou*, Togo, at the 1076th Meeting, pages 456-457.

Only one resolution pertaining to South West Africa was adopted at

¹ *Fourth Committee:*

- Mr. Kestler* (Guatemala): 1058th Meeting, p. 340.
- Mr. Thapa* (Nepal): 1059th Meeting, p. 343.
- Mr. Kizia* (Ukrainian S.S.R.): 1059th Meeting, p. 344.
- Mr. Marcos* (Philippines): 1060th Meeting, p. 349.
- Mr. Quaison-Sackey* (Ghana): 1060th Meeting, p. 348.
- Mr. Zahir* (Malaya): 1060th Meeting, p. 352.
- Mr. Lamani* (Albania): 1062nd Meeting, p. 367.
- Mr. Diallo Alpha* (Guinea): 1061st Meeting, p. 358.
- Mr. Wahab* (U.A.R.): 1062nd Meeting, pp. 361-362.
- Mr. Sophianu* (Indonesia): 1062nd Meeting, p. 366.
- Mr. Carpio* (Philippines): 1050th Meeting, p. 301.
- Mr. Loric* (Hungary): 1062nd Meeting, p. 364.
- Mr. Bouziri* (Tunisia): 1073rd Meeting, p. 436.
- Mr. Lapin* (U.S.S.R.): 1101st Meeting, p. 18.
- Mr. Carpio* (Philippines): 1115th Meeting, pp. 93-94.

the 16th Session of the General Assembly. The preamble of the resolution, that was No. 1702 (XVI), spoke of—

“... the progressive deterioration of the situation in South West Africa as a result of the ruthless intensification of the policy of apartheid”.

In its operative part it was decided to establish a United Nations Special Committee for South West Africa whose task it would be to achieve the repeal of laws and regulations which “establish and maintain the intolerable system of apartheid”. The reference here is to *General Assembly, Official Records, 16th Session, Volume I, Supplement No. 17, A/5100, page 40*. Reference to the debates in the Fourth Committee shows that apartheid was still viewed as before, that is, as an oppressive system.

Mr. President, as the general tenor, from year to year, was the same, the only difference being an increase in intensity, I shall from now onwards make the actual quotations shorter and leave more to references in the record.

At the 1233rd Meeting of the Committee, Mr. Hajro of Albania stated at page 490:

“Under the apartheid system the Africans were prisoners in their own country and were deprived of all human rights and of their fundamental freedoms. Treated as inferiors and as slaves, their sole function was to serve the Whites.”

This is from the Fourth Committee records, 16th Session, page 490.

Mr. Khosla of India, at the 1232nd Meeting of the Committee, at page 481, said:

“There was ample evidence to show that the Mandated Territory had been treated as a domain reserved for exclusive and merciless exploitation by the Afrikaners. The indigenous inhabitants were denied all basic human rights and fundamental freedoms, kept in subjection by force, made to live in poverty and denied education.”

Finally, a reference to Mr. Carpio of the Philippines, at the 1225th Meeting of the Committee, pages 428-429 follows:

“The situation was aggravated by the fact that South Africa had, from the start of its administration, practised a policy of ‘apartheid’, which was one of the vilest forms of racial segregation and resulted in the interests of the indigenous population being entirely subordinated to those of the minority of settlers . . .”

There is still one excerpt which I should like to quote and that is from a speech by Mr. O’Sullivan of Ireland at the 1236th Meeting of the Committee, page 518:

“Instead of preparing the Territory for independence, instead of promoting to the utmost the material and moral well-being and the social progress of the inhabitants as required by the terms of the Mandate, the South African Government had enforced a series of measures designed to maintain the indigenous inhabitants in a rudimentary state of civilization, to dispossess them of their land and move them forcibly to Native reserves, to organize the cultivation of former Native land by South African and other white settlers and generally to establish a situation leading up to the annexation of the Mandated Territory.”

Here we find, in the extracts which I have quoted, the same basic theme repeated over and over. Apartheid means the deliberate oppression of the non-Whites for the benefit of the White group.

Further references are given in the list marked "L"¹.

Coming to the 17th Session of the General Assembly—during this Session the Assembly adopted resolution 1805 (XVII). The reference to this is *General Assembly, Official Records, 17th Session, Supplement No. 17, A/5217*.

This resolution did not in so many words condemn apartheid, or Respondent's policies generally, but referred back to previous resolutions, and, in particular, to resolution 1702 (XVI), with which I have just dealt, which was adopted during the 16th Session. In its operative part the resolution condemned—

"the continued refusal of the Government of South Africa to cooperate with the United Nations in the implementation of resolution 1702 (XVI) as well as other resolutions concerning South West Africa";

and since the latter resolution requested Respondent to assist in repealing all laws which established the system of apartheid, the resolution under discussion by implication condemned the application of a policy of apartheid or separate development to the Territory.

In the preamble of this resolution concern was expressed "that the continuance of the critical situation in South West Africa constitutes a serious threat to international peace and security". It will be recalled that Applicants placed some obscure importance on what they termed:

"... the characterization by the General Assembly of the policy practised in both South West Africa and in the Republic itself not only as a breach of the Charter obligations but also as a threat to international peace".

This is from the verbatim record of 18 May, IX, pages 333-334. This, said Applicants, was:

"Indicative of the seriousness with which member States, with a consensus virtually approaching unanimity, have regarded the development and continuation of the policy of apartheid..." (IX, p. 333.)

As in the case of the other resolutions, the debates in the Fourth Committee clearly show why delegates who voted for the draft resolutions, condemned what they termed apartheid and why they thought that the continuation of Respondent's policies constituted a threat to

¹ *Fourth Committee:*

Mr. Nehlessa (U.S.S.R.): 1232nd Meeting, p. 504.

Mr. Carpio (Philippines): 1218th Meeting, pp. 385-386.

Miss Imru (Ethiopia): 1230th Meeting, p. 469.

Mr. Peiris (Ceylon): 1232nd Meeting, p. 473.

Mr. Szilagyí (Hungary): 1231st Meeting, p. 475.

Mr. Khosla (India): 1232nd Meeting, pp. 481-482.

Mr. Banzar (Mongolia): 1233rd Meeting, p. 487.

Mr. Bingham (U.S.A.): 1233rd Meeting, p. 492.

Mr. Nehlessa (U.S.S.R.): 1234th Meeting, p. 504.

Mr. Ibe (Nigeria): 1236th Meeting, p. 517.

Mr. Brykin (U.S.S.R.): 1235th Meeting, p. 509.

Mr. Santiso Galvez (Guatemala): 1234th Meeting, p. 499.

international peace. We shall show that even to a greater extent than before, the notion was expressed that apartheid was a policy of ruthless suppression and even extermination of the indigenous inhabitants of the Territory.

At the 1379th Meeting of the Committee, Mr. Langlo of Norway was reported to have said:

"Apartheid was the cause of all the evils afflicting South West Africa. As long as that system was maintained, the indigenous inhabitants could not expect equality of educational facilities, since the very purpose of education under apartheid was to prepare the non-white population for permanent inequality."

This is from the records of the Fourth Committee, 17th Session, page 325.

At the 1380th Meeting of the Committee, Mr. Ngando-Black of Cameroon said, *inter alia*, that the indigenous inhabitants—

"... were not allowed to own land ... nor were they allowed to enter the liberal professions, to carry on trade or industry or to establish trade unions ... Under the so-called Bantu education system, the indigenous inhabitants were given only a rudimentary education and training, so that they would remain in subjection to the white minority."

This is from the same source, at page 329.

I have one final quotation and this is taken from a speech by U Tin Maung of Burma at the 1377th Meeting, at page 309:

"The Republic of South Africa was engaged in setting up large Native reserves which would furnish cheap labour for the European farms and industries, and whilst the Africans were being removed to desert areas, white immigrants from Europe were being encouraged to occupy the fertile lands from which the indigenous inhabitants had been expelled."

Further references are given in our list marked "M" ¹.

¹ *Fourth Committee:*

- Mr. Atidépé* (Togo): 1376th Meeting, pp. 300-301.
Mr. Dmyterko (Ukrainian S.S.R.): 1377th Meeting, p. 310.
Mr. Valencia (Ecuador): 1377th Meeting, p. 311.
Mr. Khosla (India): 1378th Meeting, p. 315.
Mr. N'Garabaye (Chad): 1378th Meeting, p. 317.
Mr. Gren (U.S.S.R.): 1378th Meeting, pp. 317-318.
Mr. Purevjal (Mongolia): 1379th Meeting, p. 326.
Mr. Szilagyi (Hungary): 1380th Meeting, p. 333.
Mr. Lamani (Albania): 1380th Meeting, p. 334.
Mr. Shaba (Tanganyika): 1381st Meeting, p. 342.
Mr. Bozovie (Yugoslavia): 1382nd Meeting, p. 353.
Mr. Erebih (Mauritania): 1383rd Meeting, p. 358.
Mr. Delgado (Senegal): 1385th Meeting, p. 371.
Mr. El-Masri (Libya): 1386th Meeting, p. 380.
Mr. Hamdani (Pakistan): 1386th Meeting, p. 381.
Mr. Issa (Niger): 1387th Meeting, pp. 388-389.
Mr. Sato (Central African Republic): 1387th Meeting, p. 389.
Mr. Ipoto (Congo, Leopoldville): 1387th Meeting, p. 392.
Mr. Huidobro (Chile): 1376th Meeting, pp. 299-300.
Mr. Makhawi (Lebanon): 1383rd Meeting, p. 359.
Miss Kamal (Iraq): 1383rd Meeting, p. 364.
Mr. El Awad (Sudan): 1381st Meeting, p. 343.

Finally, Mr. President, we come to the 18th Session of the General Assembly. During this Session, the General Assembly adopted two resolutions pertaining to South West Africa: resolution 1979 (XVIII) was exclusively concerned with Respondent's so-called refusal to cooperate with the United Nations in regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples, and it is consequently not of any immediate interest; resolution 1899 (XVIII) followed much the same lines as resolution 1805 (XVII), adopted at the 17th Session of the General Assembly. In the preamble of this resolution, reference was made to "the continuing deterioration of the situation in South West Africa resulting from the intensification of the policies of apartheid"; in the operative part of the resolution it was decided—

"... to draw the attention of the Security Council to the present critical situation in South West Africa, the continuation of which constitutes a serious threat to international peace and security".

Now, Mr. President, references to the debates in the Fourth Committee show that the notion that Respondent's policies were designed to suppress, subjugate, and even exterminate the indigenous inhabitants had, if anything, grown firmer, and that the condemnation of these policies on such false premises had become even more hysterical. A few examples, selected at random from the debates of the Fourth Committee during the 18th Session, should suffice to prove this point.

First of all, I should like to refer to a statement made by Mr. Chernushchenko of the Byelorussian S.S.R., at the 1462nd Meeting of the Fourth Committee, when he said, *inter alia*:

"In South West Africa, 500,000 Blacks, representing 90 per cent. of the Territory's total population, lived in slavery and were deprived of their most elementary rights. The overwhelming majority of the population had been herded into reserves that were comparable to the fascist concentration camps and were mainly to be found in the dry and least fertile regions in the north of the Territory."

At the 1460th Meeting of the Committee, Mr. Kooli of Tunisia said:

"The principle which guided the Mandatory was that of white supremacy and, through its policies of apartheid, South Africa withheld from the indigenous inhabitants any possibility of social, economic and political progress and any hope of some day being able to exercise their right of self-determination."

At the 1464th Meeting of the Committee, Mrs. Meneses de Albizu Campos of Cuba said, at pages 217-218:

"Thus the policy of genocide was being pursued with greater vigour in South West Africa, while the barbarous policy of apartheid was also being more broadly and more intensely applied."

Finally, I refer to a statement made by Mr. Cabal of Brazil, at the 1457th Meeting of the Committee, at page 151:

"Thus the factual situation was that there was in the Territory of South West Africa an inhuman policy designed to subordinate and exploit the indigenous population . . ."

So, Mr. President, we find here allegations of oppression, of subjection, of treating the Natives as inferior human beings, even serious allegations of genocide—that is what the word or the concept of apartheid conveyed

to these delegates, not a mere allotment of rights, duties, etc., on the basis of membership in a group rather than on individual merit, etc.

The same theme, Mr. President, was expressed in numerous other statements, some of which are referred to on our list marked "N" ¹.

Many more examples of speeches to the same effect as extracts quoted by us could be cited, but we submit that we have shown conclusively that none of the resolutions relied upon by Applicants, at least those pertaining to South West Africa, were based on the application of their standards and/or norms. The delegates who voted for the resolutions, condemned Respondent's policies or apartheid by name, not because they thought that differentiation on the basis of a group or race is impermissible, but upon the basis of acceptance that such policies were designed to, and did in fact, oppress the indigenous inhabitants of the Territory for the benefit of the White group. Hence, Mr. President, the repeated allegations of subjugation of the Natives, of depriving them of all human rights, of confiscating their land, of driving them to the poorest and least fertile areas of the Territory, of deliberate retarding of economic progress, of slavery, of forced labour, of education designed to maintain them in an inferior position as beasts of burden, of lack of assistance in health, agricultural and other matters, even of wholesale murder, slaughter and genocide. If these resolutions were based on the application of any norm or standard, then it was a norm of non-oppression on the basis of group or race. As we have already demonstrated, Applicants have abandoned the case which they originally sought to bring on the basis of such a norm of non-oppression, clearly, Mr. President, because, in the face of the facts presented to the Court by Respondent, Applicants would have been wholly unable to produce the necessary factual proof that would have been required for success on that basis.

It is consequently wholly unnecessary for us to show that Respondent's policies are not in fact in conflict with the norm or standard of non-oppression, neither have we sought to do so, nor will we seek to do so, either by the presentation of evidence or in further argument. But before leaving the resolutions pertaining to South West Africa, it will be convenient to recall that one of Applicants' arguments relating to their standards and/or norm theory was that so-called authoritative interpretations of the United Nations Charter are relevant to an interpretation of the Mandate, and we refer to the verbatim record of 11 June, IX, at pages 583-584, where we summarized this argument. They relied upon the self-same resolutions of the United Nations as establishing—

¹ *Fourth Committee:*

- Mr. Ene* (Romania): 1459th Meeting, p. 169.
Mr. Salifou (Niger): 1458th Meeting, pp. 160-161.
Mr. Budu-Acquah (Ghana): 1458th Meeting, p. 158.
Mr. Dias Gonzalez (Venezuela): 1460th Meeting, pp. 181-182.
Mr. Anoma (Ivory Coast): 1460th Meeting, p. 183.
Mr. Rana (Nepal): 1460th Meeting, pp. 184-185.
Mr. Purevjal (Mongolia): 1460th Meeting, p. 185.
Mr. Kundya (Tanganyika): 1460th Meeting, p. 186.
Mr. Mongono (Nigeria): 1461st Meeting, p. 191.
Mr. Alexeyov (Ukrainian S.S.R.): 1464th Meeting, p. 215.
Mrs. Campos (Cuba): 1464th Meeting, p. 217.
Mr. Lulo (Albania): 1461st Meeting.
Mr. Mankou (Congo, Brazzaville): 1472nd Meeting, p. 258.

"... the incompatibility of Respondent's policy of apartheid with the relevant Charter provisions, in the light of which, as the Applicants contend in their Memorials, the Mandate should be read" (IX, p. 331).

Now, it is true that most of the resolutions in question stated that Respondent's policies were in conflict with the provisions of the Charter—if my recollection is correct, some also referred to a conflict with the Mandate and with the Universal Declaration of Human Rights—but, as we have shown, the resolutions condemned apartheid on the basis that it was a policy designed to oppress the indigenous inhabitants of the Territory. In so far, therefore, as these resolutions could be said to be interpretative of the Charter, they merely established the view that the Charter prohibited oppressive discrimination—and this, of course, does not in the least assist Applicants' contention regarding a norm and/or standards as defined by them.

It is also clear that whenever a delegate contended that Respondent's policies were in conflict with the Charter and/or the Mandate and/or the Universal Declaration of Human Rights, he did so on the basis of regarding Respondent's policies as being oppressive of the Native population and of subjecting their interests to those of the White group. Examples are to be found in a number of the speeches which I have cited to the Court and which are referred to in our various lists. I think it is sufficient to quote three more very typical examples, and then give references to some others.

At the 14th Session of the Fourth Committee, Mr. Caba of Guinea said:

"The Union Government disregarded its obligations as laid down in Article 22 of the Covenant of the League of Nations and in articles 2 to 5 of the Mandate. The people of the Territory were kept in a position of inferiority, denied political rights, education, medical care and freedom of movement, and subjected to forced labour. The country was administered for the benefit of the European citizens, who alone possessed civic rights and enjoyed democratic liberty, freedom of movement, the protection of the law, human dignity and opportunity for economic, social and political development." (Fourth Committee, 14th Session, 921st Meeting, 22 Oct. 1959, p. 203.)

Finally, at the 15th Session of the Committee, Mr. Marcors of the Philippines stated that the policy of apartheid was—

"... based on the concept of 'white supremacy' whereby the rights and well-being of the 'Natives' were completely subordinated to those of the 'whites'. Those policies were a flagrant breach of the sacred trust assumed by the Union Government under the League of Nations Mandate and the United Nations Charter, a violation of human rights and fundamental freedom, an open defiance of the United Nations and a callous disregard of world public opinion." (Fourth Committee, 15th Session, 1060th Meeting, 22 Nov. 1960, p. 349.)

Further examples of the same kind, Mr. President, are set out in our list "O"¹.

¹ *Fourth Committee:*
Mr. Carpio (Phillippines): 15th Session, p. 301.

Mr. President, we submit that there can be no question that these and other speakers thought that apartheid was in conflict with the Mandate or the United Nations Charter because it allotted rights, duties, etc., on the basis of membership in a group. These speakers clearly thought that apartheid was contrary to the Charter because it was an oppressive and, as was also said, a radical and inhuman policy.

We turn now to resolutions pertaining to South Africa itself. As already stated, Applicants rely on 13 such resolutions, which were adopted between the 5th and 17th Sessions of the General Assembly. It is true that most of these resolutions, which were not by any means all adopted by, to use Applicants' phrase, "a majority approaching unanimity", referred adversely to, or even condemned, Respondent's policies and apartheid by name.

Once again, reference to the debates in the *ad hoc* Political Committee, during the 5th to the 8th Sessions, and in the Special Political Committee, during later sessions, where the relevant draft resolutions were adopted, shows that such adverse commentary on Respondent's policies was based on the notion that these policies in South Africa were designed to oppress the Bantu population and not on the application of the standards or norm, for which Applicants contend.

Mr. President, it will be appreciated that it would be a tedious business to illustrate this point by citing extensively from the debates during all the sessions concerned—it would be 13 in all—the more so because the speeches tended to be repetitive to a very high degree. We submit that it suffices to quote a few extracts from the last five sessions of the Special Political Committee, during which criticism of the Respondent's policies became steadily more vehement than before.

First of all, then, I refer to the 14th Session of the General Assembly and during this session of the Special Political Committee, Mr. Talaat of the United Arab Republic, at the 140th Meeting, page 69, said:

"... the concept of racial superiority was quite out of date. The policy of 'apartheid' had been recognized by Church leaders in South Africa as a doctrine of white supremacy and privilege, seeking to maintain Africans in a permanent state of subservience."

One more quote should suffice, Mr. President; I refer to a speech by Mr. Malalasekera of Ceylon, at the 143rd Meeting of the Committee, page 81:

"The Union Government had based its political philosophy on the doctrine that the white race, as the heir to Western Christian civilization, was in duty bound to perpetuate its dominant position despite its numerical inferiority. In pursuance of that policy, the Union Government had taken various measures against the non-whites which were contrary to human dignity, thereby reducing them to the status of second-class citizens."

There we find, Mr. President, the same allegations, the same content, as encountered in the debates in the Fourth Committee, which of course

Mr. Sophiaan (Indonesia): 1062nd Meeting, p. 366.

Mr. Valencia (Ecuador): 17th Session, p. 311.

Mr. Purevjal (Mongolia): 17th Session, p. 326.

Mr. Alexeyev (Ukrainian S.S.R.): 18th Session, p. 215.

related to South West Africa. Further references are given in list "P"¹ to which I should like to add a speech by Mr. Jamil of Iraq, at the 141st Meeting of the Special Political Meeting, page 73.

Next, Mr. President, at the 15th Session Mr. Sobolev of the U.S.S.R. said, at the 240th Meeting of the Special Political Committee, at pages 64 and 65:

"The purpose of apartheid was to preserve a society based on the exploitation of the cheap labour provided by a body of indigenous inhabitants who were denied the exercise of all political and civil rights and freedoms."

Mr. Wojado of Ethiopia stated at the 240th Meeting of the Committee, at pages 66-67:

"Although based on a philosophy which rationalized prejudices and interests, in the final analysis apartheid was a system of exploitation which attempted to guarantee a life of comfort and luxury to the few million Europeans.

Since apartheid was fundamentally a policy to maintain the economic *status quo*, which enabled the minority to live on the labours of the disenfranchised and subjected majority, the resolution emphasized economic measures."

It is seen, Mr. President, that it was clearly stated that the concept of apartheid conveyed to this speaker a policy designed to maintain the economic *status quo*, namely a life of comfort and luxury to the few million Europeans.

Further references, Mr. President, are given in our list marked "Q"².

I turn now to the 16th Session of the General Assembly. First of all, I cite a passage from a speech by Mr. Barnes of Liberia, made at the 272nd Meeting of the Committee, at page 61:

"The Assembly had adopted many resolutions condemning 'apartheid', but the Government of South Africa had always refused to

¹ *Special Political Committee:*

- Mr. Quaison-Sackey* (Ghana): 140th Meeting, p. 68.
Mr. Cassel (Liberia): 141st Meeting, p. 71.
Mr. Petros (Ethiopia): 142nd Meeting, p. 76.
Mr. Shaha (Nepal): 142nd Meeting, p. 78.
Mr. Chlerev (Bulgaria): 143rd Meeting, pp. 83-84.
Mr. Bryaznov (Byelorussian S.S.R.): 146th Meeting, p. 93.

² *Special Political Committee:*

- Mrs. Fekini* (Libya): 233rd Meeting, p. 31.
Mr. Asha (United Arab Republic): 233rd Meeting, pp. 31-32.
Mr. Thiam (Mali): 235th Meeting, p. 37.
U On Sein (Burma): 235th Meeting, p. 38.
Mr. Shaha (Nepal): 235th Meeting, p. 39.
Mr. Offendal (Norway): 236th Meeting, p. 44.
Mr. Collet (Guinea): 238th Meeting, pp. 51-52.
Mr. Loncar (Yugoslavia): 238th Meeting, p. 53.
Mr. Malile (Albania): 239th Meeting, p. 57.
Mr. Bogdan (Romania): 240th Meeting, p. 63.
Mr. Galkin (Byelorussian S.S.R.): 241st Meeting, p. 71.
Mr. Akakpo (Togo): 242nd Meeting, p. 75.

comply with them. Far from revising its evil policy, it was stepping up its systematic repression of the Africans.

What exactly was 'apartheid'? A doctrine of racial superiority, which held that the Africans were mentally inferior to the Whites."

Here, Mr. President, a representative, and, if I may say so, a very distinguished representative, of one of the Applicant States clearly stated what the concept of apartheid conveyed to him; a doctrine of racial superiority which held that the Africans were mentally inferior to the Whites.

At the 279th Meeting of the Committee, at page 94, Mr. Pachachi of Iraq said:

"The South African representative had said that 'apartheid' did not mean inequality and oppression for Africans but simply separate forms of development for two different races with their distinct cultures. That argument was patently false, for anyone could see that the policy of 'apartheid' was so conceived and carried out as to keep the African inhabitants for ever subservient to the whites in all aspects of life, whether political, social or economic, while at the same time it provided the labour on which the whole South African economy was based."

Mr. President, this statement is very important because the speaker said in so many words that apartheid did not mean a policy which merely separated the races and provided separate forms of development for different races with their distinct culture; he said that concept of apartheid was false. In other words, Mr. President, he said that apartheid was not merely what I can term a colourless policy which in effect allotted rights, duties, etc., on the basis of membership in a group rather than on the basis of individual merit, etc. This delegate said that any argument that apartheid was merely such a differential allotment was false. Apartheid was something else. It was, to him, a policy conceived and carried out so as to keep African inhabitants for ever subservient to the Whites. Mr. President, further references are set out in our list marked "R"¹.

I come to the second from last of the sessions of the General Assembly, to which we refer, namely the 17th Session, and I refer first of all to a speech by Mr. Subashinghe of Ceylon, at the 332nd Meeting of the Special Political Committee, at page 27:

"Under the pretext of a threat to the whites, a society had been created in which a small white minority enjoyed riches which did not belong to it and were exploiting a mass of indigenous semi-slave labour. The State had instituted apartheid in order to perpetuate that shameful society."

¹ *Special Political Committee:*

Mr. Quaison-Sackey (Ghana): 269th Meeting, p. 46.

Mr. Tevoedjre (Dahomey): 269th Meeting, pp. 47-48.

Mr. Astaphenko (Byelorussian S.S.R.): 272nd Meeting, pp. 62-63.

Mr. Benabud (Morocco): 247th Meeting, p. 70.

Mr. Hajro (Albania): 281st Meeting, pp. 105-106.

Mr. Juabre y Juarbe (Cuba): 281st Meeting, p. 106.

Mr. Stamboliev (Bulgaria): 281st Meeting, p. 107.

Mr. Gabre Selassie (Ethiopia): 263rd Meeting, pp. 119-120.

Mr. Suleiman (Sudan): 284th Meeting, p. 121.

At the 339th Meeting of the Committee, at page 67, Mr. Gassou of Togo, speaking of apartheid, said that:

“. . . they [referring to the Africans] were deliberately kept in a state of illiteracy and ignorance by the white colonialist rulers and together with South Africans of Indian and Indo-Pakistan origin, lived in constant fear and uncertainty . . . Racist laws reminiscent of those which had been enforced in Germany at the time of the Third Reich were being enacted for the purpose of protecting the privileges of the whites and postponing indefinitely the emancipation of the indigenous inhabitants.”

Mr. President, further references to speeches made during the 17th Session of the General Assembly in the Special Political Committee are given in our list “S”¹.

I may say that in all these speeches the same old theme was repeated, namely one of oppression of the non-White inhabitants of South Africa.

Then, finally, Mr. President, we come to the 18th Session of the General Assembly: Mr. Diallo Telli of Guinea, at the 379th Meeting of the Special Political Committee, at page 9, clearly said what apartheid conveyed to him. He said:

“Apartheid meant blind repression, arbitrary imprisonment and floggings; it meant constant humiliation for the sole crime of not having a white skin. The entire international community was directly concerned by a situation which degraded the coloured man to such an extent, which flouted the United Nations Charter and trampled underfoot the dignity of the African people and of man.”

At the 385th Meeting, at page 39, Mr. Jargalsaikhan of Mongolia said:

“The policy of apartheid was a philosophy of hatred which pervaded every aspect of the country’s administrative, political, social and economic life. It was based on an out-and-out domination of the overwhelming indigenous majority of the population by a small white minority, on persecution and on tyranny.”

Then a last, final, quotation, Mr. President; this is from a speech made by Mr. Mimbang of Cameroon, at the 390th Meeting of the Special Political Committee, at page 70:

“The policy of apartheid which the advocates of segregation described as ‘separate development’, was based on force—enough

¹ *Special Political Committee:*

Mr. Talaat (United Arab Republic): 329th Meeting, pp. 11-12.

Mr. Dosumu-Johnson (Liberia): 329th Meeting, pp. 14-15.

Mr. Kizia (Ukrainian S.S.R.): 331st Meeting, pp. 23-24.

Mr. Mollinedo (Bolivia): 332nd Meeting, p. 29.

Mr. Usher (Ivory Coast): 333rd Meeting, p. 32.

Mr. Mendoza (Guatemala): 333rd Meeting, p. 33.

Mr. Ngyese (Congo, Leopoldville): 334th Meeting, p. 42.

Mr. Jargalsaikhan (Mongolia): 335th Meeting, p. 42.

Mr. Lamani (Albania): 335th Meeting, p. 44.

Mr. Garcia del Solar (Argentina): 335th Meeting, p. 45.

Mr. Gallin-Couathe (Central African Republic): 336th Meeting, p. 47.

Mr. Badra (Tunisia): 337th Meeting, p. 53.

Mr. Nur Elmi (Somalia): 337th Meeting, p. 54.

Mr. Juarbe y Juarbe (Cuba): 337th Meeting, p. 56.

Mr. Verret (Haiti): 337th Meeting, p. 57.

Mr. Sahnoun (Algeria): 339th Meeting, p. 69.

to hold in a state of slavery more than 12 million human beings. The aim was to perpetuate the domination of the Whites over the Blacks."

I'm sorry, Mr. President; there is one further important quotation which I should like to give, from the speech of Mr. Hiram of Ireland at the 423rd Meeting of the Committee, page 254:

"South Africa's racial policy was contrary to natural law. It was degrading not only to its victims but also to those who had conceived it. There was no doubt at all that it deliberately sought to keep the majority of the population of South Africa in a state of perpetual servitude."

Quite clearly then, these speakers whom we have cited expressed the notion that the main aspect of apartheid which deserved their condemnation was that it was a policy which was deliberately designed to keep the non-White inhabitants of South Africa in an inferior position and the White inhabitants in a position of superiority. Further references are given in the list marked "T"¹.

The Court will have observed that the same accusations as in the case of South West Africa were made with respect to South Africa itself: *inter alia*, economic exploitation of the indigenous population, confining them to arid areas, deprivation of all human rights, refusal to assist the Bantu in matters of health, commerce, etc., deliberate withholding of educational facilities—even serious allegations of herding of Bantu into concentration camps and of large-scale murder. Quite clearly, Mr. President, the relevant resolutions on which Applicants relied, were based on the notion that apartheid in South Africa is a policy which is designed to, and does in fact, oppress and subjugate the Bantu population. We consequently submit that the resolutions pertaining to South Africa itself also afford no proof whatsoever of Applicants' allegation that the United Nations, in condemning apartheid, applied standards and/or a norm of non-discrimination and non-separation on the basis of group or race as defined by Applicants.

Mr. President, the conclusions I have stated in regard to the resolutions of the General Assembly apply equally to the three resolutions of the Security Council pertaining to South Africa itself on which Applicants rely. These resolutions are referred to at IV, page 503 of the written Reply and the verbatim record of 18 May, IX, page 332. The resolutions in question did express the view that Respondent's policies were, or apartheid by name was, in conflict with the United Nations Charter, but again, Mr. President, this fact in itself does not assist Applicants' case.

The question is: why and on what grounds did the authors and supporters of the three resolutions deem apartheid to be in conflict with the Charter? And the answer, Mr. President, is not far to seek. The background of these three resolutions is illuminating. The first resolution,

¹ *Special Political Committee:*

Mr. Menshikov (U.S.S.R.): 391st Meeting, p. 75.

Mr. Gebre-Egzy (Ethiopia): 391st Meeting, p. 77.

Mr. Astapenko (Byelorussian S.S.R.): 392nd Meeting, p. 88.

Mr. Taythardat (Venezuela): 392nd Meeting, p. 88.

Mr. Dato' Ong (Malaysia): 394th Meeting, p. 95.

Mr. Nacoj (Albania): 394th Meeting, p. 96.

Mr. Nur Elmi (Somalia): 396th Meeting, pp. 108-109.

S/4300, was concerned with specific occurrences in South Africa, that is, disturbances which took place in 1960, while the other two resolutions were more generally concerned with Respondent's policies. The first and third resolutions were adopted after the Security Council had been convened at the request of what is popularly known as the Afro-Asian bloc at the United Nations, whilst in the case of the second resolution the meeting of the Security Council followed on a request of the independent African States, which were then 31 in number.

At all the relevant meetings of the Security Council representatives of African and Asian States, including Ethiopia and Liberia, which were not members of the Council, took part in the debates. They indeed did so to such a degree that during the 852nd Meeting of the Council, 30 March 1960, the President remarked (S/PV 852, para. 164, p. 36):

"... that there are more non-members of the Council participating in this discussion than in the discussion of any item that I can recall during my service here".

At the 1040th Meeting of the Security Council, Mr. Grimes of Liberia explained the participation of representatives of non-members of the Security Council as follows (S/PV 1040, paras. 16 and 17, p. 4):

"We have come to the United Nations Security Council as representatives of all the independent States of Africa under indigenous rule, bearing the instructions of all heads of States and Governments who met at Addis Ababa, in May 1963 . . . Our mission is to present the Security Council with the true facts of the situation of apartheid in the Republic of South Africa . . ."

Now, Mr. President, what were the true facts which were presented by the representatives of non-members of the Security Council? In our submission, it is not necessary to cite more than a few extracts from the speeches of such representatives in order to show that the theme was the old familiar one of oppression, which was repeated so often in the debates of the Fourth Committee and the Special Political Committee. At the 852nd Meeting of the Security Council (S/PV 852, para. 149, p. 33), Mr. Cox of Liberia said:

"... in a country in which the non-white population constitutes over 80 per cent. of the total, measures were adopted designed to create perpetual economic and social servitude and to practise the vilest forms of racial discrimination and segregation".

And in paragraph 151 on the next page, Mr. Cox said:

"Thus the Union of South Africa has proclaimed to all the world, openly and without any attempt at subterfuge, that it seeks to create a social and legal system to ensure the permanent supremacy of a small minority and utterly to prohibit participation of its non-white citizens in civil life."

At the same meeting, Mr. Gebre-Egzy of Ethiopia stated that the "structure of 'apartheid' is based on the colonial concept of racial supremacy",—this is in paragraph 133, at pages 30-31.

Finally, Mr. President, I refer to a speech made by Mr. Slim of Tunisia at the 1050th Meeting of the Security Council, who said:

"The pernicious and universally repudiated doctrines of racial superiority and apartheid are applied in South Africa in a cruel and odious manner. Human beings are treated as things, deprived of

freedom and the enjoyment of any of the rights and privileges which we are accustomed to regarding as the essential and basic principles of any society . . ." (Para. 45, p. 11.)

And in paragraph 49, on the same page, Mr. Slim stated:

"At the mercy of the multiple and varied demands of law and of injustice, pursued at every step by the exactions of agents of a sort of South African Gestapo, the black-skinned inhabitants are daily subjugated, humiliated and oppressed, haunted by the constant spectre of arrest and suppression. All the paths of progress and development are closed to them."

Mr. President, it will be clear from these few extracts that the true picture of apartheid, the true facts of apartheid, were represented to the Security Council by these representatives of non-members of the Security Council, as being oppression and subjugation of indigenous inhabitants of South Africa.

In view of statements such as these and against the background of a long campaign in the General Assembly and its committees, it is not surprising that the authors and supporters of the three resolutions in question viewed apartheid as a policy oppressing and subjugating the non-White inhabitants of South Africa.

In parenthesis, it may be pointed out that there is no indication whatsoever that any independent fact-finding enquiry in regard to apartheid was conducted by the Security Council or by any of its individual members.

It is true that some representatives, when speaking adversely of Respondent's policies, did not indicate clearly on what grounds the criticisms were based. On the other hand, Mr. President, we did not find a single statement from which it can be inferred that the speaker concerned based his objection to these policies on the notion that they merely allotted rights, etc., on the basis of membership in a group rather than on the basis of individual merit, etc. The important point is that those speakers who did give clear reasons for their views, based the condemnation of apartheid on its alleged oppressive and unfairly discriminatory nature. To illustrate this point it suffices to cite a few extracts, selected at random, from the debates in the Security Council, which culminated in the adoption of the three resolutions in question. At the 852nd Meeting of the Council, Sir Claude Corea of Ceylon stated:

"The vicious doctrine of racial superiority and 'apartheid' have been practised in a cruel and callous way, and human beings are treated as no more than mere chattels and are deprived of freedom and enjoyment of all those rights and privileges which we have come to regard as basic and fundamental privileges of a civilised democratic society . . ." (S/PV 852, para. 19, p. 6.)

At the 854th Meeting of the Security Council, Mr. Sobolov of the U.S.S.R., speaking of Respondent's policies in South Africa, said:

"In the political sphere, this racial discrimination means that the indigenous inhabitants are arbitrarily deprived of the elementary civil rights and freedoms, that they are excluded from service in government establishments and prohibited from taking any part in the country's political and social life.

In the economic sphere, it means the creation of conditions en-

sureing for the settlers the possibility of a ruthless and unobstructed exploitation of the local population, depriving the latter of all rights to the means of production, to the land and what lies under it, and converting the African population into a cheap, underprivileged labour force." (S/PV 852, paras. 28 and 29, p. 8.)

Mr. Sidi Baba of Morocco referred at the 1054th Meeting of the Council to: "the criminal policy . . . of the Verwoerd government" and then he proceeded to state:

"Apartheid, which the South African regime has raised to the level of a governmental policy, can be compared only with the barbarous policy of Nazi Germany, aimed at the extermination of whole groups of people on the grounds of so-called racial inferiority." (S/PV 1054, para. 7, p. 2.)

And a little bit further on, he said:

"Racism in South Africa takes the form of an inhuman system of persecution and tyranny against the overwhelming majority of indigenous population by an insignificant minority of whites." (P. 3.)

At the 1055th Meeting of the Council, the same view was expressed by Mr. Nielsen of Norway, who was then the President of the Security Council. He said that the Norwegian Government was shocked—

". . . by the merciless ways of discrimination and the other forms of suppression under which the large African majority in South Africa suffers". (S/PV 1055, para. 9, p. 3.)

Now, Mr. President, in our submission these extracts make it perfectly clear if the resolutions in question were based on the existence or application of any norm then, as in the case of the General Assembly resolutions with which we have dealt, such a norm was one of non-oppression, and not a norm or standards as defined by Applicants. It follows that the resolutions of the Security Council also do not assist Applicants' case.

But, Mr. President, apart from the views of delegates with which I have dealt, there is another very important source of evidence which clearly dispels any notion that in condemning Respondent's policies the United Nations created or applied the standards or norm contended for by Applicants. I refer to the studies which were undertaken at the request of the General Assembly regarding the so-called question of legal action to ensure the fulfilment of the obligations assumed by the Union of South Africa in respect of the Territory of South West Africa. We shall show that it was never suggested that this Court could be asked to declare that Respondent's policies are in conflict with standards and/or a norm of non-discrimination or non-separation, and that the bodies concerned concluded that such policies were contrary to the Mandate because they were designed to, and did in fact, oppress the Native population of South West Africa. It is, however, convenient first to sketch briefly the history of the so-called legal studies which were undertaken.

It started off with resolution 1060 (XI) of 26 February 1957 in which the General Assembly requested the Committee on South West Africa to study what legal action was open to ensure that Respondent fulfilled the obligations assumed by it under the Mandate for South West Africa. (*General Assembly, Official Records, 11th Session, Supplement No. 17*

(A/3572.) Having received the Committee's special report on this study, the General Assembly in October 1957 adopted Part B of resolution 1142 (XI), in terms of which the Committee was requested—

“to consider further the question of securing from the International Court of Justice advisory opinions in regard to the administration of the Territory of South West Africa, and to make recommendations in its next report concerning acts of the administration on which a reference to the Court may usefully be made as to their compatibility or otherwise with Article 22 of the Covenant of the League of Nations, the Mandate for South West Africa and the Charter of the United Nations”. (*General Assembly, Official Records, 12th Session, Supplement No. 18 (A/3805).*)

Pursuant to the adoption of this resolution the Committee appointed at its 88th Meeting a Sub-Committee to go into the question. This Sub-Committee submitted a study of the question which served as the basis for a special section of the Committee's 1958 report contained in Part II thereof, *General Assembly, Official Records, 13th Session, Supplement No. 12 (A/3906)*, page 2.

After the General Assembly had at its 13th Session by resolution 1247 (XIII) decided to resume consideration of the question of legal action at its 14th Session, the Committee appointed another Sub-Committee which was called the Sub-Committee on Legal Questions to undertake further studies of the question; the reference is *General Assembly, Official Records, 15th Session, Supplement No. 12 (A/4464)*, page 4. The report of this Sub-Committee was brought to the attention of the General Assembly during its 14th Session, and the latter body then adopted resolution 1361 which drew—

“the attention of Member States to the conclusions of the special report of the Committee on South West Africa covering the legal action open to Member States to refer any dispute with the Union of South Africa concerning the interpretation or application of the Mandate for South West Africa to the International Court of Justice for adjudication in accordance with Article 7 of the Mandate . . .”.

The reference is the same as the previous one.

At its 120th Meeting the Committee on South West Africa decided to keep the matter of legal action under review pending further instructions of the General Assembly (A/AC 73/SR 120, 9 Sep. 1959), but as far as we can ascertain nothing further was done, and in its 1960 report the Committee on South West Africa merely drew attention to the fact that at the Second Conference of Independent African States held at Addis Ababa in June 1960 it was decided that contentious proceedings concerning Respondent's obligations with respect to the Territory should be submitted to this Court by Ethiopia and Liberia (*G.A., O.R., 15th Sess., Suppl. No. 12 (A/4464)*, p. 4).

It is clear therefore that in order to determine the grounds on which it was thought that this Court might give a judgment against Respondent reference must be made to the special reports of the Committee on South West Africa and to the report of the Sub-Committee on Legal Questions.

The first special report of the Committee on South West Africa, *General Assembly, Official Records, 12th Session, Supplement No. 12A*

(A/3625), dealt mainly with the competence of organs of the United Nations to request advisory opinions of the Court and with that of individual States to institute contentious proceedings. It is, however, significant that having pointed out that in a request for an advisory opinion questions might also be put as to whether specific acts of Respondent were in conformity with the Mandate, the Committee remarked:

"If an advisory opinion were requested regarding, for example, the status of the Territory or the relationship between clauses of the Mandate and acts of administration of the Territory, there would be the advantage that the Court, in reaching its opinion, would proceed by impartial judicial methods and on the basis of evidence produced to and weighed by the Court." (P. 3.)

This attitude stands in striking contrast to that lately adopted by the Applicants, namely that no evidence may be weighed by this Court, that all evidence is irrelevant, that the Court may only have regard to what was said and decided in the United Nations, and that this Court is not competent to second guess what was there said or decided.

In its second special report, being Part II of the 1958 yearly report, (G.A., O.R., 13th Sess., Suppl. No. 12 (A/3906)), the Committee concentrated more on the specific acts of Respondent which could be referred to this Court for adjudication. The Committee considered that the compilation in its successive reports of acts of administration on which either legal doubts had been expressly stated or the conclusion put forward that they were inconsistent with the Mandate or the Charter, served to indicate the subjects of questions on which advisory opinions might be sought. Such acts were divided into two groups, namely (a) acts relating to the international status of a territory, and (b) acts relating to the moral and material well-being and social progress of inhabitants of a territory. We are of course for the present only concerned with the latter group of acts. These were sub-divided as follows: firstly, application of the practice of apartheid or racial separation with reference to the Committee's 1957 report; secondly, application of racially discriminatory legislation in the political, economic, social and educational fields with reference to the 1954, 1955, 1956 and 1957 reports; thirdly, application of restrictions on freedom of movement and vagrancy legislation, with reference to the same reports; fourthly, allocation and alienation of land, with reference to the 1957 report, and finally, legislation providing for the expulsion of persons from the Territory, with reference to the 1956 report.

The report of the Sub-Committee on Legal Questions, in so far as it is relevant for present purposes, merely repeated these suggestions of the Committee on South West Africa. It is, however, of some interest to note that when this report was discussed by the Committee on South West Africa, Mr. Carpio of the Philippines remarked—

"that the examples of questions which might be submitted to the International Court were badly chosen. To choose questions dealing with the administration of South West Africa as an integral portion of the Union of South Africa, when the Union Government was authorized by the Mandate to do so, was to choose the weakest arguments. The questions should, on the contrary, deal with such acts as the subjection of the interests of the indigenous inhabitants to those of the European settlers." (A/AC. 73/SR. 120, p. 3.)

It is clear that Mr. Carpio thought that the main case which had been made against Respondent was one of oppression of the Native population of the Territory. Applicants must have thought so too when they instituted the present action, for that was exactly the case, and the sole case, made in the Memorials.

[Public hearing of 29 October 1965]

Mr. President, prior to the adjournment yesterday, I was dealing with the studies on the so-called question of legal action against Respondent which were undertaken by United Nations organs. I pointed out that the Committee on South West Africa suggested that the compilation of acts of administration in its successive reports served to indicate the subjects of questions on which advisory opinions might be sought. Such acts included the application of the practice of apartheid, and racially discriminatory legislation in the political, social, economic and educational fields. I also pointed out that the report of the sub-committee on legal questions merely repeated these suggestions.

In the concluding paragraph of its report, the sub-committee suggested that as regards acts affecting the well-being and progress of the inhabitants of the Territory, the list of acts contained in the previous reports of the Committee on South West Africa should be expanded to include such further acts as might be selected by the Committee during its then current examination of conditions in the Territory—that would have been the 1959 report. (The reference here is A/AC. 73/2—31 August 1959.) In its 1959 report, the Committee on South West Africa did, in fact, in the context of the discussion of a question of legal action against Respondent, draw the attention of the General Assembly to certain aspects of Respondent's administration of the Territory. It follows that one has to look at the 1954, 1955, 1956, 1957 and 1959 reports of the Committee in order to ascertain the grounds on which it was thought that action could be instituted against Respondent. We propose to cite extracts from these reports in order to illustrate that the Committee's complaints and criticisms were directed at what it thought to be an oppressive and arbitrary policy, and not to mere separation or differentiation on the basis of membership in a group or race.

Referring to apartheid generally, the Committee, in its 1956 report, stated:

"The 'Native' of South West Africa still has no part whatsoever in the management of the Territory's affairs; he lives and works in an inferior and subordinate status in relation to a privileged 'European' minority and his opportunities for advancement in his own right are limited not only by the inadequacy of technical facilities, but also by a restrictive system of law and practice." (*G.A., O.R., 11th Sess., Suppl. No. 12 (A/3151), p. 27.*)

In its 1957 report the Committee stated:

"The continued and increasing political, social and economic pressures and restrictions imposed in all walks of life on the vast majority of the inhabitants and especially on the indigenous African population reveal, in the Committee's opinion, a policy intended to give paramount importance to the interests of the population of European origin, to maintain and reinforce the entrenchment

of government control in the hands of this minority . . ." (G.A., O.R., 12th Sess., Suppl. No. 12 (A/3626), p. 26.)

The statements at page 10 of the 1959 report are to the same effect, and the reference is *General Assembly, Official Records, 14th Session, Supplement No. 12 (A/4191)*. We find here, Mr. President, the same accusations that were levelled in the debates of the Fourth Committee and in the Special Political Committee, and these remarks, of course, referred to apartheid in general, but the same accusations were made with respect to specific fields of administration, education, economics, health, and so forth.

Under the heading "Economic Conditions", but referring more generally to land settlement, the Committee concluded in its 1959 report:

"The Committee considers that the land settlement programme of the Mandatory Power is contrary to Article 22 of the Covenant of the League of Nations and the Mandate in that it has resulted in the transfer of the major portion of the Mandated Territory to 'European' citizens of the Union of South Africa and in the removal of groups of 'Native' inhabitants, without due regard for their well-being, from place to place within the Territory and possibly even beyond the boundaries of the Territory, depriving the indigenous peoples not only of their traditional lands but of security of tenure and unmolested residence on the limited lands allocated to them by the Union Government." (G.A., O.R., 14th Sess., Suppl. No. 12 (A/4191), p. 21.)

Referring to the economic development of Native areas, the Committee concluded in its 1955 report:

"It [the Committee] cannot ignore the inference . . . that the limited efforts thus far made by the Administration to develop Native areas reflect a policy to relieve the longstanding labour shortage by compelling the Natives to seek employment on mines and European farms." (Italics added.) (G.A., O.R., 10th Sess., Suppl. No. 12 (A/2913), p. 21.)

May I add, Mr. President, that similar statements are to be found in the same 1955 report, at pages 17-18, and the 1957 report (A/3626), at page 17.

As regards education, Mr. President, the following passage from the 1956 report is illustrative of the way in which the Committee viewed Respondent's policies in the Territory:

" . . . it [the Committee] can only conclude that, in a manner paralleling the situation in all other fields of development in the Territory, a position of privilege and of superior opportunity for advancement has been and is still being provided for the children of the 'European' minority through the failure to expand and improve at a reasonable rate the educational facilities available to the children of the majority of the population." (Italics added.) (G.A., O.R., 11th Sess., Suppl. No. 12 (A/3151), p. 26.)

With reference to the 1958 Commission of Enquiry into Native Education, which recommended that the South African system of Bantu education should be applied to the Territory, the Committee stated in its 1959 report its conception that the proposed change would be—

" . . . devising for one part of the population a type of education for their children which on the basis of the system of apartheid would

confine them to a subordinate role in the life of the country." (G.A., O.R., 14th Sess., Suppl. No. 12 (A/4191), p. 32.)

Finally, Mr. President, reference may be made to the concluding remarks in the 1959 report, to which the Committee, in paragraph 8 of the same report, drew the attention of the General Assembly in the context of a discussion of the question of legal action against Respondent. Paragraph 230 of these remarks reads as follows:

"The Mandatory Power bases its administration of the Territory on a policy of *apartheid* and 'White supremacy' contrary to the Mandates System and to the Charter of the United Nations, and its goal is the annexation of the Territory. The Union Government has reserved political authority in the Territory, by law, to a 'European' minority, has transferred a major portion of the Mandated Territory and its resources to 'European' citizens of the Union of South Africa, has allocated the bulk of the public funds of the Territory to 'Europeans', and has reserved to them the larger share of the economic, social and educational opportunities available in the Territory. It has at the same time denied to the 'Non-European' inhabitants of the Territory, not only a recognition of their paramount interests, but also the right to participate on a basis of equality and merit in the political, economic, social and educational life of the Territory. The indigenous 'Native' majority of the population in particular have been subjected to unnatural restrictions on their freedom of movement and regulation of their daily life, and have suffered damaging removals and threats of removals from their lands to places even beyond the boundaries of the international Mandated Territory." (1959 report, pp. 32-33.)

Now, Mr. President, the extracts which we have cited from the various reports suffice to show that the Committee's adverse comments on, and criticisms of, Respondent's policies, particularly in the political, economic, social and educational fields, were based on the notion that these policies were designed to, and did in fact, oppress the Native population of the Territory for the benefit of the White group. As already stated, the policies and practices enumerated in these reports were those which, in the opinion of the Committee, should have been referred to this Court for adjudication. There can, therefore, be no room for doubt that the basis on which the Committee thought that a judgment could be procured against Respondent, was that of deliberate oppression of the Natives. It is, perhaps, no slight coincidence that the Memorials of the Applicants almost exactly adopted the enumeration of, and remarks pertaining to, Respondent's policies and practices contained in these reports. The important point, however, is that nowhere in the reports or in the discussions of the question of legal action is any indication whatsoever to be found that it was considered that Respondent's policies were in conflict with the Mandate merely because they involved separation or differentiation on the basis of membership in a group, rather than on the basis of individual merit, etc.

In conclusion, Mr. President, I wish to emphasize two points. In the first place, Applicants, in connection with the so-called evolution of their standards and/or norm, in addition to the resolutions of the General Assembly placed much reliance on conclusions of the Committee on South West Africa. So, for instance, in the verbatim record of 18 May,

IX, page 334, Applicants cited an extract from the Committee's report in which it was concluded that the situation in the Territory was not in conformity with, *inter alia*, the principles of the mandate system. Applicants went on to say:

"Mr. President, it is perhaps relevant to note here that Respondent throughout the pleadings and again in the Oral Proceedings, has sought to evade the force of the resolution, and has sought to construe the findings of agencies of the United Nations, such as and including the Committee on South West Africa, in terms of allegedly improper motivation, in terms of political campaigns, in terms of conspiracy and in terms of trading among nations for position, or favours, or other considerations of unenlightened self-interest. The force and effect of these resolutions, of these findings, cannot, in the Applicants' view, be disposed on such a basis."

That is in the same verbatim record, at page 335.

We have already dealt with the political campaign and related aspects, but the point which we wish to emphasize is that Applicants have made no attempt whatsoever to show that the Committee's findings cited by them were based on the premise that Respondent's policies were in conflict with Applicants' suggested norm or standards of non-separation and non-discrimination.

As we have shown, Mr. President, the Committee's findings were indeed not based on the application of any such standards or norm.

In the second place, Mr. President, there is the question of the factual correctness or otherwise of the sweeping condemnations contained in the report of the Committee. It will have been evident that these assertions and findings are very strongly contested by Respondent, in the light of the facts set out in the pleadings and presented to the Court in evidence and also the review of the influence of the petitioners on the findings of these reports. It will also be evident of what great significance in this respect the Applicants' admission of Respondent's exposition of the facts is. In view of this admission, but particularly in view of Applicants' abandonment of the charges of oppression and their confinement of their case to the norm and/or standards contention, it is unnecessary for Respondent to canvass systematically each and every one of the assertions and findings of the Committee.

Mr. President, this concludes our analysis of the processes and procedures in the United Nations, on which Applicants rely, within the context of a norm or standards contention.

May I be allowed to summarize very briefly what we have, in our submission, demonstrated to the Court? First, that the resolutions upon which Applicants rely were influenced by a political campaign which has been waged against Respondent; secondly, that these resolutions were to a very large extent based on erroneous factual information contained in statements of petitioners and in the reports of committees such as the Committee for South West Africa, which were in turn also based on statements of petitioners; thirdly, that the reference to the debates in the Fourth Committee and in the Special Political Committee clearly shows that the delegates who voted for the draft resolutions based their confirmation of Respondent's policies on the notion that these policies were designed to, and did, in fact, oppress the Native inhabitants of South and South West Africa, for the benefit of the White

groups; and finally, that at no time when the studies on the so-called question of legal action were considered by organs of the United Nations was it suggested that Respondent's policies were in conflict with the Mandate merely because they allotted rights, duties, etc., on the basis of membership in a group rather than on the basis of individual merit.

I thank you, Mr. President. With the leave of the Court, my learned Senior, Mr. Muller, will continue our address.

29. ADDRESS BY MR. MULLER

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS
OF 29 OCTOBER AND 1 NOVEMBER 1965

Mr. President, I indicated on Tuesday that our argument, which is now in progress, would be divided into three parts. My learned friend, Dr. van Heerden, has just concluded the address on the first part and I intend to proceed now with our argument on the second part; that is that a norm and/or standards, as suggested by the Applicants, is not universally observed in the practice of States. The argument on this part of the case, Mr. President, need not be a lengthy one inasmuch as the Applicants, in our submission, have virtually conceded in their cross-examination of Professor Possony that a norm and/or standards, as defined in the Reply, IV, page 493—that is as we interpret page 493 and as Professor Possony interprets that page—is not observed in the practice of States.

The main evidence upon which we rely for our contention that the norm and/or standards of non-discrimination or non-separation is not universally observed in the practice of States is that of Professor Possony, Professor van den Haag and Professor Manning.

Professor Possony, in his evidence, addressed himself particularly to the question whether States do or do not, by governmental policies and practices, allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential.

The evidence of Professors van den Haag and Manning, although dealing also with practices which would not be in accordance with the alleged norm and/or standards, concentrated more on the question whether the application of the norm and/or standards in certain circumstances would or would not lead to unfavourable results for the well-being and progress of the people concerned.

It is intended to deal at present with the first topic, that is, the allotment by governmental policies and practices of status, rights, duties, etc., on the basis of membership in a group, class or race.

That Professor Possony is eminently qualified to speak with authority on the subject is clear from his expertise.

I will not read it, Mr. President, I shall only indicate that he said that he had done research and teaching in the field of international relations, sociology, modern history, comparative constitutions and he has also, in his own words, for many years—

“worked on the subject of ethnic problems and relevant constitutional and legal provisions for the management of ethnic groups in multi-national societies”.

That is from the verbatim of 18 October, XI, page 648.

Now, his evidence can be divided broadly into three parts: the first is an historical development of group relations in the world; the second, an analysis of differential treatment by governmental policies and practices of population groups in various parts of the world; and the

third, attempts in the international sphere to formulate uniform objectives with regard to the treatment of individuals and ethnic groups.

I do not intend to deal in detail with the first part, that is the historical part of his evidence, which is contained in the verbatim of 18 October, at **XI**, pages 648-660.

In brief, Mr. President, this part of his evidence demonstrates the importance of group relations in the history of the world—the recognition over centuries of group identities, both on an ethnic and on a religious basis, and the methods which have been applied in giving effect to the principle of self-determination—methods such as separation, partition, population exchanges and removals and protective measures such as minority treaties and autonomy arrangements.

This part of his evidence is important in demonstrating that differential treatment of ethnic and religious groups has a long history, and it explains why, in pluralistic societies, differentiation is in many cases desirable or even a necessity.

The part of his evidence which goes to the very core of the issues in this case is contained in the record of 18 October, at **XI**, pages 664-677, and of 19 October, at **XI**, pages 677-686.

He dealt there with certain broadly gauged systems of group differentiation by law, and, in that sense, of course, by official government policy and practice. These systems he divided, for convenient treatment of the subject, into the following groups: (1) Asiatic systems of pluralistic societies; (2) certain systems in the Eastern Mediterranean; (3) pluralistic systems in the Islamic countries; and (4) systems in various countries dividing advanced from aboriginal groups or providing differentiation between tribal groups. He also mentioned other specific provisions of differentiation in many countries.

The division of his testimony in these four main groups is indicated at **XI**, pages 664-665.

Mr. President, it is not my purpose to repeat or to analyse in detail Professor's Possony's evidence on this aspect. I think it would be sufficient to give merely a summary of differential treatment found in constitutions and laws which are in force and then merely to mention the countries concerned.

In the verbatim of 18 October, at **XI**, page 665, Professor Possony dealt with Burma. He indicated differential provisions for representation of ethnic groups in the legislative body of Burma. At **XI**, pages 665-667, he dealt with India. There, he indicated differential treatment of castes and tribes with regard to administration, land rights, judicial systems, succession laws, and differential treatment of the Anglo-Indian community with regard to political rights. At pages 667-669, he referred to Cyprus. There he dealt with differential treatment of Greeks and Turks in respect of political rights, offices of State, schools, etc. At pages 669-671, he discussed the Lebanon. There, he indicated that there were differential measures between Moslems and Christians with regard to representation in Parliament and offices of Government. At pages 671-676, he dealt with the Islamic States. He indicated to the Court that there were 16 Islamic States—I shall not repeat the names of the States, they are to be found at page 671—and indicated that these Islamic States had a population of more than 230 million people.

In respect of those States he dealt with differential treatment of Moslems and non-Moslems in respect of appointment to offices of State,

personal status, testimony, guardianship, inheritance, marriage, etc. He also dealt with differential treatment as between men and women in these Islamic States with regard to marriage, succession, testimony and divorce. If I may mention here, the differential treatment of persons on the basis of religion and sex is important. Although the charge against Respondent does not extend to either of these fields, it is Applicants' case that there must be no differentiation on the basis of membership in a group, class or race and the so-called sources on which Applicants rely for the existence of their norm—whatever their substantive significance might be—specify the requirement of no distinction, *inter alia*, as to sex or religion—I refer in this respect to the Reply, IV, pages 497 and what follows.

Then at XI, pages 675-677, and in the verbatim record of the next day, pages 677-678, Professor Possony dealt with countries which have large concentrations of Moslem groups. I shall not give the names of the countries—he mentioned a number and then he gave specific examples of the Sudan, Indonesia and Nigeria. It is stated there that Moslems live under their own personal statutes often guaranteed constitutionally, and he mentioned certain examples. Then at XI, pages 677-678, Professor Possony dealt with the differential measures on religious grounds and he there mentioned ten States in all. In the same verbatim record, pages 678-684, he mentioned the following States: Liberia, Sierra Leone, Nigeria, Basutoland, Bechuanaland, Swaziland, Northern and Southern Rhodesia, Kenya, Eritrea, Peru, Panama, Brazil, Canada, the United States, Sweden, Ghana, Ethiopia, Pakistan, Australia, Venezuela and New Zealand. In respect of these States I have just mentioned, he discussed differential treatment of less advanced societies, particularly of aboriginal tribes with regard to one or more of the following: political organizations, administrative and judicial systems and/or land rights and ownership of land. I would indicate that with regard to his evidence concerning Basutoland, Bechuanaland, Swaziland, Northern and Southern Rhodesia and Kenya, he referred to the Counter-Memorial of the Respondent, III, pages 257-262, in which certain facts are set out that have not been denied by the Applicants. With respect to Canada and the United States, he also referred to the Counter-Memorial, III, pages 263-265, also containing facts in this respect which are not denied.

Then at pages 684-685, of the same verbatim record, Professor Possony dealt in particular with the case of Indians in certain countries in South America and in the United States of America. In all, Professor Possony mentioned 50 countries including protectorates under the British Crown, in which by law and official practice status, rights, duties and burdens are allotted on the basis of membership in a group, class or race. Of these 50 countries mentioned by him, 40 are Members of the United Nations and they include both the Applicant States.

We say, Mr. President, that it is clear from this body of evidence that in many countries in the world status, rights, duties, burdens, etc., are allotted on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential, and that a so-called norm of non-discrimination or non-separation, as defined by the Applicants, is not observed or practised. This indeed, Mr. President, was the expert view expressed by Professor Possony when he said in the course of his testimony-in-chief and I quote from IX, page 662:

“Mr. President, I can state that in my judgment on reading the

evidence in history and social development there is no such norm. My testimony up to this point has dealt with aspects of the norm as stated on pages 492 and 493, [of the Reply] notably the question of differentiation in general, allotment, separation and equality of opportunity. As I go on I will be able, I think, to add additional evidential points on other parts of the norm, or alleged norm."

And at the end of his evidence-in-chief, he said, at pages 707-708:

"Mr. President, from what I have indicated to the Court with relation to the practice all over the world, there is no general observance of such a rule or norm."

Mr. President, how did the Applicants react to this evidence of Professor Possony? Not one question was asked by Mr. Gross, questioning the correctness of Professor Possony's factual evidence as to the practice of States, or questioning his expert view that a norm of non-discrimination or non-separation—as both Professor Possony and Respondent interpret Applicants' definition at page 493, IV, of the Reply—is not generally observed in the practice of States. Instead the general trend of my learned friend, Mr. Gross's cross-examination proceeded on the basis that Respondent's and the witness's understanding of the Applicants' case was wrong and that, so it would seem to follow, the witness's testimony was *not* directed to the real issue before the Court. Thus, Mr. Gross commenced his cross-examination by questioning the witness with regard to the meaning of the word "discrimination". He asked Professor Possony what significance he, that is, the witness, attached to the word "discrimination"? I refer in this regard to the verbatim record, 20 October, page 3, *supra*. The witness replied that he interpreted that word in the context of page 493, IV, of the Reply in its customary sense and not in the pejorative sense of distinguishing against.

Mr. Gross continued to press the point by asking Professor Possony:

"Now, with regard to your understanding on the points to which you have testified, as set forth in the letter, paragraphs (a) and (b) [that was the letter by the Respondent indicating the points to which Professor Possony's evidence would be directed] did you understand the contents of the standards, contended for by the Applicants, to apply to any differentiation or distinction, whether or not such differentiation or distinction involved discrimination in a pejorative sense, to use your term?" (*Supra*, p. 4.)

And the answer of the witness was this:

"As I tried to clarify a moment ago, IV, page 493, and I will have to read it for what it says, does not say 'pejorative' or perhaps better terms would be 'disabling' and 'enabling', using some of the language from India for example, but it uses it neutrally in the sense that governmental policies should not be made that are allotting status, etc., to groups rather than individuals. That, I think, seems to me to be the gist of the second paragraph on page 493."

Mr. Gross then suggested that page 493, IV, of the Reply is "not a self-contained page in the pleadings" and that the "sources and content are generally described on page 493, but there is considerable discussion elsewhere concerning the nature and content intended to be carried by those words" (*supra*, p. 7).

Professor Possony was however adamant that:

"... on page 493 the language is very clear. I do not feel that I have any particular doubt—I can easily argue about the meanings of these things, but I think the meaning is quite clear." (*Supra*, p. 8.)

This attitude was adopted by Professor Possony throughout and he in fact gave a full explanation to the Court on 21 October in the verbatim record, pages 36-38, *supra*, of his reasons for interpreting page 493, IV, the Reply as he did. I shall not read what he said there, Mr. President.

Mr. Gross did not *specifically* put it to the witness that the Applicants' case was one of unfair discrimination or that the definition of the norm of non-discrimination or non-separation, as worded at page 493, IV, of the Reply, could reasonably be interpreted to contain a suggestion of unfair discrimination. Yet, my learned friend, Mr. Gross, raised some doubt on the question whether Applicants had expressed themselves clearly in their formulation of the suggested norm. Thus, he stated at page 8, *supra*, of the verbatim record of 20 October 1965:

"Now, Sir, without attempting, and I will not pursue this line too much further, to defend the language used by the Applicants—no doubt better wisdom would have suggested better language—without asking you to comment about that, Sir, would it be fair to say that you were not really sure what the definition meant in terms of your testimony? What the phrase 'discrimination' as used therein meant? Would that be a fair question to ask you to answer?"

And this immediately after my learned friend, Mr. Gross, had asked the witness whether he, that is the witness, would change any of his testimony and I quote:

"... if it were the case that Applicants contend for standards which do not make impermissible any distinction or differentiation as such..." (*supra*, p. 7).

Later, Mr. Gross, with reference to certain terms used in the affirmative part of the definition at page 493, IV, of the Reply asked Professor Possony the following question:

"Now, with respect to the question of equality of opportunity and equal protection of the laws, would it be within the normal and prevalent customary use of the term 'discrimination' to refer to phenomena, political, social, economic phenomena, in which persons are denied equality of opportunity and equal protection of the law; would that be a prevalent and customary use of the term 'discrimination' in the political and social sciences?" (*Supra*, p. 11.)

Mr. President, it is not clear what was meant by Mr. Gross's use of the words "phenomena, in which persons are denied equality of opportunity and equal protection of the law", but the question seems to suggest that Applicants intended by the use of the word "discrimination" at page 493, IV, of the Reply the denial of equality of opportunity and equal protection of the law. It is to be noted, however, that Mr. Gross, in formulating this question, left out the words "to individual persons as such" which appear in the definition at page 493, IV.

Mr. Gross then went on to cite certain constitutions which contain provisions to the following effect: that all citizens are "equal before the law"; "[a]ll men shall be equal before the law"; "the State shall not

deny . . . equality before the law and the equal protection of the laws within the territory . . ."; I refer in this regard to the verbatim record, pages 20, 23 and 24, *supra*. With reference to such provisions in the constitution, Mr. Gross asked the witness whether they were not:

" . . . evidence of a constitutional practice relevant to the question of whether or not an international standard and/or an international norm exists, of the sort contended for by the Applicants" (*supra*, p. 24).

At page 26, *supra*, of the same verbatim record, Mr. Gross asked the following question:

"Do you agree, Sir, that this furnishes evidence tending to support the existence of international standards of a content described by the Applicants and defined in their pleadings, so far as you understand it?"

That is again with reference to the provisions in certain Constitutions—the equal protection clauses contained in Constitutions.

And at page 30 of the same verbatim record the question was put in this form:

" . . . with respect to these constitutional provisions, would you or would you not agree that they severally and collectively evidence a general constitutional practice, virtually universal, in which the equality of individual citizens before the law, and equality of opportunity, are guaranteed by the constitutional provisions? Would you agree that they are evidence of standards covering the same subject-matter, and evidencing international standards?"

In the course of this questioning it was pointed out to the Court that Mr. Gross was not directing his questions specifically to the norm as defined at page 493, IV, of the Reply, and this led to an explanation by Mr. Gross as follows, and I quote from the verbatim record at pages 26-27, *supra*:

"Mr. President, I would respectfully submit that the Counsel's comment is irrelevant and the reason being, Sir, that page 493, important as it is, does not embody the case of the Applicants and, Sir, I think the impression as sought to have been created previously in these proceedings by Counsel that the language on page 493 must be interpreted as if it were disembodied from the balance of the pleadings, not explained by the sources to which reference is made and elaborated and which explain the detailed content attributed by the Applicants to the standards and the norm contended for and, Sir, if the point in the implication of Counsel's question, or interposition, is that the Applicants may not refer to any provision or language in these pleadings other than page 493, the Applicants would very respectfully disagree."

Thereupon attention was drawn to the fact that in their submissions as reformulated Applicants relied on—

"standards and legal norm, . . . as described and defined in the Reply, IV, at page 493, and solely and exclusively as there described and defined . . ." (*Supra*, p. 27.)

When the question then arose whether Applicants were not changing their case, Mr. Gross stated emphatically that they were not, and he relied on a passage at page 493, IV, of the Reply in support of the contention

that the content of the norm and/or standards was elucidated by what is stated in the pages following on page 493, dealing with the sources.

This passage at page 493 of the Reply reads as follows:

"The existence and virtually universal acceptance of the norm of non-discrimination or non-separation, as more fully described below, gives a concrete and objective content to Article 2, paragraph 2 . . ."

As was then pointed out by you, Mr. President, the passage relates to acceptance of the norm and not to its content. I refer in this regard to the verbatim, page 28, *supra*.

Eventually on 21 October Applicants came forward with an apparent formulation of their understanding of the content of their norm and/or standards. We find this in the verbatim record, pages 35 and 38-40, *supra*. At page 39 of the said verbatim record Mr. Gross's tentative formulation was as follows:

" . . . if the Applicants' true contention, [on] the actual content of the standards . . . refers to governmental policy and practices which do not give weight to individual merit or capacity but which allot rights, burdens and privileges on the basis of membership in a group and which do not protect equality of opportunity and extend equal protection of the laws to individual persons as such?"

And at page 40 of the same verbatim record Mr. Gross described this formulation which I have just read now as an attempt "to place before you [that is, the witness] an interpretation of the meaning of the Applicants' words".

As we have already indicated, and I refer in this regard to the verbatim record, at page 81, *supra*, this reformulation by the Applicants in the course of cross-examination of their norm and standards "does not differ in any material respect from the definition . . . at page 493, IV, of the Reply". All that the Applicants have done in this reformulation is (a) to change the sequence in the negative formulation of the definition whereby the position of the individual is dealt with before that of the group, and (b) to substitute the words "which do not give due weight to individual merit or capacity" for the words "rather than on the basis of individual merit, capacity or potential" which appear in the definition at page 493, IV, of the Reply.

It is submitted that Professor Possony was quite correct when he stated as follows, and I quote from the verbatim record at page 40, *supra*:

"I fail to see that the formula differs from page 493 in any substantial aspect. It is a little hard to be accurate on an evaluation of this sort but on hearing it, I think this is just a restatement, in somewhat different sequence of what page 493 says, and on that basis I would not change my testimony."

We submit that the reason why Applicants now favour a reformulation of their norm as earlier defined at page 493, IV, of the Reply is evident from their cross-examination of Professor Possony. I have already made reference to the fact that on 20 October Mr. Gross read to Professor Possony extracts from various Constitutions which provide that all citizens are "equal before the law"—"[a]ll men shall be equal before the law", etc. On 21 October, after having reformulated their suggested standards, as I have just indicated, Mr. Gross reverted to this matter.

He asked Professor Possony whether he would agree that "the equal protection clause of the United States Constitution . . . exists as a principle or standard . . . whatever way you would wish generally to describe it?" (*supra*, p. 42); and he also asked whether the witness would concede that "there is a standard at least in the United States, on a constitutional level, of equal protection of the laws" (*ibid.*). To this Professor Possony answered, and I would, with the Court's permission, want to read the whole answer before I deal further with this matter:

"Certainly, but, Mr. President, that is really not the point. The 'equal protection before the law' norm or standard has been in existence for many years. I do not know whether it started several centuries ago, but certainly as of 1920, which is a relevant date in these proceedings, that norm and standard was generally applied. Certainly we do not have to go further than to say it was being applied in France and Britain.

Now, the point in Mr. Gross's presentation, it seems to me, is that after the 1920 period, and notably in the United Nations period, a *new* norm has been developed. That is the question. That old norm, that it has been in existence, there is no question about it. This norm, I would say, was clearly recognized by all parties to the Mandate. I do not want to go further than this because it becomes a strictly legal problem but, speaking as an historian, I certainly would stand on the point that by 1920—and, in fact, Mr. Gross yesterday was kind enough to read the Constitution of the Republic of Austria, which is dated 1920, and which was written by Professor Kelsen—certainly at that time, without going any further back in history, that was an accepted principle. However, the point here is that a new norm has been developed, as defined on page 493 [of the Reply]." (*Supra*, pp. 42-43.)

Mr. Gross's cross-examination eventually culminated in the following general question:

"Would you agree that the principle of governmental protection of equality of opportunity and equal protection of the laws is a virtually universally proclaimed standard, which is enshrined in most constitutions of civilized countries and in decisions and declarations of international organizations? Do you agree with that as a statement?" (*Supra*, p. 62.)

Then Professor Possony went on to explain how he saw the equal protection clauses. I do not wish to read his explanation, which is fairly long, but in the course of that he said: "So far as I understand it [that is, the equal protection clauses in Constitutions], it means that a law that is in existence, depending on what the law says" (*supra*, p. 62), is to be applied equally. It is submitted that Professor Possony gave the correct answer to this question relative to the provisions in Constitutions indicating that there should be equal protection of the law: The equal protection clauses to be found in many Constitutions, some dating back to the 19th century, have nothing to do with a norm and/or standards as defined at page 493 of the Reply. The principle of equal protection of the laws means no more and no less than that the laws of the land shall be *applied* equally to all persons to whom they relate. The principle does not introduce a concept of non-discrimination or non-separation in the

making of a law. I draw the distinction between the application of the law and the making of the law. In other words, it does not involve a concept that the content of the laws is to be such as to accord *identical* treatment to every person in the State. This latter concept *might be* involved in the phrase "equality of opportunity" which is also found in some of the constitutional provisions, but that would depend on how that phrase is interpreted in the context. If it means *equality in fact*, differentiation in law would not only be permitted but very often required. Only if it means an artificial kind of *equality in law* could it be interpreted as requiring identical legal provisions for all persons in a State. That this is not what was meant in the Constitutions concerned, is shown by the differential laws which exist side by side with provisions in various Constitutions—provisions regarding equality before the law. A very good example in this respect, Mr. President, is the case of India. The Constitution of India cited by Mr. Gross in the verbatim at page 24, *supra*, contains an equal protection clause reading as follows:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

And in respect of India, the Court will remember Professor Possony referred to a number of measures of differential treatment of persons by reason of membership in a group, class or race. I refer in this regard to the verbatim record, XI, at pages 665 ff.

Mr. President, it seems clear from the whole trend of Mr. Gross's cross-examination of Professor Possony that Applicants are on the horns of a dilemma. On the one hand, they cannot say that their norm and/or standards contain the element of unfair discrimination. Now they cannot say that for two reasons—the first is that in reformulating their Submissions 3 and 4 they excised all allegations of discrimination in the pejorative sense and tied their submissions to the norm and/or standards as defined at page 493, IV, of the Reply, and exclusively as there defined—a definition, Mr. President, which upon analysis shows that it contains no suggestion of unfair discrimination. The second reason is that they clearly stated to the Court that their case was not concerned with motives, or with the results of Respondent's policies or practices. From that, Mr. President, it must follow that their case cannot be one of unfair discrimination. As I already indicated in addressing the Court on Tuesday, Respondent's policies and practices can only be unfair if such policies and practices are tainted with improper motives, or if, whatever the underlying motives may be, they, in fact, work out to be unfair in practice, or both of these two situations.

On the other hand, Mr. President, the Applicants do not want to admit that their norm as defined at page 493, IV, of the Reply is simply a norm of non-differentiation—i.e., a norm which prohibits the allotment by governmental policies and practices of status, rights, etc., on the basis of membership in a group, class or race. I say they do not want to admit it because, on the evidence, it is clear that such a norm is not universally observed and does not exist. It is because Applicants find themselves in this dilemma that they now have to improvise and formulate their case as resting on a norm and/or standards which prohibit—and I quote Mr. Gross's words in defining or reformulating the norm, in the verbatim record, at pages 36 and 39, *supra*:

"... governmental policies [and practices] which do not give weight

to individual merit or capacity, but which allot rights and burdens [and privileges] on the basis of membership in a group [and] which do not protect equality of opportunity and extend equal protection of the laws to individual persons as such . . .”

Mr. President, in this passage “equality of opportunity” and “equal protection of the laws” clearly mean non-differentiation on the basis of membership in a group, and this appears for three reasons: (a) from the words “to individual persons as such”; and (b) from the need to reconcile the second part of the definition with the first—the second part of the definition reading: “which do not protect equality of opportunity and extend equal protection of the laws to individual persons as such”—the first part of the definition reading: “which do not give weight to individual merit or capacity, but which allot rights, burdens and privileges on the basis of membership in a group.” Now, those two parts of the total definition must be reconciled. Applicants have never contended that there are two norms—there is only one norm—and consequently the two parts of the definition must be reconciled.

Furthermore, if the suggestion were to be that *equality, in fact*, is to be striven after, and that it was, in fact, not done by Respondent, the allegation would involve an enquiry into fact, into purposes or results which the Applicants have repeatedly told the Court that that is not necessary. There is, consequently, in fact no difference between the norm as recently reformulated by Mr. Gross in cross-examination, and the norm as defined at page 493, IV, of the Reply, and as Professor Possony has demonstrated, the practice of States does not bear out the existence of such a norm.

Mr. President, it may, in this regard, also be stated that the examples of differential treatment mentioned by Professor Possony cannot be explained away by the Applicants on a basis at one stage advanced by them relative to differential measures such as, for example, the minorities treaties. It will be recalled that they seemed to suggest at that stage, earlier in the argument, that in order to be permissible the differentiation must be aimed at the benefit of the individual rather than the group, and that the individual member of the group should, in particular, be permitted, if he wished, to quit the group. In most of the cases mentioned by Professor Possony this would be either legally or physically impossible. As examples, one can refer to the position of Cyprus, where you have the Greeks, on the one hand, and the Turks; the differential laws applied in the Islamic countries as between Moslems and non-Moslems; the laws differentiating between tribes, and the laws differentiating between men and women.

Mr. President, I wish to draw attention again at this stage of my argument to a point which was made earlier in the introductory part of our argument on Tuesday—i.e., in the verbatim record, at page 82, *supra*—with regard to the results which must necessarily flow from a departure by Applicants from their definition of the alleged norm and/or standards as formulated at page 493, IV, of the Reply, and it was this: that it would, in effect, constitute the making of a new case which Respondent has not been called upon to meet, and which Respondent, in fact, has not sought to meet; and that Applicants’ charge as formulated in their Submissions 3 and 4 would then not correspond with the norm if the new definition differs from the definition at page 493, IV, of the Reply.

This must be so, inasmuch as Applicants have charged Respondent with a breach of Article 2, paragraph 2, of the Mandate, on the sole ground that Respondent has (and I quote from their Submission No. 3 as reformulated) "distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory". As so formulated, the charge was tied to the norm as defined at page 493, IV, of the Reply, and any departure by Applicants from the norm as so defined must render the charge in their submissions defective.

Then I come now to deal with the third branch of Professor Possony's evidence, namely that concerning attempts in the international sphere to formulate uniform objectives with regard to the treatment of individuals and ethnic groups. His evidence on this aspect is contained in the verbatim record of 19 October, XI, at pages 695 to 708. Again, Mr. President, it is not necessary to enter into a detailed analysis of this evidence as the factual correctness thereof was not disputed in cross-examination. A brief summary of the purport and effect of this evidence, I think, will suffice.

Professor Possony's evidence is to the effect that on the subject of group rights, and the rights of the individual, there are no international conventions other than the Convention on Genocide which, he said, can be interpreted to mean that it provides each ethnic group the fundamental right of survival. Now, in stating that there are no international conventions, he did not mean that there are no conventions, which, in some way or another, deal with rights of certain groups or with the rights of individuals. In this regard he stated that there are conventions which, in fact, deal with rights of individuals such as, for example, the Charter of the United Nations, which, among other matters, embodies undertakings to promote human rights and fundamental freedoms of individuals. He referred to that in the verbatim record at pages 17-18, *supra*. And he also referred to trust territory agreements, which deal with the rights of individuals, but in certain areas, in the same verbatim record, at page 18.

He referred to the International Labour Organisation Constitution and Convention, which deals with certain aspects of human life relative to the question of labour, in the same verbatim record at page 18, *supra*. And he also referred to regional treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, which deal with human rights within a particular region. That is at page 19 of the same verbatim record.

Mr. President, Professor Possony distinguished conventions of the kind I have now stated when he said:

"Let me make myself clear, those are not international agreements addressed directly to the question of human rights. After all, we do have a major effort in the United Nations going on which aims at writing such an agreement on human rights *per se*."

That is in the verbatim record, at page 18, *supra*. And, Mr. President, he went on, after further questioning by Mr. Gross, to explain the position as follows:

"The difference is that essentially in most of these treaties—we will leave out the European convention—human rights are mentioned as a matter of course. The meaning of these stipulations is vague, sometimes obscure. It is precisely in order to remedy this difficulty that the United Nations has started on the effort to

straighten out the human rights problem by writing an international convention of which each Member of the United Nations could be a signatory, laying down language so clear that it could be introduced into statutory law and so that human rights in effect could be protected. It is the difference, I think, between a declaratory policy and positive law."

The statement which I have just read is from the verbatim record at page 19, *supra*.

Now with regard to attempts in the United Nations to draft a covenant on the subject of human rights *per se*, Professor Possony, in his evidence in chief, dealt with the Human Rights Declaration of 1948, which he said was—

"... issued by the General Assembly as a statement defining human rights in general terms so that on the basis of this declaration and of the ideas expounded in the declaration an international convention could be elaborated".

This is in the verbatim record, **XI**, at page 696.

Mr. President, he mentioned the attempts that have been made to draft a covenant or covenants, attempts which have come up against many difficulties, with the result that no international convention has as yet resulted. He explained that these difficulties were of two kinds, namely of an intellectual nature and of a political nature. The Court will find that in the verbatim record, **XI**, at pages 697 to 698. And he went on, Mr. President, to describe exceptions which make the drafting of a covenant difficult: that is in the same verbatim record, at pages 698 to 700. Likewise, he dealt with the Declaration on Racial Discrimination of 1963 and the attempts which have been made to settle a draft convention. The Court will find his testimony in that respect in the same verbatim record at pages 700 to 702.

Mr. President, in the course of his testimony he referred to the "in-discriminate use of the terms racial discrimination, segregation, separation, apartheid, Nazism and the linkage of all these terms to racial superiority doctrines and doctrines of expansionism and racial hatred", which, he said, had "no rational basis and leaves the whole subject in utter confusion". The Court will find that in the same verbatim record, at **XI**, page 703.

Now, Mr. President, also, this declaration has not resulted in a covenant, and how far the world community is removed from consensus on such matters as rights of groups and rights of the individual, is clearly demonstrated by the further evidence given by Professor Possony regarding a recent seminar held under the auspices of the United Nations in June of this year, in Yugoslavia. The names of the States that were represented at this seminar are stated in the verbatim record, **XI**, at page 703.

Of particular importance, Mr. President, is the main conclusion reached at the seminar which in part (and I shall only quote a part of it) reads as follows:

"There was general agreement that all Governments should promote and protect the rights of ethnic, religious, linguistic or national groups, not only through the adoption of constitutional and legislative provisions, but also through the promotion of all

forms of activities consistent with the political, economic and social conditions of the State or country concerned."

That is in the verbatim record, XI, at page 704.

In the same verbatim record, at the same page, Professor Possony quoted another conclusion to the following effect:

"There was general consensus that the United Nations, as well as Governments and institutions, should undertake measures and stimulate more intensive research on ethnic, religious, linguistic and national problems."

Professor Possony read parts of the record of the seminar which dealt with the following matters—I am not going to read the views expressed in the record, I shall merely give the Court the reference and the subject-matters dealt with, which were the following—the nature of the minority problem; language rights; individual group rights; the rights of ethnic groups; assimilation, and types of solutions. The Court will find extracts from the seminar, quoted by Professor Possony in respect of these subject-matters, in the verbatim record, XI, at pages 704 to 707.

Mr. President, also of particular importance is what Professor Possony described as the major operational conclusion reached at the seminar, parts of which he quoted at page 707 of the verbatim record that I have just referred to. These conclusions clearly bring out the point that there is as yet no consensus with regard to such matters as human rights and racial discrimination, and that the general consensus of the conference itself was that only ratification of a convention could impose binding commitments in this regard.

Mr. President, it is no wonder that when Professor Possony was asked, in conclusion, to express an opinion whether in practice and usage there was observance by States of a norm of non-discrimination or non-separation which prohibits the allotment by governmental policies or actions of rights, duties or burdens on the basis of membership in a group, class, etc., he stated emphatically:

"Mr. President, from what I have indicated to the Court with relation to the practice all over the world, there is no general observance of such a rule or norm. And furthermore, from what I have said relative to attempts at formulation of a concept of effective practice, those attempts have progressed no further than expressions of general abstract ideas."

The Court will find the quotation which I have just read in the verbatim record XI, at pages 707-708.

Mr. President, before the adjournment I had read to the Court Professor Possony's opinion expressed as to whether the norm suggested by the Applicants is observed in the practice of States and that it indicated "no". We say, Mr. President, that nothing in the cross-examination of Professor Possony, with regard to this aspect of the case, in any way detracts from the factual testimony given by Professor Possony or from the conclusion which he stated on the basis of such facts—a conclusion which, indeed, is so manifestly justified by the facts and by the documents to which he referred.

It is submitted that Professor Possony's evidence establishes beyond any doubt that the Applicants cannot rely on any of the following sources as evidence of the virtually universal acceptance of the norm

of non-discrimination or non-separation, as defined at page 493, IV, of the Reply, that is, the Universal Declaration of Human Rights, the Human Rights Draft Covenants, and the United Nations Declaration on the Elimination of all Forms of Racial Discrimination.

It may be convenient, Mr. President, also at this stage to deal with a number of resolutions of the General Assembly which are relied upon by the Applicants in regard to their norm or standards contention.

The Court will recall that when we dealt with the resolutions of the United Nations organs, as specified at pages 497-504, IV, of the Applicants' Reply, we intimated to the Court that not all of those resolutions related to South Africa or South West Africa. We then stated that the remaining resolutions, that is, those not specifically concerned with Respondent's policies, would be dealt with at a later stage, together with other suggested sources outside of the United Nations. I refer in this regard to the verbatim at page 87, *supra*.

Now, the other suggested sources have been disposed of and it remains to deal with the United Nations resolutions which are not directed at South Africa or South West Africa, and I propose to do so, Mr. President, in the light of the testimony given by Professor Possony.

The resolutions in question can be divided into two groups: those pertaining to non-self-governing territories and those which were intended to have a more general application. I shall deal first with the latter group, which comprises the following resolutions, namely resolution 103 (I) dealing with persecution and discrimination; resolution 1779 (XVII) dealing with manifestations of racial prejudice and national and religious intolerance; resolution 1780 (XVII) dealing with preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination, and resolution 1904 (XVIII), United Nations Declaration on the Elimination of all forms of Racial Discrimination.

As the title of the first resolution shows, it did not deal with mere differentiation on a group basis. The very short text of the resolution merely declared that "it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination . . ." The resolution called on governments and responsible authorities to conform to the Charter of the United Nations. The resolution is contained in *General Assembly, Official Records*, 1st Session, Second Part, Document A/64, Add. 1, page 200. The coupling of the word in this resolution "discrimination" with "persecution" makes it perfectly clear that the word "discrimination" was used in a pejorative sense, and the resolution can, consequently, not be regarded as a source of the norm and/or standards, as defined at page 493, IV, of the Applicants' Reply.

The second resolution, that is number 1779, in its preamble expressed concern at "the continued existence and manifestations of racial prejudice and of national and religious intolerance in different parts of the world". The resolution is recorded in *General Assembly, Official Records*, 17th Session, Supplement No. 17, Document A/5217, page 32. In its operative part, the resolution, *inter alia*, called upon governments "to take all necessary steps to rescind discriminatory laws which have the effect of creating and perpetuating racial prejudice and national and religious intolerance wherever they still exist . . .".

Here, again, Mr. President, the use of the phrases "racial prejudice" and "national and religious intolerance" in one breath, so to speak,

shows that what the General Assembly had in mind were laws which involved unfair discrimination and not laws which merely involved differentiation or separation on the basis of membership in a group. This, indeed, is expressly stated in the resolution, part of which reads, as I have quoted, "discriminatory laws which have the effect of creating and perpetuating racial prejudice, etc."

The third resolution, No. 1780, referred to "manifestations of discrimination based on differences of race, colour and religion still in evidence throughout the world". In its operative part the resolution requested the Economic and Social Council to ask the Commission on Human Rights to prepare a draft declaration and a draft convention on the elimination of all forms of racial discrimination. The resolution is recorded in *General Assembly, Official Records, 17th Session, Supplement No. 17, Document A/5217, page 32.*

The fourth resolution, No. 1904, *inter alia*, stated in its preamble that "any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and there is no justification for racial discrimination either in theory or in practice". The resolution went on to state "all forms of racial discrimination and, still more so, governmental policies based on the prejudice of racial superiority or on racial hatred, beside constituting a violation of fundamental human rights, tend to jeopardize friendly relations amongst people, co-operation between nations and international peace and security". This is to be found in *General Assembly, Official Records, 18th Session, Supplement No. 15, Document A/5515, at page 36.*

In its operative part the resolution proclaimed the Declaration on the Elimination of all Forms of Racial Discrimination.

In view of the evidence given by Professor Possony, Mr. President, as to the as yet abortive attempts at drafting a covenant on the basis of the Declaration on the Elimination of all Forms of Racial Discrimination, and with regard to the views expressed at the recent seminar in June of this year, it follows in our submission that the said two resolutions—1780 and 1904—cannot serve in substantiation of a norm as defined by Applicants at page 493, IV, of the Reply. These resolutions produce yet further illustration of the lack of clarity and the confusion in regard to terminology, as was referred to by Professor Possony in his evidence.

I now, Mr. President, turn to the second group of resolutions under consideration, namely those pertaining to non-self-governing territories. This group can in turn be divided into two sub-groups, namely those resolutions concerned with racial discrimination in general, and those concerned with equal treatment in matters relating to education in particular. I shall deal first with the resolutions which had a more general tenor, and then with those resolutions which relate to the particular subject of education.

Five of the resolutions relied upon by Applicants dealt in general with racial discrimination in non-self-governing territories. These resolutions are 644 (VII) of 10 December 1952, 1328 (XIII) of 12 December 1958, 1536 (XX) of 15 December 1961, 1698 (XVI) of 19 December 1961, and 1850 (XVII) of 19 December 1962.

Mr. President, in the first resolution that I have just mentioned, 644 (VII) of 10 December 1952, the General Assembly, after referring to the Charter and the Declaration of Human Rights, recognized—

"... that there is a fundamental distinction between discriminatory laws and practices, on the one hand, and protective measures designed to safeguard the rights of the indigenous inhabitants, on the other hand".

And the General Assembly recommended, *inter alia*, the abolition of—

"... discriminatory laws and practices contrary to the principles of the Charter and of the Universal Declaration of Human Rights".

And further, that—

"... where laws are in existence providing particular measures of protection for sections of the population, these laws should frequently be examined in order to ascertain whether their protective aspect is still predominant, and whether provision should be made for exemption from them in particular circumstances". (*G.A., O.R.*, 7th Sess., Suppl. No. 20 (A/2361), p. 32.)

Mr. President, it is important to note the distinction drawn, on the one hand, between discriminatory measures, and, on the other hand, measures which are intended to protect indigenous inhabitants. It seems that the General Assembly intended to draw that distinction—that is, on the one hand, discriminatory legislation, that is, legislation which is motivated by an improper design, and, on the other hand, legislation intended to protect indigenous peoples.

As long as the predominant aspect of a measure was and remained one of protection the legislation was not outlawed.

This resolution, Mr. President, we say, does not, therefore, lend support to the norm as defined at page 493, IV, of the Reply.

Coming next to resolution 1328 of 12 December 1958, which is the second resolution I mentioned, this resolution merely referred back to resolution 644 (VII), that I have just dealt with, and—

"[r]eaffirms its resolution 644 (VII) and draws the particular attention of the Administering Members to the recommendation contained in paragraph 2 thereof . . .",

and further urged members responsible for the administration of non-self-governing territories to pay special and constant attention in future to implementation of its resolution 644 (VII). (*G.A., O.R.*, 13th Sess., Suppl. No. 18 (A/4090), p. 35.)

Mr. President, again this resolution does not assist the Applicants.

Resolution 1536 (XV) of 15 December 1960—the third one mentioned by me—also in turn refers to resolution 644 (VII) of 10 December 1952, and to the second I have mentioned 1328 (XIII) of 12 December 1958. Now, this resolution in its operative parts—

- (a) endorsed the view that racial discrimination is a violation of human rights and a deterrent to progress in all fields of development;
- (b) recommended the revision of all laws and regulations which tend to encourage or sanction, directly or indirectly, discriminatory policies and practices based on racial considerations;
- (c) urged that measures to solve the problem of race relations should include the extension to all inhabitants of the full exercise of basic political rights, in particular the right to vote, and the establishment of equality among the members of all races inhabiting the non-self-governing territories.

I have just referred to the contents of the resolution as recorded in

the *General Assembly, Official Records*, 15th Session, Supplement No. 16 (A/4684), at page 27.

Now, again, Mr. President, as this resolution refers back to resolution 644 (VII), there must, by implication, again be a distinction between, on the one hand, discriminatory legislation, as such, and, on the other hand, protective legislation. In so far as it may possibly be construed as going any further, it is purely declaratory of a broad trend of policy favoured by those who voted for the resolution, as distinct from something intended to bring about binding commitments of an exactly formulated content. Consequently, we say, Mr. President, also this resolution does not assist Applicants' norm or standards contention.

I wish to deal now with resolution 1698 (XVI) of 19 December 1961. That resolution referred back to the resolution with which I have just dealt, that is resolution 1536 (XV) and also to resolution 1514 (XV) which is entitled "Declaration on the granting of independence to colonial countries and peoples". Mr. President, this resolution noted that racial discrimination still existed in non-self-governing territories and endorsed the view of the Committee on Information from such territories "that on no grounds whatsoever can the existence of racial discrimination in any aspect of life in the Non-Self-Governing Territories be justified". In its operative part, the resolution condemned "the policy and practice of racial discrimination and segregation in Non-Self-Governing Territories", and urged the administering Members to take steps to ensure:

"The immediate rescinding or revocation of all laws and regulations which tend to encourage or sanction, directly or indirectly, discriminatory policies and practices based on racial considerations."

That is in the *General Assembly, Official Record*, of the 16th Session, Supplement No. 17, document A/5100, pages 37-38.

Before saying something about the meaning and purpose of this resolution, it will be convenient to refer to the last resolution that I mentioned, that is 1850 (XVII), which was closely linked with this one. This resolution recalled resolution 1698 (XVI), and noted with deep concern:

"that racial discrimination in law and in practice, which is utterly repugnant to humanity, has not been eradicated in Non-Self-Governing Territories",

and it reaffirmed the General Assembly's "resolute condemnation of the policy and practice of racial discrimination in Non-Self-Governing Territories". That is in the *General Assembly, Official Record*, of the 17th Session, Supplement No. 17, document A/5217, at page 43.

Mr. President, I should like to draw attention to two features of these two resolutions which I have just mentioned. The first is this: resolution 1850 (XVII) referred back to resolution 1698 (XVI), which in turn referred to resolution 1536 (XV); the last-mentioned resolution in turn again referred back to resolution 644 (VII) which I mentioned earlier and which was the first resolution pertaining to non-self-governing territories that I mentioned. As already stated, Mr. President, that resolution, that is 644 (VII) raised no objection to laws providing particular measures of protection for certain sections of the population. No resolution of the General Assembly ever expressed an opposite view. And since the last two resolutions in effect referred back to resolution 644 (VII), it would seem that these two resolutions also did not intend to condemn mere differentiation on the basis of membership in a group,

class or race. In other words, it seems again that where the words "racial discrimination" were used in these resolutions, they were intended to mean "unfair racial discrimination". If they meant anything else, Mr. President, they certainly did not succeed in stating so.

A further point I wish to make is that all the resolutions pertaining to non-self-governing territories were based on information furnished with regard to such territories, which of course do not include South West Africa, and were intended to apply solely to those territories, and then, of course, merely as recommendations. They were never intended to lay down a norm or standard or principle which should also apply to other countries or territories.

In sum, therefore, these resolutions may at their highest be seen as part of the thus far abortive attempts, which Professor Possony referred to, towards arriving at a generally applicable rule about individuals and group membership.

May I then deal with the resolutions relied upon by the Applicants in so far as the subject of education is concerned. The first of these resolutions, No. 328 (IV) of 2 December 1949 invited the administering members:

"to take steps, where necessary, to establish equal treatment in matters related to the education between inhabitants of the Non-Self-Governing Territories",

and further:

"in cases where for exceptional reasons educational facilities of a separate character are provided for different communities, to include in the information transmitted under Article 73 e of the Charter full data on the costs and methods of financing the separate groups of educational institutions".

I have just quoted from the *General Assembly, Official Record, of the 4th Session, document A/1251, at page 41.*

This resolution clearly recognized that, under particular circumstances, it might be necessary to provide educational facilities of a separate character for different communities and it is worth noting that, as was pointed out in our Rejoinder, VI, page 152, the Special Committee on Information gave the following interpretation of the above resolution:

"The Special Committee considers the resolution to stress equality of opportunity for different ethnic and religious groups of the school population, in order that every child, regardless of race, religion, language or social status, may acquire both a knowledge of his own culture and a sympathetic understanding of the cultures of others. *It does not necessarily mean that a common educational programme should in all cases be provided for all groups in a community of different racial or religious composition.*" (Italics added.)

It is consequently clear that resolution 328 (IV) cannot possibly be regarded as a source of the norm or standards as defined at page 493, IV, of the Reply.

The second resolution dealing with education, that is No. 1464 (XIV) of 12 December 1959 endorsed—

"the view expressed by the Committee on Information from Non-Self-Governing Territories that on no ground whatsoever can education on a racial basis be justified",

and requested the committee to pay special attention to this matter. I refer in this regard to the *General Assembly, Official Record*, of the 14th Session, Supplement 16, document A/4354, at page 35. At the same time, the General Assembly reaffirmed resolution 328 (IV) with which I have just dealt. If regard is further had to the fact that resolution 1464 (XIV) did not call upon administering members to give effect to the view expressed by the Committee on Information, it is perfectly clear that there is no intention of laying down a standard or rule of non-separation in educational matters even with regard to non-self-governing territories.

It should be observed that the views of the Committee on Information which were endorsed by the General Assembly were conditioned by its belief that no territory could financially afford to provide equally advantageous facilities for each of the population groups. Thus, Mr. President, the committee stated, *inter alia*, that—

“whether or not it had been feasible to provide equally advantageous facilities for each of the racial groups, it was liable to entail a multiplication of staff, effort and resources which no Territory appeared able to afford”.

That is in the Rejoinder, VI, at page 155. It would therefore appear that the committee did not consider whether separate educational systems which provide “equally advantageous facilities for each group would be justified”.

It should be observed that after the adoption of the resolution in question, administering authorities continued to provide separate educational systems for different groups, although they informed the Trusteeship Council that such systems were not based on race. The following two extracts from the report dealing, respectively, with Ruanda-Urundi and New Guinea, are illuminating in this respect. I quote from the report. The first one is from 1959, relative to Ruanda-Urundi:

“So far as discrimination in schools is concerned, there are, at the primary level, schools with an African syllabus, a school for Asians at Usumbura and schools run on Belgian lines. The Administering Authority explains that these distinctions are prompted not by racial discrimination but by practical requirements arising from the location of the establishments and from profound differences in customs, education and, particularly, language, which make a single common system of education impossible.”

Mr. President, the second quotation is in the report relative to New Guinea, dated 1962:

“The great majority of both mission and Administration primary schools are classified as Primary “T”, and have a curriculum specially designed for indigenous pupils. The others, classified as Primary “A”, follow the primary school curriculum of the State of New South Wales. The Administering Authority states that the difference in schools is necessary because of the wide variations in the respective cultural and educational backgrounds of the students attending them.”

Mr. President, those quotations are from the Rejoinder, VI, pages 159-160.

It is also important to remember, Mr. President, that the resolution

in question and the views of the Committee on Information were based on particular circumstances existing in specific territories, viz., the non-self-governing territories, which do not include South West Africa. Neither the committee nor the General Assembly purported to express the view that separate systems of education for different groups can under no circumstances be justified in countries or territories other than the non-self-governing territories. It is not necessary for us to show that circumstances in South West Africa differ from those in the non-self-governing territories, but in passing it may be pointed out, as was stated in the Rejoinder, VI, at page 150, that the White population of non-self-governing territories constituted a very small percentage of the total population of such territories.

The important point, however, is that the resolutions in question do not provide the slightest proof of a norm of non-discrimination or non-differentiation of general application, or of standards which are intended to apply to South West Africa. The resolutions which I have just dealt with, therefore, do not assist the Applicants with regard to their norm as defined at page 493, IV, of the Reply.

Mr. President, with your permission, I now turn to the third part of our argument. The Court will recall that on Tuesday I explained that the argument would be divided into three parts. I wish to deal now with the third part, and that is with regard to evidence showing that the application of a norm and/or standards, as defined at page 493, IV, of the Reply, would, in the circumstances of many countries, including South West Africa, lead to results inconsistent with the promotion of well-being and progress.

For convenience, the matter can be dealt with in two main parts, namely evidence directed at the circumstances of pluralistic societies in general, and the second part, evidence directed at the particular circumstances of South West Africa.

With regard to the first-mentioned branch, that is the evidence directed to countries generally, I shall refer to the evidence of Professor van den Haag, and Professor Manning and also to the evidence given on this subject by Professor Possony.

Mr. President, Professor van den Haag's qualifications as an expert were not challenged by the Applicants. At one stage, it was indicated that he would be cross-examined as to his qualifications—this appears in the record, X, at page 139. However, Mr. President, there was no such cross-examination.

Professor van den Haag's qualifications and special fields of study are set out in X, pages 133-135. Mr. President, I shall not repeat what he stated there. I wish to make a few points relative to these qualifications. He mentioned that he had obtained certain degrees, *inter alia*, an M.A. and a Ph.D. degree and his special fields of study were sociology and psycho-analysis. He is a Professor of Social Philosophy—it is sociology and psychology combined—at the New York university. He is a lecturer in psychology and sociology at the School of Social Research in New York, and has also lectured at other universities in the United States of America. He is in private practice as a psycho-analyst and he has published very widely, one of his books being used as a text-book in United States universities.

He has for a long time given special attention to the subject of minority problems and particularly to the manifestation thereof in the United

States regarding the relationship between the Negro minority and the White majority, and he is engaged in major research projects on the effects of segregated and integrated schooling of Negro pupils under conditions where all variables are controlled.

Now, Mr. President, Professor van den Haag dealt with the existence of human or social groups and with the importance of having due regard to such groups in matters of governmental policies and practices. He stated that although a human group was, of course, composed of individuals it was *something more than* "a mere aggregate of persons". I refer in this regard to the verbatim at X, page 141. Mr. President, as I go on I shall not try to give a complete summary of what was said, but merely indicate generally the topics and then refer to the pages where the reference is made in the testimony.

He said a social group was an aggregate that felt as a group and was bound together by a feeling of group solidarity usually based on the perception of similar characteristics, on a sharing of values, or possibly on common historical experience. (X, p. 141.)

He went on to say that nations could be described as groups that were "held together by cultural values that are perceived as common". That is the same verbatim, same page.

Now such group solidarity, he testified, led to a sense of order and law-abidingness in the community and manifested itself, *inter alia*, in a preparedness to make sacrifices on behalf of the group. (*Ibid.*, pp. 141-142.)

He said that where more than one group, with such a group consciousness, found themselves within the borders of the same country, the situation could give rise to conflict, especially when one group felt itself or its identity threatened by another group. (*Ibid.*, p. 180.)

Now, in this regard, Professor van den Haag referred to situations which arose in certain countries, namely India, which, he said, was partitioned to accommodate two incompatible groups in an effort to reduce strife and conflict. (*Ibid.*, pp. 143, 144, and 435-436.)

He also pointed out how the Governments of Poland and Czechoslovakia after World War II, fearing the introduction of elements of disloyalty, had the German populations within their countries removed. He referred also to the case of Ruanda-Urundi and the fact that group conflicts led to the partitioning of the country—partitioning which in the final event turned out to be one that did not go far enough, as the tragic events showed. (*Ibid.*, p. 144.)

Professor van den Haag also referred to two cases—the United States of America and Russia—where government fears of possible disloyalty on the part of certain population groups within its borders led to action against such groups on a purely group basis. (*Ibid.*, p. 145.)

He also pointed out that certain countries framed their immigration laws in such a way as to avoid the introduction within their borders of elements which might not be readily assimilable because of the cultural or ethnic differences.

He referred in this regard to the United States of America, Australia, the United Kingdom and Canada. (*Ibid.*, pp. 146-147.)

Mr. President, all this, apart from supporting Professor Possony on the fact that there was no general practice of a norm or standards of non-separation, demonstrated also the practical importance of group solidarity and ethnic differences—practical recognition accorded to the

importance of these matters, and the tragic consequences of overlooking them or granting insufficient recognition to them.

In regard to the question of assimilation, reference may also be made to the evidence of Professor van den Haag as recorded in X, at pages 167 to 174, the effect of which can briefly be stated as follows.

At the base of group solidarity lies identification, a consciousness of kind, and it is a universal phenomenon that members of an ethnic group show a preference for, and tend to associate with, fellow members rather than with others. Indeed, as between different ethnic groups, there is everywhere in the world, he said, a tendency to "ethnic prejudice" and "ethnic separation" unless circumstances can be so arranged that there is mutual acceptance. I refer to the same verbatim, at page 172.

Professor van den Haag said that attempted assimilation might be successfully accomplished "when it is carefully regulated, when there is a lot of groundwork laid, when it was done slowly", and when it was produced, as he said, by "mutual acceptance". That is at page 174 of the same record. He said an attempt to do so by force would not be successful. Disruption leads to very injurious consequences and psychologically and sociologically it is extremely difficult for a member to quit his group. That is in the same record, pages 174-175. "The greater the cultural differentiation" between two groups, Professor van den Haag said, "the less I would urge any immediate and sudden homogenization", and the more he would want the two groups "to remain relatively isolated from each other". (X, p. 179.)

He also said that cultural differences between two groups might be so great as to call for legal measures to maintain separation between them. If this was not done a technologically weaker group might be overrun by a more advanced group. He referred in this regard to the Indians in the United States of America. (*Ibid.*, pp. 179-180.)

According to Professor van den Haag, it cannot be said that segregation is, by itself, harmful. In many cases, he said, it would have beneficial results. (*Ibid.*, pp. 179-180.)

Mr. President, in this regard, he emphasized the importance of certain factors which are of particular significance with regard to the suggested norm and/or standards, and they are the following:

- (a) The desirability of maintaining a native culture that has any sort of strength. (*Ibid.*, pp. 152-153.)
- (b) Differences in cultures and in levels of development are factors favouring separation. (*Ibid.*, pp. 164 and 179.)
- (c) When a group considers itself or its identity or its standard of life to be threatened by another group, "the amount or intensity of prejudice tends to rise". (*Ibid.*, p. 180.)

Mr. President, all this emphasizes the need to deal with each case, as Professor van den Haag said, on its merits and not by a fixed preconceived formula, as appears from the way he expressed himself, at page 180.

Professor van den Haag also dealt specifically with the question of education. I do not intend to deal with this here. It will be dealt with later, Mr. President, when we come to the particular subjects, such as education.

May I, then, deal very briefly with the evidence of Professor Manning, Mr. President? His qualifications as an expert were not challenged by the Applicants in cross-examination. It is true that during the examina-

tion-in-chief Applicants raised objections as to the formulation of the points to which Professor Manning's evidence was to be directed and to the relevance of his evidence, but this objection obviously did not relate to his expertise as such. At one stage—that was during the examination-in-chief—Mr. Gross for the Applicants suggested that Professor Manning was not really qualified as an expert, but that he was expressing his "personal *credo*". I refer in this regard to the verbatim, XI, at page 604.

Mr. President, in our submission and for reasons which I shall outline, this suggestion was unfounded.

Professor Manning's qualifications appear at XI, page 601 and the following pages of the verbatim record, and I shall very briefly summarize the qualifications. He obtained the degrees of Bachelor of Arts and Bachelor of Civil Law at the University of Oxford, his main fields of study being philosophy and law. Thereafter, he held a fellowship at Harvard University. Having taught legal subjects at Oxford, he held for more than 32 years the Chair of International Relations in the University of London. He has published a number of articles and in 1962 a book *The Nature of International Society*.

His basic field of study, international relations, entailed a study of characteristics of the international society and such developments in the domestic affairs of States as have an impact on international issues, especially the problem of the nature of groups and group personality. Also he, Mr. President, testified on the matter of group solidarity and on situations which may arise where different groups find themselves within the same country.

Very briefly, his evidence was: a group—as he said—is, of course, composed of individuals, but it can also be more than a mere aggregate of individuals. The group is sometimes socially viewed as a person, as an entity with a group personality (XI, at p. 606). He said that every individual member of a group has firstly an image of himself, as participating in the collective selfhood of his group, and secondly an image of his group, and the collective self-image of the members of the group is a part of that which gives them their cohesion and their solidarity as a group (*ibid.*).

The existence of more than one such group in a single country, Professor Manning pointed out, could lead to difficulties in government and administration. Sometimes, he said, peace and order could be maintained only by some external power or by a particular form of government, such as one-party rule (*ibid.*, p. 611). He mentioned India and Ruanda-Urundi in this regard, where resort was had to partition when Great Britain and Belgium respectively withdrew. He also referred to Cyprus, where he said a formula for ensuring peaceful coexistence of the Greek and Turkish communities was still being sought (*ibid.*, p. 614).

"Where the population of a country is a single people with a single, all-inclusive self-hood and a single, collective self-image", Professor Manning said, there is no difficulty about making satisfactory constitutional arrangements (*ibid.*).

Difficulties, he said, arise "when within the ambit of a single polity there are included one or more less dynamic . . . self-hoods whose presence and potentialities are not sufficiently allowed for in the given constitutional scheme" (*ibid.*). By way of illustration he referred, *inter alia*, to the position of French-Canadians in Quebec, and of the Flemings and the Walloons in Belgium—both cases where groups in a country

have shown themselves to be unassimilable and not wanting to be assimilated one to the other (*ibid.*).

Where the objective is the promotion of the well-being and progress of two or more underdeveloped peoples living in one territory, the approach should not be (in Professor Manning's words) "ideological or doctrinaire" but "tentative" and "clinical", i.e., suited to the sociological needs of the particular situation. I refer in this regard to the verbatim record, **XI**, at pages 616-617.

The Court will also remember that Professor Manning was asked to express certain views with regard to the position in South West Africa itself. I shall not deal with that now, but at a later stage.

Coming to the evidence of Professor Possony, he also stressed the importance of recognizing group differences in pluralistic societies. I shall only read a brief extract from his evidence in this regard (*ibid.*, p. 648). This is what Professor Possony said:

"Multi-ethnic societies presuppose the explicit recognition of ethnic differences. Such societies require institutions that are based upon and manage the ethnic diversity. In addition, an effective organization to ensure the collaboration of different ethnic groups is needed to bring about mutually beneficial economic progress and to provide for each individual an intact social community of his own. If such communities are disrupted, or if the relationship between the individual and his community is disorganized, man becomes psychologically alienated, that is, he no longer belongs to his group.

In summary, ethnic differences demand recognition. If multi-ethnic societies are to function well such differences must be handled through institutional arrangements."

Mr. President, the Court will also recall that when asked the question whether it would be practicable and just to apply a norm and/or standards as contended for by the Applicants under all circumstances and at all times, Professor Possony's answer was (and I shall read only a part of it):

"Mr. President, my answer to this question is no. Mankind with all its diversities has never accepted a single writ. To impose a single formula would be ideological imperialism . . . the best principle, it seems to me, is to tailor methods or responses to specific challenges. An optimal solution can be optimal only in terms of a concrete situation. A solution can be viable only if it respects the history of an area and is implemented in the same rhythm as the society living in that area is evolving." (**XI**, p. 708.)

Mr. President, it will therefore be seen that Professor van den Haag, Professor Manning and Professor Possony each, from his own field of learning and research, and each in his own wording, emphatically came to the same conclusion, namely that the best principle (and I quote from the words of Professor Possony) is "to tailor methods or responses to specific challenges". This evidence, in our contention, lends support to an argument which we have already advanced relative to the discretionary powers which were vested in the Mandatories, namely that it would have been impracticable, if not entirely impossible, to prescribe special methods of promoting well-being and progress for each of the mandated territories. Consequently, Mr. President, save for providing for

certain specific prohibitions, each Mandatory was expected and empowered to (and I quote Professor Possony's words) "tailor methods or responses to specific challenges".

We submit, Mr. President, that there is nothing in the cross-examination of Professor van den Haag, Professor Manning or Professor Possony which in any way detracts from their stated views that to apply the norm of non-discrimination or non-separation for which the Applicants contend, *under all circumstances and at all times, especially in countries in which there are pluralistic societies, that is, societies composed of different ethnic groups, would in many cases be to court disaster.*

Mr. President, having dealt with the general evidence, I now wish to proceed to deal with witnesses who expressed themselves relative to the situation in South West Africa itself. Here again, the testimony can be divided into two broad categories, namely (a) the evidence of witnesses who expressed opinions on the situation in general; and (b) the evidence of witnesses who dealt with particular aspects of policy, such as political rights, education, and, for instance, the economic aspect. There is, however, some overlapping between the two categories, and the evidence of some witnesses may be referred to in the argument relative to both, but, nevertheless, I consider it convenient to deal with the subject, as far as possible, in terms of these two categories.

Concerning the witnesses who expressed views on the situation in general, the Court will recall that certain witnesses, such as, for example, Professor van den Haag and Professor Manning, did so not on the basis of personal or intimate knowledge of conditions in South West Africa, but on the basis of knowledge obtained from our pleadings, the facts treated in the pleadings being admitted by the Applicants.

It will accordingly be convenient, before dealing with the evidence of such witnesses, to refer briefly to certain general circumstances or factors as described in the pleadings concerning the different population groups of South West Africa, which facts are not disputed by the Applicants.

In this regard I wish to refer the Court to a statement made by my learned friend, Mr. Gross, with regard to the admission of facts, in the verbatim record, IX, at page 21. May I be permitted to read the passage, which is to the following effect:

"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 these 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."

Mr. President, may I now be permitted to state the more important circumstances or factors to which I have just referred, and which in our submission are not only relevant but very material in the present enquiry? I shall state them very briefly, and then refer to, or give, very brief quotations from certain passages in the pleadings.

The first factor to which I refer is the existence in South West Africa of a number of population groups with different traditions, cultures and languages. In this regard I refer to the Counter-Memorial, **II**, pages 311 to 348, which contains a description of the population groups of South West Africa. The Court is respectfully referred to what is stated in regard, *inter alia*, to the history, social and political organization, language, economy, etc., of the different groups. The following passage states very briefly the position in 1920 and the position today:

"The population of South West Africa is today, and has been for centuries, a heterogeneous one. When Respondent assumed the Mandate in 1920, the Territory was occupied by at least nine major population groups differing widely as to appearance, ethnic stock, territories of origin, culture, language and general level of development."

I have just read from the Counter-Memorial, **II**, page 311, paragraph 1. There is also a passage in Book VII of the Counter-Memorial, **III**, with regard to the position in 1920. If I may be permitted to read, it is as follows:

"Each of these groups had its own identity, its own culture, customs and language (save that the Basters and other Coloureds spoke one of the European languages, and the Dama the Nama language, as they still do). There were in these respects differences not only between the White, Coloured and Native groups, but also between the various Native groups *inter se*." (**III**, p. 354, para. 5.)

And the following passage reflects not only the position in the past but also the present position:

"At no time prior to, at or since the assumption of the Mandate by Respondent, has the population of the Territory in fact formed an integrated, homogeneous society. On the contrary there has at all times existed a wide diversity of population groups, several of which have always been confined in their habitation to defined and, in some instances, relatively isolated regions or areas within the Territory. There have at all times been wide differences between the groups—in levels of development, modes of living, outlook and aspirations—and in the not too distant past conflicts of interest resulted in almost incessant warfare between some of them." (*Ibid.*, p. 106, para. 7.)

Without reading it, I would also refer the Court in this regard to the Counter-Memorial, **III**, at page 375, paragraph 49.

The second factor, Mr. President, is that in the history of the Territory, prior to the assumption of the Mandate, there had been a period of strife and warfare between a number of indigenous groups. The factual position in this regard is briefly stated as follows in the Counter-Memorial, **II**, at page 407, paragraph 13:

"In the Police Zone, . . . Respondent found various Native groups which had been in contact with one another for at least a century. This contact had not led to the creation of a common society—on the contrary, tribal and racial differences, and conflicting claims to land, had led to continual bloodshed, resulting in the subjugation or even extermination of the weaker by the stronger."

In Book III of the Counter-Memorial we dealt with these matters

in some more detail. It sets out at **II**, page 327, paragraph 56, how the Bushmen were hunted down and virtually exterminated by the stronger Hottentot, Herero and other Bantu groups; how the Dama were persecuted and enslaved by the Nama and the Herero (that is at pp. 332 to 333, paragraphs 64 and 65); and how the Herero and the Nama fought each other almost continuously for most of the nineteenth century (that is at p. 349 of the same part of the pleading).

I think the position may be summarized by the following short quotation from page 349, paragraph 1:

"The history of South West Africa during the nineteenth century consists of a record of almost uninterrupted warfare, particularly between the Nama and the Herero. As will be seen, in the period between 1835 and 1861 the Nama became undisputed masters over the Herero. After 1861, the tide turned in favour of the Herero, and in 1870 they concluded a peace treaty which confirmed their position as the dominant group in central South West Africa. After ten relatively peaceful years, the year 1880 saw the beginning of renewed hostilities, which were not finally terminated until the Germans, who had in the meanwhile acquired authority over the Territory, suppressed the warring tribes by force of arms in the last couple of years of the century."

Mr. President, the third factor is that, generally speaking, the various groups find themselves at different levels of development, and, in particular, that there is a vast difference in this respect between, on the one hand, the European group, which has a tradition of western civilization and is used to a modern economy, and, on the other hand, the various Native groups, which are to a large extent still bound to the tradition of subsistence economy.

Book III of the Counter-Memorial contains brief descriptions of the traditional economic systems of various indigenous groups. All these economies were of a simple subsistence type, with some more primitive than others. So, for example, the economy of the Bushmen was one of hunting and food gathering, and that of the Dama almost equally primitive. The references in this regard to the various groups are the following: I shall only indicate where they are to be found, Mr. President, without quoting or even summarizing.

The Eastern Caprivi people are dealt with in Book III of the Counter-Memorial, **II**, page 316, paragraphs 18 to 21; the Okavango people, in the same volume, pages 318 and 319; the Ovambo, at pages 324 and 325; the Bushmen, at pages 329 and 330; the Dama, at pages 335 and 336; the Nama, at pages 338 and 339; and the Herero, also in this same volume, at pages 346 and 347.

The agricultural and pastoral activities of the groups in the northern territories are, despite developments which have taken place, still largely of a subsistence type. Details of this are contained in the Counter-Memorial, **III**, at pages 4 to 9.

In the Police Zone development has progressed further. In that area, Native farmers have to some extent become commercial farmers who produce for the market. I would refer the Court in this regard to pages 10 to 21, **III**, of the Counter-Memorial, which deal with agriculture in the Police Zone and, more particularly, pages 15 to 19, paragraphs 13 to 17, which deal with the position in regard to the Natives.

In the field of industry and commerce the Natives of the Territory have generally not acquired the experience, enterprise or means to initiate modern development. So, Mr. President, for example, the following is said in regard to mining, if I may quote a short passage from the Counter-Memorial, **III**, page 59:

“. . . due regard must be had to the fact that the Native population has as yet not acquired the experience, and generally does not as yet have the initiative or the means, to undertake prospecting and mining operations, which . . . must usually be on a large scale to render them profitable”.

Mr. President, details with regard to commercial activities on the part of the Natives are briefly set out on pages 101 to 103, **III**, of the Counter-Memorial.

The fourth factor, Mr. President, is that to a very large extent the groups occupy, and have in the past for many years occupied, separate regions in the Territory.

Thus, the Eastern Caprivi people occupy the territory they have always occupied (Counter-Memorial, **II**, pp. 312-313); the Okavango people have occupied their present territory for probably more than one hundred years (*ibid.*, p. 317); the position would seem to be about the same in the case of the Ovambos (*ibid.*, pp. 320-321); the Himba and Tjimba of the Kaokoveld seem to have been there for considerably more than a hundred years and probably also some of the Hereros in that area (*ibid.*, pp. 341-342, paragraph 82); the other Herero went to the Kaokoveld in 1915, this matter is dealt with in the Counter-Memorial, **III**, p. 242, paragraph 39; the Nama of Okambahe have occupied that area since 1870 (Counter-Memorial, **II**, p. 378, paragraph 86); the Basters of Rehoboth have occupied that territory since 1870, I refer in this regard to the Counter-Memorial, *ibid.*, page 379, paragraph 88.

Mr. President, the fifth factor is that the indigenous groups, to a large extent, still recognize and apply their traditional system of government through chiefs and headmen. In this connection, the Court's attention is firstly drawn to what is said in Respondent's Counter-Memorial, **III**, pages 114-125, paragraphs 38-83, about the indigenous political institutions outside the police zone. As will appear from these pages, the Ovambo tribes have in some cases in a somewhat adapted form retained the original or traditional systems of government: some tribes have chiefs assisted by councils of leading men, others have councils of headmen; I refer to the Counter-Memorial, **III**, page 116, paragraph 47. These chiefs and governing bodies, as is also the position elsewhere outside the police zone, also exercise judicial functions (*ibid.*). I also refer in this regard to **II**, pages 322-323, as to the Ovambos' traditional, social and political organizations. The tribes in the Okavango territory have a system of chiefs assisted by councils of headmen; the councils of headmen are an innovation. At the inception of the Mandate there were only chiefs; this is also in the Counter-Memorial, **III**, page 119, paragraphs 58 and 59. In the Eastern Caprivi, the traditional system is still in operation—hereditary chiefs assisted by councils; I refer to the Counter-Memorial, *ibid.*, page 120, paragraph 66, and **II**, pages 314-315.

In the Kaokoveld, where conditions for a long time were unsettled and where the different sections, that is, the Herero, Himba and Tjimba,

living there did not get on too well with each other, a solution has been found by instituting a joint council of headmen who are elected by members of the tribe concerned usually on a hereditary basis—that is in the Counter-Memorial, **III**, pp. 121-125 and particularly page 124, paragraph 79.

Attention, Mr. President, is next drawn to what is stated in the Counter-Memorial, **III**, pages 125 and 130, with regard to the indigenous political institutions within the Police Zone. It will appear from what is said in those pages that tribal life and institutions had been broken down by the events during the nineteenth and early twentieth century, that members of the different groups were scattered all over the southern sector at the time when the Mandate was assumed—I refer in this regard to page 125, paragraph 84, **III**, of the Counter-Memorial. It will also appear, Mr. President, from these pages, that although the various groups do not today have their traditional systems of government, some elements of such traditional systems, largely in the forms of councils of headmen, have been introduced into the systems of administration applied in the different Reserves. The general line of development in this regard is set out at pages 125-128, **III**, of the Counter-Memorial whilst at pages 128-130 there is contained particulars relevant to the Herero, the Nama and the Dama.

The sixth and the last factor to which I wish to refer, Mr. President, is that the population groups each have and are conscious of their separate identity and that they wish to be treated as separate groups. I have already quoted certain passages from which it will appear that at the time of the assumption of the Mandate each of the population groups had a separate identity, and that is still the position today; I refer in this regard to what I stated under the first of the factors that I dealt with earlier.

Reference may also be made to certain other passages which show that the various groups wish to be treated separately and this applies not only as between the White groups, on the one hand, and the non-White groups, on the other hand, but also as between the latter, the non-White groups themselves, and that is so even in those areas where they do not occupy areas of their own, for example, in the urban areas in the police sector.

Speaking of this position in 1920, it is said in the Counter-Memorial, **II**, page 408, paragraph 15, that:

“The absorption of the non-White population in the money economy of the White group did not lead to the creation of an integrated society, even among the Native groups. Each group still regarded itself as different from the other.”

And speaking of the position of the Natives in the Police Zone in 1920, we stated in the Counter-Memorial, **II**, page 409, paragraph 21 (e): “. . . wide differences between the various groups were still found, and each group retained its own identity” and it is stated in various places in the Counter-Memorial that there has at no time in the history of the Territory been social integration between the White and the non-White groups. So for example, Mr. President, it is said that:

“In the history of the Territory there has at all times been social separation between these groups, and experience has shown that members of each group prefer to associate with members of their

own group, and that certain kinds of contact between members of these groups tend to create friction." (III, p. 55.)

Mr. President, the following passages relate to members of the Native groups living in the urban residential areas. I cite from the Counter-Memorial, III, page 180, paragraph 46:

"The various groups prefer to have their own separate schools, clubs, churches, sportsgrounds and other amenities and intermarriage between the different ethnic groups is a very rare occurrence."

And in the Counter-Memorial, *ibid.*, page 296, we have the following:

"In South West Africa Respondent makes, as far as is practicable, separate provision for each of the different Native groups, since the majority of Natives prefer to live in ethnically grouped communities."

Mr. President, may I conclude then by indicating the statement to be found in this regard in the Odendaal Commission report, page 55, paragraph 187, which states as follows:

"In the course of the enquiry the Commission gained the impression, supported by evidence, that the various population groups harbour strong feelings against other groups and would prefer to have their own homelands and communities in which they will have and retain residential rights, political say and their own language, to the exclusion of all other groups."

Mr. President, the factors I have mentioned are the more important factors. Other factors, for example, that different groups wish to have different schools will be dealt with later when we come to the particular subjects to be dealt with.

[Public hearing of 1 November 1965]

Mr. President, on Friday I dealt with certain factors which in our submission are very material to the issues before the Court, factors which are set out in our pleadings with particularity, and which, as facts, have not been disputed by the Applicants.

The last factor with which I dealt was that the different groups in South West Africa each have, and are conscious of, their separate identity, and that they wish to be treated as separate groups. I ended up on Friday by referring in this regard to a passage in the report of the Odendaal Commission. May I be permitted to add another reference, and that is to Respondent's Rejoinder, V, pages 285 to 291, where we deal with consultations with the different population groups held by the Odendaal Commission before it brought out its report and consultations held subsequent to the publication of the report. The results of these consultations, in our submission, clearly demonstrate the wishes of the groups to be treated as separate groups.

I proceed next, Mr. President, to deal with the testimony of witnesses who expressed opinions in general relative to the application in South West Africa of a norm and/or standards of a content suggested by the Applicants. The first witness is Professor Manning. Now, for the purpose of his opinion, he assumed the correctness of the description of the Territory's population groups as contained in Respondent's Counter-Memorial and in the report of the Odendaal Commission. On the basis of these descriptions Professor Manning said—and I quote from the verbatim record, XI, at page 615—

"The Territory would appear to me to be a veritable continent in miniature, inhabited by a diversity of peoples not in general yet able to stand by themselves in the world. Even so, they are, I would gather, fully conscious each of its own distinctness from the others. Individuals in general do very well know of what group they are a part. I do not assume that the group consciousness of these several communities is as yet in the nature of a national consciousness. In some cases it may well be. For instance, with the Ovambo. But that is not a necessary part of my theme. My concern is simply with the diversity of these ethnic groups and the unmistakably separate identity of each."

Mr. President, in expressing his opinion on what the effects of the application of the Applicants' norm in South West Africa would be, Professor Manning dealt with the matter from two points of view. The first concerned the *present* and the conditions for the development towards full maturity of the various groups; and the second concerned the *future* and the desirability of ensuring to the various peoples the fullest opportunity to make their own choice in respect of their own political future. The testimony in this regard is found in the verbatim record, **XI**, at page 605, and also, at page 616.

As to the first point, that is the *present*, Professor Manning stated that the application of the norm would involve a non-recognition of relevant differences. It might be, he said, administratively convenient to treat all the groups alike, once one had decided whose needs and aspirations were to be taken as typical of the needs and aspirations of all, but that such an approach would not prove conducive to the speedy development and greater well-being and progress of all. He expressed the view that one should look at the needs of each group separately, and, so far as possible, deal appropriately with each one's important needs.

"Only so [he said], will one be able to give to each group a heightened sense of and a more lively pride in its own identity, enabling it through the modernizing of its own traditional institutions to move forward towards a genuine self-determination in a world and a South West Africa made safe for diversity."

I refer in this regard to **XI**, at page 617.

As to the second point, that is the *future*, Professor Manning stated that, in his view, it was "necessary to the dignity of every ethnic group that it be given the right of self-determination". I refer in this regard to **XI**, at page 618.

Now, proceeding from that premise, he expressed the view that a rule of non-differentiation would be radically incompatible with the essential idea of self-determination. The application of such a rule, he said, would mean a lumping together of the several communities and, at best, the creation of a synthetic unit. This, he said, would preclude the several groups from the right of self-determination and the opportunity for self-rule. It would mean, furthermore, that a group could find itself joined with other groups before it had achieved the needed understanding of itself and before it was mature enough to be fully a party to what was being done. The evidence in this regard is in the verbatim record, **XI**, pages 618 to 619.

Professor Manning also expressed the view that even if self-determina-

tion was not precluded in the sense that I have just stated, the application of a rule of non-differentiation would preclude a group from advancing and from preparing for constitutional change at the rate at which it was capable. Failure to apply different measures for the speedier advancement of the several groups would therefore, Professor Manning said, be like the case of an entire convoy having to move with the slowest ship. The evidence in this regard is in **XI**, at page 619.

Now, Mr. President, although Professor Manning was cross-examined, he was not cross-examined on the opinion he expressed to which I have just referred.

May I then proceed to deal with the evidence of Professor van den Haag. As in the case of Professor Manning, Professor van den Haag was asked to express an opinion relative to the circumstances in South West Africa. Now he has not visited the Territory, but he stated in evidence that he had read certain parts of the written pleadings, particularly Book III of the Counter-Memorial, which contains a detailed description of the different population groups in the Territory. He was asked whether, in the light of his general knowledge of human relationships over the world, he found anything inherently improbable in the descriptions given in Respondent's pleadings. After this question was put, an objection was made by the Applicants, but the objection having been heard the question was allowed to be put and was repeated. That is in the verbatim record, **X**, at page 161.

Professor van den Haag's reply was as follows:

"I am aware, as any sociologist is, that there are in this world different human groups at different levels of development, if we take development not to be a matter of developing by regular stages—which is a theory I do not hold—but it is certainly true that some peoples have primitive, and others more complex cultures, that some are pre-literate and others are literate, that some are more highly developed and others less highly developed in particular respects . . . so there are major differences along those lines and though I cannot vouch for the correctness of the description of these differences in South [West] Africa I should think that, in general, one would expect that different tribes, different people, different groups, are developing in different ways."

I have just quoted from the verbatim record, **X**, at page 162.

This matter was then taken further in his evidence, with particular reference to Respondent's educational policies, a matter which will be dealt with later in the course of our argument relative to education.

Mr. President, as we have noted before, the principles and conclusions stated by Professor van den Haag generally—that is without specific reference to South West Africa—tend very strongly against the application of Applicants' norm and/or standards in South West Africa, that is, at least for a considerable time in the future. I have in mind, in this regard, particularly his emphasis on the importance of different cultures and different levels of development, and of the tensions which arise when one group feels itself threatened by another. The references in this regard, Mr. President, were given in Friday's record, at page 190, *supra*.

Now, the facts concerning South West Africa, as set out in the Respondent's pleadings, to which I referred on Friday—that is in the verbatim record at pages 193 to 198, *supra*—are not only admitted by the

Applicants, but their existence and the importance of their existence have been testified to by a number of witnesses who were asked to express an opinion relative to the application in South West Africa of a norm of a content suggested by the Applicants.

The first witness with whom I wish to deal in this regard is Dr. Eiselen. He is a renowned anthropologist who has made a special study of African life and languages, linguistics and social anthropology, as well as physical anthropology, and he testified with regard to population groups in South West Africa. He is a person with a missionary background who, in his own words, "grew up amongst the Bantu peoples" and—

"spent really the whole of my life in the service of the Bantu people of the Republic of South Africa, and I have endeavoured to obtain an intimate knowledge of the circumstances of the people there, and my life's work has been devoted to helping . . . the Bantu people of South Africa, in their efforts to attain a higher standard of civilization".

The Court will find that quotation in the verbatim record, X, at page 89.

In testifying with regard to the population groups in South West Africa, he described the position in the Territory as follows:

"Mr. President, the term 'multi-community' applies to an even greater extent to the Territory of South West Africa. [He was comparing the position in the Territory with conditions in South Africa.] When we spoke of South Africa we were able to speak of the presence in South Africa only of the Bantu—the various population groups of the Bantu—the Coloured people, the Indians and the White people, but in the Territory of South West Africa there are many more population groups and they differ far more widely than the population groups in South Africa. You have, in addition to the closely related White people related to those of the Republic, Bantu in South West Africa who are not of the same type. They do not belong to the same type. There also exists a great difference between the Ovambo and the Herero in their social structure and in many other respects." (X, p. 108.)

He then went on to describe to what extent the various groups in the Territory differ relative to their customs, traditions, ways of life and languages. The Court will find that in the verbatim record, X, at pages 108 to 109.

He described what the position was when South Africa assumed the Mandate, what parts of the Territory were occupied by the different groups, and how a policy of separate development has, throughout the existence of the Mandate and up to the present, been applied in the Territory. In this regard the reference is to X, at pages 109 to 111.

Now, in the latter regard, he denied that the policy of separate development is based on any concept of superiority and inferiority of any of the population groups or that the object of the policy is to discriminate against the Bantu people. I refer in this regard to the same verbatim, pages 111-112.

When asked to state his opinion relative to the application in South West Africa of a rule or norm or standard which would prohibit the allotment of rights or duties on the basis of membership in a race, or tribal or ethnic group, he stated that he had difficulty in understanding how the idea of non-separation could be applied to South West Africa.

He stated that the term could have in the context three possible meanings.

With regard to the first meaning, he said:

"... that you must not take to pieces a natural whole, because that would obviously be a separation; but as no such natural whole has ever existed in South West Africa, as Ovambo and the Herero, the Dama, the Bushmen and all the others have never formed a natural whole, this cannot surely refer to taking to pieces a natural whole". (X, p. 112.)

With regard to the second possible meaning, he said:

"Therefore, it is perhaps the next possible meaning of this concept, namely to allow to come together again those who have been separated by historical events, who did form a unit at one time or other. In this respect I can think of, say, the Ovambo, of whom a portion live in Portuguese Angola and another portion—perhaps the major portion—in South West Africa; these people were at one time a unit, and they have been taken apart by action of the so-called colonial powers, but it is not something in which the South African Government could take action unilaterally, although everybody would of course be pleased to see that, if these people so desired, they could once again form a whole." (*Ibid.*)

And, then, regarding the third possible meaning, he said:

"But then there is apparently this third possible meaning: that you must not allow units who in the opinion of people of greater wisdom should form a unit to remain apart, although they had never formed a unit before—that apparently is the meaning of this alleged norm in regard to South West Africa: that the population groups should now become a unit, apparently because they had been included in one area by the people who carved up Africa in the time of colonial expansion; that the Herero, the Ovambo and others had been included in the same area and were therefore, by virtue of that action of the colonial powers, now expected to become a unit; that they would not have the same right as people who had not been so included to have an independent future of their own. That [he said] ... is something that seems to be entirely against the feelings not only of the Government, but something that would definitely not be welcomed by the people." (*Ibid.*, p. 113.)

He expressed the view that the policy of separate development of the various population groups in South West Africa was the policy best suited to the circumstances of the Territory both in respect of political advancement as well as in respect of economic advancement. This was stated by him in X, at pages 113-114.

Asked what the effects would be of applying the Applicants' suggested norm of non-separation or non-discrimination, he replied that in so far as the political aspect is concerned it is difficult to visualize what would happen. He went on to say:

"If one speaks in terms of the majority, the people who are unfortunate enough to be the smaller groups would in forming a new unit—an artificial new unit—be obliged to accept the precept and example of the most numerous group. For instance, if everybody were given political rights—the vote—in the same way in

South West Africa, then the Ovambo people would, by being the vast majority in that area, obviously be the people called upon to form the Government, and I take it that their language would become the official language unless they would choose to make English or Afrikaans the official language, which does not seem to be very likely. To the other tribes, the Herero for instance, whose name is perhaps better known than that of any other people in South West Africa but who are numerically only about twelve per cent as strong as the Ovambo, this would mean a terrible thing that they, being a proud people, should now be forced to live according to the ideas of the Ovambo people." (*Ibid.*, p. 113).

Relative to the economic aspect, he stated:

"In the case of the economic sphere it is very difficult to think that anything could result from this except chaos." (*Ibid.*, p. 114.)

And he went on to say:

"... to give to them [that is the peoples of South West Africa] immediate power as a government chosen by the people of South West Africa just on the strength of their numbers, to give to such a government the power of dealing with substantial achievements in the economic sphere, in the mining sphere, in the fishing industry, in the diamond industry, in the wool industry, the meat industry, and so forth, would be asking for trouble." (*Ibid.*)

The Court will recall, Mr. President, that Dr. Eiselen was not cross-examined at all. I merely state that now as a fact. The significance and effect of it will be considered later in our argument.

May I, then, proceed to deal with the evidence of Professor Bruwer. He is a renowned social anthropologist, who can also be said, as student, missionary, educationist and administrator, to have devoted his life to a study of and the upliftment of the Bantu people, not only in South Africa itself, but also in Rhodesia and in South West Africa. I refer in this regard to the verbatim, X, at pages 239-242, where he gave the Court a detailed description of circumstances in South West Africa and, particularly, of the different groups in the Territory.

Mr. President, Professor Bruwer is, in our submission, eminently qualified to speak on these subjects. Not only has he lived amongst the indigenous peoples of South West Africa and studied their ways of life, but he was also a member of the Odendaal Commission, the report of which is before the Court, and he also served for one year as Commissioner-General for the indigenous peoples of South West Africa. The evidence in this regard is in the verbatim, X, at pages 241-242.

His description of the population of South West Africa was briefly as follows:

"... looking at the population from an anthropological point of view, I would in fact say that it is extremely heterogeneous, comprising as it does a number of separate and also distinguishable groups or communities of people". (X, p. 243.)

He described in detail the differences between the various population groups.

Mr. President, it will be a lengthy process even to summarize his evidence. I shall not do so but simply state the topics covered by his evi-

dence and indicate where such topics can be found in the record, the topics being the following:

the different names of the groups—**X**, page 243;

the classification of the indigenous groups into two main groups—*ibid.*, pages 244-246;

the languages of the groups—*ibid.*, page 246;

the ethnic background and derivation of the groups—*ibid.*, pages 246-251;

the cultural configuration, social structures and institutions and the customary laws of the different groups—*ibid.*, pages 251-256;

the economic systems, political systems and judicial systems of the groups—*ibid.*, pages 251-256.

Asked what conclusions he drew from his study of the different groups Professor Bruwer stated, and I quote from the verbatim record, **X**, pages 258-259:

"Mr. President, if I take into account the pattern that I have tried to indicate to the honourable Court, if I take into account the qualities inherent in the different systems and if I take into account the functional value, the varying systems of value inherent in these various systems, then I can only say, Mr. President, that there is no doubt in my mind that we have to do with a variety . . . on the basis of language, we have to do with a variety in regard to social structure and institutions, we have to do with a variety in regard to political systems and we have to do with a variety even in regard to the application of customary law."

He also explained the extent to which the various groups occupied different parts of the Territory, in the verbatim record, **X**, at pages 259-261.

When asked whether there is an inclination amongst the people of South West Africa towards forming an integrated whole, he stated:

"Mr. President, I cannot say that because I have never come across anything that convinced me of such a desire, either in the past or in the present . . . neither the Commission [that is the Odenaal Commission] nor I myself in the capacity as research worker, have ever been impressed by facts or by possibilities in regard to such an inclination, because I simply have not come across them. I admit that there are individuals and that there also are certain political organizations that have expressed such a desire, but it is my earnest deduction and my conviction that they do not represent the wishes of the majority in any one of these groups, neither the wishes of the majority within the population as such."

This quotation is in the verbatim record, **X**, at pages 261-262.

He explained to the Court what he considered the basic advantages of the policy of separate development as applied in South West Africa, in **X**, pages 262-264, and, when asked to state his opinion as to what the effect would be if the present measures of differentiation in the Territory, that is, measures based on membership in a group, were to be done away with, his reply was:

". . . prediction is naturally based on opinion. I have quoted certain, what to my opinion are, advantages of a certain approach, having in mind the situation as I know it and as I interpret it. Now, Mr. President, naturally if you do away with this system at a specific

moment, or let us say momentarily, you discard an approach that has been going on not only during the period of the Mandate, but long before that. If you discard that, Mr. President, then naturally all the advantages that I have explained as being my opinion, will disappear. In practice all the essential measures of protection will fall away. There would be no protection of land rights, there could be no protection of language rights, I am afraid; now what can be then the predictable consequences of something like that?" (X, p. 265.)

Having posed that question relative to the predictable consequences, Professor Bruwer discussed these consequences and he said:

"... if we had to take as an example what happened and did happen in the previous century, then one would immediately say that there would be a violation of rights, or assumed rights, and such violation would undoubtedly lead to friction, and perhaps even more than friction, perhaps even struggle; but there is also this other predictable consequence, Mr. President, and that is that one will destroy that which I have pleaded for as being the achievement by people themselves, and I do not think that I would ever be able to agree to an approach where one destroys a people even through other than physical means, Mr. President; but as far as South West Africa is concerned, I also think that the one group, either on the basis of numbers or on the basis of economic strength, will undoubtedly dominate the other group if you have not got protective measures; and I also think, Mr. President, that one can say that if you have now to start a novel or a new system, an alien system, you will very definitely retard the process of evolutionary development that has been going on for the last 40 years approximately after the assumption of the Mandate." (*Ibid.*)

In cross-examination my learned friend, Mr. Gross, questioned Professor Bruwer on various matters of detail concerning the implementation of policy in South West Africa. It is submitted, however, that nothing in the cross-examination detracts from the opinion expressed by Professor Bruwer.

The next witness, whose evidence I intend to deal with shortly, is Professor Logan. The evidence of Professor Logan is generally to the same effect as the evidence of the two other witnesses I have mentioned, that is, Dr. Eiselen and Professor Bruwer. At a later stage of the argument we shall deal in more detail with his evidence relative to the economic aspect. At the present time I intend to refer only to certain features of a more general nature.

Professor Logan explained that his particular study, that is, geography, is concerned not only with the crust of the earth as such, but also with man and actually involves a study of the relationship between man and the land. I shall indicate where that is to be found: it is in the verbatim, X, page 337. As such, his study impinges on the field of sociology, as to which he said: "... as geographers we have to know about men, and knowing about men we have to know about sociology and societies ...". This quotation is in X, at page 344.

This assertion by Professor Logan is amply borne out by the extent of sociological studies actually pursued by him and that is quite apart from the sociological aspects inherent in his discipline as a geographer.

He told the Court that he made special field studies in many parts of the world, particularly certain arid regions, and that he also had made a study in South West Africa, where he spent a considerable time. Pages 338 to 339, X, contain the evidence that I have just indicated.

Professor Logan described the general conditions in South West Africa, dealing both with the different geographical regions in the Territory and with the people inhabiting them. The aspects of this discussion which relate more directly to economic matters, as I have indicated, will be dealt with later, but what is of general importance at this stage of the argument is his description of the people in the Territory. When asked: "Would you say that the population of the Territory is a homogeneous one?" he replied: "I do not believe there is anywhere in the world a more diverse one." This quotation is from X, at page 368.

Professor Logan then proceeded to describe the various groups and to point out the differences among them in the cultural, ethnic, technological and economic spheres. This is in the verbatim, X, pages 368-370. He also explained and illustrated the relationships among the various groups, evidence which he summed up as follows:

"... they distinctly identify themselves as separate groups. They not only identify themselves as separate groups but they want to be treated separately in most cases. They do not mix together to any great extent." (X, p. 371.)

For his discussion and illustration of this aspect, I refer to *ibid.*, at pages 371-373.

When asked about the desirability of measures differentiating amongst the various groups, Professor Logan expressed the view that such measures were necessary, for reasons which he gave in his testimony. Some of these reasons were of a purely economic nature and, as I have indicated, those will be dealt with later, but at this stage it is necessary to point out that the economic measures regarded by Professor Logan as necessary related specifically to such matters as allotment of rights, duties and burdens on the basis of membership of a group rather than on the basis of individual merit or individual qualities. For example, he referred to the measures dealing with the protection of land rights and economic opportunities which necessarily entail privileges and disabilities for the various Native groups as well as disabilities for the Europeans.

Apart from referring to economic matters, Professor Logan also adverted to some more general benefits of the differential measures. Thus he referred to the necessity for controlling population movements in X, at page 374, and he concluded this part of his testimony by stating, and I quote from the same record, at pages 374-375:

"Finally, I think that the really, perhaps most important, of all of these, is the need to protect and to allow to develop, the traditional institutions of the people... There is a lot of dignity, there is a lot of common sense, there is a lot of self-respect, there is a lot of good, in a lot of the various types of Native tradition and culture. To wipe this out by superimposing a Western way of life instantly upon them, can very well bring about a rather chaotic situation, a deculturized society..."

Now perhaps the better thing to do is to permit the original traditional institutions to remain and then to develop, within the framework of the traditional institutions, something in the way of a better

way of life from the practical point of view, from the very materialistic point of view, to give them better food, to give them health services, to educate them, but to educate them still within the framework of their traditional society; and the modern ideas can come in gradually, but not be suddenly forced upon them. I emphasize, perhaps most importantly, 'forced upon them', that is, to let the idea come gradually but not to impose a new way of life instantly upon them. So, in each case then, it is a matter of allowing to develop the individual group within itself, rather than to force a different type of culture upon all of the individual groups."

After he had discussed these various reasons for differentiating between the groups, Professor Logan was asked:

"What, in your opinion, would happen if these measures of protection and control that you have referred to, were to be done away with in South West Africa?" (X, p. 375.)

His reply was as follows:

"Well, I think probably what I have said during the past few minutes has . . . led up to this: that to remove the controls would result in the domination of many by a few, would perhaps result in the subjugation or almost the obliteration of some of the existing tribal groups, it would result, I think in many cases, in a reversion to an old way of life and that was a way of violent antagonism and frequently of warfare.

The economy, as it has been developed, both on the European basis and on the Native basis, would, to a large extent, fall apart. In other words, what I would visualize myself, if all controls were to be abolished in the area and all differentiation between groups ignored, I am afraid a rather chaotic situation would develop."
(*Ibid.*)

Mr. President, Professor Logan was cross-examined at length, and we shall, at a later stage when dealing with the economic aspect, deal with the matter of cross-examination. At present, I think it will suffice to say that this cross-examination did not directly challenge the opinion expressed by Professor Logan, and, I submit, did not in any way detract therefrom.

May I then proceed to deal with the evidence of the Reverend Mr. Gericke?

Mr. President, he is a member of the Dutch Reformed Church of South Africa, and has been a minister of that Church for 27 years. I refer in this regard to XI, page 4.

He is the Vice-Chairman of the Synod of his Church and has for the past 20 years been a member of the General Missions Commission of the Church.

At the outset of his testimony, Mr. Gericke's attention was directed to the diversity of the population groups in South West Africa, and the following was put to him by Counsel for the Respondent, Dr. Rabie:

"The Applicants say that they are particularly concerned with what they call the qualitative aspects of the well-being of the inhabitants of South West Africa, that is, with their moral well-being and social progress. In this regard the Applicants rely on a suggested norm and suggested standards which appear to emanate

from a certain premise, and this premise is apparently that the allotment of rights and obligations, burdens and privileges, on the basis of membership in a race, class or group must necessarily be detrimental to the moral well-being and the social progress of some of the inhabitants. In particular, the notion seems to be that the provision of separate institutions and facilities for the different . . . groups must inevitably be detrimental to such moral well-being and social progress." (XI, p. 5.)

Mr. President, in this regard the Court's attention is drawn to statements made by the Applicants on 17 May, and I refer to the verbatim record, X, at pages 232-233.

Mr. Gericke was then asked whether his church had gained experience in Southern Africa with regard to provisions of separate institutions and facilities for different groups, and, in connection therewith, moral and social well-being.

His answer was this, Mr. President:

"The church is not concerned only with what I may call the care of the soul. The church is also deeply concerned with the moral well-being and social progress of people and has gained extensive experience which, as I see it, is relevant to this matter which has been referred to." (XI, p. 5.)

He then went on to explain the various spheres of life to which the activities of the church extend, such as mission work in a number of southern African States—he referred to Bechuanaland, Malawi, Rhodesia, Zambia and Nigeria—all of which countries the Reverend Mr. Gericke has visited, with the exception of Nigeria. In this regard, I draw the Court's attention to the evidence in the verbatim record, XI, at page 5.

He described the interests and activities of the church in such matters as medical work and hospitalization, and also in the field of education. The reference here is to the same verbatim record, at page 6.

He dealt with the history of the church, and stated that in the beginning in South Africa itself, the services of the church were multi-racial—that is, in the sense that they were attended by White people and also by slaves of that time, as well as a few Aborigines.

However, by the 19th century, according to him, it became clear that the results were very unsatisfactory, and he gave the following explanation for that state of affairs:

"Very few non-White people became Christians. Furthermore, those who joined the Church had a very inadequate opportunity for full religious experience. They were a mere appendix to the White congregation. They were seated in a separate part of the church and received very little benefit from a service which was attuned to the needs and the background of the White people." (*Ibid.*, p. 7.)

This, he said, led to the establishment of a separate, independent and self-governing church for the Coloured people in the Cape Province of South Africa.

The main consideration for such a step, in the words of Mr. Gericke, was as follows:

". . . as appears from history, it became quite clear that the difference in culture, language, level of intellectual development and racial

background, demanded a different method of approach, even an adapted form of preaching; also, new hymns to serve as a means of expression of religious experience.

In addition, there was no real communion, spiritual communion, between the White and non-White members of the congregations, chiefly due to the absence of social intercourse in ordinary life. Friction occurred on occasion between groups as a result of a feeling of frustration on the part of the Coloured people who found themselves in a minor position in the church. At that time there was a growing desire for separate services and separate churches on the part of leading members of both groups." (*Ibid.*, p. 8.)

Later, Mr. Gericke said, separate churches were also established for the Bantu groups, so that today there are, in addition to the mother church, 12 separate, or daughter, churches which are completely independent. The evidence in that regard is to be found in the verbatim record, XI, page 8.

Now, the advantages of this system of separate churches were described by Mr. Gericke as follows:

"First of all, this system provides full opportunity for self-development for the members of the daughter churches. All offices are open to them. A new stimulus is provided for development of their own leaders and the management of their own affairs. This has brought about a more positive attitude and a new sense of enterprise and responsibility on the part of the members of the daughter churches. Furthermore, this system has stimulated co-operation and removed possible occasions of friction.

The separated churches realize and appreciate the fact that they are not merely an appendix of the White Church but churches equal in status. This has really engendered a spirit of co-operation, of mutual respect and of neighbourliness. They can now meet their White brothers in the church as equals. The present relationship between the mother and the daughter churches is one of mutual respect and readiness to co-operate." (*Ibid.*, p. 9.)

He stated, Mr. President, that the daughter churches had become less and less independent on the mother church, even financially, and he said:

"All these factors must have contributed to giving the members a new sense of self-respect and independence.

But, Mr. President, to me a point of supreme importance is this, that in this set-up the feeling of human dignity must come into its own. Where you have independent self-governing churches and communities, the requirement that one must love one's neighbour as oneself becomes easier of fulfilment than might otherwise be the case." (*Ibid.*, pp. 9-10.)

When asked to express an opinion on what the results would be if there were to be no separation in the church, Mr. Gericke replied:

"... it would cause a disruption of the orderly situation which now exists in the Dutch Reformed Churches, and orderliness is of supreme importance to the Church. You cannot preach the Gospel in a disordered society where there is tension and friction. It would also lead to ... unfair competition in the church organization

which would exclude many non-White members from leadership and consequently cause friction, frustration and even bitterness. In short, it would nullify the advantages which resulted from this particular system in our Church." (*Ibid.*, p. 10.)

He said in this respect also the following, and the quotation that I give the Court now, which will be the last one out of the evidence of the Reverend Mr. Gericke, is in the verbatim record, XI, at page 12:

"Once it is appreciated and accepted, as we firmly believe, that a policy of integration will lead to—and I am speaking figuratively now—either suicide or homicide of certain groups and to a fatal set-back in the advancement of the country and its people, there can be no quarrelling with the morality of a viewpoint that such consequences are to be avoided at all costs. I think that it is largely because of a different understanding of the situation that churchmen have been led to express divergent views on this particular policy and not because of a difference of opinion on moral concepts and Christian ethics."

The policy of separate development as practised by the Dutch Reformed Church in South Africa is, according to the Reverend Mr. Gericke, also practised by that church in the territory of South West Africa although, as he explained to the Court, Mr. President, the church has only recently extended its mission work to South West Africa where other denominations have for many years covered the field. He also described to what extent separation is practised by such other denominations in South West Africa, and he indicated to the Court to what extent the church had influenced the development of policies by the South African Government. I refer in this regard to the verbatim record, XI, at pages 10-11.

Mr. President, although the Reverend Mr. Gericke was cross-examined at length, and particularly with regard to opposite views held and expressed by certain other church bodies and ministers of religion, he was, in our submission, not at all shaken in the opinion which he expressed to the Court, or the reasons upon which he based his opinion.

May I then deal with the last witness in the group of general witnesses, which form part of the argument at present, and that is the evidence of Mr. Cillie. The Court will recall that, according to Mr. Cillie's evidence, he has for many years had experience as a political journalist and as the editor of one of the leading newspapers in South Africa itself. I refer in this regard to the verbatim, X, at pages 506-507. He described political developments in the history of South Africa and dealt in particular with the policy of separate development, as it is applied in South Africa and in South West Africa, and also with the basic reasons for such a policy and the object sought to be achieved thereby. The reference which I wish to give in this regard is to the verbatim, X, at pages 509-518. When asked to express his view with regard to the application in South Africa and South West Africa of the norm and/or standards by a process of what he himself termed "pressures from outside", he stated:

"These pressures have, in my view, been increasingly directed to the main purpose of making South Africa itself, and South West Africa, conform to this standard of one man, one vote—this standard of universal adult suffrage."

The quotation is taken from the verbatim, X, at page 525.

Mr. President, he then went on to explain that the imposition of such a system on South Africa would, in his words, "be a mortal threat to the whole of Southern Africa" and he said, "innumerable tensions would be created . . . perhaps even to the extent of revolt and group wars". I refer in this regard to the verbatim, X, at page 527. For his views regarding the application of such a system in South West Africa, may I refer, Mr. President, to the answers given by him in cross-examination in the record, X, at pages 546-547.

Mr. President, although Mr. Cillie, in his evidence, concentrated on the political aspect, his evidence is, in our submission, of general importance in the sense that the political aspect has an over-riding importance, and effect with regard to the promotion of well-being and progress in all spheres in South Africa and in South West Africa.

This brings us now to the part of our argument which will deal with particular subjects, such as the political aspect, the educational aspect and the economic aspect. With the Court's permission, my learned friend, Mr. de Villiers, will address the Court on the first of these topics, that is, the question of the political aspect in South West Africa.

30. ADDRESS BY MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS
OF 1-3 NOVEMBER 1965

Mr. President, honourable Members, before I pass from the more general subject to the more specific ones, and beginning then with the subject of government and citizenship, or the political aspect, there are certain matters of what I might call a transitional nature between the two which I should like to deal with first.

My learned friend, Mr. Muller, promised the Court earlier that we would deal with certain authorities on the question of the legal effect and the practical effect of admissions and with certain related considerations. I propose to do so now, Mr. President, at this particular stage, with brief reference to authority. I refer to the authority not through any mistaken notion that the principles would not be known to the Court; it is purely a matter of giving ready references and also of building further arguments in regard to the particular circumstances of this case, on the basis of certain formulations in these principles.

Now, as far as the American and the English systems of law are concerned, the effect of admissions made by a party is dealt with very lucidly by *Wigmore* in his major work on *Evidence*, the third edition, in Volume IX. That is the edition in the Court library. I read from page 586:

"An express waiver, made in Court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. [omitting some words] It is, in truth, a substitute for evidence, in that it does away with the need for evidence."

That is the end of the quotation from the text at that page, but in the footnotes to this portion of the text, at the same page 586, we read, amongst others, the following: a reference to the law of England and to a work called *Gilbert on Evidence* and a quotation from that as follows:

"The consent of the parties concerned must be sufficient and concluding evidence of the truth of such fact, for they, [the jury] are only to try the truth of such facts wherein the parties differ."

That is the end of that quotation; and then further in the footnote a reference to the law of Louisiana, in respect of which it is said that in Louisiana the Continental law has left its mark. There is a reference then either to a decision or to a publication, I am not quite sure which, from which there is given the following quotation:

"Judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding. It amounts to full proof against him who has made it. It cannot be divided against him. It cannot be revoked . . ."

That is the end of the quotation, but the authors add, "unless made through the error of fact, but not for error in law."

Then in Wigmore's text, at the next page, 587, we find the following:

"The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, i.e., the prohibition of any further dispute of fact by him, and of any use of evidence to disprove or contradict it."

That is the end of the quotation, and I may say, Mr. President, that *Phipson on Evidence* in his ninth edition, at pages 18-19, is broadly to the same effect as I have read to the Court, thus far, about the general principles.

Then the next question is (we are now seeing what the effect of the admission is upon the party making it), what is the effect on the court? Now on this subject we find that Wigmore quotes quite extensively from an American decision *Larson Jr. Company v. Wrigley Jr. Company*; it was a dispute about alleged unfair trade in the chewing gum line. We find in this decision, in the extracts cited in Wigmore—passages reproduced there—very clear descriptions of considerations of logic and of fairness which according to one's experience are applied very generally in practice in this regard. I read some of those passages as reproduced in Wigmore, the first being at page 588 in the text:

"Undoubtedly a litigant has no cause for complaint if the Court accepts his solemn and sworn admissions in pleadings and testimony as true. But we must reject the contention that his adversary has the right to *compel* the Court to do so. Otherwise a Court would be forced by parties to decide moot, feigned, and collusive cases, or a Chancellor might be made to proceed with an equitable accounting between partners who had stolen the property they brought into court. But the present case on the counterclaim is not moot, nor feigned, nor collusive, and it presents a question of Larson's legitimate property rights."

Then at that page, and running over onto the next page, we find passages in which the court discussed certain features of fact in that particular case which could be said to throw some doubt upon the correctness of certain admissions which had been made in court by Wrigley. The admissions concerned particularly the question of the likelihood of confusion between the two articles wrapped up in accordance with the particular trade-mark, or whatever it was that was in dispute, and the court referred to those considerations, as I say, which might throw some doubt on the question whether those admissions were correct in fact. But the court then proceeded:

"But Larson's counsel may have relied on the stipulation of fact in bill and counterclaim to save hunting up and bringing in witnesses of wrongful sales. Furthermore, Wrigley and another interested with him gave testimony as experts in the gum business that confusion was likely to result from the similarities; and so there is a basis for at least the possibility that Wrigley's averment of fact and his expert opinion may be true, and that Larson's diminished sales came from Wrigley's simulation of the 'Wintermint' package.

In such a situation, the rule, in our judgment, is this: In a real and legitimate controversy, a party should be left within the knot

of his averments in pleadings and admissions in testimony, unless the Court can find an absolute demonstration from other evidence in the case, or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true."

That, then, gives a very apt summary, in our submission, of the very highly exceptional circumstances under which a court would consider itself free to depart from admissions made in a particular case.

The principles to which I have referred are not peculiar to the Anglo-American systems. They are basically founded on considerations of natural justice and of sound common sense and, as one would expect, one finds them of general application in the procedures of civilized systems. I can give the Court an example of a Continental system—the case of the German Code of Civil Procedure, paragraph 289. I read our own translation:

"A fact alleged by a party need not be proved by him if in the course of the proceedings such fact is admitted by the other party . . ." (Baumbach-Lauterbach, *Zivilprozessordnung*, 22nd edition, p. 519.)

And then we find comment on the effect of such an admission by Rosenberg, *Lehrbuch des deutschen Zivilprozessrechts*, 8th edition, page 550, and I read again our translation:

"The effect of an admission is that the admitted fact need not be proved, and that the judge must accept it as true for the purpose of his judgment, even if he is not satisfied that it is in fact true, unless he considers it to be impossible—i.e. contrary to all experience—or if the contrary is beyond question."

Paragraph 275 of the Austrian Code of Civil Procedure is to all intents and purposes identical with the paragraph of the German Code which I have just read. In that respect I could refer to Wolff, *Grundriss des österreichischen Zivilprozessrechts*, page 296.

Applying these considerations to the present case, and to the admissions of fact that have been made here and to which reference has several times been made by my learned friend, Mr. Muller, and my learned friends, Dr. Van Heerden and Mr. Van Rooyen, there can be no question of collusion, or something similar, between the Parties in this case with reference to these particular admissions. If ever there was a real dispute, it surely is this one, on the subject-matter in respect of which the admissions were made. The admissions concern expositions of fact in respect of which we gave copious references in our pleadings to documentary sources and documentary proof in substantiation of those facts. Not only did we give those. Where we could not give a documentary source but relied upon information given to us by officials or departments we cited that information as being based upon departmental information, and we gave the explanation in the introduction to our Counter-Memorial that in such cases we had the evidence available, if the information were questioned at all by the Court or by the opposite Party, to substantiate that information.

So it was in respect of documented and substantiated information of that nature that the admissions were made. The Applicants had full access to all kinds of records and sources from which they could check

the accuracy of what we said. They had full access to official publications from the Union of South Africa and the Territory of South West Africa, to records of Parliamentary debates, to press reports. There is a full reporting of everything done, particularly in the political field, in South Africa, anything said by a political leader, anything done. It is always brought to light. As Mr. Cillie said, we are an open society, and there is copious record of anything that occurs which could have been of interest to the Applicants in this respect in order to check upon the information which we supplied. The Applicants had full access to the researches and the attempts at fact-gathering that had been going on in the United Nations for years and years on the subject. They had full access to numerous books and articles written about South Africa and about South West Africa by authors and by journalists from South Africa, from South West Africa and from elsewhere, as well as to visitors to the countries, many of whom had written about the countries, and many of whom may have visited the countries without having written about them, and indeed a host of South Africans and South West Africans who had gone abroad, in many cases persons who were not friends of the Government at all. Virtually all the basic aspects of these facts that have been admitted have been confirmed by the expert witnesses in their evidence, not because that was the purpose of their evidence, but because in many instances in order to assist the Court by way of the inferences which they drew from the facts—the conclusions at which they arrived—it was necessary for them to refer again to those basic facts. And although they did not deal with them each and every one systematically, by and large the basic aspects of them stand fully confirmed by that expert testimony.

Mr. President, I was dealing with what may be termed the surrounding circumstances regarding the admissions that have been made to the Court—the considerations which go to guarantee their probable accuracy, or otherwise I was dealing with the question whether it could ever possibly be said of these admissions that they relate to facts which could not possibly be true, and I have referred in that respect to the documentary and other sources which we quoted for the facts, which were eventually admitted. I have referred to the sources available to the Applicants for checking on our facts, and I have referred to the fact that the basic aspects of the facts were confirmed by the expert witnesses who have given oral testimony before this Court. Those experts, Mr. President, were not confined to South Africans, they included also a man like Professor Logan, an outside, entirely independent observer, whose very vivid descriptions of the basic facts the Court will recall.

Then, Mr. President, I want to refer to the fact that the admissions were very carefully made, not irrationally. They were made with respect to all the facts concerned, except in so far as there might be denials in particular instances—except where otherwise indicated—so that the opportunity was reserved to the Applicants to check upon the facts as a whole and to see whether, in some cases, those admissions required qualification. As the Court will recall, denials were very few. They were in effect almost non-existent.

Finally, Mr. President, there is this important aspect about it. The admissions must not have been easy for the Applicants to make. It will be recalled that we dealt with the fact that the Applicants are appearing here in a representative capacity, representing the collectivity of African

States. And it will be evident from the reviews which we have given that those admitted facts go directly counter to what had been alleged over all these years against South Africa and its policies at the United Nations by that very group of States and others acting in this respect as their allies, so it could not have been an easy admission to make, and yet it was made.

All these factors, in my submission, combine to make just about the most cogent guarantee one could wish for the probable correctness of the admitted facts. There is no suggestion that these facts could not possibly be true or that "under no circumstances could the averments and submissions be true", if I may use the words of the authorities. On the contrary, it seems most highly probable that each and every one of them is true.

I refer next to another aspect of the authorities in regard to admissions, and that is the effect of admissions on the opposite party—the party who had not made the admissions. That is dealt with in the same volume of Wigmore, Volume IX, at page 589:

"A fact that is judicially admitted *needs* no evidence from the Party benefitting by the admission.

But his evidence, if he chooses to offer it [i.e., evidence in the context on the subject-matter which had been admitted], *may* even be *excluded*."

And then the author goes on to explain that that rule applies for reasons of practical convenience, for reasons, for instance, that the evidence then proffered may be superfluous, because it may unnecessarily take up the time of the Court, and so forth. But then he states a qualification lower down on the page as follows:

"Nevertheless, a colourless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations . . . Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances."

Now, applying that to this case, Mr. President, we find that in some of the Applicants' formulations of their admissions of the facts, although not consistently in all of them, they sought to draw a distinction between "the facts" and the "inferences that may be drawn therefrom". One finds their distinctions stated, for instance in the verbatim record of 18 March, at VIII, pages 115-116. As I said, in later formulations that was not repeated and I do not know to what extent they intended to proceed with that distinction. Nevertheless, a good deal of the evidence which we proffered to the Court did not concern the same facts as were covered by the admissions, they concerned other and additional facts. But in so far as the evidence did refer to the admitted facts, it did so exactly for the purpose of assisting the Court with regard to the proper inferences that may be drawn from the admitted facts, evaluating them, seeing them in their proper perspective and then coming to certain conclusions about them. That is, of course, in relation to the issues as they are now before the Court. Initially there were the wider issues of alleged oppression and so forth, but now the matter in respect of which inferences were

sought to be drawn, particularly from this evidence which was covered by the admissions, concerns, in particular, the question of the detrimental effect, alleged by the Respondent from the application of the suggested norm and standards in certain circumstances, in certain countries of the world, and in particular, in South West Africa.

I shall proceed next, Mr. President, to refer to certain aspects of, and implications regarding, cross-examination in proceedings of the present kind. I should like to begin by referring to the following passage in *Phipson on Evidence*, Ninth Edition, at pages 497-498:

"As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g., if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account."

Then there is a reference to an Irish case—a case decided in Ireland—and one decided by the *House of Lords*—*Browne v. Dunn*. I mention the name of that one because it is referred to several times again in the passage which follows:

"Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation . . . and this probably applies to all cases in which it is proposed to impeach the witness's credit . . . Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g., if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character . . . or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all."

Those are the comments of Phipson on this subject, Mr. President, and I may add that in the case of continental systems, to the extent that we understand them at all as far as their procedure is concerned, they apparently do not know the system of cross-examination. Apparently the Court itself leads the evidence of the witness, or expert, as the case may be, and opportunity is then afforded to the representatives of the parties to put questions, but within certain very definite limits. So under the circumstances the whole nature of the process there is a very different one, and I should take it that the failure or otherwise of the representative of a party to ask questions in a particular case would be a matter of common sense to weigh, a matter from which inferences may or may not be drawn, by effect, depending on the circumstances of the particular case.

It is largely the same, of course, in the Anglo-American system, except that there is this tendency, and a strong one, of common sense, that in particular circumstances particular significance may by way of inference be drawn from failure to cross-examine or from particular lines adopted in cross-examination, and the form which the leading of the evidence has taken in this particular case, is, of course, in accor-

dance with the adoption and adaptation of the Anglo-American system.

Now, Mr. President, applying that to the circumstances of this case, there are certain features of the cross-examination to which I should like to draw attention at this stage. The first noteworthy feature was that Dr. Eiselen was not cross-examined at all, but after Dr. Eiselen had given his testimony and the other witnesses came, there was an apparent change of policy in this respect.

The non-cross-examination of Dr. Eiselen was perfectly consistent with the attitude which the Applicants had so forcibly and so repeatedly expressed during the argument on the inspection—that was towards the end of April—and thereafter again during their argument which led up to the amendment of their submissions on 19 May, the attitude which I can very briefly summarize as being firstly, that the case was now confined to the norm and the standards—that was the only case they were bringing—that only the *per se* aspects of the Respondent's policies and measures were relevant, that the Court was bound by the judgments of the organized international community, and that there was to be no "second-guessing" of the findings or judgments of that organized international community.

Consequently, Mr. President, applying that attitude in its logical implications, all evidence would of course be irrelevant, and even evidence demonstrating to the satisfaction of the Court that the application of the suggested norm and standards would operate to the detriment of the population, even that evidence would, on that legal approach to the matter, be irrelevant. That, the Applicants, indeed, indicated as being a logical consequence of their attitude, in the verbatim record of 30 April, IX, at page 64, where, as I quoted to the Court before, they acceded to an exposition in our Rejoinder, in which we had suggested that on the basis of the alleged norm, and the standards of the same content, Respondent's policies would violate the Mandate "even if the Court were to hold that such policies were intended to enure, and did in fact enure, to the benefit of the population as a whole".

So, as I say, it would follow the other way around, that if it were to be established to the Court's satisfaction that the application of the norm and the standards in South West Africa would operate to the detriment of the population, then that would still be a legally irrelevant consideration to the case which was being advanced by the Applicants.

It seems then, Mr. President, that this was the basis upon which Dr. Eiselen was not cross-examined. Quite obviously, it seems that it was considered unnecessary, and perhaps futile, to attempt to contest the strong conclusions from his evidence that the application of the norm would detrimentally affect the inhabitants, and to contest the basis upon which he arrived at those conclusions. They were not canvassed at all in cross-examination.

But, Mr. President, as from the second witness onwards we find a change in policy. Now there is lengthy cross-examination of each witness, and the question is, why? The probable answer, in our submission, is this, Mr. President, that probably the Applicants were no longer so happy with their theory of the case, particularly because of its extreme implications. On this basis, one could understand that the Applicants could proceed with cross-examination on an alternative basis. In other words, their attitude could be something like this. They could say: we abide by our contentions as to the absolute nature and effect of the norm

and the standards, and permitting no evidence to explain them or to be relevant at all as to the question of their application in South West Africa. But, in the alternative, if the Court were to find it relevant to determine whether the norm or the standards would operate to the advantage or to the detriment of the inhabitants, and/or whether the norm and the standards were observed generally in the practice of States, then the Applicants would assist the Court by offering a testing of our evidence—the evidence of the Respondent on those subjects—and seek to break down that evidence, or to qualify it sufficiently for the Applicants' purposes.

That is a line of procedure which one could understand but, Mr. President, this was not in any way, as far as we can infer, the purpose of the subsequent cross-examination.

My learned friend, Mr. Muller, has shown that Professor Possony was hardly cross-examined at all on his vital evidence about the practice of States, and that there was nothing in the cross-examination to throw the least shadow of doubt upon the conclusions at which he arrived. The same applies, Mr. President, about the conclusions of Professor Possony, Professor Manning and Professor van den Haag regarding the detriment that would often result from the application of the norm and the standards in particular situations in the world. On those conclusions again, there was hardly any cross-examination.

We find the same, Mr. President, in regard to the conclusions of those three witnesses—Professor Possony, Professor Manning, Professor van den Haag—and also of other witnesses, like Dr. Eiselen, Professor Bruwer, Professor Logan, the Reverend Mr. Gericke and Mr. Cillie, about the general detriment that would result in South West Africa from the application of the norm and the standards. Again, those conclusions and the manner of arriving at them were in no way really tested in cross-examination.

Those were the general aspects of the evidence and the general conclusions arrived at as have been dealt with and summarized again by my learned friend, Mr. Muller. When we come, in the subsequent portion of our argument, to the evidence and the conclusions of witnesses regarding specific aspects of life in the Territory—the political aspect, the economic aspect, the educational aspect, and so forth—we shall see that the same pattern emerges. We find, Mr. President, that witnesses were one after the other asked mostly hypothetical questions about the effect of particular measures upon particular individuals in particular circumstances—for instance, the one about which we heard, I think, during the cross-examination of every witness, viz., the individual who was born, who lives and who dies in the Police Zone outside of the Reserves. The witness was particularly questioned, whether he was an expert on the subject or not, about the effect on such an individual of certain measures pertaining to, for instance, job reservation and the like. In other words, Mr. President, this was concentrating on isolated aspects of a policy flowing from particular individual measures in that policy, and not as affecting the general well-being of the people entrusted to the care of the Mandatory, but as affecting the case of, and very often the hypothetical case of, certain individuals.

But the over-all conclusions regarding the well-being of the population as a whole, those were left virtually uncanvassed, and they were certainly left unshaken by this cross-examination.

Another feature of the cross-examination was this, that very often there were put to a witness long extracts from a work written by somebody else, somebody who expresses an opinion contrary to an opinion expressed by a witness on a particular subject-matter, or putting a certain interpretation upon facts, and, on the basis of that interpretation of the facts, or version of the facts, coming to certain conclusions, or making certain comment. It was quite evident, Mr. President, that very often the purpose of that, in our respectful submission, was to get those passages on the record, not so much to ask the witness about them, because very often the question was concerned with a very minor portion of the whole long extract, and sometimes it was hardly concerned with that at all.

It is hardly necessary to say that that is not a legitimate method of bringing evidence before a court, as you, Mr. President, with respect, had occasion to point out on certain occasions. The opportunity is afforded to both Parties to put their case in regard to the facts before the Court by way of evidence, or by other legitimate means as may be proper in the presentation of their case, with a fair and proper opportunity to the other Party to meet that case. But the mere reading into the record of views or versions of fact of other witnesses, and not giving the other Party a proper opportunity at all of canvassing those, is no legitimate way of putting any evidence before the Court, and it is accordingly, in our submission, to be entirely disregarded as a possible source of evidence.

I refer to certain instances in the record, in this respect—I am just giving the references—for example, in Professor van den Haag's testimony in X, at pages 444, 460, and again, at page 461.

Mr. President, I cannot emphasize enough that it was purely for the purposes of the conclusions upon the question of the general well-being that Respondent led its evidence. That was the only relevance which this evidence now had in the light of the altered submissions and the altered issues between the Parties—the effect which the application of the norm and the standards may have on the well-being of the population as a whole, in general and in respect of the various aspects of their lives. The only question raised by the amended submissions, in our submission, is whether the approach should be one of differentiation or non-differentiation, meaning, of course, differentiation or non-differentiation in the sphere of the official allotment of rights and obligations, and so forth, and with reference to the question whether there may or may not be, in that sphere, differentiation with reference to membership in an ethnic group.

So, Mr. President, as a convenient shorthand expression for this anti-thesis, may I use the terms "official ethnic differentiation", on the one hand, versus "official ethnic non-differentiation", on the other hand.

The suggested norm and standards involve that an approach of official ethnic differentiation, in this sense in which we understand it, violates the Mandate. Now, part of our answer to that contention is that an approach of official ethnic non-differentiation would inevitably be detrimental, catastrophically detrimental, to the well-being and progress of the population as a whole in South West Africa. And we say, Mr. President, that, in our submission, the only method for avoiding the catastrophe is to build constructively upon the historical basis of ethnic differentiation as it exists, and in this manner to attain self-determination and self-realization for each group.

Therefore, Mr. President, the issue concerns the choice between the two general approaches—official ethnic differentiation, or official ethnic non-differentiation. The issue concerns nothing more than that, as now formulated before the Court. When I say “now” I mean ever since the amendment of the Applicants’ submissions in May, together with the explanations offered in regard to the purpose and the scope of that amendment.

The Applicants have *not* brought a case to the effect that although official ethnic differentiation may in general be permissible, nevertheless, certain specific measures must be regarded as impermissible on some criterion or other. That was not a case which they brought, or which they explained as being involved in their case as they made it in their amended submissions.

The position might well have been different, Mr. President, on the basis of the Applicants’ original case, as we understood it—the original case of the allegation of oppression. One could understand that case as relating to the Respondent’s policies, legal measures, laws, regulations, official practices, taken as a whole—as a body. One could understand the contention to be that the Respondent’s policies in that sense, taken as a whole and as a *corpus*, are oppressive of the Native population for the benefit of the European population. One could understand that purely as a proposition; and one could understand that that could carry within itself possibly the alternative that even if the Court should find that the policy as a whole is not oppressive in that sense, and is not aimed at oppression of the Natives, then, nevertheless, certain of the measures may be isolated, and in respect of that particular measure it may be said that it does not conform to the duties of the Mandatory, and particularly to the authorized purposes of the Mandatory in the Mandate. That would have been a possible alternative line of proceeding on the basis of the Applicants’ original form of complaint.

But, as soon as we come to the *new form of complaint*, that no longer becomes logically possible—that form of alternative—because now, Mr. President, there is one criterion and one criterion only—official ethnic differentiation or official ethnic non-differentiation. And we know that in respect of each one of the measures relied upon by the Applicants—the laws, the regulations, the official methods and measures—each one of them involves official differentiation. That is common cause. It is admitted on the pleadings that that is the position in respect of each one of these measures and in respect of a large number of the measures of Respondent’s policies and that, indeed, is the basic characteristic of the policies viewed as a whole.

So, Mr. President, the test in each case is the same and we know that the outcome of the test in each case is the same. As soon as we enquire whether the policy as a whole involves official ethnic differentiation, the answer is yes. As soon as we enquire further whether each one of the measures involves that, the answer is yes again. So there is no distinction and no room for an alternative.

If one were to come to the conclusion that, in general, a policy of official ethnic differentiation does not violate the Mandate, then that is the end of the question, because in the issues as they now stand there is no criterion suggested as an alternative upon which the Court could say that nevertheless this particular measure, or that particular measure, is, within the context of the issues before the Court, a violation of the

Mandate. That is the inevitable conclusion to which we come on the basis of the Applicants' amended case. And the Applicants have made it so clear that they advance no other criterion than this official ethnic differentiation as being a basis for contending that policies or measures violate the Mandate.

Purposes, results, fairness or unfairness, reasonableness or unreasonableness, none of these is advanced as a criterion. And it is *not* merely a question of *omission*—of the Applicants not mentioning any of those as a criterion, it goes much further than that, Mr. President. It is a matter of the Applicants explicitly and with emphasis telling the Court and telling us that they are not advancing any one of those criteria as a basis, and they do so for the specific purpose of telling us that the factual canvassing, that would have been necessary in the event of any one of them being advanced as a criterion, is now rendered unnecessary. That is the basis, then, upon which the rest of the case is shaped.

When we say this, Mr. President, then we are *not* adopting in any way a *technical* approach. It is a very realistic approach and, indeed, the only practical one which was possible to us in these circumstances. Our attitude, as expressed to the Court several times, was that we were prepared to meet any case properly presented against us, and, so, when we were first charged with improper motives or deliberate oppression, we met that properly on the pleadings, and we prepared ourselves to meet it further by oral testimony in order to resolve the factual issues emerging from the pleadings. But, then the change came in the Applicants' case. They not only altered the whole basis of the charge, but they admitted all the facts which we had presented to the Court in our answer to the original charge. There was then no longer any need for us to meet the case which was not brought against us. There was no *need* for us to prove admitted facts, and, more than that, Mr. President, on the basis of the authorities to which I have referred—well-known principles—it would have been *incompetent* for us to take up the time of the Court by bringing evidence in answer to a case which the Applicants emphatically said they were not bringing against us, and in proof of facts that had been admitted.

The abandonment of that charge of oppression, and the admission of the true facts which so abundantly refute that charge, had a very important practical effect on the Respondent's position, Mr. President. It had the effect of clearing the Respondent's name of these charges, at least before this Court. And it will have the same effect to a large extent before the whole world, if only the world gets to know about it. In explanation, I may say, in parenthesis, that, with commendable exceptions, it does not seem as if the press of the world is, in general, keen to inform the world of these extremely important developments in this case—extremely important, Mr. President, in regard to a subject-matter which has been the cause of international concern for such a long time. The importance of these developments is this: the abandonment of their charge and the acknowledgment—the admission—of the facts, constitute, at the same time, acknowledgment of the falsity or the incorrectness of the factual basis upon which the Respondent's policies have been condemned at the United Nations over all these years.

And, Mr. President, the acknowledgment did not come from a third party that stands disinterested in all this. It did not come from a party of whom the rest of the world need take no notice. It came, Mr. President, from representatives of the whole collectivity of African States which

has taken this leading part at the United Nations which we have described.

Indeed, Mr. President, it comes from States whose representatives claim, in these proceedings and on the pleadings before the Court, that they seek to uphold the interests also of all other Members of the United Nations, and indeed of the Organization itself, and they pride themselves on the fact that they were commended by the General Assembly for instituting this action. That is the tremendous practical importance for the Respondent of these developments in this case. These are the States that made the fundamental admission and this is the context in which they made it.

And, therefore, Mr. President, there is no basis, either in law or as a matter of practical dispute requiring decision by this Court, upon which individual measures are to be judged as being in conformity or otherwise with Article 2, paragraph 2, of the Mandate—individual measures that are divorced from the question of the general approach. The issue concerns, in our submission, only the general approach. In a legal sense that is so; in a practical sense that is so.

We come, Mr. President, to that same conclusion by an examination of the Applicants' so-called illustrative catalogue of laws, regulations, and official methods and measures, on which they rely as the factual basis for saying that the Mandate, read in the light of the norm and/or standards, has been violated. The catalogue, as the Court will recall, is set forth in the record of 17 May, IX. The Court may also recall that I dealt quite extensively with it in my address to the Court on 1 July, particularly at X, pages 219-221, in order to show how the Applicants emphasized that their case was concerned only with the *per se* aspects of these laws, regulations, and so forth. I need not repeat that argument.

But there is a curious aspect of the catalogue, Mr. President, to which I feel that I must draw attention. The purpose of the catalogue is said to be merely that of showing and illustrating differentiation on a group basis. Now, the Respondent admits that its whole policy is based on differentiation on a group basis, and, in fact, Mr. President, there are, by the Respondent's own admission, numerous laws, regulations, and so forth, involving such differentiation, some of them operating in favour of some ethnic groups, others operating in favour of others. So, under those circumstances, by reason of these admitted facts, the catalogue was unnecessary for the purposes of this amended case. Yet we find that the catalogue was very carefully compiled and it was read out to this Court with great gusto, and the question is, why?

The answer, in our submission, Mr. President, is not far to seek. We find the answer in, what I might call, a process of selectiveness that went into the compilation of that catalogue. The only measures selected were those which, when viewed in isolation and without reference to the total system of which they formed part, appeared to favour the White group *vis-à-vis* the non-White groups. Not a single measure having an opposite effect, or even distinguishing between the non-White groups *inter se*, was included in this catalogue. They all went one way, favouring the one group, the White group *vis-à-vis* the non-White groups—nothing in favour of a non-White group, or non-White groups generally, *vis-à-vis* the White group or *inter se* as between the various non-White groups.

Now, why was that, Mr. President? In our submission, the Applicants clearly wanted the best of two worlds.

In the first place, they wanted to avoid the factual enquiry that would have been involved in a straight-forward allegation of oppression, or unfairness, or the like. They did not want that factual enquiry—that enquiry into the whole of this system of which these laws and regulations formed a part. But, at the same time, Mr. President, they wished to attempt to attain some emotional appeal *suggestive* of such oppression or unfairness, through the superficial impact of these bits and pieces which were taken out of their context and then stacked together in a kind of a Guy Fawkes bonfire pile. That was the effect of the compilation of this catalogue, as we see it, and I very much regret to say, Mr. President, that, in our submission, it was a somewhat unworthy manoeuvre and that the Court will have no hesitation about unmasking it as such.

The important point is that this so-called "*corpus of fact*" was presented with reference only to its aspect of being *per se* and inherently in violation of the alleged norm and/or standards, as was stressed so repeatedly in the record of 17 May. I read from IX, page 285 of that record the words "*without elaboration, without argument, without characterization*". And I should like, Mr. President, to read from that record just a brief passage, which I have read before, but, because it is of such crucial importance for the whole foundations upon which the case now rests, I should like to refer to it again, at IX, pages 298-299 of the record of 17 May:

"These, and similarly conceded existent legislation and administrative measures, and effectuating implementing policies and practices, form the *corpus* of factual material or describe the pattern of Respondent's conduct, which is known and characterized widely as 'apartheid' or, more generally now, in Respondent's own usage, but referring to the same pattern, 'separate development'. Pursuant to such policy and practice, the Respondent allots status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or quality. In the Applicants' submission such a policy and practices are inherently incompatible with Respondent's obligations under Article 2 of the Mandate and Article 22 of the Covenant, and constitute *per se* and *ipso facto* violations of Article 2, the interpretation and the application of which Article are governed by international standards and/or by an international legal norm, as described in the Reply, IV, at page 493."

In the Applicants' further submission, "no evidence or testimony in purported explanation or extenuation thereof is legally relevant to the issues joined in these proceedings".

So, Mr. President, apartheid or the policy of separate development itself is given a new definition for the purposes of the new case.

Therefore our conclusion is clear. *The issue is joined*, on the Applicants' amended case, about the choice between a *general policy* of official ethnic differentiation and a *general policy* of official ethnic non-differentiation. There is *no issue joined* about the merits or the demerits, the fairness or the unfairness, the purposes or the results involved in any *individual law, regulation, method or measure*. It is for these reasons that we shall deal, in the further portion of this argument, only with the issue that has been joined, in referring to the fact under the various headings of political rights, economic aspects and so forth. We shall not deal

separately or systematically with each item in the catalogue. We shall only refer to some of them as illustrations in regard to this only general issue which is before the Court. We shall concentrate on that sole issue.

We shall demonstrate, Mr. President, with submission, that on the basis of the admitted facts and the evidence, a general approach of official ethnic non-differentiation would be catastrophically detrimental to the well-being and the progress of the population as a whole and that only an approach of differentiation could avert that catastrophe.

Now, the Court may ask me this question: what if the Court, or individual Members of the Court, may feel or consider, as a considered judgment, that a general approach of differentiation—official ethnic differentiation—is permissible and is indeed to be preferred to one of official ethnic non-differentiation, but nevertheless feel that a particular individual measure is perhaps not what it ought to be? It is quite possible, of course, to have views of that kind and it is a practical problem that could arise in the decision of this case and in deliberating upon the issues in this case. And it is for that reason that I give some attention to it, with the greatest respect.

Mr. President, for the reasons I have advanced it would, in my submission, not be possible for the Court, within the framework of the issues brought before it at the moment, to give a decision on the basis of any criterion in respect of these individual measures except, of course, as forming part of the totality and of saying that the general approach is to be differentiation or non-differentiation.

The Court, or individual Members of the Court, may possibly consider that even though a general policy of differentiation is permissible and to be preferred, a particular measure is one that could come in for criticism. Then one has to distinguish: now criticism on what basis? Would it be criticism merely in the sense of questioning the wisdom of the Mandatory in the exercise of its discretionary power in deciding upon a measure of that kind, in other words, a difference of view as a matter of policy? For reasons of law and logic, which I indicated to the Court before in arguments which I need not repeat, that is no basis, of course, for a court of law to condemn any measure decided upon by an authority in the course of a discretion duly conferred upon it. It may be that the Court may feel that even if it were to apply the more stringent tests which I suggested before, the tests of seeing whether the Mandatory was pursuing its authorized objective or unauthorized objective, whether the measure could be said to be so unreasonable that no reasonable authority could have decided upon it, that under those circumstances it may have been possible to invalidate some of these measures.

I would suggest, Mr. President, with respect, that in view of the turn which events have taken in this Court, that would be a dangerous line of enquiry to embark upon at all, especially because of the inadequate canvassing of the factual aspects which would have been necessary in order to come to a decision in respect of each of these individual measures. I may say, in general, that if we had been called upon to meet a case in which it was necessary to consider each one of these individual measures upon these various bases, then we would have been very much nearer to the beginning of this case now than to the end of it.

Therefore, Mr. President, I have pointed out before that whenever there is a system of governmental regulation there may be agreement upon the need to have such a system and upon the general benefit involved.

I used the example before of a system of rationing or of import control, and there may be differences of opinion as to whether individual measures in that particular system may or may not be commendable. It may well be that if Members of the Court feel that they want to indicate that they have not considered each measure on these various bases—on the basis of expressing a view of policy about it or on the basis of deciding whether it does or does not conform to the authorized objectives of the Mandatory or the like, then the Court or Members of the Court may make that clear, that their judgment does not extend to matters of that kind because those have been taken outside the purview of the issues in the case.

It is, in that respect, important to bear in mind the general factor which has so often been stressed in our addresses to the Court and in the oral testimony of the expert witnesses, and that is, that these policies and these measures do not constitute a static situation. They are part and parcel of a dynamic situation in which adjustments are continually being made as time goes on. There are many individual measures which are of an empirical and transitory nature; they are designed to deal with a particular problem as it arises at a particular stage, and particular measures which may cause concern at a particular stage may have disappeared or may have been radically altered by the next year or in five years' time or in ten years' time.

It is, then, against this background and this analysis of what the real nature of the issue now is before the Court that we proceed to deal with the facts in relation to the various aspects of the lives of the inhabitants of the Territory of South West Africa and we begin with the political aspect.

The first question, then, is what exactly is the content of the norm and/or the standards of like content in their relation to the political life of the Territory? The Applicants said in this regard, in the record of 17 May, prior to stating their catalogue of laws and measures and so forth to the Court, the following at IX, page 284:

"The norm of non-discrimination or non-separation, when broken down into its component parts . . . for example, in the economic field, in the economic life of the community, could be, properly is to be, conceived and spoken of as the norm of non-discrimination or non-separation in economic affairs . . . Similarly, in the political and civil liberties fields, they become norms or sub-norms, whichever phraseology is preferable, rules which prohibit discrimination or separation in respect of the particular area of human activity of human intercourse which is involved.

Taken together, the norm of non-discrimination or non-separation, or the international standards covering the same subject-matter, having precisely the same content, would of course extend to the entire life of the community in its total aspect. This is the theory of the Memorials and it is explicitly set forth as such, although it had not at that phase of our pleadings the name, the style; the title was not yet formulated or incorporated in the pleadings. It was, however, precisely the same scope and content and applicability of the international standards and the legal norm, as described at IV, page 493, of the Reply for the first time in those terms."

I apologize for making the quotation so long, but I had to read the whole of it in order to come to this link at the end with IV, page 493, of the

Reply. It describes the content of the norm and the standards taken as a whole and then the breaking down into the component parts, *inter alia*, in respect of the political aspects. Then it does bring the link with page 493. IV.

Now, in that definition (I need not read it to the Court again, it has been read so often) the terms "non-discrimination" and "non-separation" are defined in two ways: one, in a negative way, with reference to the prohibition on the allotment of status, rights, privileges and so forth on the basis of membership in a group, class or race, rather than on the basis of individual merit, capacity and so forth; then there is added the positive part (as my learned friend, Mr. Muller, has pointed out, obviously intended to bear the same meaning) where the same concepts are expressed with reference to the ideas of equality before the law and equality of opportunity.

When one applies this to the political field, this could in theory mean that the norm would be violated only where there existed a differential allotment of political rights—that that was the sole aspect with which the norm was concerned. In other words, Mr. President, one could in theory read this as applied in the political sphere to mean that the norm would not compel the granting of any political rights at all, or political rights of a particular type, as long as no difference was made on the basis of membership in a group, class or race. That would theoretically be a basis upon which one could apply this norm. But the Applicants have made it clear that that is not their case and has never been their case. In the Memorials, I, at page 131, the Applicants contended that the Respondent's duties under Article 2 of the Mandate included:

"Political advancement of such persons [that is the inhabitants of the Territory] through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions."

So, one sees that there is no suggestion here that the Respondent would be acting perfectly lawfully by just granting no political rights to anybody at all. The Respondent was expected to see to political advancement of the persons "through rights of suffrage" and in that respect, as the Applicants later stated in their Reply, there was to be applied this criterion of official ethnic non-differentiation. This suggested duty, as it was formulated in the Memorials, drew from us the following reaction in our Counter-Memorial, II, page 398, and I think it is important to read it:

"Applicants' duty No. 3 seeks to impose on Respondent the obligation to promote the 'political advancement of [the inhabitants of the Territory] through rights of suffrage' . . . Neither in the Mandate, nor in the Charter, is there any provision requiring that the political advancement of the inhabitants of dependent territories should necessarily be promoted 'through rights of suffrage'. Whereas Respondent admits that it is under a duty, *inter alia*, to promote the political advancement of the inhabitants of the Territory, it is submitted that the method to be adopted in this regard rests in its own discretion, which is to be exercised by applying policies 'as may be appropriate to the particular circumstances of [the] territory and its peoples'. Respondent, while in no way opposed to the idea of suffrage for all or any peoples in appropriate circumstances, does not consider that provision for such rights in one integrated political

entity is the only or best method of achieving political advancement in all cases, and is satisfied that it would certainly not be the best method for the peoples of South West Africa."

And we set out the factual basis for this conviction on the Respondent's part at some length in the succeeding portions of the Counter-Memorial, following on this page 398, and again at pages 104-138, III.

Now we come to the Reply stage when the Applicants introduced their norm of non-discrimination and non-separation. They then retained their contentions regarding the essentiality of granting rights of suffrage, and they made these contentions indeed very much more precise than before. And so we find under the heading "(B) Statement of Law", at page 441, IV, of the Reply, the passage which has been quoted so often, and I have particularly now referred to the background of what has gone before, in order to put this passage in its proper perspective:

"With regard to political rights, the relevant and generally accepted norms by which the obligations stated in Article 2, paragraph 2, of the Mandate should be measured, have been established by the United Nations. These include the institution of universal adult suffrage . . . within the framework of a single territorial unit."

And then, at page 442, Mr. President, they repeat the same point where they advance the proposition that these alleged requirements are some of the—

" . . . established principles and processes [which] constitute norms by which the obligations stated in Article 2, paragraph 2, of the Mandate, and Article 22 of the Covenant of the League of Nations, should be measured"

And they indicate further, Mr. President, that their case is—

" . . . that Respondent's policies and practices in the Territory are inconsistent with and repugnant to such principles and processes"

Annex 7 is then referred to as containing the material which provides the existence of this standard.

When we turn to Annex 7, at pages 451-457, IV, of the Reply, we find that it starts with this heading: "(A) United Nations policy regarding establishment of universal adult suffrage" and under this heading, the Applicants then proceed to contend the following:

" . . . the introduction of methods of suffrage leading eventually to elections by universal adult suffrage . . . evidences a clear standard from which substantial deviation is illegal under the practice of the United Nations". (VI, p. 451.)

At IV, page 452, we have this: "The principle of universality of suffrage has never been in doubt." The Applicants then go on to quote as an example all the trust territories in Africa which became independent on the basis of "majority rule with full franchise by adult indigenous inhabitants."

The next heading in Annex 7 reads as follows: "(B) United Nations policy regarding the treatment of a territory as an integrated unit."

Now, Mr. President, the degree to which the contents of the matters quoted under this heading assist the Applicants is often rather illusive, but the Applicants' purpose in quoting all this is made clear enough—explicitly clear—and that purpose is to prove the existence of a norm or a standard which requires " . . . the development of territorial integ-

rity, with identical political rights for all . . ." (IV, p. 453, para. 2).

Next, I give a quotation from the same page, still indicating the purpose: ". . . one system of government in which both Europeans and indigenous inhabitants would participate . . ." And a further quotation from the same page reads: ". . . a unified political structure for each territory in which all inhabitants would have equal rights in the government . . ." Finally, still at the same page, paragraph 3, mention is made of ". . . a totally integrated political unit for each Territory . . .".

So, we find in the context, under both of these headings, just one theme—an attempt to substantiate the existence of the alleged norms contended for in the statement of law, at IV, page 441, which I read out to the Court shortly before, and again at page 442.

Finally, then, Mr. President, facts are canvassed by the Applicants in their Reply from IV, page 442-444, which lead them to a conclusion obviously based on the alleged norms or standards contended for in their statement of the law, and this conclusion is stated as follows, at pages 442-445:

" . . . Respondent's refusal . . . to grant to the indigenous peoples of South West Africa rights of suffrage . . . within the framework of the Territorial Government, constitutes . . . a violation of the obligations of Article 2 (paragraph 2) of the Mandate agreement".

So, Mr. President, the impact of the Applicants' case in the sphere under discussion, as contained in the Reply, is clear—quite unmistakably they are saying in effect that Respondent must conform to the ". . . norms by which the obligation stated in Article 2, paragraph 2, of the Mandate . . . should be measured". (IV, p. 442.) And they say, in other words, that Respondent must, *inter alia*, institute ". . . universal adult suffrage . . . within the framework of a single territorial unit . . ." (IV, p. 441.) To act inconsistently with, or in a manner repugnant to, this would be *ipso facto* to violate the Mandate obligations. And to ensure that Respondent does in future conform to these alleged norms, we find that the Applicants castigate ". . . the policies projected in the report of the Odendaal Commission". (IV, p. 444.) They castigate them, Mr. President, as being even more serious and repugnant to Article 2 of the Mandate than the present one. That we find in the Reply at IV, page 444.

And we find in their submission No. 4 that they ask the Court not only to condemn the Respondent's present policy, but also to adjudge and declare that Respondent—

" . . . has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfill its duties under such Articles;" (I, p. 197; IV, p. 588).

This case, Mr. President, was met by the Respondent in the Rejoinder. Respondent could quite clearly understand what this was about, it accorded with its practical appreciation of what it was that the African States were really driving at, what their goals were, and the Respondent dealt with this matter in the Rejoinder, V, at pages 185-187, and again at pages 189-201, and in the Rejoinder, VI, at pages 1-12.

At this stage, we still dealt with the matter on the dual basis because it had not been made quite clear exactly what the Applicants' case was—we dealt with it on the basis of the norm, on the one hand, and on the basis of the alleged oppression on the other hand, as will be seen from

the Rejoinder, VI, at pages 7-8, and again, at page 8. But that is of less importance now because it was made clear at the hearing that Applicants' whole case is now based on the norm and/or the standards, and that in these Oral Proceedings also these norms, as set out in the Reply, IV, at page 441, were seen in this light was rendered perfectly clear on 18 May, that is on the day preceding the closing of the Applicants' case, when they stated the following:

"... in the Applicants' Reply are set forth examples of the United Nations standards of non-discrimination and non-separation in the fields of ... political development, all as expressed through the years by the organs of the United Nations with respect to dependent territories generally subject to the scope of supervision of the United Nations ... Such examples, referred to in the pleadings at the places cited ..." (IX, p. 336.)

Those places cited, I may interpose, Mr. President, include, *inter alia*, the Reply, IV, at pages 451-457, in other words, Annex 7. Those examples, the Applicants say, are the examples of the United Nations Judgments.

So, those then were the norm and the standards which the Applicants contended to be *per se* legally binding upon the Respondent, and any contrary conduct could not in law be explained or extenuated by the Respondent or approved by the Court.

The norm and the standards so explained in the Reply, IV, at page 441, agree exactly with the objectives that have been expressed by the General Assembly of the United Nations, as well as by the Applicants in that forum. I may quote but a single example, Mr. President. The special Committee on South West Africa in its report to the 16th Session of the General Assembly demanded—

"... the transfer of Government power to the indigenous people of the Territory who constitute a great majority of the population".

"Attainment of independence by South West Africa ... the election of representatives of the people on the basis of universal adult suffrage."

The reference is *Official Records* of the 16th Session, Supplement No. 12A, Document A/4926, at page 22. I indicated to the Court a few days ago that this was taken up entirely in resolution No. 1702 of the 16th Session.

Therefore, the Applicants' case as stated in the Reply, and the case of the African States as stated at the United Nations, we find, corresponded entirely.

[Public hearing of 2 November 1965]

Mr. President and honourable Members, at the adjournment yesterday I had pointed out that the Applicants' attitude as expressed in their Reply, in the political sphere was entirely clear. It was an unqualified demand for universal adult suffrage in South West Africa within the framework of a single territorial unit, as being a norm and/or standards with which, so it was contended, the Respondent was obliged to comply. I pointed out also that this clear attitude was entirely in accord with the attitude taken up at the United Nations by the Applicants, by the

African States in general, and by others who were acting as their allies in that respect. I had referred to a committee report and I had referred also to resolution 1702 (XVI) of the 16th Session in 1961 giving effect to that committee report. May I point out that (or remind the Court as I have pointed out before) both of the Applicants voted in favour of this resolution, together with the whole block of African States.

I should like to refer also to a very nearly contemporaneous resolution (the previous one was 19 December 1961, that is, No. 1702 (XVI)). We come to resolution 1760 (XVII) of the 17th Session, dated 31 October 1962. This is a resolution in respect of Southern Rhodesia. Of course, in Southern Rhodesia all groups of the population, on the basis of existing arrangements, have rights of suffrage within a single political unit, but on the basis of suffrage qualifications. In the case of Southern Rhodesia, the General Assembly demanded in this resolution "a constitution for Southern Rhodesia . . . which would ensure the rights of the majority of the people, on the basis of one man, one vote, in conformity with the principles of the Charter of the United Nations and the Declaration on the granting of independence to colonial countries and peoples . . ." And, then, further I quote again: "The immediate extension to the whole population without discrimination, of the full and unconditional exercise of their basic political rights, in particular, the right to vote." (*G.A., O.R., 17th Session, Suppl. No. 17 (A/5217), resolution 1760 (XVII), p. 38.*)

So, Mr. President, on the basis of this clear exposition in the Reply, and in view of the fact that the attitude as expressed there accorded entirely with the attitude as expressed at the United Nations, we thought that this was a clear-cut case for us to meet and we dealt with that case in our Rejoinder, V, and I shall read a passage at page 243, the paragraph numbered 3:

"3. The first, and fundamental, issue between the parties relates to the method whereby political advancement of the inhabitants of the Territory is to be secured. Respondent was at pains in the Counter-Memorial to demonstrate that the only realistic alternative to separate development was domination of the whole Territory by majority Native groups (or, possibly, by a despotic régime derived from them). Respondent emphasized, particularly, that there was *no middle course*—all expedients and manipulations intended to achieve such a course really being just slightly more extended ways of arriving at majority rule by Natives. The correctness of this assessment not only has been borne out by further events in Africa, but is confirmed by the attitude adopted by Applicants in the Reply. They urge, without any qualification, abolition of all differentiation between groups, treatment of the whole population as a unit, and universal adult suffrage—claims which have also been pressed by majority groups at the United Nations in recent years."

Mr. President, we again drew attention to this feature of the Applicants' case in the verbatim of 3 May, at IX, pages 111-112, while we were dealing with the inspection proposal.

We saw, in other words, a clear-cut straight issue between ethnic non-differentiation and ethnic differentiation—between political separation or political integration—and that was the basis upon which we dealt with this case.

Mr. President, the Applicants did not like that formulation of such a clear-cut issue, apparently because the extreme aspects thereof hit them between the eyes when dealt with in this manner. Possibly for this reason, they started a process during the Oral Proceedings of trying to get away from the implications of this straight-forward issue. The process commenced on 13 May when the Applicants said in the verbatim record of that date, at IX, page 248: "Another illustration of Respondent's attribution of extreme and, indeed, unintelligible contentions to the Applicants appears from the Rejoinder, V, at page 243." And then a portion of what I have just read out from that page in the Rejoinder is quoted by the Applicants.

Somewhat later, in the same page, they went on to say:

" 'Universal adult suffrage' is a target for achievement—but obviously those words have a content with which the Court will be familiar and of which it may take judicial notice—subject to the normal restrictions and safeguards which attend all democratic principles of suffrage in all civilized societies; age, literacy and other factors are of course implicit in such a standard of achievement." (IX, p. 248.)

Mr. President, this passage contains a number of elements which call for comment.

First of all, we find that Applicants say that the words "universal adult suffrage" have a content which is so familiar that the Court may take judicial notice of it. And then they go on to say that there are certain restrictions implicit in the concept. Mr. President, one wonders where they get this concept from and what exactly is the content which they say is so familiar that the Court may take judicial notice of it. We have looked at sources and we could find no support whatsoever for this suggestion of the qualifications or restrictions, particularly pertaining to literacy and other factors referred to by my learned friends.

Let us start with the United Nations resolution to which we have referred—the General Assembly resolution on Southern Rhodesia. There we have the concept expressed of "one man, one vote, in conformity with the principles of the Charter of the United Nations and the Declaration on the granting of Independence to Colonial Countries and Peoples". (*G.A., O.R.*, 17th Session, Suppl. No. 17 (A/5217), resolution 1760 (XVII), p. 38.)

And, again we have the words "extension to the whole population without discrimination, of the full and unconditional exercise of their basic political rights, in particular the right to vote". We do not, Mr. President, in those formulations find these suggested implicit restrictions.

Let us turn next to the dictionaries. We find in the *Shorter Oxford English Dictionary*, 1959 edition: "Universal suffrage: a suffrage extending to the whole of a community, especially one in which all persons over a fixed age, except lunatics, aliens and criminals, have the right to vote for representatives to a legislative assembly." So, there one finds no exception or restriction of the kind referred to.

In *Websters New International Dictionary*, 2nd edition (p. 2782), published in the United States in 1947, we find again, under the heading "Universal suffrage" "suffrage of all, that is, of all adults not legally disqualified by the laws of the country, as criminals, idiots and aliens; formerly manhood suffrage, but now in most countries including also

those entitled to vote under woman suffrage". And, then "manhood suffrage" is defined as "suffrage of all male citizens not under a civil disability as crime, lunacy, etc."

Then *A New English Dictionary on Historical Principles*, Volume X, —this is somewhat older in date, 1926 edition. I quote from this: "Universal suffrage: a suffrage extending to the whole of a community, especially one in virtue of which all male persons over 21 years of age except lunatics, aliens and criminals, have the right to vote for representatives to a legislative (usually parliamentary) assembly (p. 242)."

And, then, of very recent vintage, *The Concise Oxford Dictionary*, the 1964 edition, which is the fifth. Under the heading "Universal"—"Universal" is defined as "belonging to . . . all persons . . . in the world or in the class concerned; applicable to all cases". Then, under "Suffrage" "the right of voting in political elections; . . . manhood suffrage, extended to all adult males without property tests, etc." And, then, "Universal suffrage" is defined as "extended to all adults".

So, Mr. President, in the light of these definitions it is certainly not clear what the Applicants mean when they say that the concept "universal adult suffrage" is:

". . . subject to the normal restrictions and safeguards which attend all democratic principles of suffrage in all civilized societies; age, literacy and other factors are of course implicit in such a standard of achievement". (IX, p. 248.)

We have seen that literacy is not a factor in any one of these definitions and one seriously wonders whether the Applicants are suggesting that in the African context it would be realistic to suggest that literacy is, either in practice or as a matter of general concept, part and parcel of a concept of "universal adult suffrage".

Further, no light is thrown on the question of the other factors which may be involved—we are not told what they may be—other factors which would operate as restrictions and safeguards.

Another important feature of the passage under discussion is that the Applicants speak of "universal adult suffrage" as a "target for achievement". In other words, it is not something to be established immediately, it is to be left to some time in the future, but what that time is, is left vague. So the question arises whether they still regard "universal adult suffrage" as one of the alleged norms—as they stated in the Reply, IV, at page 441, "norms by which the obligations stated in Article 2, paragraph 2, of the Mandate should be measured", norms which had been "established by the United Nations" and in respect of which Applicants contended that that organ "is legally bound, not merely permitted, to formulate criteria with respect to the conduct of the administration of the Territory". We find all that in the verbatim record of 18 May at IX, page 320.

It must be recalled, Mr. President, what the United Nations in fact said on the subject and when we revert to those resolutions which I referred to this morning, 1702 (XVI) on South West Africa and the subsequent one on Rhodesia, there is certainly no suggestion of waiting until some distant date in the future, or to some uncertain date in the future. In the case of paragraph 2 (e) of resolution 1702 (XVI) the phraseology for South West Africa is:

"Preparations for general elections to the Legislative Assembly,

based on universal adult suffrage to be held as soon as possible"; (*G.A., O.R.*, 16th Sess., Suppl. No. 17 (A/5100), p. 40.)

and in the case of Rhodesia, as the Court would recall, I stressed in reading it out, the immediate extension to the whole population of this facility of universal adult suffrage.

So that again is a question that arises when the Applicants now tell us that their claim is not concerned with the immediate present; it is concerned with some stage in the future and so, as in other instances, the Applicants' attempts to qualify what they have said before have raised for them more difficulties than they have solved.

This subject as to what was meant by the concept of "universal adult suffrage" and as to what exactly the Applicants were claiming in this regard, arose again in the course of the evidence of Mr. Cillie, which the Court will recall was given on 13 and 14 July. Certain queries were raised by you, Mr. President, about the relevance of certain portions of the evidence and certain objections were raised by my learned friend, and as a result there were certain discussions in the course of which I had occasion to refer first to page 441, IV, of the Reply and later, in fact, to quote it to the Court. The reference to page 441, IV, the Court will find in what I said on page 513, X, of that record and again at X, page 523, and the actual quotation was given on that page. On these prior occasions, before actually quoting the passage in the Reply, I referred to (and I use the words as at p. 523):

"The content of the norm as applied in the political sphere, namely, the content of universal adult suffrage within the framework of a single territorial unit."

Later, on the same page, my learned friend, in speaking of this, said that this was "... a misrepresentation, surely unwitting, of the Applicants' case"; and he added: "With all respect, Sir, I just will note an objection on this line of argument by the Respondent's counsel."

It was in response to this, Mr. President, that I pressed this reference, the actual quotation from page 441, IV, of the Reply, and I pressed my learned friend to explain what his attitude was. Then, in response to your invitation, Sir, he said, at X, page 524, the following:

"I hardly know how to proceed, Mr. President. This seems to require legal argument of the sort which I know, with all respect and deference, is not in place here. Just for the sake of the record I should like to read the sentence following the two sentences quoted by Respondent's counsel on page 441, IV, of the Reply [and then follows the quotation].

'For an elaboration of the views of the United Nations which have given rise to this standard, and of compliance by Administering Powers therewith, the Court is referred to Annex 7 hereof.'

That was the quotation, then, by my learned friend from the Reply, and his statement proceeded:

"The Annex sets forth, in some detail, the judgments of the United Nations with respect to the cognate areas of the trusteeship and sets forth the policies, as we elaborated, and which explain and elaborate the two sentences quoted by the Respondent. But, without venturing to go into an elaborate argument, there are of

course all sorts of qualifications upon the phrases used, 'the institution of universal adult suffrage' and the 'participation on the part of all qualified individuals'. There is no absolute or mechanical standard which is applicable, or not, without reference to the issue in this case, which is that *apartheid*, which denies all effective rights of participation—denies suffrage totally—is a violation of the Mandate. That has been, and remains, our case. We believe that the United Nations standards, as elaborated in the Reply, may be considered and, with all respect, should be considered by this honourable Court in interpreting the Mandate and applying the undisputed facts of record constituting apartheid in this respect . . ." (X, p. 524.)

Mr. President, I shall comment on this passage presently. I should just like to follow it up by referring to a question which you, Mr. President, put, arising from this, on the next day, 14 July, at X, page 555. I shall read the question.

"Do the Applicants contend that their final submissions, as filed in the Court, contain, in the content of the obligatory norm for which they have contended, an obligation to grant universal adult suffrage in South West Africa within the framework of a single territorial unit?"

and to this question, if the Court will recall, there came the cryptic reply, immediately: "No, Sir."

So that is where the matter rests. We have had no subsequent explanation. This final answer, in reply to your question, Mr. President, does not provide any guidance as to what the Applicants now say their case is. Of course we know what case we have to meet. We have to find that from the submissions, as amended and defined on 19 May, and in the contemporaneous explanations given in regard to those submissions. That is where we have to find what their case actually is, but we do not know, in regard to these subsequent explanations, what the Applicants now say their case is. This is particularly so when regard is had to the fact that the Applicants say that they use the expression "universal adult suffrage" as being subject to certain implicit restrictions concerning, as I have pointed out, *inter alia*, age, literacy and other factors. So, if they use the phrase as carrying within itself those implicit restrictions, what does their answer to you mean, Sir, when they say that universal adult suffrage is not a part of what they suggest we have to comply with on the basis of their norm?

Surely one would have expected an answer, then, saying: yes, it is part of our case, but of course one has to bear in mind that it is subject to certain restrictions and inherent qualifications. But that is not the answer; the answer is that it is not part of their case as founded on the norm at all.

So the only statement we now have which affords some guidance as to what the Applicants now say their case is, is the one which I quoted just now from the verbatim record of 13 July at X, page 524. In essence, it will be realized, this passage appears to be contradictory to the whole norm and the standards theory, as my learned friend, Mr. Muller, pointed out earlier. It contains the statement, amongst others, that:

"... apartheid, which denies all effective rights of participation—

denies suffrage totally—is a violation of the Mandate. That has been, and remains, our case.” (X, p. 524.)

But, in putting it this way, the Applicants fail to state why apartheid is in this sense a violation of the Mandate. Is it because of the existence of some norm? If so, then what is the content of that norm? And in regard to this statement that “apartheid . . . denies effective rights of participation” who is to judge, Mr. President, whether the political rights existing and contemplated for the people and peoples of South West Africa are effective or not effective and what criteria are to be applied? This question arises particularly: may “effective rights of participation” legitimately be granted upon a group basis? Or does the idea of non-ethnic differentiation enter into this and, if so, how does it enter into it?

Furthermore, Mr. President, the other puzzling feature is what has now happened to the Applicants’ contention that the United Nations standards and the norm are *per se, ipso facto* and inherently binding upon all concerned, including this honourable Court. Now the Applicants only ask that such standards “. . . may be considered and, with all respect, should be considered by this honourable Court in interpreting the Mandate . . .”. (*Ibid.*)

Finally, Mr. President, the question is how do the Applicants reconcile all this—I may call it, not in a derogatory sense but purely in a descriptive sense—twisting and turning with a clear and explicit wording which we find at page 441, IV, of the Reply, clearly and explicitly and consistently explained in the subsequent pages of the Reply, and their clear and consistent attitude before the United Nations—their attitude and the attitude of the other African States which they represent. How are all these things to be reconciled with one another? The Applicants give no answers whatsoever to these questions.

In the result, Mr. President, and until we receive those answers, I shall proceed to deal with the subject of political rights on the only safe basis which we have—the only legitimate basis indeed—and that is the basis of the case which we are called upon to meet. And that case, I need not emphasize again, is the one which is contained in the amended submissions as read out to this Court on 19 May, and as explained in the immediately preceding and the contemporaneous explanations. I proceed against this background to deal with the potential application of the Applicants’ norm and standards in the political sphere in South West Africa.

The Court will recall that I pointed out yesterday that, as a matter of theoretical possibility, the application of the Applicants’ norm and standards in the political sphere need not necessarily involve the grant of any particular type of political rights or any political rights at all, provided that there is no official differentiation between the different groups in the allotment of political status, rights, privileges, and so forth. But, Mr. President, it would be entirely unrealistic to approach the matter on the basis of that theoretical possibility. The Applicants quite clearly do not expect the Respondent perpetually to deny the inhabitants of South West Africa all political rights whatsoever, and that course would hardly be in accordance with an obligation “to promote material and moral well-being and social progress”. Indeed, the Applicants themselves have frequently emphasized the importance of the concept of self-determination and of political development towards self-determina-

tion, as we see, for instance, in the Reply, IV, at page 238, where reference is made to "... the fundamental importance attached to the concept of self-determination and self-government ...".

On 19 March, in the verbatim record of that date, at VIII, page 140, my learned friend, Mr. Moore, referred to "... the importance which the founders of the mandates system attached to the principle of self-determination". And, at page 142, he said:

"Mr. President, it is clear, in Applicants' submission, that the basic principle of self-determination includes two necessary elements: first, an independent political unit; and second, the free choice of the inhabitants."

Now, on this phrase—"... an independent political unit ...", some light is thrown by the previous passage, at page 140, in which Mr. Moore said, in a slightly different context:

"The phrase 'a political unit' indicates ... [a] view that the concept of self-government and self-determination meant the establishment of a political unit, and not several political units."

So, those were the contentions as stated on behalf of the Applicants at that stage of the record.

Now, Mr. President, let us for the moment disregard the Applicants' explicit formulations in the Reply, IV, at pages 439 and the following, and let us just work with these two concepts of self-determination, on the one hand, and non-discrimination—ethnic non-discrimination—and non-separation, as defined at page 493, IV, of the Reply, on the other hand, and bring them together. It then becomes perfectly clear that if political advancement towards self-determination of all the inhabitants is to be secured without a differential allotment of rights, duties and burdens, and so forth, on an ethnic basis, then it must in the end lead to universal adult suffrage in South West Africa as one political unit, whether unitary or federal; it must be so. Once you combine those two features—the ethnic non-differentiation and the idea of advancement of all the inhabitants to self-determination—then this is the point at which you must arrive logically. So, Mr. President, it is not surprising at all that the Applicants themselves put that situation so clearly in the Reply, at the pages to which I have referred before. And if the Applicants now have less enthusiasm for what they said in the Reply at those pages, then it becomes clear that this is not any disenchantment with the *principle* in general—the principle of universal adult suffrage. It could, at most, suggest a contemplation that certain qualifications (on a non-group basis) might be attached to the idea of universal adult suffrage, which qualifications could *delay* the ultimate attainment of the principle, but not bring about any deviation from the principle as such.

Let us look, then, at the implications of this attitude, in the light of the facts which are admitted on the record.

On Friday, and again yesterday, my learned friend, Mr. Muller, summarized the main facts which were admitted by the Applicants, and I shall revert very briefly to just a few aspects of that summary and put them in the briefest possible terms to the Court. Firstly, there exists in South West Africa a number of population groups with different traditions, cultures and languages. Secondly, in the history of the Territory, prior to the assumption of the Mandate, there had been a period

of strife and warfare between a number of these indigenous groups. Thirdly, generally speaking, the various groups found themselves at different levels of development, and, in particular, there is a vast difference in this respect between, on the one hand, the European group, which have a tradition of Western civilization and are used to a modern economy, and, on the other hand, the various Native groups which are, to a large extent, still bound to the traditional subsistence economy. Fourthly, to a very large extent, the groups occupy, and have in the past, for many years, occupied, separate regions in the Territory. Fifthly, the indigenous groups, to a large extent, still recognize and apply their traditional system of government through chiefs, headmen and councils. Sixthly, the different population groups are conscious of their separate identity, and they wish to be treated as separate groups, also in the political field: this, Mr. President, being of the utmost importance.

These differences among the groups, as here summarized, and their group consciousness and their wishes as groups, have exerted their influence even upon the political parties which have been formed amongst the non-White inhabitants, even those which agitate for the abolition of White rule, as they call it.

The Court will recall the evidence of Mr. Dahlmann in which he described the various attempts at unification amongst the various anti-Government bodies of this kind—attempts which were stimulated by a very important factor which was referred to by Mr. Dahlmann in the verbatim record, **XI**, at page 473, as follows:

“This movement was necessary because the liberation committee of the Organization of African Unity had indicated that no financial aid should be given to splinter groups or tribal organizations but only to a united front.”

And that explains, therefore, the frantic efforts that were made to create such a united front. But these efforts failed almost completely, as Mr. Dahlmann described.

When Mr. Dahlmann was asked, in the same record, **XI**, page 477, whether any of these political parties are representative of more than one of these population groups in South West Africa, his reply was as follows, on that page and running on to the next page:

“Most of the parties are formed on a tribal basis. All attempts to achieve unity proved a failure. There is one exception—that is the South West Africa National Union [SWANU]—which has only a small following. Neither the leaders nor the followers are able to rise beyond the borders of group nationalism and therefore SWANU consists only of a small number of intellectuals, but from various population groups. You find there Ovambos, Hereros (especially Hereros) and a few Damaras.”

And later, Mr. President, he was asked, at **XI**, page 480:

“From your experience, can you state as your opinion whether the different non-White political parties will be able to co-operate and form, or work in, a single political party?”

And he then replied:

“I would like to associate myself with Mr. Kapuuo, who said, in an interview . . . that tribalism and group loyalties are things which

you have to take into account in South West Africa for many years to come. So I cannot see any possibility for a unification within the foreseeable future." (XI, p. 480.)

Mr. President, the impact and the significance of this evidence is self-evident. And Mr. Dahlmann's evidence in this respect was not challenged in cross-examination. It is apparent that he is eminently qualified and experienced to express an opinion on this point, and I can refer in this respect particularly to the record, XI, at pages 457-458.

My learned friend, Mr. Gross, did indicate that he might be attacking the credibility or the degree of expertise of this witness apparently because Mr. Dahlmann had been born in Germany, had grown up there, belonged to a certain youth organization and had fought for Germany in the War.

Mr. President, this line of questioning of the man's expertise and integrity as a witness was very effectively answered by the witness himself and I need not take it any further. I have difficulty in seeing what relevance this could have to the matter at all. Perhaps we shall hear more of that subject at a later stage. My submission is that Mr. Dahlmann's evidence was quite clearly the product of very intensive and very systematic study of this matter, extending over a long period, based on his experience and delivered with full frankness to this Court. There is no reason whatsoever why it should not be accepted. Indeed, Mr. President, the probability of the correctness of this evidence is also borne out by so many other factors on record, to some of which I shall refer in the further portion of this address.

The question is, then, Mr. President, whether, in the light of these admitted or undisputed facts, the well-being and progress of the inhabitants of the Territory would be promoted by applying the norm or standards contended for by the Applicants. In dealing with this question, the relationship between the various non-White groups, if I may call them that, or indigenous groups, *inter se*, is quite obviously as important as, if not more important than, the relationship between the White group and all or any of the non-White groups. All those aspects of the matter call for consideration and for equally serious and important consideration. But, Mr. President, we find that it is stressed, particularly in attacks which are made upon South Africa's policy from outside and again in the catalogue particularly relied upon by the Applicants in this particular case, that this relationship between White and non-White must be seen as the primary problem.

It is, in our approach, not so at all. The problem is not primarily one of colour or race, as is so often represented. It is much rather one of relations between various ethnic groups—between peoples, or embryonic nations if one might prefer to call them that—living in close geographical contact with one another, as was so strongly stressed and so clearly illustrated by the various South African witnesses and also by Professor Logan. The situation is indeed, Mr. President, a specific example, and a very intricate one, of what was called the multi-national problem, which was discussed at this recent seminar in Yugoslavia in regard to which Professor Possony testified.

As I said, because this relationship between the White inhabitants and the indigenous inhabitants of South West Africa is so stressed in these outside attacks upon South Africa's policies and because of the emphasis it received in the case being brought against us here, I should

like to say something at the outset in regard specially to the position of the European section of the population, and to the regard which is to be had to them in the potential application of this norm and these standards to South West Africa in the political sphere.

It is customary in certain circles to refer to all Europeans or White people in Africa as "settlers", a term which is often interpreted to mean persons of recent arrival, who have no real right to remain. The Court will recall from the numerous passages we cited from debates in the United Nations, particularly in the Fourth Committee, how this theme recurred time and again. I need not refer back to the wording of those statements. The Court will also recall that Mr. Dahlmann testified that NUDO, which is a party of Hereros, wished to divide South West Africa into a number of regions with regional parliaments and a federal government, but that in this whole scheme no provision is made for a region for the White people. That we find in the record, **XI**, page 476.

However, Mr. President, what are the true and the admitted facts about the European population of South West Africa? When the Respondent assumed the Mandate in 1920 there was already a settled European population in South West Africa and not only was that so but the circumstances were also such that it was necessary, with a view to the fulfilment of the Mandatory's charge, to retain and to extend that population. We deal with those circumstances very specifically in Book IV of the Counter-Memorial and I should like to refer to some of the most important aspects of our treatment of the subject, just in brief summary.

First, Mr. President, we point out at **II**, page 406, that at no time during the German regime was South West Africa self-supporting and that was in spite of the fact that under the German administration there was a much more limited extent of administration than was required of the Mandatory under the Mandate. The German administration went no further than the Police Zone but under the Mandate of course the other territories were brought in and all were put under the Respondent's charge.

We summarized the situation as Respondent found it in 1920 in the Counter-Memorial, **II**, at page 409. It is a fairly brief summary and I should like to read it out to the Court. Paragraphs 20 and 21 read:

"Outside the Police Zone, the social, political and economic lives of the inhabitants were virtually untouched by contact with the White man.

Inside the Police Zone, the salient features were as follows:

- (a) A modern economy had been developed by the White population, the major export products of which were minerals, and, in particular, diamonds.
- (b) The revenue of the Territory was also largely dependent on the production of diamonds, and had never been sufficient to cover the costs of administering the Territory.
- (c) The only other possible source of revenue which was apparent at that stage, was livestock farming. Progress had been made in this field, but it had been limited and retarded by the high capital expenditure required, and the inaccessibility of markets.
- (d) The Territory was served by an extensive railway system, which had been joined to that of South Africa during the war.

- (e) The traditional tribal economies of the Native tribes had been shattered, [we are dealing with the Police Zone, the Southern Sector now] but wide differences between the various groups, were still found, and each group retained its own identity.
- (f) The Native inhabitants did not possess the skills required for modern economic or administrative activities.
- (g) The Police Zone was considerably under-populated.

So, those are the important basic factors—the basic situation—as Respondent found it in 1920 on the assumption of the Mandate.

Mr. President, we have pointed out in II, at page 410, that even the maintenance of the status quo, namely an organized administration which could provide certain elementary protections, would *require the presence of a large number of Europeans in the Territory*. When we speak of providing certain elementary protections, we include those which were envisaged in the provisions of the Mandate relating to protection of the indigenous inhabitants against abuses such as forced labour, traffic in arms and ammunition and the supply of liquor, and, Mr. President, those involved in making the basic provisions which were then required for the population, in the state in which they were, such as gathering the scattered remnants together again, putting them on land, providing the basic facilities for them such as housing and, in the first place, safety and protection against the other groups in this state of chaos which had pertained before.

Now, the matter could not rest, in terms of the Mandatory's charge under the Mandate, at maintenance of the status quo. And—even before I come to that merely as a matter of balancing the budget, and merely as a matter of creating reserves on this basis of maintaining the status quo, reserves to combat droughts and other calamities which are known to occur in that part of the country, and also for the purpose of extending the administration to the northern areas, for all these reasons and before we even come to the question of advancement, it was necessary to extend the sources of revenue of the Territory—to have additional sources of revenue—because, in the circumstances which prevailed at that time, Mr. President, there were no international funds available for this purpose. The Mandatory was appointed to fulfil the task and the task had to be performed within the range of available funds.

But then, as I have said, it was required of the Mandatory to bring about advancement, and not merely to maintain a status quo. Therefore, there had to be development of the Territory—development which could produce benefit and advantage for the whole of the population. And for that purpose, Mr. President, as we pointed out at pages 410-411, II, of the Counter-Memorial, it was absolutely necessary for the Respondent to rely on the capital, on the initiative and on the entrepreneurial skill of Europeans. The Native inhabitants were not at a stage of development which made it possible for them to provide these elements.

The only natural resource which could be developed was the land, in the state of knowledge as it existed at that stage, and since the Territory was under-populated the obvious method was to introduce productive White farmers, and that is exactly what the Mandatory did, that is exactly what was foreshadowed that the Mandatory would do, and that is what was expected amongst the Powers which agreed upon the conferring of the Mandate upon the Respondent, as we pointed out before. We deal with this in the Counter-Memorial, II, at pages 419-421. And so.

for this reason, there was a positive encouragement to White farmers to settle in the Territory and to help with the process of economic development.

It is important to note that various investigating authorities who examined the circumstances of South West Africa came to the conclusion that this policy on the Respondent's part was a sound one and a virtually inevitable one in the circumstances in which the Respondent found itself with regard to this Territory, and we refer in that respect to the findings of the 1936 South West Africa Commission, the Commission consisting of three judges of the Supreme Court of South Africa known as the Van Zijl Commission, which is quoted in the Counter-Memorial, II, at page 420, and we refer also to comment on this subject by Lord Hailey in his report on South West Africa, quoted at II, pages 420-421.

And even today the main economic bases in the Territory are those which have been developed and maintained by Europeans. It was inevitable that it should be so, because if we look at the descriptions given by the economists, the geologists, the geographers and the others in regard to South West Africa it was evident that the only possible sources of economic development which have been put into operation so far required a very high degree of modern technology.

Let us take the various pillars of the economy in South West Africa, and they are very easy and very simple to relate. First there is farming in its two branches of agriculture and cattle and stock farming. In the sphere of agriculture the basic problem is water, "water-making" as it is called in South West Africa, involving very often the drilling of very deep bore-holes on the basis of geological knowledge and modern techniques specially adapted to the circumstances of South West Africa, water conservation and, in places where the water may be available, irrigation. All these things had never been known in the economies and in the practices of the Native groups of South West Africa.

When we come to the other branch, cattle and stock farming, there the Court will recall that there has been the development of the Karukul industry in the southern part of South West Africa. That is a long story in itself, dealt with to some extent in the Odendaal Commission report where one sees the indications of the large degree of technology and of research that was necessary in order to make it possible to have this lucrative form of industry there at all—research in regard to the development of a particular kind of pelt and so forth. Generally in regard to stock and cattle farming, be it Karukul, or be it cattle, or any other form of cattle and stock farming, there is the problem of combating stock diseases in a territory such as South West Africa—an absolute necessity as a prerequisite for marketing—and all those require the highest degrees of technology.

Then in the mining industry, the two major portions being diamonds and copper, again the techniques involved require high degrees of technology. In the case of the diamonds in the southern part of the Territory, where diamonds are taken from the desert, there is this whole process of clearing a huge overburden, as it is called, of sand and soil and so forth until one comes down onto the rock layers where the diamonds are found—the beds, as they are called—and then the process of sorting out all this and coming to the actual gem. In the case of copper mining, it is deep underground mining, and of course the processes involved in separating the copper from the other things brought up from the earth and in putting

it in a state fit for marketing, all those are techniques of high modern technology.

In the fishing industry it is the same thing. First there was a problem which had never been tackled by any of the indigenous groups, of conquering a most inhospitable and a dangerous coastline for purposes of navigation and landing and setting out to sea; but apart from that, the fishing industry in itself is based for the greater part upon an export market requiring canning processes, and the making of fish-meal in fish-meal plants and similar products which again require high degrees of technology.

Those are the economic bases of the Territory. Professor Logan said in the verbatim record, X, at page 367, in referring to the southern part of the Territory:

"That anything has been done with it, I think, is most remarkable.

Vast portions of it, were they under many other economic systems, would have been left totally unused and yet they are today producing a modest income and in some cases, a fairly good income, to the people who have developed them in the last 70 years or so."

And then, in the verbatim record, X, at page 348, Professor Logan said in regard to the Namib area (the Court will recall that is the western, desert-like area):

"... since the European group is the one that today keeps the water supply going, keeps the food supply coming in, keeps the railway operating, that it is the managerial ability, that it is the initiative and drive of this group that has kept the place in operation, the removal of this group without its direction and initiative, would, I think, result in almost immediate and almost complete collapse".

And in bringing the European group into South West Africa in order to fulfil this function, nobody was dispossessed of land, nobody was dispossessed of rights, nobody was forced into a position of being unable to make a living any more. The southern portion was underpopulated, as we demonstrated, and it continues to be so today. There is sufficient land for everybody, as was so clearly testified to by Mr. Pepler, in the verbatim record, XI, at pages 223-224 he said:

"... according to my survey and our planning made in terms of the agro-ecological regions and the carrying capacity of the different Reserves, far more people, I am talking about the non-Whites now, can be accommodated agriculturally in their Reserves than what we find there today. Actually far more stock can be carried in those Reserves than what we find there today."

And earlier, at page 221, he had said specifically—

"... that there is more than enough land in the Reserves to accommodate the non-Whites on an agricultural basis, on a farming economic unit agricultural basis".

So, Mr. President, putting it briefly, at the inception of the Mandate there was already this settled European population. Thereafter immigration was encouraged in order to develop the economy and to provide the revenue for the maintenance of law and order and for the upliftment of all the groups—so as to make surplus funds available from these growth-points in the economy for the development of the whole Territory—and one sees how the growth of this economy, together with the economy in

South Africa itself, has resulted in that very process coming about—in the large amounts becoming available, and having become available over quite a number of years now, for development, so that Mr. Pepler says that he has more than sufficient funds at his disposal for the purposes of development of the Native areas—the sole question is one of concern about the pace as far as the human element is concerned. He worries on the question whether they are not, in some respects, perhaps going too fast as far as that is concerned.

These aims have been abundantly realized as one sees also in all the planning which is involved in the Odendaal Commission report, and in the White Paper of the Government which came in response to that report.

Now, under those circumstances, Mr. President, we submit that it surely could not be suggested that the Mandatory holds no responsibility to this White population, or that the provisions of Article 2 of the Mandate do not apply to the European section of the population as well as to any other. Indeed, in our submission, in requiring the Mandatory “to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory”, the authors of the Mandate did not distinguish between, or among, the different classes of the inhabitants, and, having regard to the circumstances I have mentioned, the White population group is as much a population group of South West Africa as any other. It has a right, not only legalistically, not only by way of a vested economic interest, but a moral right to be there and to be so considered. What is more, its presence in South West Africa is still, and continues to be, of the utmost value to all the population groups in that Territory.

Now, Mr. President, when we against this background consider the probable effect of applying the Applicants' norm to the political life of the Territory, we shall submit that regard should be had to the present political institutions in the Territory. The Court will recall that at the inception of the Mandate all political authority was vested in the Respondent Government, but there were a large number of traditional Native political institutions in existence. Where they existed they were maintained and developed, positively as a matter of policy by the Respondent Government, and in cases where they had been destroyed or injured they were regenerated. That was as far as the various non-White groups were concerned.

For the White group, on the other hand, a certain measure of delegated political power was granted in due course, and in the result the White group attained a greater degree of development in political power than the other groups which is not surprising in view of the differences in stages of development. However, Mr. President, I must emphasize that that additional amount of power was not granted at the cost of the non-White groups, nor were those groups deprived of any power previously exercised by them. By and large the powers given to the White group were powers of local self-government for themselves and over those who come into their area, and come and work for them in their economy. It did not extend to the other portions of the Territory, to portions governed by the Natives, or the various indigenous groups themselves, on the basis of their own institutions.

It is evident that the Respondent had to start from scratch in 1920. The European population was able to make a greater contribution at

that stage than was possible in the case of the other groups. The European population group was used to this form of political institution in the various countries from which they had come. It was a natural extension to them at that stage, and the differentiation in the stage of development of these institutions—the stage of advancement of these institutions—was also perfectly natural. Of course, that was not a situation that was intended to persist for ever. It was one that was to be gradually wiped out in the processes of development. As we said in the Rejoinder, V, at page 309:

“Everybody, including Respondent, will agree . . . that the present position, in which the European section of the population of South West Africa exercises greater political rights than other sections, can be justified only on a transitory basis, and that the goal should be equality among the various groups.”

The question before the Court is now in the choice between the two alternatives which I held up to the Court yesterday—whether this equality must necessarily be sought on the basis of the method laid down in the Applicants' norm and standards, that is, by the abandonment of the separate political institutions of the various non-White groups and a more or less precipitant introduction of a multi-racial parliamentary institution. The question is whether that method is to be adopted or whether the approach of separate development of official ethnic differentiation is to be pursued in a constructive manner as a basis for leading each one of these groups also to their political self-realization.

In our submission, Mr. President, the admitted facts and the uncontested opinions of the acknowledged experts lead to the conclusion that the application of the Applicants' norm as a method towards the achievement of this ideal of equality amongst the various groups is bound to lead to disaster.

On the admitted facts there is a very large difference in the levels of development of the White group, on the one hand, and the most advanced of the non-White groups, even the most advanced amongst them, on the other, and it is probably for this reason that the Applicants no longer insist in this Court, as I pointed out this morning, as they insist elsewhere, that universal adult suffrage should be introduced immediately in South West Africa. The extremeness, if I may call it that, of that attitude, and the very obvious detriment involved in it must have struck the Applicants, and that is probably the reason for these attempted qualifications to which we had regard earlier this morning.

However, let us examine this possibility of a qualified franchise, which may be what they are suggesting now, I do not know, leading to eventual universal franchise in a single political unit. We submit, Mr. President, that that approach suffers from the very same defects as the immediate introduction of universal suffrage.

We dealt in the Counter-Memorial, II, at page 472, with the implications first of immediately handing over control to the non-White majority in South West Africa (I shall not deal with that for the moment as we shall come back to the implications of that situation at a later stage), and following from that we dealt then with the possibility of a further alternative, another method of approach, which appears to accord with this middle course now suggested by the Applicants.

Mr. President, we are dealing with the implications of a possible

middle-of-the-road policy in regard to the political aspect as may or may not be suggested by the Applicants at this stage. After dealing in our Counter-Memorial with the implications of an immediate handing over of power, we went on, at II, page 473, as follows:

“Another method of approach may be to attempt to establish a multi-racial society on the basis of identical rights for all. In view of the utter failure, . . . of all such attempts in other parts of Africa, and of the fact that no experiment of this kind has ever succeeded, or is showing any signs of being likely to succeed, it does not seem to Respondent that this alternative can really commend itself. The evidence is overwhelming that African nationalism does not in fact desire such a multi-racial state, that it will not tolerate any process of gradualism aimed at bringing about such a state, and that its only demand is absolute power for African Natives on the basis of their majority. In other words, this second alternative is but a slightly longer drawn out process than the first, but otherwise one involving exactly the same results.”

Mr. President, the facts set out in this passage are now, of course, admitted by the Applicants, including the facts regarding the aims and the purposes of African nationalism in general. Indeed, Mr. President, events in Africa have made it impossible for the Applicants to dispute the statements. Examples of the failure of multi-racial experiments in Africa were given in the Counter-Memorial, II, at page 454, and again at pages 470-471, and in the Rejoinder, V, at page 200, and further references were given there. We made references to the Congo, to Kenya, to Tanganyika and to Nyasaland, the present Malawi.

In regard to Rhodesia we said in the Counter-Memorial, that is, towards the end of 1963 when this portion of the Counter-Memorial was written:

“Perhaps the only remaining instance on the continent of Africa where a real attempt is still being made at the creation of a genuine multi-racial community on a basis of partnership between White and Black, is Southern Rhodesia . . . the present constitution and franchise arrangements are such as will probably result in a majority of the members of the Legislative Assembly being White for some time to come. But the fact is well known, and has been much emphasized, that this process is likely to be reversed in favour of an African majority in about 15 years' time—*i.e.*, if the present arrangements continue in force. There is overwhelming evidence, however, that this arrangement does not satisfy any African national leader, whether in or outside Southern Rhodesia.” (II, p. 470.)

Then we gave a more up to date and thorough review of the history of the Central African Federation, of which Rhodesia formed a part, of its break-up and subsequent events in our Rejoinder, V, at pages 231 to 234. In the course of this we said, at page 233:

“It is manifest that an impasse has been reached in the attempted integration of the different population groups in Southern Rhodesia into a single integrated political unit. Instead of bringing the population groups closer together, as had been hoped, the method of political development advocated by Applicants is now producing the opposite result.”

The facts in this passage, Mr. President, are of course admitted by the Applicants, and they are very heavily underscored by the current events and the situation in regard to Southern Rhodesia, upon which I need not enlarge. I need only refer to the threat of leaving the Commonwealth, of even trade boycotts and so forth, which are levelled at the United Kingdom Government in regard to this issue of granting independence to Southern Rhodesia before an African majority has already taken over.

The whole situation, Mr. President, was very well summed-up by the noted authoress and expert on Africa, Mrs. Elspeth Huxley, in a letter dated 24 September 1963, which we quote in our Rejoinder, V, at page 384. She writes:

"Alas, multi-racialism is dead beyond hope of revival and there can be no sharing of power, only seizure of it. If the whites relinquish their grip then the black majority will take it, as in Kenya—and as blacks, African racialists, not as so-called 'civilized men' measuring up to some common non-racial standard politically expressed in a qualified franchise.

... We believe in compromise and face saving; most African nationalists do not. Theirs, they believe, is the earth of Africa and everything that's in it, and this they mean to have. Whether we think this 'reasonable' or not is beside the point. It is no good going on trying to ride a dead horse."

Now, Mr. President, that this phenomenon just described applies to South West Africa as much as to other parts of Africa appears very clearly from passages which we cited from statements by petitioners to the United Nations, and to which I am not going to refer again now, and also from the evidence of Mr. Dahlmann. He was asked in cross-examination whether he had encountered Natives in South West Africa whom he regarded as sufficiently mature and sophisticated to participate in the political life of the Territory, and we find his reply in the verbatim record, XI, at page 485. He said:

"Yes, I must say I could think of a few political leaders who would be capable, I would say, to sit in the Legislative Assembly of South West Africa."

Then he mentioned a few examples, and he proceeded:

"... but the greatest difficulty is these people do not want to sit in the Legislative Assembly under the qualified franchise system. They have stated again and again that they only accept majority rule—that means one man, one vote—nothing less, and they are so dedicated to their own nation or to their own group and to group loyalty that they do not think of this qualified franchise. On the other hand, their respective nations or groups would regard them as traitors. I might mention one name again, and that was Kozonguizi; and Kozonguizi is of course for multi-racialism and against group loyalties and tribalism in any form, but he is even more outspoken against participation within, if I may say so, White-led parliament, and he went so far as to say that he is against any sort of co-operation with the White liberals within the Territory."

So, Mr. President, it is clear that any attempt at a gradual creation of a multi-racial political organization is doomed to failure. The African Nationalists do not want it except, perhaps, that they may take it as a

stepping stone to complete control, and as one that is to be a fairly expeditious stepping stone. That has been made perfectly clear, but it has also been made clear that no experiment along these lines has ever succeeded, or has ever shown any signs of success. That is the attitude that has manifested itself from the African side.

Now, as far as the White population is concerned, Mr. President, we find the following evidence of Mr. Cillie in X, at page 516:

“... every so-called middle-of-the-road policy, every policy that suggests giving limited rights to these various groups inside one political structure, does raise fears immediately that the end of this policy is a position of one man, one vote, and that once you start, there is no logical, and indeed no practical, stopping place short of universal suffrage”.

I may interpose again, Mr. President, the situation in Rhodesia which so forcibly emphasizes this.

It is, consequently, in these circumstances predictable that any form of qualified franchise introduced in South West Africa would create irreconcilable tensions between the Whites, on the one hand, who would want to retard or arrest the extension of the franchise, and the Natives, on the other hand, who would press for a continual lowering or abolition of the franchise qualifications. And the end of the road could only be one man, one vote, and sooner rather than later.

Now, Mr. President, what would the effect be of the introduction of universal adult suffrage in one political organization? What would the effect be on the well-being and the progress of the inhabitants of South West Africa, whether it occurs now or reasonably soon at the end of such a middle-of-the-road policy?

A reference may appropriately in this respect be made, Mr. President, to events in other similar countries or territories in Africa and in the rest of the world. We deal in our pleadings also with such matters and the facts we state there appear to be entirely accepted.

In the Rejoinder, V, at page 194, we referred to—

“... the generally observable fact that *there are peoples and groups (nations or embryo nations) which are for all practical purposes not assimilable, the one by the other, because of unwillingness to become assimilated.* The same psychological, emotional or cultural attributes which prevent assimilation, frequently result in a situation in which the groups concerned *cannot govern one country jointly in a manner which is fair and acceptable to both or all of them—the underlying reason being not that one is superior and the other(s) inferior, but simply that the differences between them are too great.*”

Applying this observation, more particularly to Africa, we said at page 198: “Where deep-seated tribal, racial or ethnic differences have been ignored in African States, the result has frequently been bloodshed and chaos.” We could demonstrate that proposition with reference to a certain number of territories and States in Africa. So, for instance, we could refer to the example of Rwanda which is dealt with in the Rejoinder, V, at pages 221-223, the case of the Sudan, V, pages 224-226, the Congo (Leopoldville), V, pages 205-207, and, outside of Africa, we could refer to the cases of India and Pakistan, dealt with at pages 235-236, V, and of Cyprus, dealt with at pages 237-238, V. All these facts, Mr. President, are now covered by the Applicants’ admission, and, indeed, we

believe that they have been set out in such a way in regard to matters which are fairly generally known, that there can really be no disputing of any of those facts.

A further feature which has commonly followed on the grant of independence to African States, apart from these cases of utter chaos, bloodshed and so forth—a feature which has often followed on the grant of independence under this system of universal adult suffrage—has been the creation of one-party States. We deal with that feature in our Counter-Memorial, II, at page 455, and again in the Rejoinder, V, at pages 190-191, and pages 199-200.

In some cases, as we pointed out, this tendency appears to be stimulated by the need to overcome the difficulties created by ethnic diversity and, as it were, to stifle them from above, or to keep them in control by sheer force. But, be that as it may, democracy in the western sense has had a rather rough passage in these territories in Africa—in independent Africa. This has often been to the detriment of opposition parties, whatever their colour, whether they be White, Black, Brown, African or Asiatic.

In addition, Mr. President, we pointed out and we dealt quite extensively with the phenomenon of precipitate “Africanization” of the civil service in many of these territories and the consequent lowering of standards in them. I do not need to enlarge upon that. The Court will find the references in the Counter-Memorial, II, at pages 455-456, and in the Rejoinder, V, at pages 187-189.

All these tendencies, Mr. President, are facts, and they are admitted facts and indisputable facts. So, if we take them into account, the overwhelming likelihood, in our submission, is that the introduction of universal adult suffrage in South West Africa would lead to inter-group rivalry and, possibly, clashes, or it would lead to a strong centralized rule by one group or by a dictatorial clique from such a group. Africanization would be the policy in the civil service, with the resultant decline in the standards of administration.

Now, in other parts of Africa, this syndrome has led to an evacuation of Europeans, as we point out in the Counter-Memorial, II, at page 454, and the Rejoinder, V, at pages 188-189 and 200-201. At page 200 we said:

“Apart from instances where Europeans were forced out of newly independent states by reason of violence and disorder, the general lowering of standards and development of black despotisms . . . have induced many White people to depart.”

This again forms part of the admitted facts, the indisputable facts.

But, Mr. President, as Mr. Cillie pointed out, and as I tried to point out to the Court earlier this morning, the situation of the European population, not only in South Africa, but also in South West Africa, is different. There is no question of evacuation here and of going to another homeland. Let us quote Mr. Cillie who is very apt on this point, in X, at page 511:

“ . . . The Afrikaners, by being cut off from their original Dutch homeland, ceased to be colonials—colons—more than a century and a half ago, and those European people who came later during the time of British rule are now largely falling in with that view, the basic view that we are there to stay as a White African nation, and in the second place that we are there to stay with full control of our

destiny as a nation. By that I mean that colonial minorities tend to hold on as long as possible, and then they abdicate, or they depart under the usual anti-colonial pressures; but a nation cannot do that—by its very nature it cannot do that; a nation has to defend its freedom and its right to self-determination to the very last and, even if beaten down by superior force, it has this inner compulsion to start its struggle for freedom all over again.”

It is against this background, Mr. President, that the experts whom we called, expressed an opinion as to the probable effect of applying the Applicants’ suggested norm in South West Africa in the political sphere.

The first expert was Professor Bruwer. My learned friend, Mr. Muller, has dealt with his outstanding qualifications to speak on the subject and I need not refer to those again. After explaining the composition of the population and the measures of differential allotment of rights and duties and so forth which are found necessary in the Territory, Professor Bruwer was asked this at X, page 264:

“Will you state your opinion as to what the effect would be if the present measures of differentiation on the basis of membership in a group were to be done away with?”

and his answer reads as follows at page 265:

“Mr. President, prediction is naturally based on opinion. I have quoted certain, what to my opinion are, advantages of a certain approach, having in mind the situation as I know it and as I interpret it. Now, Mr. President, naturally if you do away with this system at a specific moment, or let us say momentarily, you discard an approach that has been going on not only during the period of the Mandate, but long before that. If you discard that, Mr. President, then naturally all the advantages that I have explained as being my opinion, will disappear. In practice all the essential measures of protection will fall away. There would be no protection of land rights, there could be no protection of language rights, I am afraid; now what can be then the predictable consequences of something like that?”

Mr. President, if we had to take as an example what happened and did happen in the previous century, then one would immediately say that there would be a violation of rights, or assumed rights, and such violation would undoubtedly lead to friction, and perhaps even more than friction, perhaps even struggle; but there is also this other predictable consequence, Mr. President, and that is that one will destroy that which I have pleaded for as being the achievement by people themselves, and I do not think . . .”

May I interpose there: speaking of the achievement by the people themselves, the Court will recall that Professor Bruwer stressed particularly the achievement by the various non-White peoples themselves. I proceed with the quotation:

“. . . and I do not think that I would ever be able to agree to an approach where one destroys a people even through other than physical means, Mr. President; but as far as South West Africa is concerned, I also think that the one group, either on the basis of

numbers or on the basis of economic strength, will undoubtedly dominate the other group if you have not got protective measures; and I also think, Mr. President, that one can say that if you have now to start a novel or a new system, an alien system, you will very definitely retard the process of evolutionary development that has been going on for the last 40 years approximately after the assumption of the Mandate”.

Now, to revert to Mr. Cillic, who gave evidence specifically on the political issues, his qualifications have also been dealt with and they are beyond any question. He explained how the policy of separate development had its origin in the nationalism of the Afrikaner nation. The feature of nationalism he regarded as basic to the political scene in South Africa and in South West Africa and thus he said, in X, at page 512:

“If you subscribe to a credo of nationalism or anti-colonialism, you cannot stop short at championing the freedoms and the rights of those whom you regard as your own group.”

That was then, in his opinion, one of the main determinants of the policy of separate development as it had developed in southern Africa, a policy whereby all groups were to be encouraged to develop their own national identities.

When he was asked to express a view about the effect upon the prospective well-being and progress of the inhabitants of South West Africa of political pressures from outside the country, Mr. Cillie said this, at page 525, X, of the record:

“These pressures have, in my view, been increasingly directed to the main purpose of making South Africa itself, and South West Africa, conform to this standard of one man, one vote—this standard of universal adult suffrage. It was my conception of the case of the Applicants that this was what they wanted in South West Africa, and if you want that in South West Africa, and we have to grant that in South West Africa, with such a system in a territory next to us, which we administer as an integral part of the country itself, there would be no valid reason for refusing to do so at home. This certainly would, and does, create the utmost resistance and the utmost resolution in the White population of South Africa to resist all these pressures.

When applied to South West Africa, this sort of one man, one vote thinking would create havoc in inter-group relations in that Territory. The dominant group, in terms of numbers, is the Ovambos, whom I believe form about 45 per cent. of the total population. On the basis of one man, one vote, their numerical preponderance could be exploited by ruthless and ambitious men to subject all the other groups to Ovambo rule. Not only would the Whites be submerged, and they are going to form for a very long time the framework—and the sinews of the administration and economic development in that Territory—but also the most under-developed non-White groups, the weak groups such as the Bushmen or the tribes of the Kaokoveld would be submerged. Thirdly, you are going to submerge the most highly developed of all the non-White groups which are, I think, the Coloured people of South West Africa and the distinctive Rehoboth people. It means to these people, as it means

to the Whites, that they are being forced to commit a form of national suicide and that prospect evokes all the forces of resistance that you would expect in any nation in similar circumstances."

That quotation recalls forcibly the evidence given by Professor van den Haag upon the situation which as a general principle emerges—the tensions which emerge—when one group feels itself or its identity, or its continued existence, threatened by another.

A further question was put to Mr. Cillie as to whether the resistance mentioned by him would come from White people only, and his reply was:

"No, I don't think so. As they become wise to what is the probable end product of this, some of the minority groups would act likewise. In fact we are all minority groups in South Africa. South Africa and South West Africa are really a collection of minorities and you can only get a preponderant majority by a ganging up of various minorities, say in the name of their blackness, or in the name of their non-whiteness, or what you will. I think the resistance will not be confined to the White people only." (X, p. 525.)

I took the liberty, in reading, to correct an obvious mistake in the phrase "preponderant—should be—majority" and in the text it reads "minority". I am quite sure that Mr. Cillie will probably have corrected that.

In the result, Mr. President, Mr. Cillie expressed the opinion that the only practicable policy in the circumstances, as he called it "the only fundamental alternative" was one "of separate development; trying to build up these vastly disparate non-White peoples into self-respecting and self-governing organic entities". That is in X, at page 517.

Mr. Cillie's evidence was summed up succinctly in cross-examination in certain passages, the first one of which occurs at X, page 546, and to begin I quote a question by my learned friend, Mr. Gross:

"Do you favour the introduction of methods of suffrage which might lead eventually to elections by universal adult suffrage? Would that be compatible with the policy of apartheid or separate development?"

Mr. Cillie replied:

"Well, universal adult suffrage is quite compatible with the policy of apartheid as long as you define the group in which this voting power operates."

Mr. Gross:

"May I define it for you, Sir, so that you can answer my question briefly and responsively? I define the group as all those who may be determined to be qualified in a geographical area specifically in this case South West Africa?"

Mr. Cillie replied: "And you are asking my opinion on that as a prospect for South West Africa?"

Mr. Gross: "Yes, Sir, that is all I am talking about, Sir."

Mr. Cillie: "It would mean chaos."

The cross-examination continued in a similar vein up to the bottom

of page 547 and there is just one brief passage there which I should like to read to the Court. My learned friend, Mr. Gross, asked:

"Would the educative measures prepare the population for the adoption of universal suffrage? Would that be compatible with the situation in South West Africa?"

Mr. Cillie replied:

"I do not see how education is going to make an Herero less of an Herero. It is going to make him more of an Herero and that goes for an Ovambo too and for all the peoples of South West Africa."

Again, this was so clearly supported by the expert testimony of other witnesses like Professor Logan and Professor van den Haag.

In addition to Mr. Cillie and Professor Bruwer, we may also make a reference to general opinions expressed by men like Dr. Eiselen and Professor Logan, opinions which are also apposite to the political life of the country, because I cannot emphasize enough that the political aspect is the crucial, the kernel, aspect of all this—the main determinant of the happiness and the prosperity of the particular community. These general opinions expressed by Professor Bruwer, Dr. Eiselen and Professor Logan, were referred to by my learned friend, Mr. Muller, and will again be referred to under other topics such as *education or economy*, and consequently I shall not quote them here, but I merely wish to ask the Court to bear them in mind also for their bearing on the political issues.

Mr. President, there we have the picture painted by these experts on the basis of undisputed facts—really indisputable facts. Apart from all these possibilities mentioned of complete disruption, bloodshed, chaos, what would the result be on the situation of the least developed and the most developed groups in the country, being all minorities in that country? May I refer to two of the very artificial aspects that would result from the application of the norm and the standards in the political sphere, as we understand that norm and those standards. We refer to them in our pleadings, and I merely wish to refer to them very briefly now.

If we take the preponderant position of the Ovambos in regard to numbers, it means not only that they would, in this suggested takeover on a basis of one man one vote, rule over other groups, it means also that they would geographically rule over the whole of South West Africa—and the Ovambo nation have never had aspirations of aggrandizement of that kind. The Ovambo nation have always been very happy and very satisfied to live in the northern part of South West Africa, which is Ovamboland. They only have the complaint of the kind which Dr. Eiselen mentioned because the colonial Powers went and drew a line in the midst of their territory, so as to place some of them in South West Africa and some in Portuguese Angola, but apart from that, Mr. President, as far as anybody knows, there has never been any wish on the part of the Ovambos to rule any other country than their own. Yet, here they would, as it were, have colonialism thrust upon them—domination of other groups and other territories not their own.

The case of the Eastern Caprivi peoples affords another example of the complete artificiality of this approach. As described in the pleadings, the Court will recall, and these facts are admitted, they are completely

isolated geographically, ethnically and otherwise from the other peoples of South West Africa; they have no form of contact with one another. They have ethnic relationships with the peoples of Bechuanaland, and again, over the river, with the peoples of Zambia. And, Mr. President, according to the approach of separate development, these peoples are, when they achieve their stage of maturity, to decide upon their own destiny—they may decide whether they want to become an independent territory, they may decide whether they want to link up, say, with Zambia or with Bechuanaland, or partly with one, or partly with the other—that is part of the outcome of the approach of separate development. But, Mr. President, on the basis of the approach of non-discrimination and non-separation, with which we are dealing—non-ethnic differentiation—that freedom is not to be allowed, even when they reach that stage of development, to the peoples of the Eastern Caprivi. If the majority in South West Africa should decide, if the Ovambos should decide, that they stay a part of South West Africa, then they stay a part of South West Africa, and then they are ruled by the Ovambos or whoever may have the sway in such an independent South West Africa.

Now, Mr. President, let us see what the Applicants' reaction was to the evidence which was given by the experts.

We noted that all these experts testify that in their view certain differential allotments of rights, burdens, privileges, and so forth, on the basis of group or race, were essential for the promotion of well-being and progress. Now, one would have expected the Applicants to adopt one of two courses—those to which I referred yesterday. The one course they could adopt, was that this evidence was entirely irrelevant and therefore required no cross-examination at all, on the basis that the organized international community had spoken, and that the actual benefit or the detriment caused by the Respondent's policies or by the application of the norm would not matter but, Mr. President, as we pointed out, this attitude was consistently adopted only in so far as Dr. Eiselen was concerned, and thereafter we had cross-examination of the various witnesses.

Once it was decided to cross-examine, one would have expected the Applicants to attempt to break down the witnesses' testimony in these crucial respects—in other words, to establish that a differential allotment of rights, burdens, and so forth, indeed necessarily gave rise to undesirable consequences for the well-being and progress of the peoples concerned. And one would have expected them to endeavour to demonstrate that the abolition of such differential allotment would necessarily promote well-being. But, Mr. President, this the Applicants did not in the least attempt to do. Instead, they limited themselves on the whole to criticizing certain limited aspects of Respondent's policies, including aspects without any apparent relationship to the context of the norm or the standards. I give some examples without reading from the records but merely by way of reference to the records.

Professor Bruwer was cross-examined, amongst others, on the membership of the Odendaal Commission—that we find in the verbatim record, X, at page 267, and following—and he was questioned on the census classification between the various population groups, at pages 272 and the following; he was questioned about what was meant by the phrase "... absorbed in the economy ..."—that we find at pages 277

and the following; about changes in the boundary of the Police Zone, at pages 280 and the following; and then about job reservation, at pages 282 and the following.

Mr. Cillie was cross-examined on job reservation in the verbatim record, X, at pages 541 and following; he was cross-examined on the ultimate aims of separate development in that record, at page 544; and he was questioned on the meaning of "trusteeship", at pages 529 and the following.

Mr. President, I do not propose to analyse this cross-examination in detail. There are various reasons why I am not doing so. In the first place, the Applicants' cross-examination would, for the reasons I have just given, appear to be irrelevant to their case—to the case which they called upon us to meet. We are in the dark as to what the purpose really was which was intended to be achieved by this form of cross-examination; possibly we shall have some explanation later, and if we do have the explanation there will be opportunity for us to deal with that at a later stage.

From our point of view, as I pointed out at the beginning, the evidence was led to establish that implementation of the norm or standards would, in many instances, be detrimental to well-being and progress—that it would, indeed, over-all, for the general well-being and progress of the population, be detrimental. And it seems clear, Mr. President, that the Applicants did not even attempt to attack our evidence on that basis. At the most, they attempted to show that certain specific measures were not justified—not justified on criteria which now do not form part of their case—and they also attempted to show that certain individuals might or would suffer hardship in particular situations by reason of Respondent's policies.

Now, Mr. President, let us just have a look at these two aspects and, firstly, at the suggestion that particular measures were not justified. As I have said, no criterion is suggested in the Applicants' case for distinguishing between individual measures and the policy as a whole. If it is contrary to the Mandate to distinguish in the allotment of rights, obligations, and so forth, on the basis of membership in a group or class or race, then the whole of the Respondent's policy is in conflict with the Mandate, and each and every measure which contains that differentiation is in conflict with the Mandate. There would, therefore, on this criterion be no basis for saying that the policy as a whole is perfectly legitimate, but individual measures are to be regarded as being in conflict with the Mandate. So, if individual measures were to be tested it would have to be on a different criterion. In the first place, no such different criterion was taken up in the Applicants' case, which we are now called upon to meet as being part of the issues between the Parties and, in the second place, Mr. President, if we look at the type of suggestions made in cross-examination, the criteria suggested were not even such as would serve as a basis for a court of law to come to a conclusion about, in a process of testing the validity of measures, because they referred in general to aspects or criteria of policy—aspects of criteria of an economic nature, of a social nature, of a moral nature, and so forth—where there may or may not be difference of opinion in a particular respect, and where no account is taken whatsoever of the discretionary nature of the Mandatory's task which was entrusted to it.

We have, as I said yesterday, not essayed the task of following up

each and every measure on the basis of such criteria as would be justiciable criteria. It would have taken a tremendously long time to have done that, and *a fortiori*, Mr. President, we have not essayed that task of following up these measures one by one on the basis of non-justiciable criteria.

Consequently, to take just one example, if we had to debate whether the job reservation provisions in the mining legislation—to which a very great deal of attention was devoted in the cross-examination of all witnesses, irrespective of whether they professed to have knowledge thereof—are sound economically, morally, and socially, then a great deal more attention and evidence would have had to be directed to the moral, the social and the economic purposes, and the effects involved in those measures and in the particular setting in which they occur. This task was not essayed by us.

We shall later, in our discussion of the economic aspect, deal broadly with this question and we shall limit ourselves to showing that, in this particular sphere, certain differential allotments of rights, duties and burdens in the field of employment opportunities were necessary with a view to the promotion of well-being and progress. Mr. President, this general proposition that certain differential allotments in this sphere, also in the field of employment opportunities, were necessary, was not contested by the Applicants. They were each time concerned with the individual—the particular—instance as affecting particular individuals—and very large aspects of this total question were left entirely untraversed by the Applicants, for instance, the whole subject of the protection of Native tradesmen, in particular areas and in particular fields, and the vast opportunities offered to Native entrepreneurs who could make use of those opportunities in urban areas as well as in the more rural projected homelands. That is a matter that will be dealt with in more detail in the economic aspect.

Now, Mr. President, that was the one aspect, that the Applicants refer to all these non-justiciable criteria in their cross-examination pertaining to particular measures. The other aspect was that they referred to the fact, or tried to establish, that some persons may be detrimentally affected by Respondent's policies. Now, surely it must be true of every policy in the world, that some people would be detrimentally affected by it. If one were to examine the merits of a particular policy I am talking now not of a justiciable basis; I am talking of a basis of comparing merits and trying to come to a conclusion as to where the balance lies—then of course one would look at the nature and the extent of the detriment suffered by the individuals. One would see what the total defect, the total quantum, if I may call it so, of that factor would be, but one would view that as a relevant factor, together with so many others, to be weighed in the balance—together with other factors, such as the extent of the benefits sought to be achieved or actually achieved. And, Mr. President, what is a very important factor is weighing the policy not in vacuum, not against suggested idealistic standards of perfection, or criteria of perfection, but weighing it against the pros and cons of the only alternative policies that may be possible in the particular circumstance, because that is the only realistic way in which to weigh a policy.

That would be the nature of the task which one would have to undertake if one were to have regard to individual aspects of detriment or benefit; but that task was not essayed. It was not the nature of the

Court's task to make a determination of that kind in regard to policy. We may have had to essay a task of that kind for the purposes of the case originally brought by the Applicants—the case of deliberate oppression—but again the necessity of that fell away with the change in the Applicants' case. So, Mr. President, we are, with what are left, as the issues between the Parties before this Court for adjudication, not concerned with this factor of a certain amount of detriment to individuals. That, in itself, means nothing. It certainly does not weigh up against the preponderant weight of the undisputed and uncontested evidence that, taken as a whole and in the over-all bearing upon the well-being and progress of the population, the results of the application of the norm or standards would definitely be chaotically detrimental and that the only alternative would be the policy of separate development.

To summarize, then, Mr. President, the Applicants criticized some points of policy. Their criticism may or may not be justified on the basis of some undefined criteria, and criteria not forming part of the dispute before the Court. The criteria were not suggested, and no enquiry was attempted to ascertain whether the Respondent's measures complied with the criteria or whether any alternative measure or policy would have been preferable. And what is significant is that the Applicants made no serious attempt to break down the evidence of the witnesses on the crucial aspect. In other words, they did not attempt to show that in the over-all effect, the measures which contravene the norm or standards defined at page 493, IV, of the Reply are, or must necessarily be, harmful. We therefore, Mr. President, still wait with interest for their comment on this evidence.

Now, Mr. President, the last aspect of the political field: we submit that we have established that the Applicants' norm or standards would, if applied in South West Africa, be detrimental to well-being and progress. In our submission we have, consequently, also established that some system involving a differential allotment of rights, duties and burdens, etc., in the political field would be necessary. In our pleadings, as also in the evidence, there was some discussion of the method whereby we consider this can best be done on the basis, therefore, of the policy of separate development.

We have not, in these Oral Proceedings, attempted to define in detail a political programme for the Court's approval or otherwise. Indeed, Mr. President, that would have been completely inappropriate. If, as we submit, the Court is satisfied that official ethnic differentiation would be required in the political life of the Territory, that concludes the matter as far as the issue before the Court is concerned. The Court would not have to enquire into the actual policy which is proposed by the Respondent Government—the policy of building forth constructively on the basis of separate development. However, Mr. President, because one does not in practice look at things in vacuum, it may be desirable for us to sketch in very broad outline what our policies in the political sphere really entail in order to provide a more tangible illustration of the real matter which is at issue here. One can only, in these matters, be realistic, as I say, when one weighs practicable alternatives against one another.

The Respondent Government's attitude in the matter was expressed broadly in the White Paper which followed on the Odendaal Commission report and which is contained in the supplement to the Counter-Memorial. I read from IV, page 213:

"The Government wishes to state clearly once again that its general attitude, . . . *inter alia*, involves agreement with the Commission's finding that the objective of self-determination for the various population groups will, in the circumstances prevailing in the Territory, not be promoted by the establishment of a single multiracial central authority in which the whole population could potentially be represented, but in which some groups would in fact dominate others. [Omitting some words again] The Government also endorses the view that it should be the aim, as far as practicable, to develop for each population group its own Homeland, in which it can attain self-determination and self-realization."

Mr. President, in our pleadings, the Counter-Memorial, at II, pages 424-482, and again in the Rejoinder, V, at pages 336-338, we discussed the aims and the purposes of the policy of separate development and we discussed also the advantages offered by this policy. It is significant, Mr. President, that at no stage did the Applicants attempt to challenge this exposition and vital aspects of these expositions must now be taken to have been admitted by them by reason of their general admission of factual averments.

Now, Mr. President, it may of course be a matter of opinion or prediction whether certain benefits or advantages will, or will not, in fact accrue under any policy. That may be so as far as the future is concerned but those that have already manifested themselves and have already accrued, they are facts. It is further, Mr. President, certainly a fact that these future benefits and advantages, as envisaged, are indeed expected to accrue. It is a fact that the policy has been shaped and is implemented because the Respondent desires and expects these advantages and benefits. These facts, at least, have been admitted by the Applicants. And in so far as the actual realization of the benefits, as far as the future is concerned, may be a matter of opinion, the Applicants have not made any serious attempt to attack or to controvert the opinion which we have expressed, on which we have relied and in support of which we have called in expert testimony.

In any event, Mr. President, as Mr. Cillie emphasized so forcibly to the Court, if, in particular respects, as we go into the future, it is observed that certain expectations are not realized, then it would be necessary to think again and adaptations would have to be made as we go along. It is not a matter of being static, of having a blueprint which is to be applied in each one of its details as a rule of thumb, as a law of the Medes and the Persians, in respect of every aspect of future development. It is a broad pattern, it is a broad ideal, but it has been taken out of the sphere of mere idealism and it is brought into the practical sphere of actual implementation—to the stages of advancement as has been described in the pleadings.

Now then, let us look at the advantages, Mr. President, which the Respondent sees in the policy. They are conveniently summarized in the Rejoinder, V, at pages 244-246. The summary, Mr. President, is a fairly long one and, if I recall correctly, I think I read it out to the Court on a previous occasion. I do not intend to do so again, now, but I should like, with respect, to submit it to the Court for reading.

I should like to refer only to one or two aspects thereof and put before the Court brief quotations in that respect. Throughout the exposition here there is this weighing of the only two practicable alternatives—

the approach of political, separate development or the approach of attempted political integration and the relative advantages and disadvantages are put the one against the other.

May I just read some portion of the initial aspects of the summary and then come to the final conclusion at the end?

At page 244 the summary commences as follows:

- "(a) Separate development is not a policy of domination, but the very antithesis thereof—it contemplates evolutionary termination of guardianship in a manner calculated to lead to peaceful co-existence. Attempted integration, on the other hand, must, in the circumstances prevailing in South West Africa, inevitably lead, at least, to domination of some groups by others.
- (b) The aim of separate development is justice for all, not only for some. It seeks to avoid a situation where the exercise of self-determination by some of the inhabitants would involve the denial of self-determination to others." (V, pp. 244-245.)

And so it proceeds. It will suffice for my purposes to read the very brief description found at page 246, which says this:

"In short, separate development is intended and calculated, negatively, to avoid the human tragedies which have occurred, and are occurring, in African territories such as the Congo, the Sudan, Rwanda, and others, as well as in the systems of ruthless dictatorship found necessary in so many other territories with a view to maintaining even a semblance of order. Positively, separate development envisages the establishment of a system of peaceful and friendly co-existence, based on mutual respect for one another's identity, culture, right to existence and human dignity, coupled with fruitful co-operation in matters of common concern. Attempted integration, on the other hand, involves inevitable injustice to minority groups—the highest and the least developed ones—inevitable retrogression in standards of economy and administration, and a very high degree of probability of a repetition of the human tragedies of other territories, or ruthless dictatorial rule, or both."

One very important aspect to bear in mind, and this is of course a fact, is that the *purpose* of separate development is to lead to the self-determination of the various groups in South West Africa as well as in South Africa itself. It is consequently not possible at this stage, or any other stage, to forecast what exactly the ultimate pattern in the political or economic life of South West Africa or South Africa will be. This is inevitably so, because that exact pattern will depend upon arrangements or agreements which will have to be made by consent between entities which are at present still in a stage of formation, or which are at present still developing towards maturity. What is envisaged is that there is not to be superimposed upon peoples which have not yet reached maturity, a system of which they will not be able to rid themselves when they get to maturity—as Professor Manning expressed it, a kind of a child marriage—that is to be avoided. They are to be given the opportunity when they reach maturity of saying: "Now, we see our future as follows, and we shall try by agreement with the others to map out a course which will satisfy our sense of self-determination and self-realization." Mr. Cillie said in this respect in the verbatim record, at X, page 520:

"... obviously the extended form of future co-operation has to be brought about through pre-consultation of the various groups involved, and you are only now building up the other personalities with whom you are going eventually to have a dialogue".

But it is always important to bear in mind that the principle is acknowledged, and it is stressed as a principle and as a purpose—that of self-determination leading, if a particular group may so wish, to complete independence for that group; leading, if it may so wish, to some form of arrangement that may be entered into with a view to co-operation.

As far as co-operation between groups is concerned, various models and patterns have been tentatively suggested, but in the nature of things these are only predictions as to what may be agreed upon in the future. This point is mentioned here because there has been some cross-examination and also some questioning by Members of the Court as to the ultimate result of the policy of separate development. However, for the reasons I have mentioned, this is not a matter which the policy envisages as one which will be or will remain under the control of the Respondent Government, except of course as one of the potential contracting parties acting then on a basis of equality.

Moreover, it seems unlikely that the present boundaries of South West Africa will retain their present significance for ever—even that seems unlikely, and I can recall in this regard the evidence of Mr. Cillie, again in the verbatim record at X, page 521:

"... our theoretical thinking goes further than the geographical frontiers of South West Africa and South Africa... We are thinking not only in terms of a commonwealth or a common market for the peoples of South Africa and South West Africa—we include in our future thinking the territories, the protectorates, who are very closely linked to South Africa economically; we include the Portuguese Territories, Southern Rhodesia and possibly Zambia and Malawi... if you have a map showing the inter-dependence of these various territories, showing the lines of communication, the bonds of investment, and of development, the flowing of technological information, you would realize that this is already a very inter-dependent collection of territories."

These, however, are matters for the future. For the moment the Respondent is engaged with the assistance and with the support of the various non-White population groups in the task of building up the self-governing entities which could eventually play a role in the shaping of the eventual pattern of relationships in southern Africa.

It may be noted in passing that there is another important aspect of this. My learned friend, Mr. Gross, referred several times in cross-examination to the fact of an expectation that there would still be a flowing over the borders in regard to the matter of labour particularly. In that respect there is a significance in this pattern of development which is often not sufficiently appreciated, and that is that as soon as you have built up an entity which can speak for itself, such as we already have to an advanced extent in the Transkei, to take that as an example, then a matter of that kind which is now, as it were, one of almost international concern, becomes a legitimate matter to speak about in the various forms of co-operation that may be devised, and if the Government of,

may we say, the Transkei, or a future Ovamboland, or what have you, should be dissatisfied with the basis upon which labourers from that territory are accepted in, shall we say, the White part of the country, be it South Africa or South West Africa, surely that is a matter for legitimate discussion, and a matter upon which arrangements could be made in the same way as that in which civilized arrangements are made between other countries of the world, particularly in Europe, on matters of that kind, and in other parts of the world too that we know of? But that in passing, Mr. President.

I may emphasize that when we speak of these patterns for the future it has often been stressed from the South African point of view that the idea of a federation imposed beforehand is not favoured, for the two reasons: the one is that one does not want to determine a shape beforehand, before these various entities have risen to maturity where they can express themselves upon the matter; the other important factor is this: that in a federation almost inevitably the majority principle operates, even if it is merely as between entities. There must be some way of coming together, of having some federal structure at the head of it all or as some part of it all, and normally such a structure then operates on a majority basis. And the very purpose of these arrangements of separate development is to avoid the stresses and the strains which arise from the application of a principle of majority in circumstances of inter-group relationships such as we are dealing with. That is why, as Mr. Cillie also explained, in this future thinking the pattern and the model are very much favoured of a consultative basis, of a basis of consensus or agreement, taking as a basis, as I have said, models such as a commonwealth or the Common Market, the form of co-operation existing as between the countries of western Europe.

As I have said, the present is an important practical stage of building up these various entities, with the support of these groups. And the methods which are adopted in that respect were sketched in our Counter-Memorial, II, at pages 477-483, and again in the Rejoinder, V, at pages 256-265, at pages 281-285 and 319-324. At one stage the factual allegations in this respect were disputed by the Applicants, but they have now admitted them all; and in these passages the Court will see to what extent the Respondent has already in South Africa granted powers to Bantu Authorities, and to what an extent this has led to greater co-operation and harmony between the races and the various population groups. This process has developed furthest in the Transkei, where considerable local autonomy is exercised by a Bantu parliament and cabinet based on a constitution in which the elective element plays a major role.

[Public hearing of 3 November 1965]

Mr. President, honourable Members, I was dealing at the adjournment with illustrative examples of what is being done at this particular stage of application of the policy of separate development—the stage which I described to the Court as being one in which the Respondent Government, with the assistance and support of the indigenous groups of South Africa and South West Africa, is building up these various groups, these various communities, to a stage of self-realization, self-determination and mutual equality. I was dealing particularly, at the stage when we

came to the adjournment, with the development that had taken place in the case of the Transkei as an illustrative example of what is being contemplated not only in South Africa, but also in South West Africa, and I referred to the considerable amount of local autonomy now exercised by a Bantu parliament, a Bantu cabinet, on the basis of a constitution in which the elective element plays a major role.

I should like to refer very briefly to some very significant elements of that development. First, there is this relationship between the elective element in the parliament and what one might call the traditional element, the element of aristocracy from the traditional systems operating in the various Bantu communities, in this particular case in the communities of the Transkei. The relationship is in reality something like 64 chiefs, I think, who come there *ex officio* into the parliament and 45 elected members of that parliament. We deal in our pleadings with certain facts which led up to this development and those must now be taken to be admitted, and we pointed out that this Constitution came about on the basis of the wishes of the Transkei population itself—the wishes conveyed to the Respondent Government by what was called a Recess Committee of the previous authority there—a committee which was composed of leading members of the present Government party in the Transkei as well as of the present Opposition party in the Transkei. This factor of the elective element was one of the few on which the Respondent Government took a firm line, not by way of trying to force its will upon the representatives of the Transkei, but by way of suggestion. The original proposal from the side of the Recess Committee—dealt with in the Rejoinder, V, pages 321-322—was to have 64 chiefs and 30 elected members, but the Prime Minister of South Africa suggested that the elective element should be made stronger and as a result thereof, and as a result of the acceptance of that suggestion, the Recess Committee came back with a suggestion of 45 which was eventually agreed upon.

I mention that, Mr. President, because it is also very important as a background to an understanding of the proposals of the Odendaal Commission in respect of the political development of the various Bantu communities in South West Africa. They proposed also that initially the ratio should be something like 60 to 40, 60 traditional and 40 elected, but there is no suggestion that that is to remain the position. There is no specific indication, even from the side of the Respondent Government as yet, that that is what is going to be decided upon in each case. The White Paper, as the Court will know, in general and in principle accepted the recommendations of the Odendaal Commission, but these are matters of detail which were specifically reserved in the White Paper and, knowing the Government's attitude as we do, it seems very likely that in each case the exact wishes on that particular point of the group concerned would be ascertained before an arrangement is arrived at.

This is an example of proceeding by evolution rather than revolution, of not discarding the positive values in the traditional system before they have been completely replaced by other values which have been accepted as values in the community. Recognizing the need for bringing in the *democratic element in the particular form of suffrage and election*, one at the same time brings in that reform in, as I have said, an evolutionary fashion and not a revolutionary fashion, so that one proceeds by gradualism and at a pace which the basic structure of the society can take.

Then, another interesting facet of the development in the Transkei,

which I wish to refer to by way of illustration, is the forms of co-operation which have emerged between White South Africans and the Bantu population. In the case of the Transkei, as we have noted, the cabinet consists of a Bantu prime minister, or Chief Minister as he is called, and several other Bantu ministers. When we come to the civil service we find that as at this stage of development the permanent head of each department, the departmental secretary, is a White South African who has been lent, if I may call it that, seconded it is called in civil service jargon, to the Transkei administration by the South African Government and mostly one finds also that the more senior officials immediately below these departmental secretaries are still, at this stage of development, White South Africans there on the same basis. Then when we come to the other positions further on, as high up as one can go at the moment, there are Bantu officials working their way upwards in these civil service departments. I emphasize that that is the situation at this particular stage of development. It is again an example of proceeding by progression. This is Africanization, too, of the civil service—a very sound principle of Africanization—but it proceeds again by evolution and not by revolution. The idea is that as the necessary number of qualified officials are trained and come to the fore with the necessary qualifications and with the necessary experience to take over, they will take over from those White officials. The process is already in operation and it has already progressed up to a certain stage. And in due course there are to be no White officials left and all those situations are to be filled by the qualified Bantu. Here again, therefore, is an example of achieving a common aim, but achieving it along methods which are destined to be successful and not to break down because the pace is made too fast.

The form of co-operation I have mentioned, exists not only in the administrative sphere, it exists also in what I might call the technological spheres. If one goes to the Transkei one finds a large number of South African technological officials, Mr. Pepler's men, assisting in the same way as the administrative men in the processes of the development of the Transkei. I could give a number of details: experimentation on agricultural projects, various other development projects and so forth, where these people are assisting as long as necessary, but only as a phase of transition until their services and their assistance should no longer be required.

So also in the field of commerce and industry, encouraging Bantu initiative in that respect, there is the development of the Bantu Investment Corporation, also dealt with in the pleadings. The idea is to assist those members of the Bantu community who come forward with the necessary initiative, with the necessary basic requirements to set up some industry or some form of trade—to assist them with technical advice in the task of finding the necessary capital and so forth.

Then there is also the question of the financial relations, in which we find that there is, as at this stage of development, a major contribution being made by the South African Government, not only towards development projects, but also even to the ordinary processes of balancing the budget—again, a course of development which is intended to be a transitional one, but which certainly has its goal firmly in mind.

Now, Mr. President, that sets an example, and I have only mentioned certain illustrative aspects of the example. It is very interesting to see how the peoples of South West Africa themselves have reacted to that

example. We recall that we pointed out in the Rejoinder, V, page 291, that during October 1964:

"... the whole Ovambo nation through its tribal leaders submitted a written petition to the Prime Minister requesting, *inter alia*, the implementation of the Commission's recommendations, and particularly the recommendation relating to the creation of a central governing body for Ovamboland".

Mr. Dahlmann, the Court will recall, testified in the verbatim, at XI, page 470, as follows:

"A number of chiefs and headmen toured the Republic and the Transkei at the beginning of this year and they came back very enthusiastic about what they had seen."

In fact this touring group included not only Ovambos, it included leading members of all the other indigenous communities in South West Africa.

Mr. Dahlmann proceeded to testify about a request from 145 teachers, ministers and nurses of the Kuanyama tribe, the largest tribe in Ovamboland, that a similar tour should be arranged for them.

This represents one aspect of the reaction to the Odendaal Commission proposals in South West Africa. In general we described that reaction in the Rejoinder and that also is a statement of fact which one must take now to be admitted because there was no denial placed on record. We said:

"... excepting the meeting in the Kaokoveld [which was neutral], and except for the majority of the Herero group in the Police Zone (who refused to attend the consultations), the reaction of all the Native leaders, i.e., the Chiefs and Headmen who were consulted, and the majority of their followers, was overwhelmingly in favour of the Commission's recommendations". (V, p. 290.)

If the Odendaal Commission reports were implemented with or without modifications in detail, Mr. President, the opportunities for advance towards full self-determination would have been created. How fast the progress would be in the case of each individual community would have to be seen: it would depend to a large measure upon the efforts, upon the reactions, and upon the rate of progress shown by the particular community itself. But the end result in principle must be that all groups should be in a position to determine for themselves what their future role in southern Africa would be, on a basis of mutual equality. We, therefore, if I may use a phrase previously used in an article by Dr. Eiselen, have a situation of harmonious multi-community development—it is a process moving towards an end product of constructive co-operation between equals.

In this case, by way of cross-examination, anything else offered to the Court of an evidential or factual nature from the side of the Respondents has not advanced the least reason or the least probability why this ideal should not be capable of achievement.

It is a policy which takes full cognizance of the sociological realities of the situation, and, in that respect particularly, it stands, in our submission, in very sharp contrast to the friction, the tension and the strife, and to the almost inevitable tragedies which must result from an application of the norm and the standards suggested by the Applicants in the political sphere.

That, Mr. President, concludes my consideration of the political sphere, as such, but there is a related subject, also taken up in the Applicants' catalogue, to which I should like to devote very brief attention—very brief, because its importance has now, in the light of the developments of the issues before the Court, come to be of a subsidiary nature entirely. That is the sphere of rights of residence and freedom of movement.

The Court will recall that, at I, pages 144-152, of the Memorials, the Applicants set out a number of laws and regulations which, according to them, detrimentally affected three things—the rights of residence, the freedom of movement, and the security of the person of indigenous inhabitants of the Territory. During the course of setting out their catalogue of laws, and so forth, for purposes of illustrating the application of their norm or standards, on 17 May the Applicants said, at IX, page 290 of that verbatim record:

“At pages 144 through 152 of the Memorials (I), the Applicants have set out a series of laws and regulations and official methods and measures by which they are carried out with regard to the civil lives of the inhabitants of the territory and which, the Applicants respectfully submit, constitute *per se* violations of the international legal norm of non-discrimination and of non-separation and the international standards covering the same subject, having precisely the same content.”

The Applicants then proceeded to enumerate at page 290 what they termed “illustrative examples of the laws, regulations and official measures and methods in question”, pertaining to this sphere.

Now, the first important feature to note from that enumeration is that it did not any longer include any laws, or aspects of laws, on which the Applicants had previously relied in their Memorials, relative to the question of security of the person. That subject seems to have fallen out of the picture, and it was almost necessarily so in view of the change of the Applicants' case, Mr. President, because the attack which was made in the Memorials upon the laws and regulations in question, i.e., with reference to the subject of security of the person, was an attack alleging complete arbitrariness in the legal provisions in question. In other words, it invited a factual investigation into the question whether those provisions were indeed arbitrary or whether they were not, and the Court will recall how we set out very copiously and fully in our pleadings the reasons why those rules and regulations and laws were there, pointing out that they were anything but arbitrary.

So that, Mr. President, in the light of the issue as now before the Court, dealing with the question whether there is to be official ethnic differentiation or official ethnic non-differentiation, it is quite evident that this aspect relating to security of the person *per se* would have fallen out of the picture. It concerns mostly, as the Court will recall, questions such as powers of arrest—in some cases without warrant—and cases of that nature, forming subsidiary parts of regulatory statutes dealing with general subjects in the interests of the community as a whole.

Now, we are left, therefore, with the enumerative catalogue with respect to the other two subjects—freedom of movement and rights of residence. And we find that the catalogue included pass laws, statutory machinery designed to control the influx of Natives to urban and con-

trolled areas in the Police Zone, regulations pertaining to idle and undesirable persons in certain Reserves, laws regulating the residence and movement of northern Natives into the Police Zone, and also measures controlling egress from the Territory. I mention these as examples; I do not think I have given each one of them, but I think these examples will suffice for the purposes of what it is necessary for us to say about this aspect of the matter, because it is not our purpose to deal with each and every one of these laws and measures, for reasons which I have explained before. We do not have to test each and every one of them with reference to some criterion. The only criterion before the Court is the one of official ethnic differentiation or non-differentiation, and if we were to apply that then every one would, of course, be regarded as being in conflict with the norm and standards.

What we are concerned with here, as a proposition of fact and in regard to the other aspects, is what would be the consequences in this particular sphere of the application of the suggested norm and the suggested standards.

Again, we shall test these consequences on undisputed fact and with illustrative reference to some of the laws, measures, and so forth, taken up in the catalogue.

Now, Mr. President, let us first understand clearly what the Applicants' case would logically amount to on the application of the norm and the standards in this particular sphere. The Applicants say here, as elsewhere, that the laws and measures in question are *per se* violations of their norm and standards. Now again, as I pointed out before, although the Applicants did not rely upon restrictions imposed upon White or Coloured residents of the Territory in this sphere, and, as in other spheres, it must follow as a matter of logic from an application of the suggested norm and standards that these measures, restricting rights of White persons and Coloured persons, would also violate the suggested norm and the suggested standards.

We set out in our Counter-Memorial, III, at pages 308-310, and again at pages 311-312, a number of examples of these laws and of this aspect of the laws pertaining to freedom of movement and rights of residence, and the Court will recall that their effect is that no White or Coloured person may obtain permanent residential rights in a Native Reserve or an urban residential area, or enter such a Reserve or area without a permit, affecting therefore both the residence aspect and the movement aspect. It follows, therefore, Mr. President, that on application of the Applicants' suggested norm and standards to South West Africa all these restrictions which protect the residential rights of specific groups in specific areas would have to be abolished. And so, Ovamboland would have to be thrown open to members of other groups, including the Hereros and the White group, notwithstanding the very compelling reasons which we advanced in the Counter-Memorial, III, at pages 240-246, for protecting the residential rights of Native groups, including the Ovambo, against such encroachment.

The Court will recall that this was a subject which came up continually also in the evidence and particularly in the cross-examination of various witnesses who, when referred to limitations placed upon individual persons in the Police Zone in the White area, referred to those as being only part of a total system which, as its counterpart or as another part thereof, had also this feature, this very important feature. The

Court might recall the vivid description given by Professor Logan of a White farmer on a drought-stricken farm who would yearn for the opportunity of having a farm ready for irrigation in the Okavango, but that is not for him; it is for the Okavango people.

So, Mr. President, in the final analysis, the application of the Applicants' norm or standards would involve that the Territory should be treated as a single, integrated unit, also for the purposes of this particular sphere which we are talking about—rights of residence and freedom of movement.

We have already demonstrated that to treat the Territory as such, in the present and projected political arrangements of the Territory, would be to invite chaos; that in order to provide a general political system which may have the least chances of success it is necessary to differentiate—it is necessary to separate.

Now, Mr. President, once one has come to that conclusion, then surely what is at issue in the sphere now under discussion must follow as a matter of course. If one decides on a policy of attempting to integrate the various people, the various members of the population of South West Africa, into one integrated unit, then one makes one's laws and regulations with that end result in view. If, however, one envisages development along the lines where you would have various autonomous, or semi-autonomous communities, each in its own area, then, Mr. President, one makes one's laws and regulations with that end product in mind. If it is permissible internationally, and quite natural internationally, for States living in close proximity to one another to make provision for matters such as visas, passports, permits, restrictions upon certain things that aliens may or may not do when coming into a territory and so forth, then it is perfectly natural to do it, if there is sufficient reason for it, in the circumstances of South West Africa, where there is an evolutionary development towards that end product and where, in fact, one comes from an historical background which involves that separation—which involves that differentiation. Therefore, Mr. President, it is perfectly natural that one should have these ancillary regulations as soon as one decides upon that basic structure of the future society.

So let us now then, on that basis, have a look, a closer look, at the concrete consequences of applying the Applicants' suggested norm and standards in particular aspects of the sphere now under discussion.

In the Counter-Memorial, III, at page 279, and the following pages, we set out the basic considerations which underlie Respondent's policy of influx control into urban areas. We dealt, Mr. President, with that situation in respect of South Africa itself, with what experience had learnt and had dictated in South Africa. We dealt with it also with reference to developing situations in South West Africa itself and we dealt with it with reference to the situation in a number of other countries, particularly in Africa, where similar or the same problems arose and where the need for regulation became apparent and resulted in fact in regulation of the situation.

Mr. President, those again form part of the undisputed facts of record as they stand now.

We did not specifically call an expert on this subject for the specific reason that these facts are so completely admitted and are so clearly set out in the record that we did not think it necessary to deal with it further by way of expert testimony, but we could have called many

men of standing with the practical experience of this situation in southern Africa, who could have told the Court exactly what we say in our pleadings in that respect, that is, that, failing regulation of this very serious problem, you get the most impossible social, hygienic and attendant consequences, such as no proper provision for housing or for sanitation, capable of coping with the large and very often uncontrolled crowds swarming through the cities because of the allurements—because of the lure—of what one might call the bright lights of the cities, due to some view—some vision—of finding here employment, of finding riches, or of finding something beyond the horizon. Experience has taught so often that that has happened. It has, in fact, happened in South Africa; it has caused the most tremendous problems which required clearing up at a later stage and those situations, again, have created their new problems, but they are being tackled, and they have been tackled, energetically.

But, Mr. President, in order to prevent situations of that kind from continually arising, it is necessary, and it has been demonstrated to be necessary, in these various ways, to have this form of control.

Now, Mr. President, if we were to apply the Applicants' suggested norm and standards in this respect, what would the consequences be? One could apply them in one of two ways. One could say, first, that there ought to be no such influx control. Then these consequences, to which I have just referred, would follow as a matter of course—that seems to be undisputed as fact. The alternative would be that these provisions in regard to influx control ought not to apply to the Native population as a whole but should also be made applicable to White and to Coloured inhabitants of the Territory of South West Africa. But, Mr. President, we say in the Counter-Memorial, III, at page 287, that there has never been any problem in this respect in regard to White or Coloured inhabitants of South West Africa. That fact, too, is undisputed. It would have been the easiest thing in the world to bring evidence on that situation if it were necessary and if that were a disputed fact. So, if we were to apply the norm or the standards in this particular instance in the form of making some laws also restricting the movement of White persons or Coloured persons towards cities, then we would be fighting windmills. The South African Government would be required to make laws in respect of a non-existent problem. So, Mr. President, on either of these bases, I submit that the suggested application of the norm or standards just does not make sense.

I take only one further example, Mr. President: the reference by the Applicants to the measures controlling the residence of northern Natives in the Police Zone and the movement of those northern natives into the Police Zone. We dealt with that subject in the Counter-Memorial, III, at pages 276-277, and again in the Rejoinder, VI, at pages 325-326, and we pointed out there that these measures were enacted at the request of the tribal leaders of Ovamboland, who had in that respect consulted their councils and their peoples, and that those requests were fully representative of the views and the wishes of those groups, for very understandable social reasons. The man goes and works in the Police Zone; he leaves behind a family, a wife and children, who till the land and who reserve for him those rights which he has in regard to occupation of certain portions of the land. If he stays away and does not come back, it creates vast social problems, not only in the place

where he stays but also in this community where he has left his wife and his children. If he were to take wife and children with him, one gets other kinds of problems—*problems of inadequacy of housing*, and also problems of what happens to his rights in this community where he would like to retain them and to which he would like to come back to till the soil again, as applies in almost every case known to us.

So, Mr. President, that is the basic situation. That is why we have for these northern Natives from Ovamboland and from the Okavango—*because the same position applies in the Okavango*—the situation that they may come and work in the Police Zone, but for a limited time only; then it is expected of them—by their own communities—that they are to come back before going again.

So in this respect, therefore, the application of the Applicants' norm or standards would involve the ignoring of the wishes of these communities themselves. It would also lead, Mr. President, to the abolition of all the measures protecting the residential rights of the various groups in their own areas, because that is what lies at the basis of all this. If the northern Natives were allowed to move into the Police Zone indiscriminately, freely to obtain residential rights there, then it would follow that the opposite would have to apply also and I have already dealt with the absolute horror which some witnesses expressed at the idea, looking at it from the point of view of the interests of the indigenous population, that that should happen.

We gave in Book VI of our Counter-Memorial, Mr. President, at III, pages 257, and the following, examples of a number of States which have considered it necessary to protect the residential rights of specific groups in specific areas by excluding members of other groups from obtaining residential rights in such areas. The Court will recall that the number which we gave was considerably added to by Professor Possony in his evidence. Professor Possony tendered that evidence and we referred to those earlier in our address as illustrative of the practice of States with reference to the suggested norm and standards. For my present purposes, I emphasize it for another reason and that is because it emphasizes the common experience of mankind in this respect—that it has been necessary, in the interests of the peoples themselves, to have regulatory measures of this kind, regulatory measures that would be done away with, also in South West Africa, to the detriment of the peoples concerned, on an application of this suggested norm and these suggested standards.

That concludes this portion of the address, Mr. President. With your leave, my learned friend, Dr. Rabie, will now proceed with the next phase, concerning education.

31. ADDRESS BY MR. RABIE

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARINGS OF 3 AND 4 NOVEMBER 1965

Mr. President, Members of the Court, in the course of my address, I shall refer to the evidence of Dr. Eiselen, Dr. Van Zyl, Professor van den Haag and Professor Rautenbach.

Dr. Eiselen and Dr. Van Zyl, as the Court will remember, gave evidence on Native education in South Africa and in South West Africa. Professor van den Haag expressed, on the basis of information contained in Respondent's pleadings, certain views in regard to the subject of separate education in South West Africa. Professor Rautenbach dealt with higher, that is university, education in South Africa. The Court will know from the pleadings and from Professor Rautenbach's evidence that there are no facilities for higher education in South West Africa, but that students of all groups in the Territory can and do go to university institutions in South Africa. I shall revert to this when I come to deal with the evidence of Professor Rautenbach.

Mr. President, I shall first deal with the evidence of Dr. Eiselen and Dr. Van Zyl. Their evidence can, to a large extent, be considered together. Thereafter, I shall deal with the evidence of Professor van den Haag, and finally, with that of Professor Rautenbach.

I now proceed to deal with the evidence of Dr. Eiselen and Dr. Van Zyl. Dr. Eiselen's evidence, which deals specifically with education is recorded in the verbatim report, X, at pages 114-122, and then there are two short passages on pages 125 and 129. Dr. Van Zyl's evidence is recorded in XI, from page 252 onwards, up to page 325. As I have said, Mr. President, I shall as far as possible deal with their evidence at the same time. I shall first refer to their expertise, then I shall deal with their evidence on the advantages of the present system of separate education, then with their opinions as to what the results would be if it were attempted to introduce a system of joint schooling in the territory, and finally, I shall refer to their cross-examination.

I turn now to Dr. Eiselen's expertise. This matter has already been referred to in general terms, and I am not going to repeat all that has been said. I refer the Court to page 201, *supra*. Dr. Eiselen is, in our submission, eminently qualified to speak as an expert on the subject of education. As he told the Court, his special fields of study in working for his M.A. and Ph.D. Degrees were African life and languages, linguistics and social and physical anthropology. Professor Eiselen has an intimate knowledge of the life and culture of the Bantu people, and at the University of Stellenbosch, South Africa, he established a Department of African Life and Studies. This appears in X, at page 89. He was a professor at the University of Stellenbosch, but so great was his interest in the education of the Bantu people that he left his Chair to become an Inspector of Native Education in the Transvaal, which is a province of the Republic of South Africa. He did so, he told the Court, particularly because he thought that Native education was in need of specialization, and because he thought that he could make a useful contribution in

that regard. This appears at **X**, page 90, of the record to which I have just referred.

Dr. Eiselen's reputation as an educationist was also recognized beyond the borders of South Africa when he was, in 1945, invited by the British Government to be a member of a three-man education commission for Basutoland. This also appears in the same record, **X**, at page 92. In 1949 he was Chairman of the Native Education Commission in South Africa, a commission which was appointed to investigate the Native education system then in existence in South Africa and to make recommendations to make such education more effective. This commission is often referred to in the pleadings; I may, just by way of example, refer the Court to our Counter-Memorial, **III**, at pages 357, 364 and 369, and to the Rejoinder, **VI**, at pages 38, 39, 42, 46, 47, 50, 93 and 111.

To revert to Dr. Eiselen, he has on several occasions visited South West Africa and the various population groups living there. As the Court will know, Dr. Eiselen was not cross-examined. Objection was taken to his evidence on the ground that it was irrelevant, but there was never any suggestion on the part of Applicants that he did not have an expert knowledge of the matters on which he testified and expressed opinions.

Now, as to the expertise of Dr. Van Zyl: in this regard I should like to draw the Court's attention to the following points.

Dr. Van Zyl holds a B.A. Degree in Bantu Languages and Anthropology, an M.A. Degree in Anthropology and also a Ph.D. Degree in the same subject. This appears in **XI**, at page 252. Dr. Van Zyl speaks several Bantu languages. His whole life and work, he told the Court, have in one way or another been linked with education, and primarily Bantu education. Thus he has taught at a Native teacher training institution; he has been a principal of a Bantu high school; and he has been an Inspector of Bantu Education. Since 1957, he told the Court, he has been at the head office of the South African Department of Bantu Education in Pretoria, and at present he is the Deputy Secretary of that Department; this appears at the same page of the same record. Dr. Van Zyl is Chairman of the Committee for Bantu Languages of the Joint Matriculation Board, and moderator of matriculation examination papers in three Bantu languages of South Africa; this appears at page 254 of the record I have cited. On the same page the witness told the Court what the Joint Matriculation Board was. He told the Court that it was a body which exercised control over the standards at the matriculation level in the Republic, which is the highest school standard we know. A moderator, he also told the Court, was the man who saw to it that a proper and uniform standard was maintained at the matriculation level.

Dr. Van Zyl has also written *A Practical Guide for Bantu Teachers*; he has written also in two Bantu languages a series of graded language manuals for use in both primary and secondary schools; and he has written also several Afrikaans readers for use in Bantu schools; this appears at **XI**, pages 254 and 255. These are only some illustrations of Dr. Van Zyl's interest in the education of the Bantu people.

In 1958 he was Chairman of the education commission which inquired into Native and Coloured education in South West Africa; this appears at **XI**, page 265. This commission is frequently mentioned in the pleadings; it first appears in the Memorials, **I**, at page 152, then frequently in the Counter-Memorial and in Respondent's Rejoinder. As a member and Chairman of that commission Dr. Van Zyl made a study of the

different population groups in South West Africa, and he spent some months in the country; and during that time he also consulted with representatives of all sections of the Native population. For the last two statements I refer to **XI**, pages 253 and 266.

Dr. Van Zyl was cross-examined, but no attempt was made to challenge his expert knowledge of the types of education on which he was called to testify. Those were primary and secondary education, and technical and vocational training. Furthermore, no attempt was made to challenge his knowledge of the different population groups in South West Africa, and Applicants in no way challenged his competence to express the opinions which he did on what the results would be if attempts were made to have an integrated school system in South West Africa.

Mr. President, I now turn to the evidence of Dr. Eiselen and Dr. Van Zyl on the advantages of the present system of education. The evidence of Dr. Van Zyl and Dr. Eiselen on this issue was briefly to the effect that, firstly, the present system of separate education had decided advantages for the Bantu or Native groups, and secondly, that any attempt to introduce a system of joint education would have harmful results. As far as particulars are concerned I shall refer mainly to the evidence of Dr. Van Zyl. Dr. Eiselen's evidence on education was, as the Court will remember, not as full as that of Dr. Van Zyl, and I shall accordingly refer to Dr. Eiselen's evidence as confirmatory of that of Dr. Van Zyl.

The advantages of the present system, as dealt with by Dr. Van Zyl, may be summarized as follows. Firstly, the system allows for and contributes to the building up of an educational organization which the Native people can call their own. An important feature in this connection, as testified to by him, is the institution of community schools, which were introduced in South West Africa upon recommendations made by the 1958 Commission which I have mentioned, and of which Dr. Van Zyl was the Chairman.

These schools, he told the Court, give Native parent communities the opportunity to play an active part in the education of their children. They are managed by Native school committees and school boards. This appears in the verbatim record at **XI**, page 259. In this connection, Dr. Van Zyl told the Court that in South Africa, at the present time, about 50,000 Bantu parents were serving on such committees and boards. In the Counter-Memorial, **III**, at page 371, he set out what developments there have been in this regard in South West Africa. We say there that the scheme started to operate in the northern territories of South West Africa in 1961 and that such committees and boards have also been instituted there.

Secondly, to continue with my summary of Dr. Van Zyl's evidence, in South Africa, he told the Court, this scheme has led to increased interest in education on the part of Native parents. More so than previously, Dr. Van Zyl said, parents now encourage, or even compel, their children to go to school and to remain there for longer periods than previously. This appears at **XI**, pages 259-260, and at page 323.

In South Africa, Dr. Van Zyl said, the scheme has resulted in a phenomenal increase in enrolments during the past ten years, and also in a great increase in the number of schools. This appears at **XI**, page 260. In this connection, Dr. Van Zyl said that the number of pupils in South Africa had doubled during the period 1953 to 1963, and that

the annual growth rate was 100,000 pupils. Of all children in the age group 7-14, about 80 per cent. were at school, and in 1964 the enrolment figure was nearing the 2 million mark. The number of schools, he said, had, during that same ten-year period, grown by about 3,000. The witness expressed the belief that the system of community schools would have similar beneficial results in South West Africa, and that it would result in children staying at school longer than previously. This appears at **XI**, page 307. In this regard, Mr. President, I should also refer you to the evidence of Dr. Eiselen, **X**, pages 117-118.

Thirdly, to continue with Dr. Van Zyl's evidence, the system, he said, creates extensive opportunities for employment of Natives as teachers and in related posts. This appears at **XI**, pages 260-261. Dr. Van Zyl pointed out in this regard that in South Africa the number of teachers had grown from about 21,000 in 1953 to about 32,000 in 1964, and that the more or less 500 White teachers who were still employed in Bantu schools, chiefly in secondary school posts, comprised only 1.2 per cent. of the total teaching staff. He also pointed out that there were, at present, 55 Bantu inspectors, and 170 assistant Bantu inspectors. In an integrated system, he said, progress by the Natives would be hampered by competition from members of the more experienced and more advanced groups. This appears at the same pages of the same verbatim record.

Fourthly, Mr. President, separate schools, the witness said, and I quote from his evidence from page 261 of the same verbatim record:

"... stimulate the development of the Bantu languages concerned, and the production of school books in these languages. They also provide the stimulus in other respects of culture, such as literature, folk-songs, etc."

Fifthly, the witness said, also at page 261:

"... the separate school system makes it possible to adapt educational facilities to the background, need, and circumstances of a particular group".

In this connection, Mr. President, the witness referred to three factors. First, he said, the system makes it possible to apply or to give effect in practice to certain educational principles, such as the use of a child's home language or mother-tongue as medium of instruction, the production of specialized class books, the application of the principle of proceeding from what is known to a child to that which is unknown, the preservation of particular cultural institutions, and the adaptation of syllabuses to suit particular needs.

The second factor mentioned by the witness in this regard was that technical and vocational training could be offered to meet particular needs, and the third factor was concerned with the provision of teachers and facilities, and expenditure connected therewith. This also appears at **XI**, page 261.

Mr. President, I should like to deal specially with one of the advantages mentioned by Dr. Van Zyl, and that is the use of a child's home language as medium of instruction. I do that because of the importance of that language from an educational point of view, and, secondly, because a good deal of Dr. Van Zyl's cross-examination was directed to this issue.

I shall refer to this cross-examination a little later, but at this point I wish to say that there was very little cross-examination on any of the

other advantages dealt with by Dr. Van Zyl, and that on some of them there was no cross-examination at all.

Now, Dr. Van Zyl described mother-tongue instruction as of vital importance. This is at **XI**, page 261. Dr. Eiselen, at **X**, page 118, described mother-tongue education as basic. Dr. Van Zyl, in dealing with the advantages of mother-tongue instruction, referred firstly to his own experience in Bantu schools in South Africa, as teacher, principal and inspector of Bantu schools, and he stated that this had convinced him that mother-tongue instruction was the best method of teaching, especially in the primary school. This appears at **XI**, pages 261-262.

He pointed out, furthermore, that it was a generally accepted educational principle that the mother tongue was the best medium of teaching, and that he knew of no educationist of standing who denied that principle. That also appears at page 261 of that record.

He referred in this regard to the views of Unesco experts which supported him, and also to a recent view expressed by an African professor at the University of Ghana. This appears at the same page, and, Mr. President, in this regard I should also like to refer the Court to quotations which appear, firstly, in our Counter-Memorial, in **III**, at page 377, and in the Rejoinder, **VI**, at pages 84 and 85. And then also to page 165 of the Rejoinder, **VI**—to a passage which occurs in footnote No. 2 on that page.

Dr. Van Zyl stated that experience in South Africa was that the use of the vernacular was of the utmost importance in bridging the gap between the home and the school, and that it led to parents displaying a greater interest in the education of their children. He said also that the use of the mother tongue was the best way to ensure that pupils understood what was being taught them, and that it promoted original thinking.

South African experience, Dr. Van Zyl also said, was that pupils who are taught through the medium of their own language perform better at school than pupils who are taught through a foreign medium, and he referred to experiments carried out by Unesco experts in the Philippines which confirmed South Africa's experience.

Mr. President, I should like to quote in this regard a passage from Dr. Van Zyl's evidence which occurs, at **XI**, page 262. Dr. Van Zyl said:

"These experiments also showed, and it has also been our experience in South Africa, that vernacular-medium pupils are emotionally more stable and develop more confidence than others, and, furthermore, that they show a greater ability to organize and to express their thoughts, that their social education is better, and that they attend school more regularly."

Finally, Dr. Van Zyl stated that the mother-tongue medium had the added advantage that it stimulated the development of the language, literature and culture of the population group concerned. Language, he said, adopting the words of the Ghanaian professor previously referred to, was the foundation of society and the root of culture, and every society should preserve its language if it did not want its foundations to be destroyed. This appears at **XI**, page 262.

Dr. Eiselen gave evidence on mother-tongue instruction and on the advantages thereof, which confirms that of Dr. Van Zyl. His evidence, as I have said, was not challenged in any way, and it is recorded, on pages 118-119, **X**.

Now, Mr. President, before I proceed to deal with the opinions ex-

pressed by Dr. Van Zyl and Dr. Eiselen on what the results would be if an attempt were made to introduce a system of joint schooling in South West Africa, I should like to refer the Court to some relevant material which is contained in our pleadings, and which concerns the wishes of the different population groups in the Territory in regard to the question of mixed schooling.

In the Counter-Memorial, Book VII, **III**, Respondent stated that the system of separate education in South West Africa was in accordance with the wishes of the vast majority of the people, and, furthermore, that an attempt to introduce a system of joint schooling would lead to dissatisfaction and group friction, which would result in the neglect of the needs of all the groups and in irreparable harm to the Territory as a whole. Mr. President, I refer to paragraph 62, which appears on page 382, **III**, of the Counter-Memorial.

In their Reply, the Applicants did not dispute the truth of these statements. They said that they accepted those assertions but that they regarded them as an "indictment of the passivity and negligence of Respondent's conduct of the Mandate" (**IV**, p. 388).

Now, Mr. President, Respondent dealt with the Applicants' allegation concerning passivity and negligence in its Rejoinder, **VI**, at pages 124 to 128, and no more need be said about it now. What is important in the present context is the Applicants not disputing the truth of the following statements in the Counter-Memorial, as quoted by the Applicants themselves at pages 388 and 389, **IV**, of their Reply.

Firstly, the Applicants quote, on page 388, **IV**, of the Reply, the following statement from the Counter-Memorial, **III**, page 367, which refers to the time when Respondent assumed the Mandate. The passage reads as follows:

"The introduction of a mixed school system would have run directly counter to the prevailing social order, and would, for that very reason, have failed."

Then, Mr. President, there is also the following statement, which is quoted on page 389, **IV**, of the Reply, and which is found on page 368, **III**, of the Counter-Memorial. It refers to the wishes of the different indigenous groups and reads as follows:

"The attitude of the respective groups is, as far as possible, respected by providing separate facilities for them."

Then, Mr. President, there is also the following statement which forms, in the Counter-Memorial, **III**, at page 376, part of a paragraph in which Respondent states why it retains the present system of separate education in the Territory. It reads like this:

"The policy of separate education as applied in the past is also in accordance with the wishes of the vast majority of the population of the Territory."

And finally, there is also this statement, which also forms part of a paragraph in which Respondent states why it retains the present system of separate schooling. It appears on page 389, **IV**, of the Reply, and on page 513, **III**, of the Counter-Memorial. It reads, in somewhat adapted form:

"[T]he system of separate schooling [is] in accordance with the wishes of the vast majority of the population of the Territory . . ."

Mr. President, before the adjournment I quoted certain passages to the Court. The point I wish to make in that connection is that it stands undisputed on the pleadings that the system of separate schooling is in accordance with the wishes of the vast majority of the people.

This takes me now to the opinions expressed by Dr. Van Zyl and Dr. Eiselen as to what the results would be if attempts were made to introduce an integrated or joint system of schooling. At the end of his examination-in-chief Dr. Van Zyl was asked the following question; it appears at **XI**, page 267: "[W]hat, in your opinion, would be the results if an attempt were made to institute a system of joint schooling in the Territory of South West Africa?" Because of its importance with regard to the issue with which we are here now concerned, Mr. President, I shall first quote only the first part of Dr. Van Zyl's reply, at **XI**, pages 267-268:

"Mr. President, I do not think that there is any hope of success. The differences among the population groups in background, language, tradition and culture are so big that the people do not mix socially, with the result that integrated schools are almost inconceivable. From what I know of the people, there cannot be peaceful integration in the field of education and any attempt to enforce integration will cause the collapse of the educational services. Further, integration will bring friction and enmity among the pupils. In other countries with heterogeneous populations, attempts at integration have brought about serious clashes between the racial groups and in some instances have even led to violence and this, Mr. President, is, in my opinion, exactly what will happen in South West Africa."

Applicants, Mr. President, in no way questioned or challenged this view. They did not even cross-examine Dr. Van Zyl on it.

Dr. Van Zyl also said the following in this connection (this also appears at p. 268):

"As far as I know, nobody in South West Africa has ever requested or propagated integrated schools and I make bold to say that everybody realizes that such a policy would be impossible."

This statement also was not questioned in any way by the Applicants. In the circumstances, Mr. President, in our submission, there can be no reason why Dr. Van Zyl's opinion should not be unreservedly accepted by the Court. And, according to that opinion, it is obvious the Respondent's duty to promote the education of the inhabitants of the Territory would be made impossible by the application of the norm or standards for which the Applicants contend.

Dr. Van Zyl, having expressed the view to which I have just referred, went on to say what, in his opinion, the position would be from an educational point of view if one supposed that a system of joint schooling could be introduced in the Territory. He said—and this also appears at **XI**, page 268:

"From an educational point of view, a system of joint education would, if it could be introduced, mean the end of some of the advantages I have previously mentioned. It would be impossible to apply sound educational principles which can be applied under the present circumstances. So, for instance, instruction through medium of the mother tongue would be out of the question for at least one group

and it would be impossible to do full justice to the traditions and culture of all the groups. If the official languages, English and Afrikaans, were to be the sole media the Bantu groups will suffer as a result."

In this regard, Mr. President, I should also like to refer briefly to the evidence of Dr. Eiselen. His opinion, which was of course not challenged in any way, was that to do away with differentiation in the schooling of children in South West Africa would lead to "enormous difficulties". That appears at X, page 121. Dr. Eiselen said (this also appears at p. 121) that a system of joint education would be unfair and unrealistic and that it would do violence to sound educational principles. He referred, in this regard, to the use of the child's home language as medium of instruction and also pointed out that it would be difficult to decide "whose background was to be taken as a starting point for educational development". (*Ibid.*)

We respectfully submit, Mr. President, that the evidence of Dr. Van Zyl and Dr. Eiselen will have convinced the Court that the present system has substantial advantages for the Native people of South West Africa, and, conversely, that a system of joint schooling would mean the loss of such advantages. This result, in our submission, is also unavoidable unless one assumes that in a system of joint schooling the Coloured and White children—Afrikaans and English-speaking—must be taught through the medium of a Bantu language, and that a culture other than their own be made the basis of their educational development. But this, Mr. President, is something which the Applicants have never suggested. Their approach seems to be that it is the children of the Native groups who must forego the advantages of mother-tongue instruction and of having their own culture serve as the basis for educational development.

I now turn to the cross-examination of Dr. Van Zyl. As I have stated before, there was little cross-examination on what Dr. Van Zyl described as the advantages of the present system and on some aspects there was no cross-examination at all. Indeed, it seems to us that the cross-examination was not intended to cast doubt on what Dr. Van Zyl had testified in his examination-in-chief, but to serve some other purpose, not directly relevant to the witness's evidence, and not directly relevant to the issue of the applicability of the Applicants' norm or standards.

In the circumstances, I shall not deal with the cross-examination in detail. I shall merely indicate, in a general way, the different topics that were dealt with in cross-examination and then deal somewhat more fully with the cross-examination in regard to two matters, and they are mother-tongue instruction and compulsory education.

First there was a whole series of questions about the relationship between the South West Africa Administration and the South African Government and about the organization and internal workings of the South West Africa Education Department. I refer the Court in this regard to XI, at pages 268 to 279, and, in the same volume, pages 298 and 314. Many questions seemed to be directed to showing that the real objective of Respondent's educational policy was, and I quote the question put to the witness: "... to prepare and educate the Bantu for life and work in ... Black areas?" This appears at XI, page 301. And furthermore they were directed to showing that in the courses prescribed for Native school-children insufficient attention was given to the needs of those living in urban areas. In this regard I should like to refer the Court to the following

pages in the record, **XI**, pages 280-282, 283-284, 293, 296-300 and page 301, and then page 316. Those are answers given to questions by a Member of the Court.

Perhaps I may quote in this regard one answer given by Dr. Van Zyl in reply to one of the questions put to him in this connection, and the passage occurs at **XI**, page 300:

“ . . . For all practical purposes, the Bantu in South West Africa can get exactly the same education as Whites, with necessary modifications along the lines we have discussed this morning”.

May I say that those modifications related to questions of method and approach. I continue the quotation:

“As I pointed out in my main evidence yesterday also, the general education given to Bantu pupils and White pupils culminates in the same standards, the same examination requirements, at the end of the full school career when they all have to write the same matriculation examination.”

Next there was a series of questions concerning vocational and teacher training. It was suggested to the witness that a lack of economic opportunities accounted for the low enrolment in the industrial courses at the Augustineum and also that low salaries discouraged students from embarking on teacher training courses. The reference to the Augustineum is at **XI**, pages 302-303, and the reference to teacher training is at page 311. Both the suggestions were denied and, we submit, convincingly refuted by the witness.

In this regard I should also like to refer the Court in passing to the problem of teacher shortages, which was referred to by the Applicants, in Africa, as dealt with by us in our pleadings. We submit that it is a problem which exists everywhere in Africa. I refer the Court to the Counter-Memorial, **III**, pages 421-424, and there is also a relevant passage on page 405.

Our submission is then, Mr. President, that the cross-examination of Dr. Van Zyl on the topics which I have mentioned detracts nothing from his evidence regarding the advantages of the present system.

I now turn to the cross-examination of Dr. Van Zyl on the issue of mother-tongue instruction. I point out, first of all, and stress the fact, that although Dr. Van Zyl was cross-examined on certain aspects connected with mother-tongue instruction, his evidence in regard to the particular advantages described by him was not challenged or called into question in any way. We submit that this is an important matter for, as Dr. Van Zyl said in his evidence, in a system of joint education it would be impossible to apply sound educational principles which can be applied under the present circumstances. So, for instance, he said “instruction through medium of the mother tongue would be out of the question for at least one group”. This passage occurs in a quotation I have already quoted to the Court.

It is clear, in our submission, that non-differentiation in regard to the question of medium of instruction would deprive Native children of important advantages, that is, if Afrikaans or English should be made the medium for all. Now, cross-examination of Dr. Van Zyl on the question of mother-tongue instruction was along the following lines, and I shall mention four points.

First, the witness was asked his opinion about giving priority to the

vernacular as medium of instruction also in urban areas where Natives are employed, and I use the Applicants' phrase, in "the modern sector of the economy". This appears at **XI**, page 282.

Mr. President, the suggestion seemed to be that it was more important for a Native child to be taught through the medium of—and again I quote phrases used by the Applicants—"the language of the economy in which he works" or "the language . . . spoken by the persons for whom he works", or "the language of the community in which he works and is destined to work". These phrases, Mr. President, occur at **XI**, pages 282 and 283.

And then I also refer to **XI**, page 295, where it was suggested that the medium of instruction should be determined by "economic or social consequences".

Mr. President, Dr. Van Zyl's replies were to the effect that, from an educational point of view, the mother tongue was the best medium of instruction, no matter where a child lived; that a future employer's language was not important to a child while at school, particularly not while he was in primary school; and, also, that the fact that Natives were employed by White persons did not mean that such Native employees adopted the language of their employers as their own. And then, Mr. President, I should like to point out also that the witness made it clear that a Native child in South West Africa begins to study Afrikaans and English as subjects from as early as his second year at school (**XI**, p. 294); he studies them as subjects in the same way as an Afrikaans-speaking boy takes English as a subject, and vice versa. As far as the last statement is concerned, I refer the Court to **XI**, at page 294.

Also in regard to Dr. Van Zyl's replies, mentioned by me a little earlier, I refer to **XI**, at pages 282 and 283.

Mr. President, as to the second line of cross-examination, questions were put to Dr. Van Zyl in regard to practical difficulties encountered in using the vernacular as medium in those areas where all the children did not have the same mother tongue. In this regard, I refer to pages 285-287, **XI**.

In our submission, Mr. President, it was in no way shown that the system of home-language instruction is impracticable, and we submit that such practical difficulties as there are can best be left to local officials to solve.

It almost seems, Mr. President, as if the Applicants are suggesting that, even if only a small percentage of Native children cannot be given the benefit of mother-tongue instruction, all children should be deprived of that benefit and be taught through the medium of Afrikaans or English. This is an approach which Respondent rejects, as will appear from what we say in the Rejoinder, **VI**, at page 100.

Mr. President, in regard to the question of practical difficulties and ways of solving them, not only in South West Africa but also elsewhere, we should like to refer the Court to what is stated in the Respondent's Counter-Memorial, **III**, at pages 362 and 363, and at page 415, also the Rejoinder, **VI**, at pages 99 to 101.

Now, thirdly, Mr. President (that is, the next line of cross-examination), the witness was asked as to the fitness of the Bantu languages for describing or dealing with economic and political phenomena. This appears at page 287, **XI**, of the verbatim record.

Dr. Van Zyl pointed out that, at the present time—and this appears

at pages 287 and 288 of the record which I have mentioned—the vernacular was used as medium only during the first four, or in the northern territories five, years at school, and that politics and economics formed no part of primary school study. He stated, furthermore, that his experience in South Africa was that about 90 per cent. of the terms needed for school use already existed in the Bantu languages, and that the other 10 per cent. could be successfully coined. He also said, Mr. President, at XI, page 321, that such words had been successfully coined in South Africa up to the standard VI level, which is the last year of the primary school course. So that there are, in South Africa, Bantu terms which can be used in, for example, arithmetic problems of the kind referred to by an honourable Member of the Court.

Mr. President, in this regard I should also like to refer the Court to a passage which we quote in the Rejoinder, VI, at page 86, a passage which appears in a Unesco publication, and where Unesco experts are quoted as saying—“there is nothing in the structure of any language which precludes it from becoming a vehicle of modern civilization”. And then, Mr. President, may I also refer the honourable Court to a short passage in a document, which was referred to in evidence a little while ago by Professor Possony: it is the *Seminar on the Multi-National Society*—I believe that is before the Court. It is United Nations document ST/TAO/HR/23. The seminar was held as recently as June of this year, and it appears that the people who took part in that seminar discussed, *inter alia*, “[m]easures which should be taken to ensure the realization, by ethnic, religious, linguistic or national groups, of the special rights necessary to enable them to preserve their traditions, characteristics or national consciousness”—this appears on page 13 of the report. In the course of the debates on that problem, it was said, amongst other things—this appears at page 14, paragraph 49:

“It was not considered desirable to impose the use of an alien language on an isolated and culturally less developed group; a more equitable solution would be to develop the language of the less-advanced groups so that it could help the groups to adjust to modern life.”

And then, Mr. President, there is this further sentence, on page 16, which deals with the difficulty of language problems in various countries:

“Several participants indicated that commissions or institutes of vernacular languages had been established to give further consideration to various aspects of the problem.”

This indicates, Mr. President, the interest in preserving and developing vernaculars.

As to the fourth line of cross-examination, I indicate that Dr. Van Zyl was asked whether a Native pupil would be allowed to take his lessons through the medium of English or Afrikaans when he felt that he would like to do so. The answer was “No”, just as in the case of a White child, who wanted to be taught through the medium of a language not his own, the reply would be no. This appears at XI, pages 293-294.

And then, Mr. President, as I have already said to the Court, Dr. Van Zyl explained that a Native child in South West Africa begins to study Afrikaans and English from his second year at school.

Our submission then, in regard to the cross-examination on the ques-

tion of mother-tongue instruction, is that it leaves Dr. Van Zyl's evidence about its advantages completely untouched.

Now, Mr. President, I turn to Dr. Van Zyl's cross-examination on the question of compulsory education.

I refer the Court, first of all, to certain passages in the record regarding the fall-off between standards and the number of pupils attending school—that is at **XI**, pages 288-292 and 300-301. And as to compulsory education more particularly, I refer the Court to **XI**, at pages 292-293, and pages 307-311.

Now, first of all, as to the facts, Mr. President, it is common cause that there is compulsory education for the White children in South West Africa and not for the Native children. In the case of Coloured children, the position is this (and this appears from the Counter-Memorial, **III**, at p. 392), the Administrator has the right, under the Education Ordinance of 1962, to introduce, on the recommendation of the Education Department, compulsory education at any *Government school* for Coloured children.

It is pointed out also, Mr. President, on page 391, **III**, of the Counter-Memorial, that more than 80 per cent. of the Coloured children of the Territory attend school.

In the case of Native children, according to Dr. Van Zyl's testimony, there is in some areas a scheme of what may perhaps be called compulsory education on a voluntary basis, that is, it is not enforced by law. Dr. Van Zyl said, and I quote from **XI**, page 308:

"It is not a system of compulsory education in the ordinary sense of the word . . . the administration has made it possible for school boards in a particular centre to introduce compulsory education within its area, but it is not enforced through legislation."

Those, briefly, Mr. President, are the facts.

As to the nature of Dr. Van Zyl's cross-examination, he was asked in cross-examination why there was no compulsory education for Native children in the Territory. His reply was this, and I quote from **XI**, page 292:

" . . . I think mainly because the Bantu communities have not reached that stage of development where it would be feasible to make education compulsory. We should not lose sight of the fact that the introduction of compulsory education in any country or in any community implies legislation by which the parents are compelled by law to send their children to school and should they fail to do so, they are liable to be prosecuted . . . we have consulted the Bantu communities in South West Africa as well as in the Republic of South Africa, whether they would like such legislation by which they would be compelled to send their children to school every day and consistently up to a particular age or up to a particular standard. All the communities and leaders whom we have consulted on this matter have indicated that they are not ready for such a thing."

Dr. Van Zyl also said, in reply to a similar question, which appears at **XI**, page 308:

" . . . I do not think that it would be feasible for the simple reason that the administration will not have the co-operation of the Bantu people. They have not reached that stage where you can expect

of them to accept a drastic system like that. At the present moment, they still need their children for domestic purposes; they need them sometimes to look after the cattle or to help in the home, to look after the children and so on and they will not be satisfied with a scheme whereby they would be punished by law should they not observe the requirements of the law."

Mr. President, in the course of the cross-examination it appeared that the Odendaal Commission also thought that the Native population generally was not yet ready for compulsory education. This appears from paragraph 1097 of the Commission's report, and from XI, pages 309 and 311 of the verbatim record.

In the Counter-Memorial, III, at page 392, reference is made also to the views of the missionaries in the northern territories of South West Africa with regard to compulsory education, and it is shown there that they believe that compulsory education cannot yet be introduced. The Odendaal Commission heard similar evidence from the missions, as appears from the paragraph of the report to which I have just referred—i.e., 1097.

Mr. President, in the course of Dr. Van Zyl's cross-examination on this issue, Applicants' Agent was asked the following question by you, Mr. President, which appears at XI, page 315:

"Do I understand that if there is no compulsory education imposed upon the peoples, take for example of the north, irrespective of the difficulty of policing it, irrespective of the question whether it is acceptable to the people, irrespective of any other circumstances, that it is inherently inconsistent with Article 2 of the Mandate and *per se* a breach of the Mandate?"

Mr. Gross's answer was this, which appears on the same page: "No, Sir, that would not be the Applicants' contention." From this it is clear, in our submission, Mr. President, that Applicants do not now say that the absence of compulsory education in the case of Native children is inherently inconsistent with Respondent's duties under the Mandate, and *per se* a breach of the Mandate. One would have thought that to be consistent with their case, Applicants' reply should have been to the effect that the absence of compulsory education in the case of Native children constituted a breach of the norm or standards, and for that reason that is *ipso facto* also a breach of the Mandate, but that was not the reply. The reply was this, and I quote from the same page. Mr. Gross said:

"The Applicants' contention in respect of the difference, standard or requirement of compulsory education on a strictly racial basis would be that that standing alone, unsupported and unexplained, would violate the duty to allot rights and burdens, privileges and so forth on the basis of promotion of welfare and progress of all the inhabitants to the fullest practicable extent, and that it would seem to the Applicants that a system in which no compulsory education in any part of the Territory, irrespective of its economic development, is a practice or a policy, that this would be a factor relevant for the Court's consideration in connection with the significance of the educational aspect of apartheid seen in relation to all other aspects of the apartheid policy of which this forms a part."

Now, Mr. President, we do not pretend that we understand every-

thing that is said in this passage, but one thing seems to be fairly clear, and it is this: the reply contemplates that deviations from the norm or standards can be explained, and that non-conformity therewith does not by itself constitute a breach of the Mandate. This, in our submission, is clearly inconsistent with the Applicants' case as previously formulated when it was said, and I refer to only one instance which appears at IX, page 45:

"It is the Applicants' case, rightly or wrongly, that the policy and practices complained of, as a matter of the international legal norm, and the universally accepted standards upon which that legal norm is based and which it reflects, that such a policy cannot inherently promote the welfare of [the] . . . inhabitants of the Territory. Any contention to the contrary is an attack upon the norm itself."

Mr. President, according to this passage, the Applicants' present contention in regard to compulsory education would be nothing less than an attack on their own norm or standards.

It is significant in this regard to note that in the Reply the Applicants' contention was that the absence of compulsory education in the case of the Native population was the result of an alleged attitude of *laissez-faire* on Respondent's part, an alleged negligent failure to remove such difficulties as stood in the way of a successful introduction of a system of compulsory education. There was no question then of the absence of compulsory education being a *per se* breach of the Mandate. I refer in this regard to the Applicants' Reply, IV, at pages 388, 389 and 390 to 393.

At that time, Mr. President, Applicants dealt with the question of compulsory education in a Chapter headed "Extent of Education in the Territory" (this appears at p. 386, IV, of the Reply), and they then said:

"Applicants now show that the *extent* of education in the Territory is a violation by Respondent of its obligation to promote to the *utmost* the well-being and progress of the inhabitants." (IV, pp. 386-387.)

This shows, Mr. President, that Applicants were at that time in no sense trying to make a case of a *per se* breach of the Mandate in respect of compulsory education. They were trying to make out a quantitative case, and this was part of their general charge of oppression. And Respondent accordingly regarded and treated it also as being alternative to their case on the norm.

In the Oral Proceedings in this Court, of course, it has been expressly stated by Applicants that no quantitative case is being made, and that reliance is placed solely on the norm or standards for which they contend.

The Court will recall, if I may refer to only one passage, at IX, page 363, that on one occasion the Applicants' Agent expressly stated that their case was not brought on the theory that the Mandatory had built too few schools or hospitals in the Territory. Now, this being so, the Applicants must, in our submission, if they want to be consistent, contend that the absence of compulsory education in the case of the Native population is *per se* a breach of the Mandate, but now that they have indicated that they do not contend for such a *per se* breach on the issue of compulsory education, they would appear to have fallen between two stools.

Further, on this issue of compulsory education, we should like to

point out that we have shown in our pleadings that it would be wholly unrealistic and artificial to regard the existence, or otherwise, of a compulsory education law as necessarily *determinative* of the question whether progress has been made or can be made.

Mr. President, I propose to deal briefly with some of the relevant facts in this regard, and shall in doing so refer, *inter alia*, to the position in one of the Applicant States. I do this because this State's own experience should, in our submission, also help to make it clear that a compulsory education law can only be successfully introduced when all relevant circumstances are favourable.

Mr. President, in the Counter-Memorial, III, at page 405, we make the following statement. We say:

"The difficulty of translating principle into practice is probably nowhere more graphically illustrated than in the case of Liberia. A law providing for compulsory education was passed as far back as 1912, but it has never been possible to implement the provisions of the law."

That statement was not denied.

In the Rejoinder, VI, at page 132, we show that this compulsory education starts for all children at the age of 6 and ends at 16. We quote, for that statement, Mr. President, a Unesco publication of 1958. The quotation is at page 133, VI, of the Rejoinder. In the Counter-Memorial, at III, page 445, we show, on the basis of official Liberian figures, that about 22 per cent. of the school-age population of Liberia attended school in 1961-1962. We make this calculation, Mr. President, on the assumption that the school-age population constitutes 23 per cent. of the total population. This is also the basis on which we make calculations in regard to the school-age population of South West Africa. This appears in the Counter-Memorial, at III, page 443. Now, at III, page 382 of the Counter-Memorial, we quote from a book on Liberia called *The Firestone Operations in Liberia*, written by one Taylor and published in 1959. From that it appears that the average age of children in the first grade at school is 14 years. This is despite the fact that the education law requires attendance from a pupil's sixth year. I shall quote the passage, Mr. President, because it is also revealing as to what have been considered good grounds for providing separate schools for Liberian children, on the one hand, and American and European children, on the other hand. The passage reads:

"Teaching of American and European children in the same schools and classes as the Liberian children is impracticable, owing to the language barrier and to the very large differences in the children's ages, curricula, and cultural backgrounds. For example, the average age in the first grade of the Liberian schools is 14, as compared with 6 in the American and European school. For this reason alone, the classes could not be integrated."

Mr. President, in addition to what I have just said about the position in Liberia, I should like to refer the Court also to the position in regard to compulsory education in Africa generally. Here, again, I do so merely to draw the honourable Court's attention to factors which should, in our submission, always be borne in mind when the question of compulsory education in Africa is discussed.

First, there is this point. In 1961, we point out in the Counter-Memo-

rial, at **III**, page 446: ". . . for the African States as a whole, only 16 per cent. of the children of school age are [enrolled] in school." This appears from a Unesco publication, which we cite at the page to which I have referred the Court.

Next, Mr. President, at pages 445-447 of our Counter-Memorial, **III**, we give details of school attendance figures in various African countries. I am not going to deal with them in any way, Mr. President, but we respectfully draw the Court's attention to what appears from those pages.

Next, in the Rejoinder, **V**, at page 132, we refer to a Unesco publication of 1961 which says that at the end of the 1950s only 9 of some 40 African countries listed had a system of compulsory education pertaining to their indigenous inhabitants. As stated on the page referred to, Mr. President, we did not attempt to establish what percentage of school-age children attended school in those nine countries. We looked at the position in only two of them—one high up on the list, Chad, and one which was referred to by the Applicants, Togo, and we showed on that page, Mr. President, that in the case of one country, one of the two we mentioned, the attendance rate was only about 5.6 per cent., and in the other case it was about 28.6 per cent., calculated on the same basis as the South West Africa figures are calculated in the Counter-Memorial.

Then, Mr. President, we should like to refer the Court also to the Counter-Memorial, **III**, pages 396-406, where we give a general exposition in regard to compulsory education in various African States. The Court will observe that we set out, first, passages from two or three works which deal generally with the difficulties which are encountered in African and other States in extending education, and then we go over to set out what the position is as reported in various official documents in various countries. They are set out under the headings "Central African Territories", "East African Territories" and "West African Territories" and then separate paragraphs are devoted to Tanganyika, Ethiopia and Liberia.

Finally, Mr. President, before I turn to the question of school attendance in South West Africa, I should like to draw the Court's attention to certain material contained in our Counter-Memorial, which shows what difficulties educational authorities have generally to contend with in African countries. This material is contained in the Counter-Memorial, **III**, on the pages I have referred to—396-399, and also pages 421-424. It shows, Mr. President, what factors have hitherto affected the development of education in South West Africa and also in other African countries. As regards South West Africa, Mr. President, I should also like to refer the Court to what is said on pages 407-421, **III**, of the Counter-Memorial. I am not going to go into any detail, Mr. President; I merely make the submission that we show on these pages, first, that there are, in many parts of Africa, even at the present time, parental attitudes which do not conduce to any rapid extension of education and, secondly, that teacher shortages hamper development everywhere.

Now, coming to the position in South West Africa, particulars of school attendance are given first in the Counter-Memorial, **III**, at pages 444 and 445, and also on 447, and I also refer to the Rejoinder, **VI**, at page 136, paragraph 21 on that page. From these pages, it appears, Mr. President, that in 1960 the attendance percentage was 39.8, in 1961 it was 44 and, in 1964, it was estimated to be 52.

On the pages of the Counter-Memorial referred to, Mr. President, that is pages 444 and 445, III, we also set out what progress has been made in South West Africa since 1951. Between 1951 and 1960, as is shown on page 444, there was an increase of 54 per cent. in the number of children enrolled. This was more than three times the rate at which the total population increased over the same period, which was 17.4 per cent. In the Rejoinder, VI, at page 136, we show that in 1964 enrolments in the Police Zone were 6 per cent. higher than in 1963, and in the northern areas no less than 15 per cent.

Mr. President, in the light of what has been said, we make the submission that the only realistic and the only fair approach to adopt at the present time is to aim at the ideal of compulsory education but to show, at the same time, due appreciation of those practical difficulties which exist in so many African countries in regard to their indigenous populations.

Mr. President, I now turn to the evidence of Professor van den Haag. The Court will recall that Professor van den Haag's testimony has already been discussed in relation to our general contention that the application of a norm or standards as contended for by the Applicants would, in the circumstances of many countries, including South West Africa, lead to results inconsistent with the promotion of the well-being and progress of the peoples concerned. I refer in this regard to the verbatim record, at pages 188-191, *supra*, and 200, *supra*.

In the course of his address, Mr. Muller dealt briefly with Professor van den Haag's qualifications and his special fields of study and teaching. In addition, it was mentioned that Professor van den Haag was engaged on a research project on the effects of segregated and integrated schooling in the United States of America. This appears at pages 188-189, *supra*.

The Court's attention was also drawn to the fact that although the Agent for the Applicants at one stage indicated that he would cross-examine Professor van den Haag as to his qualifications as an expert, there was in fact no such cross-examination. This appears at page 188, *supra*.

In the course of his address Mr. Muller also stated that Professor van den Haag had dealt specifically with the question of education, but that his evidence would be referred to at a later stage of our argument. I now propose to deal with Professor van den Haag's evidence.

Professor van den Haag was asked whether segregation or differentiation must necessarily lead to discrimination in the unfavourable sense, and he replied as follows—this appears in X, page 160—

“... as I tried to indicate yesterday, I think, depending on the intention of the user of these devices and on the wishes of those concerned and on the circumstances, segregation must be regarded like a knife, or any other instrument, as neutral; it can be used for surgery, it can be used for murder; it can be used for beneficial purposes, it can be used for malevolent ones”.

And when Professor van den Haag was asked whether he believed in the proposition that psychological damage inevitably resulted from separation, or segregation, or differentiation, his answer was this—it appears at the same page—

“I certainly believe that this conclusion has in no way been

proved and, on the face of it, I would say in many cases, though by no means all, desegregation is probably far more harmful."

Mr. President, these conclusions were stated with reference to the United States. Even there, in the United States, Professor van den Haag said, there is no acceptable evidence that segregation *per se* causes psychological injury. This appears at X, page 158.

The United States Federal Court decision in the *Brown* case, Professor van den Haag said, was, in his opinion, highly questionable, even in the American context. I refer in this regard to the evidence recorded at X, pages 154 to 158.

In the *Brown* case, Professor van den Haag said, evidence was produced by only one of the parties. This appears at page 427, X. According to Professor van den Haag, the only experimentation on which this evidence rested was of dubious scientific value—that was the so-called "Coloured dolls preference test", of which he told the Court.

Mr. President, in cross-examination, Professor van den Haag was asked whether he agreed or disagreed with certain views which had been expressed by others in the United States, and which appeared to be to the effect that segregation was *per se* harmful. Professor van den Haag said that he did not agree with those views. I refer the Court in this regard to the evidence recorded on pages 459 to 462, X.

Mr. President, we submit that views so put to Professor van den Haag and not agreed to by him are, of course, not evidence in this case, and for that reason I do not propose to deal with them. We point out also in this regard, that is in connection with the *Brown* case, that at an earlier stage of the proceedings the learned Agent for the Applicants stated that:

"The Applicants are aware, and do not suggest otherwise, that decisions of domestic tribunals are peculiarly suited to, and reflect, conditions and traditions particular to their own societies."

This appears at VIII, page 119. And then I wish to quote the following passage, which appears at VIII, page 120:

"... the Applicants do not suggest that the considerations which motivated the decision in the *Brown* case govern these proceedings".

A statement to the same effect, Mr. President, appears at IX, page 308.

The Respondent deals with the differing conditions in the United States and South West Africa, *à propos* the *Brown* case, in the Rejoinder, VI, at pages 71 to 74. I am not going to deal with that in any way, Mr. President; I merely refer the Court to the pages where we deal with the position.

In regard to education in South West Africa, I believe it has already been mentioned in this Court that Professor van den Haag has not visited the Territory, but assuming the correctness of what is said in Book III of Respondent's Counter-Memorial, II, as to the different population groups in the Territory, and accepting also the aims of Respondent's education policy, as stated in Book VII of the Counter-Memorial, III, Professor van den Haag stated that he would not in any way expect that the mere fact of separate schooling in South West Africa must inevitably inflict psychological harm. Mr. President, I refer in this connection to X, pages 161, 162 and, particularly, 163 and 164. On the contrary, Professor van den Haag said—and I quote from X, page 164—

"... I would in fact think that non-separation would be harmful to both of the groups that are congregated; as long as the levels of learning, the backgrounds, the customs, the morals are as different as you describe them to be, an attempted homogenization would certainly be harmful to both, as well as unsuccessful".

Professor van den Haag stated that the position in South West Africa was different from that in the United States, and he said, amongst other things, and I quote from the same page:

"... in the United States there is certainly a much better case for desegregation because, as I mentioned in my testimony yesterday, there is no separate cultural source for the Negroes who are really, generally, participants in American culture".

May I in this regard, Mr. President, also refer to the evidence recorded on X, pages 151-152.

Now, all this means, in our submission, Mr. President, that solutions which are proposed in the United States of America are not necessarily appropriate and might, in fact, be quite inappropriate in a situation such as obtains in South West Africa.

[Public hearing of 4 November 1965]

Mr. President, yesterday I dealt with the evidence of Dr. Van Zyl, Dr. Eiselen and Professor van den Haag, and I now turn to the evidence of Professor Rautenbach, who testified on university education in South Africa and, more particularly, university education for the Bantu.

The Court will recall that we explained in our pleadings that there were no facilities in South West Africa itself for higher education, that is, education at the university level.

Mr. President, in the Counter-Memorial, III, at page 474, it is stated, amongst other things:

"The number of students who qualify for a university education is not sufficient to warrant the establishment at this stage of any institution for such education in the Territory."

Students of South West Africa—European, Coloured and Native—who desire a university education, can proceed to institutions for higher education in South Africa.

In the Counter-Memorial, III, at page 476, and again at pages 485 and 486, we set out what those institutions are: they are, firstly, institutions for European students; three university colleges for Native students; a similar institution for the Coloured people; and another one for Indian students. In addition to those, there is a medical school for non-European students at the University of Natal. Furthermore, Mr. President, students of any of these groups can enrol at the University of South Africa, as it is called, which is not a residential university, but conducts its teaching by means of correspondence—this appears in the Counter-Memorial, III, at page 476. And then, Mr. President, as will also have appeared from the evidence, and we point also in this regard to the Counter-Memorial, III, page 476, Native students may also, subject to certain conditions and with the consent of the Minister of Bantu Education, enrol at the European or White universities in South Africa.

It was further explained in the Counter-Memorial that students from

South West Africa—students of all groups—are given financial assistance, in the way of loans or bursaries, to enable them to attend university institutions in South Africa. In this regard, I refer the Court to the Counter-Memorial, III, at page 477, and also to the Rejoinder, VI, at page 118.

Now, Mr. President, as the Court will recall, Professor Rautenbach gave evidence on the establishment in South Africa of separate universities for the different population groups and, more particularly, the Bantu groups, and the reasons therefor. Professor Rautenbach's expertise is set out in the verbatim record at XI, pages 326 and 327, and also on a few other pages, to which I shall refer. As will appear from what is stated in that record, Mr. President, Professor Rautenbach has wide experience of university life and administration in South Africa. He has been associated with the University of Pretoria since 1923, when he became a lecturer there; and he became the Principal and Vice-Chancellor of that University in 1948. This appears on page 327, XI.

Professor Rautenbach was, for many years, also a member of the Council of the University of South Africa, to which I have referred, and he is, at present, the Chairman of the Council of the University College of the North, which is one of the three Bantu university colleges which were established a few years ago, after the passing of the University Act of 1959, which was frequently referred to in the course of his evidence. This appears on the same page.

Professor Rautenbach, as will appear from his evidence, also serves on a number of scientific and advisory bodies, such as the National Advisory Education Council of South Africa, of which he is the Chairman, and at one time he served, for a period of five years, as a member of the Executive Committee of the Association of Universities of the British Commonwealth. This appears at pages 327-328 of the record to which I have referred.

Mr. President, Professor Rautenbach supported the Respondent's contention that it would not be practicable, at this stage, to establish a university institution in South West Africa. This appears at XI, page 329.

Then, Mr. President, I wish to point out that there was no suggestion at all that Professor Rautenbach's experience of university administration and his knowledge of South West Africa did not entitle him to express this view. And his view was in no way challenged by the Applicants.

Now, with regard to university education in South Africa, Professor Rautenbach expressed the opinion that the present system of having separate university institutions for the different population groups held decided advantages over the former—that is the pre-1959—system of so-called open universities.

In regard to university education for the Bantu in South Africa, Professor Rautenbach drew a comparison between the position which obtained up to 1959, and the position since then. In 1959, as appears from his evidence, three university colleges were established especially for the Bantu. Prior to 1959, the governing bodies of the so-called open or White universities had the right to decide whether they would admit Bantu students. This appears at XI, pages 329-330 and 445.

Now it appears from the evidence, Mr. President, that some of these so-called open universities did not admit Bantu students at all; others,

again, did, but at the same time placed certain limitations on admissions. This appears from **XI**, pages 330 and 331. At present, as I have stated, Bantu students may still enrol at White universities, if given the necessary permission by the responsible Minister. This appears at **XI**, page 329.

Now, in regard to the pre-1959 period, Professor Rautenbach drew attention to the following features, which I shall now briefly mention: firstly, he pointed out, those White universities which were prepared to admit Bantu students limited the number of admissions. In the case of one university, he told the Court, some faculties, again, were completely closed to Bantu students. This appears at **XI**, page 331. And, Mr. President, in this connection, I also refer to our Counter-Memorial, **III**, page 482, where we refer to a speech by the Minister of Bantu Administration and Development, in which he said that certain White universities allowed only a certain quota of non-White students.

Now, the second feature mentioned by Professor Rautenbach: the Bantu students, he said, who were admitted to the White universities, never led a full university life: they attended lectures with White students, but all extra-curricular activities were separate—for example, sport, social gatherings, and all university activities—nor did they ever share university lodgings with other students. Mr. President, this appears at **XI**, pages 331 and 332, and also on pages 337-338. Now, in such circumstances, and because of the small numbers of Bantu students at the White universities, Professor Rautenbach said that the Bantu student at a White university was a lonely individual. This appears at **XI**, page 411.

The third feature mentioned by Professor Rautenbach: fees, he said, at the White universities, were high, and this factor served to limit Bantu admissions. This appears at **XI**, pages 332 and 336.

Fourthly, he said Bantu students attending White universities tended to create a gap between themselves and their communities; they were brought into a sphere which was foreign to their own people. This appears at **XI**, page 332.

Now, Mr. President, I come to the post-1959 period, as dealt with by Professor Rautenbach. The advantages of the present, that is, the post-1959, system, as described by him, may be summarized as follows. First, he said that universities have been established for the Bantu people themselves. These institutions, he said, play, and will play, an important role in the development of the various Bantu communities. They are already, he said, receiving the support of these communities, financially and otherwise, and enrolments are steadily increasing. The establishment of these university colleges especially for the Bantu, Professor Rautenbach also pointed out, is in line with developments elsewhere in Africa where it has been felt that university education should be attuned to African society. This appears at **XI**, pages 339-343 of the verbatim record.

Mr. President, in this same connection, we should also like to refer the Court to what is stated at pages 486-489, **III**, of the Counter-Memorial. There, are set out views which have been expressed in regard to university education for the Bantu in Africa, and then, in this regard also, we refer to pages 378-382 of the same volume of the Counter-Memorial where are set out trends in various States in Africa to "africanize" education for the African.

Now the second feature mentioned by Professor Rautenbach: at the Bantu universities at present, he said, Bantu students lead a fuller life than would be possible at a White university. They are now, he said, in the same position as White students at White universities, enjoying a full life, both academically and in the extra-curricular sphere. This appears at **XI**, page 337.

Thirdly, he pointed out, fees at these Bantu universities are appreciably lower than at the White universities. Particulars are given at **XI**, page 336.

The fourth point mentioned by him: teaching methods, he said, at the Bantu institutions, can be properly adjusted to the background and culture of the Bantu students and this takes place, he pointed out, without any loss in standard of work, since Bantu students at these institutions take the same examinations as White students at the University of South Africa. This is set out at **XI**, page 336.

Then the final point mentioned by him: the establishment of these Bantu university colleges, he said, has created more opportunities for Bantu intellectuals to be appointed to teaching posts on university staffs. This appears at pages 335-336 of the same record.

Now, Mr. President, I come to Professor Rautenbach's opinion as to what the results would be if the present system were to be done away with. He said that to go back to the pre-1959 position "We would not only be back where we were in 1958, but we would be saddled with a number of new problems". This appears at page 344 of the same record.

Now, I do not intend to go into any detail. We have already referred to the advantages of the present system as described by Professor Rautenbach and it would obviously, in his view, mean a loss for the Bantu people if the present system were to be done away with. Mr. President, he also expressed the view that it would have unfortunate results for these Bantu colleges if the present system were retained but students were given an unrestricted right to go to other universities. The loss of students would be harmful, especially at the post-graduate level, and would make it difficult, at the same time, to retain the best staff. All this, he said, would make it impossible to build up these institutions to become the equal in every respect of university institutions elsewhere. This appears at **XI**, pages 344 and 345.

In addition to what I have just said, Mr. President, I also draw the Court's attention to a particular instance mentioned by Professor Rautenbach, where it has been essential to adopt differential measures in the case of Bantu university students. This concerns the training of Bantu medical students at the University of Natal, to which I have already referred, and where it has been found necessary to devote an extra year to the course of Bantu students in order to wipe out what Professor Rautenbach termed a cultural lag, which was temporary, he said, but nevertheless there at the present time.

Mr. President, in this connection, I refer to pages 330-332 of the same record. **XI**.

To do away with this differentiation in the training of Bantu medical students, Professor Rautenbach said, would obviously be to the detriment of such students. This appears at page 344 of the same record.

Mr. President, I now turn briefly to the cross-examination of Professor Rautenbach. First, Professor Rautenbach was cross-examined on a large variety of subjects, but very little of that was directed to the advantages

of the existing system in South Africa as testified to by him. He was questioned widely on matters (I am not going to mention all of them), which did not relate to university education at all—for example, he was asked many questions on the functions of the National Advisory Committee on Education in South Africa. He was questioned on compulsory education for school-children in South Africa and also on such education in South West Africa. I need not give the Court all the references, but some of them may be found in XI, at pages 347 to 364. In regard to university education, more particularly, Professor Rautenbach was cross-examined on such questions as government policy in regard to students wishing to study overseas, on the internal organization of the Bantu university colleges and the measure of their control by the State, on the question of why there was not a so-called conscience clause in all university statutes and whether regulations concerning the rights of White and Bantu students to leave the precincts of their university were the same in all cases, and so forth. Mr. President, some of these references are in XI, at pages 366-369, 429-430, 389-395 and 385-389.

Finally, Mr. President, certain views contrary to those of Professor Rautenbach were put to him concerning such questions as to whether universities should be completely autonomous or not and as to whether mixed universities in the pre-1959 period did or did not contribute to inter-racial harmony and understanding. The references on these two topics are in XI, at pages 400-403, 405-408 and 441-442.

Now, Professor Rautenbach did not agree with these views which were put to him and, as has been stated before in the course of argument, our submission is that views and opinions of other persons which are put to a witness, and with which he does not agree, do not become evidence. In our submission, it is therefore unnecessary to deal with these views and it is also unnecessary to state Professor Rautenbach's replies to the questions that were put to him. Our submission, Mr. President, is that on Professor Rautenbach's evidence, the present system of separate institutions for the different population groups has substantial advantages for the Bantu people of South Africa and that the Bantu universities will, in future, play an important part in the building up of the Bantu peoples of South Africa. It is hardly necessary to say, Mr. President, that in our submission nothing has been advanced by the Applicants to suggest that the system of separate university education is incompatible with the promotion of progress.

We appreciate, of course, that some of the advantages of the present system as testified to by Professor Rautenbach do not directly concern the Native peoples of South West Africa in the same way as they do the people of South Africa. So, for example, the building up of their own universities for the Bantu people of South Africa does not directly concern, for example, the Ovambo people of South West Africa. As far as South West Africa Native students are concerned, the relevant question in regard to university education relates to facilities available for them in South Africa, and to the qualitative effect on their moral well-being and social progress of the fact that facilities are separate from those of European students. The purpose of our evidence has been to show that qualitative well-being is served by the existence of separate facilities, and that it would be injured by non-separation.

I should like to point out that in the Memorials, Applicants alleged

that the university institution for the Bantu in South Africa were of an inferior type. This appears from what is said on pages 157 and 158, **I**, of the Memorials. This allegation was denied in Respondent's Counter-Memorial, where the subject was fully dealt with. I refer to **III**, page 527. *Of course, this aspect of the case is no longer relevant to Applicants' case as formulated at present.* I should like to point out, however, that it was never put to Professor Rautenbach that the facilities for the Bantu were in any way inferior. In his evidence-in-chief Professor Rautenbach testified that the material facilities at the Bantu university colleges of which he knew, were very good, and that the teaching staff was of excellent quality; this appears at **XI**, pages 334 and 335. These statements were not challenged in any way in cross-examination. The Applicants' learned Agent at one point asked Professor Rautenbach whether there were South West African students studying overseas, but it was not suggested that that fact proved a lack of proper facilities in South Africa. In fact, when there was an attempt to re-examine Professor Rautenbach on this issue, any such suggestion seems to have been expressly disclaimed. I refer to **XI**, pages 454 and 455. But, as I have said, adequacy of facilities is not the issue as the Applicants' case is formulated at present.

I conclude, Mr. President, by repeating our submission that the evidence has shown that the present system has decided advantages for the Bantu people, and that reversion to the earlier system would be injurious to the qualitative well-being, particularly of those persons about whom Applicants are specially concerned.

Mr. President, that concludes my address, and with your permission my colleague, Mr. Grosskopf, will now address the Court on the economic aspect of the case.

32. ADDRESS BY MR. GROSSKOPF

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARINGS OF 4 AND 5 NOVEMBER 1965

If it please the Court, Mr. President, as my learned friend has said, I shall deal with the economic aspects of Respondent's policy. The purpose of this argument is in line with what has been said by other speakers on our side to show that Applicants' norm or standards as defined at page 493, of the Reply, IV, will, if applied to South West Africa, in many respects not promote well-being and progress also in the economic life of the people. As in our argument generally, so also in this aspect, we shall refer to the facts stated in our pleadings, which are now of course admitted by the Applicants, as well as to the evidence given by various witnesses.

The main witnesses who testified in particular on the economic aspects were, firstly, Professor R. F. Logan, whose evidence may be found in X, at pages 336-429 and 479-505. Then, the Court will recall, there was Professor D. C. Krogh, whose evidence may be found in XI, pages 67-206. Finally on the witnesses mainly on the economic aspects there was Mr. Pepler, whose evidence is found in XI, pages 202-251.

In our submission these witnesses were clearly competent to express opinions on the economic aspects of Respondent's policies. I do not want to go into their qualifications in detail, but perhaps it might be convenient to give a brief summary. Professor Logan, the first one—his qualifications are found in X, at pages 337-346. He explained to the Court that his major field of study was geography, of which he was a professor. It is not necessary to give his academic qualifications in detail, but in view of the attitude adopted by the Applicants, to which I shall advert at a later stage, it may be convenient to quote the definition which Professor Logan gave of his discipline, and that one finds in X, at page 337, where he said the following:

"Perhaps I had better explain first the contrast between geography and geology with which it is quite frequently confused. Geology is the study of the crust of the earth and its land forms. However, in geography we start with this base and we go on into a study of the relationship between man and the land."

Professor Logan then added that geographers were consequently interested not only in all elements of the physical environment, that is, the climates, the natural resources and things of that sort, but that they were also interested in the manner in which the elements in question are utilized by man. Professor Logan then continued, still at the same page:

"So it is necessary for us to know about man, that is, the different groups of men, both racially and ethnically, that occupy a given area, and we also need to know about the stage of technology, the stage of material development of these people, because different societies use land in different ways and so we are interested in this aspect. We are also interested in the economic phases because the whole basis of economy is an integral part of the study of the geog-

raphy of an area. Consequently we are interested in man and in the land on which he lives, not simply in the land."

It is therefore, in our submission, clear that Professor Logan's field of expert knowledge impinges also on economic and sociological spheres, in respect of which he said in the same verbatim record, at page 344:

"... there on at least a number of facets I think I can testify with a fair degree of certainty and with a fair degree of technical knowledge".

Professor Logan has published somewhere around 70 publications on his subject, of which details are given in the verbatim record, **X**, at page 338, and he has been a delegate to a number of international conferences on geographical topics; that is in the same verbatim record, at the same page. He has given special attention to arid regions, to desert lands, and he has done a great deal of work in that sphere in various parts of the world. And he told the Court that it was pursuant to this interest of his that he became interested also in South West Africa, where he has done a considerable amount of field research work; that is in the same verbatim record, at pages 338-339.

I have gone into Professor Logan's qualifications in perhaps more detail than I otherwise would have because Applicants' Agent launched an attack on his qualifications as an expert in the same verbatim record, at pages 340-346. However, at the end, when asked whether he challenged the competency of the witness as an expert, he said at page 346: "Not as an expert with respect to his discipline as a geographer—no, Sir." In the result there can be no doubt, in our submission, that Professor Logan was eminently qualified to testify as an expert on the topics on which he did testify.

We then come to Professor Krogh, whose qualifications are set out in **XI**, at pages 67-68. The Court will recall that Professor Krogh was born and grew up in South West Africa, with which Territory he has still retained personal and professional bonds and has, *inter alia*, performed economic research there. He holds the degrees of B.Comm., M.A. and a doctorate in economics at Amsterdam, as well as a doctorate in philosophy at Pretoria. He is Professor of Economics and Head of the Department of Economics and Economic History in the University of South Africa. He also serves on a number of committees concerned with economic affairs, and participates in the work of several economic institutions and societies. His special field of study concerns the use of economic accounting in development planning, with particular reference to Africa, and in this connection he has done research in various countries and territories in Africa as well as the United States of America. He has also published several publications on economic affairs.

Then there is Mr. Pepler, whose qualifications may be found in **XI**, at pages 207-208; he holds a B.Sc. Degree in Agriculture, and has had a long and distinguished career in the civil service in the field of agricultural technical services. At present he is Director of Bantu Development, and as such he is responsible for development schemes of the indigenous population groups both in South Africa and in South West Africa, and particularly as far as the various homelands are concerned. He also serves on a number of government bodies, and has represented his country at international conferences relating to agricultural matters. In the course of his official duties he has also paid a number of visits to the Territory, details of which may be found in **XI**, at page 219.

Now, Mr. President, save for the case of Professor Logan, to which I have already referred, Applicants have not sought to impeach the expert qualifications of any of these witnesses, and in our submission, their competency has been clearly established. Before dealing specifically with Applicants' case, and the application, or possible application of the norm or standards to South West Africa, it may be convenient to give a general outline of the background of the economic situation in South West Africa. This background derives from the historical, geographic and social factors in the Territory. It appears from the admitted facts on the pleadings, as well as the evidence of the witnesses to whom I have just referred, that these factors have given rise to a number of basic problems regarding economic development. These may be summarized as follows.

The first factor is the size of the Territory. Now South West Africa has an area of 824,269 sq. kilometres, which includes the area of Walvis Bay, which, although part of the Republic of South Africa, is for convenience administered as part of South West Africa. That is in the Counter-Memorial, **II**, at page 291.

The Court will recall that in the Counter-Memorial, **II**, page 291, map 2 shows graphically how one could take South West Africa, and how the Netherlands, England and Liberia could be placed within its borders with lots of room to spare, so it is a very large territory indeed. The relevance of this factor to economic development was explained by Professor Krogh in **XI**, at page 72, where he said:

"... the implications for economic development are rather self-evident—to establish in any short period of time effective administrative control, means of communication, transportation and so forth over an area 20 times that of the Netherlands, is technically and financially simply an impossible task. It would take a very long time to extend the necessary public utility services for the encouragement of economic development over so vast a territory."

As the second factor, I should like to refer to the nature and distribution of the natural resources of the Territory. A brief survey of the natural resources of the South West is provided in the Counter-Memorial, **II**, at pages 301-310, under the headings: "Water Resources", "Land Resources", "Mineral Resources" and "Marine Resources". There it was stated in general, at page 289:

"... the natural environment of South West Africa is to a large extent unfavourable for man's purposes and that it displays great diversity, resulting in special problems of administration and development. The adverse physical environment places a premium on the rôle of man in realizing the limited and diverse natural potential of the Territory."

Dealing specifically with water resources, it was shown that rainfall varies between less than 50 mm. (i.e., 2 in.) in the south-western part of the Territory to more than 400 mm. (16 in.) in the north-eastern part of the Territory (on p. 295, **II**). Indeed, Mr. President, we said in the Counter-Memorial that the north-eastern part of the Territory, and I quote from page 298, **II**:

"... has the combined advantages of a higher amount of rainfall, a longer rainy season and a smaller variability of rainfall".

In addition, by reason of the availability of water in the perennial rivers along the northern boundary of the Territory, and I quote from pages 303-304, **II**, of the Counter-Memorial:

"... the only considerable water potential is confined to the areas in the north and north-east of the Territory. The scarcity of water resources in the remainder of the Territory is a serious impediment to substantial industrial development, and tends to restrict agricultural activity in the major part of the Territory to livestock farming."

And as regards mineral resources, we said, at **II**, page 307:

"South West Africa has a great variety of mineral deposits but only a few have proved of real economic importance. There are concentrated occurrences of diamonds, lead/zinc, copper and salt deposits; for the rest the Territory's mineral resources are characterized by rich samples from small quantities widely dispersed over the country."

And the final item in the list of natural resources, Mr. President, relates to fishing with regard to which we said, at **II**, page 308:

"In the period after World War II South West Africa has emerged as a considerable fish-producing Territory, due to the presence and exploitation of a teeming marine life along the otherwise barren and inhospitable coast."

These then, Mr. President, are the main features of the natural endowment of the Territory. Within the extremes of rainfall and climate to which I have referred, there are found a number of different regions, each with its own particular problems. I do not want to go into any of these as they are set out and classified in the Counter-Memorial, **II**, pages 298-301; by Professor Logan in **X**, at pages 340-355; Professor Krogh in **XI**, at pages 72-73, and Mr. Pepler in **XI**, at pages 208-211.

In general, Mr. President, Professor Krogh summed up his evidence on this aspect as follows, in **X**, at page 73:

"... speaking generally, I think South West Africa can be described, from the viewpoint of economic development and looking at its natural resources—as a poor territory. It is not only poor, but also displays great variety or differences in the location or quality of its resources."

Now, Mr. President, the most striking difference between various areas as regards natural endowment was summarized by Professor Logan in his evidence in the following words, and I quote from **X**, at pages 367-368:

"We can divide the Territory of South West Africa ... into two contrasting regions ...

We have in the south an area that is poorly endowed as far as all aspects of agricultural and pastoral activity are concerned. Its natural resources are quite limited. The sole big resource is that of the diamonds along the extreme southern coast. The area, otherwise, is lacking in most mineral resources. It is lacking in good, reliable precipitation. It has a relatively poor vegetation. That anything has been done with it, I think, is most remarkable. Vast portions of it, were they under many other economic systems, would have been left totally unused and yet they are today producing a modest income

and in some cases, a fairly good income, to the people who have developed them in the last 70 years or so.

Now in contrast to this, there is the northern portion of the Territory. The northern portion of the Territory has by far the best soil. It is the only area of relatively reliable precipitation and it is the only area of enough precipitation to allow field crops to be grown successfully in almost every year, perhaps 9 years out of 10 . . . It is also the area of the greatest population concentration, a rather stable economy at the subsistence level with the beginnings of cash economy beginning to come into it."

Now, Mr. President, the facts to which I have referred are, of course, admitted explicitly in the case of the passages from the Counter-Memorial and, we submit, implicitly in the case of the evidence given by the witnesses, by reason of the failure to cross-examine. In passing, however, it may be instructive to note the following comment which appeared in the Memorials, I, at page 109:

"The Police Zone embraces generally the southern and central sections of the Territory, being the richer and better developed portion . . . The smaller segment, lying to the north, is the poorer and less well developed portion . . ."

And in the Reply, IV, at page 464, the Applicants stated that "'non-White' inhabitants are confined to the poorest areas of the Territory".

Mr. President, on the admitted facts it is clear that the adjectives "richer" and "poorer" certainly cannot relate to natural resources, but at most to a comparison of development brought about by the population groups occupying the areas concerned. It is also obvious that these facts give the lie to many statements made before the United Nations by petitioners and others to the effect that the Reserves are all situated in desert areas, that the non-White inhabitants are relegated to the worst portions of the Territory from an agricultural point of view, that the best lands have been taken away from them, and so on.

Reference was made to some of these statements by my learned friends, Mr. Van Rooyen and Dr. Van Heerden, last week, and I would refer the Court to pages 120-123, 146 and 151, *supra*, just by way of example of the type of statements that are made.

I come now to a further factor tending to retard the economic development of the Territory—the size of the population. With a population of approximately half a million, South West Africa has a population density of just over half a person per square kilometre. With the exception of Bechuanaland, which adjoins the Territory, it has the lowest population density in Africa south of the Sahara. That one finds in the Counter-Memorial, II, page 292. In this regard Professor Krogh said in XI, at page 74:

"Africa as a whole has the lowest population density of all continents in the world. So South West Africa is in fact an exception in Africa, which again is an exception in the world."

The detrimental effect of this feature was summed up by him as follows, at the same page:

"Low population densities, apart from indicating the necessity for exporting because of a limited local market, also add weight to

the difficulties . . . with regard to the vastness of the Territory in supplying modern means of communication and administration."

That then is as far as that feature is concerned, Mr. President. I turn now to another factor and that is the nature of the population. Under this heading, Professor Krogh's evidence referred to the "dearth or the lack of entrepreneurial elements, enterprising elements" (XI, p. 74), found in the tradition-bound societies of the Territory, which Professor Krogh contrasted with the modern, dynamic, economic society of the European inhabitants. The references may be found in XI, at pages 74-75 and 77-78.

Under cross-examination, in XI, pages 90-96, he explained further that this difference results from a basic cultural difference between the two groups, which is generally recognized by experts on the problems of developing countries. The implications, as far as the tradition-bound society was concerned, were summed up by him as follows in the same verbatim record, at page 94:

"This simply means that the problem of economic development lies in gradual cultural change, and is not simply a matter of supplying foreign aid and technical assistance to them. It is not a pure economic-technical problem, it is basically a social cultural problem that it takes a long time to produce these enterprising people. Nevertheless, the fact is that they are in due course produced . . ."

Now, Mr. President, Professor Logan, in our submission, graphically illustrated this, more specifically with reference to the Namib region, in a passage part of which has been previously quoted by my learned senior, Mr. de Villiers, and this passage is found in X, at page 348, where the witness said:

" . . . since the European group is the one that today keeps the water supply going, keeps the food supply coming in, keeps the railway operating, that it is the managerial ability, that it is the initiative and drive of this group that has kept the place in operation, the removal of this group without its direction and initiative, would, I think, result in almost immediate and almost complete collapse. The Native group is not of the calibre, whether it be in trained ability or whether it be in the desire to be there each morning at the given hour that is necessary to turn on the plant or oil the machinery, and since there is no such initiative, from the local Native group, I am afraid that things would fall apart very quickly."

The same point was made in the pleadings—in the Counter-Memorial, II, pages 408 and 410-411 and III, pages 44 to 46, page 68 and page 101—and as such, of course, now admitted.

The next feature, Mr. President, to which I would advert, is the social environment of the population. This feature has been discussed before. It relates to the heterogeneity of the population and my learned friend, Mr. Muller, referred to it at page 194, *supra*; and it will be recalled that in this regard Professor Logan said, in X, at page 368, "I do not believe there is anywhere in the world a more diverse" population.

For present purposes, that is as far as economic policy is concerned, this feature is to be taken into account when applying policies which in a homogeneous society would have been eminently sound from an

economic point of view. Professor Krogh said in this connection, when he referred to members of such a heterogeneous population, that—

“ . . . their loyalty is first and foremost, and their interests are seen to be those of their particular group rather than of the population considered as a whole. I make this point . . . because it is very difficult, under such a set of circumstances, to devise a policy of administration and development that could in fact satisfy every group . . . [and] everywhere in the Territory. To deny that this exists is, without doubt, inviting disaster and strife in the Territory.”
(XI, p. 75.)

Those, then, Mr. President, are the features which witnesses and the pleadings told the Court tend to retard economic development of the Territory, or at any rate, those are the features which present problems for any administration which sets about such economic development.

It also appears, in our submission, from the record, that is, from the pleadings and oral evidence, that these features necessitate policies which involve a differential allotment of rights on a group basis among the various population groups. Of course, the political aspects, to which my learned senior, Mr. de Villiers, referred on Tuesday, are basic also, from that point of view, to the economy, in the sense that no economic activity is possible in a state of political chaos, or, if one puts it at a lower level, that any political tension, or any political uncertainty, necessarily undermines also the confidence, matters of investment, and the smooth functioning of the economy in general.

In the course of his presentation on the political aspects, Mr. de Villiers dealt also with the position of the Europeans in South West Africa, and their important role in the economic life of the Territory, and in that regard I would refer the Court to pages 240 to 244, *supra*. As he pointed out—and I do not wish to repeat it in detail—policies which would lead to the expulsion or immigration of this population group would necessarily have a detrimental effect on the economy of the Territory. However, I do not want to traverse that field again, but I shall confine myself as far as possible to matters which are more purely of an economic nature.

In this regard, Mr. President, the first, and, in our submission, one of the most important reasons for adopting a differential approach arises from the necessity in South West Africa of protecting the land rights—the rights to the possession and use of land—of the various groups. The Court will recall that in Book III, Chapter III, of the Counter-Memorial, II, we set out briefly the history of the various conflicts that had occurred in the Territory, caused largely by disputes regarding land and grazing rights. The Court will recall that there were always disputes, for instance, between the Hereros and the Namas, about who was entitled to graze their stock on a particular piece of territory, or to whom that land really belonged. And the Court will recall that disputes about land also formed one of the major causes of the war between the Hereros and the Germans in the years 1904 to 1906, in regard to which we said, in the Counter-Memorial, II, at page 373:

“ . . . economic conceptions differed widely between the Hereros and the Germans. This manifested itself, *inter alia*, in conflicting claims to land. Thus the Germans bought land from the chiefs, intending thereby to obtain sole rights of property; but this concept was not

understood by the Herero, who resented being prevented from grazing their cattle on land which they had sold."

Furthermore, Mr. President, in Book VI of the Counter-Memorial, **III**, we explained how, at the inception of the Mandate, it was found necessary to allocate land to the various indigenous groups. We also explained how these allocations were in due course increased and extended; that is at **III**, pages 246 to 253. And, of course, the Court will be aware that the Odendaal Commission has now recommended certain further extensions, and that some of the lands concerned have already been purchased in anticipation of these extensions.

We also demonstrated, Mr. President, in my submission, in Book VI of the Counter-Memorial, that there was always a strong tendency on the part of members of the indigenous groups to dispose of their land at excessively low prices, and certain examples were given at **III**, page 245.

Mr. President, of course, these things are matters of historical knowledge and we do not suggest that the Native population of South West Africa is today as unsophisticated, or as economically unaware, as it was 40 years ago.

However, Mr. President, this tendency—the tendency to sell land at uneconomic prices—will always persist, in our submission, as long as there is a substantial difference in the productivity as among the various groups, because, Mr. President, when one speaks of an economic or an uneconomic price it depends on one's point of view. A price may be extremely economic from the point of view of the seller inasmuch as the seller may be deriving much more from the sale of the lands than he could ever derive from cultivation of the lands, but it may be, by any objective standard, a very low price. It is from that point of view that in the case of a capital asset such as land, its price must always depend on the return which can be derived therefrom.

Now, in the case of the Native peoples in South West Africa, the return which they derive from the land is very much smaller than the return which a progressive and modern European farmer would, or could, derive. That, Mr. President, in our submission, appears clearly from the record herein.

The Court may recall that we made reference to the Rehoboth Basters which is one of the most advanced population groups in South West Africa. In 1926 there was a Commission of Enquiry into their affairs and the Chairman of the Rehoboth Commission of that year stated in his report that, in his opinion which he based on facts disclosed in the report:

"... there [was] no doubt whatever that liberty to alienate land to Europeans would inevitably result in the Burghers [of Rehoboth, that is] losing the greater portion, if not the whole, of their land within a comparatively short period of time." (**III**, p. 245.)

In regard specifically to Rehoboth, Mr. President, the policy was thereafter pursued of encouraging the Basters to farm their land themselves and to encourage them to improve their agricultural methods, rather than to sell it or to lease it to European farmers.

But as late as 1957 this policy drew the following stricture from the Committee on South West Africa:

"The application of apartheid to the Gebiet [that is the Rehoboth

Gebiet] and the consequent forced removal of 'European' leasing farms from Rehoboth landowners automatically deprives the Rehoboth landowners of a major source of income." (III, p. 33.)

In other words, Mr. President, the complaint is made that if they are not allowed to lease their land then they are deprived of income from the land, which, as we pointed out in the Counter-Memorial, suggests that:

"Thus the Committee appears to have accepted that the Rehoboth Basters could best utilise their land by letting it to Europeans, rather than by practising agriculture themselves, and that European farmers would be able to make a profit over and above the amount of the rent, whereas Baster farmers would not even be able to raise a sum equivalent to such rent." (*Ibid.*)

In this regard I may also refer to the evidence of Professor Logan in X, page 355, where he also dealt with agriculture in the Rehoboth area, so that, Mr. President, the picture emerges of even the most advanced, or one of the most advanced non-European groups not being able to farm progressively enough to raise as much money as they could raise by leasing the farm to European agriculturalists.

Now, a similar picture appears from a study made by Professor Logan, as to which he testified in X, at pages 350-352. As part of his scientific studies, he compared the utilization of the land on the Nama Reserves Tses and Berseba and the European farms immediately adjacent to these Reserves. He found that the Reserves and the European areas carried the same population both of stock and of people, but that the European farms were in a much better condition and provided a higher standard of living for all their occupiers than the Reserves did. His investigations also showed that this contrast did not result from any difference in the nature or quality of the land or in the nature or quality of the services and encouragement provided by that administration, but purely, as he testified, from the traditional approach and attitude of the various groups. In the verbatim, X, at page 359, he testified regarding a similar experiment with certain Herero Reserves where his findings were exactly the same—that on equal lands (equal in quality, size, population both of cattle and of people) the European farms provided a much higher income and a much higher productivity than the adjacent Native Reserves.

As regards the northern areas, Mr. President, which Professor Logan described as the best agricultural areas in the Territory, he gave the following account of the agricultural activities of the inhabitants:

"This agriculture is dependent entirely upon rainfall and the rain is usually good enough to produce a good crop. In some years it is not. In the years in which it is not, there is no reliance whatever upon irrigation anywhere in the area. Even in the Okavango area in which the Okavango River flows even in drought years, a large river on the surface flowing very frequently right alongside of the fields which are dying of drought, there is no carrying of water at all from the one to the other. This is in marked contrast to other parts of the world in similar situations where one finds equally primitive groups carrying on irrigation.

This is entirely a subsistence type of agriculture, these people produce for their own needs, they do not produce for the market.

Nor do they buy anything on the market. It is not a cash economy basically. There are beginnings of a cash economy starting to develop within the area, but this is only beginning and traditionally this is a purely subsistence type of agriculture or economy." (X, pp. 363-364.)

Now, Mr. President, to avoid any misunderstanding as a result of the use of the words "subsistence economy", it must be emphasized that such references do not suggest that the persons involved suffer any lack, or that they were not producing enough to satisfy their needs, as indeed Professor Logan showed at X, page 409 and at page 503. The expression "subsistence economy" is a term which he used to convey "that the people produce everything that they need and furthermore they need everything that they produce so that they do not produce a surplus for sale nor do they purchase from outside". (X, p. 503.)

Similarly, Mr. President, it must be emphasized that this subsistence type of economy and the approach which it shows are not expected to remain unaltered. Indeed, all the witnesses on the economic aspect, and in particular Mr. Pepler, explained to the Court what efforts are, in fact, being made to lead the Natives to a higher level of productivity and to a more progressive approach, what success they have been having and what problems they have encountered. I may refer the Court to Mr. Pepler's evidence in XI, at pages 211-217, and this is a topic to which I shall come back at a later stage.

Furthermore, as noted by my learned friend, Mr. de Villiers when dealing with the political aspect, Mr. Pepler also emphasized that the present Reserves—the present areas for the indigenous inhabitants—could accommodate the whole Native population on an agricultural basis. This was dealt with by my learned senior at pages 243-244, *supra*.

Mr. President, before the adjournment I was dealing with the need to protect the land rights of the different population groups in South West Africa. I had just finished referring the Court to the various sources of the general proposition that the Native groups do not make as productive use of their land as do the European farmers, and the point which is sought to be made is that the productive capacity of the Native agriculturalist is so low that a price for his land, which from the point of view of a European purchaser would be a low one, would appear uneconomically high and consequently extremely attractive to the Native owner and, as I have shown, this has in fact been the practice in the past. Land has been sold for prices which appear extremely low to us. The inevitable result of this situation would be, in our submission, that unless there is some measure of protection, many of most Natives would be induced to sell their land. This view was expressed by all the witnesses who gave evidence on this topic. Thus, Professor Logan was asked, at X, page 373: "Do you consider that measures of differentiation to protect the various groups are necessary?" The first part of his reply reads as follows at pages 373-374:

"Yes, I think there are protective measures in existence today that have to be continued. The first of these, I think, are protective measures to reserve the lands of the Natives—this is to reserve the lands of the Natives against the Whites. I have just painted a quite nice picture before the tea recess of the northern part of the Territory.

There are a great many White farmers on rather drought-stricken farms in the South who would be delighted to move into the Okavango and push a group of Okavango Natives out of the area. They would do much better with the area than is being done today . . . and they would produce very high productivity in the area. This is being encouraged today by the administration, but not for Whites, being encouraged instead for the Natives to carry on irrigation agriculture."

Thereafter Professor Logan gave some examples of experimental irrigation projects for Natives in the Okavango, which are at present being pursued. He then continued, and I quote again from the same pages:

"Were controls to be pulled off, we would find that, instead, we would have some European irrigationists in the area very quickly.

The same is true of Ovamboland, much of Ovamboland is very fine agricultural land. If it were not under control, certainly many Whites would move into the area and take it over."

Replying to a similar question, Mr. Pepler said, in **XI**, at pages 218-219:

"It is my personal opinion that if a norm of this nature has to apply, if I interpret it correctly, it will be a very tragic day for the Native peoples . . . Mr. President, I think that other groups [that is groups other than the Natives], more highly developed, with better financial resources will buy up the lands of the less highly developed people. They will develop the natural resources for their own benefit and these people undoubtedly, the less developed people, will be the sufferers for it."

Professor Krogh said, in **XI**, at page 82:

" . . . it follows from what I have said previously in reply to other questions that it would be necessary to protect the economically weaker or less productive or less viable groups against the economically stronger and more resourceful with regard to land ownership. Thus, for example, it would be necessary to ensure that the economically more resourceful and stronger group would not transgress onto the land owned by the economically weaker and less productive, for if this protection was not given I have no doubt that in a relatively short period of time the economically weaker groups holding land would in fact not have an opportunity to earn a living on the land; they would, in fact, become a landless people if no protection was afforded in this respect."

These opinions, which were expressed by the experts I have mentioned which we called, were not contradicted in any way and they were not attacked in cross-examination. In addition, we submit that these opinions are solidly based on undisputed and undisputable facts.

Now, the question may well be asked, what is the bearing of all this on the norm or standard? My submission is that it is clearly impossible to protect the land rights of the Natives without allotting status, rights, burdens, privileges, disabilities or whatever, on the basis of membership in a group, class or race, rather than on the basis of individual merit, capacity or other qualities. One may well have the situation where one has a particular European farmer who has all the qualities necessary for successful farming along the Okavango, he may have experience, ability, energy, capital, everything one needs, but nevertheless for transcending or more important reasons he is prevented from farming there.

Similarly, one may have a situation where one has a member or chief of a tribe in the Okavango who might be in need of money, who might want money, who might even be able to negotiate a favourable or suitable price, and might even possibly have sufficient sophistication to know what to do with the money once he has it. However, in the interests of the group as a whole, it is necessary to prevent him from selling the land. Furthermore, in this situation it is clearly also a case when an individual should not be allowed to leave his group or to contract out of his obligations or rights as a member of the group. You will recall, Mr. President, that at one stage my learned friend suggested that that possibly might be a feature which would render an allotment of rights in order if a particular member of a group were to be entitled to leave that group or to abandon his rights and privileges or obligations as a member of that group.

Now, if one were to protect the land rights of the Natives then clearly it must follow that no individual Native could practically have the right to leave that group or to say to himself or to the authorities: well, if I am not allowed to sell my land because I am a Native, then I would rather not be a Native. If that were to be the case then the whole idea of protecting land rights would be rendered nugatory. The whole purpose would come to nothing. Similarly, if a prospective European farmer were able, in law, to say that he would rather be an Okavangan than a European, he would rather have the right to go and farm along the Okavango, than the right to buy land, say, in the Police Zone, because he finds the farming along the Okavango more attractive, or for reasons of his own, then that again would render entirely nugatory all these provisions which are there for a sound purpose. One would then soon have the position, it is submitted, that a number of Europeans would avail themselves of this opportunity. They would go there, they would buy up the land and they would farm there and the result would be that in the end all the land would be in European hands. It would probably have a much higher productive capacity than formerly, but, on the other hand, on the debit side, one would have the Okavango Natives dispossessed of their lands and dispersed from their environment.

So that, Mr. President, my submission is that on any basis this is a sound principle. Nevertheless, on the other hand, on any possible basis, these provisions for protecting land rights offend against the norm or standard which my learned friend suggested. One can hardly seriously say that that is not a case where rights or privileges, or viewing it from the other side, disabilities, are granted purely on the basis of membership in a group, or a class, or a race and not on individual merit at all.

However, one finds that this is one aspect of differential allotment which my learned friends apparently do not object to. They have not attacked it in cross-examination at all and they have indeed not even included it in their illustrative catalogue of measures to which they object. The catalogue, as the Court will recall, appears in IX, and as far as the economic aspect is concerned, on pages 284-287.

Now, Mr. President, it is submitted that even this one example of a case where one could clearly not apply the norm or standard without serious detriment to well-being and progress, that even this one example, which is an important one, shows how untenable their argument is.

Up to now I have dealt particularly with the protection of land rights

of weaker groups, economically speaking, against stronger groups from an economic point of view. However, quite apart from the problems which arise where there exists a disparity of economic power or productivity, such protection may well be and, in our submission, is also required for the maintenance of matters such as social peace and traditional political institutions. The Court will recall that the extent to which ownership and possession of land are associated with the traditional values of particular indigenous groups, was discussed in the pleadings and must now be taken to be admitted. I would refer in this regard to the Counter-Memorial, **II**, pages 316, 319, 325, 339 and 346-347. In these passages we showed what an important aspect of the life of these various groups is the ownership of land and how it has ramifications or implications extending beyond purely economic use and also impinging on the social and the religious fields. I would also refer the Court to the evidence of Professor Bruwer in **X**, at page 257. This land in the traditional systems is held in communal ownership and it has all these wider implications to which I have referred.

These various factors, in my submission, Mr. President, support the opinion expressed by Professor Krogh in **XI**, at page 82, to the effect that:

“... even in the case where population groups are at the same level of economic development . . . it could very well lead to social strife and upset the delicate social balance in the Territory if members of one group insisted on obtaining, or in fact obtained land occupied by another group, if this other group felt that this would lead to the alienation of their land . . . This is a fact that you cannot ignore, and you will ignore it at the expense of social peace and therefore, indirectly, at the expense of economic co-operation and development in the Territory.”

This is, of course, illustrated by the events which in fact occurred prior to the advent of the European population, when there were all these quarrels between the various groups, largely about land.

Both the aspects of land protection to which I have referred, that is, the aspect of protection of the economically weaker against the economically stronger, and also the social implications involved in land rights, are, it is submitted, illustrated by the circumstances relating to the purchase of agricultural land in the Police Zone of the Territory. In the Memorials, at **I**, page 114, Applicants said:

“In sum, on the basis of available information, it may be inferred that no individual ‘Natives’ own land or can own land anywhere within the Territory of South West Africa.”

That was the allegation in the Memorials but, as we pointed out in the Counter-Memorial and is now admitted in the pleadings, there, in fact, exists no legal provision preventing non-Whites from purchasing agricultural land in the Police Zone. That appears, *inter alia*, in the Counter-Memorial, **III**, pages 319 and 324. That is in the Police Zone, as such. Of course the Court will recall that in the Reserves land is utilized on a communal basis, which is the traditional system obtaining, and which Respondent has not, as yet, changed because the groups appear to prefer it to remain as such.

However, coming back to the Police Zone outside the Reserves, the

fact that no Native has, as yet, purchased any farm or agricultural land there, in Professor Krogh's view, illustrates the following:

"... that they are either not able to afford this land—because the market value is determined by the productive use made thereof by White farmers and they cannot afford this and cannot use that land productively—or even if they can afford it, that they probably will not wish to stay there among these White farmers". (XI, p. 84.)

Thus, in my submission, Mr. President, showing both the economic and the social aspects involved.

Now, Mr. President, that, then, as far as the protection of land rights, which is a very important thing in an agricultural country or territory such as South West Africa, as I have said in our submission, by itself shows the untenability of Applicants' case on the norm and the fact that, if it were to be applied, it would be detrimental to progress of all the groups.

A further aspect in which differentiation is, in our submission, essential—and in the views of the experts called by us—is as regards commercial and employment opportunities. As regards commerce, there are certain facts which are undisputed on the record, to which I should like to refer briefly. Firstly, Mr. President, it appears that between 1952 and 1960 Ovambo traders in Ovamboland were permitted by law to open small businesses without payment of the prescribed licence fee, and without complying with specifications laid down for shop buildings. Since 1960, licence fees are charged for the benefit of the Tribal Fund, but the method of obtaining licences is simpler and less expensive than in the rest of the Territory. That appears in the Counter-Memorial, III, at page 101.

Now, if the Court will recall, Europeans are not allowed into that area at all, except in certain cases, so the Native tradesmen there have a virtual monopoly or, at any rate, these preferential provisions in their favour. Secondly, in the Police Zone, in order to encourage trading by Natives it is the Administration's policy to refuse all applications by European traders to trade in the Reserves, unless no Native is prepared to open a business in an area where there is a need for such a business, or unless the residents of a Reserve request that a particular European be allowed to open a business, which occurred years ago in the Waterberg East Reserve. These facts are set out, Mr. President, in the Counter-Memorial, III, at page 102.

In urban areas, business and trading rights in Native townships have, since 1951, been reserved by law exclusively for Natives. To promote trade in the townships, Native dealers in several urban areas are exempted from observing the ordinary shop hours. Those facts, Mr. President, may be found in the Counter-Memorial, III, at page 102.

Now, Mr. President, the reason for this preferential treatment of the various groups is, in my submission, quite clear. In the words of Professor Logan:

"... if this was thrown open to equal opportunity, all sorts of avaricious entrepreneurs would move into the area, and in a short time the existing system would be a shambles, and the Native traders, who are today able to compete quite well with the permitted White traders in the area, would be totally out of business". (X, p. 373.)

The extent to which the protective measures implemented by the Administration have in fact led to an increased participation by the Native population in commerce, is, in my submission, shown by the facts we have set out in the Counter-Memorial, III, pages 101-103, and which facts are, of course, now admitted. So that, in sum, Mr. President, it would appear again to be a case where it is necessary, in the general interests of the people concerned, to give a certain section certain preferential rights, purely on the basis of group or race, or class or something of that sort. Once again, Mr. President, if one were permitted to leave a group, or if one were entitled to the privileges of another group, the whole system would be rendered nugatory. So, if the test were purely economic ability, as such, then one would never have the opportunity of encouraging the Native businessman, who has risen above the general level, by giving him a chance to rise even higher and to help others up with him.

Now, allied to this topic, Mr. President, is the subject of holding jobs, in which regard Professor Krogh illustrated the general policy in the Territory as follows:

"... there is preference given to the employment of Ovambos in, for instance, jobs available and created in Ovamboland. I have in fact been there quite recently and I have seen that in the field of public administration, jobs are being held and preference is being given to the Ovambo to the extent that these people are available. They are encouraged to hold jobs in the field of public administration. I have also seen them doing skilled jobs connected with development projects that are in progress there on a large scale. I have seen Ovambo contractors making bricks, driving tractors and employed in all sorts of other occupations. I saw a factory there quite recently, at Oshikati, not far from Ondangua, where on the factory floor there were Ovambo skilled and unskilled workers... I should put it, very roughly, at let us say something like 25 or 30 of them working there, and there were only at that time two Whites serving there to demonstrate to them and to manage this particular factory, but on the express understanding by the authorities that as soon as a qualified member of the Ovambo group was able to do this job this would be given to him, even if he were, economically speaking, less qualified than the White manager to do this." (XI, p. 85.)

Again this is a case, in our submission, where it is necessary, in the general well-being, to allot rights on a differential basis as amongst the different groups—in this case in order to uplift the one group which, at present, is still less developed than the other.

Professor Krogh adverted also to the restrictions on job opportunities for non-Whites in the White areas. In this regard, he said:

"I know of this and I can understand why these restrictions operate, but at the same time it is very important to remember that a much wider range of restrictions operates with regard to job opportunities in the non-White areas compared with these few posts in the mining industry and in the supply of public transport." (*Ibid.*)

The justification for these limitations was seen by Professor Krogh in features which he summed up as follows, in the same verbatim:

"I can understand the reason for these restrictions—yes. They are in the interests of protecting those who would otherwise have to face unfair competition from the economically stronger. I can also understand that where this is not the case, even if they were at the same level of economic development, that it is simply a matter of the group insisting upon and wanting these job opportunities not to be occupied by members of the other group—that is wanting preference to be given to the members of its particular group. Such restrictions are therefore for the sake of social peace without which, I cannot over-emphasize, there is little prospect of economic development in the Territory anyway." (*Ibid.*)

So that, in this regard, Professor Krogh emphasized that social peace might require certain measures which, from a purely economic point of view, might otherwise not be justified in the same way.

Although, Mr. President, Applicants did not in their pleadings or cross-examination dispute the necessity or the advisability of special measures to protect and promote the economic advancement of the various Native groups, even if they entailed limitations or deprivations for individuals of European descent, or of the Coloured group or of other Native groups, although they did not appear to dispute the necessity of these measures, nevertheless, they devoted a considerable part of their cross-examination to the job disabilities of Natives in the White areas.

Now, Mr. President, my learned senior, Mr. de Villiers, has dealt with the apparent purpose and effect of Applicants' cross-examination, both generally and also with some reference to the economic aspect. I shall, also, at a later stage, make brief reference thereto. However, at present it will suffice to point out that the Applicants' norm or standards are either applicable or non-applicable. In the way in which they have formulated them, they cannot be applied to some allotments, to the exclusion of others. They are either applicable to any allotment of rights, burdens, privileges, etc., on the basis of class, group or race, rather than on individual qualities, or they are not applicable to any. They have not suggested that there are only some or a certain class or a particular type of allotment—differential allotment—of rights to which they object. So, Mr. President, if the norm were to be applied in South West Africa, for instance, it would not only strike, in the economic sphere, at job limitations of Natives in White areas, it would equally, in my submission, and necessarily, strike also at benefits or privileges which non-Europeans have, as against Europeans. It would equally strike, for instance, at the protection of employment opportunities or commercial opportunities of the non-European population. It would equally strike at the protection of the land rights of the non-European population. So, Mr. President, one cannot, at any rate as my learned friend formulated his case, divide up these various allotments into those that are good and those that are bad, because, as he formulated his case, the norm and standards would strike at all of them, whether good or bad, whether they affected Europeans or non-Europeans, and irrespective of how they affected Europeans or non-Europeans.

Mr. President, the final reason, in the economic sphere, for the necessity of a policy which differentiates between various population groups, is the consideration that there are certain special methods of promotion and improvement, which are necessary as between the various groups.

For example, it would be impossible to secure any improvement in agricultural methods employed by the Natives without regard to their particular backgrounds and needs, and their existing methods, their social and cultural patterns, and so on. The whole process of development proceeds from a different point of departure, and it must therefore follow a different method.

These different methods were described, amongst others, by Mr. Pepler, in **XI**, at pages 211-218, 248-250 and by Professor Logan in **X**, at pages 351-352 and 366-367. I do not want to go into any of these details, Mr. President. The Court will recall how Mr. Pepler described the different methods and problems that they have in encouraging a promotion or an improvement of Native agriculture, as against that of Europeans, and even the different methods that are sometimes required and the knowledge that is necessary for the promotion of the agriculture of various Native groups individually, as distinct from other Native groups. In sum, Professor Krogh said:

“... because your problems are different you will have to have different approaches and you will have to use different measures. You will have to have different policies with regard to the economic development of these particular groups and the areas which they occupy ...”. (**XI**, p. 80.)

The problems are different and therefore the methods must be different.

In conclusion, Mr. President, it must again be emphasized that all these measures, to which I have referred, necessarily involve the allotment of status, rights, obligations and privileges, on the basis of membership in a group, class or race, rather than on the basis of individual quality, potential, etc. For the reasons I have also given, it would be impractical in any of these cases to permit an individual to abandon or to give up his rights or his privileges or his disabilities as a member of a particular group. That would render the whole purpose of the differentiation and of the measure nugatory.

Now, in culmination, Mr. President, the question was asked of the various witnesses in the economic sphere what, in their opinion, the effect would be of abolishing these various differential measures. The replies were the following. First, Professor Logan said:

“Well, I think probably what I have said during the past few minutes has somewhat led up to this: that to remove the controls would result in the domination of many by a few, would perhaps result in the subjugation or almost the obliteration, of some of the existing tribal groups, it would result, I think in many cases, in a reversion to an old way of life and that was a way of violent antagonism and frequently of warfare.

The economy, as it has been developed, both on the European basis, and on the Native basis, would, to a large extent, fall apart. In other words, what I would visualize myself, if all controls were to be abolished in the area and all differentiation between groups ignored, I am afraid a rather chaotic situation would develop.” (**X**, p. 375.)

That is the end of that quotation. I have already referred the Court to Mr. Pepler's view—I have already quoted it and I shall not do so again—that the land rights would inevitably suffer. Professor Krogh said:

"... under the circumstances I have sketched to you, and bearing in mind these diverse social and economic conditions in South West Africa, I have little doubt in saying that it would lead to the rapid deterioration of the material and economic welfare of the majority of the population, and by this I particularly refer to the non-White population groups. I can also see that they would not tolerate this and that this might very well lead to social strife, that would in fact arrest the economic development of South West Africa. The economic development of this Territory is exceptional in Africa, even having grown from a lower base than that of the Republic of South Africa, it has advanced at a rate faster than that of the Republic of South Africa, during the last 40 years during which the latter experienced a phenomenal industrial revolution. Confidence would be lost, economic development and betterment would be arrested as a result of encouraging, as it were, social strife in the Territory. And, I cannot see how the long term basic problems of economic development in South West Africa would thereby be made any easier. In fact, I believe that more problems would be added to its economic development." (XI, p. 86.)

That is the end of that quotation, Mr. President.

Those then are the witnesses who gave evidence specifically on the economic field. I should like also to refer to one opinion of a person who is not an economist, and that is Dr. Eiselen.

Reference has already been made to his evidence by my learned Senior, Mr. Muller, at pages 201-203, *supra*, and, although Dr. Eiselen is not an economist, he possesses, in my submission, such an intimate knowledge of the people and the circumstances in South West Africa that he is clearly competent to express a view on this particular question. It will be recalled, Mr. President, that he was asked for an opinion as to the effect of applying the Applicants' norm and standards in the economic sphere also. His reply was:

"Mr. President, in the case of the economic sphere, it is very difficult to think that anything could result from this except chaos. I have tried to put before the Court information in regard to the state of civilization—the state of advancement—of the various population groups in South West Africa, and to explain that they have not so far responded very well, and that applies particularly to the field of economics where, on the one hand, they have shown great reluctance to depart from their own primitive customs in agriculture and animal husbandry, and where, on the other hand, they have shown no initiative so far in developing commerce and industry in their own areas, but have relied in all these matters upon the initiative of the White people." (X, p. 114.)

That is the end of the quotation. The point to be emphasized is that the witness considered that nothing could result from this except chaos.

Mr. President, turning now to the reaction of Applicants to this evidence—their reaction in the economic sphere followed much the same pattern as that sketched by my learned Senior, Mr. de Villiers, on Monday, which appears, at pages 218-219, *supra*, and Tuesday, which appears, at pages 254-256, *supra*—it followed much the same pattern in that the Applicants, in my submission, did not attempt to break down the witnesses' testimony nor to establish positively that a differential allotment of rights, burdens, etc., indeed necessarily gave rise to undesirable con-

sequences or, on the other hand, that the abolition of such differential allotment would necessarily, as a fact, promote well-being. Instead, as in the political aspect to which my learned Senior referred on Tuesday, Applicants limited themselves to criticizing certain restricted aspects of Respondent's policy, frequently without any apparent relationship to the content of the norm or standard. Their emphasis fell, as in other aspects, on the detriment which could conceivably be suffered by a particular individual in particular circumstances. I do not want to give a list of them all; I may give some examples—for instance, Professor Logan was cross-examined on the question whether the Territory as a whole is economically interdependent and the probable effects if the various parts of the Territory, or the various groups, were so to speak cut off into watertight compartments.

Now, if I may just comment, Mr. President, assuming that it would be indeed impossible to do that, how does it assist my learned friend in his case? That still does not show that any allotment must be wrong, any differential allotment on the basis of group, race, etc. It merely shows that a particular division, taking it to a particular extreme, which is in any event not contemplated, might, or could be, a bad thing, but that does not show in any way that the norm could operate fully in South West Africa, or that any allotment on a differential basis must necessarily be a bad thing.

Similarly, Mr. President, there was a cross-examination of Professor Logan on the future political rights of Natives in the White areas. That is in X, at pages 392-396, on the question whether there is population pressure on the land in Ovamboland—pages 406-410, and so on. There again, of course, if population pressure exists, or if it does not exist, I do not see, with respect, what bearing that has on the existence of the norm.

Professor Krogh was cross-examined on methods of communication between the various groups—that is in XI, at pages 87-90; the reason why there is a lack of enterprise in a commercial sense, or economic sense, amongst the Natives and how that could be remedied—XI, at pages 91-96; job reservation policies—a lot of emphasis was placed on that—at pages 107-139, and so on. I do not want to go into all the details, Mr. President.

For reasons which my learned Senior, Mr. de Villiers, dealt with, I shall not go into the details of this cross-examination which might well be clarified in due course when Applicants comment on the evidence. However, Mr. President, I would again emphasize and repeat that the question whether or not particular measures can, or cannot, be justified on the basis of economic or moral or other unformulated criteria, was not canvassed by us and cannot, it is submitted with respect, be passed upon by the Court. There was never any attempt on our part to discuss the economic or the social or the moral merits of each and every detailed provision which has been referred to in this Court. It would indeed, in my submission, as my learned friend, Mr. de Villiers, pointed out, have been an emphatically long task to attempt to do that. One would never reach the end of it and, in my submission, that applies *a fortiori* to the issue whether and to what extent individuals are, or may be, harmed by these particular measures—an issue which falls within an even smaller compass. There are two issues there, Mr. President, first whether the provision as a whole, as it stands, may be justified on the basis of some economic or other criterion, and then there is the further question of how

an individual is affected. That is an even smaller issue, which of course would form a part of the wider issue of the justifiability of the provision itself, but in itself it forms an even smaller enquiry—a more limited enquiry.

If I may illustrate these submissions we have put before the Court, with an example, I refer to the provisions of the Mining Proclamation, to which a great deal of attention has been devoted in these proceedings and which, as the Court will recall, provides certain restrictions as to jobs which may be held by Natives in mines owned by Europeans. Now, Mr. President, if one were to test this measure on the basis suggested by my learned friend, on the basis of the norm as defined at page 493, of the Reply, IV, then the problem is not a difficult one because then one would merely look and see if there is an allotment of rights, burdens, privileges, and if the basis of such allotment is membership in a group irrespective of individual quality? However, Mr. President, if one were to go beyond that and if one were to test it on the basis of other criteria such as, for instance, economic advisability or social advisability, then the problem becomes much more difficult and, in my submission, virtually insuperable. First, if one were to look purely at economic criteria with which we are, at this stage of the argument, concerned, then one may look, in the first instance, at the immediate economic implications of such a provision and one may ask oneself if the effect of this measure is to keep wages higher? Is the effect of this measure to keep more efficient workers out of jobs which are at present being filled by less efficient workers? These would be economic factors which might bear on the economic justifiability of the measure and if one were to go into this, then, of course, one would have to have evidence about this. One would have to canvass these various things. One would, for instance, find out whether, as a fact, wages are being increased by such a measure. One would look and see how wages are determined in these various occupations. Possibly one could have evidence of persons in the mining industry itself, or persons associated with the mining industry, to tell the Court how wages are determined in the industry and they could possibly express an opinion as to what extent, and in what manner, these wages would be affected if these provisions were not there.

One would also have to have evidence as to how many other persons, that is persons who are at present debarred or not permitted, would, in fact, be available. What practical effect would it have on wages? Would it have any economic effect or not?

One would also have to see whether these persons are better qualified; would they, if they were appointed, make the industry a more efficient one from an economic point of view, or would they not? These are all matters to which one would have to give attention, and if they are not at present better qualified, could one make them better qualified, could one train them? If so, how much would it cost to train them? What would be the pros and cons; would it be cheaper, or more efficient, to employ an existing trained European; would it be more efficient economically to dismiss the trained European and to train a non-European who might be prepared to work at a lower wage? These things would have to be investigated, and such evidence might, in my submission, show that the measure has no undesirable economic consequences, or it might show that it has undesirable economic consequences, and if so, it would show what the extent of the undesirable economic consequences is.

If one takes it a step further, and one has regard also to wider economic or socio-economic or social considerations, one would have to investigate whether it would not, from this wider point of view, be necessary to have these measures, whether they do not balance or outweigh the immediate economic disadvantage which the previous enquiry to which I have referred might have shown to exist. So, for instance, one could conceivably lead evidence from persons in the mining industry, or persons with knowledge of the mining industry or in contact therewith as to the probable effect of lifting these restrictions—what would happen to the present incumbents, would they lose their occupations, would they be forced to take a lower wage; if they were to lose their occupations, are there other occupations available for them; would they require training, to what extent would this create social problems, or would it not create social problems; how many of them are they, and so on? One would also have to look at the industry as a whole. Would a lifting of this sort be conducive to labour peace, or to labour unrest? If it were to lead to labour unrest, what would be the implications socially, economically? One may have a purely economic disadvantage in the sense of a strike or destruction of property, things of that sort, which would mean a loss economically, apart from the social implications thereof. What would be the probable effect of that, if any? These things would have, in my submission, to be investigated. The latter aspect was briefly touched upon by Professor Krogh, the Court will recall, in XI, at pages 109-110, where he referred, amongst other things, to a 1922 labour unrest on the Witwatersrand which led to considerable destruction of property and even, I think, bloodshed. Also one would have to investigate the availability of necessary skilled European operators if such a provision were not there. In other words, if there were no such provision, would one get the workers; would the Europeans make themselves available? If not, would there be sufficient non-Europeans to do the job?

These things would have arisen had one had regard to economic criteria or social criteria or socio-economic criteria in assessing the merits of any particular measure such as that, and, in addition, one would also have had to investigate the credit side, if I may put it that way; in other words, what benefit would actually have accrued if one had lifted these measures? One would have had to see whether there is, in fact, at present an uneconomic utilization of Native labour in the sense that qualified people are unemployed, or in the sense that qualified people are employed at a lower level than their qualifications would permit—that would have had to be investigated—in other words, to see whether there is, in fact, a real problem, or a real defect.

Indeed, Mr. President, you will recall that there has been considerable evidence that there is, in fact, an unsatisfied demand for educated or trained Natives as it is; that there is, as a fact, not a surplus of trained Natives or an underemployment of trained Natives; but if the question had to be argued on a purely economic or social basis, then one would have had to go into that more deeply. One could possibly call officials of the Department of Labour, or people of that sort, and one would have had to see what the position was in other branches of industry—for instance, in the fishing industry, where these restrictions do not apply. Are there adequate opportunities, and so on? What would be the remedy if there were persons underemployed or unemployed; are there enough openings, where should one create them, and so on?

If one were to take the argument a step further, assuming that after the enquiry I have postulated it appeared that from a financial or economic point of view these measures were undoubtedly detrimental, that they had a detrimental effect on the economy of the country seen in isolation, then the further question would arise whether this detrimental effect is not part of the price which has to be paid for a peaceful pattern of race relations in a territory where all progress depends on racial peace. This issue would then have required an assessment of the measure in question in the whole context of the policies applied in the Territory as a whole, because even from an economic point of view, of course, one can have no progress in the absence of a relative state of peace anyway.

So that, then, in broad outline is the type of enquiry on which one would have had to embark if this Court would have been required to decide whether a particular measure is or is not a sound one from an economic point of view or from a social point of view, and if one were to embark on such an enquiry, one would, I take it, or one could in theory, in many cases reach the situation where a particular measure has certain pros and certain cons; there are certain things to be said in favour of it, and there are certain things to be said against it. How would the Court, in the ultimate result, measure the over-all effect? What criterion would the Court apply in deciding that a particular measure is on the whole a good one or a bad one? In my submission, no criterion for that sort of enquiry has been suggested, certainly not by my learned friends' case as it now stands, and consequently no such enquiry was essayed by us.

As my learned Senior, Mr. de Villiers, also indicated in another context, I may add that the same type of investigation would have been necessary if the Applicants had kept to their original case based on oppression; then one might very well have had to go into this sort of thing, but then only as a method, of course, in testing the Mandatory's state of mind. Then the question would not have been whether the measure is sound or is not sound as measured against some standard of economics or social science; then the question would have been whether the measure is such that an inference as to state of mind may be drawn from it. A final purpose for which the investigation would have been conducted would have been a different one, but the type of investigation would have been much the same.

However, this of course we have not met now, Applicants have not made this case any more, and the sole issue with which we dealt, was whether there exists this absolute rule which *per se* prohibits any allotment of status, rights, etc., on the basis of membership in a group rather than on individual qualities. And the immediate question with which I dealt specifically, is whether the application of such a rule would or would not, in fact, promote well-being and progress in the economic field, including the field, of course, of employment opportunities, and to this question, it is submitted, the Applicants did not advert in their cross-examination at all. In the result my submission is that the views of our experts, fully supported by the admitted facts of record, stand completely unchallenged.

Therefore, in conclusion, I submit that, for the reasons I have dealt with, the Court will hold that the application of a norm or standards as defined at page 493, IV, of the Reply to the economic life of the Territory would be incompatible with the well-being and progress of all the inhabitants, including, in particular, the Native inhabitants, and since this is

the final aspect under Article 2 (2) I may recall to the Court that this was also the conclusion which was reached in respect of the situation in other fields of the Territory's life—that is, in the general life of the Territory and also in respect of each of the various aspects, such as the political aspects and the educational aspect and so on.

Mr. President, this then also virtually completes our argument on Article 2, paragraph 2, of the Mandate. Some concluding remarks will still be made on the whole of the case, including Article 2, paragraph 2, but this will, with the Court's leave, follow after we have also dealt with the remaining submissions of the Applicants, that is, those submissions relating to militarization and to unilateral incorporation, with which we shall deal very briefly. However, as far as the merits are concerned, this then concludes our treatment of Article 2 and we have, it is submitted, shown firstly that the United Nations organs on which my learned friend relied have not purported to and have not, in fact, created any norm or standards of the content on which he relied. We have also, in my submission, shown that no such norm is generally applied in the practice of States, and we have also demonstrated, in my submission, that the application of such a norm to South West Africa would be incompatible with well-being and progress. In the process of this last demonstration we provided further evidence, it is submitted, of the unreliability of the petitioners on whose testimony the norm or standards on which my learned friend relies, to such a large extent ultimately depend.

If the Court will permit me, Mr. President, I shall then pass over to the question of militarization, which is the next topic with which we shall deal briefly, and in respect of which complaints were made against us.

The PRESIDENT: Please do.

Mr. GROSSKOPF: Now, Mr. President, the Court will recall that the military clause in the Mandate is Article 4, which reads as follows:

"The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory."

In the Oral Proceedings the Applicants did not devote any great attention to their charges under militarization, and it will accordingly also not be necessary for us to deal with the matter in any great detail. However, in view of the fact that the Applicants have at various stages in these proceedings made serious allegations of violations of Article 4 of the Mandate, and in view of the fact that similar and even more serious accusations are still persistently levelled against Respondent elsewhere, we cannot ignore this topic completely. We shall therefore deal with it fairly briefly.

To see the matter in its whole perspective it is, in my submission, necessary to trace in broad outline the dispute as it emerged in the pleadings. In the Memorials, the Court will recall, the Applicants' case was summarized as follows, and I quote from the Memorials, I, page 181:

"The Applicant has not been able to make an independent verification of the existence or nonexistence of 'bases' or 'fortifications' in the Territory, but on the basis of statements contained in the 'Report of the Committee on South West Africa' for the years 1959 and 1960, it alleges upon information and belief that the Union maintains three 'military bases' within the Territory."

Now these three military bases were alleged to be the following:

Firstly, the supply and maintenance facilities of Regiment Windhoek, together with the vehicles and material of the Regiment itself. That appears in the same volume of the Memorials, I, at pages 181-182 and pages 182-183. Secondly, an alleged military landing field at Swakopmund. That appears at pages 182-183. And thirdly, a military camp and/or military airfield at Ohopoho in the Kaokoveld. That appears on the same pages.

These were the three military bases which, in the Memorials, Applicants alleged had been established in the Territory. The basis upon which these installations, or alleged installations, were contended to constitute military bases, was defined as follows, at page 181, I:

“Armed installations not related to police protection or internal security fall within the class of ‘military bases’ or ‘fortifications’ and are therefore prohibited by Article 4 of the Mandate.”

That was the criterion which was suggested—“armed installations” which do not relate to “police protection or internal security”—that was the test. In accordance with this statement the three alleged military bases were said to be such because (and I quote from p. 182): “its purpose is not police protection or internal security.” Now, as I submit we demonstrated, Mr. President, this, of course, is not a tenable basis for deciding whether a particular installation is a military base or not. The fact that an installation is, or is not, related to police protection or internal security certainly, in our submission, cannot ordinarily be a reason for deciding whether it is a military base or not—the two enquiries seem to be entirely different ones. As, in our submission, we showed in the Counter-Memorial, this whole test was devised because of an artificial and fallacious interpretation of the military clause itself in so far as it dealt with the training of persons. The criterion used for training of persons was applied to the other question, namely whether a facility was a military base or not. And we dealt with these arguments in the Counter-Memorial, IV, at pages 47-63.

Firstly, Mr. President, we considered what was to be regarded as understood by the expression “military bases” as used in Article 4 of the Mandate. For this purpose we provided an analysis of the wording of the Mandate and of Article 22 of the Covenant, a survey of the drafting history of these provisions, and we further referred to standard dictionaries and to practice during the League period. After these various things had been considered, we concluded, at page 50, IV:

“Consequently, failing the *purpose of utilization for operations or a campaign, actual or prospective, by a force or an army*, a place cannot be said to be maintained as a military or naval base.”

That was the criterion which we suggested, namely the purpose of utilization for operations or a campaign, actual or prospective, and it may be noted in passing that General Marshall who was called as a witness by us, said in cross-examination that this formula constitutes: “an acceptable definition”. That was in XI, at page 589, and later at page 596 he called it “a fair definition”. At this stage, Mr. President, I may just say that General Marshall’s expertise is set out in XI, at pages 574-576, and it is submitted that he is eminently qualified to express opinions on military matters. In fact, Applicants conceded that

he is "indeed a recognized military authority and widely read as such in our native country". This appears in **XI**, at page 587.

Now, Mr. President, Applicants' reaction to our Counter-Memorial and our submissions as to what constitutes a military base, and the application thereof to the facts, can, in my submission, best be dealt with in relation to each of the three alleged military bases separately, since different considerations arise in respect of each. Consequently, I shall first deal with Regiment Windhoek.

This was dealt with in the Counter-Memorial, **IV**, pages 54-57. There we set out the two facts showing that the only purpose of the Regiment is to provide training facilities for European civilians in the Territory who are required to undergo a few weeks' military training per year for a period of three years for the purpose of defence of the Territory, and, in our submission, this could not possibly constitute a military base. Evidence to the same effect was given by General Marshall in **XI**, at pages 580-582 and 593-597, where he also confirmed that that particular institution was no military base.

Faced with these facts, Mr. President, the Applicants would not concede that the information and belief on which they had relied in the Memorials for their charges, had been incorrect. That they would not concede, but they sought to justify their previous attitude, which, in view of the change which had occurred in the facts, or in view of the true facts, in our submission, was no longer tenable, with a number of what we submit to be *ex post facto* rationalizations. It is, with respect, not necessary to analyse all the arguments used in the Reply, it is sufficient to note that they raised rather extreme and unlikely suggestions. One was, for instance, that only Natives could legitimately be trained "for purposes of internal police and the local defence of the territory". That they tried to justify on an interpretation of Article 4, at page 567, **IV**, of the Reply.

Another contention of theirs was that Article 4 would be contravened unless Respondent could say "that there [is] not in the entire territory a single soldier or sailor on the active list". This is from the Reply, **IV**, at page 559.

There were also similar arguments, Mr. President, which we dealt with in our pleadings, in the Rejoinder, and I shall not analyse them in detail here, but if the Court wishes it can have regard to our written pleadings on this point.

Specifically, as regards Regiment Windhoek, the Applicants said in the Reply, **IV**, at page 558:

"... the growth of Regiment Windhoek in its several forms since 1946, its incorporation as 'an integral part of the South African Defence Forces', its establishment as part of the South West Africa Command of the defence establishment of the Republic of South Africa, and its corresponding place in the Republic's administrative hierarchy and chain of command, constitute a violation of Article 4 of the Mandate".

These points were dealt with in the Rejoinder, **VI**, pages 369-376. I do not wish to repeat our arguments here, Mr. President. In our submission, the Applicants' contentions were so far-fetched and fallacious that they hardly needed refutation. However, the Court may, with respect, have regard or may refer to our pleadings for our more specific

answers to these various contentions. What I do want to say now is that it will, of course, also be evident that the reasons given in the Reply as to why this Regiment Windhoek was allegedly a military base were entirely different from those which had appeared originally in the Memorials. No longer was it the test, as in the Memorials; now entirely different criteria are suggested.

I now turn to the alleged military landing ground in Swakopmund. In the Counter-Memorial we showed that the landing ground in question was not situated in Swakopmund at all, but in Walvis Bay, which is not a part of the Territory of South West Africa, but is a part of the Cape Province of the Republic of South Africa. That was in the Counter-Memorial, IV, pages 57-58. So that the whole basis on which the charge had been brought, fell away. There was no landing ground in South West Africa at all; the landing ground was on territory of the Republic of South Africa itself. However, instead of leaving it there and admitting that the information and belief on which the charge had been brought had turned out to be erroneous, Applicants contended in the Reply, IV, at page 560:

"... [that] Walvis Bay must, in a military sense, be considered to be 'in' South West Africa, inasmuch as it is completely surrounded by territory subject to the Mandate and necessarily depends thereon for essential services, transport, communications and supplies, including water".

So that no longer is it, in fact, in South West Africa, it is only in a military sense in South West Africa. These contentions, Mr. President, we dealt with in the Rejoinder, VI, pages 374-376, where we demonstrated, it is submitted, that they were neither factually correct nor legally tenable, so that, in fact, Walvis Bay is, for instance, not completely surrounded by territory subject to the Mandate, and in any event, we submitted that legally this argument is untenable.

Now, the only further reference to this line of argument came during the cross-examination of General Marshall, when he was asked whether planes on military missions from Walvis Bay ever overflew South West Africa. The General said that he had no knowledge thereof. That was in XI, at pages 595-596. My learned friend then asked, at page 596 of the same record:

"As a military analyst could you say whether, on the basis of your own visit to Walvis Bay, planes taking off from the airfield there would have to either fly over the water or over South West Africa?"

With respect, Mr. President, the answer to this question becomes clear even to a non-military analyst who had only seen a map of the Territory, but in my submission the relevance of the question is not as readily apparent as the answer to the question.

[Public hearing of 5 November 1965]

Mr. President, at the conclusion I was dealing with the topic of militarization, and as I pointed out yesterday the Applicants' original case in this regard was based on the alleged existence of three military bases—that is, the Regiment Windhoek, an alleged airfield at Swakopmund and a military camp and/or a military airfield at Ohopoho. Their

reason in the Memorials for saying that these installations were military bases was that their purpose was not police protection and internal security. We dealt with the facts and with the law in our Counter-Memorial, and thereafter Applicants changed the basis of their case.

In regard to the Regiment Windhoek they now advanced entirely different criteria for saying that the facilities constituted a military base, criteria which we submit to be entirely irrelevant to the issue. In regard to the alleged airfield at Swakopmund, the Court will recall, this turned out to be in fact in Walvis Bay, and Applicants thereafter changed their attitude to say that although this airfield was in a geographical sense not within the Territory, nevertheless in a military sense it was so within the Territory. This contention also we submitted to be entirely untenable. In both cases, however, which was the point we really sought to make, Applicants still insisted that the facilities were in fact military bases, although for different reasons from those which they had advanced in the Memorials. The same applies to the alleged military camp and/or military airfield at Ohopoho, to which I shall now turn.

The nature of these facilities was described in the Counter-Memorial, IV, at pages 59-61, and was again described by General Marshall in his evidence, which is recorded at XI, pages 577-580. The Court will recall that he said at XI, page 579: ". . . in my judgment, any plane that can land in that field could also put down safely in the Bush". He was asked at the same page: "Were there any indications that there had ever been a military base at Ohopoho?", and his reply was: "No, Mr. President. There were no indications whatever." This statement was not challenged in any way in cross-examination.

In their Reply, IV, at pages 561-562, the Applicants were reduced to arguing that the strip at Ohopoho, in common with similar strips in other parts of the Territory, were military bases because, so they said, they were used at intermittent intervals for the training of air force personnel for purposes of defence, for purposes of internal security and rescue operations, and because they could in future be used for military purposes; that was an aspect on which they also relied, and which indeed they emphasized—that these installations, although possibly not at the moment used for military purposes except in a very unnatural, strained sense, could be so used in the future, and this latter argument was taken to what we submit to be its ultimate absurdity during the cross-examination of General Marshall. He was asked:

"Would you describe, Sir, on the basis of your military expertise, in a very general way, to the Court, as briefly as possible, the nature of the current military technology with respect to helicopters or other methods of vertical envelopment." (XI, p. 592.)

His reply was:

"In the simplest terms, Mr. President, if you have a piece of flat ground anywhere on earth, this can be made a military base if you want to strain the meaning of the term, because you can put a helicopter down on a pad of that size and it can fight from that ground, so there would be scarcely a bit of South West Africa that could not be thought of as a military base if one wants to argue that point of view. Almost any piece of ground there will accommodate a helicopter." (*Ibid.*)

Apparently the suggestion that because one can put a helicopter down on a particular airfield, whatever the nature of the airfield, in some way bears on the question whether it is a military base or not.

In the Reply Applicants also contended that lack of supervision over the Territory in some way affected the nature of these various installations—that was at page 562, IV. However, since this is the only argument which is still relied upon by Applicants, or at any rate the only one which they advanced during the Oral Proceedings, I shall come to that at a somewhat later stage. In the Reply also, possibly because Applicants realized the weakness of their case on military bases, they introduced a new omnibus charge relating to military activity in general—that was at pages 562-563, IV. In this they referred to "Respondent's ever-increasing military activity in the Territory" (p. 562). In passing it may be noted that this charge was in the Reply based entirely on certain resolutions of the General Assembly of the United Nations which in turn were based on information derived from petitioners—that appears in the Reply, IV, pages 562-563. It is, in my submission, not necessary to refer to these detailed allegations which were, in our submission, as untenable as, or more so than, the original complaints in the Memorials which had also, as the Court will recall, been based on what was said to be information and belief, and we dealt with this whole topic in the Rejoinder, VI, pages 379-381, where, in my submission, we showed the untenability thereof. On this general aspect General Marshall also gave evidence, and he said, at XI, page 587: "... The Territory is less militarized and more under-armed than any territory of its size I have ever seen in the world." Also this statement was not contested in cross-examination. Indeed, my learned friend, Mr. Gross, referred in general at XI, page 590 to the "first-hand, authentic and undoubtedly correct factual statement" of what the witness had seen as a result of his inspection, so that there was no attack upon the correctness or the authenticity of the statements which General Marshall made.

That is where the matter ends, but I should like to point out that this again underlines the complete unreliability of the petitioners, and also the extent to which they have misled not only certain organs of the United Nations but also apparently Applicants themselves. This process, as we have shown, still continues. The Court will recall that Mr. Van Rooyen, my learned friend, dealt with this last Wednesday at pages 124-127, *supra*, where he gave some examples of the wild allegations that were made, *inter alia*, with reference to allegations regarding a certain alleged atomic testing centre, which turned out to be completely untrue.

Those, then, were the complaints in the pleadings, and I shall now advert to what was said in the Oral Proceedings. In the opening argument, that is in the verbatim record of 18 March, at VIII, page 135, Applicants' Agent said:

"Now I turn very briefly, Mr. President, with your permission, to the asserted violations of Article 4 . . . of the Mandate. The Applicants will deal at the later, if I may call it, fact stage of these proceedings, with the issues presented by Respondent's asserted violations of Article 4 of the Mandate, the so-called 'military clause' . . . It does appear pertinent, however, at this legal stage of these proceedings to note that the controversy placed before the Court with respect to factual issues involved in the so-called 'military

clause' of Article 4, are before the Court as a result of the lack, or default, of administrative supervisory authority, which would be in a position to ascertain the true state of affairs . . .

The facts asserted by the Applicants with respect to this matter must, under the circumstances, be asserted on what would be called, in jurisdictions with which I am familiar, information and belief."

It appears from that at that stage the Applicants still asserted certain facts on the basis of information and belief, which facts had been controverted by Respondent in the pleadings, and that they intended to deal with this controversy at the so-called "fact stage" of the proceedings; there then was, in the way in which they saw the matter, still a factual dispute which had to be dealt with at some later stage.

During Applicants' oral reply on the legal aspects they once more came to deal with this question of militarization. However, that was after they had already generally admitted all averments of fact in our pleadings, so then, when they dealt with it at that stage, they had already previously generally admitted all the facts which were in dispute, and all the facts in Respondent's pleadings. This was specifically repeated by Applicants in direct relation to the question of militarization in the verbatim record of 12 May, at **IX**, page 235, when they referred to—

" . . . the facts with respect . . . to militarization . . . , as disputed by the Respondent, and as subsequently accepted by the Applicants for purposes of these proceedings"

It is consequently clear, in our submission, that whereas the Applicants originally indicated that they were going to deal with the issues regarding militarization "at the later fact stage of these proceedings", there ultimately did not remain any issue of fact to be dealt with, and apparently for this reason Applicants disposed of the whole issue in their oral reply to Respondent's legal argument in a short passage which the Court may find in the verbatim record at **IX**, pages 234-237—that was on 12 May. Since this is now the point which they defended before this Court it does, in my submission, call for close scrutiny.

They do not at those pages deal with complaints regarding militarization as a substantive submission standing on its own any more. They couple it with the argument that administrative supervision is a necessity if the Mandate is to survive at all. In other words, they couple it to the argument regarding Article 6 of the Mandate. They deal with it with the context of the necessity which they claim to exist for a continued existence of supervision, and they do so after referring to certain aspects of necessity which they said existed, which we have already dealt with in our legal argument, and thereafter they then said, at **IX**, page 235 of that same record:

" . . . identical considerations with respect to the scope and importance of administrative supervision underlie the Applicants' 5th and 6th Submissions which relate, respectively, to the Respondent's asserted violation of the international status of the Territory and to the establishment of military bases therein. I refer the Court to the submissions set forth in the Memorials, **I**, at page 198.

It is regarded . . . by the Applicants, as appropriate to consider and dispose of these submissions at this stage in the context of the requirement of administrative supervision which the Applicants contend as a matter of law must exist so long as the Mandate itself

endures, because . . . the necessity for continuing administrative supervision is highlighted by considerations which relate to these Submissions 5 and 6."

In this context then, they wish to dispose of the submissions. On the next page they stated that:

" . . . the failure of administrative supervision, the absence of effective consultation and information . . . transcend, although they include, the Applicants' request for a favourable determination on their 6th Submission . . ." (IX, p. 236.)

Finally, on the same page of that record they refer to:

" . . . the Applicants' contention to the effect that the absence of administrative supervision in the case of doubt concerning the nature of an installation resolves such doubt against the mandatory".

I would emphasize, Mr. President, that their contention is that the absence of administrative supervision in the case of doubt concerning the nature of an installation resolves such doubt against the Mandatory.

Now, from all this, in my submission, it becomes clear that Applicants in the Oral Proceedings advanced only one central theme regarding Submission 6. Their theme is that the Court should find in favour of Applicants, and against Respondent, because Respondent has not submitted to administrative supervision by the General Assembly of the United Nations. This seems to be the only case which they presented to the Court during the Oral Proceedings. The facts which they admitted to be true are apparently all relegated to the background and are not even referred to. As a matter of fact, they refer to Regiment Windhoek and to Respondent's statement in the Rejoinder, VI, page 370 that:

"The issue turns on the question whether the complex of what has been established and what is being done at the establishment constitutes a military base." (IX, p. 237.)

Now, Applicants refer to this statement which we made, but in regard thereto all that they say is the following, and I quote from the same verbatim record at the same page:

"Mr. President, it is not the purpose of these references to enquire into the accuracy of the information, to weigh and evaluate its significance, to consider its merits in any respect . . ."

And, Mr. President, I may add that this is the sole specific reference in the whole of the Oral Proceedings to any of the earlier alleged military bases.

Now, if one were to apply this test which is now propounded by the Applicants, namely that lack of supervision resolves any doubt as to the nature of an installation against the Mandatory, the question immediately arises, what possible doubt could there be concerning the nature of any installation after Applicants had admitted as true all Respondent's statements of fact? Once they admit all our facts, what doubt could there be? In our submission, Mr. President, there could not be any doubt whatever. What then must one understand of this contention? What do the Applicants intend to convey? What effect could the lack of supervision have on the question whether or not a particular installation is a military base? Let us analyse this question with reference to the three alleged military bases: for instance, first, if one has regard to Regiment Windhoek—would these facilities which

have been described in the pleadings and are admitted, which have been described by General Marshall and not contested, and in fact also admitted, constitute a military base while there is no supervision, and cease being a military base once supervision is established?

Secondly, Mr. President, if one has regard to the airfield at Walvis Bay—would that airfield become a part of the Territory, would it be included within the Territory when there is no supervision, and move out of the Territory again when supervision is established?

Thirdly, if one has regard to the rudimentary, primitive landing strips at Ohopoho and other places, to which we referred in the pleadings and which General Marshall described so graphically to the Court, would they change their essential character merely by reason of the existence or non-existence of supervision? The answer to these questions, Mr. President, must clearly be in the negative, in our submission.

However, Mr. President, this argument may be taken a step further. In the Memorials, Applicants' Submission 6 as it was then formulated read as follows:

"the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory;" (I, p. 198).

In the Reply, the submission was, without any amendment, reaffirmed and incorporated by reference, and that one finds at page 588, IV, of the Reply.

At the conclusion of the Applicants' case this submission was reformulated (this was the position, of course, with certain others) and it now reads:

"Respondent has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to remove all such military bases from within the Territory; and that Respondent has the duty to refrain from the establishment of military bases within the Territory;" (IX, p. 375).

The Court will see that the reference to the acts described in Chapter VII of the Memorials has fallen away. Now, this amendment was probably regarded as necessary because the Applicants' case had meanwhile been widened beyond what it had been in the Memorials by including this omnibus allegation of military activities in general. However, Mr. President, be that as it may, that is not the point which I want to make really. The point which I do want to make is that the Applicants still ask for an order declaring "... that Respondent forthwith has the duty to remove all such military bases from within the Territory".

Now, Mr. President, what is Respondent to remove? Should Respondent now remove these admitted facilities which are either non-military or are outside the Territory? In our submission, no answer at all is provided to these questions, and indeed the matter goes further than that. In the Oral Proceedings Applicants also said:

"The techniques and logistics of military science in 1965 are such

that the Territory could effectively be militarized in two or three days, or a shorter time than that." (IX, p. 235.)

This line was also pursued in the cross-examination of General Marshall at XI, page 592 and the following pages.

Now, if we understand that correctly, the implication would appear to be that Respondent must be deemed to be guilty of a violation of Article 4 by reason of a combination between lack of supervision on the one hand and the technical ability to militarize the Territory within a short time. In other words, because there is no supervision, and because it is technically possible to militarize the Territory in a very short space of time, therefore Respondent must be guilty of a contravention of the military clause. That, as we understand it, seems to be the argument. Now, Mr. President, this may or may not be an argument in favour of the necessity of supervision; that is another matter with which I am not dealing at present. It may be said that supervision would be necessary, or desirable, because there is this technical ability to militarize the Territory, but this feature could hardly show that there is any reason for holding that Respondent (and I quote from the submission) "has established military bases". And, furthermore, it can hardly show that Respondent has the duty "to remove all such bases". How, Mr. President, does one remove a base which *ex hypothesi* is going to be established, if at all, only in the future? The Court will recall that I dealt with a similar argument regarding airstrips where the suggestion was also made that these airstrips, whatever their purpose and nature might be at present, might in the future be converted for military use. That is a similar argument relating specifically to airstrips, and that I have already dealt with, and I gave references in the Rejoinder.

Now, for all these reasons, Mr. President, we submit that Applicants' Submission No. 6 has very plainly been shown to be without any substance whatsoever, and we ask the Court that it should be dismissed.

Thank you, Mr. President. With the Court's leave my learned senior, Mr. de Villiers, will now continue Respondent's address.

33. ADDRESS BY MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARING OF 5 NOVEMBER 1965

Mr. President, honourable Members of the Court, I should like to begin by correcting a statement of fact which I made to the Court on Tuesday. I referred to the Van Zyl Commission of 1936, also known as the Constitution Commission, and said that it had consisted of three judges. That was unfortunately wrong—the actual composition was two judges and an economist. The reference is to page 242, *supra*, of the record of Tuesday, 2 November. I apologize for the slip in my memory.

I propose to deal now, Mr. President, with the Applicants' Submission No. 5 very briefly, and thereafter their Submission No. 9—No. 5 relating to incorporation and No. 9 to unilateral amendment of the mandate instrument.

The course of events in regard to these two submissions of the Applicants, Mr. President, was very much similar to that in regard to militarization, which has just been dealt with by my learned friend, Mr. Grosskopf. In both instances we find also that there was, during the pleadings stage, a gradual amendment or change of the grounds upon which the Applicants relied in support of their submissions, until eventually, when we came to the Oral Proceedings stage and to the close of the Applicants' case in that respect, nothing remained of the original grounds of the pleadings and there was substituted a completely new ground in each case. And the measure of agreement does not stop there, because this new ground relied upon in the Oral Proceedings was indeed exactly the same in both these cases as it was in the case of militarization. It was reliance upon the proposition that failure, on the Respondent's part, to submit to international supervision or to the supervision of the General Assembly of the United Nations, constituted not only a violation of the Respondent's obligations under Article 6 of the Mandate, but also a violation of the Respondent's obligations in these particular respects.

In these circumstances, Mr. President, it is unnecessary for me to take up the time of the Court with a detailed examination of what went in the pleadings. I shall deal with that briefly, in order to indicate that the Applicants were forced into this new ground—into this shift of ground—which brought them to this rather desperate contention at the Oral Proceedings stage; and then I shall deal very briefly with their contention in each case.

Starting, then, with Submission No. 5, incorporation: the change in the Applicants' case to which I have referred, is marked immediately by a comparison of the formal submission, as originally contained in the Memorials, with the submission in its final and amended form, as put to the Court on 19 May. In the Memorials the submission read as follows:

“the Union, by word and by action, in the respects set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the

Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the actions summarized in Section C of Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the Territory;" (I, p. 198).

Mr. President, a feature of this submission is that the word and the action complained of are identified; it is identified "in the respects set forth in Chapter VIII of this Memorial"; and again, when there is reference to a duty to cease particular actions, the actions are identified as those "summarized in Section C of Chapter VIII" therein. Reference to Section C of that chapter in the Memorials, Mr. President, will reveal that the actions fell under four headings, as there summarized. One related to a matter of citizenship; another related to a matter of representation in the Union Parliament, as it then was, now the Republican Parliament; another related to the case of separate administration of the Eastern Caprivi, and the fourth related to certain matters pertaining to administration in regard to the Native Trust and to Native affairs generally. Those were the four actions listed, which had been dealt with earlier in that chapter in purported support of this submission. I may say that the submission was reaffirmed, or incorporated by reference, in the Reply, IV, at page 588, without any change.

Then at the conclusion of the Applicants' case on 19 May the reformulation read as follows:

"Respondent, by word and by action, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of Respondent's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to cease such actions, and to refrain from similar actions in the future; and that Respondent has the duty to accord full faith and respect to the international status of the Territory;"

That is at IX, pages 374-375 of the verbatim record of 19 May, Mr. President.

Immediately it will be apparent that the two features of the first submission, to which I referred before, have fallen away. There is now no longer any identification of the word or the action complained of, and there is no identification of the actions from which Respondent has the duty to refrain in future.

Now, Mr. President, let us look briefly into what happened in the pleadings. The Applicants started off in the Memorials by construing a legal prohibition against "unilateral annexation or other unilateral processes of incorporation": we find that in the Memorials, at I, page 184. They then stated that "incorporation or annexation can take place through . . . gradual and erosive processes": that is at page 185. And it then became apparent that under this Submission No. 3 the Applicants were bringing a charge, a charge of fact, against the Respondent, namely one of piece-meal incorporation of the Territory. And in this respect they made this submission of law, at page 186 of the Memorials:

"Piece-meal incorporation . . . is both insidious and elusive. Mo-

tive is an important indicator since it sheds light upon the significance of individual actions, which might otherwise seem ambiguous."

This was the conclusion of their statement on the law in the Memorials and they proceeded on that basis with their exposition of the facts.

In accordance with their appreciation of the importance of the role to be played by motive or intent, they then proceeded with an attempt to show that the Respondent had an intent or purpose to incorporate the Territory, and they alleged that that intent or purpose was manifest from certain official statements, which they proceeded to cite.

Clearly, Mr. President, they were dealing here, then, with allegations of fact, as to what the intent or the purpose of the Respondent Government was in this respect, and an attempt was made to substantiate the allegations of fact with direct evidence—direct evidence coming from persons who had spoken about the matter. Having set out these statements on which they relied in the Memorials, the Applicants then drew this eventual conclusion. I quote from the Memorials, I, at page 189:

"Although the Union has not chosen, at least up to the present, to announce *de jure* annexation, its purpose is incorporation. The Union, in furtherance of this purpose, avowedly treats as null and void the obligations stated in Article 22 of the Covenant and the Mandate, which prohibit unilateral annexation and contemplate progress toward self-determination."

So, Mr. President, having then purported to establish by direct evidence this intent to incorporate, they sought to build further upon this foundation, and they alleged that this so-called intent "has been given practical effect by, and explains" (I, p. 189) Respondent's actions. The individual actions complained of were then dealt with—the four I mentioned before—and they were stigmatized as "part of a plan to incorporate the Territory". That we find in the Memorials, at I, page 193. And, finally, in their legal conclusions, the Applicants stated as follows in the Memorials:

"By the foregoing actions, read in the light of the Union's avowed intent, the Union has violated, and is violating, its international obligations stated in Article 22." (I, p. 195.)

So, Mr. President, it was clear that this "avowed intent" was of the essence of the case presented against the Respondent as at that stage. It formed the basis; because of this alleged "plan to incorporate the Territory", all these acts were also invalidated as forming part and parcel of that plan. Basically, then, it was a case of fact made against us in that respect.

It was also clear that the Applicants then accepted the necessity of proving this intention to incorporate on the Respondent's part, as they attempted to do. We deal with that matter especially in our Counter-Memorial, IV, at pages 74-75.

We dealt fully with the law and the facts in the Counter-Memorial, IV, over the pages 67 to 133. Analysing the legal position, we emphasized the feature that the Respondent has, in terms of the Mandate, "full power of administration and legislation [over the Territory] . . . as an integral portion of the Union of South Africa". (IV, p. 67.) Because of that feature, any facts within the purview of that form of administration would be permissible, save only if they were tainted by an improper or an ulterior purpose. And, therefore, Mr. President, where we were met

with an allegation of a contravention of the provisions of the Mandate in this particular respect, we pointed out that motive or intent on the Respondent's part would not only be an important element in such a charge, but it would—

“... be the very criterion, and the only criterion, for determining whether a particular action is in violation of Respondent's obligations under the Mandate;”.

That was from the Counter-Memorial, IV, page 75, and I can also refer to pages 68 to 70 on that point.

Then, as far as the facts were concerned, we denied that the Respondent had an intent to incorporate the Territory, and we substantiated the denial with a factual exposition of what the Respondent's attitude to the Territory was, quite apart from the statements relied upon by the Applicants—a statement of fact and an exposition of fact as to what the attitude really was. That we find in the Counter-Memorial, IV, at pages 76 to 92.

We analysed the statements by political leaders and officials relied upon by the Applicants, and looked at them in their proper context and setting, and we demonstrated that they were entirely consistent with this exposition of the Respondent's attitude and in no way supported the contention to the contrary by the Applicants.

Next, Mr. President, the acts that were complained of by the Applicants—the list of four that I mentioned earlier—were closely analysed and discussed and we showed that those acts were permissible in terms of the Respondent's authority under the Mandate, that they did not affect the separate international status of the Territory, that they were intended to promote the well-being of the inhabitants of the Territory and that they, in fact, operated to that effect. That we dealt with in the Counter-Memorial, IV, at pages 93-131.

Now, Mr. President, when we come to the Reply, the Applicants significantly showed an appreciation of the fact that their effort to prove an intent to incorporate was doomed to failure. They now introduced a new argument which was to the effect that Respondent's—

“... policies and acts ... constitute *ipso facto*, and without regard to Respondent's motive or purpose, a violation of Respondent's obligation to respect the separate international status of the Territory.” (IV, 576.)

The Applicants retained their allegation that the Respondent had an intent to incorporate the Territory but that allegation was toned down in importance. There was not this, what appeared to be, alternative contention to the effect that those acts were inconsistent without any regard to motive or purpose.

These selfsame four acts, which I mentioned before and which the Applicants had described in the Memorials as acts which could be regarded as ambiguous and of which they had said that they were to be read in the light of the Respondent's avowed intent in order to be properly understood, were now represented as being unambiguous and as constituting *per se* violations of the Mandate and of the Covenant. Mr. President, in those circumstances, it was not difficult for us to show that this argument in the Reply was without any substance, as we did in our submission in the Rejoinder, VI, at pages 391-421, and I need not enter into the details of that demonstration again, not at this stage.

Then came the Oral Proceedings. The Applicants started off in the Oral Proceedings by saying, as in the case of militarization, that they would deal with the charges levelled under Submission 5 "at the later . . . fact stage of the proceedings". That was in VIII, at page 135.

There were, as the matter then stood, clearly very important issues of fact involved, because, as the Court will recall, the Applicants had maintained, without further attempt at supporting, their allegation of an intent to incorporate still at the Reply stage of the pleadings.

So, Mr. President, the factual allegations in that respect still remained in issue—over-all, and also with reference to the four acts complained of, the allegations that they were all elements in a plan of incorporation. Those matters were specifically and directly at issue between the Parties as matters of fact. So, it would have been necessary to canvass and examine these facts at the oral hearings in order to test the validity of the Applicants' allegations as they stood.

But, as my learned friend, Mr. Grosskopf, pointed out in the case of militarization, so also here the Applicants never reached the discussion of "the later . . . fact stage of the proceedings". At the end of their initial argument on 24 March, in the record of that date at VIII, page 268, we find that the Applicants stated certain submissions which they felt they could already state at that stage, reserving some others until the facts had been dealt with, and we find that they, at this stage also, asked for an order on Submission 5, without having dealt with any of the facts in support of that submission.

In the record of 26 April, at VIII, pages 707-711—we expressed our surprise at this treatment of the matter and we asked for clarification, reserving our further comments until we had received such clarification.

We also commented at the same time on a new feature which had emerged in the Applicants' argument-in-chief regarding this alleged intent to incorporate. We found that the requirement of intent, initially so clearly acknowledged as being a basic requirement of a factual proposition in the Applicants' case, now became a completely artificial one. In the verbatim record of 23 March, at VIII, page 220, the Applicants argued that "Respondent has taken action reflecting a purpose, objectively determined, to incorporate and annex the Territory into the Republic of South Africa".

And, then, on the next page, Mr. President, page 221, the Applicants made it clear that they were now asking the Court to infer this intent "legally", as they said, by means of a presumption—the presumption that a person or a body is presumed to intend the natural and probable consequences of his or its actions.

The Court will recall that we dealt very extensively with the law pertaining to this suggested presumption because it was relied upon also by the Applicants in regard to other aspects of their case. We dealt with it mainly in the record from page 639 to page 653, VIII, and we pointed out, Mr. President, that this manner of approaching the matter really avoided the necessary enquiry into the factual aspects of the dispute regarding intent.

In the record of 26 April we indicated that this argument, which we had presented earlier on other aspects of the case, was specifically applicable also on this aspect of the Applicants' submissions. That the Court will find at VIII, pages 709-711 of the record of 26 April.

In this particular aspect of the Applicants' case, Mr. President, the

artificiality really becomes extreme. In the Memorials, as I pointed out, the Applicants relied on direct proof of an "intent to incorporate"—suggested direct proof. They then used this as a basis "to shed light upon the significance of individual actions which might otherwise seem ambiguous"—those were their words.

Now, at the Oral Proceedings stage, they relied upon these self-same actions in order to argue that from those "an intent to incorporate" could be inferred. It is not surprising, Mr. President, that the Applicants avoided an enquiry into the facts in order to justify the validity of such an inference. It should be sufficient for me to say that you cannot infer an intent from ambiguous acts and you cannot, having purported to do that, then use this inferred intent in order to prove that those same acts are not ambiguous. That is really what the Applicants' argument amounted to.

So, at this stage, the "intent to incorporate" argument was dead. The Applicants thereafter, in proffering the explanation for which we have asked, on 12 May, at IX, page 235, explicitly said that all the Respondent's versions of the facts were accepted also in respect of this particular submission. They said it explicitly at that page. So, inasmuch as the existence or otherwise of an intention to incorporate is a fact and was initially treated very specifically by the Applicants as being a fact, the Applicants' admission of the facts constitute an acceptance of, *inter alia*, that fact which we stated in our pleadings, that the Respondent has no intention to incorporate the Territory. Once the Applicants had admitted all the other facts, it was indeed, Mr. President, quite impossible for them to contest the validity of that statement of the Respondent. So it is not surprising that they then went over to suggest that Respondent had a somewhat inconsistent intent, that is, an intent to partition the Territory without the consent of the supervisory organs. That we find in the record of 12 May at IX, page 239. The central theme of the Memorials, therefore, that Respondent had a plan to annex the Territory and was putting it into effect by piece-meal acts, simply petered out into nothingness.

It would, Mr. President, in my submission, have been entirely unrealistic for the Applicants to have attempted to demonstrate anything else. From a practical point of view, what earthly reason could they suggest why Respondent should today wish formally to incorporate the Territory into the Republic of South Africa? One could understand in the days of the formation of the United Nations, at the stage when General Smuts put his incorporation proposal to the United Nations and in the years shortly afterwards, that there may, with or without justification, have been suspicions on the part of parties inclined to be suspicious, as to whether South Africa perhaps did not have an idea of incorporating this Territory without the concurrence and the assistance and the acknowledgment of the United Nations or other international recognition. One could understand it at that stage, Mr. President, although even then the South African Government made it perfectly clear that it had no such intention. But, when we have come to this stage of development, when the Respondent's policy has crystallized absolutely clearly into one which involves self-determination for each one of the various population groups of South West Africa, where each one of those could, if it so wished, decide upon complete independence, where it is known to the South African Government that the White group of South West Africa has

always indicated that it would prefer to seek its future in conjunction with the Republic of South Africa but whereas the principle is that every one of the groups can decide for themselves, surely, Mr. President, what purpose could there be, while one is in the process of getting on with that policy, of unilaterally incorporating the Territory?

So the next question we ask is: what happened in the Oral Proceedings in regard to this apparently alternative line taken in the Reply, namely that the acts complained of—the four of them—were *per se*, and irrespective of the Respondent's purpose or motive, a violation of the separate international status of the Territory? The simple answer is that this contention did not feature in the Oral Proceedings at all. We never heard of it again.

For the reasons which I have mentioned and especially after the acknowledgment in the Memorials that these acts, seen by themselves, could appear ambiguous, this argument was really without merit right from the outset, and it is quite clear that it was introduced into the Reply merely to meet the exigencies of the moment, namely the collapse of the basic contention that Respondent had an intent to incorporate the Territory.

As I have said, we dealt with the total unsoundness of this *per se* argument in the Rejoinder and, after that and after the subsequent admission of all the facts relied upon by the Respondent, it was inevitable that this argument could no longer be pressed. Indeed, it does not seem to be represented any more in the amended submission because, as I have pointed out, the amended submission does not any longer identify these acts, or any acts of the Respondent, as being particular ones relied upon.

It is therefore really unnecessary for us, as we see the situation, to enter into any discussion of these separate elements with a view to seeing whether they are indeed, or whether they can indeed be said to be, *per se* in conflict with the separate international status of the Territory. Nevertheless, I shall very briefly indicate what the effect of what we stated in that respect was on the pleadings and what seems now to be admitted as a matter of fact by the Applicants.

In regard to the question of nationality, the complaint there related to the conferment of South African citizenship upon the non-White inhabitants—the indigenous inhabitants—of South West Africa, by an Act of the Union Parliament of 1949. The matter was dealt with in the Memorials, I, at pages 190-192, in the Counter-Memorial, IV, pages 93-100, in the Reply, IV, at pages 576-579, and in the Rejoinder, VI, pages 403-405.

Originally, it will be recalled, the Applicants alleged that this too was part of a plan to incorporate the Territory, but this, as we have shown, has fallen away. The alternative basis, as we demonstrated with respect, was a highly technical approach and, in our submission, entirely unsound. It relied, not upon an analysis of the principles involved and of reasoning to a conclusion that there was *per se* an infringement of the separate international status of the Territory, but purely upon suggested conflict with a resolution of the League Council adopted in 1923. Now, we admitted that there was in one respect a conflict with the provisions of that resolution of the League Council, although in completely different circumstances in 1949 from those which had obtained at the time when the League Council resolution was adopted. The Council resolution was adopted at a stage when the mandates system was in full operation as a system. The Act came in 1949 when the system had come to an end—

when there was total uncertainty in the international world as to what exactly the status of South West Africa was—as to whether it could still be regarded as a mandated territory at all. If the Court will recall, this was before the 1950 Opinion of this Court, and the attitude adopted by the South African Government at the time was indeed that in its view the Mandate had lapsed and there was a need for regularizing the position of the inhabitants.

We pointed out, Mr. President, that the League Council resolution showed that it did not contemplate that there was any incompatibility with mandate principles, etc., in the inhabitants of a mandated territory taking the citizenship of the mandatory country. That was not regarded as incompatible at all if it happened by a voluntary process on the part of the inhabitants of the mandated territory. So if, along these processes, a situation should have arisen whereby all the inhabitants of a mandated territory had taken on the citizenship of the mandatory, that still would not have been, according to the contemplation of this resolution, a situation in conflict with mandate principles or with the principles or requirements of the mandate system. The objection was to a general act bringing about that result and we have no clear distinction between what was regarded as good mandate policy in that respect, or what was regarded as clear mandate law in that respect.

If it was suggested, Mr. President, that in circumstances as they existed in 1949, and as I have briefly tried to sketch them, it would have been in conflict with mandate law to bring about such a result, then we must, with respect, differ with the conclusion arrived at by the Council of the League on that particular point, but there is, as far as we can see, no such suggestion. The matter would appear to have been treated as a matter of policy and the League Council certainly did not express itself on what its conclusion would have been in altered circumstances, such as applied in 1949.

A particularly important feature which we stressed is that this conferment of South African nationality upon the inhabitants generally of the mandated territory took nothing away from them; it did not impair any rights which they may or may not have had as citizens of the mandated territory, or inhabitants of the mandated territory, and any status that may have flowed therefrom. What was given to them was given as something additional which might be of assistance and of help to them in this stage of uncertainty and stage of transition. That this is so becomes evident again from the very proposals of the Odendaal Commission on the matter of citizenship—a matter referred to several times in the course of the cross-examination of various witnesses. I read as an example to the Court the paragraph 306 of the Odendaal report at page 83, regarding Ovamboland:

“That, as soon as is practicable, the Legislative Council by legislation institute for the homeland a citizenship of its own and that every Ovambo born in or outside Ovamboland but within South West Africa, as well as any Ovambo born outside South West Africa but now permanently resident in Ovamboland and not declared a prohibited immigrant in South West Africa, shall be entitled to such citizenship: Provided that such a person shall forfeit his citizenship if he assumes the citizenship of another homeland.”

In other words, citizenship particularly pertaining to each homeland

is contemplated here. As I have said, nothing has been taken away; this is what the policy leads to in its ultimate consequences. There are similar provisions in respect of all the other homelands:

paragraph 319, page 85, about the Okavango;
 paragraph 332, page 87, about the Kaokoveld;
 paragraph 344, page 93, about Damaraland;
 paragraph 362, page 97, about Hereroland;
 paragraph 375, page 99, about the Eastern Caprivi;
 paragraph 404, page 107, regarding Namaland.

The Rehoboth Basters, as the Court might recall, already have their own citizenship in terms of their own patriarchal laws.

The next matter, Mr. President, was the question of representation in the South African Parliament, and this aspect was dealt with in the Memorials, **I**, at pages 192-193, in the Counter-Memorial, **IV**, at pages 101-104, in the Reply, **IV**, at pages 579-581, and in the Rejoinder, **VI**, at pages 405-409. Here also the Applicants stigmatized initially the present arrangements as "part of a plan to incorporate the Territory politically", but that also was dropped and we are dealing only with the later contention of a *per se* violation of the Mandate and the Covenant.

Mr. President, on the facts which we set out in our pleadings and which are now accepted as fact, it is manifest that such an arrangement can only benefit the Territory, that similar arrangements were made in other territories, including trust territories which had formerly been under mandate, and that that had been permitted under practices of international supervision without anybody thinking that there was any incompatibility in such an arrangement—incompatibility with the separate status of the mandated or trust territory. It is also a fact that the 1949 Act, under which these arrangements were made about representation in the South African Parliament, was fully and openly explained and discussed in the United Nations. There were proposed condemnatory resolutions in the United Nations, but these were rejected. And that is where the matter stands as a matter of fact. The reference is to the Counter-Memorial, **IV**, at pages 82-84.

We pointed out further, Mr. President, that the Committee on South West Africa could not suggest that this type of arrangement constituted a *per se* violation of the Mandate or the Covenant. In general we submit that each and every one of the arguments submitted by the Applicants was shown to be without substance.

Next, there is the administrative separation of the Eastern Caprivi Zipfel, and that is dealt with in the Memorials, **I**, at pages 193-194, in the Counter-Memorial, **IV**, at pages 105-118, in the Reply, **IV**, at pages 581-582, and in the Rejoinder, **VI**, at pages 409-414. Again, initially a suggestion that this formed part of a plan of incorporation was eventually dropped as part and parcel of the dropping of that contention.

Now here again, Mr. President, we indicated—and I may say very briefly—in the Counter-Memorial that the area was inaccessible from the rest of South West Africa, that serious problems of administration were created and that the separation was effected for this reason; and when upon the urging of the Permanent Mandates Commission to the contrary, an experiment was made over the years 1929-1939 to administer the Eastern Caprivi Zipfel from Windhoek, as part and parcel of the ordinary administration, that attempt proved to be a failure.

We also pointed out that those were the practical reasons why we had to revert to this form of administration from Pretoria; that it all happened in terms of the charge under the Mandate, that there was nothing inconsistent with the separate international status of the Territory, and that the Permanent Mandates Commission had, indeed, no objection to the arrangement, provided all the provisions of the Mandate were properly applied in the area. So again, Mr. President, it is quite clear that the Applicants' charges under this heading were without any merit, on a *per se* basis or on any other basis. On the admitted facts, this administration takes place in this particular form because that is the most practicable one and it is the one most conducive to the well-being and progress of the inhabitants.

Finally, the very same follows in regard to the other matter of complaint—the transfer of administration of Native affairs to the Minister of Bantu Affairs and Development, and the vesting of South West African Native Reserve land in the South African Native Trust. This was dealt with in the Memorials, I, at pages 194-195, the Counter-Memorial, IV, at pages 119-131, in the Reply, IV, at pages 583-586 and the Rejoinder, VI, at pages 414-418.

We submit, Mr. President, that we showed without doubt that these measures are purely administrative measures, fully within the Respondent's powers under the Mandate, that they were designed to operate for the benefit of the inhabitants of the Territory, for the protection of their land, and for the intensification of the development of those lands and their homelands, and that they do, in fact, so operate. These facts are admitted, and we submit that the conclusion follows that the actions cannot, *per se* or on any other basis, be regarded as violative of the Mandate or the Covenant. It is therefore clear, Mr. President, that this *per se* argument of the Applicants stood no earthly chance of success, and that is obviously the reason why we did not hear of it again in these Oral Proceedings.

That brings us then to this totally new line adopted by the Applicants in the Oral Proceedings—the same sort of argument to which they were driven, as I have pointed out, in respect of militarization.

To our request for clarification of their attitude, to which I referred before, they reacted on 12 May, at IX, pages 235-239. In conjunction with militarization, there is a passage, at page 235 of this verbatim, where the Applicants said:

"It is regarded . . . by the Applicants, as appropriate to consider and dispose of these submissions at this stage in the context of the requirement of administrative supervision . . ."

The next paragraph made it clear that the Applicants admitted all the facts advanced by Respondent in connection with the charges originally levelled under Submission 5—and that is in a passage at page 235, to which we have referred before.

And then, having dealt on this basis with militarization, the Applicants said, at page 237:

"On the same basis of analysis and consideration, turning to the question of annexation, administrative supervision is here again seen to be of the essence. Respondent's refusal to submit to administrative supervision, indeed, is the underlying element of the Applicants' complaint in this regard . . ."

And on the same page:

"Denial of submission—the duty to submit—to international accountability is a denial of the separate international status of the Territory."

On page 238:

"In the absence of such accountability, Respondent's function of administration would cease to be international. That is the essence of our contention in this regard."

Finally, a quote from the same page:

"The absence, the denial, of the rejection of international supervision, alters the international status of the Territory, it deprives it of that character . . . [That] is the basis of our submission in this regard."

Mr. President, I had read those passages from the record of 12 May to indicate the Applicants' own explanations of their amended Submission No. 5 and we find in these explanations, indeed, a conclusion which concurs entirely with that which we drew already upon a mere comparison at the beginning between the original submission and the amended submission, and, that is, that there is now a totally new case. Submission No. 5, is now completely dependent upon the Applicants' case as regards supervision, and the excision of the previous factual basis upon which this charge had rested was no mistake, it was done deliberately. There is now no longer an identification of those four original listed acts or any other acts as forming the basis of this charge; it has now become generalized, as in the case of militarization.

In the Reply already the Applicants had raised a non-supervision argument of this kind, and we then said the following about it in our Rejoinder, VI, at pages 415-416:

"Respondent does not appreciate how its contention that the United Nations has no supervisory powers over its administration of South West Africa—a contention which Respondent submits is sound—can have any bearing on the propriety or otherwise of its acts of administration in the Territory. If such acts of administration are in themselves unquestionable, the fact that there is no supervision cannot render them questionable. On the other hand, if such acts of administration constitute violations of Respondent's obligations, then again the existence or non-existence of supervision cannot alter the situation."

How did the Applicants react to this? They react with a play on the words "questionable" and "unquestionable", and as I shall show, it leads them into worse trouble than before. We find that in the verbatim record of 12 May at IX, page 237:

" . . . Respondent's analysis presupposes the possibility of a judgment of this honourable Court to the effect that such acts of administration are 'unquestionable', and, as I have said and as the Applicants respectfully submit, all acts of administration, in the absence of supervision, must be 'questionable'. That does not reflect upon their merits, they are questionable because they are open to question because there is no information available upon which their merits, or otherwise, can be supervised and examined."

So we find that the Applicants refuse to discuss whether the acts originally complained of are questionable on their merits, or any other acts;

as a matter of fact, they make it plain now that that is no longer relevant to their contention. Instead the original acts are no longer isolated, as being specifically relied upon; they are equated with all other acts of administration, and the sweeping statement is then made that in Applicants' submission all acts of administration, irrespective of their merits, are questionable in the absence of supervision.

And so it becomes perfectly clear that Chapter VIII of the Memorials and the original Submission No. 5 have now been turned into a complaint relating solely to the denial on Respondent's part of a duty to submit to supervision by the General Assembly of the United Nations, which complaint is identical with their purely legal complaints with regard to supervision. And that is the reason why, as I emphasized before, it is now really unnecessary to give attention to each one of those specific acts of which the Applicants originally complained.

Once this becomes clear, it also becomes evident that the amended Submission No. 5 has now virtually become meaningless. Let us illustrate it by reading the submission in the light of the Applicants' new contentions. They submit that this treatment of the Territory by Respondent—that is, the denial of supervision and the refusal to submit thereto—"has thereby impeded opportunities for self-determination by the inhabitants of the Territory" (IX, p. 374). This allegation is now a complete *non sequitur*. They continue: "that such treatment is in violation of Respondent's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant."

It will be remembered that the obligations relied upon by the Applicants in their Memorials for the purposes of this submission were firstly, the alleged duty to refrain from unilateral annexation, and, secondly, the alleged duty to advance the political maturity of the Territory's inhabitants so that they may ultimately exercise self-determination. The new factual complaint under amended Submission No. 5—that is, the Respondent's denial of supervision to the United Nations and the refusal to submit to such supervision—has nothing to do with these alleged obligations—with these obligations of refraining from unilateral annexation and advancing political maturity. On the contrary, the complaint is exactly the same as that made by the Applicants under their submission relating to Article 6 of the Mandate. And so it goes further also when the amended Submission No. 5 continues: "that Respondent has the duty forthwith to cease such actions, and to refrain from similar actions in the future; and that Respondent has the duty to accord full faith and respect to the international status of the Territory" (IX, p. 375). Those are the words from the new, amended submission.

The Applicants are now merely asking for an order that Respondent must stop denying the existence of rights of supervision on the part of the United Nations, and that the Respondent is legally bound to submit to such supervision in future. In other words, they are asking all over again for the same things as in their Submissions 2, 7 and 8. There is no distinction. The only distinction now has become a verbal one, and the description in these later submissions, for instance No. 5, of that contention is really a very strangely worded one. It arose from one circumstance, and one circumstance only, Mr. President, and that is that the Applicants refrain from taking the logical course which they ought to have adopted at the Reply stage when they saw that these facts on which they were originally relying could not support them, and

that therefore these original charges they made were, as a whole, completely insupportable.

The Applicants ought to have heeded the warning of Mr. Carpio of the Philippines, which was quoted to the Court earlier, in a discussion in one of these committees dealing with the question of possible litigation against South Africa. I quote from the *General Assembly, Official Records, A/AC73/SR120* of 9 September 1959, page 3, where Mr. Carpio said:

"To choose questions dealing with the administration of South West Africa as an integral portion of the Union of South Africa, when the Union Government was authorized by the Mandate to do so, was to choose the weakest argument."

My learned friend, Mr. Grosskopf, has indicated to the Court why this argument cannot succeed in the case of militarization. It would be supererogation on my part to repeat that argument to the Court. I submit, very clearly, that also Submission No. 5 should be dismissed.

Then we come to Submission No. 9, unilateral amendment of the Mandate, where we have much the same story. And I am quite sure the Court would not like to listen in detail to all the various courses which the dispute in this form took. I shall deal with it very briefly.

In the Memorials the Applicants alleged:

". . . that the actions of the Union, as set forth in Chapters V, VI, VII and VIII of this Memorial, read in the light of the intent of the Union, . . . constitute a unilateral attempt by the Union substantially to modify the terms of the Mandate". (I, p. 196.)

Now of these chapters as identified here, Mr. President, V to VIII of the Memorials, Chapter V dealt respectively with alleged violations of Article 2, paragraph 2, of the Mandate, which, as the Court will recall at that stage, were alleged to be intentional violations of the Mandate. Then Chapter VI related to allegations of petitioners, Chapter VII related to militarization, and Chapter VIII related to unilateral incorporation. It was on the basis of all those allegations made that the Court will recall the factual basis of the Applicants' case in each of these instances, that there was said to be a unilateral attempt by the Union substantially to modify the terms of the Mandate.

Now, Mr. President, in our Counter-Memorial we denied that Respondent had any "intent to modify the Mandate". We emphasized then, as I should like to emphasize now, that it is very difficult to see how there could ever be an amendment, or an attempt at amendment, of a mandate instrument or an agreement of any kind, unless there should be an intent to bring about an amendment. One can think under particular circumstances of an unintentional violation of obligations under an agreement where there is a difference of interpretation or a basis for an unintentional action which, nevertheless, transgresses provisions of an instrument. But one could as a matter of notion, in my submission, never conceive of an unintentional attempt at modifying the provisions of an instrument. Surely that is something that can be brought about only by an intent, or on the basis of an intent, to bring about a modification. The very concept of an attempt to do something of that kind already carries a notion of intent with it. But apart from that, the actual process of amendment is one that could only be brought about by exercising the mind about it and by having an intent.

So, Mr. President, we emphasized as being fundamental to our answer, in the Counter-Memorial, **IV**, at page 136, that—

“... the record shows a complete absence of intent on Respondent's part to perform any actions in regard to the Territory which would not have been permissible under the Mandate if it had still been in force”.

And we also denied that any acts by the Respondent modified the terms of the Mandate.

Now the Applicants' reaction in the Reply, **IV**, at page 587, was dealt with in the Rejoinder, **VI**, at pages 423-428. Of special importance was the fact that the Applicants had, in the Reply, introduced this alleged norm, and we pointed out that the contention was apparently that this norm had come into existence despite objection or opposition thereto by the Respondent, the Respondent never having agreed to it at all. And it was, according to the Applicants' contention, to be read as forming part of, or as being determinative of, obligations under the Mandate. In that way, therefore, according to the Applicants' contention, there had come about a unilateral amendment of the provisions of the Mandate.

We pointed out, therefore, that if anybody wished to modify the terms of the Mandate unilaterally, it was certainly not the Respondent. That was in the Rejoinder, **VI**, at pages 424-425.

A further point of importance, Mr. President, was one I have already referred to, and that is, that in each of these chapters of complaints—I am leaving aside the petitioners now for the moment—those relating to Article 2, paragraph 2, of the Mandate, those relating to militarization and those relating to unilateral co-operation, the Applicants in each case, as at that stage, relied on a factual allegation in regard to intent, and that, as we have traced out in these proceedings, has fallen away in every respect, including this intent to incorporate the Territory in relation to Submission No. 5.

Now, when we came to the Oral Proceedings, in the argument-in-chief, my learned friend coupled Submissions 5 and 9, and then made it clear that the nature of the intent relied upon by them was the same in both of the submissions, so they said:

“An attempt . . . direct or indirect unilaterally to incorporate or annex the Territory would constitute a modification of the terms of the Mandate without the consent of the supervisory organ, to wit, the United Nations.

The correlation of Article 2, paragraph 1, with Article 7, paragraph 1, underlies the Applicants' Submissions Nos. 5 and 9 respectively.”

That was the record of 23 March, at **VIII**, page 220, and this was still their evidence-in-chief before the changes in regard to the element of intent became so absolutely manifest.

The Applicants then proceeded to state that this intent to incorporate had to be objectively determined by legal inference from conduct and they continued, at page 221:

“Accordingly, conduct from which may be objectively inferred an intent to evade the requirements of Article 7, paragraph 1, by means of unilateral action, takes on significance in the absence of a showing by Respondent of any plan or purpose to seek consent of the supervisory organ.”

So, Mr. President, it is apparent that the Applicants not only relied on the same alleged intent to substantiate the charges of unilateral incorporation under Submission 5 and unilateral amendment of the terms of the Mandate, Submission 9, but also that both of these submissions were dependent on their arguments regarding supervision. That appears from their statement at page 221 of the same verbatim record:

"If the honourable Court were to accept Respondent's contention concerning lapse of provisions for international supervision, including Article 7, paragraph 1, the Applicants' Submissions numbers 5 and 9 would, thereby, and for that reason alone become unavailing."

Here, too, we found this strange phenomenon that already at this early stage, on 23 March, they were asking for an Order in terms of Submission No. 9, at page 231 of the same record, and the submission was formally stated on the next day, 24 March, at VIII, page 269 of the record, when the Applicants closed their legal argument-in-chief. At that stage the submission was still worded as in the Memorials and it still referred to and relied on "the acts described in Chapters V, VI, VII and VIII . . . [in] the Memorial".

Now, in the light of the explanations that had been offered, there was clearly something wrong with this formulation. These chapters, as I have pointed out, certainly as at that stage still held within themselves various allegations of intent and disputes of fact. So how could the Applicants then ask for this Order before dealing with these disputes of fact as they suggested they would do at a later stage of the proceedings? Here, also, we commented in a like way, as in the case of Submission No. 5, on the artificiality of this suggested reliance on the presumption which I mentioned before in regard to the question of intent, and we finished off on 26 April, at VIII, page 712:

"The fact is, in our submission, that the Applicants are here also running away from the task of embarking upon that full enquiry, of establishing by ordinary, evidential means an intent which they have to prove, and which they admit that they have to prove, in order to establish their case in law. I have never heard of a proposition that an unintentional violation of an obligation can be seen as an attempt at a unilateral modification thereof."

And so we got the Applicants' reaction on 12 May in conjunction with these two previous matters I have just mentioned, militarization and unilateral incorporation, and here the pattern was exactly the same. No longer relying upon these previous factual allegations in regard to intent, they continued simply with a new argument, and they no longer relied on an intent to incorporate the Territory; they now placed reliance upon another intent and that is: "... an avowed and declared design of Respondent to partition the Territory . . ." This is found in the record of 12 May, at IX, page 239. At the same page, they said—

"In respect of Submission No. 9, Respondent has explicitly avowed an intent to partition the Territory without the consent of the supervisory organs."

And again, on page 240:

"The Applicants accordingly have requested the Court to adjudge and declare that consent on the part of the United Nations is a

condition precedent to the effectuation of such an avowed intention or plan."

Then on page 239, they said:

"It was on this basis and for this reason, in the light of these avowals, that Submission No. 9 is the only submission which incorporates or is intended to incorporate reference to or relies upon Respondent's intent."

Mr. President, this was rather surprising because the only intent we had heard of up to that stage was the "intent to annex the Territory". That had petered out in the way I had described before. We hear now for the first time about this intent unilaterally to partition the Territory as being the factor relied upon, and that is offered as an explanation for this reference to intent that had been in the submission right from the days of the Memorials. Anyway, this is also the very last that we hear of Submission No. 9 from the Applicants. It must be noted that they never specifically met the queries which we raised on 26 April—the queries in regard to the question of what it is now that is said to be part and parcel of the Respondent's intent to bring about a modification of the provisions of the Mandate. We are left with this suggestion of an intent to partition the Territory unilaterally and it is very evident that the Applicants are grasping at straws.

None of their characterizations of the Respondent's alleged intent is correct. We dealt with this matter very clearly in the Rejoinder, VI, at pages 416-418. The Odendaal Commission's recommendations are aimed at the best methods of administration and development regarding the specific circumstances of South West Africa. The approach of the Commission and the Respondent's attitude thereto concern prospective measures entirely within the provisions of the Mandate and directed solely at the well-being of the inhabitants. The Applicants overlook entirely the Respondent's power under the Mandate—"the full powers of and administration and legislation over the Territory . . . as an integral portion of the Union of South Africa" and they overlook that the organization of the administration of the Territory is a matter vested in the Respondent's discretion.

The so-called partition problem is one which will only be met when that particular stage is arrived at. The policy as at this stage envisages nothing more than that certain communities develop up to a stage of self-determination where they are ripe for the purpose and where they, in fact, express their wishes as to what their future is to be and is to involve. It may involve something that does not mean partition, it may involve something that does mean partition. If so, that position will have to be met as at that particular stage, but to talk at this stage of an intent on the part of the Respondent to partition the Territory unilaterally makes complete nonsense in my submission. If one reaches that stage eventually and there is no question of a partition, then the question falls away. If there is a question of partition, then questions of international recognition may arise.

There was, as I have pointed out before, provision for amendment of the provisions of the Mandate—special provision—in Article 7, paragraph 1, of the Mandate, under which it could be achieved by the useful procedure of the consent of the Council of the League. That is certainly not the only way in which it could have been achieved and it is certainly

not the only way in which a change with international recognition could be achieved under circumstances as at present obtaining.

If we are correct in saying that the United Nations has no supervisory authority in respect of the Mandate, then the whole basis of this contention on the Applicants' part in any case falls away. But even if the United Nations should have supervisory functions then the Mandate never said and never meant that the organ exercising the supervisory functions must necessarily give its consent to a modification of the Mandate, if such a modification is to be a valid one. That the Mandate never said, as I have pointed out before, and I need not go into those arguments again.

So, Mr. President, there is again no factual and no legal basis for this line of attack on the part of the Applicants. It becomes a completely artificial one.

Perhaps the Applicants have appreciated their difficulties after all. When we look at their final submissions of 19 May, in the record of that date at IX, page 375, we notice that they no longer refer to the actions of the Union as set forth in Chapters V, VI, VII and VIII of the Memorials and, even, that they no longer refer to the Respondent's alleged intent, which previously had featured so prominently in the submissions. Their final submission now reads:

"Respondent has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of Respondent directly or indirectly to modify the terms of the Mandate."

It could hardly be more vague than this, Mr. President. All reference to the manner in which they allege that the Respondent has attempted to modify the terms of the Mandate has simply been excised. Apparently, as we find from the explanations, the denial of supervision—the denial by the Respondent of supervisory powers on the part of the United Nations—is now the sole ground relied upon. It would appear that here also all the reliance previously placed upon specific facts and particularly on specific alleged forms of intent has now been abandoned. Here again, our answer to this contention in regard to the Respondent's denial of supervisory powers on the part of the United Nations, is the same as we gave before. If we are correct in saying that there are no supervisory powers, the whole question falls away. If we are wrong in saying that, and if the Court holds that we are wrong in saying that, then it means that the Applicants must succeed in respect of those particular submissions which deal with that question and which allege that the Respondent violated its obligations in the respects of failing to submit to the supervision of the United Nations, but to suggest that the Respondent, in addition, must be held to have failed in respect of every one of its substantive obligations under the Mandate, in our submission, is clearly without any substance and we submit that in the premises also the Applicants' Submission No. 9 should be dismissed.

Mr. President, it remains for me, then, only to offer some very brief remarks in conclusion; the Court will probably hear that with relief! In regard to the Applicants' Submissions Nos. 1, 2, 7 and 8, these have

been disposed of and the different conclusions which, we submit, may be reached by the Court in this respect have been dealt with by us. Merely for handy reference, I point out that that was in the verbatim record at VIII, pages 583-584, and again at IX, page 481.

Now, in regard to Submissions Nos. 3, 4, 5, 6 and 9, on the basis of the contentions which we have put to the Court there are general grounds upon which all these submissions may be dismissed. One of them would be that the *Mandate as a whole has lapsed*. That would, of course, dispose of all the submissions. Another may be that the Court has no jurisdiction generally, on the basis that was argued in the Preliminary Objections.

Now, specifically in regard to Submissions Nos. 3 and 4, to summarize the various possible findings in our favour, for which we have contended in the course of our presentation to the Court, the issue turns on the existence or otherwise of the norm and/or standards as defined at page 493, of the Reply, IV, and it may be convenient to deal with the matter separately as regards the norm and the standards.

In regard to the norm, firstly, we pointed out that the Court would not possess jurisdiction in terms of Article 7, paragraph 2, to decide on alleged contraventions of any newly created norm, such as that relied upon by the Applicants. But we did not abide, of course, by submissions about jurisdiction, we proceeded to deal with the merits of the contention in regard to the norm. And we contended, secondly, that there is no legislative or other power on the part of the, or an, organized international community to create legally binding norms in the manner, or through such processes, as contended for by the Applicants.

Thirdly, we contended, Mr. President, that no norm of the content contended for by the Applicants was, in fact, created, or purported to be created, by collective actions on the part of the organized international community, nor was such a norm created by the practice of States. We pointed out further—we contended—that the real purpose of the majorities in the United Nations who voted for the resolutions concerned, was to prosecute a political campaign and not to create legal norms.

Then in regard to standards: firstly, we contended that no implication can be read into the *Mandate* to the effect that the Mandatory would comply with standards laid down by the competent supervisory organ. Secondly, that there is no longer any competent supervisory organ since the dissolution of the League. Thirdly, Mr. President, we contended that the United Nations did not attempt or purport, to lay down standards of any kind, or of the content relied upon by the Applicants, that no such standard is generally applied in the practice of States, and that no agreement has been reached in any other international body about standards, intended to be binding, of a content as relied upon by the Applicants.

As far as United Nations activities are concerned in regard to standards, we demonstrated, in our submission, that the judgments relied upon were based upon erroneous facts, and were inspired by improper motives, which would by itself render any purported standard invalid.

On the subject of the well-being and the progress of the inhabitants of the Territory of South West Africa, Mr. President, we have demonstrated, in our submission, that a norm or a standard, as defined, would, in its application, be detrimental to such well-being and progress. We

submit that this is relevant and material because of the following conclusions that flow from it:

Firstly, that no norm as defined could exist or could be applied by the Court by virtue of Article 7, paragraph 2, of the Mandate, inasmuch as a norm which is inconsistent with the purposes of the Mandate could not fall under "the provisions of the Mandate".

Secondly, Mr. President, in our submission, this incompatibility would by itself show that no standard of this description could have been created. And alternatively we contend that this feature, in any event, underlines and strengthens our contention that the erroneous factual premises and the political motivation in the United Nations would render invalid any purported creation of standards. In other words, bringing those two together—our demonstration of what really happened in the processes of the United Nations, and what are the real facts about well-being and progress—emphasizes and gives cumulative weight to the conclusions which flow from each of those.

And then, in regard to Submissions 5, 6 and 9, our contention is that they should be dismissed for the reasons with which we dealt yesterday and today.

I wish to offer only a very few concluding remarks about what has been described as the heart of the case, the case concerning Article 2, paragraph 2, of the Mandate. Representatives of both sides, Mr. President, at the outset, referred the Court to the vital influence and implications which these proceedings might have upon the well-being of a multitude of human beings. From the Respondent's side, we hope that the presentation of our case, which we could make to the Court by way of expositions of true facts, by legal argument, by the assistance afforded by the evidence of the experts, will be regarded by the Court as being of assistance to it in the determination of its task with these very serious, and these very far-reaching implications.

We trust also, Mr. President, that we may have thrown further light on a statement which I had occasion to make at the beginning of these proceedings, and that is, that there is, as far as the Respondent Government is concerned, no real argument about basic objectives, questions of humanity, basic norms and standards which require to be applied in a matter of this kind; that differences which have arisen, have been differences in regard to method of achieving common ideals. We have directed our evidence to the question of those methods, and to the reasons why we submit that those methods that are being adopted, the broad approach that has been adopted by the Respondent Government in that respect, is the *only one* which could really be conducive to the well-being and the progress of all the peoples concerned in the application of its policies.

We have endeavoured to demonstrate also that the approach of the South African Government in this respect is not one of the spirit of infallibility. I had occasion to say, in my opening statement on the question of the inspection, on 30 March, at VIII, page 278, "the South African Government does not lay any claim to perfection". I wish to refer the Court also to the statement by the Reverend Mr. Gericke in the record of 21 September 1965, at XI, page 62, made under cross-examination:

"We are not defying the world—we are following the road, which we consider as being the right road. We are not walking on that road

as people who are cocksure of themselves. On the 'road of progress', the cocksure man is a very dangerous bed-fellow, but we are following this road because it is our conviction . . . We are seeing this road as the only road to the solution, that is all."

So, Mr. President, I trust that we have been able to demonstrate to this Court what the South African Government sees as, and submits to be, the basic real norms and standards to be applied to its task, and what would appear to be, as a matter of general approach, the best method of setting about that task. Now what are those real norms? They have clearly been shown to be basic, generally accepted, norms and standards: justice for everybody, faith, hope and charity. Charity in this context, Mr. President, charity or love, must very clearly include also the concepts of patience and humility. There has been much show of impatience, but we trust, and according to our analysis, it has merely been that of individuals. If we look at large masses of the African people on the African Continent, our Black African fellow-countrymen on the African Continent, they have set to us a very grand example in this respect—an example which we, of European and other origins, could do well to follow in regard to this question of patience and humility.

Experience has very often shown in Africa that the best intentioned schemes are bound to fail unless they take sufficient cognizance of African reality: imported or preconceived notions which do not take sufficient cognizance of that factor, and are not prepared to learn from the local circumstances, are very often doomed to failure, whether it be a groundnut scheme or a political constitution.

Mr. Pepler in his evidence mentioned to the Court some of his disappointments which he has struck in the course of his constructive endeavours. He has stressed the need for patience, for learning by experience, and for starting all over again when it may be necessary.

That, then, Mr. President, is what the Respondent's Government wishes to stress to the Court as the way in which it sees its task in regard to these principles, these norms, these standards, to be adopted—submitted to this Court as the way in which its duty is to be construed.

In particular, it submits that it is to have regard to those basic norms especially commended to it by leaders of the Dutch Reformed Church in a time of stress in 1960. It was a reference to a very well-known text in the Old Testament in the Book of Micah, Chapter VI, verse 8:

"He hath shewed thee, O man, what is good; and what doth the Lord require of thee but to do justly, and to love mercy, and to walk humbly with thy God?"

Mr. President, that concludes the presentation of the Respondent's case on the facts, subject of course to what we may find necessary by way of oral rejoinder at a later stage. Again, I wish to convey to you, Mr. President, and to every Member of the Court, our very sincere appreciation of the patience, the kindness, the courtesy and the co-operation with which you have listened to and reacted to the presentation of our case. With your leave, one of the Agents for the Respondent, Mr. Botha, will present our formal submissions to the Court.

34. ADDRESS BY MR. BOTHA

AGENT FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARING OF 5 NOVEMBER 1965

Mr. President, we repeat and re-affirm our submissions, as set forth at page 6, of the Counter-Memorial, **II**, and confirmed at page 429, of the Rejoinder, **VI**. These submissions, Mr. President, can be brought up-to-date without any amendments of substance and then they read as follows:

Upon the basis of the statements of fact and law as set forth in Respondent's pleadings and the Oral Proceedings, may it please the Court to adjudge and declare that the submissions of the Governments of Ethiopia and Liberia, as recorded at **IX**, pages 374-376 of the verbatim record of 19 May 1965, are unfounded and that no declaration be made as claimed by them. In particular, Respondent submits—

1. That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.

2. In the alternative to 1 above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:

- (a) Relative to Applicants' Submissions numbers 2, 7 and 8, that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body. Respondent is therefore under no obligation to submit reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body;
- (b) Relative to Applicants' Submissions numbers 3, 4, 5, 6 and 9, that the Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations.

Mr. President and honourable Members of the Court, I thank you.

35. OBSERVATIONS OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA
AT THE PUBLIC HEARINGS OF 9-12 NOVEMBER 1965

Mr. President and honourable Members of the Court, it may be convenient for the Applicants to preface comments upon the evidence with a brief statement concerning the posture of the litigation upon the conclusion by Applicants of their argument on both law and fact, subject to the reservations made by the Applicants in the Oral Proceedings on 19 May in the verbatim record at **IX**, page 373. The Applicants at that time, as the Court will recall, reserved the right, pursuant to Article 50 of the Rules of Court, to comment upon evidence given, as well as to exercise any other right to which they may be entitled by virtue of the Statute or Rules of Court, or the practice of the Court. The rights then reserved included, *inter alia*, the right of amendment of submissions.

The Applicants take the occasion to reaffirm their response to the question addressed to them by the honourable President on 5 November, in the Minutes, **VIII**, page 92. The Applicants rest upon the final submissions presented to the Court on 19 May, as set out in full in the verbatim record of that date, **IX**, pages 374-375. The Applicants perceive no reason, on the basis of any arguments made by Respondent since that date or of any evidence produced, to amend their submissions.

If it please the honourable President, I now proceed, on behalf of the Applicants, to comment upon the evidence of the witnesses and experts. Diligent effort has been made in the time provided, and will be maintained, to comply with the terms of the statement made by the honourable President on behalf of the Court on 24 May, in the Minutes, **VIII**, page 46, and to that end, subject of course to the disposition of the Court, the Applicants will not detain the Court beyond the session of tomorrow.

Comment will be first addressed to the objections fully and timely made by the Applicants with regard to the question or issue of relevance, weight and credibility to be attached to the evidence, in the light of the manner or guise in which Respondent formulated the points to which the evidence was directed, and the issues to which such evidence was said by Respondent to be relevant.

The Applicants' objections in this regard were first lodged by letter dated 20 June 1965, confirmed and read into the record in open Court on 21 June¹. In the same verbatim record, pages 103 and following, the Applicants elaborated the grounds upon which such objections were based. As the Court will no doubt recall, the Applicants' objections were consistently and repeatedly maintained thereafter. In the interest of expedition, it will suffice perhaps to draw to the Court's attention the reservation of such objections in the verbatim records, *inter alia*, 22 June, at **X**, pages 130-133; 7 July, at **X**, pages 335-336; 14 October, at **XI**, pages 600-601, and 18 October, at **XI**, pages 644-645.

The Respondent's formulation of the issues to which its evidence was directed, or said to be directed, made its formal debut in a letter dated 16 June 1965, addressed to the Court by Respondent's Agent¹. Para-

¹ See **XII**, Part IV.

graph (b) of the Respondent's letter of 16 June stated, among other things, as follows:

"The testimony of all the witnesses to be called will be directed solely to the question whether a norm and/or standards such as contended for by Applicants exist and are applicable to South West Africa."

Consideration of the grounds of the Applicants' objections to such a formulation of the issue to which the Respondent's evidence was said to be directed—which was described as the sole question in the letter—consideration of the grounds upon which the Applicants' objections to such a formulation were lodged is germane to, and a relevant aspect of, comment upon the evidence itself, in the Applicants' submission. More than this, however, consideration of the grounds of the Applicants' objections furnishes a key to evaluation by the Court of the relevance, the weight and the significance properly to be attached to the evidence led by Respondent and produced in response to this formulation, by the Respondent, of the issue to which the evidence was said to be directed. This is all the more apparent from the practice, adopted consistently thereafter by Respondent, of putting to virtually every witness a so-called "culminating question", or series of questions, in which expert opinion was solicited as to the effect upon the inhabitants of the Territory, in the standard form, of a "norm and/or standards such as contended for by Applicants". Sometimes, as a variation of the same theme, perhaps to relieve monotony, the phrase "of the nature contended for by the Applicants" was substituted for the phrase "such as contended for by the Applicants"—the distinction, of course, is insignificant.

In the case of Professor Manning, the Respondent injected a new variant, according to which the testimony of the witness was to be directed to a consideration "of the application of a suggested rule of non-differentiation in South West Africa". This is from the verbatim record of 14 October, at XI, page 600.

The Applicants, as they had before and as they did thereafter, duly and promptly reaffirmed their objections on the grounds set out in the same verbatim record at the same page. The attention of the Court is respectfully drawn to the citations to the record given by the Applicants in the course of their objection at that page. The Applicants objected to Respondent's newly coined, though no less counterfeit, formulation of the point to which Professor Manning's evidence was said to be directed. In the Applicants' submission, the new formulation merely served to compound the confusion and ambiguity inherent and implicit in the earlier ones.

This became increasingly manifest during the course of Professor Manning's testimony. The witness was led by Respondent, for example, to express views concerning "group personality", in a context which implied that, on the basis of the Applicants' theory of the case, or anything contended for by the Applicants, recognition or protection of so-called "group personality" as such was questionable or impermissible. The Court's attention is drawn to the verbatim record of 14 October, at XI, pages 605 and following.

The Applicants have raised, as they raise again now, the question of relevance of such testimony, on the ground of their uncertainty as to the real point to which the evidence was being directed. The attention of the

Court is drawn to the objection stated at **XI**, pages 606 to 607. The Applicants stated that they also were firm believers in "group personality", but did not perceive what relevance that fact bore to the issues in this case. The Applicants stated, in explanation of their objection, and I quote from page 607 of the same verbatim record:

"If the witness is attempting by his testimony to support official discrimination on a basis of race, the Applicants would like to know that with clarity, Sir, if it is possible."

The Respondent never answered the question.

A concise statement of the grounds of the Applicants' objections to any and all such formulations of the issue to which the evidence was said to be directed, may be found in the verbatim record of 22 June, at **X**, pages 131-132, and the Court's attention, respectfully, is drawn thereto: it will not be cited again, in the interests of expedition; no quotations will be made.

The essence of the objection, Mr. President and honourable Members, can be put into a nutshell. Evidence directed to a false issue is irrelevant to the real issue. The ambiguity of Respondent's formulation was bound to, and in the event did, sow confusion concerning the relevance, weight or significance of the questions and of the testimony addressed to it.

The formulation in all its variations imports a false rendering of the true nature of the standards for which the Applicants in fact contend, as well as of the international legal norm of the same content which the Applicants have put forward as an alternative legal theory; it is of course understood by the Applicants that a recanvass of the arguments, with respect to the content or other aspects of the standards and the legal norm, would be out of place in the context of this comment upon the evidence.

Respondent's formulation of the issue to which its evidence was directed would in any event, under any other circumstances, justify an objection on the grounds of ambiguity pursuant to normal and logical principles of evidentiary procedure. But more than this, it is, in fact, in its very formulation, an implied legal argument, meaningless in itself without reference to the conflicting interpretations of the Parties concerning the legal nature of the standards or of the international legal norm, or both, as described in the written pleadings, including particularly of course the Reply.

In the course of repeated objections to the formulation of the issues to which the Respondent's evidence was said to be relevant, the Applicants pointed out that the Respondent's obstinate use of the term "differentiation" was a tactical, rather than a merely semantic exercise. In directing evidence to issues formulated in an unintelligible manner, however, the Respondent took the risk that, even apart from the question of relevance as such, the evidence itself would be difficult, at best, for the Court to credit or to evaluate. This is precisely what happened in the event. Thus, Professor Logan was asked by Respondent, as a culminating question: "Do you consider that measures of differentiation to protect the various groups are necessary?" (**X**, p. 373.)

Is it the intended sense of such a question—is it to be inferred therefrom—that measures of racial discrimination may be necessary to protect groups against which such measures are practised?

The question in its very form is inherently misleading because of its ambiguity. It would be like asking a witness whether "measures of differentiation" to protect minors or incompetents or war widows or blind persons are "necessary". The question has nothing to do with the Applicants' case. The consequence of the formulation of the question made itself apparent immediately in the evidence, in the testimony in response thereto.

In his response, Professor Logan confined himself to measures to reserve the lands of the Natives, to control the population movements in certain circumstances, particularly into urban areas, and the protection and development of what was called the "traditional institutions of the people". (X, pp. 373-375.)

Professor Logan made no mention at all of laws and regulations or of Respondent's official methods and measures for effectuating such laws, which impose limitations upon economic advancement on a racial basis, or totally deny franchise on a racial basis, or place obstacles on a purely racial basis in the way of achievement of engineering, scientific or professional skills, or preclude on a racial basis rights of association or collective bargaining.

Professor Logan, in his response, made no reference to these discriminatory laws which comprise the policy of apartheid. In other words, Professor Logan was not expected to, by the terms of the formulation of the issues to which his testimony was said to be directed and the questions put to him in pursuance thereof, and did not address himself to the facts which, on the Applicants' theory, are decisively relevant to their case.

Arguments relative to this matter have been thoroughly canvassed during the course of the proceedings, and have been stated. The Applicants, of course, appreciate that it is not appropriate to re-open such arguments in the context of comment upon the evidence. They would not, however, in any event, consider it necessary to do so. It is surely supererogatory to assure the honourable Court that no aspect of implication of the Applicants' objections to Respondent's formulation of the issue, to which its evidence was said to be directed, reflects the slightest doubt that, as the Applicants put in the Oral Proceedings of 21 June, "the Court indeed is able to appreciate the contentions of the respective Parties". (X, p. 106.)

The evidentiary confusion (which is the subject of this portion of the Applicants' comment) which the Applicants had forecast in their objections as the inevitable toll of the formula by which Respondent had chosen to lead its evidence and mislead its witnesses, nowhere was more apparent than in the course of the testimony of Professor Possony.

As the Applicants sought to bring out on cross-examination of this witness, the relevance, weight and credibility of all opinions elicited by the Respondent from Professor Possony as an expert all hinged upon an understanding of the witness concerning the true nature, content and scope of the Applicants' legal theory of its case. Accordingly, the witness found it necessary to seek to validate and make relevant his testimony by means of a legal argument of his own concerning the legal basis of the Applicants' case. His legal argument, which is to be found in the verbatim record of 21 October, at pages 36-38, *supra*, in support of what he understood to be the Respondent's interpretation of the standards or the norm, or both, as defined and described at page 493, of the

Reply, IV, was studded with references to the sources set out at other pages in the Reply from which the standards are derived, and the sources described in the Reply which, as is also stated in the Reply at page 493, "severally and in their totality comprise the generally accepted norm". The witness, for example, referred to the Draft Convention on the Elimination of all forms of Racial Discrimination, one of the sources cited by the Applicants, which embodies a definition of racial discrimination, which is quoted in the Reply, IV, at page 507, footnote 2. The purport of Professor Possony's testimony in this regard appeared to be that the Draft Convention, or its underlying premises, were, in his words, "out of line with the spirit of the Charter". (*Supra*, p. 38.) Such a view—if it is indeed a fair rendering of his testimony, as it seems to be—would, in the Applicants' submission, go far to diminish or dismiss the credibility and weight of his testimony as an expert in regard to international standards relating to racial discrimination, as well as in regard to the sources from which those standards are derived and of which they are comprised.

However, the point the Applicants seek to make is that his response was difficult—if not impossible—to evaluate, except in the light of his understanding of the legal nature and content of the international standards for which the Applicants contend, and as they are described in their Reply, IV, at page 493.

I turn now to another aspect of the consequences of Respondent's formulation of the issues to which Professor Possony's testimony was said to be directed, that is, "the absence of a general practice of a suggested norm and/or standards of non-discrimination and non-separation as relied upon by the Applicants". (XI, p. 643.)

The Applicants' objections were made and noted in the same verbatim record and are set forth at pages 644 and following. The phraseology of the formulation, as pointed out by the Applicants, was, of course, a variation on the familiar theme first played in the Respondent's letter of 16 June, to which I have referred.

Following his argument in support of his construction of the legal nature of the Applicants' contention—an argument, incidentally, which was triggered by a question addressed to him on cross-examination but which was not responsive to it, as the Court will observe in pages 35-36, *supra*—Professor Possony was questioned further in an effort to elicit as clearly as possible his own understanding of the point or issue to which his evidence was said by Respondent to be relevant. The inherent ambiguity and unintelligibility of Respondent's formulation took its inexorable toll.

The Applicants read to the witness a passage from the Rejoinder, V, page 131. In this passage, as the Court may recall, the Respondent, among other things, characterized the Applicants' contention or argument as meaning that "a Member of the United Nations would not be entitled to provide special protection or special public conveniences for women". (*Supra*, p. 41.)

Professor Possony, after a prefatory comment, responded: "I think page 131, V, of the Rejoinder, which Mr. Gross just read, is a correct description of page 493." (*Ibid.*) He meant, of course, page 493 of the Reply, IV.

The witness thus found it necessary, by reason of the formulation by Respondent of the issue to which its evidence is said to be directed

and relevant, to travel the road of confusion to its destination, which in this case was absurdity.

In response to a question addressed to the Applicants by the honourable President at X, page 132, the Applicants indicated that it was their position that evidence relevant to international custom could be adduced in terms of Article 38 (1) (b) of the Statute of the Court. Respondent's Counsel earlier had advised the Court that Respondent intended to show by its evidence "firstly, that there is no evidence of a general practice accepted as law, in accordance with the norm and standards contended for, but that, in truth, there is a very substantial amount of practice to the contrary". (X, p. 83.)

As the Applicants pointed out in repeated objections, such a formulation linking, and hyphenating, "norm" and "standards" in this context could produce nothing but confusion in the evidence. The existence or otherwise of international custom in the sense of Article 38 (1) (b) of the Statute of the Court, has a legal connotation and signification quite different from a so-called "practice" of international standards in the sense employed in these proceedings.

In respect of the Applicants' contention with regard to the asserted international legal norm, or rule of international law, the issue is whether the rule of international law contended for exists as such, as a matter of law, and whether the Court could properly find and apply it to this case in terms of Article 38 of the Statute. That is the issue to which evidence pertaining to such an alleged international legal norm would be relevant and would be properly directed.

In respect of the international standards, however, quite a different issue is presented. No evidence is relevant, in the Applicants' submission, concerning the extent to which international standards pertaining to racial discrimination—to discrimination on the grounds of race or colour—are applied in practice. If the Court should find that such standards exist and that they are comprised of the sources cited and properly reflect them—the existence of which sources is undisputed and indisputable—then the extent to which such standards are perhaps violated in practice is irrelevant; just as in the case of standards of negligence, or reasonable care, or due process of law, failure to observe such standards in practice makes them *more*, not *less*, necessary.

In the event, the evidence actually led by Respondent, as distinguished from that indicated in Counsel's initial proffer, to which I have referred, largely was concerned with sociological data and hypotheses, rather than general practice. Such evidence as was produced which did relate to practice of States proved the obvious fact, the inescapably obvious fact, that it is frequently necessary to protect individuals from racial discrimination or otherwise to assure that the individual will not suffer adverse consequences by reason of his membership in a racial group or by reason of his colour. None of this evidence had anything to do with the Applicants' contention, except to confirm the true nature of the standards and the norm, or either of them, in respect of the inherent consequences of racial discrimination.

The testimony of Professor van den Haag, for example, did not concern State practice at all. I would say parenthetically, if I may, Mr. President, that Respondent neither through Professor van den Haag, nor through any other witness, offered evidence—nor is there any such evidence to be found—tending to show that racial discrimination could promote

moral well-being or social progress in any human context. As was brought out during the examination of Professor Possony—I will come back to Professor van den Haag in a moment—Respondent itself in its pleadings, and Respondent's witnesses in their testimony, employed the term "discrimination" in its customary and prevalent sense connoting adverse and unfair denial of equal rights or opportunities to an individual as such, on the grounds of his race and colour. Examples of the use of the term "discrimination" in this sense by Respondent may be found, *inter alia*, at pages 5, 6-7 and 12, *supra*, and the Court's attention is drawn also to the testimony of Professor van den Haag at X, page 150, and to that of Professor Bruwer at X, page 299.

As I have said, Mr. President, the testimony of Professor van den Haag did not concern State practice at all. It appeared at first that his proffered testimony might be directed to the practice of States—see X, page 130, and the question propounded by the honourable President at page 132 in the same record.

In the event, Professor van den Haag's testimony, however, proved to be wide of this mark. In the Applicants' submission this was brought out in Professor van den Haag's response to the question put to him by Judge Koretsky at X, pages 471 and 472. Professor van den Haag's testimony, likewise, is devoid of reference to the pertinent practice of States.

Turning to Professor Possony's examination: during the course of his testimony he described, for example, social or political *mores* in the United States, conceding, as the Applicants understood him, that constitutional practice in the United States, as in most other civilized countries, interdicted official racial discrimination. The Applicants refer to the intervention by the honourable President, in respect of certain aspects of Professor Possony's testimony in regard to this matter, at XI, pages 693-694.

With regard to Professor Manning's testimony, the Applicants respectfully draw the Court's attention to Professor Manning's statements at XI, pages 620 and 623-624. Likewise, at page 637 of the same record, Professor Manning conceded that he would have to make what he called a "special study" before he could answer a question as to whether the States he had enumerated in the course of his testimony had, or pursued, policies of establishing the rights, status, duties, privileges or burdens of individuals on the basis of their group or race, rather than on the basis of their individual merit and capacity.

Whatever the testimony of Professors van den Haag and Manning was intended to show, it had nothing, so far as the Applicants perceive, to do with international custom evidencing the practice of States, in this sense or in the terms of Article 38 (1) (b) of the Statute of the Court. Professor Possony expressed opinions with regard to practices and he gave evidence concerning certain laws and constitutions of States. None of this, however, was relevant to issues presented and raised in respect of the international standards or the international legal norm, or both, for which the Applicants contend, as contrasted with the unintelligible and ambiguous reformulation, used as the basis upon which Respondent led its witnesses, and asserted to be the sole question to which their evidence was directed or relevant.

When Respondent led its witnesses to testify concerning the practice of States with regard to the norm of non-discrimination, or of non-sepa-

ration as it is alternatively called, what the Court heard, in our submission, was either testimony concerning the unofficial practice of groups or individuals within States, usually not sanctioned by official action—to say nothing of not being fostered and encouraged or required by official action—or testimony related to the practice of States concerning some standard or some international norm, but not the one for which the Applicants contend.

In connection with the range of issues relevant to this matter under comment, the Applicants were asked by the honourable President, at **XI**, page 690, whether or not evidence designed to establish that the application of a standard, claimed to exist by Applicants, to the Territory would be contrary to the social progress or welfare and development of the inhabitants of the Territory, would or would not be relevant? At the time of the questioning, after an initial attempt at response and in order to make certain that the Applicants understood and did justice to the true import of the honourable President's question, the Applicants requested and received permission to answer at a later date, in order to give a considered response. With the President's leave, a very brief comment in response thereto will now be made.

In the Applicants' respectful submission, no evidence *could* establish that the application of the standard claimed to exist by the Applicants—of the nature and content claimed to exist by the Applicants—would be contrary to the social progress or welfare or development of the inhabitants of the Territory of South West Africa (or indeed the inhabitants of any other territory, but the latter is not in question here). The Applicants' contention is that official racial discrimination is inherently incompatible with social progress and human welfare. The standard for which they contend reflects and embodies, in their submission, a virtually universal judgment that racial discrimination under all circumstances is an impermissible governmental policy, and is *a fortiori* so in respect of a mandate obligation to promote moral well-being and social progress to the utmost.

The Applicants, with respect, cannot conceive of any evidence relevant to show that it would be *contrary* to social progress to apply a standard according to which racial discrimination is *incompatible with* social progress. Any such evidence would be based upon a self-contradicting proposition, and this was the intended sense of the brief, and only partially considered, reply made by the Applicants to the President's question as first understood at **XI**, page 690.

Furthermore, in the Applicants' submission, the testimony of Professor Possony proves that, within the ambit of State practice and under the general rubric of Article 38 (1) (b), of the Statute of the Court, official racial discrimination is universally condemned and proscribed in the constitutional and legislative practices of all civilized States, with virtually the sole exception of Respondent, as well as in the judgments and in the basic ordinances of international organizations, and the Applicants respectfully draw the Court's attention in this regard to the verbatim record of 19 October in general, in which the relevant arguments are made and which, of course, may not now be re-canvassed.

If it pleases the Court, I turn now to comment upon another aspect of the evidence which likewise relates both to Respondent's formulation of the issues to which the evidence was directed, and to the relevance, or weight, properly to be attached to the evidence produced. I refer

to the misunderstanding, or the apparent misunderstanding, of the Respondent with respect to the actual significance of the Applicants' contention which was made in the Reply, IV, at page 260, and ever since maintained, that—"... the decisively relevant facts concerning Applicants' Submissions 3 and 4 are undisputed". In the context of the present comment, emphasis is on the word "*relevant*". One by-product of Respondent's persistent misconception of the meaning of the Applicants' contention in this respect is the heavyhanded play, made by Respondent, of the Applicants' so-called "admissions". Before disposing of the Respondent's argument in this regard, which can be done quickly, it would seem appropriate to comment upon a deeper dimension of the Respondent's apparent misunderstanding of the contention which relates to relevance of the evidence.

A climax of absurdity seems to have been reached on 28 October, when Respondent's counsel attributed to the Applicants the attitude "that no evidence may be weighed by this Court, that all evidence is irrelevant . . ." This is from page 163, *supra*. The comment, however, stands as an exceptionally candid version of Respondent's more customary contention that the Applicants have rested their case upon some so-called mechanical or automatic "norm and/or standards", as to which no evidence or facts are relevant, but which—by means of some process of legal alchemy—establish a violation of the Mandate without reference to any evidence. And the "norm and/or standards", moreover, are said to make impermissible "special public conveniences for women". This is the parody of the case to which Respondent elected to lead its evidence—the sole question to which it saw fit to direct the testimony of its witnesses.

The true significance of the Applicants' contention that all decisively relevant facts are undisputed is readily apparent on the basis of a simple syllogism. It can, in our view, be stated in three declarative sentences which furnish a key to the interpretation and application of the Mandate, and which demonstrate the actual basis upon which the Applicants' contention—that "all decisively relevant facts are undisputed"—rests. The syllogism is as follows:

1. *The major premise*: international standards are accepted according to which racial discrimination is inherently and always incompatible with moral well-being and social progress.

2. *As a minor premise*: apartheid is an extreme form of racial discrimination.

3. *The conclusion*: apartheid is inherently and *per se* incompatible with the mandate obligation to promote moral well-being and social progress, interpreted, as the obligation is to be interpreted, in the light of the applicable international standards which are set out in the major premise.

To the conclusion may be added a footnote sentence that, inasmuch as the mandate obligation is—and I quote from the Mandate, Article 2 (2): "to promote to the utmost", apartheid is *a fortiori* a violation of the obligation.

This is the Applicants' case, and it always has been, from the Applications to the final submissions.

The Applicants' contention that the decisively relevant facts are undisputed is, of course, pertinent to the second or minor premise of the

syllogism which I have just ventured to place before the Court—that is, that “apartheid is an extreme form of racial discrimination”. The laws and regulations, and the official methods and measures by which they are effectuated, the existence of which is conceded by Respondent and is on record as evidence, constitute a policy and practice of racial discrimination of an extreme and virulent nature, which is universally condemned as such. Such a policy, established by such evidence, is inherently and *per se* incompatible with moral well-being and social progress, not only in the mandated territory but, in the Applicants’ submission and as has often been said, anywhere, at any time, and under any circumstances.

It is on this basis and for this reason that the Applicants have maintained that no evidence, *additional* to that already in the record in the written pleadings, is necessary or relevant to their case, whether such further evidence is in the form of testimony or inspection. There is no issue of fact, relevant to the existence of the international standards for which the Applicants contend. The sources of which such standards are comprised are, as is explicitly stated in the Reply, IV, at page 493, set out in the Applicants’ pleadings. The sole issue which, of course, is not appropriate for argument at this phase of the proceedings, is their legal quality and applicability to the Mandate—a purely legal issue for the Court, which has been thoroughly canvassed.

In regard to the Applicants’ alternative contention that, by reason of their universal acceptance, the standards have obtained the legal quality of international law in the sense of Article 38 of the Statute of the Court: the only fact, or evidentiary, issue relevant to this contention would be, as I have already indicated, the existence or otherwise of relevant international conventions, relevant international custom, relevant general principles of law, relevant judicial decisions or teachings of qualified publicists—all in the terms of Article 38 (1) of the Statute of the Court. And as the Applicants indicated during the course of the proceedings, they perceive no objection, subject to the Court’s pleasure, if materials relevant to Article 38 of the Statute are brought in by the Respondent as evidence rather than as argument.

The Respondent’s argument or contention with respect to the asserted legal consequences of the Applicants’ so-called “admissions”, to which I now turn our attention, is premised upon the same misconception of the Applicants’ case as that which forms the basis for Respondent’s formulation of the issue to which the evidence itself was said to be directed. The Applicants at all times, as the record makes clear, have reserved the issue of *relevance*. This appears, *inter alia*, in the very portions of the record cited by Respondent’s Counsel, Mr. Muller, in support of the sweeping contention regarding the asserted legal effect of the Applicants’ so-called “admissions”. Thus, in the verbatim record of 27 April, from which an excerpt was quoted by Mr. Muller, the Applicants state, at IX, page 21:

“All facts set forth in this record, which upon the Applicants’ theory of the case are relevant to its contentions of law, are undisputed.”

Similarly, Mr. Muller cited the verbatim record of 26 October, IX, pages 43-44, at page 43—one of the very pages cited by Mr. Muller—the Applicants stated:

"There is no relevant factual issue in dispute between the Parties concerning the measures and the practices by which the Respondent gives effect to the admitted policy of apartheid."

Mr. President, the Applicants' reservation in this regard and on this basis was explicitly made on the very first day of the oral proceedings in these cases, as the Court will observe in the verbatim record, of 18 March 1965, VIII, pages 115-116. The reservations expressly included inferences to be drawn from averments of fact, as well as averments not relevant to the Applicants' theory of the case. Thereafter Respondent, and appropriately so, on several occasions expressed doubt concerning the significance and the scope of the Applicants' reservation. Ultimately, on 3 May, in the verbatim record at IX, page 95, Respondent's Counsel asked: "What do the Applicants mean by the expression 'averments of fact'?" It was a fair question and it received a fair answer.

In the verbatim record of 17 May, the Applicants have set out what was described as an "illustrative enumeration" of laws and regulations, official methods and measures, the existence of which is conceded by Respondent and upon which the Applicants rely, and which, of course, stand undisputed in the record. In describing the legal significance of the "illustrative enumeration" of these facts, the Applicants stated:

"These [the illustrative enumerated facts or, as the Respondent calls them, the catalogue of facts], and similarly conceded existent legislation and administrative measures, and effectuating policies and practices, form the *corpus* of factual material or describe the pattern of Respondent's conduct, which is known and characterized widely as 'apartheid' . . .

In the Applicants' further submission, no evidence or testimony in purported explanation or extenuation thereof is legally relevant to the issues joined in these proceedings." (IX, pp. 298-299.)

And the Applicants sought to clarify the matter still further, if possible, in their response to the second question addressed to them by Judge Sir Gerald Fitzmaurice, in the verbatim record of 19 May at IX, page 361. A so-called "admission of *irrelevant* facts" is a contradiction in terms. If averments of fact are contended by a party to be irrelevant, the question of admission or denial does not arise as a legal proposition. For the purposes of litigation such averments of fact simply are ignored, and I would also again draw to the Court's attention, with respect, the persistent—if I may so describe it—confusion existing which one finds in the Respondent's repeated treatment of averments of fact, inferences to be drawn therefrom, arguments with respect thereto, comments made thereon—the Respondent's treatment of all of these entirely different elements as being legally synonymous, and examples have been cited at more than one place in the record of these proceedings. The Respondent's contention concerning the alleged legal effect of the Applicants' so-called "admissions" is, in the Applicants' submission, without merit and should be rejected.

Before turning to comment of a more specific nature in regard to the relevance, weight and significance of the testimony of particular witnesses, it may be convenient first to dispose of a preliminary legal question raised by Respondent regarding certain procedures followed on cross-examination. I refer in particular to the question raised by Respondent in the verbatim record of 1 November, at page 220, *supra*. As the

Applicants understand the argument there made, with respect to the procedures and the rules of evidence or practice which should be applied thereto, the Respondent urges the Court to disregard "as a possible source of evidence" the views of recognized authorities read by the Applicants to Respondent's experts, for expression of their concurrence or non-concurrence therewith, accompanied by any elaboration of their views which they deemed pertinent to explain their agreement or disagreement, as the case might be. As is clear, in the Applicants' respectful submission, from the very nature of contentious proceedings before this tribunal, as well as from the character of the parties to such proceedings, latitude of a considerable degree, both on direct and cross-examination, properly may be accorded which, of course, always subject to axiomatic considerations of fairness, may not strictly be in accord with rules of evidence generally observed in municipal jurisdictions in the field of procedure. The self-evident character of this proposition is manifest from the breadth of Article 49 of the Statute of the Court and Article 53, paragraph 1, of the Rules of Court. Reference is also respectfully made to a specific application of the foregoing principle by the honourable President regarding an objection made by the Applicants to evidence proffered by the Respondent during the course of witness Dahlmann's testimony—the reference is to the verbatim record of 8 October, at XI, pages 460-461.

Respondent's experts have expressed far-ranging views concerning broad aspects of social, political, economic, and moral policy. Also, in the course of their direct examination, these experts supported their opinions by reading into the record newspaper cuttings, extracts from publications in the social and behavioural sciences, scholarly works on general economic development, general studies on education, and many other like sources. All the foregoing evidence was led, in the words later employed by Respondent's counsel Mr. de Villiers at page 220, *supra*: "purely for the purposes of the conclusions upon the question of the general well-being . . .". Respondent's argument with respect to the procedures followed on cross-examination seems to boil down to the proposition that in deliberating the credibility or weight properly to be assigned by the Court to the views or opinions of experts, or in assessing their possible bias or prejudice, the Court should not take into account their expressions of agreement or disagreement with views of recognized scholarly authority with which they may be confronted upon cross-examination in the broad fields covered by their testimony; or, what comes to the same thing, the Respondent's contention seems to be that such evidence, submitted in that form and for that purpose, must be inadmissible unless it is presented by personal testimony of all the scholarly authorities whose views are to be placed before the witness for his concurrence or non-concurrence.

Respondent's very reference to the testimony of Professor van den Haag in this context brings the unreasonableness of the contention into sharp focus. This witness, a professor of social philosophy, cited and quoted in support of his own views numerous opinions of other authorities. The Court's attention is drawn, *inter alia*, to the verbatim record of 22 June, at X, pages 145, 146, 147 and to the verbatim record of 23 June, at X, pages 166-171, 172-175 and 176-177. It was accordingly, peculiarly relevant and appropriate, in order to assist the Court in evaluating the weight and credibility of Professor van den Haag's testimony, as well

as his possible bias, was, accordingly, the solicitation by the Applicants, upon cross-examination, of his agreement or disagreement with views expressed by other scholarly authority in the fields of his expertise and to which fields his evidence was directed. Indeed, in the case of this very witness, referred to by learned Counsel for Respondent as an example in support of its contention, the Applicants not only demonstrated that his views conflicted with a significant weight of authority in the social and behavioural sciences, but also that the witness went so far as to question the motives and even the honesty of some of his most highly respected contemporaries in the same fields. I refer the Court to the verbatim record of 12 July at X, pages 458-460 and 466, and in respect of the last-cited point—Professor van den Haag's exhibition of bias—at X, pages 461-462.

Finally in this regard the Applicants would draw to the Court's attention recent municipal cases in some jurisdictions which are cited, for example, in *Wigmore on Evidence* (a work referred to by Respondent as an authority), Volume VI, the 1964 Pocket Supplement, pages 9-10; from this the Court will observe that the cases there cited reveal an increasing tendency on the part of some municipal courts, in any event, to enlarge or to expand previous practice, so as to permit the procedures followed by the Applicants in cross-examination of the experts presented in these proceedings, and that such increasing tendency to enlarge upon previous practice in these jurisdictions is viewed as an appropriate means of testing the knowledge, the credibility and the weight properly to be accorded to expert opinion. The Applicants, on the basis of all these considerations which I have mentioned in this regard, respectfully submit that the Respondent's contention, in respect of the use made by the Applicants of the works of scholarly authorities, lacks merit and should be rejected.

Mr. President, the Respondent has thought fit to make enquiry as to the reason why the Applicants embarked upon a course of extensive cross-examination, but there is no need for speculation. The Applicants did so because they thought it would pay dividends to their case. For reasons which will be made clear by way of specific comment on the evidence, the Applicants by no means have been disappointed in the results.

The witnesses, both by admission and evasion, strikingly confirmed the correctness of the Applicants' basic contention and legal premise that apartheid by its very nature is an extreme, and fortunately unique, form of racial discrimination, which is inherently incompatible with the moral well-being and social progress of the persons whom it affects and whose lives it touches. The witnesses brought to life in the Court room the impact upon individual human beings of an official policy of racial discrimination in which, and according to which, inhabitants are classified by inexorable *fiat* as either "non-European" or "European", as either "White", or "Native", or "Coloured", or "Asiatic".

The Applicants, from the beginning, have maintained that (and I quote from the Memorials, I, p. 161, paragraph 188):

"Taken as a whole, the weight of the factual record cannot be materially diminished by attempts at extenuation."

And it is accordingly paradoxical but true that the testimony, in direct as well as upon cross-examination, confirmed over and over again how

unnecessary the evidence really was. The testimony revealed the impact and the effect of Respondent's policies upon the so-called "non-White" inhabitants of the Territory in a manner which would in any event, in our submission, have been inescapably, and inevitably, drawn from the evidence of record in the exceptionally voluminous written pleadings.

Respondent disparages the weight and significance of testimony elicited in response to what Counsel for Respondent describes, or characterizes, as (and I quote from the verbatim record of 1 November, at p. 219, *supra*): "... hypothetical questions about the effect of particular measures upon particular individuals in particular circumstances", as if this were a cause to demean the evidence brought out in this respect, upon cross-examination and also upon direct. The asserted distinction drawn by Counsel: between what he referred to as "the general well-being", of the population as a whole, as distinguished from "the effect of particular measures upon particular individuals in particular circumstances", in our respectful view, begs the central question.

The impact of Respondent's racially discriminatory policy upon *individuals* "in particular circumstances", and through "particular measures", is precisely what the Applicants are talking about. The distinction purported to be drawn by Respondent between "the general well-being" and the well-being of the individual, if that is indeed what is sought to be drawn—it is not clear entirely what is meant by the distinction and the emphasis, but such a distinction, if sought to be drawn—would illuminate with lightning clarity, as the evidence has done, the essentially racist perspective which uniquely marks apartheid in the official ordering of the relationship between the individual and a group and the society as a whole, where the individual person is classified and his rights and burdens are irrevocably established on the basis of his race or colour. The testimony of Respondent's witnesses confirms and corroborates the truth and the soundness of the Applicants' observations which were deferentially placed before the Court on 3 May in the verbatim record at IX, pages 87-89. The heart of the matter, as the evidence brings out time and time again, was summarized on that date in a sentence on the credo, or in the ideology, or doctrine (call it what you will) of apartheid (and I quote from this record at p. 89): "the individual is essentially looked upon as a Native; the Native is not looked upon as an individual."

Mr. President and honourable Members of the Court, I turn now to comment upon the relevance, weight, credibility and significance of evidence of individual witnesses. I refer first to Dr. Bruwer, the only member of the Odendaal Commission to be called as a witness by Respondent, who testified, among other things (as the Court will recall) concerning the relationship, if any, between his testimony and a statement by Respondent's Prime Minister, Dr. Verwoerd, in which the latter referred to "domination by the White in his own areas". This is in the verbatim record of 5 July, at X, page 278.

In response to this question, posed on cross-examination, Dr. Bruwer conceded, at the page just cited, that the establishment of rights and privileges in the Territory was "by reason of being White and non-White". He further testified, at page 280 of the same verbatim record, that "the position of the non-Whites, using that term, is different from that of the Whites"—and then, referring to the so-called White economy—

"[in the White economy] . . . in the sense that the Whites in that area have certain rights and privileges which the non-Whites have not in that area".

With regard to job reservation laws and practices, Dr. Bruwer conceded on cross-examination, that the policy did not relate to what he had earlier termed "cultural configuration" as an explanation of the differential policies pursued on a racial basis or ethnic basis, but that the restriction precluding a Native from becoming a mine overseer, in European-owned mines, for example, had "nothing to do with any other factor" except that of classification by law as a "Native". This is in the verbatim record at X, page 284.

At page 286 of the same verbatim record, Dr. Bruwer stated that all people falling under the category of non-White are excluded "in regard to rights and privileges" in the White area. And he further stated, at X, page 313, his agreement with the proposition put to him, that rights are allocated and freedoms limited, in the White sector, on the basis of whether an individual is a Native or a White person by legal classification.

Professor Logan also, like Professor Bruwer, commenced by laying stress upon a "cultural difference between different groups" (to use his language in the verbatim record at X, p. 400). While he started with the emphasis that these cultural differences were the basis upon which rights and privileges were accorded, he did concede, at page 402 of the same verbatim record, that the fact that a Bantu (that is to say a "Native" or "Bantu", since the terms are used interchangeably in this record) happened to be a Herero, or a Nama, or a child of mixed marriage, had nothing to do with the level which he could achieve above certain forms of labour in the European community—in other words, that cultural configuration, or "cultural difference", had nothing to do with this fact, as it was based on a "White" *versus* "non-White" categorization.

Again, at X, page 400 of the verbatim record, Professor Logan expressed the opinion that the rights and privileges in the southern sector, the modern or exchange economy of the Territory, are not, in his words, "based on the census classifications, they are based on the tribal affiliations". That was his testimony at page 400. But at pages 419-420 of the same verbatim record he conceded that job reservation policies bear no relation to the individual's innate capacity, or personal potential or ability, but were based entirely on his classification under the census. It is relevant to note, in this connection, Professor Logan's earlier concession, at page 403 of the same record, that he did not regard colour to be a valid basis for allotment of rights and burdens.

Mr. Cillie, in his testimony, was not sure about the existence of any legislation in South or South West Africa establishing rights or imposing limitations upon freedoms on the sole basis of ethnic origin or colour—X, page 544. Earlier in the cross-examination, however, Mr. Cillie had conceded that ceilings were placed upon non-Whites in the southern sector—and I quote from X, page 538—"because they do not belong to the White group".

The irrevocability of racial categorization by law was demonstrated by the testimony of Dr. Krogh, who stated in the verbatim record at XI, page 171, that he would look at the colour of a person's skin to tell what group he was in and whether he was a "member" of the "developed

sector" of the Territory. At page 172 of the same verbatim record, Dr. Krogh admitted that the fact that the members of one society are of a different colour than those of another is a "rule" which is applied (as he called it), because "it is only human to do so" in determining the economic "absorptive capacity" of a group; he conceded the colour basis which governed or prevailed, at least in his view of the matter.

The evidence of the witnesses over and over again confirmed the rigid inflexibility with which the individual inhabitant is categorized by race or colour, without reference to individual potential or preference.

Dr. Van Zyl, describing his enquiry into Native education in the Territory in 1958, stated in the verbatim record at XI, page 310, as follows:

"We took these people who had settled in urban areas at the time still to be part and parcel of their respective national groups pertaining to different homelands. We were informed . . . that the Hereros staying in urban centres have all retained their connections with their homelands and their national groups in the Reserves. So we took all the others still to have the affiliation with their homelands and their national groups, irrespective of the fact that they were living in these urban areas."

And, as the Court will recall, the fact of residence, no matter for how long a period, no matter through what number of generations, does not affect the premise upon which this evidence was based.

Among more specific opinions reflecting the same rigidity of classification and irrevocability was that of Reverend Gericke, who in the verbatim record, at XI, page 54, stated "I have never met a de-tribalized Bantu in South Africa. They all belong to a tribe."

Dr. Rautenbach, in the verbatim record, at XI, page 356, expressed the view that an urbanized Bantu or Native in Pretoria, for example, and I quote from his testimony, "still has his roots in the rural areas in his own community". At page 357 of the same verbatim record, Dr. Rautenbach stated the view that education and economic interdependence within an area does not change what he described as "the essential 'Africanness' of any individual".

The meaning of that is not clear except for its connotation with respect to the impossibility, in the witness's view, of educational, economic, and, presumably, social factors affecting the relationship between an individual and the society except upon racial considerations, or ethnic considerations.

Conceptually, the evidence uniformly followed a line that the individual and the group are interchangeable concepts for the present purposes. This was shown in the testimony of Dr. Bruwer, for example, who stated, at X, page 271, that "it was to the Odendaal Commission and also to me, in the type of analysis that I made, a question of exercising one's rights and one's privileges within an area assigned to you . . . In the area looked upon as belonging to you."

Then, Dr. Bruwer, in response to questioning, commented that he did not distinguish between the individual and the group, on the ground that, if a group exercises rights, it means that every individual of that group exercises those rights. (X, p. 271.) This is true, but not sufficiently comprehensive to state the whole truth. It was no part of Dr. Bruwer's thinking, on the basis of his evidence, that the individual, as such, might

be entitled to rights which did not necessarily pertain to the group, as such.

The concept of interchangeability of individual and group likewise was revealed in the testimony of Dr. Logan in the verbatim at X, pages 416-417. The essence of his approach is found in his response to questions designed to elicit his opinion when, if ever, an individual may be regarded as having attained a personal status of his own, by which he should be, in the terms of the question, "judged as an individual and not as a member of a group in terms of his rights and duties and freedoms". This was the question.

Dr. Logan responded at X, page 416: "He will be judged as a member of the group who has achieved these things and will achieve this status within his group."

Dr. Logan then gave an affirmative response to the question whether he believed "that limitations imposed upon individual freedoms will always be regulated or measured by reference to the fact that he is classified in a certain group". (*Ibid.*)

In more specific terms, which the honourable Court may well recall, this witness viewed any Herero, as such, as one of what he called "the cattle people", irrevocably imbued, in Dr. Logan's phrase, with "the cattle philosophy". This is from the verbatim, X, pages 424 and 425.

Proceeding from this premise, Dr. Logan expressed the view that this consideration, that every Herero was imbued irrevocably with "the cattle philosophy", was relevant to the imposition of limitations upon the freedoms of individual Hereros.

According to Dr. Krogh, it is what he called "characteristic" and "inherent" in the Whites to seek out modern economic opportunities for development in the Territory, while, as he said, in his view the only "product" the Natives "could contribute at this stage to their economic development" was their "labour employment". These were his words at XI, page 77.

At XI, page 292, according to Dr. Van Zyl, no Native communities have "reached that stage of development where it would be feasible to make education compulsory". This was a blanket racial judgment.

Dr. Pepler was of the opinion that Natives should not be given "private, individual land ownership unless it is their wish, the wish of the people themselves, as a group, and not as individuals". (XI, p. 224.)

Likewise, in the verbatim at XI, page 142, Dr. Krogh referred to—

"... members of non-White population groups that are, according to my mind as an economist, at a much lower stage of economic development... and face quite different problems of economic development, and, therefore, require quite a different policy approach to those of the members of the White groups".

The emphasis, the preoccupation—of an obsessive quality in the Applicants' submission—on the rights, duties, freedoms, status, achievements, and so forth, of "groups" is also marked in the testimony of Dr. Bruwer, a member of the Odendaal Commission, who, in the verbatim at X, page 255, was led by Respondent to express his opinion concerning what counsel described as "vast differences between the groups".

No aspect of Dr. Bruwer's analysis or opinion, in respect to this question which was addressed to him at X, page 255 of the record I have

cited, and which he answered at pages 256-258 of the same record, touched problems or relationships arising or existing in the modern economic sector, such as factors incident to social change, which the Odendaal Commission report itself indicates an awareness, or indeed rapid social change, or to necessary adjustments to meet the conditions of the modern world in the modern economic sector of the Territory.

Dr. Bruwer's attention was exclusively confined to the familiar distinction of matrilineal descent, and the differences between the traditions of the tribes, particularly—almost exclusively—in the subsistence areas, in the northern areas and the like. I refer the Court to his testimony in **X**, pages 256-258. On cross-examination, Dr. Bruwer generalized all problems pertinent to the economic heart of the Territory in its economic life, with the sweeping statement "... the White economy, the money economy, is alien to the basic economic systems of these people". (**X**, p. 278.) He ignored the fact that many of "these people", that is the non-Whites, were part and parcel of the money economy, which, he conceded at another point of his testimony, could not thrive or perhaps even survive without their services. (**X**, p. 303.)

In the same vein and to the same effect, Mr. Cillie characterized non-Whites as "people on a lower level of civilization". (**X**, p. 544.) Earlier, at page 541, in response to a question if there would be, as a matter of policy, limitations imposed by reason of their colour upon non-Whites remaining for any reason in the White economy, Mr. Cillie remarked:

"It is not mainly a question of colour, it is a question of different peoples. These people are lesser developed, they are different from us and they have not attained the Western standard of living. I do not know why you are concentrating on colour."

(This statement was addressed to Counsel on cross-examination.)

The evidence of the witnesses similarly demonstrated that the policy is self-perpetuating; it leads to restrictions upon certain higher levels of activities for persons classified as non-White, and then such restrictions necessarily require, and are expected to require, a search elsewhere for opportunity by the non-Whites affected by such restrictions. It is a classic vicious circularity of cause and effect. Applicants will shortly comment upon evidence relating to this aspect of apartheid, that is, the "search elsewhere".

Dr. Bruwer, although a member of the Odendaal Commission, testified that he did not know whether or not there was any law or regulation which fixed individual rights or burdens on the basis of individual capacity, apart from membership in a group. I refer to **X**, page 292.

In the result, as Dr. Bruwer conceded, the only solution for the individual deprived of equality of opportunity, or subject to limitations upon his freedom, is to "escape" from the local situation. I refer to the verbatim at **X**, page 317. The word "escape" was used by Counsel upon cross-examination, and Dr. Bruwer, at the cited page, accepted that characterization of the situation.

In the words of Professor Logan, in response to Judge Sir Gerald Fitzmaurice's question in **X**, pages 501-502 (Judge Fitzmaurice's question, if I may remind the honourable Court, was "whether... it does not begin to look a little as if these laws are aimed precisely at preventing the man who would be able to do the job from doing it?"): "Yes, I think

that the basic aim is to try to force this man to do that job elsewhere than in the White community, to force him to do it in his home community . . . and that would be my explanation of it." (*Ibid.*, p. 502.)

The policy was referred to subsequently by Mr. Cillie at X, page 542. Mr. Cillie referred to this policy as "an encouragement for non-White groups and non-White peoples who are qualified to serve their people in the areas where they establish their homelands".

Dr. Krogh gave different expression to the same thought—the same concept—when he used the following metaphor in describing job reservation laws and other officially-imposed limitations upon economic advancement:

" . . . a signpost indicating before you enter the street that this is a cul-de-sac, instead of arriving at the end and then discovering that you have not been warned or clearly indicated that there are other ways of arriving at your particular destination". (XI, p. 119.)

Much testimony confirmed the evidence—replete in the written pleadings and leading therein to the same inescapable conclusion—that non-Whites, as such, are regarded and treated as mere *sojourners* in so-called White areas; the word is used in this context numerous times by Respondent in its written pleadings, and is reflected in the testimony as well.

These persons, these individuals who are classified by law as "non-White", with rights irrevocably established on that basis, are "sojourners" in the so-called "White areas", irrespective of the length of time that they, their ancestors, or their descendants, may live and work there. (This, of course, is what the Applicants have had in mind in emphasizing, and in using, the phrase—which they have done on more than one occasion in these proceedings—of the treatment of persons who "live, work and die" in the so-called White sector as "sojourners"—and the Respondent's Counsel has rather ridiculed this in his comment upon the evidence.)

As a "sojourner", the non-White is denied equality of opportunity or equal protection of the laws, on the basis of his "non-Whiteness", as compared to the Whites in the same area and working in a common and shared economy.

Dr. Logan, at X, page 493, conceded: "There is a ceiling if [referring to non-Whites] they wish to remain in the White Territory."

Dr. Rautenbach expressed the view that Natives in the southern sector are regarded as living in *an alien territory*. In the verbatim at XI, page 379, he stated that he would regard a Native: ". . . as being a man who is sojourning there and they sojourn there perhaps for three generations or four generations".

This appears at XI, page 379 in this stark form. These are the inhabitants of the Territory *under Mandate*!

Similarly, Dr. Pepler agreed that the non-White in the so-called White sector of the Territory is there as a temporary sojourner or as a guest. This is at XI, page 247.

Dr. Logan, at X, page 498, admitted, in response to a question about the individual Native who is "absorbed in the White economy"—these words being used in the Odendaal Commission report, as the Court will recall—that:

" . . . there are programmes for attempting to give him a better education, to do better things for himself within the area, subject,

of course, to the fact that there is a ceiling placed upon his economic attainment”.

Dr. Bruwer likewise conceded that unless the non-White physically moves to his own so-called territory or “homeland”, which he may never have seen but where he can “dominate”, however—that unless he moves away from where he is, there is no safeguard to protect him against present limitations upon his freedom so long as he works or lives in the White area. I refer the Court to X, pages 310-311. According to Dr. Bruwer (and his testimony in this regard is at X, page 308, “the best possible approach”, in his words, which commended itself to the Odendaal Commission (of which he was a member) was the physical removal of the non-White to his own “territory”. Likewise, he acknowledged as correct the statement that was posed to him on the same page of the record I have cited:

“... the non-White, who might spend his entire working life or longer—beyond his retirement—in the White area, would be subject to imposed limitations on his freedom so long as he was physically present in the White area”.

In order to avoid confusion, let me repeat, if I may, Mr. President, that the words I have just quoted were put to the witness by Counsel, but that he expressed agreement with them as a characterization.

Likewise, at X, page 543, Mr. Cillie agreed with Dr. Bruwer’s affirmative response (X, p. 317) to the question whether the alternative posed by the Odendaal Commission for the individual Native was the option of remaining in the White sector so long as he pays the price of limitation upon his freedom, or taking himself and his family and removing outside the area.

Much evidence was directed toward explaining or extenuating the adverse effects of apartheid upon the individual victim of discrimination, on the ground that apartheid, in the words of Dr. Rautenbach, is conceived as “a means towards an end—it is not an end in itself”. These words were used by the witness at XI, page 378. The same witness described the end envisaged for the policy in terms of what he called “a vision of the future”, with what he described as “nations or communities politically independent and economically interdependent”. This was on the same page of the record I have just cited.

Witnesses expressed the view that a necessary prerequisite for the attainment of this vision was what was frequently described as “social peace”. “Social peace”, it appeared from the testimony, is not adequately assured by normal conditions of equality of opportunity and equal protection of the laws. Different standards of “social peace” prevail here. As Dr. Krogh testified on page 79, XI, in order to ensure “social” peace it is necessary:

“... to recognize the diverse and heterogeneous nature of the population that is organized in different groups, primarily seeing their economic interests from the group rather than the national view-point”.

Seen in this light, according to the opinion of Dr. Krogh, “social peace” must, if necessary, be bought at the price of limitations upon individual advancement, such as the job reservation laws. This is on page 109, XI.

Similarly, Mr. Dahlmann, when asked to explain why it is necessary to impose job restrictions upon non-Whites if there are too few appli-

cants to fill the demand, replied, at **XI**, page 509: "That might be to avoid social friction, for example."

The simplest level where dangerous "social friction", as it was called, might arise, was described by Dr. Logan in his capacity as an expert on the relationship between man and the land, in the following terms, at **X**, page 488. First, Dr. Logan said:

"If you were to put side by side within a housing area of an urban community, a Damara, a Nama, a Herero, Ovambo, mixing them thoroughly, house by house down the street, then I am afraid there would be considerable difficulty between them."

Then he went on to say:

"The same thing would be true if you mixed in a collective gathering of individuals standing together in an open space. There might be some difficulty between them."

Dr. Rautenbach, justifying the legislative imposition of apartheid on the so-called "open universities", over their protests (as the evidence shows) stated at **XI**, page 406: ". . . bringing people together from various backgrounds may lead to conflict." He explained that educational apartheid at university level would "lead to more harmony because nobody will have a right to be disgruntled or make comparisons". It is not explained why this degree of disgruntlement arising from making "comparisons" does not exist in respect of those universities where, by special exception granted by the Government, there are persons of different backgrounds who are in common educational pursuits, even if they may live in separate houses, or attend separate theatres, or stand in separate lines at post offices.

The Reverend Gericke, furthermore, indicated that his church had in fact urged Respondent Government to pursue its policy of apartheid, although he conceded that churches other than his own had contrary views. But among the principal reasons relevant to this portion of my comment upon the evidence—among the principal reasons for his own views on the matter of church apartheid was his opinion that such separation, in his own words, "removed possible occasions of friction". In more, shall one say, theological or moral terms (**XI**, pages 9 and 10 and 15-17 respectively) the Reverend Gericke said:

"Where you have independent self-governing churches and communities, the requirement that one must love one's neighbour as oneself becomes easier of fulfilment than might otherwise be the case."

And as the opinions of others cited for his expression of agreement or disagreement demonstrated, the principle is just precisely the opposite from that implicit in his statement: the requirement of "loving one's neighbour" is decisively important in the case of *bringing together* persons of *different backgrounds*.

The evidence showed in considerable detail the sacrifice exacted from individual non-White inhabitants on the altar of "social peace", as it is repeatedly called in the evidence.

Dr. Krogh testified that non-Whites are excluded from positions as firemen, conductors and guards for the sake of "social peace". This is in the verbatim record at **XI**, page 139. At **XI**, page 182, he explained the policy in the mining industry against placing Natives in positions of

authority over Whites, or against permitting them to achieve positions above a certain low level, in these words:

"... but I respect ... the wishes of the members of different groups. If they do not in fact want to employ members of another group or do not want their members to work under members of another group, I can very well appreciate that if you forced them to do this, you would be inviting social strife ..."

Dr. Krogh appeared to assume without question, for the purpose of his testimony, that the preferences of the employing group must always govern, automatically, unquestionably. This emerged somewhat more candidly in his further testimony concerning the framework for the imposition of prospecting and mining restrictions on non-Whites. In the verbatim record, at XI, page 84, Dr. Krogh stated:

"This [that is to say, these limitations and restrictions] is not on the grounds of protecting the economically weaker against the economically stronger. It makes no sense. But I can very well appreciate that this is for the sake of social peace and in the interests of the White population group laying down these particular restrictive measures, through feeling that the members of the other population groups have equal opportunities for owning, of prospecting and of obtaining mining rights in their [own] areas."

It appeared, as the Court may recall from other admissions and testimony, that there was no equality of this sort at all. There are no mines in the northern territories, or in the Reserves, comparable to those which supply sinews to the modern economy in the Territory.

Dr. Krogh's testimony is consistent with Dr. Bruwer's acknowledgement that "integration", in his sense of the word, cannot be achieved in the modern economy of the Territory because of the requirements perceived by Dr. Bruwer as necessary to protect the White group. I refer to X, page 297. At page 315 of the same verbatim record, Dr. Bruwer agreed that a cited section of the Odendaal Commission report could fairly be interpreted to mean that non-White persons are admitted to the activities of the White group "only in so far as they are supplementary to the White group and not competitive". I wish to point out to the Court that I have quoted the words of the question, rather than the words of Dr. Bruwer's response, but Dr. Bruwer agreed to this characterization at page 315 of the verbatim record I have cited. And further, at page 316, Dr. Bruwer agreed (again in the words of the question put to him) that this was "just another way of describing the admission of non-Whites physically into the White area for the purpose of labour".

Mr. Cillie, when asked to define unfair economic competition in the context of industrial situations in South West Africa, replied (and I quote from his testimony in the verbatim record at X, p. 544):

"... people on a lower level of civilization are sometimes willing to work at lower rates and you have to protect the civilized standards".

Dr. Krogh readily agreed that the approach, implicit in this type of testimony which I have just cited, entails what Dr. Krogh, as an economist, termed a "social cost", at XI, page 187. At page 188 of that same record, Dr. Krogh conceded that:

"... looking at a particular individual I can very well understand

that this would in fact mean an economic sacrifice for this particular individual”.

Although Dr. Logan confessed disagreement with the policy of job reservation in the so-called “European area” of the Territory, he condoned it, at the same time, on the ground that systematic development of the apartheid policy as a whole could not tolerate exceptions in favour of individuals. At X, page 494, in which he commented upon this matter of the job reservation system, Dr. Logan said:

“Because there are exceptional cases, the individual that you want to bring out, from time to time, who perhaps would be able to conform and be able to work to the best of his ability within the European area. The moment, however, a door is opened to a situation of this sort, then the entire attempt at a development, a parallel elevation of groups, a whole concept, begins to break down.”

Dr. Logan appeared to find consolation in a feeling which he expressed at the same page of the cited record:

“... feeling that in some cases it is necessary to jeopardise the absolute happiness, perhaps, of a certain very small proportion . . . in order that the set of circumstances, the set of conditions and the set of plans be allowed to operate”.

Parenthetically, and with respect, this would seem to be the underlying thought; philosophy or perspective of Respondent, as voiced by Respondent’s Counsel in stressing, in the verbatim record of 1 November, that the sole purpose to which the evidence was led was “the general well-being”; it was apparently intended to be a reflection of this concept.

Reverend Gericke likewise felt that the group was so much more important than the individual, that “. . . sacrifices as a person in favour of the group . . .” might be necessary. That is at XI, page 46, and is presumably based on moral or theological grounds—one is not sure which. He testified also that “. . . there are certain hardships which have got to be endured en route to the goal”. That is at page 47 of the same verbatim record.

As Dr. Logan put it, in the verbatim record at X, page 396, perhaps more unkindly than he may have intended:

“There is, of course, always the renegade, always the person who is the non-conformist. *Even in Native groups*, I am sure there are these individuals but they are the rare ones, and to try to steer an entire programme to fit the one individual or the small number of individuals who do not want to conform to the over-all pattern is, I think, quite impractical.” (Italics added.)

In another colloquy in the same record, Dr. Logan conceded, at page 405:

“In the case of the exceptional individual, sometimes the regulations bear heavily upon him—I think there is no question of this. There are in every one of the communities, every one of the Native groups, I am sure, in South West Africa an, or some, or sometimes a reasonable number of people who have the ability to have privileges at a higher level than is accorded to the group.”

Dr. Logan, however (as was true of other witnesses), felt that such sacrifices were not too much to ask in the light of the objective of raising the “level of the greater part of the group”. Neither he, nor any witness, so far as we have observed, attempted to explain—what clearly is in

any event inexplicable—why the precise contrary is not true: why and how would the level of the group not be raised precisely by permitting and promoting and encouraging the raising of the level of qualified individual members thereof, instead of remitting them to the alternative of escape.

Some evidence sought to support the Respondent's view, as expressed again by Respondent's Counsel, our friend Mr. de Villiers, at page 219, *supra*, that the sacrifices and burdens are, as he said, mere "isolated aspects" which do not affect the "general well-being".

Mr. Cillie, for example, in response to the question addressed to him by Judge Sir Louis Mbanefo at X, page 555, said:

"... I don't think that this matter of discrimination in the southern sector is as important as has been made out in the cross-examination. I think this has been blown up. These are ... trivial, piffing points which do not affect the real case."

Dr. Krogh described the individual impact of racial discrimination in the Territory in different words, but to the same effect, and I quote from his testimony at XI, page 188:

"I can very well understand that there are certain individuals who may, in fact, be affected detrimentally, economically speaking by such restrictions as you are referring to in the mining industry, and the supply of public transportation, and the other examples that you mentioned, but I can assure you as an economist that this is of marginal significance considering the economy as a whole."

In further regard to the effect of racial restrictions in the mining industry upon the economic welfare of individuals, Dr. Krogh testified at XI, page 110:

"... I must admit however, that, for that particular individual, it may affect his living standard at that stage of development of the territory where not sufficient conditions, and mining opportunities exist in other areas ... But I think that it is marginal from the viewpoint of the economic advancement of that particular group and I think it is even less important viewed from the national economy as a whole. I think it is marginal."

In what respect permitting an individual to achieve economic advancement or promotion above a certain level in an existent mining industry is incompatible with raising the level of the so-called group to which he belongs, when the industry does not exist elsewhere; if that is a relevant factor, this was never made clear.

Dr. Rautenbach stressed the inherent capacity of a talented individual to overcome the adverse personal impact of discriminatory restrictions laid upon him by Government action. A non-White individual, otherwise qualified, denied entrance to the university of his choice where the faculty or facilities might correspond to his requirements, should keep in mind, Dr. Rautenbach implied:

"... there are occasions when the individual must sacrifice something for the greatest happiness of the greatest number, but I doubt whether that would be such a ... serious sacrifice because the very gifted individual finds his own way wherever he is ... despite the obstacles". (XI, p. 443.)

It would appear from the opinion of this and other witnesses that the

quality of the individual as such is more relevant to his capacity to surmount official discriminatory restrictions placed upon him than it is to avoiding or eliminating such restrictions in the first place.

The concept of avoiding the impact of discriminatory measures by escaping the situation in which they occur, or are visited, has been referred to already in comment upon evidence of Dr. Bruwer.

Dr. Logan was somewhat more explicit. He expressed the view that 5 per cent. of the population would not be an unreasonably high proportion to suffer in the service of the ultimate vision. (X, p. 421.) Such persons would, he explained, "be the ones who are at least in conformance with the pattern of the group"—I refer to X, same page. When he was asked in cross-examination whether his answer would be affected if such individuals "happen to be . . . of a highly superior innate capability", Dr. Logan answered:

"Yes, it would affect it. I think that the people who were of a higher development would find their own way of handling the situation, that they would not insist on remaining in the area which was antagonistic to them, but would find their means of development within the area in which they fitted, in which they wished to develop their own group." (X, pp. 421-422.)

The "wish" being an imposed or implied wish in many cases, no doubt.

As in the case of Dr. Bruwer, this witness, Dr. Logan, conceded that it would be a fair rendering of his testimony as well to say that the solution for such persons, in such an event, would be ". . . to escape from that situation". I refer to the verbatim at X, page 422.

The Court will recall that Dr. Bruwer also conceded that the basis upon which the Odendaal Commission recommendations rested was that the only assurance envisaged by the Commission against continued and perpetual domination of the non-Whites by the Whites, in the so-called "White areas", was that the non-Whites could, and it was hoped would, leave the White area. (I refer to X, at p. 314.) But if a non-White could not escape from his condition, by reason of economic compulsion or perhaps health or sentiment or other circumstances of a human character, he would then be irrevocably subject to limitations upon his freedoms in the White area, under the concept and approach of apartheid. Dr. Bruwer conceded that this would be true, so long as the non-White was there, present physically and alive. I refer to X, page 322.

Acceptance of the inevitability and propriety, of the necessity of sacrifice, as the evidence confirms and as is clear from the evidence of record, is posited upon the concept that the policy and doctrine of apartheid must be served at all costs. This was explicitly brought out in the response of Dr. Logan to a question propounded to him by Judge Sir Gerald Fitzmaurice in the verbatim record. The learned Judge asked Dr. Logan, with respect to job restriction, whether he—

". . . would agree then that these laws are not made exclusively because the great mass of the non-Whites are not up to doing certain jobs, they are made at least partly in the interests of the policy of separate development". (X, p. 502.)

And Dr. Logan answered: "I think it is made largely in the interest of the policy of separate development."

Dr. Logan had earlier stated, in the verbatim record that he—

". . . differed with the Government policy [that is to say, on job

reservations] because it does prevent certain individuals from reaching higher than they might do otherwise, but . . . I still felt that it was necessary and while I don't necessarily approve wholeheartedly of such measures, it is necessary in order to carry out the full development of the programme as envisioned." (*Ibid.*, p. 498.)

He then agreed that it was necessary to impose limitations upon the economic advancement of an individual Native in the so-called "White area", and I refer now to the same page:

"In order to prevent the breaking-down of the entire programme that is being developed because then if one exception was made, in the case of this particular individual we have in mind, then there would immediately be another one of less validity, and then another one, and eventually the system would break down because of a tremendous number of exceptions being made endlessly."

The clearest implication being that the possibility of this happening had to be avoided at all costs, irrespective of the wish of the individuals composing the groups who are, presumably, so desperately anxious to have these results brought about; there is a basic inconsistency in the concept reflected in Dr. Logan's testimony.

The Reverend Gericke contended:

". . . if you had to open the gates and give political rights, then it will never be possible to work out this policy of separate development". (XI, p. 54.)

The full impact of apartheid in human terms upon the individual inhabitants, is confirmed and manifest from the undisputed evidence concerning, for example, the numbers of non-Whites who are "domiciled" in the southern sector, outside of any Reserves, in the so-called White rural or urban areas. Dr. Logan, in his testimony on 13 July, at X, pages 479-480, responded to a request by the honourable Court for information with regard to the number of the non-Whites in the southern sector. Dr. Logan's testimony included his exposition of the meaning the Respondent attributed to the word "domiciled" in this context—to wit:

". . . a reference to whether or not their permanent place of residence is within one zone or the other; the place where the family is located, where the place of recognized residence is". (X, p. 480.)

These were the categories, of course, of persons to whom reference was intended to be made by Applicants' references to the area where an individual may be born, live, work and die.

The foregoing evidence, that is of Dr. Logan, which I have just cited, illuminates Dr. Bruwer's description of the premises upon which the Odendaal recommendations are based. I refer to the verbatim record, at X, page 322, where Dr. Bruwer testified:

". . . the [Odendaal] Commission very definitely came to the conclusion that the one people cannot be dominated by another people in an area, and it was on that basis that the Commission said, well, under these circumstances, having now a White group—and let us then, for the moment, Mr. President, say that they dominate the non-Whites in regard to the fact that there are measures that they have applied—the Commission could not subscribe to such a position and, on the other hand again, the Commission had to subscribe to existing rights in that White area and on that basis . . . it was

the conviction of the Commission [Dr. Bruwer continued] that if you agree, or if you accept the rights and privileges of people, and there are other people in that society not having those rights and privileges, then it is your duty, if you cannot change—and the Commission could not change a factual position—then you have at least got to provide for the other man, so that he also can make use of the same liberties, the same rights and the same privileges . . .”

And on the basis of this rather elaborate premise, which boils down to a formulation that has been described, I believe, as “reciprocity” or the concept of reciprocity, to which I shall refer later, Dr. Bruwer testified in the verbatim record:

“ . . . the recommendations made by the Odendaal Commission as protective measures for domination of the one group by the other group were those recommendations that assigned to a group of people a certain area in which they would have the only say in regard to certain matters, such as land rights and these things, and in which the other group would not be able to exercise such rights. The Odendaal Commission conceived that in that way then the interests of the one group would be safeguarded and protected against domination by any one of the other groups.” (X, p. 314.)

It was in this context that Dr. Bruwer, as has been noted, testified that the protective measure recommended by the Odendaal Commission to assure against domination of the non-Whites by the Whites was that the non-White could, and it was hoped would, leave the White area. And it should be observed in this connection that even on the assumption, *arguendo*, that this reasoning corresponds to justice and common sense—assuming its practicability, which stretches the imagination—it would have no application whatever to that segment of the inhabitants of the Territory classified as “Coloureds”. These individuals have no homelands either reserved or contemplated for them, even as part of a “vision”. This is clear from the Odendaal Commission report, paragraphs 420-424, at page 109.

The premise underlying the “escape” theory, in the case of the Natives, thus has no relevance to the Coloureds, who are left without either an escape route or the hope of equal rights and equal protection of the laws. In the words of Mr. Dahlmann, the Coloureds “do not fit in” to the scheme—I quote from the verbatim record, XI, page 559.

[Public hearing of 10 November 1965]

Mr. President and honourable Members of the Court, special problems and difficulties, raised by the unhappy fact that the Coloureds “do not fit in”, in the language of witness Dahlmann, to the plan or concept of territorial apartheid, were canvassed during the cross-examination of this witness—XI, pages 559 and following. Mr. Dahlmann agreed with the finding of the Odendaal Commission that the individuals categorized under the heading “Coloured”, and I quote from the Odendaal report: “. . . have a strong Caucasian strain and for the most part maintain a Western culture and way of life.” This is at XI, page 560. All of these persons categorized as “Coloureds”—including those who, in the language of the census “although in appearance are obviously white, are generally accepted as Coloured persons”—pay the inexorable price

of their classification. Among other discriminatory restrictions, based upon their colour alone, they are denied the franchise in the central organs of government, including the Legislative Assembly—**XI**, pages 559-560.

The Odendaal Commission recommends that Coloureds who are resident in urban areas should be persuaded "in their own interests and to enable them to have a say in their own affairs, to move to their respective urban residential areas"—that is in the Odendaal report, page 119, paragraph 452. This refers to the three so-called Coloured townships which, in the words of the report, are to be "properly planned and proclaimed" and where the Coloureds "shall enjoy the right to own property". That is in the Odendaal report on page 109, paragraph 420.

Mr. Dahlmann testified that he did not know whether or not Coloureds who presently reside in urban areas have "a say" in their own affairs, in the language of the Odendaal Commission report, whatever that locution means. His testimony on this point is at **XI**, page 560. The witness also left the record obscure as to whether the Coloureds who might not be persuaded to move to the Coloured townships, to be "planned and proclaimed", would have "a say" in affairs where they resided, and he left obscure equally the question of whether the Coloureds who were persuaded to move to the three Coloured townships, as and when they were planned and proclaimed, would have a "say" in their affairs, to use the language of the report, in respect of those affairs pertaining to that portion of their lives which would be spent in and at work for the so-called White economy, including, of course, their working conditions. The testimony of the witness on this point is at **XI**, page 561.

Professor Manning manifested similar ignorance, even unconcern, in regard to the status of individuals classified in the "Coloured" category. The witness was asked on cross-examination—**XI**, page 639—whether the problems presented by the Coloureds in the society of South West Africa could be defined in the same terms as his analysis of the relationship between Natives and Whites. Professor Manning's response, in our view, was revealing. He said, with reference to the question posed—at **XI**, page 639:

"It may be that if I knew more about it, I could give an adequate explanation for everything that has been done ['it' means the problem, if any, presented by the Coloureds as distinguished from the Natives], but it would be quite wrong for me to stand here and purport to be a source of enlightenment for this Court on the reasons for which particular things are done on the fulfilment of a policy which seems to me to be the wise policy in its basic philosophy".

The witness's response, in the Applicants' view, reflects a perspective similar to that which inheres in the distinction which Respondent's Counsel, Mr. de Villiers, apparently sought to draw in his comments at page 219, *supra*. The Court may recall learned Counsel's critique that cross-examination by the Applicants, as he said, left virtually uncanvassed "the over-all conclusions regarding the well-being of the population as a whole". Instead, as the learned Counsel admonished the Court, the Applicants concentrated on what he described as "isolated aspects of a policy flowing from particular individual measures in that policy".

So, too, Professor Manning appeared to regard as a merely isolated aspect of the policy of apartheid the effect upon the well-being and prog-

ress of more than 12,000 inhabitants, whose rights and freedoms are regulated and determined and limited on the basis of colour alone. The "basic philosophy" of apartheid is "wise", in Professor Manning's view, and that is that.

Such a perspective seems to be called for by the premises of apartheid itself. Application of a rule of reason would judge the character of a policy in the light of the laws and the regulations and the practices by which it is carried out. Professor Manning's approach, like that of Respondent itself, seeks to explain and to extenuate the laws, the regulations and the practices, in the light of the policy. The same mirror-reading approach characterizes the evidence seeking to justify the discriminatory denial of rights to Natives in one area on the basis that Whites will be discriminated against in other areas.

Mention already has been made of Professor Bruwer's testimony concerning the premise and hope of the Odendaal Commission that Natives would, and should, in their own interests, leave the White areas. The witness, Professor Bruwer, was asked to explain the significance of the word "integration" in the finding of the Odendaal Commission report at page 429, paragraph 1437. There the Odendaal Commission declared that the advantages of what it called "special protection" could not be:

"... brought about in an integrated community without openly subscribing to discrimination, which is not feasible, and is in any case undesirable under the circumstances on moral and ethnic grounds".

Parenthetically, Mr. President, it might be noted that the word "discrimination", unqualifiedly used by the Commission in this paragraph, is obviously employed in its prevalent and customary, or pejorative, sense, precisely as it is in the constitutions of governments throughout the world, in United Nations judgments and other sources comprising the standards defined at page 493, IV, of the Applicants' Reply.

The Odendaal Commission report, in the same paragraph which I have cited, concludes that the aims of separate development, or apartheid:

"... cannot be achieved in a framework of integration, and the traditional non-White groups must therefore be given separate geographical areas in which the aim of special advancement can be carried into practice".

And then in the immediately following paragraph, 1438, the Commission recommends that such areas be converted and expanded into what are called "homelands".

Now, Professor Bruwer's definition of the word "integration", as used in the report of the Commission of which he was a member, was reflected again in the mirror language of apartheid, at X, page 296, in the following terms:

"... I would say that integration would be where you create a society by giving rights and privileges to members of other groups, who have already got their rights and privileges in another area, in that specific society of another group".

This imported into the testimony the concept of what has been referred to, if I am not mistaken, by the learned Judge Sir Gerald Fitzmaurice (although I may be mistaken there) as "reciprocity" which, as the evi-

dence likewise confirms, is based upon a premise of wholly false equivalence. This, moreover, became a major and recurrent theme of the evidence.

Dr. Bruwer had earlier explained, and I quote from **X**, at page 264:

"... you have already given the rights to those people in their specific area of abode, and what is excluded for them here in this one area... that is to say the Caucasoid or White area, is naturally also excluded for the Caucasoids or Whites in their areas, that is the areas of other people".

Dr. Logan likewise explained a policy which accords no place to a non-White in the White area above the level of certain forms of labour on the ground that "... he is permitted this development in the other area". This is quoted from **X**, page 495.

Dr. Logan also stressed that the policy of limitation upon economic freedoms on racial grounds "... must be viewed in the whole context of the country, because it works in both directions". This is from **X**, at page 417.

How the policy is in practice, and in its impact upon the lives of the inhabitants, designed to work "in both directions" (as Professor Logan said) was elaborated by Mr. Cillie, who testified—

"... there is no equality of Whites and non-Whites in the White sector, just as there is eventually going to be no equality between Whites and Ovambos in Ovamboland". (**X**, p. 548.)

This concept, which characterized other evidence as well, paid no heed to the temporal or time factor, which is a basic factor in a human life. There was no heed taken of time factors in establishing these false equivalents underlying reciprocity—even of the most indefinite sort. Mr. Cillie effected a smooth transition in one sentence from the use of the present tense, in respect of the discrimination against or the limitations upon the freedoms of non-Whites in White areas, to the future indefinite, in the same sentence, with respect to the ultimate "eventual" deprivation of rights of Whites in other areas. Present White domination in the modern, economic sector is "balanced" against "eventual" Black domination in the subsistence or traditional areas. It was noticeable throughout the evidence, as it is in the Odendaal Commission report itself, that the living present is set off against a hypothetical and indeterminate future.

In application of the doctrine of reciprocity, Dr. Krogh testified, at **XI**, pages 108-109, in regard to the mining regulations that—

"... these restrictions operate with regard to mining being carried on in White areas. Similar restrictions would, in fact, operate in the non-White areas where mining operations exist or will in due course be developed."

Likewise, the Reverend Gericke said, at **XI**, page 46:

"... if a man has a ceiling in Johannesburg, [he was talking about South Africa where a situation cognate, to the Territory had arisen, according to the Respondent's contention] and that man has no ceiling in Umtata, then it is not an infringement on his rights".

Whether he has ever visited or ever may visit, or ever works in or ever may work in, Umtata, seems to be beside the point.

Reference is also made to Dr. Krogh's testimony at **XI**, page 114, to

Dr. Pepler's evidence at XI, pages 225, 226 and 227-228, and to the comments of Dr. Rautenbach at XI, page 442. From this testimony, the Court will note the progression of the doctrine of reciprocity from the economic field, to the political field, and to the educational field—from Krogh to Pepler to Rautenbach.

Dr. Logan expressed, with singular clarity, the personal impact of the doctrine of reciprocity upon the lives and welfare of the individual inhabitants of the Territory. At X, page 418, Dr. Logan observed as follows:

"The Native cannot work above a particular level in the European portion of the Police Zone.

Within his own Reserve . . . he can go to any level; within the Native township within the European area of the Police Zone he can go to any level; in Katatura in Windhoek he can operate any kind of machinery, he can be a doctor, he can go to any level desired, but not within the White Area.

But he is only deprived . . . because he likes to live in Windhoek, or to work in that mine, or work in that farm or factory, and if he does not wish to live in Windhoek, then he can go to his Reserve area and live there and enjoy those freedoms."

The testimony likewise confirms and corroborates what is, in any event, inescapably clear from the undisputed facts of record, namely that discrimination is inherent and implicit in the premises and policies of apartheid.

Professor van den Haag defined "discrimination" as involving a situation where—and I quote from X, page 450—

" . . . if there is a limitation imposed, be it economic, be it on freedom, and so on, and that limitation is imposed unilaterally on one group without being imposed in a manner that is more or less symmetrical on the other group, I would regard this as discrimination . . . that is, discrimination involves a unilateral imposition of a disadvantage not compensated for by any advantage to be achieved elsewhere."

Of course, unless this is but verbiage, the "symmetry" must be substantive and not merely formal, and the "compensation" must be the substance, and not the shadow, of a balance; otherwise the premise is totally a false equivalence.

The witness elaborated by stating that—" . . . the key to my answer is that bilaterality, that is that the limitations, be imposed equally on both groups". (X, p. 450.) "Equally"—this again, in the reverse twist which apartheid gives to more normal concepts, equality of protection of the laws, is, in this case and in the context of his testimony, satisfied if there is an equality of *denial* of equal protection of the laws. This is the underlying significance. But the key word is *equality*, even on the premise asserted by the Respondent, there must at least be an equality of denial, if that is really a sensible basis on which to apply a standard.

Professor van den Haag likewise responded to questions put to him by Judge Forster, at X, pages 474 and 475, respectively, as follows:

" . . . if people, because of their race, are prevented from holding the jobs you have just listed, and are not offered elsewhere similar opportunities to hold jobs of similar status, so that the whole purpose is to deprive them of a higher status they may otherwise have achieved, then I would call it discrimination . . .

If . . . people are deprived of advantageous locations without being offered other locations equally advantageous or similar in advantages, then I would call it discrimination because they would be deprived irrelevantly of opportunities to which, in my opinion, they are entitled. If, on the other hand, they are prevented from locating themselves in one place but allowed and able to locate themselves in another place about equally advantageous, then I would say this falls within the rubric of segregation."

The witness was seeking to draw the distinction here between what he referred to as the possible inconsistent uses of segregation, which he compared to a knife which could be used for either surgery or for murder. It was implicit in Professor van den Haag's testimony, as it was implicit in Professor Logan's, that the opportunities must be in substance, and not merely in shadow, similar, and this refers to that heavily temporal factor, which all human beings share in common, and that is that advantages accrue to them during their own lifetime.

In response to further questions asked by Judge Forster, Professor van den Haag stated, at X, page 476, with regard to a hypothetical Native engineer who is offered an equivalence of practising engineering in a place where there are no engineering works:

"I should certainly say that if he is permitted to carry out his profession in an area where there are no material possibilities to carry out his profession then in effect he is not permitted to carry it out, and I would then call it discrimination and not segregation. However, I would say that if there is a reasonable chance that he can carry out his profession, although perhaps not immediately, but if arrangements are being made along those lines, I would have to mitigate my statement accordingly."

The testimony confirmed and corroborated the undisputed evidence of record showing how false the asserted equivalence really is.

With respect to population figures, Dr. Bruwer, at X, pages 287-288, testified that there are "around 300" Whites in Ovamboland, as against about 240,000 non-Whites in the same area. At page 288 of the same verbatim, Dr. Bruwer gave the total number of Whites "in other areas outside the Police Zone or southern sector, other than Ovamboland" as being "not more than between 300 and 400 altogether".

Dr. Logan generally described the north, by which of course he meant the area of the Territory north of the Police Zone, or the "Red Line" as it is sometimes called in the record; the north was, he said—

"entirely an area of Native occupants. There are no Whites in the area at all other than a few administrators, health officers, mission people, traders and so on. The area is a strictly Native area carrying on strictly Native agriculture . . ." (X, p. 363.)

By way of contrast, Dr. Logan proceeded, at page 382 of the same verbatim record, to draw the picture of an average White farm in the southern sector as having a population of five Europeans and some 50-odd Natives, the Natives being employees and their dependants.

Dr. Krogh, at XI, page 194, agreed that approximately 250 to 300 Natives are employed in skills in industry or non-public enterprises in the north. He also stated, at XI, page 165, that the economic policy pursued in the Territory rests heavily upon the distinction drawn

between the modern economy of the southern sector and the traditional or subsistence economy of the north, and he said: "In fact it is more striking in the case of South West Africa than it is in many other African territories." Dr. Krogh stated that there are no job opportunities in the northern areas for electrical and mechanical engineers, as he said, "at the moment" (XI, p. 118). Similarly, in the same verbatim record at page 124, Dr. Krogh indicated that—and again in his words—"at this particular stage"—there are no or very few available employment opportunities for non-Whites in motor service or repair stations, for example, in the northern territories. At page 111 of the same verbatim record he had earlier stated that employment opportunities, again saying "at the present time"—for mine workers, outside the salt mines in the north, are non-existent. Dr. Krogh likewise conceded at XI, page 110, that, although he thought that the impact of mining regulations upon the economic welfare of a qualified non-White individual would be, as he said, "marginal, viewed from the economy as a whole, or from the group from which that member derives":

"... I must admit however, that, for that particular individual, it may affect his living standard at that stage of development of the Territory where not sufficient conditions, and mining opportunities exist in other areas. I can appreciate that point and I admit that that is so."

The evidence confirms also what is in any event inescapably self-evident from the facts of record—there is no meaningful option to escape from the environment in which official racial discrimination is practised. As Dr. Logan conceded at X, page 393:

"... today, with the economic development of the homeland areas still in an embryonic stage, it is quite likely that many people are quite forced, economically, to stay in an area in which they are able to obtain a higher standard of living than they would if they returned to the Reserves".

The use of the word "returned" is, if the Court will recall, a locution which applies to persons whether or not they have ever been in the Reserves, on Dr. Logan's premise that they belong there; therefore when they go there, even for the first time, they "return" there.

Dr. Krogh answered, when asked the following question upon cross-examination—I shall read the question, if I may, first—at XI, page 120:

"Would you say as an economist or as a witness or both that a non-White who ... has been born and lives and works in the economic sector in the urban area has a practical option as to whether to stay where he is or go to, let us say, Ovamboland or some other northern territory to finish out his life—does he have a practical economic option?"

That question was asked on cross-examination, and Dr. Krogh answered, at the same page, as follows:

"... not at the same level of living—that is after all why he is there and is working there because it is in his economic interest to be there and it is in the economic interest of the White employers to have him there. It is in the economic interest of both these parties participating in this exchange relationship".

The Applicants found peculiar significance to be attached to the words

"exchange relationship", because it may go far to indicate what the Odendaal Commission report perhaps had in mind in references to the "absorption" of non-Whites in the White economy; the phrase is not otherwise defined or explained in the report itself.

In the light of the foregoing admissions, there is an unreality bordering on evasion in Dr. Logan's response to the question posed to him by Judge Sir Gerald Fitzmaurice when Dr. Logan expressed the view—

"... that the basic aim [that is, of the limiting legislation] is to try to force this man to do that job elsewhere than in the White community, to force him to do it in his home community . . ." (X, p. 502.)

The concept of reciprocity and its underlying fallacy of false equivalence also is exposed by evidence that non-White labour will in fact, for all the foreseeable future, be essential to the so-called White economy. Witnesses who testified to the point conceded this to be true, although with varying degrees of candour. Dr. Bruwer admitted at X, page 277 that he would—

"very definitely say that the fact that the . . . non-Whites are working in the White area is a very important contribution towards the economy of that area".

He testified that neither the Odendaal Commission as a whole, nor he as a member of the Commission, foresaw the practical possibility of the White economy surviving or thriving without the continued use of non-White labour (X, p. 304). At page 305 of the same verbatim record Dr. Bruwer stated as follows:

"... it was not in the mind of the Odendaal Commission that the economy in the White sector would operate without the so-called non-White labour . . . within the foreseeable future . . .".

He agreed, on the same page, that this could possibly be true for 300 years.

Dr. Logan gave his opinion at X, page 384. He said—

"that all of the plans that have ever been envisaged have envisaged a continuing use of Native labour on the European farms and in other ways within the White area of the Police Zone".

The Native labour supply, according to Dr. Krogh (XI, p. 177), is necessary to enable the economy of the Southern Sector "to operate at the level at which it is operating at the moment. It is, in fact, an economic part of it."

Dr. Rautenbach, referring to the prospects in regard to the Republic itself, stated at XI, page 381, that "we will always have people coming from over the border to work in the White area, as far as human vision stretches"; and likewise he indicated that (in his response to a question by Judge Sir Gerald Fitzmaurice at XI, p. 477) "by the middle of the following century" there will be many non-Whites working in the White areas of South Africa. This testimony, as the Court will observe, was not directly related to South West Africa, but there is no evidence which questions in any respect the applicability of the same evidence to South West Africa.

With regard to the political aspect of any homelands proposals, such as those reflected in the Odendaal Commission report, Mr. Dahlmann said that he could not say or judge how long that would take to be implemented (XI, p. 512). At XI, page 537, the same witness testified that the nature of the political independence envisaged for these so-called "home-

lands" was, as he said, "in the far future". Mr. Dahlmann was "unable to give any figure" (XI, p. 544) in terms of years, decades or even centuries as to the accomplishment of the political independence envisaged in the Odendaal Commission report.

In response to a question by Judge Sir Louis Mbanefo concerning the number of States recommended by the Odendaal Commission to be created in the Territory, Dr. Eiselen stated:

"That . . . would be very difficult to say, some of the units are very small . . . the policy in regard to the further development of South West Africa with a number of these small units has not been so fully worked out yet by the Government that I am in a position to give a definite answer to this question. My own personal view is, of course, . . . that you would hardly be able to think of Bushmen or the Dama or even of such people as the Herero as being independent states." (X, pp. 127-128.)

Likewise Mr. Cillie responded to a question by Judge Sir Louis Mbanefo, at X, page 533, concerning the ultimate independent status foreseen for the proposed homelands by saying: "Some of these units could obviously not be independent states in any accepted sense", and that:

"Some of them are so small and the numbers are so low [meaning population] that obviously you cannot speak of all those smaller areas as viable states. You cannot envisage that, nor for the foreseeable future . . ."

At XI, page 561, the honourable President put a question to the Applicants with regard to paragraphs 356 and 357 of the Odendaal Commission report, which had formed the basis for certain questions put to witness Dahlmann on cross-examination at page 552 and following of the same verbatim record. The Applicants' questions in cross-examination (it was, as I understood, Sir, permitted at that time that the answer, which is a very brief one, might be given in the course of comment, and with the leave of the President I would propose to do so now) were not intended to be directed toward eliciting the witness's opinion as to the transitional quality, or otherwise, of the Odendaal recommendations in question.

With regard to paragraph 222 of the Odendaal Commission report, to which the honourable President drew the Applicants' attention and to which he suggested that we give our consideration, the Applicants' questioning of Mr. Dahlmann in regard to paragraphs 356 and 357 (to which the President also referred) was not designed in any manner to engage the witness, or to elicit opinions, concerning the possible intentment of the Odendaal Commission with respect to the relationship between paragraph 222 of the report and the recommendations set forth in paragraphs 356 and 357.

However, as the Applicants understand the language employed in paragraph 222, which in any event they do find ambiguous, the contemplation of eventual transfer of certain functions to legislative bodies in the so-called homelands, when as and if established, appears not to include the functions enumerated in paragraph 357; nor does it appear to contemplate repealing the requirement at any stage that all legislation would be subject to approval of the State President of the Republic. This, however, is necessarily pure speculation on the Applicants' part, particularly having in mind the hypothetical and wholly contingent and

unofficial quality of these ambiguous recommendations—ambiguous in this respect in any event. But that was the sole purport and intendment of the Applicants' line of questioning addressed to the witness in this regard.

Reverting to the comments to which the Applicants have been addressing themselves. The evidence—and this is relevant to the general approach of the Odendaal Commission report with respect to the unilateral determination by the White minority, without effective voice or participation of those composing the large majority who would be affected by the recommendations, if carried out—confirms the facts of record. These show indisputably that the non-White inhabitants of the Territory are, as I have said, denied a vote in decisions affecting the development, the direction, the timing, the structure or the form of the political institutions under which they live and under which they would be governed and regulated if the recommendations of the Odendaal Commission report were to be carried out in this or some other form. As Dominie Gericke put it at **XI**, page 54:

“ . . . if you had to open the gates, give political rights, then it will never be possible to work out this policy of separate development”.

When asked on cross-examination whether there were any methods or means—other than the right of petition—by which non-Whites could make their views or wishes known to the South African legislature, Mr. Cillie responded at **X**, page 535:

“ . . . I do not know whether they have little councils, perhaps they have spontaneous councils which make representations to the Government—I do not know”.

Mr. Cillie appeared to think it sufficient assurance that the governing authority (and I quote his words at **X**, p. 533):

“ . . . would soon know if we made a really ghastly mess, you know—that would be apparent very soon, because they do have their ways of expressing themselves . . . By making representations to authorities; by sending deputations; by giving interviews to newspapers.”

Mr. Dahlmann appeared reluctant to respond to questions put on cross-examination, aimed at eliciting his view whether only Whites have a vote in determining the future of the Territory (**XI**, at pp. 543-544)—he appeared to be evading this fundamentally simple and clear proposition. So did Mr. Cillie at **X**, pages 530 through 532.

Dr. Rautenbach admitted that Native taxpayers, in regard to the field of education, have no right to vote for the members of Parliament, which, for example, decreed the university apartheid system. This was at **XI**, page 418. Just as Dr. Bruwer admitted at **X**, page 266, that there were no non-White members of the Odendaal Commission or on the staff of the Commission which made the recommendations to which reference has been made, including the timing and the structure of the Legislative Council and the homelands to be established (if at all), so Dr. Van Zyl conceded that educational policy in the Territory was determined by the Legislative Council and Executive Committee, all of the members of which are White, and all of whom are elected by Whites alone. That is at **XI**, page 274. He also admitted that the inspectors in the Education Department were all Whites—**XI**, page 275. Dr. Rauten-

bach conceded that all the members of the National Advisory Council on Education were White—**XI**, page 347.

This may be a convenient context, Mr. President, in which to turn to another question addressed to the Applicants by the honourable President at **XI**, page 315, relating to the matter of compulsory education in the Territory. With the leave of the honourable President, the response is made pursuant to the grant, at that time, of the Applicants' request to be permitted to take the matter up, after consideration, during the course of comment.

Mr. President, as was stated at pages 391 and 392, **IV**, of their Reply, the Applicants have not insisted that education be made compulsory for all Native children in the Territory—that is explicitly set forth in the Reply. Nor do they insist that education be compulsory for *all* the children in the Territory. Compulsory education, like universal adult suffrage, is an aim, a target for achievement. It is not a rule of international law. If compulsory education is applied in the case of *all* White children, irrespective of wish or circumstance, and is not applied in the case of *any* Native children, a question fairly arises concerning the reason. And if such a striking contrast exists in a society governed by a policy of extreme racial discrimination and separation, the reasonable inference may very well become a compelling one. Respondent's failure, after 45 years of administration of the Mandate, to have instituted even an experimental or provisional compulsory education system for any Native, even in urban areas where Natives have for generations, as the evidence shows, been "domiciled" and where they are "absorbed" in the economic life (whatever that term may mean exactly)—such a failure, in the Applicants' view, must reasonably be ascribed to, and is obviously based upon, racial considerations.

If so, and to that extent, such a failure is inherently incompatible with the obligation to promote the well-being and the social progress of the inhabitants of the Territory. That is the Applicants' contention.

Reverting to the question of limitation or denial of participation in decision-making processes pertaining to their own welfare, in the economic field, for example, Dr. Krogh, at **XI**, pages 143-145, conceded, as the record made clear in any event, that Natives were represented in labour disputes and collective bargaining situations exclusively by Government officials, all of whom were White. He conceded also that non-White labourers (and I quote from p. 144, **XI**):

"... have no participation in the government of the White area where the modern economy operates. In other words, they are in that respect not represented politically in the administration of the White sector of the southern part of South West Africa."

Dr. Pepler, at **XI**, page 238, stated that no "Bantu" (synonymous with "Natives" in this record) were members of the Board of Directors of the Bantu Investment Corporation. At that page of this record he said: "That is a policy."

Dr. Dahlmann informed the Court about the present circumstances of political life in the Territory with respect to the Natives and their political organizations. At **XI**, page 512, he indicated it to be his opinion that—

"... the outside world takes these organizations a little bit too seriously . . . they have very limited support and people—as we say,

the man on the street—are not much interested in these political parties and organizations”.

Mr. President, the Applicants would not find this surprising, even if it were true. What *else* could be expected when the normal and natural end of political activity—which is participation of a meaningful nature in decision-making processes—is denied on the basis of race or colour? Such a denial is by inexorable classification, even though, as Mr. Dahlmann conceded, there are non-Whites in the Territory who would be capable and qualified to serve in governmental bodies and participate in the decision-making. And, of course, this refers throughout to participation in decision-making of the central authorities, which actually determine the well-being and the social progress and welfare of the individuals concerned, presently and in the living future.

With regard to perhaps the most important attribute of political life—that is to say nationality and citizenship—Mr. Dahlmann was unable to say whether it is open to a South West African Native to become a citizen of the Republic of South Africa, as may—and do—White South West Africans. At XI, page 496, he appeared to dismiss the subject, or else to consider it responsive to the explicit question posed to him on cross-examination, by saying:

“He [that is the Native] is part and parcel of his own nation, in the first instance, and there are these . . . tribal and national links, however one wants to call them, within this community and he cannot regard himself as anything else than he is.”

In the Applicants' respectful view, this is pure doubletalk. The same ambiguity marks Respondent's pleadings as well. The question posed is clear and simple: are the non-White inhabitants of the Territory, or are they not, eligible for citizenship in the Republic of South Africa on the same basis, terms and conditions as are the White inhabitants of the Territory? And the Applicants would respectfully urge clarification, for the first time, of this point, for the benefit of the Court's clearer understanding of the matter.

The evidence confirmed the full implications and consequences of Respondent's concept that a dominant White minority could justly and objectively make decisions affecting the well-being and social progress of the non-White inhabitants who happen to compose the majority. But ignoring the latter fact for the moment, the point is whether the Respondent could, under such circumstances, justly and objectively make such decisions without, on the one hand, permitting the non-Whites to share effectively in the decision-making process, or, on the other hand, accepting international supervision, or both. On cross-examination Mr. Cillie was asked if he considered the official position of Respondent's governing party to be a statement made by the Prime Minister, Dr. Verwoerd, in the House of Assembly of the Republic on the Odendaal Commission report. As is set forth at X, page 530, the Prime Minister had said, *inter alia*:

“Our policy is based on our belief that whatever others may say, the only way in which we can test our policy and our actions is by asking ourselves whether we are honestly and sincerely doing what a Christian guardian can be expected to do for the peoples entrusted to his care.”

"Asking ourselves". And who is it who asks themselves? It is a government elected by and composed exclusively of members assigned to, or categorized in, one racial grouping alone, that is, the Whites, even excluding those "who, although in appearance are obviously white, are generally accepted as" something else.

Mr. Cillie responded to this question, "Yes, definitely" at X, page 530. He likewise conceded, in a statement made upon direct examination, that he had used the word "trusteeship" in the same sense as he understood the Prime Minister had, and that he could not see, in his appreciation of the word "trusteeship", that there was any connotation of responsibility to account or report to any body or agency outside the South African Government itself.

He expressed the view, and I quote from the same page of the same verbatim record, with regard to "trusteeship" in his and Respondent's use of the term, "in this technical, political sense it is accountability to yourself and to your conscience". The witness conceded, as in any event is obvious from the record, at X, page 531, that "the predominant power", in his words, "the ruling power resides at the moment in South West Africa and in South Africa in the hands of the White group" and that the legislative and governmental organs are elected exclusively by White persons; and reference has already been made, Mr. President, to his testimony concerning the means, the only means available, to non-Whites for the expression of their views or grievances.

Again, in response to questioning by Judge Sir Louis Mbanefo, at X, page 554, Mr. Cillie testified "Certainly, if, in the process, we find points of friction and if their objections are valid, we will make the necessary accommodations", and further stated that by the words "we" he intended "the administration . . . the ruling White people".

In regard to the impact upon the economic life of the non-White inhabitants of the unsupervised and unshared control of the Territory by the dominant White ruling group, as so-called "trustee". Dr. Krogh readily admitted that this group determined the degree and the condition of individual sacrifice or hardship which is to be visited upon individual non-White inhabitants of the Territory—this is at XI, page 189. Dr. Krogh likewise conceded that the objectivity of the trustee, under such circumstances, could become clouded by self-interest. At XI, page 82, he stated:

" . . . I can very well understand that the members of one population group would give preference to job opportunities created by them or, in fact, created in their area or available in their area. They may prefer that these jobs should be occupied by members of their group . . . "

And the same witness has said:

"The problem in South West Africa is that the Whites may very well look too well after themselves individually—too well that is at the expense of other groups." (XI, p. 187.)

Well, Mr. President, if I may insert parenthetically, this, of course, happens to be true of people everywhere. This is a universal human truth, and the "White trustee" is no exception to the general human rule.

Professor Manning expressed the same thought differently. He said:

" . . . detachment . . . is as difficult for defenders of apartheid as it is for critics of apartheid. Defenders of apartheid are quite commonly members of the privileged society into which I was born,

and it is notorious amongst sociologists that privileged people find it difficult to be detached in thinking about their own situation.' (XI, p. 628.)

So it is true that privileged trustees may find it difficult to be "detached" with respect to decisions made without accountability or supervision.

Evidence was led by Respondent which sought to explain or extenuate apartheid and this in many ways, Mr. President and honourable Members of the Court, the Applicants found to be the most remarkable contention of all—evidence was led by Respondent which sought to explain or extenuate apartheid on the ground that the trustee's objectivity would be clouded, or his conscience impaired, if non-Whites were to be accorded equal opportunities and equal protection of the laws. Mr. Cillie formulated the conception in very stark terms indeed. The Court will note his testimony in the following terms:

"The successful implementation of this promising but very difficult policy in Southern Africa is utterly dependent upon the sustained will and the capacity of the present leading people, the White people of South Africa, to carry it through . . . All wisdom in statesmanship is to some extent a function of a sense of security. Threats to that security, of course, could arise from various sources, in South Africa and South West Africa. I would like to distinguish between two kinds of threats. The one sort of threat comes through encroachments. If a group encroaches on the preserves of another you get a feeling of fear and you engender bitterness and hostility which make all sorts of positive and constructive action very difficult. That is the one sort of threat that could upset, what I call orderly evolution. You really cannot expect the White South Africans in South Africa and South West Africa to act generously or wisely if they are continually being threatened in their social institutions or in their economic position by encroachments by other groups; it puts their backs up and instead of co-operation and friendliness you get tension and hostility." (X, pp. 521-522.)

The witness went on to explain that avoidance of tension and hostility and of being "threatened", was, in his words, "the real justification for some of the legislation that has been under attack in the Court and in other forums". (X, p. 522.) In Mr. Cillie's words, "you cannot risk sabotaging this whole constructive outlook on the part of the Whites by allowing a process of encroachment to put economic and social fears into the hearts of the White people".

At page 537 of the same verbatim, Mr. Cillie warned that "you have to protect the sense of security of the Whites in order to make them behave wisely. If they are racked with fears, hostilities and bitterness they cannot behave as real trustees should."

The testimony likewise confirmed, as the evidence on record made inescapably clear, that Respondent's insistent pursuit of a unilateral course under such circumstances breeds extremism, which, in turn, generates a sense of isolation and persecution. Mr. Cillie strongly rejected what were described as (and I quote from X, p. 516) "so-called middle of the road policies—policies of moderation, moderating somewhere between an extreme of differentiation and integration".

This witness, editor-in-chief of the newspaper which, according to his testimony, has the closest relations with what he called the thinking

element of the National Party, stated his grounds candidly as follows:

"The reason, I think, is fairly simple, because every so-called middle of the road policy, every policy that suggests giving limited rights to these various groups inside one political structure, does raise fears immediately that the end of this policy is a position of one man, one vote, and that once you start, there is no logical, and indeed no practical stopping place short of universal suffrage." (X, p. 516.)

The emphasis on "fears" was repeated by Mr. Cillie, in response to a question put to him on direct examination, with respect to a reference the witness had made earlier to what he described as "pressure from the outside". After voicing concern that what he called "one man, one vote thinking" might lead to domination or exploitation by one non-White group over another, Mr. Cillie reverted to his principal theme, as follows:

"... it does raise fears among the ruling Whites as to their position [that is, these "outside pressures"] and their safety, and it does make them behave in more negative ways than is appropriate in the circumstances, than they should behave. The Whites certainly are not going to surrender themselves to so-called majority rule based on the numerical preponderance of the Black peoples in South Africa or South West Africa. They would resist it as meaning the end of their world and they will deal with it as such." (*Ibid.*, p. 525.)

And, Mr. President and Members of the honourable Court, the witness, as does the Respondent, looked upon the United Nations as the embodiment of the source of their fears. The Respondent's intemperate and baseless assaults upon the Organization are to be evaluated in this light.

In the verbatim record at X, page 84, Respondent's Counsel advised the Court as to the issues to which the testimony of Mr. Dahlmann and witnesses generally were to be directed. Mr. de Villiers advised the Court as follows:

"... by the means which I have already indicated plus other evidence and demonstration from available records, we want to show in what light the activities in the international bodies, as relied upon by the Applicants, are really to be seen."

Respondent's course and objective in this regard, and one of the purposes for which its testimony was said to be directed and said to be relevant, had been forecast by the Respondent as early as the verbatim of 30 March, at VIII, page 272, where Respondent's Counsel referred to these proceedings as—

"... the culmination of a vehement campaign which has been waged against the South African Government for a long period and persistently in the international political arena, particularly in the United Nations".

In offering the testimony of Mr. Dahlmann at XI, page 456, Respondent there indicated, as one of the issues to which his testimony would be relevant, what Respondent described as the "connection" between certain political parties in the Territory and "certain persons at the United Nations". Such evidence, Respondent's Counsel said, would be "relevant when we come to deal later on in argument with the so-called law-creating processes or norm-creating processes referred

to by the Applicants, that is, resolutions and reports of organs and agents in the United Nations".

From this statement of the issues to which the evidence was said to be relevant in whole or in part, it would appear that the sole issue to which it was said to be relevant was that issue raised by the Applicants' contention with respect to the international legal norm, of the content described at page 493, **IV**, of the Reply, that is to say, in terms of Article 38 of the Statute of the Court.

The Applicants had, it is true, referred to "law-creating processes" in the course of their arguments addressed to this point but made explicitly clear that they were not, of course, contending that United Nations resolutions themselves had force of law, for example, at **IX**, pages 347-348. The arguments will not be re-canvassed here.

The actual relationship envisaged as between evidence and argument in this regard never became quite wholly clear to the Applicants, as the Respondent put forward the points to which the evidence was to be directed, particularly Mr. Dahlmann's testimony.

Mr. Dahlmann's testimony, for example, at **XI**, page 564, appeared to involve an attempt to discredit certain unspecified United Nations resolutions. On the other hand, Mr. Muller, Respondent's Counsel, in a colloquy which ensued in the same verbatim at pages 563-564, advised the Court that Respondent did not envisage any evidence from the witness as to the basis of or influence upon United Nations resolutions, but was reserving this for argument. That is at **XI**, page 563.

Following the conclusion of the testimony, Respondent in the course of the two weeks of comment and of resumed argument, introduced into the record a considerable volume of material for use as ammunition in a broadside, the target of which was obscure to the Applicants. Mr. Dahlmann's testimony regarding the activities of certain petitioners—some of whom had left the Territory to seek opportunities abroad, educational or other—and the implications to be drawn by the Court from his testimony in this regard, were equally obscure to the Applicants.

Mr. President, in the light of this treatment, the Court may appreciate that a difficulty confronts the Applicants in an effort to limit and confine comment upon evidence which is adduced by the Respondent in the form of argument—and argument which is produced by the Respondent in the form of evidence.

Mr. Dahlmann's testimony concerning petitions seemed to assume, among other things—or to reflect a view—that petitioning, in itself, was not far removed from subversion (although he did not use the latter expression, that is true). Thus, in testifying at **XI**, page 471, as to political activities of the Hereros, the witness said:

"They [that is, the Hereros] are mainly responsible for the internal campaign against the Government. They have transmitted a large number of petitions to the United Nations."

And then the witness proceeded to name several persons whom, he said, had "appeared before the United Nations as petitioners for the Chiefs Council of Hosea Kutako."

Mr. President and honourable Members of the Court. In any event I would respectfully advise the Court that there is not much more to follow—in time, as distinguished from substance.

In regard to the material introduced by Respondent pertaining to

United Nations resolutions, or debates in the United Nations, or deliberations of United Nations committees and agencies dealing with the mandated Territory, little need be said and it can be said in a few sentences of comment, without argument.

I should like, with the honourable President's permission to state five undisputed facts.

1. Conclusions concerning Respondent's racial policies in the Territory, expressed by the General Assembly and its relevant and competent committees and agencies, as well as by the Trusteeship Council and the Specialized Agencies, including the International Labour Organisation—conclusions in this field, and in respect of the Territory, are based upon evidence which has poured in over the years. Much the most important evidence consists in Respondent's laws and regulations and the practices and methods by which they are effectuated, the existence of which has never been and is not now denied by Respondent. The Court's attention, by way of example, can be drawn to one Committee Report: the report of the South West Africa Committee of 1958 at page 29, paragraph 170.

2. The United Nations bodies which have passed on this matter are, without exception so far as the Applicants are aware of a multi-partisan nature. The structure and composition of such bodies represent and incorporate the most diverse perspectives, interests and ideologies existent in the organized international community.

3. The virtually unanimous support of resolutions condemning apartheid and calling for elimination of racial discrimination in all its forms, and human rights resolutions and declarations, is all the more significant in the light of the variety and diversity of the membership composing the bodies and committees and agencies concerned.

4. The resolutions, by their very terms, demonstrate the opprobrium with which the members of the Organization, of all shades of ideology, perspective and point of view, view racial discrimination in general, and apartheid in particular, as an extreme form thereof. This is manifest from the resolutions themselves in their own terms which, in this respect, do no more than reflect the same degree of revulsion and opprobrium with respect to these policies, as are reflected in the views of representative Governments set forth in the Reply brief.

5. Just as the bodies are multifarious and multi-partisan in composition, so the bodies which have dealt with problems of racial discrimination in general, and apartheid in particular, have been characterized by, and have approached the matter from, the perspective of varying responsibilities and areas of competence—political, economic, labour, educational and the like. And in each case their judgments have been consistently the same; they have been overwhelmingly supported, and they have been emphatically worded.

No testimony adduced by Professors Manning, Possony, van den Haag, or Mr. Dahlmann, or any of the other witnesses, and no evidence which Respondent itself has introduced in any other form or manner, refutes the accuracy of the five propositions of fact I have just enumerated.

When the Applicants asked the Court, as they have and respectfully do, to attribute to the resolutions and actions of international bodies, taken on this basis, and over these years, and done in this manner—

to attribute authoritative weight to such decisions, they do not of course suggest that the Court act as a "rubber stamp", in the infelicitous phrase used by the Respondent, and there is no argument necessary on this point. The argument has been made to the best of our ability.

If the Court considers that these resolutions and these actions embody reasonable and just interpretations of the Charter of the United Nations, then it is submitted that the Court should give them the authoritative weight to which, in our view, they are entitled. The Applicants do not believe that Professor Possony's interpretation of the Charter—in regard, for example, to the draft Convention on the Elimination of All Forms of Racial Discrimination as being incompatible with the principles of the Charter—is persuasive.

It is, of course, for the Court, as the principal judicial organ of the United Nations, to determine whether or not the international standards reflected in the acts of United Nations organs and bodies are in conformity with, or do interpret correctly, the Charter of the United Nations. Even more so is it for the Court to determine whether the sources from which international law is derived, in the sense of Article 38 of the Statute, have generated an international legal norm of non-discrimination according to the Applicants' alternative contention in that respect.

The Applicants have always believed and contended, as the Court will be aware, that the evidence already of record in these voluminous written pleadings, as amplified, explained, and elaborated during the lengthy Oral Proceedings, established the inherent and *per se* incompatibility of apartheid with individual moral well-being and social progress, and that such a policy if applied anywhere would inherently be incompatible with the moral well-being and social progress of any individual, inside or outside this court-room.

The Applicants did not think that additional evidence, in the form of testimony or taken by other means, could add to or detract from, or explain or extenuate, racially discriminatory policies established in the undisputed laws and regulations and practices of the Respondent—could show in any manner that they were indeed beneficial to the moral well-being and social progress of individuals. The effects of apartheid, in the Applicants' consistent submission, are established by the facts of record as a matter of law. Whether apartheid is, in the words of the Respondent, "good or bad", is not a question of *fact*, it is a question of *law* in terms of the obligations of the Mandate.

The evidence produced by the Respondent made it crystal clear, as it inevitably would have through these witnesses or any others, that the Applicants' contention from the beginning is a correct and valid contention. Out of their own mouths the witnesses showed the inherently incompatible quality of apartheid with moral well-being and social progress. It was this aspect which the Applicants had in mind when, at the outset of these comments, I made reference to the paradoxical but true fact that the evidence, by its very cascade and *persuasiveness*, showed how unnecessary it was, because the impacts upon the individual, which emerged so clearly from it, were inescapably to be drawn from the written record before the Court. The evidence confirmed, in our view—and this was the purpose, the essential purpose, of the cross-examination—out of the mouths of the Respondent's own witnesses and experts, the inherent incompatibility of apartheid with moral well-being and social progress of the individuals exposed to it. And, moreover,

it made this exposure in the vocabulary of apartheid, which has an upside-down language peculiar to itself, consistently with the perspectives towards race and colour which characterize apartheid and form its major premise. The testimony of witness after witness was consistent only with the following propositions—I take three brief ones just to enumerate and illustrate:

1. Limitations are imposed upon the economic advancement of non-White persons in order to protect them from the competition of the more advanced Whites.

This is proposition 1, but it makes no sense.

2. Obstacles are placed in the way of the achievement by non-Whites of professional, scientific or engineering skills, in order to protect them from what is called the “inevitable frustration” they would otherwise suffer, from the unwillingness of Whites to employ them in these capacities, or to be supervised by them.

This applies, if the Court please, to the Territory *under Mandate*, where not even the Government agencies see fit to train and place these persons for service in their own Territory.

3. Non-Whites are denied any effective participation in political decisions affecting their well-being and progress, on the asserted basis that this denial, in some manner, promotes more effectively their political advancement and their rights of self-determination.

Propositions such as these appear to be taken for granted, almost as axiomatic, by the witnesses, as they are by Respondent’s highest officials—as shown by their official statements which are of record in this case and appear in the Respondent’s own pleadings.

Mr. President, and Members of the honourable Court, it seems to the Applicants that no further comment appears to be necessary. I should like in closing, Mr. President and honourable Members of the Court, to thank, on behalf of my colleagues, the Deputy-Registrar and his staff, and the many who have suffered above and beyond the call of duty and co-operated through these months in performing their arduous services which have helped us immeasurably, as I am sure they have helped my distinguished and learned colleagues from the other side, and to thank the Court, the honourable President and the Members of the Court, for the extraordinary degree of patience and tolerance with which our lengthy, and sometimes over-lengthy, comments and arguments have been permitted. And with that, Mr. President, I take my leave of the Court, if that is the disposition of the Court.

36. COMMENT BY MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARINGS OF 12 AND 15 NOVEMBER 1965

Mr. President and honourable Members of the Court, it will have struck the Court that the Applicants' comment to which we are about to reply did not contain a word about militarization, which was their Submission No. 6, nothing about incorporation, which was their Submission No. 5, and nothing about modification of the Mandate, which was their Submission No. 9. In regard to these last two, incorporation and modification, they may have thought that their right of comment on the evidence did not extend to further comment on these matters, but that certainly did not apply in regard to militarization, in respect of which there was evidence by General Marshall, and there was cross-examination of the witness. So at least in this respect it is clear that, in boxing parlance, the Applicants just did not come up for the last round, and in our submission, in the light of the course which events took in regard to the issue of militarization and also in regard to the other two matters, this is not surprising at all.

The Applicants' comment was confined to the subject-matter of their Submissions Nos. 3 and 4—the alleged violation of the sacred trust obligation contained in Article 2, paragraph 2, of the Mandate—and our comment will therefore likewise be confined to that subject.

Mr. President, perhaps I may be allowed a few very broad, general remarks at the start before I deal in more detail, on a more analytical basis, with the Applicants' comment. Broadly it can be said, in my submission, that the Applicants' comment represented a very remarkable attempt to sail between Scylla and Charybdis. Scylla represented in this context the abiding by the Applicants' submissions as reformulated and amended on 19 May, especially if those submissions are read in the light of their explicit wording and in the light of the definitions and explanations which were incorporated therein by reference. It was clear that it would not be profitable for the Applicants to abide by those submissions so worded, so defined and so explained because it had clearly been established in the Respondent's case that the norm and standards as so defined and explained simply did not exist. The Charybdis for the Applicants would be openly to depart from their submissions as so worded and so defined and so explained, because if they were openly to depart from those submissions, that would involve an amendment of their submissions, an amendment which, in all the circumstances, would almost inevitably have then brought them into a factual field which would require investigation, and in respect of which they had explicitly said at earlier stages that no such investigation was required—no such investigation was invited—and the Respondent and the Court were informed that it was unnecessary for the Respondent to cover that factual field. Therefore the Applicants knew that at this stage an amendment of their submissions to that effect could certainly not be granted by this Court, and so they found themselves in this dilemma.

And how did they attempt to get out of it? The attempted solution

was broadly this: they maintained that their case still rested on the norm and the standards as incorporated in the submissions, but, on the other hand, they suggested that that norm and standards have a different content from that previously defined and explained. And in order to cover this up the formula was apparently to keep it all rather vague and to load it as heavily as possible with the emotional and slogan-like talk which one usually finds at the United Nations when South Africa's policies are discussed, but which one does not usually associate with a discussion in a court of law.

Our contention is that these tactics on the Applicants' part cannot, and will not, bear analysis. On the contrary, on proper analysis they show very clear recognition on the Applicants' part that their case as reflected in their submissions of 19 May has collapsed entirely, and we shall also show, with submission, that the attempted and somewhat concealed substitution for that case is equally without merit or substance.

I may add at this stage, also by way of general comment, that the Applicants' comment contained a rather pathetic attempt to slither out of admissions of fact which had so clearly and so unequivocally been made at an earlier stage. It was not only pathetic, it was also futile, as we shall show, but I do not want to anticipate my argument—we shall come to that at a later stage.

Let us start by reverting very briefly to the basic question of the content of the standards or the norm which constitutes the sole basis of the Applicants' present case. We have dealt with this several times, and the final review was given in our opening address to the Court on 26 October after the completion of the oral evidence—the address by my learned friend, Mr. Muller. It is contained in the verbatim record, at pages 70-82, *supra*, and I do not intend to cover that field in detail again, but as a basis to my further comment I should like to recapitulate very briefly some of the main points.

In the Memorials, where we started off in this case, in Submissions 3 and 4 the Applicants objected to the Respondent's policies on the ground that they were—

“determined and allotted arbitrarily . . . in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority”. (I, p. 108.)

That is the often-quoted passage from the Memorials, defining then what is objected to in the Respondent's policies; defining also what this concept of so-called apartheid was to which the Applicants objected, and which they wanted the Court to rule as being a policy in conflict with the Mandate.

On 19 May the Applicants, after long and piecemeal adjustment and long explanation, amended these submissions by the deletion of these very factual allegations which I have now read out to the Court.

Their grounds of objection are now, as regards Submission 3, that Respondent “has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory”. As regards Submission No. 4, the feature to which objection is made is the alleged violation of the norm and standards of non-discrimination or non-separation as defined at page 493, IV, of the Reply, thus identifying Submission 4 entirely with Submission No. 3.

Mr. President, we pointed out repeatedly that this amendment was not inadvertent or unimportant. It represented a studied and a deliberate decision on the Applicants' part not to ask for any decision of this Court as to whether the Respondent's policies are ill-intentioned or well-intentioned, or whether they have been beneficial results or detrimental results for the inhabitants of South West Africa.

The purpose which emerged so clearly from the circumstances in which these changes came about, and which was expressly stated by the Applicants, Mr. President, was to avoid the factual enquiry which would be necessary if the original, factual allegations were persisted in—the factual enquiry which the Respondent had declared itself to be willing to undertake, in respect of which the Respondent had notified the Court that it intended to call a large number of witnesses, and in respect of which it invited this Court to go on an inspection of the Territory of South West Africa, and also other territories in Africa. It was specifically with a view to demonstrating to the Court—to contending to the Court—to assuring the Court and assuring the Respondent—that such a factual enquiry was totally unnecessary that this change was made studiously and deliberately in the Applicants' case.

The case for the Applicants then was that any distinction on the grounds of race, colour, national or tribal origin in establishing the rights and duties of the inhabitants would be illegal, whatever the purpose or the result of such distinction would be. I use the word distinction here, Mr. President, because that is the word appearing in Submission No. 3. There has, as the Court will recall, been objection to our use of the word "differentiation". I am using here the Applicants' own word contained in their formal submission.

Now, Mr. President, this was the Applicants' case, as I have just stated it, which was apparent from a number of circumstances. It appeared from the very wording of the submission. The key-words which the Applicants used interchangeably in their Submissions 3 and 4 were "distinguish", "discriminate" and "separate". We gave certain dictionary definitions of these words which showed that they do not bear any pejorative connotation, except in the case of the word "discriminate" which may bear such a connotation in a secondary sense, and not in its primary sense. The definition given by the Applicants at page 493, IV, of the Reply confirmed that their case was as we have just stated it. They said there that these words "non-discrimination" and "non-separation" were used in their prevalent and customary sense, and then followed the definition, which has so often been read to the Court, and which amounted to nothing more than the objection to an allotment by official governmental policies or actions of status, rights, duties and privileges on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential.

In other words, Mr. President, there was nothing to indicate that anything pejorative was intended, and all the indications of reconciling the concepts of separation with discrimination—reconciling the second part of the definition with the first—taking into the account the official and the non-official explanations, all confirmed that that was what was intended.

Then, Mr. President, this also appeared from an examination of the Applicants' treatment of the sources upon which they relied for this statement, and for this definition, and for this suggested norm and

standard which they could abstract from the sources. That we also demonstrated. They did not interpret those sources—they did not purport to rely on those sources to the effect that discrimination in a pejorative sense was spoken of in them, in so far as that may have been the case in regard to certain sources. Every time they abstracted the meaning which they assigned to them, referring to the neutral concept of distinction—of differentiation—confirming again that the word “discrimination”, where used by them, was used in that primary sense.

Then, Mr. President, the very nature of the amendments of 19 May showed, in our submission, that the Applicants intended to foreswear any allegations that the Respondent's policies were ill-intentioned, or that they produced undesirable results; and, as I have said, this was made further explicitly clear and confirmed by a number of informal statements which we have read out to the Court before, and which I do not intend to read out again.

In this same opening statement in the verbatim record of 26 October by my learned friend, Mr. Muller, to which I have referred, we also showed that the Applicants had apparently realized more recently the extreme implications of the attitude which they adopted as the basis for their amended submissions on 19 May. They apparently also realized the absurd consequences to which that contention would lead, such as, for instance, the interdiction of separate public conveniences for men and women. This would be a classic case of contravention of the norm and the standards as defined at page 493, IV, of the Reply, because in such a case the needs of a particular individual are not taken into account at all in determining whether he or she is entitled to take advantage of a particular public facility rather than some other one which may be more inconvenient or situated at a greater distance from him or her than that particular one. The allotment is purely, in such a case, on the basis of membership in a group or class.

This, the Applicants say, is the caricature of their case, that it is something which flows naturally from their case as defined at that particular page, and as incorporated in their submission. And it was apparently because some of these extreme and absurd consequences were realized that the Applicants showed some signs of fretting, of wishing to escape from their case on which they had so deliberately decided. But, Mr. President, it was not so easy for them. They could not escape that case. Their difficulty was, on the surface, one of formulation, but, of course, the formulation was only the symptom; it was only symptomatic of their real substantive difficulties.

If their norm and standards did not strike at *all* types of differential allotments of rights, duties and so forth, on the basis of membership in a race, class or group, then they would have to define the criterion to be applied in determining the illegality of some such allotments to the exclusion of others.

The only conceivable criteria by which they could do this, i.e., by which they could say that some differential allotments of the kind under discussion would be permissible, and some would be impermissible, would have to fall into one or other of the categories which my learned friend, Mr. Muller, mentioned to the Court. They would have to fall, firstly, in the category of an improper state of mind of the person who allots the rights, duties, and so forth. Alternatively, they would have to fall in the category of undesirable results which flow from such an

allotment. Or, as a third alternative, they would have to fall in a category which involves a combination of both of these that I have mentioned.

Of course, Mr. President, what I have just mentioned now as categories, are broad classifications only. If the Applicants had decided in favour of one or the other of these broad classifications, that would not have been sufficient for them for the purposes of formulation of a case which can be put forward for the Respondent to meet and to enable the Court to understand what that case is. They would have to define with some particularity what exactly it is that brings about this impropriety, and they would have to define with reference to the facts the factual aspects of the Respondent's conduct. They would have to define what are those factual aspects which they allege and which they say are violative of this norm and these standards upon which they rely.

Therefore, Mr. President, if I may give some examples of that, they would have to say, with some clarity, in respect of the groups of which they are speaking—if they are speaking of groups at all—whether they are talking simply about a relationship or a differential allotment as between White persons and non-White persons, whether they object to that only, or whether they also object to a differential allotment between non-White groups or peoples *inter se*, whether they object also to a differentiation between Coloured people and the Bantu, whether they object to a differentiation between the Nama and the Bushmen, and so forth. They would have to make their election and tell the Court what exactly they object to in those various relationships and in those various distinctions. Are some permissible and some impermissible, or what is the position? That would have to be clarified.

They would have to clarify further in what particular respects the differential allotments as between whatever groups they choose, are objected to; and when I say "respects" I really mean two things—I mean in what spheres of life, political, economic, educational, health services and whatever there might be, they would have to select those. They did at a certain stage make a certain selection of that kind, but they would have to go further. They would also have to indicate within those spheres of life what it is they object to.

I may give the Court some examples. Within the political sphere, the sphere of government and citizenship, they would have to say, they would have to clarify their attitude as to whether it means that it is permissible to have separate political institutions for the various groups, but that their complaint is really that the progress in the case of some groups is too slow as compared with others—that would be a possible kind of complaint; or they would have to say that the separation itself is objectionable and they would therefore have to contend for an integrated political system. They would have to make clear what is it they contend for as being wrong and objectionable in that particular sphere.

In another sphere, Mr. President—education—they would have to say, in regard to compulsory education, whether they object to the principle of having compulsory education for some groups and not for other groups, or they would have to indicate whether they object merely that in the case of the groups which do not yet have compulsory education that the progress has been too slow. And so one can take it over all these spheres, and all these various questions arise as to what exactly it is that the Applicants object to.

I raise these things not by way of theoretical abstractions, Mr. President, or by way of something academic which has got nothing to do with this case, but because as we go along we shall see that the Applicants' case, particularly as it was put to the Court in this final comment, involves extreme vagueness and confusion exactly on aspects of this kind.

However, Mr. President, it was not possible for the Applicants to define any case falling within any or all three of these broad classifications which I have given to the Court, because they had explicitly renounced any reliance upon an improper state of mind on the Respondent's part, and they had explicitly renounced any reliance on detrimental consequences of the policy. And the reason because of which they made these renunciations still remains: the reason was the need to avoid a factual enquiry into these aspects as I have mentioned to the Court. I may remind the Court that that factual enquiry would, *inter alia*, have involved a comparison with standards in other parts of Africa—comparison of standards in South West Africa with standards in other parts of Africa, including the Applicant States themselves.

So, Mr. President, how did the Applicants then seek to overcome this dilemma flowing from the untenability of this wide formulation of their norm and their standards and the difficulty, on the other hand, that they could not go back to categories of complaints which they had explicitly foresworn? They tried to cope with it in a number of ways. When they were faced with problems such as the minority treaties, which fell four-square within their definition, they sought to distinguish those minority treaties by referring to features of them which are, on the face of it, entirely immaterial to their norm as defined, or to their standards as defined. The criterion to which they referred, was the purpose of protecting groups and members of groups, and also they referred to the criterion of the possibility for an individual to leave his group. Why these features would have been relevant as distinguishing between legitimate and illegitimate, on the basis of a norm and standard as defined by the Applicants, was never explained by them.

Then, Mr. President, the Applicants often objected violently to our description of their norm and standards as involving non-differentiation. They objected to the use of that word but they did not explain the difference in meaning between "distinction", "discrimination" and "separation", on the one hand, and "differentiation", on the other hand. In particular, they never said that by "discrimination" they meant something pejorative, for as soon as they had said that it would have landed them into the difficulties I have just mentioned. It would have brought them back into the field of necessity for a factual enquiry, which they did not want.

Next, Mr. President, in the course of the leading of our evidence and cross-examination in respect thereof, repeated allegations were made by the Applicants that the Respondent had distorted their norm. But they never told the Court how or in what respect this was done. When a serious allegation of that kind is made, Mr. President, one would expect the objector to say to the Court, even if very briefly; here we have the clear content of our norm and standards as defined, and our clear explanations as to what it means, and here, by way of contrast, we have the Respondent's distortion thereof. But we never got that. Nowhere under any of these circumstances of violent objection to so-

called distortion did we have any clear indication from the Applicants what exactly it is that they say their norm and standards is—what is this content which is so different from that which is now being represented by the Respondent.

On various occasions during the course of the evidence the Applicants gave some *ad hoc* explanations in regard to the norm and the standards. They did so, for instance, in regard to universal adult suffrage; they did so also, on occasion, in regard to compulsory education. As was demonstrated by my learned friend Mr. Muller, in his address to which I have referred, these explanations were inconsistent with the content of the norm and standards as that content has been formulated at page 493, IV, of the Reply, and I need not enter into those details again.

Even that definition, Mr. President, as at page 493, IV, was at one stage represented by my learned friend, Mr. Gross, as not really representing the Applicants' case. The Court will recall the occasion when it was said that regard would have to be had to what follows by way of the various instruments and sources upon which reliance was placed. But when this came to a final combination, in the verbatim record at pages 35-36 and 48, *supra*, when my learned friend was pressed to put to a witness what he contends to be the real meaning and purport of the norm and the standard, what was then eventually put amounted in substance to exactly the same as we find at page 493, IV, and there was certainly then no indication whatsoever that the word "discrimination" was intended to be used in a pejorative sense.

It was suggested, Mr. President, to some of the witnesses very vaguely, for instance, Professor Possony, that the use of the word "discrimination" in the definition at page 493, IV, had some significance. However, the nature of that significance was never explained. There was always on the part of the Applicants a holding back from saying, specifically and explicitly, that "discrimination" meant something bad.

It was suggested by the Applicants to some witnesses, and particularly to Professor Manning, that there was, or might be, a difference between the positive and the negative formulations of the norm at page 493, IV, of the Reply, but also this suggestion was not pursued subsequently: it obviously was without substance.

So, Mr. President, we went through the list and we found that these various hints and suggestions on the Applicants' part were, of course, not intended by them to be a comprehensive explanation of what their attitude really amounted to. Indeed, the Applicants said on some of these occasions that they would elaborate on this question when they gave their comments on the evidence. We found that that was promised to the Court, for instance, in the verbatim record at XI, page 315, and again at page 647. But now we have reached that stage—the stage in which the Applicants' comments on the evidence was given—and we shall consider to what extent further light on that question has been shed by these comments.

The first and important point to note, Mr. President, is that the Applicants still persist, in these comments to which I am now replying, with accusations of distortion on our side, but they couple those accusations with a complete failure to state wherein this distortion lies, or even to state the alleged content of the norm and/or the standards. They explained this attitude as follows in the record of Tuesday, at page 349, *supra*:

"The formulation in all its variations imports a false rendering of the true nature of the standards for which the Applicants in fact contend, as well as of the international legal norm of the same content which the Applicants have put forward as an alternative legal theory; it is of course understood by the Applicants that a recanvass of the arguments, with respect to the content or other aspects of the standards and the legal norm, would be out of place in the context of this comment upon the evidence."

So, Mr. President, we find this most amazing statement in lieu of the elaboration which we had been promised at various stages during objections to the evidence. It is most amazing, Mr. President, because the Court will recall that my learned friend spent the half of the first session on Tuesday making the point that the Respondent's evidence had not been directed at the real meaning and content of the Applicants' norm and standards. That was the main point which he made over that first half of that first session. That was the form which his comment on the evidence took, as far as that particular stage was concerned.

Now, surely, Mr. President, if there was any substance in it, of course that would be a legitimate form of comment on the evidence. But, then, surely one would expect that for the purposes of such comment it would be equally legitimate—it would indeed almost be indispensable for purposes of clarity and for purposes of understanding on the part of the Court and on the part of the Respondent—to say: here is the content of our norm; we are not arguing again as to whether it is a justified content or not justified from its sources; we are not arguing the legal merit again of the contention that such a norm does or does not exist, from the sources as we previously relied upon them; we are saying that we have made clear before, and we are repeating, that the content of this norm and of these standards is so and so and so, and the Respondent, by way of contrast, ignores that and it directs its evidence to a proposition which is vitally different in that it is so and so and so. But we do not find that, Mr. President. The excuse is given that that would not be appropriate by way of comment upon evidence, and that in spite of the fact that you, Mr. President, said explicitly on 18 October at XI, page 647: "... comment as to relevance of evidence falls within the permission which has already been accorded." And my learned friend, Mr. Gross, there reserved his right to present such comment on the relevance of evidence, and, as I have pointed out, he had earlier promised that there would be elaboration.

So, on the basis of this rather transparent excuse, the Applicants do not once tell us explicitly what it is that they allege to be prohibited by their norm and their standards. Instead, they make use in this comment of their suggestion by speaking of the sense in which other people have used the word "discrimination". And so we find in Tuesday's record, at page 353, *supra*, this illustrative passage, a rather significant one:

"Respondent itself in its pleadings, and Respondent's witnesses in their testimony, employed the term 'discrimination' in its customary and prevalent sense connoting adverse and unfair denial of equal rights or opportunities to an individual as such, on the grounds of his race and colour."

There is a great deal of suggestion in this passage, Mr. President.

Although literally it refers to what the Respondent said and what its witnesses said, the passage speaks of a "customary and prevalent sense" of the word "discrimination", and that "customary and prevalent sense" is now said to be something unfavourable, something adverse, something unfair. I shall analyse later to what this unfairness and this adversity relate—I shall come to that later. But, by suggestion, one is apparently intended to understand that this is how the Applicants intended to use the word "discrimination" in the earlier formulations of their definitions of their norm and of their standards—of their definitions and their submissions. If that really is what was intended here, Mr. President, then they have guarded that secret very, very well. Then we had to await this very final comment before we first heard any suggestion of any kind from the Applicants of the use of the word "discrimination" in a pejorative sense as far as their case is concerned—their case as formulated in the submissions of 19 May.

The simple question could be put to my learned friends as to whether they can point to any portion of this long record of the Oral Proceedings in which at any time, after they had started to make their turn towards their amended submissions of 19 May, they had in the least said or suggested that their use of the concept of discrimination was intended to be in a pejorative sense. I know what the answer is to that, Mr. President. There is no such instance.

Then we come to Wednesday's record at page 375, *supra*, where we have a similar example. There reference is made to a statement by the Odendaal Commission, and the Applicants say:

"Parenthetically, Mr. President, it might be noted that the word 'discrimination', unqualifiedly used by the Commission in this paragraph, is obviously employed in its prevalent and customary, or pejorative, sense, precisely as it is in the constitutions of governments throughout the world, in United Nations judgments and other sources comprising the standards defined at page 493, IV, of the Applicants' Reply."

Here the suggestion becomes almost stronger, although it still stops short of saying explicitly that that is the way in which the Applicants intended to use the word, or that there is even a link in the sense that this is spoken of as the way in which the word is used in certain sources on which the Applicants have relied for the formulation of their standards, as defined at page 493, IV, of the Reply.

But, still, it will be noted that the Applicants do not say explicitly that they themselves used, or intended to use, the word "discrimination" in that sense—they merely imply it—they merely suggest it—by ascribing such use to Respondent, to some certain witnesses, to the Odendaal Commission, to certain constitutions, and to certain international instruments and resolutions, and so forth. And, indeed, Mr. President, it will be obvious that the Applicants cannot make such a statement. They cannot say that that was how they intended to use the word "discrimination" in their case, as formulated on 19 May in their submissions, because such a statement would be patently untrue. That we have demonstrated. And such a statement would, in addition, Mr. President, only lead them into further difficulties, as we shall show.

In passing, we may just note that where the Respondent or certain witnesses used the word "discrimination" in a pejorative sense this

always appeared from the context. This was always made explicitly clear by the author of the particular passage in the pleadings or by the particular witness by explicitly using adjectives such as "unfair" or prepositions such as "against"—discrimination "against" as distinguished from a more neutral sense of discrimination "between". Neither the Respondent at any stage nor any of its witnesses ever stated that such sense of the term was its customary or its prevalent sense.

In regard to the use of the word in resolutions and other proceedings of the United Nations, I may refer the Court to the testimony of Professor Possony at XI, pages 698-703, where he demonstrated how inconsistently the term was used generally in the United Nations records—sometimes as meaning one thing, and sometimes as meaning another, and sometimes it is impossible to make out in what particular sense it was intended to be used.

Now, Mr. President, let us then analyse this suggested "customary and prevalent sense" of the word "discrimination", which, by suggestion, apparently should be read into the norm and/or the standards of non-discrimination and non-separation.

In the first Place, Mr. President, it conflicts with the customary and the prevalent sense of the word which the Applicants explicitly told us at page 493, IV, of the Reply is to be assigned to it. There they also, as I pointed out earlier, used the term "customary and prevalent sense" but there to the exactly opposite effect—exactly with a view to explaining to the Court that they are not talking of something pejorative—that they are talking of discrimination in the neutral sense of discriminating between and not discriminating against.

Secondly, Mr. President, no new "customary and prevalent sense" is provided for the other words which the Applicants used in their definitions and explanations, and which words were used inter-changeably with the word "discrimination", namely the word "separation" and the word "distinguishing". At page 493, IV, we are told that the terms "non-discrimination" or "non-separation" are used in their prevalent and customary sense. I stress the word "or". This indicates clearly that those two are used inter-changeably as meaning the same thing for purposes of this norm; as my learned friend, Mr. Muller, demonstrated, there were not two norms, there was one norm. There were not two contents to the standards, there was one content, and that related to the two inter-changeable concepts of "discrimination" and "separation", or "non-discrimination" and "non-separation". And, certainly, Mr. President, we have had no suggestion that one could speak of "separation" in a pejorative sense. The same applies to the word "distinguishing" or "distinguish", which is, as I have pointed out, the word used and still used in Submission No. 3.

Now, when one examines the concept of *discrimination itself*, as used by the Applicants in these quoted portions of what they said on Tuesday and Wednesday, then it becomes even more apparent that this manoeuvre cannot provide an avenue of escape for the Applicants. The phrase which they used in these formulations which I read out to the Court, was "adverse and unfair denial of equal rights or opportunities to an individual". Those are their quoted words. Now, one finds in that expression the words "equal rights or opportunities". Those words of course are in themselves unclear and they do not make matters more explicit without explanation.

Do they mean—are they intended to mean—that everybody should have identical rights and opportunities—in other words, rights and opportunities which are defined in identical terms by law? Or, do they connote that it would be permissible and sometimes even necessary to have an allotment of different rights and opportunities in order to bring about an equivalence in efficacy or utility, in fact?

If this latter should be the intended meaning, Mr. President, then how would one set about measuring the efficacy or the utility of the rights and the opportunities given on a differential basis? In particular, Mr. President, how would one even attempt a task of such a kind without the fullest and the most wide-range inquiry of fact into that precise problem, which is something, of course, which has not taken place—deliberately not taken place because the Applicants have said that they are not bringing a case which makes that necessary.

However, Mr. President, be that as it may, in regard to this phrase “equal rights and opportunities”, the Applicants are right back with their old problem, also, with their employment of the adjectives “adverse” and “unfair”. What are the criteria to be applied in determining whether a measure is adverse or unfair? Again, we submit—we have considered this matter from all possible angles but it seems to us impossible to conclude otherwise—that unfairness or adversity must always bring into issue either the state of mind of the person performing the act, or the effect of the act upon the person affected thereby, or both these things. Consequently, Mr. President, it is impossible to determine whether a measure is unfair without having regard to the person to whom and the circumstances in which it applies—in other words, a factual inquiry. And in a case like this such an inquiry would involve the fullest investigation of the facts to see whether adversity or unfairness, whether in intent or in effect or in both, is actually present.

Then, Mr. President, a most important further question arises. Unfairness or adversity to whom? If the answer is that the Applicants rely upon alleged unfairness towards particular major groups of the population—major collections of the population such as all the Natives—then, Mr. President, they would be right back at the case which they originally made in the Memorials and which they have subsequently abandoned. This would then mean that they are now presenting a case on a basis which they expressly told us was not their case and which we, on the strength of that assurance, specifically refrained from meeting in the Oral Proceedings. The untenability of such a situation will be obvious to the Court and I need not labour it.

There are some indications that the Applicants may have intended a reversion to this case. If we look, for instance, at page 383, *supra*, where they said this:

“If compulsory education is applied in the case of *all* White children, irrespective of wish or circumstance, and is not applied in the case of *any* Native children, a question fairly arises concerning the reason”.

it looks, as I say, superficially as if there is again this suggestion of unfairness towards the whole of the Native population. Then we find, after referring to certain circumstances in the Territory, the Applicants continue to state that a failure to apply compulsory education to any Native children “. . . must reasonably be ascribed to, and is obviously

based upon racial considerations". Here, in this passage, the Applicants are apparently contrasting racial considerations with educational or practical considerations. In other words, the suggestion appears to be that the Respondent limits the opportunities given to Natives merely because they are Natives. If this is so, then, of course, we are right back at the original oppression case, as originally brought—the case of arbitrary, deliberate, improper oppression, subordination of the Native population to the interests of the White population. But, as I have said, that case was abandoned and, as I understand it, it is unnecessary now for us to say anything more about that case. If that was not abandoned, are we to understand that the Applicants have deliberately lulled us into a false sense of security? Are we to understand that they had the deliberate object of prejudicing us in the presentation of facts and opinions to this Court by way of testimony in order to meet that original oppression case? Certainly their assurances which they gave us, had the necessary effect so that we did not bring the evidence we intended to bring. And now, must we understand that they are in effect telling us: "But you should not have believed us; you should have understood that our case was still the same as at the beginning—that you still had to meet all that and in spite of all we said it was for you to decide whether or not to bring those witnesses. Now that you have not brought those witnesses, we come again with our original allegations and we say it is good enough to take the record as it stands, even though we know that you wanted to supplement that record—that you wanted to bring much more detailed evidence about it. Now we take bits and pieces from what we can extract from cross-examination and from evidence of experts—whether in context or out of context, does not really matter—we piece them together and we say, there, there is something on which the Court can still find that our original case was substantiated"?

Mr. President, if that is how the Applicants' attitude is to be understood, I have to say no more about it. I am quite sure that this Court itself will make very short shrift of that kind of tactic.

On proper analysis of what it is that the Applicants told this Court on Tuesday and Wednesday, it seems to us that that is not the sense in which the Applicants suggested that this expression "unfair" or "adverse" was to be used or understood. It seems to us that they intended something else thereby, not something that would bring them any further, but nevertheless something different from the possibility which I have just discussed, and a very useful key is afforded by a passage which occurs in Tuesday's record, at page 360, *supra*. There they refer to a statement which I think I had made before and they said this:

"The asserted distinction drawn by Counsel: between what he referred to as 'the general well-being', of the population as a whole, as distinguished from the 'effect of particular measures upon particular individuals in particular circumstances', in our respectful view, begs the central question.

The impact of Respondent's . . . policy upon individuals 'in particular circumstances', and through 'particular measures', is precisely what the Applicants are talking about."

Now, Mr. President, in this last sentence I have deliberately omitted certain emotionally charged adjectives in order to go more directly, as it seems to us, to the legal significance, if any, which may be attached to

this passage. I shall come back to these adjectives later—to the purple prose in general—but for the moment I want to concentrate on what appears to be the suggested legal significance of this passage.

The suggestion seems to us to be this: that unfairness exists because certain individuals may in certain circumstances be harmed by certain particular measures—that, and no more. Certain individuals may be harmed in certain circumstances by certain particular measures. Now, if that is so, Mr. President, then that is surely a very strange concept of unfairness. This is so particularly in the context of discussing policies which are required to promote the well-being and the progress of the inhabitants of the mandated Territory—all the inhabitants of the mandated Territory. In such a context surely it is generally accepted that the individual's happiness must often necessarily be abated for the greater happiness of the group of which he is a member, and consequently, also, and this is most important, for his own future happiness. That situation is not normally regarded as necessarily unfair; and even if it should or might be regarded in the light of being unfair, it is normally seen as something inevitable. Indeed, Mr. President, it is hardly conceivable of any policy or any measure in the world which does not discriminate amongst individuals in its effect or in its terms, in the sense that certain of them receive less direct benefit or greater immediate detriment therefrom than other individuals. One can take examples of policies all over the world, and one can hardly think of a policy which does not have the effect of causing or ostensibly causing direct or immediate harm to individuals, as distinguished, of course, from over-all well-being and, therefore, also of the real well-being, now or prospective, of that individual.

Let us take examples, merely by way of illustration, which were discussed in the evidence: let us take the examples of policies in the United States, where we get an example of a policy of differentiation in regard to the Indians—the land reservation policy, if I may call it that—and then a policy of non-differentiation or integration, in so far as the American Negroes are concerned. In the case of the differentiation regarding the Indian Reservations, surely, Mr. President, some individuals are hit harder, more specifically and more directly by that than others, and are affected in different ways. There is the member of the Indian community who has a special desire, special aptitude, special development which now brings him to a point where he wants to set out in the world, he wants to take up some other occupation somewhere—he wants to sell his land at the best price he can get—and the price which would make it economically worthwhile for him would be that from a European member of the American community, but he is not allowed to do that. He is affected more directly and more specifically than the other member of his community who is content to stay on the Reservation and wishes to stay there as far as he and his family and descendants are concerned. That is an example of a differentiating policy.

The same examples occur in the case of a non-differentiating or an integrating policy. There is the policy of integration as far as the Negroes are concerned—the Court will recall the evidence of Professor Possony to the effect that, as was demonstrated in a recent report on the subject—there is a tremendous lag in the development stages of the Negro population as a whole, compared with the White population as a whole, and there is a strong body of opinion to the effect that the only way in which

one could be fair to the Negro, now in these circumstances, would be to discriminate in his favour, and to try, by that way, to eliminate that lag first before expecting him to compete, without any assistance, with the White members of the community. Again, Mr. President, that demonstrates how particular individuals may be much more specifically or immediately or detrimentally affected by a policy than others. One can immediately imagine some who would not require that special assistance; one can immediately imagine others who would very definitely require it.

Then, Mr. President, one can think of policies which have nothing whatever to do with questions of integration or differentiation, which are just concerned with something else—a policy such as a declaration of war. Under certain circumstances, a declaration of war may be regarded as being the only thing that can be beneficial to the welfare of a community as a whole, and therefore also to all the individuals comprising that community. But that policy may affect very harshly some individuals, and some, of course, more than others—those who are going to be in the fighting lines, being in that particular age group, and those who are going to stay at home.

Mr. President, if this, as I have said, is the concept of unfairness with which we are dealing, it is a very strange one and, indeed, if that is so, and if that is intended to be represented as the content of the Applicants' norm and/or standards, then it is difficult to see how we could ever be said to have misrepresented the Applicants' norm or standards because, Mr. President, if the essence of the discrimination is that some individuals in certain circumstances are detrimentally affected by particular measures, then I may recall that any measure which allots rights, duties, and so forth, on the basis of group, class or race, must be interdicted because in all those cases some harm must necessarily fall on individual members. In any case, where one has a differential policy, some individuals must be more specifically affected by it than others. In all these cases of which Professor Possony spoke, all over the world in the practice of States that must inevitably be so, and he pointed it out in his evidence too. And that applies not only to these cases of racial discrimination, of which my learned friends now speak, it applies to all these cases of differentiation on the basis of group, class or race.

As I said, of course, when I am speaking here in terms of detriment to some individuals, it is ostensible or immediate deprivation—ostensible I stress because very often the curtailment of liberty at this particular stage is something which is looked upon in an immediate sense as a detriment—but one must not look at that in isolation; one must see what the effect is going to be for this individual, not only in the future, but *now*, if this policy, of which this particular measure forms a part, did not apply. If the answer is that this policy did not apply, and the only alternative applied that the whole State—the whole community—would be reduced to a state of misery, affecting also that individual, then it is not true to say that that individual suffers any detriment at all, even on a short-term basis as compared with a long-term basis. But, of course, there are also circumstances in which one could say that the individual may be said to suffer on a short-term basis, whereas the long-term, overall basis is intended for the benefit of the community as a whole, as is normally the case, Mr. President, in the case of all the various kinds of policies which have been discussed.

Mr. President, may I just make this point: if this is the sense in which

the Applicants speak of detriment, then, of course, they have not, despite all appearances to the contrary, in that respect departed from what their case was before in regard to the norm and the standards.

Mr. President, towards the conclusion of the Applicants' comment to the Court on Wednesday, at page 390, *supra*, the Applicants again referred to—

“... the inherent and *per se* incompatibility of apartheid with individual moral well-being and social progress, and that such a policy if applied anywhere would inherently be incompatible with the moral well-being and social progress of any individual, inside or outside this court-room”.

I skip about six lines, and I read a further passage:

“The effects of apartheid, in the Applicants' consistent submission, are established by the facts of record as a matter of law. Whether apartheid is, in the words of the Respondent, 'good or bad', is not a question of *fact*, it is a question of *law* in terms of the obligations of the Mandate.”

Bringing that in conjunction with the factors which I mentioned to the Court just before the tea adjournment would make it appear, therefore, that the Applicants have not departed from the basic attitude which they expressed in regard to their norm and/or standards contention at an earlier stage. When they speak of harm or detriment to an individual, when they speak in that sense of unfair or detrimental consequences of apartheid, apparently they speak of those things not as facts but as legal fictions. Apparently the attitude is that, whatever powers have decided upon the norm and upon the standards and have brought them into legally binding existence, those powers have decided that on the basis that they consider such a policy as is prohibited by the norm and standards to be detrimental, and therefore that is a legal consequence which inheres in the whole concept and the whole contention of a norm and a standard, and therefore it is not really a question of fact, because if it were a question of fact, then it would of course be impossible to stop just there, and to say “well, let us merely look at these immediate, these ostensible, these short-term effects upon certain individuals under certain circumstances, let us look at the whole”. But the Applicants say “no, that is not necessary, that is indeed not permissible; it is legally irrelevant”. So, looking at the matter in that way, it seems that the Applicants still in that sense, wish to rely upon their norm and standards as defined and as incorporated in their submissions on 19 May, and that this talk of unfair, adverse effects is really just another way of stating the same things that they had stated before.

However, the Applicants do not make it very easy for us to understand what exactly it is that they mean, because if the inference which I have just stated to the Court is a correct one, then it is still difficult to understand when one may differentiate and when not. In the verbatim record on Tuesday, at page 350, *supra*, the Applicants spoke of—

“measures to reserve the lands of the Natives, to control the population movements in certain circumstances, particularly into urban areas, and the protection and development of what was called the 'traditional institutions of the people'”.

These were matters to which Professor Logan testified. The Applicants,

within the context as at that page of the record, appeared to approve of these matters as being on a par with protecting minors, incompetents, war widows or blind persons, and they certainly suggested that this "has nothing to do with the Applicants' case" (p. 350). But can it be seriously doubted that each of these provisions or sets of provisions necessarily entails disadvantages to individuals of the immediate, ostensible type that we have been discussing? As has been repeatedly pointed out, the measures to reserve Native land impose a limitation on all individuals outside the Native group in question who may wish to purchase that reserved land. It also imposes a limitation on all Natives who wish to sell reserved land. If we take the next one, i.e., control of population movements, particularly into urban areas, that affects individuals who may wish to go to the urban areas. If we take maintenance of the traditional institutions, that also may subject a particular individual to a type of control which he does not desire. One gets the example of the individual member of a particular people who has had education, and who considers himself to be more advanced than the chief under whose jurisdiction he is now to serve. It is with a view to coping with situations of that kind that there is provision in the Respondent's policies, of which we have spoken before, for introducing the democratic element, together with the traditional elements, as a form of advance, but at particular stages of development one may have these individuals who are perhaps in advance of the developments in the institutions provided for his group. So, certainly, in that respect, and in other respects also, maintenance of the traditional institutions may have certain effects upon certain individual persons. And yet, it seems to us that the Applicants say that these forms of discrimination, differentiation, separation or distinction are not prohibited—why we are not told. We are not told what is the criterion separating these legitimate forms of discrimination, etc., from the others which the Applicants wish to have interdicted.

Let us return, then, to this example referred to in our Rejoinder—the case of special protection or special public conveniences for women. The Applicants referred to this passage when they dealt with Professor Possony's evidence, i.e., that a prohibition of such a discrimination would indeed be a consequence of the Applicants' norm and standards, and the Applicants said in Tuesday's record, at pages 351-352, *supra*:

"The witness thus found it necessary, by reason of the formulation by Respondent of the issue to which its evidence is said to be directed and relevant, to travel the road of confusion to its destination, which in this case was absurdity."

Of course the absurdity was there with respect to this submission, but that absurdity results not from distortion on our part, it results from the Applicants' formulation of their norm and their standards; it does not result from anything we said or did—we or Professor Possony.

The Applicants say that because we can point to absurd consequences, therefore, we are misrepresenting their case. We say that these absurdities show the untenability of their case. They have drawn their lines so wide as to include instances of this kind—instances which demonstrate that that case which they make is an untenable one—and they cannot draw a narrower line so as to exclude these absurd cases without coming in to a sphere of factual enquiry which they have sought to avoid. That is, and remains, their difficulty.

So, by way of suggestions and insinuations the Applicants have attempted to create the impression that there was something more to their case—something more to be taken into account—than mere differentiation, discrimination in the neutral sense, and so forth, within the sphere of allotment of rights, obligations and so on, on the basis of membership in a group, race or class. They suggested that there was an additional element to be taken into account, but they never defined that additional element, and they never told us what case it was we had to meet in regard to that element which they now suggest must be regarded as decisive.

They did this, Mr. President, by playing around with the word "discrimination" without defining exactly what they meant thereby, as I have demonstrated. It is a similar manoeuvre, Mr. President, to what we referred to earlier in regard to the use of the word "apartheid". The Court will remember that I dealt with this matter in reply to a question by the Court as to the scope of the Applicants' submissions of 19 May, and as to the possible scope of enquiry by the Court, particularly in the verbatim record of 1 July, at X, pages 220-224, where I dealt with the play which the Applicants made on the use of the word "apartheid"—on the meaning of the word "apartheid"—how they started off with one meaning—a definition giving it the meaning of an oppressive system—and how it ended up with an entirely different meaning for the purposes of their submissions, referring merely to the element of differential allotment—of distinction—as being the word which they use in their submission. And I pointed out at a later stage when answering this self-same question of the Court, they wished to make those lines a bit vaguer again so as to add a bit of confusion as to whether they were now talking about apartheid still in the original sense or in this more limited, specialized sense in which they later defined the word. We have much the same process, Mr. President, with this word "discrimination". I have dealt with that and I need not enlarge upon it any further.

Not only the word "discrimination" came into this. I also promised the Court that I would come back to certain adjectives which I left out of a particular passage earlier. We are now brought to a conception that in various ways of suggestion, and so forth, their norm and standards did not prohibit distinction or separation amongst all groups or classes, but only amongst *racial* groups. It will be recalled, of course, that at page 493, IV, of the Reply the Applicants defined their norm by reference to allotments on the basis of membership in "a group, class or race". They could hardly avoid this general formulation for the simple reason that the various sources upon which they relied—the various international instruments and draft instruments and so forth—use a variety of concepts in the particular provisions of those instruments.

We say that the Applicants do not interpret those provisions correctly when they say that they afford any support for the norm and the standards which the Applicants attempted to extract therefrom, but that is not the point under discussion at the moment. The point is that for whatever purpose those instruments spoke of groups and so forth, they did use language including "race, sex, language or religion". That phraseology I have just referred to now, occurs in the United Nations Charter as cited in the Reply, IV, at pages 497-498.

Next, Mr. President, in the Universal Declaration of Human Rights cited in the Reply, IV, at page 501, we find that the instrument speaks

of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The third example, the draft Declaration on Rights and Duties of States which we find at the same page of the Reply—501—speaks of "race, sex, language or religion".

The formulation in the Applicants' definition of "group, class or race" was consequently necessary because of the wide terms of these other instruments relied upon; whether the reliance was a justified one or not is not under discussion for the moment. The formulation—group, class or race—was consistently employed by the Applicants throughout these proceedings. As examples we may refer to the verbatim record of 30 April, at IX, pages 64-65—to a passage there which was previously quoted to the Court by us on 10 June at IX, page 566. Here there was an even more simplified method of rendering their contention. The reference was to group *simpliciter*, not even with reference to the question of race or class in that particular formulation.

The Applicants were there acceding to a formulation by us in the Reply, of what we conceive to be the effect of their norm or contention as it had already been stated in their Reply and dealt with by us in our Rejoinder, and the Court will recall that at IX, page 64 of that record of 30 April, the Applicants said:

"For the purpose of interpretation and application, the following passage in the same volume of the Rejoinder removes any vestige of doubt that Respondent clearly understands the basis of the Applicants' case."

And in this passage then, cited from the Rejoinder, there comes this sentence which I have previously quoted for another purpose, but which I should like to read now for this purpose:

"If indeed Article 2 of the Mandate must be read as containing an absolute prohibition on 'the allotment, by governmental policy and action, of rights and burdens on the basis of membership in a "group"', Applicants would sufficiently establish a violation of the Article by proving such an allotment, irrespective of whether it was intended to operate, or does in fact operate, for the benefit of the inhabitants of the Territory." (IX, pp. 64-65.)

That is the end of the quotation which, the Applicants say, removes any vestige of doubt that Respondent clearly understands the basis of the Applicants' case.

On 22 June the Applicants themselves used similar language. This was in the course of a discussion of objections raised with regard to the evidence of the witness, Professor van den Haag, and here the Applicants said this:

"If this or any other witness is competent to testify with respect to the practice of States, citing the official laws and regulations which, in his view, do constitute discrimination or separation by reason of group without regard to individual merit or capacity (which is the contention of the Applicants as to the content and nature of the norm and standards), I should think that it would be perfectly easy for learned Counsel to explain . . ." (X, p. 139.)

So, very clearly, Mr. President, if the evidence about practice of States could relate to practice of official laws and regulations which

constitute discrimination or separation by reason of a group, without regard to individual merit or capacity, then that is said to be the contention of the Applicants as to the content and nature of the norm or standards. One can have sympathy with the Applicants because they said that before knowing exactly what the evidence of practice of States was going to produce. By way of contrast we can refer to what they now say about it in Tuesday's record, page 353, *supra*:

"Professor Possony expressed opinions with regard to practices and he gave evidence concerning certain laws and constitutions of States. None of this, however, was relevant to issues presented and raised in respect of the international standards or the international legal norm, or both, for which the Applicants contend, as contrasted with the unintelligible and ambiguous reformulation, used as the basis upon which Respondent led its witnesses, and asserted to be the sole question to which their evidence was directed or relevant."

Mr. President, I can hardly imagine evidence more directly concerned with, and I should say directly anchored to, the Applicants' own formulation, which I have read out to the Court, as to what evidence of practice of States would really be meeting their case in regard to the standards and the norm.

Now, Mr. President, to return to this present attempt at narrowing down the issue to *racial* discrimination. It is quite obvious that the absurdity of the whole approach of the Applicants, as contained in their norm and standards theory, could be more easily demonstrated while they kept it so wide—while they retained that vague formula of group or class or race. Some of the extreme consequences would fall away, I suppose, or would not be so easy to demonstrate—so readily demonstrable—when they cut out the others and they come down to race alone; for instance, what they spoke of as the parody of their case, the separate conveniences for men and women.

In addition, of course, Mr. President, very little emotional impact is produced by such formula as group, class or race. If one wants real bandwagon effects it is much more to the point to speak of racial discrimination. So it seems to us that it was apparently for these reasons, in an attempt to reduce absurdities and in attempts to compound emotion, that the Applicants now have a formulation of what they themselves call their major premise and which reads as follows in the verbatim record at page 355, *supra*:

"... international standards are accepted according to which racial discrimination is inherently and always incompatible with moral well-being and social progress".

Their case is now no longer the one as defined at page 493, IV, of the Reply. It is now one against "racial discrimination". As I pointed out, no attempt was made to define this concept—racial discrimination. No attempt was made to link up any new or other definition which the Court was asked to take into account—no attempt was made to link that up with the case previously made. No attempt was made to amend the Applicants' submissions. No attempt was made even to show the relationship of this concept of which they are now speaking—racial discrimination—to show that relationship with the wide words used in

the alleged documents relied upon as sources for the norm and/or standards, some of which documents were quoted above, where these documents speak of race, class, group, religion and so forth.

Nevertheless, Mr. President, despite their complete failure to attach any legal meaning to this expression "racial discrimination", the Applicants have now developed such a fondness for it that they used it no fewer than 17 times before tea on Tuesday. Why is that? In our submission the impression is unmistakable that the Applicants have now abandoned all attempts to define, in a legal and logical way, the distinction between the allotment of rights and so forth which would be legitimate and the allotment or allotments which would not be legitimate. They have given up all attempts at a clear legal, logical definition of that criterion or distinction. Instead they have now resorted to undefined expressions, more prevalent on political platforms than before courts of law. We submit, Mr. President, that this Court will have no difficulty about recognizing this manoeuvre and about knowing how to deal with it.

The reason for the Applicants' disenchantment with the content of their norm and standards as previously explained and as previously formulated, is of course obvious. It is obvious after the Respondent's evidence and the Respondent's demonstration of what happened in the various international bodies, that no norm or standard of the content relied upon by the Applicants could possibly exist. The only way in which the Applicants could meet the impact of the Respondent's case as presented in the evidence and in argument was to deny its relevance and in that way they have implicitly conceded, in our submission, in the most effective way possible, that if our case was indeed relevant, it would also be conclusive. However, the Applicants could not logically demonstrate why our case was irrelevant—why it did not meet this case which they previously presented and which they explained to us. They could not go further and they could not define what their case really was. They were consequently left with only one weapon and that was an appeal to the emotions.

In view of what I have said, it is hardly necessary to add that the Respondent's witnesses did indeed advert to this case presented by the Applicants and they assisted in demonstrating its complete untenability—even this case as the Applicants are putting it to the Court now. Since they are now apparently limiting themselves to differentiation among racial groups, it may be apposite to remind the Court that although no evidence of the Respondent was specifically directed to such a narrowly defined issue, the evidence and the argument which was presented to the Court indeed covered this aspect. I could give examples from the evidence of Professor Possony which very clearly show that his evidence about the practice of States, and also about what is desirable and what may be desirable for well-being and so forth in certain circumstances, is apposite whether one speaks of differentiation, discrimination, distinctions on the basis of group, race or class in the wide way, or even when one merely narrows it down to racial groups. Of course, one has difficulty when one deals with an undefined concept especially this vague one about race. What exactly is meant by race? There are so many classifications. Are we speaking only of the so-called "grand" races—the three sometimes referred to: the *Caucasoid*, the *Mongoloid* and the *Negroid*—or are we speaking

more generally of other classifications that have come about or of various ethnic groups that exist all over the world. The Applicants have not explained that to us.

Even if we take the various possibilities into account, even if we look at the matter most conservatively as being distinctions only between these "grand" races, there are various examples in Professor Possony's evidence of a practice of State showing such differentiation and necessarily involving the fact that there must be this type of artificial or short-term or immediate detriment to the individuals involved that the Applicants spoke of.

There are particular provisions in India with regard to the Anglo-Indian community. We find that at **XI**, page 667. There is the differentiation between Negroes and Whites in Liberia which we find at **XI**, page 681. There is the position of the aboriginal races in Australia, found in the same record, on page 684. There are the differential laws regarding the Maoris in New Zealand, also at **XI**, page 684. There are the separate systems for Indians in Venezuela—same record, same page. There are the special provisions for Indians in America, at **XI**, page 685. There is the situation in 17 states of the United States of America which still prohibit marriages between Negroes and Whites—**XI**, page 695.

If we do not confine ourselves strictly to these "grand" races, if we take into account also ethnic differentiations and so forth, there is the very well-known, often quoted, example of the differential measures in Cyprus, as between Greeks and Turks. Professor Possony referred to this at **XI**, pages 667-668.

These are only examples. If this emphasis had come earlier we could also have placed more emphasis, in our searches for evidence, on practices of States and on the proceedings in the international bodies in concentrating upon this aspect, which is now presented as being the gravamen of the Applicants' case, but indeed, Mr. President, what we have done, I submit, is really enough in that respect.

Also, Mr. President, our evidence in regard to South West Africa itself stands uncontradicted, including the evidence that it is often necessary to distinguish, on the basis of membership in an ethnic or racial group, for the benefit of the whole community. It is necessary to distinguish between the various non-White groups *inter se*, for the reasons that have been given. It is necessary also to distinguish between the White group, particularly in its own homeland, and the various non-White groups; but not only in its own homeland, but also in the homelands of the various non-White groups where the distinction operates again in favour of these various non-White groups.

So, Mr. President, all this evidence clearly goes to show that even if the Applicants' case is now narrowed down to emphasis on this aspect of so-called racial discrimination, with the immediate short-term or similar effects which it may have in the case of individuals, then that case is still completely insupportable.

Now, before I leave this aspect of analysis of the content of the norm and the standards, may we just test the matter in another way, by way of illustration. It involves, perhaps, saying some things that I have said already in another way, but I think it affords a rather graphic illustration of what we are talking about. What would the Respondent be required to do if the Court were to grant an order simply in terms of Submissions Nos. 3 and 4? Mr. President, as those submissions are

worded, with reference to the definitions incorporated in them by reference and the official explanations, then obviously an order in terms of those submissions would require the Respondent to repeal or abolish all measures or practices which do not comply with the formulations set out in those submissions and in those definitions, particularly the one at page 493, **IV**, of the Reply.

This would mean, in effect, that the Respondent would have to repeal all measures which distinguish, on the basis of race, colour, national or tribal origin, in establishing the rights and duties of the inhabitants of the Territory. If the Court were to make such a declaration, which is what the Applicants asked for in those submissions, it would mean that the Respondent would have to repeal all its measures which have as their object the protection of the indigenous groups, including those measures which, the Applicants apparently now say, are not objectionable—such as the measures to reserve the lands of the Natives, the measures to control the movements of Natives in certain circumstances, particularly into urban areas, and the measures directed at the protection and development of the traditional institutions of the Native peoples. I have referred before to the passage in the record at page 350, *supra*, where the Applicants apparently indicated that these measures would not be in conflict with their case.

And, Mr. President, if the Court is not now asked to make a declaration on the basis of the submissions as they stand and as they are worded, what is the nature and the compass of the declaration which is sought to be obtained? Is the Court now asked, despite the wording of the submissions, to examine each and every measure separately in order to decide whether each should be repealed or not? If that is what is required of the Court, Mr. President, so that the Court must then in the end compile its own list or catalogue, what criteria is the Court to apply? Must the Court seek to determine whether a particular measure brings about an actual or a potential disability for certain individuals, and if that should be the criterion, must the Court have regard only to immediate effects, or should it have regard also to the fact, if that is so, that in the long run, or over-all, even the individual who suffers this immediate or ostensible hardship will be substantially benefited by the measure, or by the whole system of which the measure forms a necessary part? Must the Court entirely disregard the over-all advantages of a measure for the group as a whole, or must it weigh those advantages against disadvantages suffered by a few individuals?

The question then further arises, Mr. President, as to how the Court is to apply any of these criteria to certain types of measures which have formed the subject of discussion in those proceedings, and in regard to which we now really do not know where we stand at all as far as the Applicants' case is concerned. Let us take the measures which provide for separate educational facilities for the different groups, having regard to the evidence, the uncontested evidence which the Court has heard, about the basic importance of mother-tongue education, about the general differences in levels of development of the children at the pre-school stage when they come to school, and so forth. Where does that stand? How does the Court determine now whether that is to be interdicted or declared against, or whether it is to be declared a permissible form of differentiation? Does the Court determine that on any criteria, or does the Registrar write a letter to the Applicants and

ask them—do you want this included or do you not want it included?

Mr. President, the same question arises about measures such as those which protect opportunities of commercial development for indigenous peoples in their own area, where they get the preferent opportunities—where those are specially protected for them. Are those to be declared contrary to the Mandate, or are they to be declared permissible? How about measures protecting administrative posts for Natives and other indigenous peoples in their own area—positions such as teachers, policemen, school inspectors and so forth, agricultural officials, administrative officials, all these; how about measures for separate residential facilities for various groups, where the groups indicate that they want those—that that is the way in which they prefer to live and in which they wish to live?

These are only examples, Mr. President, of the problems which would necessarily arise in this regard. They are in fact so multiplex as to render the task of the Court an impossible one, and this is the more so when we take into account that in view of the form of the submissions, and the Applicants' definitions and declarations regarding the nature of their case, that because of that, an investigation of the problems which would present themselves to the Court in this matter, and the presentation of factual material which would be relevant and necessary for the Court if it were to attempt to embark upon such a task, have not taken place.

That, then, Mr. President, is the basis upon which we propose to devote further discussion on the Applicants' comment on the evidence, but before we turn directly to that, there are two other matters of a general nature, dealt with by the Applicants in their comments, with which I should first like to deal.

The first is this subject of the admissions made by the Applicants. On Tuesday, in the record, at page 357, *supra*, the Applicants said on this subject:

"The Respondent's contention concerning the alleged legal effect of the Applicants' so-called 'admissions' is, in the Applicants' submission, without merit and should be rejected."

Mr. President, let us trace very briefly the course and the history which was taken by what is now called by the Applicants "the Applicants' so-called admissions". The Court will recall that in our Counter-Memorial, II, at page 5, we said the following:

"9. It will be noted that in many instances Respondent does not quote any published work or authority in support of statements made in the succeeding volumes. In such cases, apart from facts which are so generally and well known as to require no citation, the information is mostly derived from Respondent's own official sources. If any doubt is cast on the accuracy of such information, or if the Court wishes it to be amplified or explained, Respondent would willingly make the necessary evidence available during the oral proceedings."

Now, Mr. President, many of these statements of fact referred to in this passage which I have just quoted, and many other statements of fact, were not specifically admitted or denied or otherwise dealt with by the Applicants in the Reply.

And then came our Rejoinder, which was the last of the pleadings,

and in that Rejoinder further facts were put on record by us which the Applicants had had no opportunity to deal with, of course, when it came to the commencement of the Oral Proceedings—the converse had not occurred. All the factual allegations which had been made by the Applicants in the Memorials and the Reply had been specifically dealt with by the Respondent in its pleadings, each and every one of those, systematically. But we were faced with the difficulty—and the difficulty applied to the Court as at that stage—that here the Respondent intended to call evidence, *viva voce*, to be directed to what might be issues between the Parties but, as yet, we did not know exactly what the total scope or ambit of those issues would be, for these reasons. And the question then arose when we had to comply with the Rules of the Court regarding the list of witnesses, subjects to which they would testify and so forth—a practical problem arose in that regard. It will be known to the Court—I shall not disclose any details about discussions—but it will be known that because of this problem there were certain pre-trial discussions between the President and the representatives of the Parties, and these led then to an understanding which was expressed by the Applicants' representative, on the very second day of these proceedings, at VIII, pages 115-116, which reads as follows:

“Without conceding the relevance of facts contained in Respondent's pleadings, including the oral proceedings, the facts—as distinct from inferences which may be drawn therefrom—are not contested by the Applicants except as otherwise indicated, specifically or by implication, in the Applicants' written pleadings or in the oral proceedings.”

That, then, was the statement as made explicitly as of that date—in other words, all those facts “except as otherwise indicated specifically or by implication, [either] in the Applicants' . . . pleadings or in the Oral Proceedings”.

Those were then two methods by which the Applicants could indicate that specific facts would fall out of the generality of this admission. Those would be excluded then.

But, Mr. President, when we came to the debate on the proposal for an inspection the matter came to a new stage, and the Court will recall that the Applicants then went further and further in order to eliminate any factual dispute between the Parties, whether by way of oral testimony or by way of an inspection. And, so, they said in this respect on 27 April, at IX, page 21:

“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 these 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.”

So, Mr. President, now we go a stage further. This previous qualification, which had existed about denials or indications to the contrary in the Applicants' pleadings, has now fallen away. On the contrary, whatever the Respondent had said in its pleadings is now taken, not only

as being admitted as true, but "as if incorporated by reference into the Applicants' pleadings", unless there should be an indication to the contrary in the Oral Proceedings. And the Applicants stress here, in this very passage, that they "have not found it necessary and do not find it necessary to controvert any such averments of fact".

Similarly, Mr. President, in the next record, at **IX**, page 43, the Applicants refer to their pleadings in which now all averments of fact in Respondent's pleadings are incorporated by reference.

So nothing could really be clearer than what we had at that stage.

Then we came to the stage where the Applicants dealt later with militarization and annexation, and they referred to "the facts . . . as disputed by Respondent and as subsequently accepted by the Applicants for purposes of these proceedings" (**IX**, p. 235)—a very clear, a very fair description of exactly what it meant before.

This clear and common understanding between the Parties, Mr. President, as to what had been admitted, remained unchanged even on 8 October. On that date, with the presentation of the evidence of Mr. Dahlmann, my learned friend, Mr. Muller, referred to letters by petitioners quoted in Book VIII of the Counter-Memorial, **IV**, as "documents which have been admitted by the Applicants". That is at **XI**, page 459. He also referred to them as "letters which are before the Court and have been admitted". That is at page 461 of the same record.

Although my learned friend, Mr. Gross, made frequent objections about the evidence and aspects of the evidence, he at no stage disputed that he had indeed admitted these letters. Indeed, Mr. President, at page 468 of that record there occurs a passage where my learned friend, Mr. Gross, could not find the relevant passage in the Counter-Memorial, and there was then a discussion between the President, Mr. Muller and Mr. Gross, which concluded as follows:

"Mr. MULLER: The witness is quoting from the letter itself.

Mr. GROSS: And that is in evidence, is it Mr. President?

Mr. MULLER: The whole letter has been handed in and the whole letter has been admitted.

Mr. GROSS: Thank you, Sir."

So, even at that stage, Mr. President, the Applicants accepted completely that they had admitted all the facts in the Respondent's pleadings, something which one could hardly imagine they would ever deny, as they apparently now appear to do.

Now, after the conclusion of our presentation, the Applicants refer to their "so-called admissions". And it is interesting to note how they attempt, Mr. President, with the greatest respect, to slither out of this situation which they now realize has very dangerous implications for them. They start off by referring to a contention of theirs in the Reply, **IV**, at page 260, that "the decisively relevant facts concerning Applicants' Submissions 3 and 4 are undisputed". And, they say, this contention has been maintained ever since. The Applicants say, in this record:

*"I refer to the misunderstanding, or the apparent misunderstanding, of the Respondent with respect to the actual significance of the Applicants' contention which was made in the Reply, **IV**, page 260, and ever since maintained, that—. . . the decisively relevant facts*

concerning Applicants' Submissions 3 and 4 are undisputed.'" (*Supra*, pp. 354-355.)

Mr. President, we never spoke about this passage in the Reply. We were talking about the later admissions in the Oral Proceedings which I have just read out to the Court, against their background of context. But, to that, the Applicants never refer in their comment. They refer to this passage in the Reply, a passage which was indeed concerned, not with admissions made by the Applicants, but with admissions made by the Respondent. This appears very clearly from that passage in the Reply as a whole, at page 260, IV, and even more clearly at the repetition in somewhat different words, at page 262, IV, I think I might read both.

"Notwithstanding the voluminous detail with which the Counter-Memorial is encumbered, the decisively relevant facts concerning Applicants' Submissions 3 and 4 are undisputed.

It is possible, nevertheless, that the central issue, viz., the character and consequences of the policy of *apartheid*, or 'separate development' (in Respondent's presently preferred usage) may be lost to sight in a haze of irrelevant particulars." (IV, p. 260.)

Proceeding to page 262, IV, Mr. President:

"The decisively relevant facts concerning Respondent's policies and objectives, relied upon by Applicants in support of their Submissions with regard to Article 2, paragraph 2, of the Mandate, are undisputed. The doctrine of *apartheid* or, in the phrase of Respondent's currently preferred usage, 'separate development' emerges from Respondent's own formulations of that policy, as set out in excerpts drawn below from the Counter-Memorial, *passim*, as well as from public statements of Respondent's highest officials." (*Ibid.*, pp. 262-263.)

Mr. President, they could hardly have made it clearer that they were speaking here of facts relied upon by the Applicants in support of their submission, and they speak of those as being admitted and confirmed by Respondent in these various sources of which they speak.

It has always been the Applicants' contention that all relevant facts for the purposes of their theory of the case—or their case as now presented—are admitted by the Respondent. That they have always said. But that contention in no way bears upon the completely different question, namely what facts did the Applicants admit? And the answer to that question is: they admitted explicitly all the facts in the Respondent's voluminous pleadings. They made one exception only, the one to which I referred some days ago concerning the representative capacity in which they appear in this Court and political motivation of the campaign of the group of States on whose behalf they appear. That was the only one that I could recall and that we could find. That was isolated for purposes of a denial.

In their comment on the evidence, Mr. President, the Applicants now quote only their contentions regarding admission by Respondent of the facts relevant to the Applicants' case, in purported substantiation of a contention that the Applicants have only admitted such of the Respondent's averments as the Applicants regard as relevant. That is the way in which they now put it. They now suggest all they have admitted are those facts which they regard as relevant and nothing else. They state that in this form at page 357, *supra*:

"A so-called 'admission of irrelevant facts' is a contradiction in terms. If averments of fact are contended by a party to be irrelevant, the question of admission or denial does not arise as a legal proposition."

Mr. President, really, words almost fail one in having to reply to such a contention. Of course, if a court were to hold that the particular fact is irrelevant, then it would not matter in the result whether that fact was admitted or denied. But it is an entirely different thing to say that a party cannot admit a fact which that party contends to be irrelevant. Indeed, Mr. President, that is the very form in which the first, more limited, admission was made; without any admission or with reservation of right as to the question of relevance, the facts are admitted.

Mr. President, a party is often much more ready to admit facts which it regards as irrelevant to the particular case than it would be to admit facts which it regards as highly relevant to its particular view of the case. Indeed there are stages of the record where the Applicants stated specifically as the reason why they had admitted the Respondent's facts, or denials of facts, that the Applicants regarded those statements or denials as irrelevant. They gave that as the very reason why they admitted the facts. That appears in the record, at IX, page 21:

"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 facts, data or other materials which have been contraverted by the Respondent and such contraversion has been accepted by the Applicants and those facts are not relied upon."

To conclude, then, Mr. President, on this aspect, the Applicants quote passages dealing with what they contend was admitted by Respondent and they pretend that these passages define what was admitted by the Applicants. This, in our submission, with the greatest respect, was not only dishonest, it was also absurd. It would mean that the Applicants only admitted facts which the Respondent had admitted, or, in other words, that the Applicants admitted only the facts which they themselves had initially alleged as the facts on which they rely for their theory of the case. The lengths to which the Applicants had to go in this respect, Mr. President, illustrate, in our submission, the inescapable corner in which they find themselves at this stage of the proceedings.

I proceed to deal with another general point which the Applicants mentioned in their comment, and that was in regard to our contention that the views of alleged authorities, read at some length into the record by the Applicants to witnesses under cross-examination, did not *per se* become evidence. The Court will remember that I dealt with that point in the verbatim record of 1 November, at page 220, *supra*.

This is the way in which the Applicants referred to this argument on 9 November, at pages 357-359, *supra*—they deal with it over those pages—and on page 358, *supra*, they say that our argument—

"... seems to boil down to the proposition that in deliberating the credibility or weight properly to be assigned by the Court to the views or opinions of experts, or in assessing their possible bias or prejudice, the Court should not take into account their expressions of agreement or disagreement with views of recognized scholarly authority with which they may be confronted ...".

Of course, Mr. President, that imputes to us a contention that we never advanced. We never suggested that it was not permissible for Applicants or for anybody cross-examining a witness or an expert to put views of others to the witness or the expert in order to test his credibility or possible bias. That, of course, is always permissible, and we never suggested anything to the contrary. We merely said that those views, read at such extraordinary length in this case to those witnesses, often not followed up by a question that dealt with the whole of the passage, would not in themselves become evidence in the true sense of the word—in other words, evidence of the truth or the correctness of those views. Obviously if an expert agrees with a view of somebody else which is put to him in cross-examination, then that view does become evidence, not because it has been expressed by somebody else, but because this man who is now standing in the box makes it evidence by agreeing with it and, therefore, indicating that that is also his own view. But if the expert disagrees with the view put to him, then such a view does obviously not become evidence in the sense that there are now two conflicting views on record which must be weighed by the Court—the other one is not a view to be weighed at all; the only relevance of the operation is to see whether the expert agrees or not; if he does not agree, there may be features in the way in which he answers, in his demeanour, or in other circumstances which may afford the Court some guidance as to what weight is to be attached to his evidence, but that is all.

In passing, Mr. President, we may point out that in the context under consideration the Applicants referred to "... the views of recognized authorities read by the Applicants to Respondent's experts..."—we find that in the verbatim record, of 9 November 1965, at page 358, *supra*. And in speaking of alleged bias on the part of Professor van den Haag the Applicants also said that he questioned the motives of "... some of his most highly respected contemporaries in the same field". (*Ibid.*)

Now, Mr. President, the experts which we called had to qualify as experts, but it seems that the authors and others to whom the Applicants refer in cross-examination become experts or recognized authorities merely by reason of the fact that the Applicants happen to cite their views, or because the Applicants attribute that quality to them. Some of them may well be experts or "highly respected contemporaries" in a particular field, but, Mr. President, that is not something which we know on the record as it stands. It suffices to say that the Respondent does not concede that all the persons whose views were put by the Applicants to the Respondent's witnesses, are indeed experts or recognized authorities.

The Applicants in this respect also relied on cases which were cited in the 1964 supplement to *Wigmore on Evidence*, Volume VI, pages 9-10. They relied on those for the proposition that there is an increasing tendency on the part of some municipal courts "... to enlarge or to expand previous practice, so as to permit the procedures followed by the Applicants in cross-examination of the experts presented in these proceedings..."—that is in the same record, at page 359, *supra*.

Now, Mr. President, we have looked at these pages of the supplement. They refer to pages 17-19 of the main work, Volume VI, where it is stated that according to the general practice in the United States it is inadmissible for any purpose to read to an expert in cross-examination views of other persons—a very rigid view of the general practice in the United

States in this respect—a rigid view, of course, which we never adopted in this case. The cases in the supplement merely show that the present trend in the *United States*, although by no means in all the states, is to relax this rigid tendency by allowing such a procedure for the purpose of attacking the witness' credibility or showing possible bias. But the cases, it is interesting to note, cited at page 11 of the supplement make it clear that, even for this limited purpose, the procedure is impermissible unless the *authoritativeness* of the view put to the expert is recognized by him or has been established by other direct evidence.

Mr. President, I may just in passing say that the attack which the Applicants made on this basis and on other bases upon the credibility or upon the weight to be attached to the evidence of some of our witnesses has been shown to be entirely without substance. For instance, the Applicants attacked Professor van den Haag as having shown bias—we submit that that was entirely without merit. They quoted to Professor van den Haag views of others in his field, who had also participated in some way in the earlier court proceedings in the United States, to which reference was made and to which Professor van den Haag had, indeed, previously referred in his evidence, but which, he had indicated, were expressions of view, and that in no instances did they rest upon practical experimentation or clinical work with one exception—that being the case of Professor Clark. And in the case of Professor Clark, Professor van den Haag, for the reasons which he gave to the Court, considered that the Professor had failed in the professional standards that would be expected of him, and his condemnation of him was somewhat harsh, as one might perhaps understand but it certainly did not display any bias as far as the subject-matter before the Court was concerned.

Equally, in the case of Professor Possony—perhaps even more strongly so—we find that a completely unfounded basis is suggested for attacking his credibility. The Applicants say in the record, at page 350, *supra*, that as they sought to bring out in cross-examination of this witness—

“... the relevance, weight and credibility of all opinions elicited by the Respondent from Professor Possony as an expert all hinged upon an understanding of the witness concerning the true nature, content and scope of the Applicants' legal theory of its case”.

The Applicants then proceeded to attempt to make two points. The first was, and I quote from the same page:

“... the witness found it necessary to seek to validate and make relevant [to] his testimony by means of a legal argument of his own concerning the legal basis of the Applicants' case”.

Mr. President, the Court will recall of course that that is *not* a correct version of what transpired in Court.

During the evidence-in-chief of Professor Possony he was questioned by my learned friend, Mr. Muller, as to whether a norm such as contended for by the Applicants was observed in the usage and practice of States. And then came your suggestion, Mr. President, that the definition of the norm, as set out at page 493, IV, of the Reply, should be read to Professor Possony, and that was done—that was the verbatim record, at XI, page 662.

After that had been done, Professor Possony then answered that “... there is no such norm”. That is at the same page.

During cross-examination on 20 October, my learned friend, Mr. Gross, repeatedly put questions regarding this witness's understanding of the definition at page 493, IV—this you will find at pages 3-5, 7, 8 and 11, *supra*. And this was adverted to again on 21 October, still under cross-examination, and it was then that the witness repeated his understanding of the definition at page 493, IV, and he gave reasons for that understanding—that is in the verbatim record, at pages 36-38, *supra*. There was no question of the witness seeking to validate and to make relevant his testimony by means of a legal argument of his own concerning the legal basis of the Applicants' case.

[Public hearing of 15 November 1965]

Mr. President, at the adjournment on Friday I was dealing with certain criticism which had been offered in regard to the evidence of some of our witnesses and experts by my learned friend, Mr. Gross, in his comment on behalf of the Applicants. With regard to Professor Possony the first suggestion was that his evidence as to the practice of States had proceeded upon a wrong or improper interpretation of the norm or standards relied upon by the Applicants. We have shown, with submission, that that suggestion was without substance.

The other suggested point of criticism one found in the verbatim record at page 351, *supra*. There the Applicants say that Professor Possony referred to the Draft Convention on the Elimination of all forms of Racial Discrimination, and they then proceed:

"The purport of Professor Possony's testimony in this regard appeared to be that the Draft Convention, or its underlying premises, were, in his words 'out of line with the spirit of the Charter' (*supra*, p. 38). Such a view—if it is indeed a fair rendering of his testimony as it seems to be—would, in the Applicants' submission, go far to diminish or dismiss the credibility and weight of his testimony as an expert in regard to international standards relating to racial discrimination, as well as to the sources from which those standards are derived and of which they are comprised."

Mr. President, this rendering of what Professor Possony said is in fact exactly the opposite of what he said, and how this could possibly be suggested as appearing to be a fair rendering of his testimony I do not, with respect, understand. What Professor Possony said is to be found at page 38, *supra*:

"But then when we go to the declaration or the convention against racial discrimination, then specifically the allegation would be that those forms of—I am using the term here as used in the declaration—discrimination which are based on, or reflect, or aim at racial hatred, racial superiority or generally speaking, involve oppression and genocide, those forms of distinguishing—if that be the word—are absolutely out of line with the spirit of the Charter. I do not think there is any question about that."

So, what is said to be out of line with the spirit of the Charter is not this Draft Convention, but those very things which are condemned in the Convention, and it is really incredible, in my submission, how simple and clear language could be so badly misrepresented, and then used as a

basis for suggested discrediting of a witness. We submit that Professor Possony in his evidence makes it clear that in his opinion the object of the Draft Convention and the Draft Convention itself were entirely in line with the Charter, and that this whole form of attack upon the credibility of the witness falls to the ground. Professor Possony, in my submission, was a most impressive witness and he showed on the basis of the actual practice of States that there is no ground whatsoever for the suggestion of the existence of a norm and/or standards as relied upon by the Applicants.

We come to dealing with the Applicants' comment on the contents of the testimony of the various witnesses. We have shown that the Applicants' complaint is now restricted to: "The impact of Respondent's racially discriminatory policy upon individuals in particular circumstances, and through particular measures . . ." That we find at page 360, *supra*. I have now brought in those words which I left out before—racially discriminatory policy. Indeed one finds, Mr. President, in this explanation which is a key one in the comment of the Applicants, that there are apparently two elements upon which the Applicants rely in this new formulation.

They seem to rely either on one or on the other, or on both. The one is the element of so-called racial discrimination, and the other is the element of the impact of the policy upon individuals. Now, as a basis for analysing or replying to the Applicants' comment upon the testimony of the witnesses, let us just have a brief further look at both these elements, starting for convenience with the second—the impact upon individuals—a matter with which I already largely dealt on Friday, and what I need now say about it need not repeat the whole of that analysis; it is merely offered very briefly by way of recapitulation. As we have noted, this is a very strange form of complaint. The Applicants are not concerned with the over-all effect of the policy as a whole upon particular individuals, nor are they concerned with the effect of particular measures upon the over-all well-being of everybody. They are only, in their own words, "concerned with the effect of the policy through particular measures upon individuals in particular circumstances". Now, this form of complaint as we have analysed it before is, in our submission, completely alien to the Mandate. Article 22 of the Covenant refers to: ". . . the principle that the well-being and development of . . . peoples form a sacred trust of civilization . . ." (I, p. 200.) The word "peoples" in this context clearly does not mean, as the Applicants say in the Reply IV, at page 275, "the individual inhabitants comprising the *population*". It clearly means national or ethnic groups.

It could never have been the intention of the mandate system that a mandatory would be required to jeopardize or to disregard the interests of the preponderant number of the inhabitants merely for the sake of preventing harm to a few individuals. This conclusion follows not only from the wording of Article 22 of the Covenant, it follows also from the crucial provision in Article 2, paragraph 2, of the Mandate giving effect to the sacred trust principle which requires the mandatory to promote the well-being and the progress of the inhabitants of the Territory, without exception. In other words, the inhabitants as a whole were to be looked upon as the persons to be benefited by this sacred trust, and again, it would have been a strange concept to suggest that the mandatory was to disregard the over-all benefit of the large majority—the preponderant

number—of the population, merely for the sake of preventing harm to a few individuals.

That, then, is as far as the intent of the mandate system is concerned. But, Mr. President, in our submission, such a canon of government is also entirely unknown in the practice of States as well as in the deliberations and decisions of international bodies and conferences relied upon by the Applicants as alleged sources of their suggested norm and/or standards. Even on the record, incomplete as it is, with a view to investigating a suggestion of this kind, it is clear as we have shown, that there are in actual practice many recognized *distinctions* between groups, racial or otherwise, which necessarily involve some detriment to individuals. It is indeed unthinkable that there could be any rule which would result in a measure being regarded as objectionable merely because some individuals are harmed in some way, without having regard to the over-all effect or purpose of the measure or of the policy of which the measure forms a part.

We have not found examples of anything of that kind anywhere in the practice of States, and Professor Possony's evidence has clearly shown such a large body of practice to the contrary. And as regards the alleged sources of the norm or the standards, the Applicants have not been able to refer to a single instance, to a single conference, to a single resolution of an international body or assembly, where such an artificial concept has been designated as a basis for regarding a measure as impermissible. There is indeed none whatsoever anywhere in the deliberations of the bodies relied upon.

That then is as far as the element of impact upon individuals is concerned. In discussing that impact I used the neutral word "distinctions" between groups, racial and otherwise. And that brings us to the other element, apparently now relied upon by the Applicants in the present formulation of their complaint of racial discrimination. We have already pointed out that if this were intended to mean *unfair discrimination* then an enquiry into the accusation could not stop short at ostensible or immediate or short-term effects of policies or measures upon individuals. Unfair discrimination may be directed against individuals or it may be directed against groups, and the unfairness may lie in the motives of the authority which discriminates, or it may lie in the results of the measure, or it may lie in a combination of these.

Save then for the rather unlikely case where there may be direct evidence of improper motive, any such enquiry would, in our submission, have to entail a full examination of all the purposes and the effects of the measure, before any reliable inferences could be drawn. In particular, Mr. President, the enquiry would have to include actual, long-term and over-all effects of the measure or the policy, as distinct merely from illusory or short-term ones affecting particular individuals.

The Applicants, as we have demonstrated, have foresworn such an enquiry into over-all effect, and they speak only and exclusively of the so-called *per se* effect of the measures upon individuals and not upon the community as a whole or upon the population as a whole.

It is therefore evident, Mr. President, that they are not speaking of a racial discrimination in the sense of something unfair—something alleged to be unfair—in one or other of the senses to which I have referred—indeed in one or other of the only senses in which one could speak of *unfair discrimination*, whether towards individuals or towards the whole

of a particular population or a particular population group. They are not speaking of that, quite apart from the fact that it would not be competent for them to do so under the submissions as they stand. Consequently, we find confirmation for the fact that racial discrimination, even as now used by them, could at most mean *distinction* in the allotment of rights and so forth, upon the basis of membership in a *racial group*. The group, then, would have to be a racial group, because the concept is now racial discrimination, but discrimination would still be the equivalent of distinction in the sphere of allotment of rights and obligations.

And as we have shown, Mr. President, neither the practice of States, nor the sources relied upon by the Applicants, support their contention as to the existence of a norm or standards prohibiting such distinctions *per se*. But, Mr. President, when we look at the whole of the Applicants' comment of 9 and 10 November, we find that there is a strong suggestion of a further element of artificiality which reduces this whole concept of racial discrimination relied upon by the Applicants to an extreme of absurdity. I say that would appear to be the suggestion, because it is nowhere stated explicitly, but there are very strong grounds why we say that that seems to be the suggestion. The suggestion would appear to be that, in the Applicants' usage, the concept of "racial discrimination" applies only as between White and non-White persons, and then, also, only in one direction, namely when the distinguishing measure is such that its immediate effect is to protect the interests of White persons vis-à-vis non-White persons. That appears to be the sense—the sole and exclusive sense—in which the Applicants speak of racial discrimination. Apparently, only when a measure comes to fall in this category then it is impermissible racial discrimination, otherwise not.

When a distinguishing measure has an *opposite* immediate effect, protecting the interests of non-White persons vis-à-vis White persons, or when it is concerned with members of non-White groups *inter se*, then, apparently, it is not affected by this most recent version of the Applicants' norms or standards.

As I have said, the Applicants have nowhere said it explicitly, but I could mention to the Court some of the factors which would appear to indicate very strongly that this would seem to be what the Applicants are suggesting. The first factor is that the Applicants nowhere complain of differentiation of the last kinds that I have mentioned, in favour of non-White persons vis-à-vis White persons, or as amongst non-White persons *inter se*. They nowhere complain of that form of distinction, of which there is plenty in South West Africa, as constituting racial discrimination. They specifically mention some forms of that kind of differentiation as being permissible, in their contemplation. I have referred the Court to what they said in the record at page 350, *supra*, where they referred to the reservation of Native land rights, to the control of movement, particularly influx into cities, and to the protection and development of traditional institutions, where they refer to all those apparently as being permissible.

They seem to suggest, Mr. President, that measures of that kind are to be seen in general as being in the nature of *protection*, and therefore as being permissible. They speak in that vein not only in regard to South West Africa—we find that at page 350, *supra*—but they speak in that vein also, in general, of the practice of States, at pages 352-353, *supra*. And then, in contrast to this, we find passages such as the following, which I

quote by way of example (this is in the same record, at page 350, *supra*):

"Professor Logan made no mention at all of laws and regulations or of Respondent's official methods and measures for effectuating such laws, which impose limitations upon economic advancement on a racial basis, or totally deny franchise on a racial basis, or place obstacles on a purely racial basis in the way of achievement of engineering, scientific or professional skills, or preclude on a racial basis rights of association or collective bargaining.

Professor Logan, in his response, made no reference to these discriminatory laws which comprise the policy of apartheid."

In other words, Mr. President, where there is an exclusion of measures not regarded as discrimination, but regarded as protection, and where there is now, by way of contrast, an enumeration or illustration of measures which are to be regarded as racial discrimination, we find this distinction, namely when the measure operates in favour of a non-White it is in order; where it operates in favour of Whites it is racial discrimination.

At pages 352-353, *supra*, by way of contrast to speaking of protective measures in the practice of States, we find this passage:

"... Respondent neither through Professor van den Haag, nor through any other witness, offered evidence—nor is there any such evidence to be found—tending to show that racial discrimination could promote moral well-being or social progress in any human context".

And again at page 353, *supra*, we find this passage:

"... constitutional practice in the United States, as in most other civilized countries, interdicted official racial discrimination".

Now, Mr. President, in regard to both of these passages, we did point to a number of instances where distinctions were drawn between groups which on any classification can be called "racial groups"; but apparently those are ignored because they do not constitute this peculiar concept of racial discrimination which operates only when the short-term or immediate effect would appear to be to favour Europeans or to protect the European interests vis-à-vis non-White interests.

If we take the case of constitutional practice in the United States as a ready example, we cited the example in evidence and in argument of the protection of the rights of the Indians in their Reservations, but apparently it is said that that constitutional practice does not constitute official racial discrimination.

In general, Mr. President, we find that, in discussing the evidence on South West Africa, the Applicants concentrated entirely on aspects of this White/non-White relationship, and then in one sector only, namely the White sector, to the exclusion of anything else. The laws and so forth which were designed to protect interests of the White group in this sector—those alone, came under fire as "racial discrimination" and as "the essentially racist perspective which uniquely marks apartheid". Those were the words used in the record at page 360, *supra*.

So can it really be, Mr. President, that the Applicants, although not saying so explicitly, are by suggestion advancing this (suggested) norm or (such suggested) standards to this Court? If that should be so, all I need say is that there is no support whatsoever for such an artificial concept,

either from the sources relied upon by the Applicants for their norm or standards, or from the practice of States.

As regards the sources, the position is quite obvious: I need hardly enlarge upon it. There may well have been political talk from time to time which would appear to have suggested that it might be permissible to discriminate or distinguish in favour of non-White groups but not in favour of White groups, but nobody, Mr. President, has ever come forward at any international gathering, or on any occasion that I am aware of, to suggest or propose seriously that such a norm or a standard is to be accepted by any international body or conference as one being, or purporting to be, binding internationally and generally speaking. There is no source whatsoever upon which the Applicants could possibly rely for such an artificial concept.

And then in regard to the practice of States, there is no relevant practice which can be referred to as constituting or indicating an acknowledgment of an obligation to conform to such a suggested norm or a standard. Particularly, Mr. President, if we look at the situation of States with populations which are either exclusively or overwhelmingly European or White, one finds no relevant practice there upon which my learned friends could rely, because, and for the simple reason, that the problem of a White group which may need protection vis-à-vis non-White groups or persons, does not arise in such countries. That is so in general if we look at the situation all over Europe, in Northern America, the United States, Canada, in the case of Australia, New Zealand and so forth—the situation is as I have described it for one of two reasons: either because non-White persons do not offer themselves in large numbers as immigrants in such countries, or because the number of potential non-White immigrants is limited in such countries, either by immigration laws or by stringent requirements about standards of civilization before they are admitted as citizens or the like. That is the situation in all these cases, and therefore there is no relevant aspect of State practice to which one could point and say that even in circumstances where, as a matter of fact, it is obvious that a White group may be in need of protection as a group against possible genocide, upon possible flooding of its standards by non-White groups in its vicinity, it could be said that it must necessarily be impermissible racial discrimination if any measures of protection are offered to that White group. There is no practice anywhere in the world to which one could point as being relevant in this respect.

There is only one aspect which is in a sense relevant, but that does not operate in the Applicants' favour; it operates strongly in favour of the Respondent's contention, and that is, the whole international practice and regime in regard to the minorities treaties. That practice and regime certainly showed, Mr. President, that protection is not necessarily required only by an under-developed or a less developed group, but that there are circumstances where the minority group in need of protection may well be a group standing at an equally advanced stage of development as, or a more advanced stage of development than, the rest of the population, against which the protection is needed.

On the admitted and undisputed facts before the Court with regard to South West Africa, the situation in South West Africa is exactly that both the most advanced groups in the Territory and the least advanced groups in the Territory are minority groups in practical need of protec-

tion; the most advanced groups being the White, the Coloured and the Baster groups, and the least advanced groups being the Bushmen, the Himba and the Tjimba. Those facts are facts; they are dealt with extensively in the record and in the pleadings. They have been dealt with by each and every one of the expert witnesses who have shown that they are incontrovertible facts.

It would, therefore, Mr. President, be a very strange norm, or very strange standard, which ordained that such protection is to be regarded *per se* as impermissible racial discrimination.

It is because of fundamental errors in perspective that one finds that the Applicants' comment on detailed aspects of the evidence also leads them to results which are absolutely far-fetched and, in our submission, absurd and completely in conflict with what has been accepted and what has been established as incontrovertible fact in this case. The fundamental error of perspective in the Applicants' comment lies in their disregard of the basic aspects of the circumstances of the Territory. We have been over these several times and I need not go into any detail about them, but for purposes of showing this warped perspective I must refer to them very briefly again.

There are a number of separate groups in South West Africa, largely living in different regions of the Territory. The groups differ widely from one another. They maintain different institutions; they are at different stages of development; they regard themselves as being different from one another in important respects and they wish to retain their separate identities. There are certain types of contact between those groups which would lead to friction and have done so in the past, in history. In particular, it has been established and it forms part of the incontrovertible record of fact in this case that any attempt to force these groups into a single political entity would result in chaos—in anarchy or in despotism. We dealt in respect to this particular problem, specifically with the position of the White group, because of the concentration on that aspect in the Applicants' attack and in the attack which has been made upon Respondent's policies at the United Nations. We demonstrated that they had a right to be there. We demonstrated what harm would result to the whole community if it were not made possible for them to remain in South West Africa. We demonstrated how attempted integration would prevent their remaining on in South West Africa under circumstances where they feel that they could remain on there and where they could still make the contribution which they are making at this stage. We have demonstrated that such attempted integration would have these consequences, whether that attempt were of an immediate or gradual nature.

We have demonstrated also, Mr. President, that in the case of the other groups, self-determination on a basis of integration of all these into one community must necessarily mean the denial of self-determination for others. If one applies a simple majority concept over the whole of the Territory—if one ignores the facts of the different groups with group identities existing within the Territory—then one arrives at a result where the minority groups are denied the self-determination to which they are entitled. Therefore, in these circumstances, there is an established need for a carefully checked and balanced system of protected rights and interests for each group. That has been the essence of the Respondent's demonstrations on the pleadings, of which all the facts

are accepted. That has been the essence of the demonstration of each and every one of the witnesses who have appeared before this Court.

The Applicants have made no attempt whatsoever to impugn or to controvert this mass of material. It all stands unchallenged. Therefore, if they had now come along and said: we wish to attack certain measures in Respondent's policies because of the effect which they have upon individual persons—then they should have taken these basic incontrovertible facts as their premise—as their point of departure. That is the only permissible basis upon which it could happen at this stage of the proceedings. Then, of course, all that would have been open to them, would have been to say: the Respondent's policies in general, as regards their general purport and their general direction, are perfectly permissible (that is on the established facts the only course that one could adopt in these circumstances). But we still say that individual measures within that system should not be there for this, that or the other reason, (whatever criterion in law they want to propose as to why individual measures should be declared impermissible). That, as a question of fact, quite apart now from the way in which the issues have been defined—that would really have been the only course now open to them. But that is not what they do. They offer comment which appears to proceed from an assumption (which has never been established), that the contrary premise is a good one, namely that integration in South West Africa is both possible and desirable. In the course of this we find that they pay lip service to the factor of the importance of group personality. They do say, at pages 348-349, *supra*—repeating something they had said in the course of Professor Manning's evidence—that they admit that group personality is important—that it matters—but that the relevance of that testimony to the circumstances of this case is not apparent to them.

Surely, Mr. President, in the light of the demonstration to which I have just referred—in the light of the need to have this carefully checked and balanced system—how can they possibly say that they cannot see the importance or the relevance of group personality in the whole situation in South West Africa and the impact which that has upon the appropriate policies to be adopted?

They are not even consistent in apparently assuming that integration is possible and desirable. They nowhere go the whole hog with this and try to analyse what would be the consequences of it when applied all over South West Africa. They are concerned only with the aspect of protection of the interests of the White community. This one aspect of a whole total system of checks and balances is isolated from its context and is now looked upon in isolation, and all the measures which are directed to the end of protection of the interests of the White community where regarded as necessary, are branded and condemned as racial discrimination. Their comment is directed only at demonstrating the supposed plight of the non-White, particularly the Native who is not taken up in the White society or the White economy. In this respect, therefore, they appear to suggest that a policy of integration is to be enforced, regardless of what the admitted and the established consequences would be on the situation as a whole in the Territory.

When one sees this background, then of course it becomes perfectly plain and understandable that the Applicants would disregard circumstances in the Territory as a whole and that they would concentrate

only on the position of individual non-White persons, particularly Natives within the Police Zone. This is indeed what they did, although they sometimes pretended to do more, as I shall point out. But this process of concentrating within these narrow, isolated limits had of course started during their cross-examination of witnesses, when witnesses were discouraged from wandering beyond the limits of that portion of the Police Zone which was situated outside the Reserves and outside Native townships. It is in this context, I may say at once, that a witness like Mr. Cillie spoke of certain piffing suggested effects upon individuals being blown up into something beyond their importance—when taken into account in the total perspective of the issues really at stake here in regard to the well-being and progress of all the peoples of South West Africa. It is in that context that Mr. Cillie used that language. It is in that context that I spoke—my learned friend says disparagingly—of lines of cross-examination which concentrated on the situation of the Natives who live, work and will die in the Police Zone. I did not speak disparagingly of the situation of the individual or of his interests or of his aspirations, or of his circumstances of life. What I spoke about was the lack of perspective in the argument which concentrated on that aspect of the situation and blew it up into something quite beyond its true significance.

Against this background it will be understandable that the Applicants' comment on the evidence will lack perspective. It must necessarily do so, and it is hardly necessary, therefore, for us to go into much detail about this. I propose merely to illustrate this theme with reference to certain aspects of the comment. I shall not try to make my answer exhaustive; it is not necessary for our purpose.

Let us begin with this aspect of the suggestion of the "essentially racist perspective which uniquely marks apartheid". That one finds on page 360, *supra*. In making a suggestion of that kind the Applicants did not attempt to weigh what evidence there is on record, which either enables one to say this, or does not enable one to say this—what evidence there is which bears upon the question whether apartheid has an essentially racist perspective or not. If they had tried to have regard to what evidence there was, they must surely have noticed the evidence of Dr. Eiselen at X, page 96 where he emphasized that in Southern Africa we are dealing with a "multi-community" problem, and I use his words, and "while these peoples are also different in race, the race is not of great concern to us". Dr. Eiselen was speaking specifically of South Africa, but in the context it was clear that his remarks were of general application also to the problems in South West Africa. He emphasized that the factor of race was not of concern and he explained why that was so—why race was not regarded as being of importance—the important emphasis fell all the time upon the multi-community problem—the number of different groups, the number of different national entities—that were formed, and their relationship with one another.

I should like to refer the Court also to the Counter-Memorial, where, in the vicinity of page 468, II, and the pages which follow, we cite quite extensively from various addresses by the Prime Minister of South Africa, Dr. Verwoerd, where he expounds the basic essentials of the policy of separate development. Mr. President, in every case one finds that the emphasis falls on *group, nationality*—on the need for recognizing the different national entities, and on the difficulties which come about

when that is not done. There are these particular quotations at page 468, II, to which I would refer the Court:

"Difficulties arise where the founders [that is of new States in Africa] try to throw together in one State more than one national community. Whenever account has been taken of national entities when creating new States, contentment has been the result."

In reverting to South Africa, the Prime Minister stated:

"It is as unlikely that it will be possible to hold together the Whites and the Bantu in peace and free of strife in one multi-racial unit as it is to do so in the case of Black nations in other parts of Africa or as it is to throw together Xhosa, Basuto and Zulu without conflict into one communal entity. They too are just as proud of their own national identity as we as Whites are of our national identity . . .

Any attempt to force different communities into one national entity will never succeed. Suppression will be possible but never co-operation between separate groups who desire to remain separate."

That, Mr. President, is what one might call the sociological aspect of the matter, not the racial aspect of the matter. That is what one finds to be the basic emphasis in the Respondent's policies.

The same emerges, Mr. President, from a factor of which my learned friend, Mr. Gross, made great play at various stages of his address to the Court, and that is what he called the Respondent's census classification. The Court will recall this comment of his, in the verbatim record at page 360, *supra*: "... the individual person is classified and his rights and burdens are irrevocably established on the basis of his race or colour". And then, in the verbatim record, at page 373, *supra*, he said:

"All of these persons categorized as 'Coloureds'—including those who, in the language of the census 'although in appearance are obviously white, are generally accepted as Coloured persons'—pay the inexorable price of their classification."

Now, Mr. President, perhaps it was an omission on our part not to have spoken of this matter before, but in a case involving such a measure of detail some are sometimes lost sight of. This definition, and particularly this aspect of it, "although in appearance are obviously White are generally accepted as Coloured persons", really demonstrates exactly the opposite of what my learned friend is contending for. It is, I must admit, in that particular formulation rather clumsy draftsmanship, but if one knows the background, and if one looks at what it really says, then it becomes perfectly clear what the basic objectives are.

In South Africa we have had legislation for a long time providing for separate institutions for Native persons, Coloured persons, Europeans, and so forth—schools, and other institutions of that kind. In earlier legislation it often happened that those particular concepts—the Native, Coloured person or a White or European person—were not especially defined for the purposes of the Statute, and it then became necessary for the courts, in cases of dispute, to decide what exact criterion was to be adopted. In the course of extensive case law upon this subject,

the courts pointed out that there were various criteria that one could apply: there was the criterion of a man's appearance; there was the criterion of his descent; there was also the criterion of what I might call his sociological acceptance—where is he accepted in society; does he live amongst Coloured persons? Does he live amongst White persons; does he live amongst Native persons; and is he accepted generally by that community; does he identify himself with the particular community; and is he accepted in that community as being one of their members? The courts came to the conclusion that, on the whole, in the absence of special statutory definition, although these factors of association and appearance may be taken into account, when it came to an ultimate dispute the ultimate deciding factor would have to be the factor of racial descent. That, of course, as one can see, could in certain instances lead to anomalous consequences and particular hardship upon an individual and upon a family—a family having been accepted in a particular community and then, because of an instance of admission to a school, or something, having to delve into the past of that family and to see, purely and strictly upon a descent basis, where that family is to be classified. It could, of course, in certain cases lead to hardship. As a result, therefore, of this definition on the part of the courts, the practice was generally adopted in South African Statutes—and also, of course, applied to South West Africa—of having a special statutory definition and making it clear that, although the factor of appearance could afford prima facie guidance, the ultimate deciding factor was not going to be the factor of race or descent but the ultimate deciding factor was to be the sociological one of where the man identifies himself and where is he accepted. And that is the census classification which we read at page 109 of the Memorial, I, and it is just an example, taken from one of the Statutes, of this type of definition, and the purpose is quite evident from it when one takes the background into account.

Let us look at the definition of White persons:

“(a) *Whites*—Persons who in appearance obviously are, or who are generally accepted as white persons, but excluding persons who, although in appearance are obviously white, are generally accepted as Coloured persons.”

One could have refined that by saying rather “but excluding persons who, although in appearance would seem to be white, are generally accepted as Coloured persons”. But the general purport of it and the intention of it are clear. The criterion of appearance, in other words, is prima facie accepted as designating that a person may be regarded as a White person. But there may be instances where appearance could be deceptive and where, in actual fact, that person is not accepted as a White person—where he is accepted and where he identifies himself as a member of the Coloured community. And so it could be the other way round—where a person, if one were to look at his appearance alone, would be perhaps darker than other persons who are identified as members of the Coloured community, but, nevertheless, by reason of this test of acceptance of identification, is generally regarded as a member of the White community. And that is all that it means.

Therefore, also one finds in the case of Natives the definition is: “Persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa.” (I, p. 109.)

In the case of Asiatics, I may point out, the definition is purely—"Natives of Asia and their descendants".

And then it goes on, in the case of Coloureds—"All persons not included in any of the three groups mentioned above". (*Ibid.*)

Now, the case of Asiatics, in this total context, is also easily explained. The basic test there is the test of descent: for a man who wishes to be regarded as an Asiatic, he need merely point to his descent as an Asiatic, and then he is regarded as such and not as a member of any of the other groups. But where there has been an admixture, and particularly where there has been identification of a particular person as a member of, say, the Coloured community, or as a member of the White community, then the definitions given in the cases of those other groups would see to it that that man is then regarded as a member of that group.

So, Mr. President, the whole system is one which places the emphasis on sociological acceptance and identification, and not on the factor of race. It is not a matter of delving into a man's past and finding whether by statutory definition he has a quarter or one-eighth per cent., or whatever it might be (perhaps I should have said 25 per cent. or 12.5 per cent.) of a particular kind of blood. That is not the criterion. The criterion is that of sociological acceptance.

And therefore, Mr. President, also, although the classification is a rigid one, as my learned friend correctly says, for the large number of persons, it is not absolutely rigid for those persons who are somewhere on the borderline. It is quite possible for a person, purely by reason of this aspect of acceptance, to find a change in his classification—that he may by moving from one part of the country to the other—cases occur of that kind—where he may become entirely identified and accepted in a particular community, that is the end of it—he is then entitled to be classified as being a member of that community.

We also had occasion to point out that this census classification relied upon at page 109 of the Memorials, I, refers only to some aspects of classification. It does not stop short at a classification of Natives as a group, because even for the census purposes one finds that the census statute goes further, and it provides that the census is to be taken on the basis of home language, and home language then provides for a counting for the census of the various different Native groups in South West Africa. That is why those statistics can be provided in the way in which they are provided in the Odendaal Commission report—but not only for census purposes—after all, a census is only a count—but if we look at all the other laws and practices in regard to South West Africa, and also in regard to South Africa, we find that there are laws and practices which distinguish most clearly on the sociological basis between the various Native groups, identifying them as Herero, or Ovambo, or whatever the particular group may be, and providing differential rights and obligations for them on the basis of that classification.

Against this background we find that the Applicants suggest that certain witnesses—Professor Bruwer, Professor Logan, Mr. Cillie and Professor Krogh—had acceded to the proposition that rights and privileges in the Territory are established in accordance with the colour of the inhabitants—that is, by reason of their being White and non-White. The Applicants say, for example, in the case of Professor Bruwer, in the verbatim record, at page 360, *supra*, referring to evidence which Professor Bruwer, gave in the verbatim record, at X, page 279:

"... Dr. Bruwer conceded... that the establishment of rights and privileges in the Territory was 'by reason of being White and non-White'". Mr. President, with the greatest respect, this is a complete distortion of what the witness said. The witness was not speaking of rights and privileges *in the Territory*. He was questioned in this verbatim record, at X, page 278, regarding a passage in the Odendaal Commission report concerning non-Whites being absorbed in the White or money economy of the southern sector, and in this context my learned friend Mr. Gross, referred to a sentence in the statement of the Prime Minister of South Africa regarding "domination by the White in his own areas"; so that was the context in which this discussion took place. Dr. Bruwer said that that statement by the Prime Minister related to "certain rights that people look upon to have in certain areas". He was then asked "By reason of being White and non-White?" His answer was "By reason of belonging to different groups". Then my learned friend repeated the question "by reason of being White and non-White?" and the witness said "Yes", but in that context relating of course to the situation within the area under discussion—the White area in the Police Zone. The witness was not dealing with the Territory as a whole; the discussion did not concern the Territory as a whole. The discussion did not stop there—it went on; this was at page 278. At the next page, 279, there was a long colloquy about defining this exact area about which cross-examining counsel and the witness were speaking—nearly the whole of that page was devoted to that—and emerging from that, then, Dr. Bruwer said:

"I understand the question, Mr. President, and I would say that it is based on the area—call it, then, in the southern sector—excluding those areas where other groups have got rights, and excluding, to my opinion, also areas that are looked upon as being Crown Land or State Land."

And then, later, at page 280, following up then the particular question being put about the non-Whites in that area, Dr. Bruwer said:

"Mr. President, the position of the non-Whites, using that term, is different from that of the Whites in that area as we have now defined it in the sense that the 'Whites' in that area have certain rights and privileges which the 'non-Whites' have not in that area."

So nothing could have been clearer by way of emphasis and by way of repetition in the experts' account, that that is what they were talking about, and that in that context alone one could speak of White *versus* non-White.

In line with this my learned friend, Mr. Gross, alleged in the verbatim record, at page 361, *supra*, that Dr. Bruwer had conceded—

"that the restriction precluding a Native from becoming a mine overseer, in European-owned mines, for example, had 'nothing to do with any other factor' except that of classification by law as a 'Native'. This is in the verbatim record, at X, page 284."

I need to refer to only one question and answer to show how much out of context this comment by the Applicants was. I refer to verbatim record at X, page 284:

Question by Mr. Gross:

"And his rights to rise above a certain form of labour in the mine,

therefore, depend upon the—shall we call it ethnic group—to which he belongs? Is that correct?

Mr. BRUWER: That is correct, but only then in the area of the other group, because [and then he is interrupted by cross-examining Counsel, who says to him :]

I am talking, Sir, about the southern sector, I am talking about one particular area. Let us confine ourselves, if you will, to that; then, perhaps, we can discuss other areas if you wish."

So it becomes perfectly plain what the witness was saying, and when he is now confined by the questioner to this particular area, then it is in that particular area a case of distinguishing between White and non-White, but not because of following a racist approach or a racist perspective, but because that is the area in which the interests of this particular group, the White group, is protected. The White group happens to be the group which is protected in that area, and therefore all other groups which are not White groups come into that area subject to such limitations as may be necessary with a view to protecting the interests of the White group, just as in the case of Ovamboland, everybody who is non-Ovambo has to accept the limitations which are imposed with a view to protecting the rights of the Ovambo; and just as one would not say that the distinction, then, in Ovamboland between Ovambo and non-Ovambo is not imposed on a racial basis, just as little justification is there for saying that in the White area the distinction imposed between White and non-White is on a racial basis.

And this is exactly what was explained by Mr. Cillie—very briefly and concisely stated by him in the verbatim record at X, page 538.

A question was put to Mr. Cillie in the context with reference to the southern sector, and the question read: "And the answer is 'yes' to the question that there are ceilings placed upon non-Whites, solely because they are non-Whites? Is that correct?" And the answer came: "No, I would say no. If you put it like that, I would say placed upon them because they do not belong to the White group." And that puts it exactly in perspective. My learned friend, Mr. Gross, says now in his comments at page 361, *supra*, that this was something which was "conceded" by Mr. Cillie. It was anything but a concession. Mr. Cillie was restoring the correct perspective directly contrary to the suggestion which had been made by cross-examining Counsel—the suggestion that the ceilings were placed upon non-Whites solely because they are non-Whites, and the suggestion which is now still being pressed upon the Court irrespective of the answers which were, in fact, received from the expert witnesses.

Mr. President, this process I can follow up also in regard to the Applicants' comment on the evidence of Professor Logan and with reference to the actual evidence given by Professor Logan, and I could do it likewise with reference to the evidence of Professor Krogh and the comments of the Applicants in that respect. I do not find it necessary to do it in detail, but I shall give the Court the references. The same pattern emerges as in the cases of Professor Bruwer and Mr. Cillie.

The Applicants speak of Professor Logan's case at page 361, *supra*, and the relevant part of his evidence is to be found at X, pages 400-405. This evidence made two points clear. The witness said that in general allotment of rights, duties and privileges took into account not only a man's "classification as a Bantu", which was a phrase used by cross-

examining Counsel, at page 401, but that it actually extended also into the exact groups of being an Herero or an Ovambo or whatever the case might be. However, that was in general.

He acknowledged by contrast that such limitations as there were with regard to employment of non-White persons within the White sector of the Police Zone operated as against all the Bantu groups—the discussion *then centred on the Bantu only*. That we found at X, page 402. And that again was not because of any colour criterion, but because of distinction between the particular group, which happened to be the White group, whose interests were being protected in that particular area and the other groups. Professor Logan made this quite clear in a concluding passage at page 404.

We find the very same story in regard to Professor Krogh. The comment by my learned friend started at page 361, *supra*, and the Court will find Professor Krogh's relevant evidence at XI, pages 171-172. It will be seen that this evidence does not bear out the comment at all for similar reasons to those in the case of the other witnesses.

So, Mr. President, this suggestion to the Court of demonstrating on the basis of the testimony of the experts that the establishment of the rights and duties in the Territory was by reason of being White and non-White, *entirely fell to the ground, as one could expect, because one knew from the start that it was in conflict with all the basic facts, it ignored all the basic facts which had been admitted and established. In fact, as we have seen, it received no support whatsoever from the witnesses.*

Let us take the next example, viz., the suggestion by the Applicants that there is a rigid inflexibility with which the individual inhabitant is categorized by race or colour without reference to individual potential or preference. The Applicants on this point sought to build something from the evidence. I commented earlier this afternoon on this old concept of rigidity in so far as it does apply. In so far as it applies it is, of course, necessary in a situation such as operates in South West Africa. Professor Possony demonstrated in his evidence in regard to the practice of States that rigidity is necessary in circumstances of this kind, is found necessary in many such situations—multi-group or multi-national situations—all over the world, and if there were no such rigidity the system as a whole necessarily had to break down. Professor Possony's testimony in this respect is to be found at page 178, *supra*.

Rigidity, to the extent that it applies, must necessarily, of course, sometimes affect the interests or the position of a particular individual, and that is a necessary incident, therefore, of all these instances of State practice testified to by Professor Possony. But when asked about this aspect, Professor Possony said, at page 65, *supra*, in answer to the question of how a conflict between the rights of groups and those of individuals were reconciled:

“The State practice, I would say, is that the rights of the community predominate, and that this is done on the basis of generalized laws, and that as individual cases arise where on one or the other ground a hardship has been created, there are usually, but not always, ways by which hardship cases could be handled.”

In other words, the classifications remain rigid, more or less, but some method is sought to alleviate the hardships which are suffered by an

individual, or which may be suffered by an individual, where it is practicable to have such alleviation of hardship. And that, Mr. President, is not only the practice of States as testified to by Professor Possony, it is exactly the practice of the Respondent as appears from the undisputed facts of record. We can refer to several examples. One of those is this very measure which the Applicants have played up so very heavily, the mining regulations which reserve certain posts in European mines for Europeans. There is provision in the regulations in question for exemptions in suitable cases, and as we point out in the Rejoinder, VI, at page 232, since 1962 five non-White mine employees have, in terms of this provision, been granted exemption in particular circumstances to enable them to occupy positions in European mines which otherwise would have been closed to them.

There are other examples—the examples referred to by Professor Rautenbach in regard to the Act dealing with Higher Education in South Africa—Act 45 of 1959—which enables Native students in particular circumstances to enrol at European universities in South Africa with the permission of the Minister of Bantu Education. We deal with that in the Counter-Memorial, III, at page 476, and Professor Rautenbach dealt with it at XI, pages 410, 415-416, 441 and 450. It emerged that the permission is granted, for example, in the case of a Native student who wishes to enrol for a course for which there is as yet no provision in a Native university, or in the case of a Native student who attended a European university before the Act came into force and wished to complete his studies at that university.

Then, Mr. President, it appears from the facts of record that various exceptions and exemptions are also made under the pass laws to meet the needs of certain individuals. Section 6 of the General Pass Law operating in South West Africa, which is Proclamation 11 of 1922, specifically exempts, *inter-alia*, the following Natives from the requirement of obtaining and carrying passes: any Native missionary or teacher; any Native to whom a certificate of exemption has been granted; and as emerges from the Counter-Memorial, III, at pages 315-316, such certificates are granted exactly on the basis of individual merit, capacity and so forth. The number of exemptions granted, as appears there, during the years 1951-1960 was 676 out of a total of 918 applicants. Then in addition to that, Mr. President, there are what are termed blanket exemptions granted by the Minister applying generally to headmen, to counsellors, to members of Advisory Boards, to teachers, to police officers, to clergymen and to messengers, and as the Counter-Memorial discloses, there were as at 1963 about 1,000 of such blanket exemptions, and this, of course, is only in the Police Zone.

Mr. President, I have given examples of measures of exemption and so forth whereby the position of the individual is most certainly taken into account. I could give more examples but I think I have quoted sufficiently. The Applicants, on the other hand, say, by way of comment on the evidence, and we find this at page 362, *supra*:

“Conceptually, the evidence uniformly followed a line that the individual and the group are interchangeable concepts for the present purposes.”

Mr. President, in our submission there is no justification whatsoever for such a comment. The references were to brief extracts from the

evidence of certain witnesses. One was from that of Professor Krogh. The extract was quoted at page 363, *supra*, and it conveys the impression that even today "the only 'product' the Natives 'could contribute at this stage to their economic development' was their 'labour employment'". But that is completely incorrect, Mr. President. Professor Krogh was talking about conditions at the inception of the Mandate: that is perfectly clear from what he said, at XI, page 77:

"This [labour employment] is the only by-the-way product that they could contribute at this stage of their economic development to the development of the Territory."

And it is not only clear from the context that he was speaking of 40 years ago, but he went on at the same page, at the beginning of his answer to the following question, to indicate that this was the position "generally speaking"—those were his words. In other words, he *did not even suggest* that 40 years ago it was applicable to every individual Native person.

Also on this subject of suggested rigidity of classification, i.e., not taking the individuals sufficiently into account, the Applicants referred, at pages 362 to 363, *supra*, to the evidence of witnesses such as the Reverend Mr. Gericke, Dr. Rautenbach and Professor Logan, to the effect that even urbanized Natives or Bantu still retained their contacts with their tribes and their cultural attributes.

Mr. President, it is very difficult to see how this evidence could assist the Applicants to establish this point which they seek to make—that the Respondent does not sufficiently take cognizance of the individual as contrasted with a group. The witnesses did not testify that it was by some process of legal fiction that these individuals are still regarded as belonging to a tribal group. They testified that *as a fact* these individuals retained their tribal identification and regarded themselves as members of their tribal or ethnic groups; and they told the Court that the process of urbanization did not result in a cultural assimilation with the Europeans, but that these persons rather retained a modified African or Bantu culture, maintaining strong lines with the traditional. I could refer particularly to Professor Rautenbach on this point, at XI, page 358, under cross-examination, where he quoted, in support of what he was saying, from the writings of an African intellectual.

So this comment, Mr. President, was also totally out of perspective, having started from a warped premise.

The same applies to another point sought to be made by the Applicants in their comments about a suggested false equivalence between what they called "the limitations upon the freedoms of non-Whites in White areas" and the deprivation of rights of Whites in other areas. They spoke of this at page 375, *supra*, and the following. And they spoke of this suggested equivalence as being something offered by the Respondent in justification or in extenuation of the system of apartheid. I may say, in passing, that I object to the word "extenuation". One extenuates something which is wrong, which is acknowledged or shown to be wrong. There has been no attempt on Respondent's part to extenuate apartheid; the Respondent's evidence has explained apartheid.

The attempt to show a false equivalence, Mr. President, is warped because the whole basis from which it proceeds is warped again. It is not a matter of saying that limitations are imposed here upon certain persons

and to compensate for that other limitations are imposed upon other persons. This line of approach was suggested also to Professor Manning in his evidence and he gave a very apt answer to it, at XI, page 641:

"With all respect, I am afraid I find very great difficulty in answering the question so worded. I do not think in terms of 'limitations' imposed upon people because of their colour or race. I do not think of it in these terms. I think of the Mandatory as having to have an over-all policy for trying to advance the well-being of all the peoples, and then I would go and see what are the implications of this policy and what opportunities can be given, in what places and to whom."

In other words, Mr. President, the emphasis is placed on the positive, on the creation of opportunities for development of peoples in certain areas, and not upon the negative aspects which merely flow from these as incidentals, but if you want to protect certain people in certain places and in respect of certain opportunities, then that must necessarily involve some limitations for others.

Professor Manning proceeded to say, at page 642, when he was pressed along this line of emphasis upon limitations:

"I should have thought that the regulations in any given area were determined by which community was seen as paramount as regards its interests in that area. But I would also have thought that the over-all scheme of what was best for the country as a whole might affect the question of what opportunities particular categories of the population had in particular places."

That, therefore, is the approach, Mr. President, as has appeared so amply from the evidence and from the body of admitted fact—the approach of this policy which seeks to secure for each group its own, by way of political development to self-determination; by way of economic opportunity, protecting it where necessary; by way of educational facilities specially adapted to the needs of each particular group of people.

The Applicants try to write all this off as some lunatic scheme, the sole purpose of which is to impose restrictions purely for the sake of imposing restrictions and then to balance them by imposing more restrictions upon other persons elsewhere. That, of course, is an absurd caricature of the whole system. If one is to examine whether one person or one group is treated less favourably or more favourably than another, then the question becomes a very complex one. That is so because the purposes which are to be served by the various provisions are so different. The benefits accruing to the various groups and the individual and the needs of the various individuals and the groups—all those are so different. Let us illustrate this by an example: an Ovambo is protected in his possession of land in Ovamboland but he is prevented from occupying certain positions in certain mines. Now, how does one weigh up the relative advantage and disadvantage here? Does one look only to one particular Ovambo, who may or may not have particular wishes in this respect, or does one look to his whole group, or does one look at all the inhabitants of the Territory, and if it appears that a particular Ovambo would rather be a mine overseer than a farmer, would that be a reason for abolishing all these provisions on both sides, irrespective of the purposes sought to be achieved thereby?

The Applicants, of course, do not adopt this approach, they do not

look at the over-all picture at all, but they seem to suggest that each individual may legitimately be required to make a sacrifice only if he has an exact or mathematically accurate compensation somewhere else, or if somebody else is required to make exactly the same sacrifice somewhere else. So, for instance, following this line of approach—incidentally I do not know how it is to be linked up with their norm and standard—but just following it up for the moment on its own merits, they point to the fact that there are only approximately 300 White persons in Ovamboland, whereas there are a substantial number of non-White persons in the White area. They say this is now an example of this false equivalence and the suggestion is, of course, that by drawing this equivalence the non-Whites are badly treated. In fact, of course, there is a reason why there are only 300 Europeans in Ovamboland. The reason is that Ovamboland has been particularly effectively protected and those 300 are there only to serve and to help the Ovambo to develop their own homeland for themselves. On the other hand, large numbers of Ovambos do come into the European area—the White area—from time to time, *inter alia*, for their own benefit.

Then the question arises, if we now weigh this up, of the European farmer who would like to have a farm in Ovamboland, where he could irrigate or could do something similar in Ovamboland or in the Okavango, but is deprived of that opportunity—he cannot go into Ovamboland or the Okavango at all—and one weighs up the position of the Ovambo who may come and earn a living in the White area if he wishes, but subject to limitations which make it impossible for him to over-rule and over-run the White population in respect of their rights and interests and political future: who is in the worst position, and how does one weigh the one against the other?

It is not a question which can be answered mathematically, or exactly, and it is not a question which a Court, with respect, could attempt to answer without a much more comprehensive and extensive enquiry and on the basis of some legal norm or criterion which one would have to find in some legal source somewhere.

The real point which we have consistently attempted to make in this regard, Mr. President, is found in the Rejoinder, V, at pages 246-247. I read:

“Such contributions and sacrifices would, however, in the further application of the policy of separate development in South West Africa, not be demanded only of some groups, to the exclusion of others. As will be demonstrated in the more detailed treatment below, members of all groups would be affected by reciprocal restrictions on political and economic opportunities and other facilities in the homelands of other groups. Transitional steps, e.g., moving to a new home, would affect at least some members of all the groups. Specifically as regards the White group, alleged by Applicants to be specially favoured, it will be noted, e.g., that not only would a large number of them have to give up farms owned and developed by them, but the group as a whole would, through the public revenues, have to make very substantial economic contributions to the accelerated and large-scale development of the non-White homelands and the upliftment of the non-White peoples.

That some members of the non-White peoples would also be adversely affected in some respects, or would have to make special

contributions or sacrifices, cannot be denied. But in Respondent's view the extent thereof is very minor as compared with the over-all benefits involved for their respective peoples, and indeed for all the inhabitants of the Territory, as a whole."

What we said here, Mr. President, was reaffirmed by the experts, each in his own branch of life, to which he testified. The Court will remember particularly the term "marginal" used in that respect by Professor Krogh in the economic sphere.

In passing, another point of comment, the Applicants, on page 384, *supra*, took a rather challenging attitude and posed a question to us as to whether—

"... non-White inhabitants of the Territory... [are or are not] eligible for citizenship in the Republic of South Africa on the same basis, terms and conditions as are the White inhabitants of the Territory?"

as if this were something which we would find difficulty in answering. As a matter of fact, if we look back at the Memorials we find that one of the things the Applicants complained about was the fact that the South African Government passed a law in 1949 which extended South African citizenship to Natives of South West Africa. That is on page 190, I, of the Memorials and on page 192, they said that "by official usage, 'Native' inhabitants of the Territory are considered Union citizens". We acknowledged, in the Counter-Memorial, III, pages 98-99, that all this was so. So it has been common cause for some years that the inhabitants of South West Africa, White and non-White, have South African citizenship. I do not know what is the ambiguity in our pleadings, or the urge for clarification of this matter which is common cause. Perhaps the Applicants' left hands do not know what their right hands are doing. Perhaps the Applicants meant something which they did not say. Perhaps the question was intended to mean, whether citizenship of the Republic means in its practical effect the same for non-White inhabitants of South West Africa as for White inhabitants of South West Africa. Perhaps that is what they meant, but they never said so.

Well, if they meant that, then the answer is perfectly simple. The answer is that if one looks at identity of effects, then obviously the answer is, no. If one looks at substantial equivalence of effects then the answer is, yes. For each citizen of South Africa, whether coming from South West Africa or from South Africa, there is provided a future of self-realization and self-determination within the nation or group of which he forms a part, and that is so for White citizens and for non-White citizens of South Africa alike.

Another kind of test question thrown out was: when will the homelands eventually be established? In the record at pages 381-382, *supra*, this point was developed in connection with this "false equivalence" point. The suggestion was that all this is on a never-never basis and of course it is all a question of unfair discrimination against the Natives, because at present they have no political rights where the Whites have political rights and the political rights envisaged for them by way of self-government and so forth are so far in the future that they cannot be taken into account. That was the line of argument.

Mr. President, again this type of suggestion runs away altogether from the reality of what have been established and have been accepted as the

basic facts of this case. Any uncertainty as to when and how homelands will come to fruition and in what form they will come to self-government, independence or some other form of association on the basis of standing on their own feet—any uncertainty that may be attached to that is joined to one factor and one factor alone, and that is inability to forecast exactly how fast these various peoples will avail themselves of the opportunities granted to them to develop to the necessary stage; and uncertainty coupled with that as to what their decision is going to be, if and when they reach that stage, because it is their decision that will decide what exactly is going to happen with a particular territory like Ovambo-land—will it become entirely independent, standing on its own? Will it form some form of alliance? If so, what form? That is something which will have to be decided when the appropriate stage is arrived at.

So again, Mr. President, there is nothing in this suggestion. Or must we understand the Applicants to say that because there is uncertainty as to the rate at which particular peoples can develop, and because there may be some individuals in advance of the rate of development of that particular people, therefore those individuals are to be accommodated in some other group where they do not belong, in such a way then that the self-determination of their own group may be held back, because the cream is being taken away all the time, or a situation is created in this other group which is undesirable—a situation of tension and friction which may deny self-determination for that group.

If that is the suggestion, Mr. President, again I need only point to the admitted facts and to the clear evidence on record to show that that is a suggestion without any substance when regard is had to the well-being of the peoples of South West Africa.

Applicants, in the verbatim record at pages 383-384, *supra*, commented on the evidence of Mr. Dahlmann regarding the present political situation amongst the non-White inhabitants of the Territory. The Court will recall that a very large field was covered by Mr. Dahlmann's testimony, but out of all this the Applicants chose only a part of one single sentence on which to deliver comment—they said this:

"Dr. Dahlmann informed the Court about the present circumstances of political life in the Territory with respect to the Natives and their political organizations . . . [H]e indicated it to be his opinion that—

' . . . the outside world takes these organizations a little bit too seriously . . . they have very limited support and people—as we say, the man on the street—are not much interested in these political parties and organizations'."

And then the Applicants comment: "Mr. President, the Applicants would not find this surprising, even if it were true." (*Supra*, p. 384.) Why the evidence should not be true, of course we are not told, and that need not detain us.

As to the suggestion of not finding this surprising, the Applicants go on to say:

"What *else* could be expected when the normal and natural end of political activity—which is participation of a meaningful nature in decision-making processes—is denied on the basis of race or colour? Such a denial is by inexorable classification, even though, as Mr. Dahlmann conceded, there are non-Whites in the Territory who

would be capable and qualified to serve in governmental bodies and participate in the decision-making." (*Ibid.*)

Once again, Mr. President, this is a completely warped presentation, with the greatest respect. It is to be noted in the first place that the Applicants did not, at any stage, suggest in cross-examination to Mr. Dahlmann this proposition which they are now urging upon the Court as their only argument. The question which they asked Mr. Dahlmann was: whether these political parties and organizations "are influenced, and even perhaps deeply affected, by the uncertainty concerning the future of their place of residence and their status". To this Mr. Dahlmann answered: "No, definitely not. Mr. President, I think the outside world takes these organizations a little bit too seriously . . ." (XI, p. 512). In other words, this suggested uncertainty certainly did not exist—that was not a factor affecting these political organizations. What was affecting them was the fact that they just had no support to speak of, and that was the effect of Mr. Dahlmann's evidence, which was entirely ignored in this comment, although that factor of his evidence was never attacked and never brought into any serious question. The whole comment runs counter to and, in fact, ignores the basic situation which has appeared in regard to the facts of the matter, viz., the attachment of the vast majority of the non-White populations to their own groups, as testified to by the experts and as appeared from the admitted facts—the support given by the large majority of the non-White population to their traditional authorities and the fact that these traditional authorities do, in fact, exercise meaningful powers of decision-making, as we point out in the Counter-Memorial, III, at pages 114-131, and in regard to the Rehoboth Basters in IV, pages 19-22, and again generally in the Rejoinder, VI, pages 11-19. These are all part of the admitted facts of record.

The fact is ignored that the Odendaal Commission's proposals will still further increase these basic powers and will produce a wider representation of the population into these authorities, as we point out in the Rejoinder, VI, at pages 1-4, and, as I pointed out in my argument a few days ago, will increase the bargaining power of these authorities when speaking as equals or as developing equals with the South African Government on matters of common concern.

The comment ignores the fact of record, which is undisputed and indisputable, that these proposals of the Odendaal Commission were acceptable to and desired by the majority of the population, and that the majority of these political parties agitating against the recommendation were brought into being by a few people only for ulterior purposes, with very little support, that is, in order to provide a few petitioners at the United Nations with a front and a semblance of power. Those are the real facts that have been established.

Those are the real facts that have been established, and the simple answer is, therefore, that the parties need not be taken seriously because they enjoy no real support. The real support of the non-White peoples is for the Government's policy regarding the development of their political institutions.

In regard to the Coloured population of South West Africa, Mr. President, we got a very belated interest from the side of the Applicants. In the Memorials the Coloured population did not form part of this subject of complaint—the complaint of oppression of the Native popula-

tions—at all. The complaint was confined to the Native population; not a word was said about the Coloured population, as we pointed out in our Counter-Memorial, II, at pages 382-383. We went on to state there, Mr. President, that we would from time to time, in giving general expositions, have to refer to population groups other than the Natives, although the complaint centred on the Natives—that we would in the course of expositions have to refer to the Coloured group or the Basters, or both—but we added:

“Inasmuch, however, as these groups do not in any way feature in the complaints or charges, a systematic or complete survey in regard to them would be out of place, and is consequently not attempted. Any reference to them will be only for the purpose of explanation or example, or to answer some specific point or allegation raised in the Memorials.” (II, p. 383.)

Now we come to the Reply, and there the Court will recall that the Applicants introduced for the first time the suggested norm on which they now rely. We find at page 257, IV, and the following, in the Reply the Applicants talk about “unwarranted misrepresentation” on our part, and a “strained construction” of their Submissions 3 and 4 “as excluding certain groups or individuals in the Territory designated ‘Coloureds’ or ‘Basters’”.

We dealt with this matter in our Rejoinder, V, at pages 108-111, and there we pointed out and demonstrated, Mr. President, that we had not been guilty of any misrepresentation or strained construction at all, but that the Applicants were now trying to broaden their case “apparently to bring it into conformity with their newly introduced legal norm of non-discrimination or non-separation”. It was only in this context I may point out, as we did in the Rejoinder, that the Coloured population was apparently then sought to be brought into the picture. Again there was no complaint of conduct relative to the Coloured or Baster population; there was no suggestion of discrimination against them, as there had been an allegation of discrimination against the Native population, and therefore again we were not called upon to deal with any complaint in that context relative to the Coloured group or the Baster group.

When we came to my learned friend’s catalogue of 17 May, we there find special reference made to paragraphs in the Odendaal report, cited by us in our Rejoinder, dealing with proposed local boards for Natives in urban areas—that is, in that record of 17 May, at IX, page 289. Again in this catalogue the Applicants’ whole concern was with the interests of the Natives; they also made specific reference to the policy relating to homelands for the Native groups—that is at page 288 of that record—but no mention was made in the whole of this catalogue about the position of the Coloureds.

In conformity, therefore, with this situation and the attitude we had adopted all along, we led no evidence concerning the position of the Coloured group—that would have simply not been relevant. The evidence commenced on 18 June: Dr. Eiselen, as we pointed out, was not examined at all; Dr. Bruwer, who was an early witness, had been a member of the Odendaal Commission and a party, therefore, to these recommendations about the Coloured population, which were later referred to by my learned friend; but not a word of cross-examination was directed to Dr. Bruwer about the question of the Coloured population, although, as the Court

will recall, he was cross-examined at length over some days. So it went on with witness after witness. There followed a two-month break from mid-July until 20 September, and then on 13 October, when we came very near to the end of the presentation of our evidence, questions concerning the Coloured group were suddenly put in cross-examination to Mr. Dahlmann in the verbatim record at **XI**, page 559. These questions concerned, amongst others, the paragraph in the Odendaal Commission's report concerning Coloured urban settlement, and the absence of a recommendation to establish a homeland for the Coloured group. Mr. Dahlmann, incidentally, in that record, at the same page, agreed with my learned friend, Mr. Gross, that the Coloured population did not fit into the homelands plan, but he stated "that the Coloureds, or the majority of the Coloureds, are supporting this plan in the Government policy".

The process was repeated in the case of Professor Manning, who testified after Mr. Dahlmann. He was also asked about the absence of a recommendation for a Coloured homeland, and Professor Manning said, as the Court will recall, that he did not possess the necessary knowledge to say why that was so; and he went on to say:

"It may be that if I knew more about it, I could give an adequate explanation for everything that has been done, but it would be quite wrong for me to stand here and purport to be a source of enlightenment for this Court on the reasons for which particular things are done in the fulfilment of a policy which seems to me to be the wise policy in its basic philosophy." (**XI**, p. 639.)

On the basis of this my learned friend, Mr. Gross, says in the verbatim record, at page 374, *supra*, that Professor Manning manifested unconcern about the Coloured population. I need not labour the comment that this suggestion was entirely unwarranted.

The same unwarranted suggestion was made about the evidence of Mr. Dahlmann, and my learned friend went on to say, now quite unfettered, that the Coloureds were treated separately on the basis of colour alone. On the basis of what evidence he said that, of course, we still do not know. Mr. Dahlmann in his evidence certainly did not lend any support to this statement. Mr. Dahlmann in his statement said that the Coloured population regarded themselves as a group, and that there was the question of community development. We find that at pages 373 and 374, *supra*, and again, at **XI**, page 560—this latter is the reference to Mr. Dahlmann, the former is the reference to the comment.

Mr. President, our attitude can be stated very shortly. We have here apparently a belated effort to introduce the question of the Coloured population in order to affect in some undescribed way the homeland policy of the Respondent in regard to the Natives. Or perhaps the suggestion is that the Coloured population is going to receive less beneficial treatment than the Native groups—I do not know, we are not told exactly what this suggestion is. What is clear is that this whole effort is an afterthought on the Applicants' part.

We did not deal with the matter in our pleadings because we were not required to do so, and I may explain that this is not a technical attitude; there is, in fact, a very large policy in operation in regard to the development of the Coloured population in all spheres of their lives in order to bring them to a fit and a proper stage of self-realization, although it proceeds along somewhat different lines of detail than in the case of the

Native population. To set that out in detail could fill a book—in all its various aspects of political development, social development, economic development and so forth. We could have given those expositions if we were called upon to give them, but not being called upon to give them we did not traverse a field which would have been entirely irrelevant. So that is the situation where we stand, and we know on the evidence of Mr. Dahlmann as given in cross-examination that the Coloured people, or the majority of them, are in favour of the Government's policy. This confirms what we had stated earlier, in the Rejoinder, V, at page 290, paragraph 80, namely: "The Coloured group enthusiastically supported the recommendations", meaning the recommendations of the Odendaal Commission; we said that *à propos* of meetings which were held by the Minister of Coloured Affairs in February of 1964. So what the Applicants' purpose was with this late attempt to introduce new matter we do not know. Perhaps it was just a drowning man grasping at a straw. It certainly, in our submission, has not brought the Applicants anywhere.

Another element of comment by the Applicants concerned the subject of social peace. We find that at page 366, *supra*:

"Witnesses expressed the view that a necessary prerequisite for the attainment of this vision [namely, the vision of separate homelands] was what was frequently described as 'social peace'. 'Social peace', it appeared from the testimony, is not adequately assured by normal conditions of equality of opportunity and equal protection of the laws."

And then at page 367 the Applicants proceeded to scoff at the suggestion that bringing people together from different backgrounds may lead to conflict. In view of the mass of evidence to the contrary—admitted facts on the pleadings and the evidence of the experts—this is really surprising indeed. I may refer to the Counter-Memorial, II, pages 449-454, to the Rejoinder, V, pages 185-241, again pages 400-408 and pages 430-461. In these passages not only did we speak in theory about group relations, we spoke of policies in many parts of the world which recognized the basic fact of the necessity of having regard to differences which exist and which are perceived as existing between groups, and to the conflict which may result and the tragedies which may result when this factor is not properly or sufficiently taken into account. We referred to immigration policies; we referred to events in other parts of Africa—in other parts of the world; and the Court will recall the testimony given by Professors van den Haag, Possony and Manning upon these aspects of the matter.

This is again all ignored, and the Applicants simply mock at the underlying principle. Then they proceed to refer (at 367, *supra*) "to the sacrifice exacted from individual non-White inhabitants on the altar of social peace", and they go on to speak of what they call job reservation measures. On analysis we see they relate to measures in the railways and in the mining industry, and the Court will recall the uncontested testimony that these are the only two sectors in the whole economy of the White portion of South West Africa, of the whole of South West Africa, in which there are measures which operate in favour of White workers—only those two, none else—but they are blown up time after time as if they were setting a ceiling—an economic ceiling—over the whole of the White sector as regards every portion of the White economy, and as regards every potential Native worker in that economy. But be

that as it may, whether or not these particular measures, which do exist, and which, as Mr. Cillie pointed out, are decided upon in regard to specific matters as they arise from time to time, and are revised from time to time as may be necessary, are necessary for the purpose of protecting social peace is a question of fact, and we pointed out when we dealt with the economic aspect that an enquiry into the social and economic justifiability of each and every measure referred to in the proceedings would be an enormous undertaking, which has not been essayed by reason of the nature of the dispute here, which has not made it necessary for us to embark on such an undertaking.

But what is clear, and this is what I want to say by way of comment on the facts, Mr. President, is that the factor of social peace does exist as a most important one. It is a most important requisite for well-being and progress. Paying regard to social peace can therefore never be said to be an ulterior motivation on the part of the Mandatory, nor can it ever be said to be indicative of an essentially racist approach on the Mandatory's part, whatever that might mean.

Details about this matter are, in the light of the real issue before the Court, not important, but in view of the efforts at creating some impression about the hardships that would be suffered by individuals—efforts made by my learned friends in their comment—I may just refer to the fact that even on the incomplete record as it is we have shown that the number of persons who could be affected by these provisions I have referred to, is very small, that hardship is largely avoided by exemptions, that ample openings and economic opportunities exist for all non-Europeans of ability and training in South West Africa in all sectors of the economy, and that indeed there is a large unsatisfied demand for them—all those are facts which have been established as facts.

In the result, even if anybody should in fact find himself frustrated in the mining industry—of course, there has been no evidence that this is applied to any individual at all in fact—there has been no such evidence—but even if that should be assumed to be the case in regard to a particular individual, there is no reason whatsoever to think that his particular competence will not enable him to make equivalent or better progress in another industry or occupation in which no similar limitations exist. The Applicants have not contested our demonstration of these basic facts, and again therefore it will be perceived how warped and how unrealistic their comment is also on this aspect of the matter.

In regard to education, the only factor of comment to which I need refer is that regarding compulsory education. We have pointed out before that the attitude now apparently taken by the Applicants in regard to compulsory education would appear to be entirely alien to their norm or standards. If one were to apply the norm or standards, then any distinction made on a basis of membership in a group, i.e., having compulsory education for one and not for the other, would automatically transgress the norm, but now they say "no". Be that as it may, we are dealing with the factual aspects, and the Applicants say on that point, at page 383, *supra*, "a question fairly arises concerning the reason"—the reason why there is compulsory education for White persons and none for Native children. The Applicants then continue, without any reference to the facts of record or to the evidence, to seek a factual reason—a reason which they then seek by way of processes of inference and imagination. In fact, of course, most compelling reasons were given in the plead-

ings and in the oral evidence, including answers elicited by the Applicants' representatives themselves in cross-examination from the various experts. My learned friend, Dr. Rabie, dealt with this matter fully a few days ago, at pages 281-286, *supra*.

I need not go into that again, but there is that whole body of most compelling reasons; there is not a word of reference to that in the Applicants' comment but they go on to make their inference, as they call it, and their inference, at which they arrive eventually, is that this difference "is obviously based upon racial considerations", and that it is therefore "inherently incompatible with the obligation to promote the well-being and the social progress of the inhabitants of the Territory".

It was not surprising, Mr. President, that the Applicants were careful, in making this comment, not to refer to the facts or the record at all.

And that brings me to the Applicants' comment, or lack of comment, upon our demonstration of the real basis upon which proceedings at the United Nations were to be seen, relative to a large group of resolutions upon which the Applicants relied in support of their suggested norm and standards. The Court will recall our demonstration—detailed, documented, divided into portions, making each point clearly, giving references to the record and lists of further references where further quotations were not offered. Do the Applicants meet our case and our demonstration in that respect? Mr. President, they simply say that the witnesses and the Respondent—I quote from the record at page 387, *supra*—

"... looked upon the United Nations as the embodiment of the source of their fears. The Respondent's intemperate and baseless assaults upon the Organization are to be evaluated in this light."

Mr. President, they did not advance anything at all to show that any of the points made by us were incorrect, not even to speak of "intemperate and baseless". We heard no repetition of the Applicants' previous indignant denials that they were acting in a representative capacity as nominal parties in these proceedings. We heard not a word of denial as regards the existence or the objectives of the political campaign being waged against the Respondent. We heard not a single word of refutation of the proof which we adduced that the allegations of large-scale oppression, made by the petitioners at the United Nations, have been indefensibly false. We have heard no denial that these false allegations have been echoed and accepted and acted upon by majorities in committees and organs of the United Nations. We have heard no refutation of the fact that the resolutions adopted in those bodies were based on acceptance of these allegations of oppression. We have heard no attempt on the part of the Applicants to show that even a single delegate—let alone the majorities—who voted for such resolutions, based his vote on the existence of standards or a norm as defined at page 493, IV, of the Reply. We heard not a word, Mr. President, on any of these basic, these relevant, these fundamental matters which we demonstrated.

The Applicants' failure to meet us here was obvious, and it was obviously based upon a complete inability to meet any of those points, because the points are all true and they have been substantiated beyond any doubt. So let us see what is the nature of the answer attempted to be given by the Applicants. We can forget now about the so-called assaults being "intemperate and baseless"; we can go on to the next

element, the suggestion that these assaults were levelled by us "against the [United Nations] Organization". This, of course, is equally baseless. We did not attack the United Nations Organization. We attacked the *quality* of the evidence accepted and echoed by certain delegations in the deliberations of the United Nations organs. We attacked the motivation and the attitudes displayed by some of those delegations, and we attacked the Applicants' contention that the resolutions of the bodies have given rise to, or reflect the existence of, a norm or standards as defined at page 493, IV, of the Reply. We have attacked those things; we have not attacked the Organization.

Thirdly, Mr. President, the Applicants suggested that the target of this so-called broadside was obscure. That we find in the record, at page 388, *supra*. All I need say about that, Mr. President, is that we are confident that it would not have been obscure to the Court.

Fourthly, the Applicants came with so-called "five undisputed facts"—just stated without any attempt at substantiation from evidential or other sources—stated as being five undisputed facts. That is in the record, at page 389, *supra*.

I am not going to read each one to the Court or to analyse each one in detail, because their essence in each case is, Mr. President, that they simply ignore the very points which were so clearly made by our uncontroverted demonstration. I shall merely illustrate this, very briefly, with reference to these so-called five undisputed facts.

The first one says that the conclusions of the bodies about Respondent's policies were "based upon evidence which had poured in over the years", and that "[m]uch the most important evidence consist[ed] in the Respondent's laws and regulations and the practices and methods by which they are effectuated, the existence of which has never been and is not now denied by Respondent". That we find in the record, at the same page.

Now, Mr. President, we made the very points which now stand unanswered, that this so-called "evidence" which poured in over the years emanated largely from a small group of biased professional petitioners actuated by ulterior motives. We demonstrated that this evidence was false, and that great weight was given and is still given to this evidence, that the evidence led to a wholly false perspective of the purposes or effects of Respondent's laws, regulations and policies.

And, Mr. President, we demonstrated that this situation is now substantiated by the Applicants' admission of all the real basic facts which we have set out in our pleadings, and which controvert entirely those facts upon which the United Nations organs and agencies have acted. Yet we are told now that the most important evidence is undisputed; it had poured in over the years.

The second and the third and the fifth points made by the Applicants, under their list of five, turn around the variety involved in the membership, and the nature, of the United Nations and the other bodies which adopted the various resolutions upon which they rely. This again, Mr. President, in our submission, brings the Applicants nowhere. We have always conceded that standards exist all over the world, not only amongst people waging a certain campaign, but amongst all right-thinking peoples—standards which condemn oppression, whether it be oppression of a group or whether it be oppression of individuals under any circumstances and whether by a differential policy or by an inte-

grating policy those standards exist. And if, therefore, Mr. President, representations are made to bodies that the Respondent is applying policies of oppression, and those representations are believed and accepted, what else can one expect but condemnation from those bodies with this wide membership of which they are comprised?

But this takes the Applicants nowhere. Once it is established, as it has been established in this case, that those charges of oppression were false, once the Applicants, acting on behalf of that large body of States which has been waging this campaign against the Respondent at the United Nations, have been forced to drop and abandon their charges of oppression and to accept all the basic facts which show that those charges were baseless, what weight can now be attached to these resolutions and to these factors mentioned in their second, their third and their fifth points?

What is more, Mr. President, we made the point that the United Nations and the other majorities which adopted the resolutions did not adopt them on the basis of the standards or the norm as defined at page 493, IV, of the Reply, on which the Applicants exclusively rely. This was also a crucial point which the Applicants had to meet, and this point they have not met in any way.

That leaves only the fourth of these five points, Mr. President, and that point, it will be found, adds nothing except certain purple patches about "revulsion" and "opprobrium" shown by these various delegations or these various countries represented at these conferences and bodies. *The remarks which I have just made about the second, the third and the fifth points are sufficient also to dispose of these.*

So, Mr. President, on the whole of this subject of what really happened in the international bodies, we have found distortion and evasion of our case, we have found no answer.

It remains for me only to refer to two points which were made by the Applicants in regard to their standards contention, as distinct from their norm contention; and both these points, in my submission, show very clearly their own realization that the writing was on the wall also in this respect.

The Court will recall that the essence of the standards contention, as it was advanced preparatory to the amended submissions of 19 May, was that the standards were laid down by supervisory bodies which were now to be binding upon the Respondent in law and binding upon the Court in that the Court had to apply them, for good or for bad; because they were binding upon the Respondent, therefore in this litigation the Court was bound to apply them and to give effect to them in the Court's determination as to whether or not there has been a violation of the Mandate.

Now, Mr. President, we are told, in the record, at page 390, *supra*, that "authoritative weight" only is to be given to these standards, and that there is to be no "rubber-stamping", which is the word we had used previously in that regard.

But then, Mr. President, if those resolutions, even if they should have been productive of standards, which of course we do not concede, if they should have produced certain standards and the Applicants concede that those standards are not binding, why should this Court apply them, in the face of all the uncontroverted demonstration of fact to this Court that to apply them, in the circumstances of South West

Africa, would lead to chaos and misery? What leg has the Applicants left to stand on when they now tell the Court that it merely has to give authoritative weight to those resolutions and not to regard them as being binding, especially in the light of the demonstration to which I have just referred—in the light of the demonstration that those resolutions were not intended to lay down these standards at all, that in so far as they condemned the Respondent's policies as being oppressive, they were based upon false information, and that therefore they can be of no assistance to this Court at all when this Court has had a real enquiry into the actual basic facts.

That is the one factor, Mr. President. The other factor is this. The Applicants suggested as follows in the record, at page 352, *supra*:

"No evidence is relevant, in the Applicants' submission, concerning the extent to which international standards . . . are applied in practice. If the Court should find that such standards exist and that they are comprised of the sources cited and properly reflect them—the existence of these sources is undisputed and indisputable—then the extent to which such standards are perhaps violated in practice is irrelevant; just as in the case of standards of negligence, or reasonable care, or due process of law, failure to observe such standards in practice makes them more, not less, necessary."

Mr. President, this is a curious argument. It is true, of course, that where a body indisputably having the authority to lay down the law, has laid down the law, where there is no difficulty about interpreting what that body has done and where one finds that here is this rule which was intended to be binding and which has the binding effect of law—then that simply has to be applied and there is nothing more to it. Then, of course, it would be true to say that if that law is being breached in practice by this or that or the other person, that does not affect the fact of the existence of the law.

But here the very issue is whether these bodies, of which the Applicants speak, had the power to bring about such binding standards, or whether they thought they had the power to do it, or whether they thought indeed that they were purporting to bring about the existence of such standards. If that is the issue—the issue between the Parties—then surely it must be relevant to show to the Court that as large a number as 40 of the States which took part in these deliberations, by their own practices in their own States, show that they have no contemplation of the existence of such a binding standard. If they do not comply with such a suggested standard in their own practice in their own States, how can it possibly be said, in a record which is for the Applicants at best ambiguous, but which in our submission is really quite clear against them, how could the Applicants ever come and suggest that those States must have intended to bring into existence such standards that are to be binding generally?

I submit, Mr. President, that that again shows that the Applicants have begun to realize that, just as their norm contention cannot possibly be justified, the same applies to their standards contention.

This brings me to the end of this comment. Again, Mr. President, on behalf of my colleagues and myself, I should like to express our appreciation to the whole Court of the patience and courtesy with which it has treated our presentation of our case throughout these proceedings.

I should like, also on behalf of my colleagues and myself, to express our appreciation to you, Sir, of the way in which you have presided over these proceedings. The task has not always been an easy one in that respect and we have great appreciation of the way in which you have accomplished it, with respect from our side.

I also wish to express our most sincere appreciation of the never-failing courtesy, kindness and efficiency which we have experienced from the Registrar and his personnel during all this period which must have been a strained one for them at times.

That really brings us to the end, Mr. President, eight months after we started here and at record number 99. We shall leave number 100 at the disposal of the Court. Thank you.
