DISSENTING OPINION OF JUDGE TANAKA

I

On 4 November 1960, the Governments of Liberia and Ethiopia (hereinafter referred to as the "Applicants") submitted an Application to this Court to institute proceedings against the Union of South Africa, now the Republic of South Africa (hereinafter referred to as the "Respondent"). The Respondent filed four preliminary objections relating to the jurisdiction of the Court. These objections having been dismissed by a Judgment dated 21 December 1962 and the written and oral pleadings on the merits being completed, the Court has now to decide on the submissions of the Applicants presented to the Court in the Memorials and amended by the Applicants during the course of the oral proceedings (on 19 May 1965).

One of these preliminary objections rejected by the 1962 Judgment was the third preliminary objection which related to the nature of the dispute brought before the Court by the Applicants, namely to the question of the existence of their legal right or interest. This matter again, at this stage of the proceedings, has been taken up by the Court and examined, but from the viewpoint of the merits.

Here, attention must be drawn to the Court's characterization of the question of the Applicants' legal interest, namely its statement that "there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings ... the question ... of their legal right or interest regarding the subject-matter of their claim, as set out in their final submissions".

The result is that the Applicants' claims are declared to be rejected on the ground of the lack of any legal right or interest appertaining to them in the subject-matter of the present claims and that the 1962 Judgment is substantively overruled concerning its decision on the third preliminary objection.

Although we do not deny the power of the Court to re-examine jurisdictional and other preliminary matters at any stage of proceedings *proprio motu*, we consider that there are not sufficient reasons to overrule on this point the 1962 Judgment and that the Court should proceed to decide the questions of the "ultimate" merits which have arisen from the Applicants' final submissions.

We are again confronted with the question whether the Applicants possess a legal right or interest in the proper discharge by the Respondent, as the Mandatory, of the obligations incumbent upon it by virtue of the "conduct clauses" in the mandate agreement.

A negative conclusion is derived either from the nature of the interest, or from the capacity of the Applicants.

It is argued that the dispute brought before the Court by the Applicants does not affect any material interest of the Applicant States or their nationals and is not envisaged in Article 7, paragraph 2, of the Mandate.

The Mandate, as is stated in more detail below, presents itself, economically and sociologically, as an aggregate of several kinds of interest.

The personal structure of the mandates system is very complicated and *sui generis*; besides the mandatory, the League and the inhabitants of the territories, there are persons who are connected with the mandate in some way, particularly those who collaborate in the establishment or in the proper functioning of this system, such as the Principal Allied and Associated Powers and the Members of the League.

The interests corresponding to the categories of persons mentioned are multiple. Here, only the interest of Members of the League is in question, since the question of the existence of a legal interest of the Applicants as former Members of the League has now to be determined.

The interests which may be possessed by the member States of the League in connection with the mandates system, are usually classified in two categories. The first one is the so-called national interest which includes both the interest of the member States as States and the interest of their nationals (Article 5 of the Mandate). The second one is the common or general interest, which the member States possess in the proper performance by the mandatory of the mandate obligations.

Whether the adjudication clause, namely Article 7, paragraph 2, of the Mandate can cover both kinds of interests, or only the first one, namely national interest, is the question that has to be answered in the present cases.

Here, we must recognize the fact that the above-mentioned two kinds of interests are different from each other. The first category of interest although related to the Mandate, is of an individual nature and each member State of the League may possess such an interest regarding the mandated territory, incidentally, that is to say, for some reason other than the Mandate itself. The second category of interest emanates from the sphere of social or corporate law concerning the function of the League in regard to the Mandate. The member States of the League are in the position of constituting a personal element of the League and its organs and, consequently, are interested in the realization of the objectives of the mandates system and in the proper administration of mandated territories. The interest which the member States possess concerning the Mandate is, in its content, the same for all Members of the League, and is therefore general and uniform in the case of each member State, thereby differing from the first category of interest, which emanates from the individual sphere. However, the fact that it is of this nature does not prevent it from possessing the

nature of interest. There is no reason why an immaterial, intangible interest, particularly one inspired by the lofty humanitarian idea of a "sacred trust of civilization" cannot be called "interest".

In short, the interest possessed by the member States of the League as its Members is corporate and, at the same time, idealistic. However, this does not prevent it from being "interest".

The interest which the member States of the League possess regarding the proper administration of the mandated territory by the Mandatory is possessed by Members of the League individually, but it is vested with a corporate character. Each Member of the League has this kind of interest as a Member of the League, that is to say, in the capacity of an organ of the League which is destined to carry out a function of the League.

The question is, whether this kind of interest can be called "*legal* interest", and whether law recognizes it as such.

The historical development of law demonstrates the continual process of the cultural enrichment of the legal order by taking into consideration values or interests which had previously been excluded from the sphere of law. In particular, the extension of the object of rights to cultural, and therefore intangible, matters and the legalization of social justice and of humanitarian ideas which cannot be separated from the gradual realization of world peace, are worthy of our attention.

The fact that international law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other "material" or so-called "physical" or "tangible" interests was exhaustively pointed out by Judge Jessup in his separate opinion in the *South West Africa* cases, 1962 Judgment (*I.C.J. Reports 1962*, pp. 425-428). As outstanding examples of the recognition of the legal interests of States in general humanitarian causes, the international efforts to suppress the slave trade, the minorities treaties, the Genocide Convention and the Constitution of the International Labour Organisation are cited.

We consider that in these treaties and organizations common and humanitarian interests are incorporated. By being given organizational form, these interests take the nature of "legal interest" and require to be protected by specific procedural means.

The mandates system which was created under the League, presents itself as nothing other than an historical manifestation of the trend of thought which contributed to establish the above-mentioned treaties and organizations. The mandates system as a whole, by incorporating humanitarian and other interests, can be said to be a "legal interest".

However, what is in question is not whether the Mandate is a legal interest or not. What we are considering is not legal interest in itself,

but its relationship with persons who possess it, that is to say, the question of the existence of a legal interest as a condition on which the Applicants, as Members of the League, possess the right to have recourse to the International Court.

Each member of a human society—whether domestic or international —is interested in the realization of social justice and humanitarian ideas. The State which belongs as a member to an international organization incorporating such ideas must necessarily be interested. So far as the interest in this case affects the rights and obligations of a State, it may be called a legal interest. The State may become the subject or holder of a legal interest regarding social justice and humanitarian matters, but this interest includes its profound concern with the attitude of other States, particularly member States belonging to the same treaty or organization. In short, each State may possess a legal interest in the observance of the obligations by other States.

In the mechanism of the above-mentioned treaties and organizations, the procedural means to guarantee the observance are provided, although not in a uniform way, taking into consideration the difference in the objective and structure of each treaty and organization.

The question is whether under Article 7, paragraph 2, of the Mandate, the Applicants possess a right to have recourse to the Court by reason of a violation by the Respondent of certain conduct clauses provided by the Mandate, namely whether the Applicants have a legal interest in invoking the Court's jurisdiction concerning the obligations imposed on the Respondent by the conduct clauses.

One of the arguments in denial of the Applicants' legal interest in the Respondent's observance of the conduct clauses is that the Applicants do not suffer any injuries from non-observance of the conduct clauses. The Applicants, however, may not suffer any injuries in the sense that their own State interests or the interests of their nationals are injured. The injuries need not be physical and material, but may be psychological and immaterial, and this latter kind of injuries may exist for the Applicants in the case of non-observance by the Respondent of the conduct clauses.

The supreme objectives of the mandates system, namely the promotion of the well-being and social progress of the inhabitants of the Territory mentioned in Article 2, paragraph 2, of the Mandate, in spite of their highly abstract nature, cannot be denied the nature of a legal interest in which all Members of the League participate.

As we have seen above, there exist two categories of legal relationships in the mandates system from the viewpoint of the Members of the League: the one is its individual side and the other is its corporate side.

Now, the existence of the corporate side in regard to the Mandate is in question.

One ground for denying to a Member of the League the right to have recourse to the International Court of Justice under Article 7, paragraph 2, of the Mandate, seems to be that this right, being of a public nature, cannot be exercised by a Member of the League. Only the League could possess such right and exercise it notwithstanding the fact that States only may become parties in cases before the Court. If a Member of the League exercises a right which should belong to the League as a whole, this would be nothing but an act *ultra vires.*

Here we must consider whether it is not legally impossible that in the case of an organization an individual member of it can act as an organ of the whole.

In the field of corporation law, such phenomena are highly developed. In some countries we find the institution of a representative suit by a shareholder against the administration. Each shareholder not only possesses individual rights in respect of dividends and rights to participate in the assembly and to vote, but can behave independently of the administration and of the assembly in bringing a law suit on behalf of the corporation. In this case, in the position of a shareholder, the corporate and individual elements are intermingled. As a result, even if a Member of the League has a right to have recourse to the International Court by virtue of Article 7, paragraph 2, on the ground of non-compliance by the Mandatory with the obligations of Article 2, paragraph 2, of the Mandate, it cannot be considered as unjuristic. In the present cases, the Applicants appear formally in an individual capacity as Members of the League, but they are acting substantially in a representative capacity. That not only the Council, but the Member States of the League are equally interested in the proper administration of the mandated territory, is quite natural and significant. In this respect, the individual Member States of the League penetrate the corporate veil of the League and function independently of the League.

There are two main reasonings upon which the Court's denial of the Applicants' legal right now appears to be based. The one is the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system is both created and enshrined. The League functions "through the instrumentality of an Assembly and a Council" and "no role was reserved either by the Covenant or the mandate instruments to individual members . . .".

We cannot deny that the League and the mandates system possess such structure that the member States as individuals are fundamentally excluded from participation in the functioning of the League and the mandates system and that rights cannot be derived from the mere fact of membership of the organization in itself. The question remains as

to whether the corporate structure of the League excludes the possibility that the mandate instrument may confer upon the individual member States the right to have recourse to the International Court on matters concerning the "conduct" clause. The answer depends upon the interpretation of Article 7, paragraph 2, of the Mandate.

The other reasoning is, that, in the Court's opinion, the Applicants do not possess a legal right directly or by a clearly necessary implication, through a substantive and not merely adjectival provision of the Mandate in the same way as they possess it by virtue of Article 5 of the Mandate which is concerned with the so-called "national rights" of the Member States. But in this case, whether a substantive right is conferred on member States by that provision or not, is highly doubtful.

It seems that by the effect of this provision the member States and their nationals are simply accorded an interest as beneficiaries in connection with the proper administration of the Mandate. This fact is clear from the first half of the said Article which is concerned with the guarantee of freedom of conscience and the free exercise of all forms of worship—matters which concern the inhabitants in general, and not only the member States.

Although Article 5 of the Mandate is partly concerned with the national interest of the member States of the League, the nature of this provision is not fundamentally different from that of the rest of the provisions of the Mandate. It possesses the same nature as the "conduct" clause. It does not confer upon the member States any substantive right. They receive only a certain benefit as a "reflective" effect of the mandate instrument, but not any right as an effect of an independent juridical act which does not exist.

Incidentally, Article 5 of the Mandate mentions "all missionaries, nationals of any State Member of the League of Nations". But this phrase does not mean that any member State possesses a right concerning its missionaries and nationals, because it is used simply to identify the missionaries and nationals. Whether the member States of the League possess the right of diplomatic protection is another matter.

Accordingly, the distinction between the "conduct" clause and the "national" clause is not an essential one. The latter must be considered as an integral part of the Mandatory's obligations which are derived from the objectives of the mandates system, namely the promotion of material and moral well-being and social progress. Whether some of the obligations are related to the interest of some of the member States of the League or not, is quite immaterial to the nature of Article 5 of the Mandate.

Therefore the classification of the mandate provisions into two categories, namely the conduct clause and the national clause is of secondary importance.

As to the argument that the substantive right of the Applicants must

be found, not in the jurisdictional, adjectival provision but in the substantive provision, we feel we should point out that in the Mandate the substantive and procedural elements are inseparably intermingled and that Article 7, paragraph 2, can confer substantive rights on the individual member States of the League. This conclusion must be justified, if we approve the above-mentioned viewpoint that Article 5 of the Mandate does not confer upon the member States of the League any substantive right. The source of their right cannot be sought elsewhere than in Article 7, paragraph 2, in connection with other provisions of the Mandate.

In this connection, we cannot overlook the dissenting opinions of Judges de Bustamante and Oda appended to the Judgment of the *Mavrommatis Concessions* case. Both emphasize what they consider as essential in the compromissory clause. Judge de Bustamante says:

> "As the latter [the League of Nations] could not appear as a party to a dispute concerning the application or interpretation of the Mandate, having regard to the restrictive terms of Article 34 of the Court's Statute, it is the Members of the League who have been authorized, in their capacity as Members, to bring before the Court questions regarding the interpretation or application of the Mandate." (*P.C.I.J., Series A, No. 2*, p. 81.)
>
> "Whenever Great Britain as Mandatory performs in Palestine under the Mandate acts of a general nature affecting the public interest, the Members of the League—from which she holds the Mandate—are entitled, provided that all other conditions are fulfilled, to have recourse to the Permanent Court. On the other hand, when Great Britain takes action affecting private interests and in respect of individuals and private companies in her capacity as the Administration of Palestine, there is no question of juridical relations between the Mandatory and the Members of the League from which she holds the Mandate, but of legal relations between third parties who have nothing to do with the Mandate itself from the standpoint of public law." (*Ibid.*, pp. 81-82.)

Next, Judge Oda, pursuing the same idea more clearly, says:

> "Since the Mandate establishes a special legal relationship, it is natural that the League of Nations, which issued the Mandate, should have rights of supervision as regards the Mandatory. Under the Mandate, in addition to the direct supervision of the Council of the League of Nations (Articles 24 and 25) provision is made for indirect supervision by the Court; but the latter may only be exercised at the request of a Member of the League of Nations (Article 26). It is therefore to be supposed that an application by such a Member must be made exclusively with a view to the protection of general interests and that it is not admissible for a State

simply to substitute itself for a private person in order to assert his private claims." (*Ibid.*, p. 86).

Although these views of the two dissenting Judges have remained minority opinions on this matter and were recently criticized by Judge Winiarski (dissenting opinion in *South West Africa* cases, *I.C.J. Reports 1962*, pp. 450, 451), we cannot fail to attach importance to the fact that, shortly after the inception of the mandates system, such opinions, even if they were minority, existed.

Another strong argument raised by Judges Sir Percy Spender and Sir Gerald Fitzmaurice in the joint dissenting opinion to the 1962 Judgment (*I.C.J. Reports 1962*, pp. 552, 553), against the admissibility of the Applicants' claim is related to the character of interest which, it is contended, does not allow a settlement to be achieved. The arguments are related to the question of competence with regard to settlement.

The dispute within the meaning of Article 7, paragraph 2, must be one which cannot be settled by negotiation.

Well, in the present cases, the dispute in which the interest is incorporated is of a humanitarian character which does not appear to be compatible with the possibility of settlement by negotiation. It will furnish a strong reason to support the argument denying the admissibility of the claim in the present cases, because the law suit is in some sense an act of disposal of interest and, in this case, the dispute is mainly concerned with fundamental human rights which are called *inalienable*.

The joint dissenting opinion (*ibid.*, p. 551), denies the possibility of settlement of the dispute by negotiation *inter se*—namely between the Applicant and Respondent States. The reason seems to be based, on the one hand on the nature of the dispute which does not relate to their own State interests or those of their nationals, but belongs to the "conduct of the Mandate" type—the "sacred trust"; on the other hand, on the incapability of any settlement negotiated between single States, such as the Applicant States and the Mandatory.

The inherent incapability of settlement of subject-matter such as the sacred trust, to be settled by negotiation, however, does not exclude the possibility of compromise concerning detailed policies and measures in order to implement the fundamental principles of the Mandate. Implementation is essentially a matter of degree and is therefore susceptible of compromise. Accordingly, we cannot consider that the nature of a dispute which is concerned with the sacred trust is incompatible with settlement by negotiation.

The question of competence to settle by negotiation must be decided from the point of view that the Applicants as Members of the League individually and at the same time as its organ possess a legal interest in the realization of the sacred trust and therefore competence to settle the dispute by negotiation.

It may reasonably be feared that, if each individual Member of the League possesses a right to institute proceedings against the Mandatory by reason of non-compliance with the conduct clauses, repetitious suits against the Mandatory would arise, procedural chaos would prevail and the legal situation of the Mandatory would be highly precarious.

In circumstances in which the binding power, *erga omnes* effect, of a decision of this category is lacking, one is obliged to rely solely upon the possibility of intervention (Articles 62, 63 of the Statute), the wisdom of the Court and the common-sense of those concerned until legislative arrangement and adjustment will be made to attain uniformity of decision. These possible abnormalities, arising from the defect of the machinery, however, should not be a reason for denying a right to have recourse to the International Court by reason of non-compliance by the Mandatory of the conduct clauses of the Mandate.

As we have seen above, the interests involved in the mandates system are multiple. The Applicants in their capacity as Members of the League possess a legal interest in compliance by the Respondent with the obligations imposed by the conduct clauses of the Mandate. The Applicants, on the other side, can have individual interests which are classified in two categories: on the one hand, State interests and on the other, the interests of their own nationals. Although these interests may exist in connection with the administration of the Mandate, they are only incidental to the mandates system. Far more important are the general interests which are inherent in the Mandate itself and which cannot be ignored in the interpretation of the compromissory clause in the Mandate.

As we have seen above, it is argued that the supervision of the Mandate belongs to the Council of the League and to this body only, not to individual Members of the League; therefore they possess no right to invoke the Court's jurisdiction in matters concerning the general administration of the Mandate, nor does the Court possess power to adjudicate on such matters.

However, the existence of the Council as a supervisory organ of the Mandate cannot be considered as contradictory to the existence of the Court as an organ of judicial protection of the Mandate. The former, being in charge of the policies and administration of the Mandatory and the latter, being in charge of the legal aspects of the Mandate, they cannot be substituted the one for the other and their activities need not necessarily overlap or contradict one another. They belong to different planes. The one cannot be regarded as exercising appellate jurisdiction over the other.

As long as the compromissory clause is adopted in a mandate agreement and the scope and limit of its application are by reason of the vagueness of the terms of the provision not clear, it is quite natural

that we should seek the just criterion of interpretation *in* the principle of the Mandate, that the well-being and development of peoples not yet able to stand by themselves form a sacred trust of civilization. This principle presents itself as a criterion of interpretation of the provisions of the Mandate including Article 7, paragraph 2. Such is the conclusion of a teleological interpretation of Article 7, paragraph 2, of the Mandate. Article 7, paragraph 2, does not specify the dispute; it says, "any dispute whatever". The dispute may relate to the interpretation or the application of the "provisions" of the Mandate. There is no reason for concluding that this dispute should be limited to the kinds of dispute involving the individual interests of the member States of the League and that the provisions should mean only those which protect such kinds of interest.

The above-mentioned conclusion is precisely in conformity with a literal interpretation of Article 7, paragraph 2, namely the "natural and ordinary meaning" of the terms of its text.

In sum, Article 7, paragraph 2, as the means of judicial protection of the Mandate cannot be interpreted in such a way that it ignores the most fundamental and essential obligations of the Mandatory to carry out the "sacred trust" and excludes the "conduct clauses" from the "provisions" to which Article 7, paragraph 2, shall be applied. We must not lose sight of what is essential in the face of what is incidental.

For the above-mentioned reasons, we consider that the Applicants are entitled to have recourse to the International Court of Justice, because our view is that the present dispute, involving a legal interest of the Applicants, falls within the scope and limit of the application of Article 7, paragraph 2, of the Mandate. Accordingly, we are unable to concur in the Court's opinion that the Applicants' claims are, on the ground of the lack of any legal right or interest, to be rejected.

II

Before going into the examination on the merits of the present cases, we are confronted with a preliminary question concerning the *res judicata* which shall be recognized or denied to the Court's foregoing decisions on identical matters.

The first question which we must decide at the stage of the merits, is the question of the existence or otherwise of the Mandate after the dissolution of the League. This question is, without doubt, the core of the present cases in the sense that whole obligations and rights of the Respondent as Mandatory depend on the solution of this question.

This question has been envisaged by the Court twice. The Advisory Opinion of 11 July 1950 denied the annihilative effect of the dissolution of the League and recognized the continuance of the obligations of the

Respondent under the Mandate. Next, in the preliminary objections stage of the present cases the Respondent's first preliminary objection was the denial to the Mandate of the character of "a treaty or convention in force" within the meaning of Article 37 of the Statute, an argument based on the doctrine of the lapse of the Mandate automatically caused by the dissolution of the League. This objection, however, was dismissed by the Judgment of 1962.

The effect of the dissolution of the League upon the survival of the Mandate is questioned for the third time in the proceedings on the merits of the present cases.

Before we go into the examination of the issue of the survival or otherwise of the Mandate, we must solve a question concerning the effect of the Court's Advisory Opinion in 1950 and the decision of the Court in 1962. If the Court's finding of 1950 or the decision of 1962 establish any *res judicata* the examination *de novo* of this issue would become as a whole or partially impermissible or at least superfluous.

Firstly, concerning the Advisory Opinion of 1950, it has no binding force upon those concerned, namely no *res judicata* results from an advisory opinion for the purposes of subsequent litigation, even if the issue is identical. This point constitutes a difference between advisory and contentious proceedings. The structure of the proceedings is not the same, and the concept of parties in the same sense as in the latter does not exist in the former. This legal nature of an advisory opinion does not prevent that, as an authoritative pronouncement of what the law is, its content will have an influence upon the Court's decision on the same legal issue, irrespective of whether or not this issue constitutes a part of a subsequent stage of the same affairs.

Judge Sir Hersch Lauterpacht expressed in a separate opinion his view that:

> "The Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law—a question upon which the Court need not express a view—it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion." (*I.C.J. Reports 1956*, pp. 46-47.)

The opinion of Judge Lauterpacht does not appear to attribute *res judicata* to the 1950 Opinion, but to recognize its authoritative meaning as to the interpretation of an issue of the same kind.

There is no doubt that—

> ". . . the International Court does not adhere to the doctrine of *stare decisis*; nevertheless it will not readily depart from a prior ruling, especially if the subsequent proceeding involves issues of fact and law identical in every respect to those in the prior proceeding". (Memorials, p. 97.)

The advisory opinion has *de facto* authority upon which the Court may rely in deciding subsequent cases which are identical with it or which involve the same kind of issue.

Judge Winiarski stated:

> "Opinions are not formally binding on States nor on the organ which requests them, they do not have the authority of *res judicata*; but the Court must, in view of its high mission, attribute to them great legal value and a moral authority." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 91.)

Next, the decision of 1962 needs to be considered.

It may be thought that the Court's finding in the 1962 Judgment in favour of the survival of the Mandate would have the force of *res judicata* (Article 59 of the Statute), but that the effect of *res judicata* of this Judgment should be limited to the operative part of the Judgment and not extend to the reasons underlying it.

The effect of *res judicata* concerning a judgment on jurisdictional matters must be confined to the point of the existence or otherwise of the Court's jurisdiction. In case of an affirmative decision, the only effect is that the Court shall proceed to examine the question of the merits. To the preliminary stage must not be attached more meaning than this.

At the preliminary objection stage of the present cases the question of the survival of the Mandate was examined. But this examination was made from the viewpoint of Article 7, paragraph 2, of the Mandate and Article 37 of the Statute, i.e., mainly from the angle of the jurisdiction of the Court and more thorough and exhaustive investigations and arguments might be expected at the merits stage. Therefore, the Court's reasoning underlying its finding in the 1962 Judgment does not prohibit or make superfluous *de novo* arguments on the question of the survival or otherwise of the Mandate after the dissolution of the League. We could consider that the first preliminary objection which was linked with the question of the survival or otherwise of the Mandate could have been more appropriately joined to the merits.

This conclusion is justified by the distinction between preliminary objection proceedings and proceedings on the merits from the viewpoint of their objectives. What was decided in a finding in the preliminary objection proceedings as a basis of jurisdiction, must not be prejudicial to the decision on the merits, therefore may not have binding force vis-à-vis the parties; accordingly, in the present cases, it is permissible that the Respondent should deny and continue to deny the survival of the Mandate after the dissolution of the League, despite the fact that this issue was dealt with by the Court at the stage on jurisdiction, and despite the fact that the arguments might become repetitive.

Incidentally it should be indicated that the Applicants conceded that the 1950 Advisory Opinion was not binding upon the Respondent in the strict sense of *res judicata*, and that the Court's 1962 Judgment

related to the issue of competence and did not constitute an adjudication upon the merits of the dispute (Reply, p. 303).

Before going into an examination of the individual items of the Applicants' submissions, we must solve another question of a preliminary nature which is concerned with the matter of the scope and limit, freedom of expression for a dissenting judge. In the present cases, a question arises as to whether a dissenting judge is permitted to deal in his opinion with matters which are not included in the majority opinion, particularly questions regarding the alleged violations by the Respondent of the obligations under Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant, the policy of apartheid, Respondent's accountability to the United Nations, etc.

This question is concerned with the interpretation of Article 57 of the Statute. As regards this question, we must first consider it from a general point of view.

In countries where the institution of separate (concurring and dissenting) opinions is adopted, an individual judge is not absorbed in an anonymous majority even in the system where an incognito majority opinion is elaborated, but he can maintain his own individual viewpoint by appending a concurring opinion. The opinion of the majority is nothing but the common denominator among the opinions of judges who constitute the majority, but do not necessarily agree on the reasoning.

From what is indicated above, we may say that the majority opinion presupposes the existence of diverse individual opinions which are common at least in the operative part of the decision, and that the free individual opinions of judges are logically foregoing to the majority opinion, notwithstanding the fact that the former may be gradually formulated during the process of the deliberations. Accordingly, we consider that the majority opinion cannot be conceived to establish any limits to the separate opinions of individual judges. The latter are perfectly independent of the former. This point must particularly be emphasized in the case of a dissenting opinion, because standing on a quite different footing from the majority opinion, its freedom must be greater.

Next, we shall consider this matter in the light of the present proceedings. The proceedings have gone through the preliminary objection stage and are at the stage of the merits. Now the Court has decided on the merits, but on a preliminary question of the legal interest leaving the rest of the questions on the merits undecided. The reason that the Court rejected the Applicants' claims, is the lack of their legal right or interest.

Disagreement between the dissenting view and the majority view is not limited to the matter of legal right or interest but it is concerned with the whole attitude vis-à-vis all questions on the merits. The dissenting judges are able to argue on the hypothesis that their contention regarding the existence of the Applicants' legal right or interest is well-founded.

This position is not the same as the position of a dissenting judge in a decision rejecting an application by reason of the lack of the Court's jurisdiction. In that case the dissenting judge cannot deal with the matters on the merits on the hypothesis that his view is right, because the proceedings are limited to the preliminary objection and the proceedings on the merits have been suspended. The stage of the question of legal right or interest, however, does not constitute independent proceedings like preliminary objection proceedings, but is an integral part of the proceedings on the merits. Therefore, this question has not been dealt with distinctly from other questions on the merits in the pleadings and oral arguments.

In short, for the foregoing reasons the majority opinion cannot place a limitation upon the separate and dissenting opinions; therefore judges are entitled to deal with all matters on the merits entirely irrespective of the content of the majority opinion.

* * *

The controversy between the Applicants and the Respondent on the survival of the Mandate was the starting point of the preliminary objection proceedings of the present cases; the same applies to the proceedings on the merits. All claims and complaints of the Applicants, being concerned with the interpretation and application of the Mandate, are based on the continual existence of the Mandate; consequently, if its existence could not be proved, they would necessarily fall away.

The Applicants' Final Submissions Nos. 1 and 2 deal with the matter of the survival of the Mandate. Submission No. 1 reads as follows:

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

By Submission No. 1, the Applicants define the international status of the Territory of South West Africa and contend that this status is not merely an historical fact, but continues to the present time.

By Submission No. 2 the Applicants further contend the continuation of the international obligations of the Respondent as Mandatory. It reads as follows:

> "Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and

in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and petitions are to be submitted."

The Respondent's final submissions (C.R. 65/95, pp. 53-54) which are the same as set forth in the Counter-Memorial, Book I, page 6, and the Rejoinder, Volume II, page 483, particularly contend in regard to the question of the lapse or otherwise of the Mandate on the dissolution of the League as follows:

"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 Nos. 2, 7 and 8,

that 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 . . .

(b) Relative to Applicants' Submissions Nos. 3, 4, 5, 6 and 9,

that Respondent has not, in any of the respects alleged, violated its obligations . . ."

* * *

To resolve the question of the lapse or otherwise of the Mandate on the dissolution of the League, some preliminary observations are required concerning the legal and social nature and characteristics of the mandates system.

The mandates system, established by the Covenant of the League of Nations, can be considered as an original method of administering certain underdeveloped overseas possessions which formerly belonged to States in the First World War. "The essential principles of the mandates system" says the 1962 Judgment in the *South West Africa* cases—

"consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a 'Mandatory' 'on behalf of the League of Nations'; and the recognition of 'a sacred trust of civilization' laid upon the League as an organized international community and upon its

> Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights." (*I.C.J. Reports 1962*, p. 329.)

The idea that it belongs to the noble obligation of conquering powers to treat indigenous peoples of conquered territories and to promote their well-being has existed for many hundred years, at least since the era of Vitoria. But we had to wait for the Treaty of Peace with Germany, signed at Versailles in 1919, and the creation of the League of Nations for this idea to take the concrete form of an international institution, namely the mandates system, and to be realized by a large and complicated machinery of implementation. After the dissolution of the League the same idea and principles have been continued in the "International Trusteeship System" in the Charter of the United Nations.

The above-mentioned essential principles of the mandates system are important to decide the nature and characteristics of the Mandate as a legal institution.

Here, we are not going to construct a more-or-less perfect definition or concept of the Mandate. We must be satisfied to limit ourselves to the points of which clarification would be necessary or useful to decide the issue now in question.

The mandates system is from the viewpoint of its objectives, as well of its structure, highly complicated. Since its objectives are the promotion of the well-being and social progress of the inhabitants of certain territories as a sacred trust of civilization, its content and function are intimately related to almost all branches of the social and cultural aspects of human life. Politics, law, morality, religion, education, strategy, economy and history are intermingled with one another in inseparable complexity. From the point of view of the Court the question is how to draw the line of demarcation between what is law and what is extra-legal matter, particularly politics which must be kept outside of justiciability (we intend to deal with this question below).

The mandates system is from the structural viewpoint very complicated The parties to the Mandate, as a treaty or convention, are on the one side the League of Nations and on the other the Mandatory—in the present cases the Respondent. The latter accepted the Mandate in respect of the Territory of South West Africa "on behalf of the League of Nations". Besides these parties, there are persons who are connected with the Mandate in some way, particularly who collaborate in the establishment or the proper functioning of this system, such as the Principal Allied and Associated Powers, to which these territories had been ceded by the Peace Treaty, Members of the League, and those who are interested as beneficiaries, namely the inhabitants of the mandated territories. Whether or not, and to what degree the United Nations and

its Members can be considered as concerned, belongs to the matters which fall to be decided by the Court.

The Mandate, constituting an aggregate of the said diverse personal elements, as we have seen above, presents itself as a complex of many kinds of interests. The League and Mandatory, as parties to the Mandate, have a common interest in the proper performance of the provisions of the Mandate. The inhabitants of the mandated territories possess, as beneficiaries, a most vital interest in the performance of the Mandate.

The Mandatory does not exercise the rights of tutelage of peoples entrusted to it on behalf of itself, but on behalf of the League. The realization of the "sacred trust of civilization" is an interest of a public nature. The League is to serve as the existing political organ of the international community by guarding this kind of public interest.

The Mandate, being of the said personal and real structure, possesses in many points characteristics which distinguish it from other kinds of treaties.

Firstly, the Mandate is intended to establish between parties a certain legal relationship of which the aims and purposes are different from those we find in the case of commercial treaties in which two different kinds of operations stand reciprocally against each other and which are extinguished with simultaneous performance by the parties. They are a realization of identical aims, which is a "sacred trust of civilization". In this sense, the Mandate has characteristics similar to law-making treaties, defined by Oppenheim as those "concluded for the purpose of establishing new rules for the law of nations". (Quincy Wright, *Mandates under the League of Nations*, 1930, p. 357.)

What is intended by the parties of the mandate agreement as a "sacred trust of civilization" is the promotion of the material and moral well-being and social progress of the inhabitants of the territory who are "not yet able to stand by themselves under the strenuous conditions of the modern world".

The Mandate is a legal method or machinery for achieving the above-mentioned humanitarian purposes. Therefore, between the two parties to the mandate agreement there does not exist a fundamental conflict of interests or "exchange of balancing services" such as we recognize in synallagmatic contracts (cf. Judge Bustamante's separate opinion on *South West Africa* cases, *I.C.J. Reports 1962*, pp. 357 and 359) or contracts of the type *do-ut-des*. The mandate agreement can be characterized rather as a union of two unilateral declarations, the one by the League, the other by the Mandatory, a phenomenon which we find in cases of creation of partnerships or corporations. Incidentally, this conclusion, in our view, does not prevent the construction of the mandate agreement as a kind of treaty or convention.

This characteristic is clearly manifest in the fact that the League can be considered as a collaborator of the Mandatory by its power of super-

vision and an adviser in the performance of the obligations of the latter.

If we seek some type of legal concept analogous to the mandate agreement in the field of private law, we can mention the terms "mandatum", "tutelage" and "trust". These institutions possess some common elements with the mandates system, although the principles governing the latter cannot be exhaustively explained by those governing the former. The point which we indicated above, namely the identity of aims between the parties, exists in the case of guardianship, tutelage and trust.

Secondly, the long-term nature of the mandate agreement is what characterizes it from the other contracts. This character derives from the nature of the purposes of the mandates system, namely the promotion of material and moral well-being and social progress of the mandated territories, which cannot be realized instantaneously or within a foreseeable space of time.

Thirdly, the mandate agreement requires from the Mandatory a strong sense of moral conscience in fulfilling its responsibility as is required in the case of guardianship, tutelage and trust. "The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . ." The obligations incumbent upon the Mandatory are of an ethical nature, therefore unlimited. The mandate agreement is of the nature of a bona fide contract. For its performance the utmost wisdom and delicacy are required.

From what is indicated above, it follows that, although the Mandatory is conferred "full power of administration and legislation over the territory", the weight of the mandates system shall be put on the obligations of the Mandatory rather than on its rights.

The 1962 Judgment, clarifying this characteristic of the mandates system, declares as follows:

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

Judge Bustamante emphasized very appropriately (*ibid.*, p. 357) the more important aspect of responsibility rather than of rights regarding the function of the Mandatory. The Mandatory must exercise its power only for the purpose of realizing the well-being and progress of the inhabitants of the territory and not for the purpose of serving its egoistic ends. As Professor Quincy Wright puts it, "it has been recognized that the conception of mandates in the Covenant requires that the Mandatory receive no direct profit from its administration of the territory". This is called the "principle of gratuitous administration" (Quincy Wright, *op. cit.*, pp. 452-453).

From the nature and characteristics of the mandates system and the mandate agreement, indicated above, we can conclude that, although the existence of contractual elements in the Mandate cannot be denied, the institutional elements predominate over the former. We cannot

explain all the contents and functions of the mandates system from the contractual, namely the individualistic, and subjective viewpoint, but we are required to consider them from the institutional, namely collectivistic, and objective viewpoint also. This latter viewpoint is, according to Lord McNair, that of—

> "... certain rights of possession and government (administrative and legislative) which are valid *in rem—erga omnes*, that is against the whole world, or at any rate against every State which was a Member of the League or in any other way recognized the Mandate". (*I.C.J. Reports 1950*, p. 156.)

From the purely contractual and individualistic viewpoint the Mandate would be a personal relationship between the two parties, the existence of which depends upon the continuance of the same parties. For instance, a mandate contract in private law lapses by reason of the death of the mandator. But the international mandate does not remain, as we have seen above, purely a relationship, but an objective institution, in which several kinds of interests and values are incorporated and which maintains independent existence against third parties. The Mandate, as an institution, being deprived of personal character, must be placed outside of the free disposal of the original parties, because its content includes a humanitarian value, namely the promotion of the material and moral well-being of the inhabitants of the territories. Therefore, there shall exist a certain limitation, derived from the characteristics of the Mandate, upon the possibility of modification for which the consent of the Council of the League of Nations is required (Article 7, paragraph 1, of the Mandate).

* * *

We shall now envisage the question whether, despite the dissolution of the League of Nations the Mandate for South West Africa still exists, and if so, whether the supervisory function of the League has passed to the United Nations.

Let us consider, firstly, the question whether the Mandate still exists despite the dissolution of the League.

The solution of this question may depend upon the question of the essentiality or otherwise of the supervision of the Mandate, but it can be answered independently of the latter, because if the Mandate as a whole lapsed for some other reasons, there would be no question of its supervision. The question of supervision presupposes the *prima facie* continued existence of the Mandate. That is why this matter was dealt with in detail in the 1950 Advisory Opinion and discussed at length in the preliminary objection stage of the present cases in connection with the survival of Article 7, paragraph 2, of the Mandate, which is concerned with judicial supervision. Because we can, in the main, agree with what was decided by the Court in 1950 and 1962, we need not go into the

details of the question. We are satisfied to state simply the reasons why we agree with the decisions of the Court.

The controversy concerning the survival or lapse of the Mandate on the dissolution of the League, and accordingly of rights and obligations created by it, may be, in its final instance, attributed to the fundamental difference of methods existing in regard to the interpretation of law, namely the antagonism between voluntarism and objectivism. Controversies present themselves as to whether law cannot attribute certain effects to a treaty or a convention—which the parties did not or could not foresee at the moment of its inception—or whether law, on the contrary through its interpretation may be expected to play the function of filling the lacuna of juridical acts by creating certain legal effects uncovered by the original intent of the parties.

From the point of view of purely juridical formalism, there is the conclusion that, so far as the Mandate is conceived as a contract between the two parties, namely the League of Nations on the one hand and the Mandatory on the other, the dissolution of the League would produce, as a necessary consequence, the absolute extinction of the Mandate with all its legal vincula and that nothing remains thereafter. This is the fundamental standpoint upon which the arguments of the Respondent are based. This pure logicism is combined with strict voluntarism according to which all legal consequences attached to a juridical act are conceived as the effect of the will or intent of the parties. This is the reason why the Respondent, since the preliminary objections stage, has, concerning the interpretation of the Mandate, consistently attached importance to the question of joint or common intent of the parties, and why the Respondent has repeatedly invoked the "crucial new facts" to refute the conclusion of the Advisory Opinion of 1950, which recognized the transfer of international supervision from the League of Nations to the United Nations.

It seems that the Respondent, analysing the Opinion, and assuming that its conclusion of the transfer of the obligations is based on the tacit consent of the parties, believes it has found a clue to re-examine and reverse the 1950 Advisory Opinion by the presentation of the "crucial new facts". The essential viewpoint of the Opinion, however, is based on the idea of "international institution with international object—a sacred trust of civilization", not much on consensual elements.

In accordance with the above analysis, we must attach more importance to the institutional side of the Mandate, which, according to Lord McNair, is "valid *in rem—erga omnes*". The 1950 Opinion says "the object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law" (*I.C.J. Reports 1950*, p. 132). The Mandate as an institution is the starting point of the Opinion and the most influential reason to justify the survival of the Mandate notwithstanding the dissolution of the League.

The vital interests of the inhabitants of the mandated territories, being of primary importance, require that the Mandate shall not be affected by the vicissitudes of international circumstances. In a mandate, the matter of who the mandator is is not so important as who is the mandatory. The position of mandatory, different from that of mandator, for the reasons of special obligations which are incumbent upon him, is highly personal and unable to be substituted by any other persons. From the standpoint of the inhabitants, therefore, whether the mandate is established on behalf of the League or whether it exists on behalf of the United Nations is quite immaterial.

As a theoretical construction, the concept of the "organized international community" may be referred to in order to explain the legal position of the mandatory. The mandatory owes obligations on behalf of the League, but in the formal sense. Substantively, the mandatory is responsible to an international entity which underlies the League as a sociological reality, namely the organized international community, which was represented by the League, and, after its dissolution, has been represented by the United Nations. In short, we may conceive that, after the dissolution of the League, the mandatory continues to have obligations in relation to an impersonal entity, namely the organized international community as before, which is personified as the United Nations.

The only important matter is that a "sacred trust of civilization" is conscientiously carried out by the mandatories. The mandate, inspired by the spirit of a "sacred trust of civilization", once created by an international agreement between the two parties, the League on the one hand and the mandatory on the other, enjoys its perpetual objective existence. The continual existence of the organized international community guarantees the objectivity and perpetuity of the mandate as an international institution.

Lord McNair described this very appropriately in his separate opinion—

> "... the Mandate created a status for South-West Africa. This fact is important in assessing the effect of the dissolution of the League. This status—valid *in rem*—supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League. 'Real' rights created by an international agreement have a greater degree of permanence than personal rights ..." (*I.C.J. Reports 1950*, pp. 156-157.)

The Mandate, being an institution, incorporates the above-mentioned

several interests and values. It is a social organism and as such must be maintained and protected.

In general, once condensed and conglomerated, social energies under juridical techniques, such as a juridical person, partnership, company, etc., cannot easily be dismembered and disorganized by some external or internal event. To avoid the loss of social and economic energies and values of an enterprise which would be caused by liquidation, the law establishes an institution of amalgamation or fusion which has an effect analogous to universal succession in the case of a physical person. This principle is the "Erhaltung des Unternehmens" (maintenance of enterprise) as put forward by Rudolf Müller-Erzbach, which, according to him is one of the important principles of commercial law (*Die Erhaltung des Unternehmens, Z. f. Handelsr.*, Vol. 61, 1911, pp. 530 ff.; *Deutsches Handelsrecht*, 2nd ed., 1927, pp. 71 ff.). The application of this idea is not limited to matters of commercial law, but may be extended to other social entities.

In short, the Mandate as a social entity must be maintained and protected. From this viewpoint, we consider the Mandate does not lapse; it continues to function. The existence of the League of Nations itself is immaterial to the existence of the Mandate, on behalf of whom the Mandate is carried out, apart from the question of supervision which is dealt with below.

Moreover, under the hypothesis of the lapse of the Mandate caused by the dissolution of the League, it cannot be asserted that the Mandate suddenly ceased to exist at the moment of the dissolution of the League. For the purpose of carrying out the liquidation of an entity the continued existence of some of the functions is recognized by the law of both Anglo-American as well as civil law countries (Observations, p. 447). Both the defunct entities, the League and the Mandate, maintain their *de facto* existence. From the viewpoint of the League, it is to be conceived that its responsibilities concerning the Mandate still survive until its future status is definitively established (for instance, the conclusion of a trusteeship agreement); parallel with this, the continued existence of the Mandate can be recognized for the same space of time.

In short, the doctrine of "carry-over" referred to by the Applicants is a logical consequence of the aforesaid argument of the Mandate as an institution. It may assist the Applicants' cases in a supplementary way.

The above-mentioned conclusions may coincide with what the parties to the mandate agreement or those concerned with it really intended, or they may not be necessarily so. The tacit intent of parties which is referred to by the Applicants, if it is proved, may serve as a corroborating ground to reach the same conclusion. But the Court will establish its

conclusion on the theoretical basis independently of the psychological intents of the parties or those concerned, which do not necessarily coincide and from which it is not easy to derive any definite conclusion, be it positive or negative. In this sense, the Court's reference (*I.C.J. Reports 1950*, p. 134; *ibid.*, *1962*, p. 340) to the resolution of the League of Nations of 18 April 1946, which said, *inter alia*:

> "4. Takes note of the expressed intention of the Members of the League now administering territories under Mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory",

is to be considered as possessing only subsidiary significance in the reasoning of the Court.

* * *

What is stated above is concerned with the survival of the Mandate despite the dissolution of the League. We have arrived at the affirmative conclusion, like the 1950 Advisory Opinion, but apart from the question of international supervision of the Mandatory. We are required to re-examine the issue in the light of international supervision, because even if the survival of the Mandate can be recognized in general, it may be denied in certain respects.

From the viewpoint of the Respondent, the international supervision to which the Mandatory was subjected fell away with the disappearance of the League, because the supervisory organ also disappeared with the League, without being validly replaced by a corresponding organ of the United Nations. The Respondent's argument is based upon the viewpoint that the international supervision under the League cannot be replaced by the United Nations, because this supervision does not mean international supervision *in abstracto* but means supervision by a specific organ of the League only.

The 1950 Opinion recognizes that the obligations of the Mandatory to submit to international supervision survive with the Mandate and that the supervisory function is exercised by the organ of the United Nations. The Opinion rules as follows:

> "The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ

performing similar, though not identical, supervisory functions." (*I.C.J. Reports 1950*, p. 136.)

The fundamental viewpoint of the Advisory Opinion is the recognition of the non-severability of the obligations of the Mandatory to submit to international supervision from its authority to administer the mandated territory. This viewpoint can be maintained for the following reasons:

1. Continuous international supervision is required from the essence of the mandates system. As the interests involved in the Mandate are of a humanitarian and important nature, and as the power conferred upon the mandatories is very extensive and mandatories possess wide discretionary power (cf. Article 2, paragraph 1, of the Mandate) as indicated below, the performance of obligations incumbent upon mandatories cannot be unrestricted and unsupervised and left only to the bona fide of mandatories. The mandatories possess no sovereignty over the territories, but they have conferred on them very broad discretionary powers in the administration of the mandated territories. Therefore, without some kind of supervision the attainment of the aim and purpose of the mandates system must be illusory. The mechanism of effective supervision is the necessity to prevent this system from becoming simple *lex imperfecta* or the abuse of power. This mechanism constitutes an integral part of the mandates system as a social institution, a social organism. Therefore, the contention of severability of the Respondent is illogical.

2. The rights of tutelage of mandated areas are exercised by mandatories but they are exercised on behalf of the League. They have no sovereign powers; they are responsible to the League for the execution of the term of the mandate (Quincy Wright, *op. cit.*, p. 22). In this case the League must have supervisory power as a guardian of public interest of the organized international community of which the League constitutes the organ.

3. The mandates system is generally recognized as a product of compromise, at the period of its inception, between two principles: annexation and internationalization. The principle of international supervision by the League can be conceived as a product of compromise between the two extremes. So long as the mandate survives, international supervision as a factor of compromise must be continued by some possible means to prevent the mandate from being transformed into a kind of annexation.

4. The Respondent, while denying its obligations to submit to supervision, insists on preserving its rights or authority to administer the Territory. It seems that the Respondent recognizes the severability of its rights from its obligations, an attitude which is not in conformity with the spirit of the mandates system. The 1950 Opinion declares:

> "The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*Ibid.*, p. 133.)

The Respondent cannot properly defend itself against the Applicants' argument criticizing its attitude as the "doctrine of partial lapse".

* * *

The survival of the Mandate as an institution, on the one hand, requires, on the other hand, an international supervision because supervision is essential to the proper functioning of the mandates system. The question is whether the mechanism of international supervision which existed under the League disappeared with its dissolution, not being replaced by a similar mechanism. In the case of an affirmative answer, the Mandate being paralysed, its proper administration would become impossible and it would be highly undesirable from the viewpoint of the well-being and progress of the inhabitants of the Territory.

Fortunately, the problem of supervisory mechanism for the existing Mandate is solved by the unforeseeable appearance of an international organization, namely the United Nations which, in so far as the main purposes are concerned, i.e., the maintenance of international peace and security and the realization of humanitarian ideas, possesses a high degree of similarity and homogeneity with the League of Nations. Furthermore, we can assert that the United Nations constitutes a more advanced form of international organization from several viewpoints, namely scope and extension of the organized international community, its organization and functions. The same can be said about the two systems—trusteeship under the United Nations and the mandate under the League of Nations. So far as a "sacred trust of civilisation" regarding territories whose peoples have not yet attained a full measure of self-government is concerned, the international trusteeship system is established under the United Nations. This system can be said to be the more advanced continuation of the mandates system under the League of Nations.

Therefore, it is not very unnatural and unreasonable to recognize in the United Nations and the trusteeship system the successor of the League and the mandates system respectively.

Nevertheless, we cannot recognize universal succession in the juridical sense in these cases. Universal succession between the two entities, namely the League and the United Nations did not occur. Neither can the application of the provisions of the trusteeship system on the Mandate be recognized without the conclusion of a trusteeship agreement. But nobody would wonder that the Mandatory's power once exercised on

behalf of the League, from the necessity of circumstances, becomes exercised on behalf of the United Nations, and consequently that international supervisory power, once belonging to the League, now belongs to the United Nations. The acceptance of this power and with it the responsibility by the United Nations does not appear to constitute *ultra vires* because the matter concerning the tutelage of backward peoples without doubt lies within the scope and limit of the objectives of the United Nations.

Neither is the replacement of the supervision by the League by that of the United Nations detrimental to the Mandatory. The Respondent invokes the difference between the way of supervision under the League and that under the United Nations, namely the different composition between the Permanent Mandates Commission and the Trusteeship Council—composition by political elements or experts—and the difference in the voting method as between the Council of the League and the General Assembly, that is, the unanimity or majority rule.

The last-mentioned points cannot be recognized in themselves as an onerous burden imposed on the Respondent; the difference of the method of composition as well as the voting method may affect in both a favourable and unfavourable way. The absence of precise identity between the two supervisory mechanisms cannot be considered as a reason for denying the supervision itself.

As the mechanism of implementation of international supervision, the majority opinion of 1950 refers to the United Nations as its organ (*I.C.J. Reports 1950*, pp. 136-137) contrary to the views of Lord McNair (*ibid.*, pp. 159-160) and Judge Read (*ibid.*, pp. 166-169). This conclusion cannot be derived from the express or tacit intent of the parties to the mandate agreement and those concerned, because at the period of the inception of the Mandate an event such as the dissolution of the League surely could not be foreseen by them, and because the intention of the parties and those concerned, and the surrounding circumstances at the period of the dissolution of the League are susceptible of diverse interpretations. There was a lacuna in the mandate agreement which should be filled by the theoretical or logical interpretation by the Court.

The replacement of the League as a supervisory organ by the United Nations is not normal; it is an exceptional phenomenon of the transitional period which was produced by the non-conclusion of a trusteeship agreement by the Respondent. What the Charter provided for the future of existing mandates was the conclusion of trusteeship agreements which, according to the majority opinion of 1950, the Respondent as Mandatory was not legally obliged, but expected, to make.

The attitude of the Respondent that, on the one hand, it did not enter into the trusteeship agreement which it would normally have been expected under the Charter to conclude and that, on the other hand,

it refuses to submit to international supervision because of the difference of the mechanism of its implementation, is contrary to the spirit of the Mandate and the Charter and cannot be justified.

In short, the maintenance and continuation of international supervision by the United Nations is derived from the nature of the Mandate as an international institution aimed at the promotion of the material and moral well-being and social progress of the inhabitants of territories and independent of and notwithstanding its contractual origin. The Mandate survives independently of the League and the necessity for the supervision remains with the Mandate—this necessity being satisfied by the United Nations as the above-cited 1950 Opinion points out.

* * *

We have reached an affirmative conclusion as to the survival of the Mandate as an international institution despite the dissolution of the League. This conclusion was reached by the 1950 Advisory Opinion and approved by the 1962 Judgment. Apart from the doctrinal basis of this proposition, the continual existence of the Mandate as an institution, notwithstanding the dissolution of the League, is admitted even by the Respondent. From the Respondent's standpoint the denial of the existence of the Mandate would mean denial of its rights to administer the mandated territory also.

The recognition of the institutional side of the Mandate beside its contractual side by the 1950 Advisory Opinion and the 1962 Judgment can confer on the mandates system a durability beyond the life of the League and an objective existence independent of the original or ulterior intent of the parties. This recognition is nothing else but a product of a scientific method of interpretation of the mandates system, in which the consideration of spirit and objectives as well as social reality of this system play important roles. This method of interpretation may be called sociological or teleological, in contrast with strict juristic formalism. Relying on the concept of the Mandate as an institution of a sociological nature, we take a step forward out of traditional conceptional jurisprudence, which would easily assert the lapse of the Mandate on the dissolution of the League.

What has been said about the question of the survival of the Mandate can be applied to the continuation of international supervision and the replacement by the United Nations of the Council of the League. The solution of the latter question is to be found in the same direction as the former. The continuation of international supervision of the Mandate by the United Nations is a logical conclusion of the survival of the Mandate as an international institution.

It is argued that the Court's Opinion on the existence of international supervision, namely the Respondent's accountability to the United Nations, is based on the doctrine of "necessity", and that the

Court cannot exceed the limitation incumbent upon it as a court of law.

Undoubtedly a court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and difficult matter. Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the *raison d'être* of a legal system, legal institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled.

So far as the continuance of international supervision is concerned, the above-mentioned conclusion cannot be criticized as exceeding the function of the Court to interpret law. The Court's Opinion of 1950 on this question is not creating law simply for the reason of necessity or desirability without being founded in law and fact. The survival of the Mandate despite the dissolution of the League, the importance of international supervision in the mandates system, the appearance of the United Nations which, as the organized international community, it characterized by political and social homogeneity with the defunct League of Nations, particularly in respect of the "sacred trust" for peoples who have not yet attained a full measure of self-government, and the establishment of the international trusteeship system, the Respondent's membership in the United Nations, and, finally, the refusal by the Respondent to conclude a trusteeship agreement as expected by the Charter: these factors, individually and as a whole, are enough to establish the continuation of international supervision by the United Nations.

Consideration of the necessity that the paralysis of mandate without supervision must be avoided, can by no means be denied. But we are not going to deduce the above-mentioned conclusion from mere necessity or desirability but from the *raison d'être* and the theoretical construction of the mandates system as a whole.

We, therefore, must recognize that social and individual necessity constitutes one of the guiding factors for the development of law by the way of interpretation as well as legislation. The principle of effectiveness often referred to, may be applied to explain the viewpoint of the "necessity" argument of the 1950 Advisory Opinion recognizing the continued existence of the Mandate as well as international supervision (cf. Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, pp. 277-280).

In this case, we cannot deny that the necessity created the law independently of the will of the parties and those concerned. The explanation by the reasonably assumed intention of the parties (Oppenheim-Lauterpacht, *International Law*, Vol. I, 8th ed., p. 168) seems a compromise

with voluntarism. "The reasonably assumed intention" is not identical with the psychological intention which very probably did not exist. The former shall be assumed by the Court taking into consideration all legal and extra-legal factors, from which the "necessity" is not excluded. These kinds of activities of judges are not very far from those of legislators.

In parentheses, although the Court does not possess the power to decide a case *ex aequo et bono* without the parties' agreement (Article 38, paragraph 2, of the Statute), the result of the interpretation mentioned above can satisfy the requirement of justice and good sense. The contrary solution shall be striking to most of those concerned and the public at large.

Such attitude of interpretation has been known as a method of "libre recherche scientifique" or "Freirecht", mainly in civil-law countries for three-quarters of a century as emancipating judges from the rigid interpretation of written laws and emphasizing the creative role in their judicial activities. There is no reason to believe that the same method should be denied in the field of international law except the opposing tendency of strong voluntarism derived from the concept of sovereignty and not being in conformity with the concept of law which attributes to law an objective and independent existence from the will and intention of those to whom law is addressed.

In short the difference of opinions on the questions before us is in the final instance attributed to the difference between two methods of interpretation: teleological or sociological and conceptional or formalistic.

* * *

For the above-mentioned reasons (1) South West Africa is a territory under the Mandate, and (2) Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, the supervisory functions to be exercised by the United Nations, to which the annual reports are to be submitted. (As to the obligation to transmit petitions mentioned in the Applicants' Submission No. 2, we will deal with it below.) So far as these matters are concerned, the Applicants' Submissions Nos. 1 and 2 are well-founded.

III

Now we must proceed to examine the Applicants' Final Submissions Nos. 3 and 4, which constitute the core of the present cases in the sense that they are concerned with the fundamental obligations stipulated in Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant of the League of Nations.

The submissions presented to the Court by the Applicants in the

Memorials, supplemented in the Reply and amended during the oral proceedings on 19 May 1965, are concerned with the complaints raised against the Respondent as the Mandatory of the Territory of South West Africa; they are fundamentally concerned with the allegations by the Applicants that the Respondent has violated the obligations incumbent upon it by Article 22 of the Covenant of the League of Nations and by the Mandate for South West Africa.

Although the submissions of Applicants include multiple obligations resulting from the various provisions of the Covenant and the Mandate, i.e., Article 2, paragraph 2, Articles 4, 6 and 7, paragraph 1, the main legal questions involved in the present cases are undoubtedly those concerning the obligations of the Respondent as the Mandatory stipulated in Article 2, paragraph 2, of the Mandate: obligations to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory".

In the following statement of our view, we consider that it is more convenient, in dealing with the submissions of the Applicants, to distinguish general questions, namely the matters concerning the general obligations of the Respondent as Mandatory as provided for in Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant from those stipulated in particular provisions of the Mandate and the Covenant, and to deal with the former before the latter.

Briefly, the legal issues of the present cases are centred in the final analysis on the question of compliance or otherwise by the Respondent as Mandatory with the obligations declared in Article 2, paragraph 2, of the Mandate for the Territory of South West Africa, which is nothing else but the concrete application to this Territory of the principle enunciated in Article 22, paragraph 1, of the Covenant concerning the mandates system in general.

Before examining the Applicants' Submissions Nos. 3 and 4 in detail, we must envisage the question of the justiciability raised by the Respondent of the dispute of the present cases. If the dispute of these cases is political, administrative, technical or otherwise in character, and not of legal character, the Court will have no power to exercise its jurisdiction over it.

Regarding this matter, it must be recalled that the contention of the political character of the dispute was not raised by the Respondent to the Court at the stage of the preliminary objection proceedings and that it was made later during the first stage of the oral proceedings by counsel for the Respondent (C.R. 65/18, pp. 6 ff.). It is to be noted that this contention is related only to the general obligations incumbent upon the Respondent by Article 2, paragraph 2, and Article 22 of the Covenant as Mandatory and not to specific obligations provided for in Articles 3, 4, 5, 6 and 7 of the Mandate. Accordingly, the arguments between the Parties concerning the justiciability of the dispute of the present cases have particular significance only in relation to the Applicants' Submissions Nos. 3 and 4 which are concerned with the general principles and objectives of the mandates system.

The Mandate cannot be conceived as divorced from political, administrative, economic, technical and cultural factors and as a result this consideration makes the question of justiciability more complicated.

The Respondent denies the justiciability of matters pertaining to Article 2, paragraph 2, of the Mandate. The reason thereof is found in the nature of the power of the Mandatory which is political and technical, therefore wide, general and, accordingly, discretionary.

The objectives of the mandates system are declared to be "the well-being and development" of such peoples, namely "peoples not yet able to stand by themselves under the strenuous conditions of the modern world". The "well-being and development" mean "the material and moral well-being and the social progress". (Article 2, paragraph 2, of the Mandate.) That these objectives form a "sacred trust of civilization" and "that securities for the performance of this trust should be embodied in this Covenant", is the principle which should be applied to the colonies and territories under the mandates system. The securities for the performance of the trust are provided in the Covenant as well as in the individual mandate instruments, but the objectives of the mandates system are broad, abstract and comprehensive as is shown by the use of words such as "well-being", "development" and "progress".

Strictly speaking, these concepts having the character of a value judgment are susceptible of taking different contents according to various philosophical, theological, political systems and ways of thinking, and consequently it may be extremely difficult for everybody to agree on what is meant or implied by these terms, and on the degree of importance which should be attached to a value in the whole hierarchy of values. What is meant by well-being or progress? Which one has priority in case of conflict between material and moral well-being? Is there any difference between "progress" and "development"? Concerning the latter two concepts there may be great divergence of standpoints between evolutionists or pragmatists and conservatives. Concerning the appreciation of the moral well-being and what it consists of idealists and materialists may differ one from the other.

The creators of Article 22 and the drafters of the Mandate agreement, however, do not appear to have scrutinized these matters from the above-mentioned point of view. They wanted to indicate by this simple formula the goal of good government as it should be applied to the administration of mandated territories. They wanted to find some idea or principle which could be considered a common denominator among divergent political ideas and thoughts on good government just as it is inevitable in the case of indicating a constitutional aim of a democratic State or, in an analogous case, of an international organization whose purposes are as general as those of the League of Nations or the United Nations.

Let us suppose that the legislators of a certain political community

succeeded in finding a constitutional formula which the majority of its members could agree to adopt. Still one cannot be optimistic about its interpretation. Everyone would interpret it according to his own philosophical or political viewpoint; each would attach a different meaning to the same slogan. The necessary conclusion would be subjectivism, relativism and anarchism in the interpretation and multiplicity of political parties in a democratic society.

The fact that, in most cases, political communities under abstract principles which would indicate general orientation to the politics and administration, stand, survive, maintain and even prosper, is not attributable to the legislative technique or the manner in which the objectives of the communities in their constitutions are expressed, but, in final instance, to the common-sense and political wisdom of the leaders and constituents of the respective communities.

From what has been mentioned above, we are inclined to conclude that the concept of the promotion of "material and moral well-being and social progress of the inhabitants" which constitutes the objectives of the Mandate for South West Africa (Article 2, paragraph 2), is in itself of political character and cannot be recognized as susceptible of judicial determination and execution.

By saying so we do not assert that Article 2, paragraph 2, of the Mandate does not possess the character of a legal norm. Legislators can adopt in the system of legal norms other cultural norms, which are socially relevant, namely moral, political, economic, technical norms, etc., as distinct from the juridical value judgment. In such cases, a cultural norm quite heterogeneous in character to legal norm, e.g., in the control of traffic or architecture, is incorporated in the system of law. In such cases, we may say that a technique is vested with juridical value, or that a technique is "naturalized" in the system of law.

Such "naturalization" between legal and other cultural norms occurs most frequently between law on the one hand and morals and politics on the other. The article with which we are now confronted is one of the typical examples of such "naturalization".

The promotion of the material and moral well-being and the social progress of the inhabitants, are the ultimate objectives which the Mandatory is obliged to realize. These objectives are essentially of a political nature, but moral and humanitarian as well. In this case the political and moral obligations of the Mandatory, as an effect of the mandate agreement, are incorporated into the law.

The obligations incumbent upon the Respondent as Mandatory are different from its specific duties enumerated in the Covenant and mandate agreement and, clearly defined from the viewpoint of their content, present themselves as the supreme goal of the mandates system which is of political character. These obligations are therefore general, vague and abstract, and, accordingly, they are not susceptible of judicial execution, in spite of the fact that we cannot deny the legal character of the mandate agreement in its entirety.

This is a reason why, even in countries where the institution of constitutional judicial review is adopted, some of the higher principles of the constitution are by doctrine and practice excluded from the function of courts of law. The execution of some constitutional provisions is not guaranteed as in the case of *lex imperfecta.*

This is a consequence of the essential difference between law and politics or administration.

The essential difference between law and politics or administration lies in the fact that law distinguishes in a categorical way what is right and just from what is wrong and unjust, while politics and administration, being the means to attain specific purposes, and dominated by considerations of expediency, make a distinction between the practical and the unpractical, the efficient and the inefficient. Consequently, in the judgment of law there is no possibility apart from what is just or unjust *(tertium non datur)*, in the case of politics and administration there are many possibilities of choice from the viewpoint of expediency and efficiency. Politics are susceptible of gradation, in contrast to law which is categorical and absolute.

As has been mentioned above, the purposes and content of a good government are vague and are not precisely defined. Suppose we indicate it by a formula such as the promotion of "the material and moral well-being and social progress" as in the case of the Mandate for South West Africa. An infinite number of policies can be conceived that would achieve the purposes of good government, which are general and abstract. In concrete, individual cases, the objectives which should be achieved may be spiritual or material, direct or indirect, important or less important, essential or non-essential, urgent or non-urgent. Good government is concerned with the choice of means to attain certain ends. This is a characteristic of politics and administration where the discretionary power of the competent authorities prevails, and since the Mandate aims at the well-being and progress of the inhabitants, it therefore belongs to the category of politics and administration, is characterized by the discretionary nature of the Mandatory's activities.

Briefly, to promote the well-being and progress of the inhabitants, many policies and measures are conceivable. The Mandatory has a discretionary power to choose those it considers to be the most appropriate and efficient means of realizing the said objectives of the Mandate.

There is a question, posed by Judge Sir Gerald Fitzmaurice on 7 May 1965 (C.R. 65/27, pp. 57-59) to both Parties, in relation to whether the requirement of the "promotion of well-being and social progress" can be satisfied by any total increase, namely by considering the progress "on balance", or whether the existence of a total increase on the one side cannot itself be considered as the achievement of "promotion of the well-being and progress", if, on the other side, there exists, on the part of the government, any failure to promote well-being and progress. If one takes the view that the Mandatory is in principle given

discretionary power to perform the obligations imposed by Article 2, paragraph 2, of the Mandate, namely the well-being and progress of the inhabitants, it follows that it can choose quite freely any policies or measures which it considers appropriate to realize this objective; accordingly, any partial failure in respect of specific policies or measures cannot necessarily be considered to constitute a breach of the Mandate. The reason therefor is that the discretionary power recognized as being conferred on the Mandatory includes its capacity of value judgment as between various possible policies and measures to be taken to realize the objectives of the Mandate.

Furthermore, the concept of the well-being and progress involves a quantitative factor. One cannot ascertain whether, at a certain point of time, the well-being and progress have been achieved or not. That the Mandatory is required to promote "to the utmost" (English) or "*par tous les moyens en son pouvoir*" (French) means that the obligations of the Mandatory provided by Article 2, paragraph 2, are elastic and that there exists a possibility of wide discretion for their performance.

Investigation of the degree of expediency is not a matter for courts of law to deal with. The appropriateness of the exercise of a discretionary power by the Mandatory does not belong to matters subject to the jurisdiction of a court of law. Therefore the contention of the Respondent that the exercise of the Mandatory's power is discretionary, and that it is not justiciable unless the power has been exercised in bad faith, can be recognized as being fundamentally right. The political obligations are in themselves incompatible with judicial review.

That the Mandatory has discretionary power concerning the administration of the Territory is declared by Article 2, paragraph 1, which provides: "The Mandatory shall have full power of administration and legislation over the territory . . ."

What has been said above does not mean that the Mandatory has an unlimited right to exercise the discretionary power conferred upon it for the performance of the obligations imposed by the Mandate. The exercise of this power is primarily limited by the individual provisions of the mandate instrument and Article 22 of the Covenant. Article 2, paragraph 1, provides that ". . . the full power of administration and legislation . . . subject to the present Mandate . . .". The Applicants indeed based their Submissions Nos. 5, 6, 7 and 9 on Article 2, paragraph 1, of the Mandate, Article 22 of the Covenant, Article 6 of the Mandate and Article 22 of the Covenant, and Article 7, paragraph 1, of the Mandate respectively. Concerning these points, justiciability on the Applicants' submissions cannot be denied and the Respondent does not dare to deny it. Controversy on the justiciability of the present cases would accordingly be limited to the Applicants' Submissions Nos. 3 and 4 which are related only to Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant to the extent that it is concerned with Article 2, paragraph 2, of the Mandate.

From this viewpoint the question is whether the wide discretionary power conferred by Article 2, paragraph 1, excludes any possibility of a breach of the Mandate other than a breach of individual provisions of the Mandate and the Covenant indicated above. If any legal norm exists which is applicable to the exercise of the discretionary power of the Mandatory, then it will present itself as a limitation of this power, and the possible violation of this norm would result in a breach of the Mandate and hence the justiciability of this matter.

* * *

Now we shall examine Nos. 3 and 4 of the Applicants' final submissions. Submission No. 3 reads as follows:

> "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;" (Applicants' final submissions, C.R. 65/35, p. 69).

At the same time, Applicants have presented another submission (Submission No. 4) which states 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;" (Applicants' final submissions, 19 May 1965, C.R. 65/35, pp. 69-70).

The President, Sir Percy Spender, for the purpose of clarification, addressed a question to the Applicants in relation to Submissions 3 and 4 in the Memorials at page 197, which are not fundamentally different from the above-mentioned Final Submissions Nos. 3 and 4. He asked what was the distinction between one (i.e., Submission No. 3) and the other (i.e., Submission No. 4). (C.R. 65/23, 28 April 1965, p. 31.)

The response of the Applicants on this point was that the distinction between the two Submissions 3 and 4 was verbal only (19 May 1965, C.R. 65/35, p. 71). This response, being made after the amendment of the Applicants' submissions, may be considered as applicable to the amended Submissions Nos. 3 and 4.

It should be pointed out that the main difference between the original and the Final Submissions Nos. 3 and 4 is that a phrase, namely: "in the light of applicable international standards or international legal norm, or both" is inserted between "has" and "failed to promote to the utmost . . ." which seems to make clear the substantive identity existing between these two submissions.

Now we shall analyse each of these submissions, which occupy the central issue of the whole of the Applicants' submissions and upon which the greater part of the arguments of the Parties has been focused. This issue is without doubt the question concerning the policy of apartheid which the Respondent as Mandatory is alleged to have practised.

First, we shall deal with the concept of apartheid. The Applicants, in defining apartheid, said: "Respondent . . . has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory."

It may be said that, as between the Parties, no divergence of opinion on the concept of apartheid itself exists, notwithstanding that the Respondent prefers to use other terminology, such as "separate development", instead of "apartheid". Anyhow, it seems that there has been no argument concerning the concept of apartheid itself. Furthermore, we can also recognize that the Respondent has never denied its practice of apartheid; but it wants to establish the legality and reasonableness of this policy under the mandates system and its compatibility with the obligations of the Respondent as Mandatory, as well as its necessity to perform these obligations.

Submission No. 3 contends that such practice (i.e., the practice of apartheid) is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant. However, the Applicants' contention is not clear as to whether the violation, by the practice of apartheid, of the Respondent's obligation is conceived from the viewpoint of politics or law. If we consider Submission No. 3, only on the basis of its literal interpretation, it may be considered to be from the viewpoint of politics; this means that the policy of apartheid is not in conformity with the objectives of the Mandate, namely the promotion of well-being and social progress of the inhabitants without regard to any conceivable legal norm or standards. If the Applicants maintain this position, the issue would be a matter of discretion and the case, so far as this point is concerned, would not be justiciable, as the Respondent has contended.

Now the Applicants do not allege the violation of obligations by the Respondent independently of any legal norm or standards. Since the Applicants amended Submission No. 4 in the Memorials and inserted

a phrase "in the light of applicable international standards or international legal norm", the violation of the obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant (Submission No. 3) which is identical with the failure to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory (Submission No. 4) has come to possess a special meaning; namely of a juridical character. Applicants' cause is no longer based directly on a violation of the well-being and progress by the practice of apartheid, but on the alleged violation of certain international standards or international legal norm and not directly on the obligation to promote the well-being and social progress of the inhabitants. There is no doubt that, if such standards and norm exist, their observance in itself may constitute a part of Respondent's general obligations to promote the well-being and social progress.

From what is said above, the relationship between the Applicants' Submissions Nos. 3 and 4 may be understood as follows. The two submissions deal with the same subject-matter, namely the illegal character of the policy and practice of apartheid. However, the contents of each submission are not quite the same, consequently the distinction between the two submissions is not verbal only, as Applicants stated in answer to the question of the President; each seems to be supplementary to the other.

Briefly, the Applicants' Submissions Nos. 3 and 4, as newly formulated, rest upon a norm and/or standard. This norm or standard has been added by the Applicants to Submission No. 4. The existence of this norm or standard to be applied to the Mandate relationships, according to the Applicants' allegation, constitutes a legal limitation of the Respondent's discretionary power and makes the practice of apartheid illegal, and accordingly a violation of the obligations incumbent on the Mandatory.

What the Applicants mean by apartheid is 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 . . . It deals with apartheid in practice, as it actually is and as it actually has been in the life of the people of the Territory . . ." (Memorials, p. 108.)

The Applicants contend the existence of a norm or standards which prohibit the practice of apartheid. These norm or standards are nothing other than those of non-discrimination or non-separation.

The Respondent denies the existence of a norm or standard to prohibit

the practice of apartheid and tries to justify this practice from the discretionary nature of the Mandatory's power. The Respondent emphasizes that the practice of apartheid is only impermissible when it is carried out in bad faith.

From the viewpoint of the Applicants, the existence, and objective validity, of a norm of non-discrimination make the question of the intention or motivation irrelevant for the purposes of determining whether there has been a violation of this norm. The principle that a legal precept, as opposed to a moral one, in so far as it is not specifically provided otherwise, shall be applied objectively, independently of motivation on the part of those concerned and independently of other individual circumstances, may be applicable to the Respondent's defence of *bona fides*.

* * *

Here we are concerned with the existence of a legal norm or standards regarding non-discrimination. It is a question which is concerned with the sources of international law, and, at the same time, with the mandate law. Furthermore, the question is intimately related to the essence and nature of fundamental human rights, the promotion and encouragement of respect for which constitute one of the purposes of the United Nations (Article 1, paragraph 3, Charter of the United Nations), in which the principle of equality before the law occupies the most important part —a principle, from the Applicants' view, antithetical to the policy of apartheid.

What is meant by "international norm or standards" can be understood as being related to the principle of equality before the law.

The question is whether a legal norm on equality before the law exists in the international sphere and whether it has a binding power upon the Respondent's conduct in carrying out its obligations as Mandatory. The question is whether the principle of equality before the law can find its place among the sources of international law which are referred to in Article 38, paragraph 1.

Now we shall examine one by one the sources of international law enumerated by the above-mentioned provision.

First we consider the international conventions (or treaties). Here we are not concerned with "special" or "particular" law-making bilateral treaties, but only with law-making multilateral treaties such as the Charter of the United Nations, the Constitution of the International Labour Organisation, the Genocide Convention, which have special significance as legislative methods. However, even such law-making treaties bind only signatory States and they do not bind States which are not parties to them.

The question is whether the Charter of the United Nations contains a legal norm of equality before the law and the principle of non-dis-

crimination on account of religion, race, colour, sex, language, political creed, etc. The achievement of international co-operation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" constitutes one of the purposes of the United Nations (Article 1, paragraph 3). Next, the General Assembly shall initiate studies and make recommendations for the purpose of: "... *(b)* ... and assisting in the realization of human rights and fundamental freedoms without distinction as to race, sex, language, or religion" (Article 13, paragraph 1 *(b)*). "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" is one of the items which shall be promoted by the United Nations in the field of international economic and social co-operation (Articles 55 *(c)*, 56). In this field, the Economic and Social Council may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all (Article 62, paragraph 2, Charter). Finally, "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" is indicated as one of the basic objectives of the trusteeship system (Article 76 *(c)*).

The repeated references in the Charter to the fundamental rights and freedoms—at least four times—presents itself as one of its differences from the Covenant of the League of Nations, in which the existence of intimate relationships between peace and respect for human rights were not so keenly felt as in the Charter of the United Nations. However, the Charter did not go so far as to give the definition to the fundamental rights and freedoms, nor to provide any machinery of implementation for the protection and guarantee of these rights and freedoms. The "Universal Declaration of Human Rights and Fundamental Freedoms" of 1948 which wanted to formulate each right and freedom and give them concrete content, is no more than a declaration adopted by the General Assembly and not a treaty binding on the member States. The goal of the codification on the matter of human rights and freedoms has until now not been reached save in very limited degree, namely with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1953, the validity of which is only regional and not universal and with a few special conventions, such as "genocide" and political rights of women, the application of which is limited to their respective matters.

In view of these situations, can the Applicants contend, as an interpretation of the Charter, that the existence of a legal norm on equality before the law, which prescribes non-discrimination on account of religion, race, colour, etc., accordingly forbids the practice of apartheid? Is what the Charter requires limited only "to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms ..." and other matters referred to above?

Under these circumstances it seems difficult to recognize that the

Charter expressly imposes on member States any legal obligation with respect to the fundamental human rights and freedoms. On the other hand, we cannot ignore the enormous importance which the Charter attaches to the realization of fundamental human rights and freedoms. Article 56 states: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." (Article 55 enumerates the purposes of international economic and social co-operation, in which "universal respect for, and observance of, human rights and fundamental freedoms" is included.) Well, those who pledge themselves to take action in co-operation with the United Nations in respect of the promotion of universal respect for, and observance of, human rights and fundamental freedoms, cannot violate, without contradiction, these rights and freedoms. How can one, on the one hand, preach respect for human rights to others and, on the other hand, disclaim for oneself the obligation to respect them? From the provisions of the Charter referring to the human rights and fundamental freedoms it can be inferred that the legal obligation to respect human rights and fundamental freedoms is imposed on member States.

Judge Spiropoulos confirmed the binding character of the human rights provisions of the Charter:

> "As the obligation to respect human rights was placed upon Member States by the Charter, it followed that any violation of human rights was a violation of the provision of the Charter." (*G.A., O.R., 3rd Session, 6th Committee*, 138th Meeting, 7 December 1948, p. 765.)

Judge Jessup also attributed the same character to the human rights provisions:

> "Since this book is written *de lege ferenda*, the attempt is made throughout to distinguish between the existing law and the future goals of the law. It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter." (Philip C. Jessup, *Modern Law of Nations*, 1948, p. 91.)

Without doubt, under the present circumstances, the international protection of human rights and fundamental freedoms is very imperfect. The work of codification in this field of law has advanced little from the viewpoint of defining each human right and freedom, as well as the machinery for their realization. But there is little doubt of the existence of human rights and freedoms; if not, respect for these is logically inconceivable; the Charter presupposes the existence of human rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable without corresponding obligations of persons concerned and a legal norm underlying them. Furthermore, there is no doubt that these obligations are not only moral ones, and that they

also have a legal character by the very nature of the subject-matter.

Therefore, the legislative imperfections in the definition of human rights and freedoms and the lack of mechanism for implementation, do not constitute a reason for denying their existence and the need for their legal protection.

Furthermore, it must be pointed out that the Charter provisions, as indicated above, repeatedly emphasize the principle of equality before the law by saying, "without distinction as to race, sex, language or religion".

Under the hypothesis that in the United Nations Charter there exists a legal norm or standards of non-discrimination, are the Applicants, referring to this norm, entitled to have recourse to the International Court of Justice according to Article 7, paragraph 2, of the Mandate? The Respondent contends that such an alleged norm does not constitute a part of the mandate agreement, and therefore the question on this norm falls outside the dispute, which, by the compromissory clause, is placed under the jurisdiction of the International Court of Justice. The Applicants' contention would amount to the introduction of a new element into the mandate agreement which is alien to this instrument.

It is evident that, as the Respondent contends, the mandate agreement does not stipulate equality before the law clause, and that this clause does not formally constitute a part of the mandate instrument. Nevertheless, the equality principle, as an integral part of the Charter of the United Nations or as an independent source of general international law, can be directly applied to the matter of the Mandate either as constituting a kind of law of the Mandate *in sensu lato* or, at least in respect of standards, as a principle of interpretation of the mandate agreement. Accordingly, the dispute concerning the legality of apartheid comes within the field of the interpretation and application of the provisions of the Mandate stipulated in Article 7, paragraph 2, of the Mandate.

This conclusion is justified only on the presupposition that the Respondent is bound by the Charter of the United Nations not only as a member State but also as a Mandatory. The Charter, being of the nature of special international law, or the law of the organized international community, must be applied to all matters which come within the purposes and competence of the United Nations and with which member States are concerned, including the matter of the Mandate. Logic requires that, so long as we recognize the unity of personality, the same principle must govern both the conduct of a member State in the United Nations itself and also its conduct as a mandatory, particularly in the matter of the protection and guarantee of human rights and freedoms.

* * *

Concerning the Applicants' contention attributing to the norm of non-discrimination or non-separation the character of customary international law, the following points must be noted.

The Applicants enumerate resolutions and declarations of international organs which condemn racial discrimination, segregation, separation and apartheid, and contend that the said resolutions and declarations were adopted by an overwhelming majority, and therefore have binding power in regard to an opposing State, namely the Respondent. Concerning the question whether the consent of all States is required for the creation of a customary international law or not, we consider that the answer must be in the negative for the reason that Article 38, paragraph 1 *(b)*, of the Statute does not exclude the possibility of a few dissidents for the purpose of the creation of a customary international law and that the contrary view of a particular State or States would result in the permission of obstruction by veto, which could not have been expected by the legislator who drafted the said Article.

An important question involved in the Applicants' contention is whether resolutions and declarations of international organs can be recognized as a factor in the custom-generating process in the interpretation of Article 38, paragraph 1 *(b)*, that is to say, as "evidence of a general practice".

According to traditional international law, a general practice is the result of the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law. Such repetition of acts is an historical process extending over a long period of time. The process of the formation of a customary law in this case may be described as individualistic. On the contrary, this process is going to change in adapting itself to changes in the way of international life. The appearance of organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions, replacing an important part of the traditional individualistic method of international negotiation by the method of "parliamentary diplomacy" (Judgment on the *South West Africa* cases, *I.C.J. Reports 1962*, p. 346), is bound to influence the mode of generation of customary international law. A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter. In former days, practice, repetition and *opinio juris sive necessitatis*, which are the ingredients of customary law might be combined together in a very long and slow process extending over centuries. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organizations is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even far less than that. This is one of the examples of the transformation of law inevitably produced by change in the social substratum.

Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly.

Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law.

In short, the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 *(b)*.

In the present case the Applicants assert the existence of the international norm and standards of non-discrimination and non-separation and refer to this source of international law. They enumerate resolutions of the General Assembly which repeatedly and strongly deny the apartheid policy of racial discrimination as an interpretation of the Charter (General Assembly resolution 1178 (XII) of 26 November 1957; resolution 1248 (XIII) of 30 October 1958; resolution 1375 (XIV) of 17 November 1959; resolution 1598 (XV) of 13 April 1961; and resolutions of the Security Council (with regard to apartheid as practised in the Republic of South Africa); resolution of 7 August 1953 which declares the inconsistency of the policy of the South African Government with the principles contained in the Charter of the United Nations and with its obligations as a member State of the United Nations; resolution of 4 December 1963 which declares ". . . the policies of apartheid and racial discrimination . . . are abhorrent to the conscience of mankind . . .". The Applicants cite also the report of the Committee on South West Africa for 1956.)

Moreover, the 11 trust territories agreements, each of them containing a provision concerning the norm of official non-discrimination or non-separation on the basis of membership in a group or race, may be considered as contributions to the development of the universal acceptance of the norm of non-discrimination, in addition to the meaning which each provision possesses in each trusteeship agreement, by virtue of Article 38, paragraph 1 *(a)*, of the Statute.

Furthermore, the Universal Declaration of Human Rights adopted by the General Assembly in 1948, although not binding in itself, constitutes evidence of the interpretation and application of the relevant Charter provisions. The same may be said of the Draft Declaration on Rights and Duties of States adopted by the International Law Commission in 1949, the Draft Covenant on civil and political rights, the Draft Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of all Forms of Racial Discrimination adopted by the General Assembly of the United Nations on 20 November 1963 and of regional treaties and declarations, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms signed on 3 September 1953, the Charter of the Organization of American States signed on 30 April 1948, the American Declaration of the Rights and Duties of Man, 1948, the Draft Declaration of International Rights and Duties, 1945.

From what has been said above, we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law as is contended by the Applicants, and as a result, the Respondent's obligations as Mandatory are governed by this legal norm in its capacity as a member of the United Nations either directly or at least by way of interpretation of Article 2, paragraph 2.

One of the contentions concerning the application of the said legal norm is that, if such a legal norm exists for judging the Respondent's obligations under Article 2, paragraph 2, of the Mandate, it would be the one in existence at the time the Mandate was entrusted to the Respondent. This is evidently a question of inter-temporal law.

The Respondent's position is that of denying the application of a new law to a matter which arose under an old law, namely the negation of retroactivity of a new customary law. The Applicants' argument is based on "the relevance of the evolving practice and views of States, growth of experience and increasing knowledge in political and social science to the determination of obligations bearing on the nature and purpose of the Mandate in general, and Article 2, paragraph 2"; briefly, it rests on the assertion of the concept of the "continuous, dynamic and ascending growth" of the obligation of the Mandatory.

Our view on this question is substantially not very different from that of the Applicants. The reason why we recognize the retroactive application of a new customary law to a matter which started more than 40 years ago is as follows.

The matter in question is in reality not that of an old law and a new law, that is to say, it is not a question which arises out of an amendment of a law and which should be decided on the basis of the principle of the protection of *droit acquis* and therefore of non-retroactivity. In the present

case, the protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purposes of the mandate system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during these 40 years. Therefore, the recognition of the generation of a new customary international law on the matter of non-discrimination is not to be regarded as detrimental to the Mandatory, but as an authentic interpretation of the already existing provisions of Article 2, paragraph 2, of the Mandate and the Covenant. It is nothing other than a simple clarification of what was not so clear 40 years ago. What ought to have been clear 40 years ago has been revealed by the creation of a new customary law which plays the role of authentic interpretation the effect of which is retroactive.

Briefly, the method of the generation of customary international law is in the stage of transformation from being an individualistic process to being a collectivistic process. This phenomenon can be said to be the adaptation of the traditional creative process of international law to the reality of the growth of the organized international community. It can be characterized, considered from the sociological viewpoint, as a transition from traditional custom-making to international legislation by treaty.

* * *

Following the reference to Article 38, paragraph 1 *(b)*, of the Statute, the Applicants base their contention on the legal norm alternatively on Article 38, paragraph 1 *(c)*, of the Statute, namely "the general principles of law recognized by civilized nations".

Applicants refer to this source of international law both as an independent ground for the justification of the norm of non-discrimination and as a supplement and reinforcement of the other arguments advanced by them to demonstrate their theory.

The question is whether the legal norm of non-discrimination or non-separation denying the practice of apartheid can be recognized as a principle enunciated in the said provision.

The wording of this provision is very broad and vague; the meaning is not clear. Multiple interpretations ranging from the most strict to the most liberal are possible.

To decide this question we must clarify the meaning of "general principles of law". To restrict the meaning to private law principles or principles of procedural law seems from the viewpoint of literal interpretation untenable. So far as the "general principles of law" are not qualified, the "law" must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.

Nevertheless, analogies drawn from these laws should not be made mechanically, that is to say, to borrow the expression of Lord McNair, "by means of importing private law institutions 'lock, stock and barrel' ready-made and fully equipped with a set of rules". (*I.C.J. Reports 1950*, p. 148.)

What international law can with advantage borrow from these sources must be from the viewpoint of underlying or guiding "principles". These principles, therefore, must not be limited to statutory provisions and institutions of national laws: they must be extended to the fundamental concepts of each branch of law as well as to law in general so far as these can be considered as "recognized by civilized nations."

Accordingly, the general principles of law in the sense of Article 38, paragraph 1 *(c)*, are not limited to certain basic principles of law such as the limitation of State sovereignty, third-party judgment, limitation of the right of self-defence, *pacta sunt servanda*, respect for acquired rights, liability for unlawful harm to one's neighbour, the principle of good faith, etc. The word "general" may be understood to possess the same meaning as in the case of the "*general* theory of law", "théorie *générale* de droit", "die *Allgemeine* Rechtslehre", namely common to all branches of law. But the principles themselves are very extensive and can be interpreted to include not only the general theory of law, but the general theories of each branch of municipal law, so far as recognized by civilized nations. They may be conceived, furthermore, as including not only legal principles but the fundamental legal concepts of which the legal norms are composed such as person, right, duty, property, juristic act, contract, tort, succession, etc.

In short, they may include what can be considered as "juridical truth" (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 24).

The question is whether a legal norm of non-discrimination and non-separation has come into existence in international society, as the Applicants contend. It is beyond all doubt that the presence of laws against racial discrimination and segregation in the municipal systems of virtually every State can be established by comparative law studies. The recognition of this norm by civilized nations can be ascertained. If the condition of "general principles" is fulfilled, namely if we can say that the general principles include the norm concerning the protection of human rights by adopting the wide interpretation of the provision of Article 38, paragraph 1 *(c)*, the norm will find its place among the sources of international law.

In this context we have to consider the relationship between a norm of a human rights nature and international law. Originally, general principles are considered to be certain private law principles found by

the comparative law method and applicable by way of analogy to matters of an international character. These principles are of a nature common to all nations, that is of the character of *jus gentium*. These principles, which originally belong to private law and have the character of *jus gentium*, can be incorporated in international law so as to be applied to matters of an international nature by way of analogy, as we see in the case of the application of some rules of contract law to the interpretation of treaties. In the case of the international protection of human rights, on the contrary, what is involved is not the application by analogy of a principle or a norm of private law to a matter of international character, but the recognition of the juridical validity of a similar legal fact without any distinction as between the municipal and the international legal sphere.

In short, human rights which require protection are the same; they are not the product of a particular juridical system in the hierarchy of the legal order, but the same human rights must be recognized, respected and protected everywhere man goes. The uniformity of national laws on the protection of human rights is not derived, as in the cases of the law of contracts and commercial and maritime transactions, from considerations of expediency by the legislative organs or from the creative power of the custom of a community, but it already exists in spite of its more-or-less vague form. This is of nature *jus naturale* in roman law.

The unified national laws of the character of *jus gentium* and of the law of human rights, which is of the character of *jus naturale* in roman law, both constituting a part of the law of the world community which may be designated as World Law, Common Law of Mankind (Jenks), Transnational Law (Jessup), etc., at the same time constitute a part of international law through the medium of Article 38, paragraph 1 *(c)*. But there is a difference between these two cases. In the former, the general principles are presented as common elements among diverse national laws; in the latter, only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and co-ordination.

This distinction between the two categories of law of an international character is important in deciding the scope and extent of Article 38, paragraph 1 *(c)*. The Respondent contends that the suggested application by the Applicants of a principle recognized by civilized nations is not a correct analogy and application as contemplated by Article 38, paragraph 1 *(c)*. The Respondent contends that the alleged norm of non-differentiation as between individuals within a State on the basis of membership of a race, class or group could not be transferred by way of analogy to the international relationship, otherwise it would mean that all nations are to be treated equally despite the difference of race, colour, etc.—a conclusion which is absurd. (C.R. 65/47, p. 7.) If we limit the application of Article 38, paragraph 1 *(c)*, to a strict analogical extension of certain

principles of municipal law, we must recognize that the contention of the Respondent is well-founded. The said provision, however, does not limit its application to cases of anology with municipal, or private law which has certainly been a most important instance of the application of this provision. We must include the international protection of human rights in the application of this provision. It must not be regarded as a case of analogy. In reality, there is only one human right which is valid in the international sphere as well as in the domestic sphere.

The question here is not of an "international", that is to say, inter-State nature, but it is concerned with the question of the international validity of human rights, that is to say, the question whether a State is obliged to protect human rights in the international sphere as it is obliged in the domestic sphere.

The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element.

A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory. It is exactly the same as the International Court of Justice ruling concerning the *Reservations to the Genocide Convention* case (*I.C.J. Reports 1951*, p. 23):

> "The solution of these problems must be found in the special characteristics of the Genocide Convention . . . The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (resolution 96 (1) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, *even without any conventional obligation.* A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)." (Italics added.)

Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons

must not be deprived of them. Belonging to diverse kinds of communities and societies—ranging from family, club, corporation, to State and international community, the human rights of man must be protected everywhere in this social hierarchy, just as copyright is protected domestically and internationally. There must be no legal vacuum in the protection of human rights. Who can believe, as a reasonable man, that the existence of human rights depends upon the internal or international legislative measures, etc., of the State and that accordingly they can be validly abolished or modified by the will of the State?

If a law exists independently of the will of the State and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called "natural law" in contrast to "positive law".

Provisions of the constitutions of some countries characterize fundamental human rights and freedoms as "inalienable", "sacred", "eternal", "inviolate", etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance.

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.

As an interpretation of Article 38, paragraph 1 *(c)*, we consider that the concept of human rights and of their protection is included in the general principles mentioned in that Article.

Such an interpretation would necessarily be open to the criticism of falling into the error of natural law dogma. But it is undeniable that in Article 38, paragraph 1 *(c)*, some natural law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State. But this viewpoint, we believe, was clearly overruled by Article 38, paragraph 1 *(c)*, by the fact that this provision does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra-positive character.

The above-mentioned character of Article 38, paragraph 1 *(c)*, of the Statute is proved by the process of the drafting of this article by

the Committee of Jurists. The original proposal made by Baron Descamps referred to "*la conscience juridique des peuples civilisés*", a concept which clearly indicated an idea originating in natural law. This proposal met with the opposition of the positivist members of the Committee, represented by Mr. Root. The final draft, namely Article 38, paragraph 1 *(c)*, is the product of a compromise between two schools, naturalist and positivist, and therefore the fact that the natural law idea became incorporated therein is not difficult to discover (see particularly Jean Spiropoulos, *Die Allgemeine Rechtsgrundsätze im Völkerrecht*, 1928, pp. 60 ff.; Bin Cheng, *op. cit.*, pp. 24-26).

Furthermore, an important role which can be played by Article 38, paragraph 1 *(c)*, in filling in gaps in the positive sources in order to avoid *non liquet* decisions, can only be derived from the natural law character of this provision. Professor Brierly puts it, "its inclusion is important as a rejection of the positivistic doctrine, according to which international law consists solely of rules to which States have given their consent" (J. L. Brierly, *The Law of Nations*, 6th ed., p. 63). Mr. Rosenne comments on the general principles of law as follows:

> "Having independent existence, their validity as legal no ms does not derive from the consent of the parties as such ... The Statute places this element on a footing of formal equality with two positivist elements of custom and treaty, and thus is positivist recognitions of the Grotian concept of the co-existence implying no subjugation of positive law and so-called natural law of nations in the Grotian sense." (Shabtai Rosenne, *The International Court of Justice*, 1965, Vol. II, p. 610.)

Now the question is whether the alleged norm of non-discrimination and non-separation as a kind of protection of human rights can be considered as recognized by civilized nations and included in the general principles of law.

First the recognition of a principle by civilized nations, as indicated above, does not mean recognition by *all* civilized nations, nor does it mean recognition by an official act such as a legislative act; therefo.e the recognition is of a very elastic nature. The principle of equality before the law, however, is stipulated in the list of human rights recognized by the municipal system of virtually every State no matter whether the form of government be republican or monarchical and in spite of any differences in the degree of precision of the relevant provisions. This principle has become an integral part of the constitutions of most of the civilized countries in the world. Common-law countries must be included. (According to *Constitutions of Nations*, 2nd ed., by Amos J. Peaslee, 1956, Vol. I, p. 7, about 73 per cent. of the national constitutions contain clauses respecting equality.)

The manifestation of the recognition of this principle does not need to be limited to the act of legislation as indicated above; it may include the attitude of delegations of member States in cases of participation in resolutions, declarations, etc., against racial discrimination adopted by the organs of the League of Nations, the United Nations and other organizations which, as we have seen above, constitute an important element in the generation of customary international law.

From what we have seen above, the alleged norm of non-discrimination and non-separation, being based on the United Nations Charter, particularly Articles 55 *(c)*, 56, and on numerous resolutions and declarations of the General Assembly and other organs of the United Nations, and owing to its nature as a general principle, can be regarded as a source of international law according to the provisions of Article 38, paragraph 1 *(a)*-*(c)*. In this case three kinds of sources are cumulatively functioning to defend the above-mentioned norm: (1) international convention, (2) international custom and (3) the general principles of law.

Practically the justification of any one of these is enough, but theoretically there may be a difference in the degree of importance among the three. From a positivistic, voluntaristic viewpoint, first the convention, and next the custom, is considered important, and general principles occupy merely a supplementary position. On the contrary, if we take the supra-national objective viewpoint, the general principles would come first and the two others would follow them. If we accept the fact that convention and custom are generally the manifestation and concretization of already existing general principles, we are inclined to attribute to this third source of international law the primary position vis-à-vis the other two.

To sum up, the principle of the protection of human rights has received recognition as a legal norm under three main sources of international law, namely (1) international conventions, (2) international custom and (3) the general principles of law. Now, the principle of equality before the law or equal protection by the law presents itself as a kind of human rights norm. Therefore, what has been said on human rights in general can be applied to the principle of equality. (Cf. Wilfred Jenks, *The Common Law of Mankind*, 1958, p. 121. The author recognizes the principle of respect for human rights including equality before the law as a general principle of law.)

Here we must consider the principle of equality in relationship to the Mandate. The contention of the Applicants is based on this principle as condemning the practice of apartheid. The Applicants contend not only that this practice is in violation of the obligations of the Respondent imposed upon it by Article 2 of the Mandate and Article 22 of the Covenant (Submission No. 3), but that the Respondent, by virtue of economic,

political, social and educational policies has, in the light of applicable international standards or international legal norms, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory. What the Applicants seek to establish seems to be that the Respondent's practice of apartheid constitutes a violation of international standards and/or an international legal norm, namely the principle of equality and, as a result, a violation of the obligations to promote to the utmost, etc. If the violation of this principle exists, this will be necessarily followed by failure to promote the well-being, etc. The question is whether the principle of equality is applicable to the relationships of the Mandate or not. The Respondent denies that the Mandate includes in its content the principle of equality as to race, colour, etc.

Regarding this point, we would refer to our above-mentioned view concerning the Respondent's contention that the alleged norm of non-discrimination of the Charter does not constitute a part of the mandate agreement, and therefore the question of this norm falls outside the dispute under Article 7, paragraph 2, of the Mandate.

We consider that the principle of equality, although it is not expressly mentioned in the mandate instrument constitutes, by its nature, an integral part of the mandates system and therefore is embodied in the Mandate. From the natural-law character of this principle its inclusion in the Mandate must be justified.

It appears to be a paradox that the inhabitants of the mandated territories are internationally more protected than citizens of States by the application of Article 7, paragraph 2, but this interpretation falls outside the scope of the present proceedings.

Next, we shall consider the content of the principle of equality which must be applied to the question of apartheid.

IV

As we have seen above, the objectives of the mandates system, being the material and moral well-being and social progress of the inhabitants of the territory, are in themselves of a political nature. Their achievement must be measured by the criteria of politics and the method of their realization belongs to the matter of the discretion conferred upon the Mandatory by Article 2, paragraph 1, of the Mandate, and Article 22 of the Covenant of the League.

The discretionary power of the Mandatory however, is not unlimited. Besides the general rules which prohibit the Mandatory from abusing its power and *mala fides* in performing its obligations, and besides the individual provisions of the Mandate and the Covenant, the Mandatory is subject to the Charter of the United Nations as a member State, the customary international law, general principles of law, and other sources

of international law enunciated in Article 38, paragraph 1. According to the contention of the Applicants, the norm and/or standards which prohibit the practice of apartheid, are either immediately or by way of interpretation of the Mandate binding upon the discretionary power of the Mandatory. The Respondent denies the existence of such norm and/or standards.

The divergence of views between the Parties is summarized in the following formula: whether or not the policy of racial discrimination or separate development is *per se* incompatible with the well-being and social progress of the inhabitants, or in other terms, whether the policy of apartheid is illegal and constitutes a breach of the Mandate, or depends upon the motive (*bona fides* or *mala fides*), the result or effect. From the Respondent's standpoint apartheid is not *per se* prohibited but only a special kind of discrimination which leads to oppression is prohibited.

This divergence of fundamental standpoints between the Parties is reflected in their attitudes as to what extent their contentions depend on the evidence. Contrary to the Applicants' attitude in denying the necessity of calling witnesses and experts and of an inspection *in loco*, the Respondent abundantly utilized numerous witnesses and experts and requested the Court to visit South West Africa, South Africa and other parts of Africa to make an inspection *in loco*.

First, we shall examine the content of the norm and standards of which violation by the Respondent is alleged by the Applicants.

The Applicants contend, as set forth in the Memorials (p. 108) that the Respondent's violation of its obligations under the said paragraph 2 of Article 2 of the Mandate consists in a "systematic course of positive action which inhibits the well-being, prevents the social progress and thwarts the development of the overwhelming majority" of the inhabitants of the Territory. In pursuit of such course of action, and as a pervasive feature thereof, the Respondent has, by governmental action, installed and maintained the policy of apartheid, or separate development. What is meant by apartheid is 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." (Memorials, p. 108.)

Such policy, the Applicants contend, "runs counter to modern conceptions of human rights, dignities and freedom, irrespective of race, colour or creed", which conclusion is denied by the Respondent.

The alleged legal norms of non-discrimination or non-separation by

which, by way of interpretation of Article 2, paragraph 2, of the Mandate, apartheid becomes illegal, are defined by the Applicants as follows:

> "In the following analysis of the relevant legal norms, 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." (Reply, p. 274.)

What the Applicants want to establish, are the legal norms of "non-discrimination" or "non-separation" which are of a *per se*, non-qualified absolute nature, namely that the decision of observance or otherwise of the norm does not depend upon the motive, result, effect, etc. Therefore from the standpoint of the Applicants, the violation of the norm of non-discrimination is established if there exists a simple fact of discrimination without regard to the intent of oppression on the part of the Mandatory.

On the other hand, the Respondent does not recognize the existence of the norm of non-discrimination of an absolute character and seeks to prove the necessity of group differentiation in the administration of a multi-racial, multi-national, or multi-lingual community. The pleadings and verbatim records are extremely rich in examples of different treatment of diverse population groups in multi-cultural societies in the world. Many examples of different treatment quoted by the Respondent and testified to by the witnesses and experts appear to belong to the system of protection of minority groups in multi-cultural communities and cover not only the field of public law but also of private law.

The doctrine of different treatment of diverse population groups constitutes a fundamental political principle by which the Respondent administers not only the Republic of South Africa, but the neighbouring Territory of South West Africa. The geographical, historical, ethnological, economic and cultural differences and varieties between several population groups, according to the contention of the Respondent, have necessitated the adoption of the policy of apartheid or "separate development". This policy is said to be required for the purpose of the promotion of the well-being and social progress of the inhabitants of the Territory. The Respondent insists that each population group developing its own characteristics and individuality, to attain self-determination, separate development should be the best way to realize the well-being and social progress of the inhabitants. The other alternative, namely the mixed integral society in the sense of Western

democracy would necessarily lead to competition, friction, struggle, chaos, bloodshed, and dictatorship as examples may be found in some other African countries. Therefore, the most appropriate method of administration of the Territory is the principle of indirect rule maintaining and utilizing the merits of tribalism.

Briefly, it seems that the idea underlying the policy of apartheid or separate development is the racial philosophy which is not entirely identical with ideological Nazism but attributes great importance to the racial or ethnological factors in the fields of politics, law, economy and culture. Next, the method of apartheid is of sociological and, therefore, strong deterministic tendency, as we can guess from the fact that at the oral proceedings the standpoint of the Respondent was energetically sustained by many witnesses—experts who were sociologists and ethnologists.

Contrary to the standpoint of the Applicants who condemn the policy of apartheid or separate development of the Respondent as illegal, the latter conceives this policy as something neutral. The Respondent says that it can be utilized as a tool to attain a particular end, good or bad, as a knife can serve a surgeon as well as a murderer.

* * *

Before we decide this question, general consideration of the content of the principle of equality before the law is required. Although the existence of this principle is universally recognized as we have seen above, its precise content is not very clear.

This principle has been recognized as one of the fundamental principles of modern democracy and government based on the rule of law. Judge Lauterpacht puts it:

> "The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties." (Sir Hersch Lauterpacht, *An International Bill of the Rights of Man*, 1945, p. 115.)

Historically, this principle was derived from the Christian idea of the equality of all men before God. All mankind are children of God, and, consequently, brothers and sisters, notwithstanding their natural and social differences, namely man and woman, husband and wife, master and slave, etc. The idea of equality of man is derived from the fact that human beings "by the common possession of reason" distinguish themselves "from other living beings". (Lauterpacht, *op. cit.*, p. 116.) This idea existed already in the Stoic philosophy, and was developed by the scholastic philosophers and treated by natural law scholars and encyclopedists of the seventeenth and eighteenth centuries. It received

legislative formulation however, at the end of the eighteenth century first by the Bills of Rights of some American states, next by the Declaration of the French Revolution, and then in the course of the nineteenth century the equality clause, as we have seen above, became one of the common elements of the constitutions of modern European and other countries.

Examining the principle of equality before the law, we consider that it is philosophically related to the concepts of freedom and justice. The freedom of individual persons, being one of the fundamental ideas of law, is not unlimited and must be restricted by the principle of equality allotting to each individual a sphere of freedom which is due to him. In other words the freedom can exist only under the premise of the equality principle.

In what way is each individual allotted his sphere of freedom by the principle of equality? What is the content of this principle? The principle is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference. This is what was indicated by Aristotle as *justitia commutativa* and *justitia distributiva.*

The most fundamental point in the equality principle is that all human beings as persons have an equal value in themselves, that they are the aim itself and not means for others, and that, therefore, slavery is denied. The idea of equality of men as persons and equal treatment as such is of a metaphysical nature. It underlies all modern, democratic and humanitarian law systems as a principle of natural law. This idea, however, does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.

We know that law serves the concrete requirements of individual human beings and societies. If individuals differ one from another and societies also, their needs will be different, and accordingly, the content of law may not be identical. Hence is derived the relativity of law to individual circumstances.

The historical development of law tells us that, parallel to the trend of generalization the tendency of individualization or differentiation is remarkable as may be exemplified by the appearance of a system of commercial law separate from the general private law in civil law countries, creation of labour law. The acquisition of independent status by commercial and labour law can be conceived as the conferment of a kind of privilege or special treatment to a merchant or labour class. In the field of criminal law the recent tendency of criminal legislative polic is directed towards the individualization of the penalty.

We can say accordingly that the principle of equality before the law

does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.

The question is, in what case equal treatment or different treatment should exist. If we attach importance to the fact that no man is strictly equal to another and he may have some particularities, the principle of equal treatment could be easily evaded by referring to any factual and legal differences and the existence of this principle would be virtually denied. A different treatment comes into question only when and to the extent that it corresponds to the nature of the difference. To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists. Accordingly, not every different treatment can be justified by the existence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice—"the principle to treat equal equally and unequal according to its inequality, constitutes an essential content of the idea of justice" (Goetz Hueck, *Der Grundsatz der Gleichmässigen Behandlung in Privatrecht*, 1958, p. 106) *[translation]*.

Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law.

Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness. The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to his motive or purpose.

There is no doubt that the principle of equality is binding upon administrative organs. The discretionary power exercised on considerations of expediency by the administrative organs is restricted by the norm of equality and the infringement of this norm makes an administrative measure illegal. The judicial power also is subjected to this principle. Then, what about the legislative power? Under the constitutions which express this principle in a form such as "all citizens are equal before the law", there may be doubt whether or not the legislators also are bound by the principle of equality. From the nature of this principle the answer must be in the affirmative. The legislators cannot be permitted to exercise their power arbitrarily and unreasonably. They are bound not only in exercising the ordinary legislative power but also the power to establish the constitution. The reason therefor is that the principle of equality being in the nature of natural law and therefore of a supra-constitutional character, is placed at the summit of hierarchy of the system of law, and that all positive laws including the constitution shall be in conformity with this principle.

The Respondent for the purpose of justifying its policy of apartheid or separate development quotes many examples of different treatment such as minorities treaties, public conveniences (between man and woman), etc. Nobody would object to the different treatment in these cases as a violation of the norm of non-discrimination or non-separation on the hypothesis that such a norm exists. The Applicants contend for the unqualified application of the norm of non-discrimination or non-separation, but even from their point of view it would be impossible to assert that the above-mentioned cases of different treatment constitute a violation of the norm of non-discrimination.

Then, what is the criterion to distinguish a permissible discrimination from an impermissible one?

In the case of the minorities treaties the norm of non-discrimination as a reverse side of the notion of equality before the law prohibits a State to exclude members of a minority group from participating in rights, interests and opportunities which a majority population group can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of the minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.

In any event, in case of a minority, members belonging to this group, enjoying the citizenship on equal terms with members of majority groups, have conferred on them the possibility of cultivating their own religious, educational or linguistic values as a recognition of their fundamental human rights and freedoms.

The spirit of the minorities treaties, therefore, is not negative and prohibitive, but positive and permissive.

Whether the spirit of the policy of apartheid or separate development is common with that of minorities treaties to which the Respondent repeatedly refers, whether the different treatment between man and woman concerning the public conveniences can be referred to for the purpose of justifying the policy of apartheid or not, that is the question.

In the case of apartheid, we cannot deny the existence of reasonableness in some matters that diverse ethnic groups should be treated in certain aspects differently from one another. As we have seen above, differentiation in law and politics is one of the most remarkable tendencies of the modern political society. This tendency is in itself derived from the concept of justice, therefore it cannot be judged as wrong. It is an adaptation of the idea of justice to social realities which, as its structure, is going to be more complicated and multiplicate from the viewpoint of economic, occupational, cultural and other elements.

Therefore, different treatment requires reasonableness to justify it as is stated above. The reason may be the protection of some fundamental human rights and freedoms as we have seen in the case of minorities

treaties, or of some other nature such as incapacity of minors to conclude contracts, physical differences between man and woman.

In the case of the protection of minorities, what is protected is not the religious or linguistic group as a whole but the individuals belonging to this group, the former being nothing but a name and not a group. In the case of different treatment of minors or between man and woman, it is clear that minors, disabled persons or men or women in a country do not constitute respectively a group. But whether a racial or ethnic group can be treated in the same way as categories such as minors, disabled persons, men and women, is doubtful. Our conclusion on this point is negative. The reasons therefor are that the scientific and clear-cut definition of race is not established; that what man considers as a matter of common-sense as criteria to distinguish one race from the other, are the appearance, particularly physical characteristics such as colour, hair, etc., which do not constitute in themselves relevant factors as the basis for different political or legal treatment; and that, if there exists the necessity to treat one race differently from another, this necessity is not derived from the physical characteristics or other racial qualifications but other factors, namely religious, linguistic, educational, social, etc., which in themselves are not related to race or colour.

Briefly, in these cases it is possible that the different treatment in certain aspects is reasonably required by the differences of religion, language, education, custom, etc., not by reason of race or colour. Therefore, the Respondent tries in some cases to justify the different treatment of population groups by the concept of cultural population groups. The different treatment would be justified if there really existed the need for it by reason of cultural differences. The different treatment, however, should be condemned if cultural reasons are referred to for the purpose of dissimulating the underlying racial intention.

In any case, as we have seen above, all human beings are equal before the law and have equal opportunities without regard to religion, race, language, sex, social groups, etc. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind. On the other hand, human beings, being endowed with individuality, living in different surroundings and circumstances are not all alike, and they need in some aspects politically, legally and socially different treatment. Hence the above-mentioned examples of different treatment are derived. Equal treatment is a principle but its mechanical application ignoring all concrete factors engenders injustice. Accordingly, it requires different treatment, taken into consideration, of concrete circumstances of individual cases. The different treatment is permissible and required by the considerations of justice; it does not mean a disregard of justice.

Equality being a principle and different treatment an exception, those who refer to the different treatment must prove its *raison d'être* and its reasonableness.

The Applicants' norm of non-discrimination or non-separation, being conceived as of a *per se* nature, would appear not to permit any exception. The policy of apartheid or separate development which 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 potential is illegal whether the motive be *bona fide* or *mala fide*, oppressive or benevolent; whether its effect or result be good or bad for the inhabitants. From this viewpoint all protective measures taken in the case of minorities treaties and other matters would be included in the illegal discrimination—a conclusion which might not be expected from the Applicants. These measures, according to the Applicants, would have nothing to do with the question of discrimination. The protection the minorities treaties intended to afford to the inhabitants is concerned with life, liberty and free exercise of religion. On the contrary, the Respondent argues the existence of the same reason in the policy of apartheid—the reason of protective measures in the case of minorities treaties.

We must recognize, on the one hand, the legality of different treatment so far as justice or reasonableness exists in it. On the other hand, we cannot recognize all measures of different treatment as legal, which have been and will be performed in the name of apartheid or separate development. The Respondent tries to prove by the pleadings and the testimony of the witnesses and experts the existence of a trend of differentiation in accordance with different religious, racial, linguistic groups. From the viewpoint of the Applicants, the abundant examples quoted by the Respondent and the testimony of witnesses and experts cannot serve as the justification of the policy of apartheid, because they belong to an entirely different plane from that of apartheid and because they are of a nature quite heterogeneous to the policy of apartheid, which is based on a particular racial philosophy and group sociology.

The important question is whether there exists, from the point of view of the requirements of justice, any necessity for establishing an exception to the principle of equality, and the Respondent must prove this necessity, namely the reasonableness of different treatment.

On the aspect of "reasonableness" two considerations arise. The one is the consideration whether or not the individual necessity exists to establish an exception to the general principle of equality before the law and equal opportunity. In this sense the necessity may be conceived as of the same nature as in the case of minorities treaties of which

the objectives are protective and beneficial. The other is the consideration whether the different treatment does or does not harm the sense of dignity of individual persons.

For instance, if we consider education, on which the Parties argued extensively, we cannot deny the value of vernacular as the medium of instruction and the result thereof would be separate schooling as between children of diverse population groups, particularly between the Whites and the Natives. In this case separate education and schooling may be recognized as reasonable. This is justified by the nature of the matter in question. But even in such a case, by reason of the matter which is related to a delicate racial and ethnic problem, the manner of dealing with this matter should be extremely careful. But, so far as the public use of such facilities as hotels, buses, etc., justification of discriminatory and separate treatment by racial groups cannot be found in the same way as separation between smokers and non-smokers in a train.

We cannot condemn all measures derived from the Respondent's policy of apartheid or separate development, particularly as proposed by the Odendaal Commission, on the ground that they are motivated by the racial concept, and therefore devoid of the reasonableness. There may be some measures which are of the same character as we see in the protection measures in the case of the minorities treaties and others. We cannot approve, however, all measures constituting a kind of different treatment of apartheid policy as reasonable.

One of the characteristics of the policy of apartheid is marked by its restrictive tendency on the basis of racial distinction. The policy includes on the one hand protective measures for the benefit of the Natives as we see in the institutions of reserves and homelands connected with restrictions on land rights; however, on the other hand, several kinds of restrictions of rights and freedoms are alleged to exist regarding those Natives who live and work in the southern sector, namely the White area outside the reserves. These restrictions, if they exist, in many cases presenting themselves as violation of respective human rights and freedoms at the same time, would constitute violation of the principle of equality before the law (particularly concerning the discrimination between the Natives and the Whites).

* * *

Here we are not required to give answers exhaustively in respect of the Applicants' allegations of violation by the Respondent of the Mandate concerning the legislation *(largo sensu)* applicable in the Territory. The items enumerated by the Applicants in the Memorials (pp. 118-166) are not included in their submissions. We are not obliged to pronounce our views thereon. By way of illustration we shall examine

a few points. What is required from us is a decision on the question of whether the Respondent's policy of apartheid constitutes a violation of Article 2, paragraph 2, of the Mandate or not.

For the purpose of illustration we shall consider freedom of choice of occupations (cf. Memorials, pp. 121, 122 and 136).

In the field of civil service, participation by "Natives" in the general administration appears, in practice, to be confined to the lowest and least-skilled categories, such as messengers and cleaners. This practice of "job-reservation" for Natives is exemplified by allusion to the territorial budget, which classifies jobs as between "European" and "Natives".

In the mining industry the Natives are excluded from certain occupations, such as those of prospector for precious and base minerals, dealer in unwrought precious metals, manager, assistant manager, sectional or underground manager, etc., in mines owned by persons of "European" descent, officer in the Police Force. Concerning these occupations, "ceilings" are put on the promotion of the Natives. The role of the "Native" is confined to that of unskilled labourer.

In the fishing industry, the enterprises are essentially "European" owned and operated. The role of the "Native" is substantially confined to unskilled labour (Memorials, p. 119).

As regards railways and harbours, all graded posts in the Railway and Harbours Administration are reserved to "Europeans", subject to temporary exceptions. The official policy appears to be that "non-Europeans" should not be allowed to occupy graded posts.

The question is whether these restrictions are reasonable or not, whether there is a necessity to establish exceptions to the general application of the principle of equality or non-discrimination or not.

The matter of "ceilings" was dealt with minutely and at length in the oral proceedings by the Parties. The Respondent's defence against the condemnation of arbitrariness, injustice and unreasonableness on the part of the Applicants may be summarized in two points: the one is the reason of social security and the other is the principle of balance or reciprocity.

The Respondent contends that the Whites in general do not desire to serve under the authority of the Natives in the hierarchy of industrial or bureaucratic systems. If this fact be ignored and the Natives occupy leading positions in which they would be able to supervise Whites friction between the two groups necessarily would occur and the social peace would be disturbed. This argument of the Respondent seems to be based on a pessimistic view of the possibility of harmonious coexistence of diverse racial and ethnic elements in an integrated society.

It is not deniable that there may exist certain causes of friction, conflict and animosity between diverse racial and ethnic groups which produce obstacles to their coexistence and co-operation in a friendly political community. We may recognize this as one aspect of reality of human nature and social life. It is, however, no less true that mankind aspires and strives towards the ideal of the achievement of a harmonious society composed of racially heterogeneous elements overcoming difficulties which may result from the primitive instinctive sentiment of racial prejudice and antagonism. Such sentiment must be overcome and not approved. In modern, democratic societies we have to expect this result mainly from the progress of humanitarian education. But the mission of politics and law cannot be said to be less important in minimizing racial prejudice and antagonism and avoiding collapse and tragedy. The State is obliged to educate the people by means of legislative and administrative measures for the same purpose.

To take into consideration the psychological effect upon the Whites who would be subjected to the supervision of the Natives if a ceiling did not exist, that is nothing else but the justification or official recognition of racial prejudice or sentiment of racial superiority on the part of the White population which does harm to the dignity of man.

Furthermore, individuals who could have advanced by their personal merits if there existed no ceiling are unduly deprived of their opportunity for promotion.

It is contended by the Respondent that those who are excluded from the jobs proportionate to their capacity and ability in the White areas, can find the same jobs in their own homelands where no restriction exists in regard to them. But even if they can find jobs in their homelands the conditions may not be substantially the same and, accordingly, in most cases, they may not be inclined to go back to the northern sector, their homelands, and they cannot be forced to do so.

The Respondent probably being aware of the unreasonableness in such hard cases, tries to explain it as a necessary sacrifice which should be paid by individuals for the maintenance of social security. But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality.

The establishment of ceilings in regard to certain jobs violates human rights of the Natives in two respects: one is violation of the principle of equality before the law and equal opportunity; the other is violation of the right of free choice of employment.

The Respondent furthermore advocates the establishment of ceilings by the principle of reciprocity or balance between two legal situations, namely one existing in the White areas where certain rights and freedoms of the Natives are restricted and the other situation existing in the Native areas where the corresponding rights and freedoms of the Whites

are restricted. The Respondent seeks to prove by this logic that in such circumstances the principle of equality of the Whites and the Natives is observed. Unequal treatment unfavourable to one population group in area A, however, cannot be justified by similar treatment of the other population group in area B. Each unequal treatment constitutes an independent illegal conduct; the one cannot be counter-balanced by the other, as set-off is not permitted between two obligations resulting from illegal acts.

Besides, from the viewpoint of group interest, those of the Natives living in the White area outside the reserves are, owing to the number of the Native population, far bigger than those of the Whites living in the Native areas, the idea of counter-balance is quantitatively unjust.

It is also maintained, in respect of the restrictive policy as regards study to become an engineer by a non-White person, that the underlying purpose of this policy is to prevent the frustration on the part of the individual which he might experience when he could not find White assistants willing to serve under him. The sentiment of frustration on the part of non-White individuals, however, should not be rightly referred to as a reason for establishing a restriction on the educational opportunity of non-Whites, firstly because the question is that the frustration is caused by the racial prejudice on the part of the Whites which in itself must be eliminated and secondly because a more important matter is to open to the non-Whites the future possibility of social promotion. Therefore, the reason of the frustration of non-Whites cannot be justified.

* * *

Finally, we wish to make the following conclusive and supplementary remarks on the matter of the Applicants' Submissions Nos. 3 and 4.

1. The principle of equality before the law requires that what are equal are to be treated equally and what are different are to be treated differently. The question arises: what is equal and what is different.

2. All human beings, notwithstanding the differences in their appearance and other minor points, are equal in their dignity as persons. Accordingly, from the point of view of human rights and fundamental freedoms, they must be treated equally.

3. The principle of equality does not mean absolute equality, but recognizes relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sexes regarding public conveniences, etc. In these cases, the differentiation is aimed at the protection of those concerned, and it is not detrimental and therefore not against their will.

4. Discrimination according to the criterion of "race, colour, national or tribal origin" in establishing the rights and duties of the inhabitants of the territory is not considered reasonable and just. Race, colour, etc., do not constitute in themselves factors which can influence the rights and duties of the inhabitants as in the case of sex, age, language, religion, etc. If differentiation be required, it would be derived from the difference of language, religion, custom, etc., not from the racial difference itself. In the policy of apartheid the necessary logical and material link between difference itself and different treatment, which can justify such treatment in the case of sex, minorities, etc., does not exist.

We cannot imagine in what case the distinction between Natives and Whites, namely racial distinction apart from linguistic, cultural or other differences, may necessarily have an influence on the establishment of the rights and duties of the inhabitants of the territory.

5. Consequently, the practice of apartheid is fundamentally unreasonable and unjust. The unreasonableness and injustice do not depend upon the intention or motive of the Mandatory, namely its *mala fides*. Distinction on a racial basis is in itself contrary to the principle of equality which is of the character of natural law, and accordingly illegal.

The above-mentioned contention of the Respondent that the policy of apartheid has a neutral character, as a tool to attain a particular end, is not right. If the policy of apartheid is a means, the axiom that the end cannot justify the means can be applied to this policy.

6. As to the alleged violation by the Respondent of the obligations incumbent upon it under Article 2, paragraph 2, of the Mandate, the policy of apartheid, including in itself elements not consistent with the principle of equality before the law, constitutes a violation of the said Article, because the observance of the principle of equality before the law must be considered as a necessary condition of the promotion of the material and moral well-being and the social progress of the inhabitants of the territory.

7. As indicated above, so far as the interpretation of Article 2, paragraph 2, of the Mandate is concerned, only questions of a legal nature belong to the matter upon which the Court is competent. Diverse activities which the Respondent as Mandatory carries out as a matter of discretion, to achieve the promotion of the material and moral well-being and the social progress of the inhabitants, fall outside the scope of judicial examination as matters of a political and administrative nature.

Accordingly, questions of whether the ultimate goal of the mandates system should be independence or annexation, and in the first alternative whether a unitary or federal system in regard to the local administration is preferable, whether or in what degree the principle of indirect rule or

respect for tribal custom may or must be introduced—such questions, which have been very extensively argued in the written proceedings as well as in the oral proceedings, have, despite their substantial connection with the policy of apartheid, no relevance to a decision on the question of apartheid, from the legal viewpoint.

These questions are of a purely political or administrative character, the study and examination of which might have belonged or may belong to competent organs of the League or the United Nations.

8. The Court cannot examine and pronounce the legality or illegality of the policy of apartheid as a whole; it can decide that there exist some elements in the apartheid policy which are not in conformity with the principle of equality before the law or international standard or international norm of non-discrimination and non-separation. The Court can declare if it is requested to examine the laws, proclamations, ordinances and other governmental measures enacted to implement the policy of apartheid in the light of the principle of equality. For the purpose of the present cases, the foregoing consideration of a few points as illustrations may be sufficient to establish the Respondent's violation of the principle of equality, and accordingly its obligations incumbent upon it by Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant.

9. Measures complained of by the Applicants appear in themselves to be violations of some of the human rights and fundamental freedoms such as rights concerning the security of the person, rights of residence, freedom of movement, etc., but such measures, being applied to the "Natives" only and the "Whites" being excluded therefrom, these violations, if they exist, may constitute, at the same time, violations of the principle of equality and non-discrimination also.

In short, we interpret the Applicants' Submissions Nos. 3 and 4 in such a way that their complaints include the violation by the Respondent of two kinds of human rights, namely individual human rights and rights to equal protection of the law. There is no doubt that the Respondent as Mandatory is obliged to protect all human rights and fundamental freedoms including rights to equal protection of the law as a necessary prerequisite of the material and moral well-being and the social progress of the inhabitants of the Territory. By this reason, what has been explained above about the principle of equality in connection with Article 38, paragraph 1 *(c)*, is applicable to human rights and fundamental freedoms in general.

10. From the procedural viewpoint, two matters must be considered. The one is concerned with the effect of the Applicants' amendment of the Submissions Nos. 3 and 4 (Memorials, 15 April 1961, pp. 197-199) by the submissions of 19 May 1965 (C.R. 65/35). Since the amendment of the submissions is allowed until the stage of oral proceedings, and the amendment was made within the scope of the claim set forth in the Applications, there is no reason to deny its effectiveness. Furthermore,

we wish to mention that the Respondent raised no objection during the course of the oral proceedings regarding the amendment.

The other is concerned with the question of choice by the Court of the reasons underlying its decisions.

Concerning this question, we consider that, although the Court is bound by the submissions of the Parties, it is entirely free to choose the reasons for its decisions. The Parties may present and develop their own argument as to the interpretation of the provisions of the Mandate, the Covenant, the Charter, etc., but the Court, so far as legal questions are concerned, quite unfettered by what has been put forward by the Parties, can exercise its power of interpretation in approving or rejecting the submissions of the Parties.

For the foregoing reasons, the Applicants' Submissions Nos. 3 and 4 are well-founded.

V

We shall now examine the Applicants' other submissions one by one.

Final Submission No. 5 alleges that the—

> "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;" (C.R. 65/35, p. 70).

The Respondent's acts alleged to be inconsistent with the international status of the Territory are as follows (Memorials, Chap. VIII, pp. 189-194):

(a) General conferral of Union citizenship upon inhabitants of the Territory.

(b) Inclusion of representatives from South West Africa in the Union Parliament.

(c) Administrative separation of the Eastern Caprivi Zipfel from the Territory.

(d) The vesting of South West Africa Native Reserve Land in the South Africa Native Trust and the transfer of administration of "Native" affairs to the Union's Minister of Bantu Administration and Development.

Concerning *(a)*: that the status of the Native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory power, and, therefore, that the Native inhabitants are not invested with the nationality of the mandatory Power by reason of the protection extended

to them, was made clear by a resolution of 23 April 1923 of the Council of the League of Nations. (League of Nations, *Official Journal*, 1923, p. 604; cited in Memorials, p. 190.) This is the natural consequence of the fact that sovereignty does not rest with a mandatory Power and that it possesses no sovereign power over the mandated territory and the inhabitants.

Concerning South West Africa, the question of the status of the inhabitants had been regulated by an Act of 1926 (No. 18 of 1926) and an Act of 1927 (No. 40 of 1927), which were repealed in 1949 by the Act at present in force—the South African Citizenship Act, 1949 (No. 44 of 1949). By the latter Act, under section 2 (2), inhabitants of South West Africa who were born there and were domiciled there automatically became citizens of the Union by virtue of their place of birth.

Of course the individual inhabitants of the Territory can voluntarily obtain naturalization from the mandatory Power. But the compulsory mass conferment of the Respondent's citizenship, having regard to the spirit of the Mandate and the international status of the mandated territory, cannot be justified. The Respondent may find it difficult to defend itself against the charge of possessing the avowed intention of piece-meal incorporation amounting to *de facto* annexation.

The effect of the general conferment of Union citizenship upon the inhabitants of the Territory does not remain a purely theoretical one. It may have an important significance in the matter of the right of the inhabitants to address petitions to the United Nations Organization. If the general conferment be valid and if the inhabitants of the Territory acquire citizenship of the Union, they would lose the right of petition to the United Nations which they have had, and their right of petition —being the subject's right—could only be exercised against the highest legislative and administrative authority in the land, namely South Africa.

We consider that the act of the general conferment of Union citizenship upon the inhabitants of the Territory, being inconsistent with the international status of the Territory, goes beyond the scope and limit of the discretionary power recognized by Article 2, paragraph 1, of the Mandate and that Article 2, paragraph 1, of the Mandate, which stipulates that "... the Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as *an integral portion of the Union of South Africa* to the territory" (italics added), cannot be interpreted to justify such general conferment of Union citizenship. The reason for this is supposed to be that this provision recognizes such power in respect of administrative and legislative matters in the 'C' mandate because of the technical consideration of expediency and economy whilst not allowing highly political acts which may affect the international status of the Territory.

Concerning *(b)*: the South West Africa Amendment Act (Act No. 23

of 1949) provides for the inclusion of elected representatives from South West Africa in both the Senate and the House of Assembly of the Union Parliament. The same Act, in addition to deleting all references to the Mandate as such from the Union Statutes, makes no distinction between the representatives of the Territory and those elected from the provinces of the Union. The representatives of the Territory possess the same right to speak and to vote on matters regarding the Union also.

Apart from the question of the discriminatory policy of the Union concerning the election of the territorial representatives, namely election only by "Europeans", we are unable to overlook the important significance of the fact of the inclusion of elected South West African representatives. This amendment does not appear to come within the Mandatory's "power of administration and legislation over the territory ... as an integral portion of the Union of South Africa" (Article 2, paragraph 1); it means far more than a simple administrative measure which, as providing for treatment as an integral portion of the Union, is permitted by the said provision; it is an act of a constitutional nature which influences both South Africa and the Territory of South West Africa, which particularly affects the international status of the Territory as "an important step towards the political integration of the Territory into the Union" (Report of the Committee on South West Africa, U.N., *G.A., O.R., 11th Sess. Supp. No. 12* at 8 (A/3151) (1956), cited in the Memorials, pp. 192 and 193), and which implies the incorporation into South Africa of the Territory of South West Africa as a fifth province.

Therefore, the Respondent cannot justify the inclusion of the representatives from South West Africa by referring to the phrase "as an integral portion of the Union" in Article 2, paragraph 1, of the Mandate. The act of the Respondent is inconsistent with the international status of the Territory recognized by the provisions of Article 22 of the Covenant as well as by the Mandate for South West Africa.

Concerning *(c)*: heading *(c)* is concerned with the question of the administrative separation of the Eastern Caprivi Zipfel from the Territory. This part of the Territory of South West Africa, a narrow strip in the north-eastern corner of the Territory, has been subject to frequent change in the mode of its administration since the inception of the Mandate on South West Africa. The main reason thereof lies in geographical factors, namely the remoteness of this region from the administrative centre of the Territory, Windhoek, and the difficulties of access to it.

In 1939, the Union enacted Proclamation No. 147, transferring administration of the Eastern Caprivi Zipfel from the Administrator of South West Africa to the Union directly. In 1955 the report of the Committee on South West Africa condemned this separation as a violation of the Mandate, the main reason thereof appears to be that—

> ". . . such a separation is likely to prejudice consideration *(b)* of the 'General Conditions' which must be fulfilled before the Mandate régime can be brought to an end in respect of the countries placed under that régime, approved by the Council of the League on 4 September 1931, namely, that 'It [the territory] must be capable of maintaining its territorial integrity and political independence' ". (Report of the Committee on South West Africa, U.N. *G.A., O.R., 10th Sess., Supp. No. 12* at p. 10 (A/2913), 1955, cited in the Memorials, pp. 193 and 194.)

We cannot deny that geographical factors can play an important role in determining systems and measures of administration. We consider that the phrase "subject to such local modifications as circumstances may require" (Article 2, paragraph 1, of the Mandate) can be referred to in considering this kind of issue and that the decision of existence or otherwise of the necessity for the separate administration of this area comes entirely within the discretionary power of the Mandatory conferred on him by the said provision of the Mandate. Furthermore, we consider that the administrative separation, being in itself of a technical nature, cannot have an effect detrimental to what the "General Conditions" would expect to be realized.

Accordingly, the Applicants' contention on this matter is not well-founded.

Concerning *(d)*: this heading includes two points. As to the first point, apart from the possibility of consideration from the angle of Article 2, paragraph 2, particularly as regards the policy of apartheid or separate development, the vesting of South West Africa Native Reserve Land in the South African Native Trust is a measure which is of an administrative nature and in which economic considerations are predominant; therefore, it has nothing to do with the international status of the Territory. It belongs to matters within the discretionary power of the Respondent as Mandatory, as in the case of *(c)*. Concerning the second point, namely "the transfer of administration of 'Native' affairs to the Union's Minister of Bantu Administration and Development", we have only to refer to what has been said on *(c)* and the first point of *(d)*.

For the above-mentioned reasons the Applicants' contention under *(d)* is not well-founded.

* * *

In the submissions (original as well as final) the Applicants state that the Respondent continued to have the obligation to transmit petitions from the inhabitants of the Territory (Submission No. 2) and that the Respondent has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as

Mandatory and that the Respondent has the duty to transmit such petitions to the General Assembly (Submission No. 8).

There is no provision on petitions either in Article 22 of the Covenant or in the Mandate. The only legal basis for the reference made by the Applicants is the Rules adopted by the Council of the League of Nations on 31 January 1923, relating to petitions from mandated territories. The mandates after the First World War did not mention the right of petition, the reason being that this right was "regarded as a natural concomitant of the system established by the Covenant . . . The receipt and examination of petitions became subsequently one of the main features of the system of mandates" (Sir Hersch Lauterpacht, *International Law and Human Rights*, 1950, pp. 244-245). If there were no guarantee through the recognition of a right of petition, the fulfilment of the protection of human rights and fundamental freedoms in general and in the mandates might be illusory. This right is inherent in the concept of the body politic and other political institutions. Even if the right of petition is not based upon any legal provision, it is "in a sense a natural right" (Duncan Hall, *Mandates, Dependencies and Trusteeship*, 1948, p. 198). In this sense the above-mentioned "League of Nations Rules" and the provision of the Charter concerning the competence of the Trusteeship Council (Article 87 *(b)*) have no more than a confirmatory meaning.

The right of petition entails the obligation of the Mandatory to transmit petitions to the supervisory organ for acceptance and examination. In this respect, what is said about the survival of international supervision, despite the dissolution of the League and the replacement of the Council of the League by the General Assembly as the supervisory organ, can be applied to the right of petition.

From what is stated above, it can be concluded that the obligation of the Mandatory to transmit to the General Assembly petitions from the inhabitants of the Territory exists; therefore Submission No. 2 concerning petitions is well-founded.

Next, it is clear from the pleadings and oral hearing that the Respondent has failed to comply with this obligation; accordingly, Submission No. 8 is well-founded.

* * *

The Applicants' Final Submission No. 6 reads as follows:

> "Respondent has established military bases within the Territory in violation of its obligation 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."

Article 4 of the Mandate based on a part of Article 22 (5) provides:

"The military training of the natives other 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."

The second sentence of Article 4 characterizes the status of the mandated territory concerning militarization. It declares the military neutralization of the Territory by prohibiting the establishment of military or naval bases or the erection of fortifications. The Mandatory is not permitted to utilize the Territory, by means of bases or fortifications, for military purposes. This is a limitation imposed upon the authority of the Mandatory concerning the material element of the military functions which may be exercized by the Mandatory.

The first sentence of Article 4 of the Mandate prohibits the military training of the Natives. It may be said that the spirit of this provision is to be found in a humanitarian consideration, namely the prohibition of the militaristic exploitation of the indigenous population.

However, the prohibition of the military training of the Natives is not absolute; the military training of the Natives for the purposes of internal police and the local defence of the Territory is permissible. The reason thereof may be that the internal police and the local defence are not related to the humanitarian idea of this provision.

The first sentence of Article 4 refers only to the training of Natives; it remains silent on that of White people. Accordingly, it is doubtful whether military training in general or at least for the purposes of internal police and local defence is permissible.

That the training of Whites for the purposes of internal police and local defence is not to be deemed to be prohibited, can be assumed from the fact that the provision relates only to Natives and that there is no reason to prohibit the training of Whites for the purposes of internal police and local defence from the viewpoint of the military neutralization of the Territory.

Nevertheless, the question is whether military training otherwise than for the purposes of internal police and local defence is also permissible for the Whites. We consider that the provision aiming at the protection of Natives is not concerned with Whites, and that the military training of Whites in general is not inconsistent with the principle of neutralization of the Territory. This principle must be considered as not inconsistent with the Respondent's right and duty to defend the Territory in the event of its being attacked.

Such right and duty must be performed and exercised within the limit prescribed by Article 4, namely without establishing military bases and without erecting fortifications. Within this limit the Respondent is considered to be permitted to maintain facilities for the training of non-Natives in the Territory.

A few points must be clarified relating to the arguments between the Parties. As to whether the military bases must be related to aggressive designs or not, the conclusion must be in the negative. The Court must

decide the question objectively; it is not concerned with the examination of the Respondent's motive for establishing military bases.

The question whether a common feature of a military base is that a base is something utilized by a force or an army for the purposes of operations or for a campaign or not, must be answered in the affirmative in the sense that the prohibition has a practical meaning mostly in time of peace and that the purposes of operations or of a campaign are inherent in the potential meaning. The question whether the place in the Respondent's administrative hierarchy and chain of command determines that it is a military base or not, must be answered in the negative. The question of administrative hierarchy and command can have no bearing on the substantive character of a military base.

As to the Applicants' submission, it is the military bases alleged to be established in the Territory by the Respondent that are in question, not the military training of the Natives. The Applicants allege that the Respondent maintains three military bases within the Territory, which are the Regiment Windhoek, a military landing ground in the Swakopmund District of South West Africa and "at least one military facility in or near the Kaokoveld" in part of the Territory.

The Applicants, however, presented no direct evidence to establish their charge. Their charge was based simply on "information and belief" (Memorials, p. 181) on which the Applicants refrained from calling evidence on the part of their informants. On the contrary, the Respondent produced direct evidence in contradiction of the evidence of the Applicants based on information and belief. Testimony given by a witness-expert, who made inspection of the three places in September 1965 and who was presented by the Respondent at the oral proceedings, made upon us a strong impression of the absence of any military base at the three places mentioned above. On the other hand, the Applicants neither produced any evidence in contradiction thereof nor disputed it in cross-examination.

On the evidence before the Court the Respondent did not establish any military or naval bases in the Territory. Therefore, Applicants' Submission No. 6 is not well-founded.

* * *

The Applicants' Submission No. 9 reads as follows:

> "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."

The answer to this question depends upon the nature of Article 7 (1) of the Mandate. Does this provision declare the prohibition of unilateral modification of the Mandate by the Respondent in view of the contractual nature of the Mandate or does it impose some duty upon the Respondent to abstain from conduct contrary to the provisions of the Mandate?

In our view Article 7 (1) must be interpreted in the sense of the first alternative. This provision simply defines a condition for the modification or amendment of the terms of the Mandate, namely the consent of the Council of the League of Nations. This provision is of a purely procedural nature. Its non-observance merely produces the effect that the modification cannot take place.

The Applicants' charge in the Applications rested on the fact that the Respondent had substantially modified the terms of the Mandate and also had attempted to do so and, in the Memorials, that the Respondent attempted to modify the terms of the Mandate.

Whether the alleged conduct of the Respondent is the modification or the attempts to modify, the result is the same.

Modification is impossible so long as the consent of the United Nations is lacking. Since the attempts presuppose the possibility of modification, they are also impossible without the consent of the United Nations.

The facts relied upon by the Applicants to establish the attempts by the Respondent to modify the Mandate are not specified in Final Submission No. 9, but they are referred to in Chapters V, VI, VII and VIII of the Memorials (Submission No. 9). Chapters V, VI and VIII deal with alleged violations of Article 2 of the Mandate and Chapter VII deals with alleged violations of Article 4 of the Mandate.

If the alleged violation of these Articles exists, the violation is simply concerned with the individual provisions and not with Article 7, paragraph 1.

A few additional remarks may be made on this Article of the Mandate.

The prohibition of unilateral modification exists not only in regard to the Mandatory but in regard to the League of Nations also.

Article 7, paragraph 1, possesses essential meaning for the surviving Mandate after the dissolution of the League just as does Article 6 in regard to administrative supervision. The General Assembly of the United Nations was therefore substituted for the Council of the League.

So long as the Mandate survives on an institutional basis after the dissolution of the League, the necessity for the future amendment of the Mandate by consent of both parties does subsist. In this sense the contractual element is recognized as remaining together with the institutional elements.

Moreover, this claim of the Applicants, namely that an attempt to

modify the terms of the Mandate is a breach of Article 7, paragraph 1, can be recognized as part of the dispute between the Parties which existed prior to the Application in the sense that the claim constitutes a development of the same dispute.

For the reason indicated above, the Applicants' Submission No. 9 is not well-founded.

(Signed) Kotaro TANAKA.