INTERNATIONAL COURT OF JUSTICE

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SOUTH WEST AFRICA CASES

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

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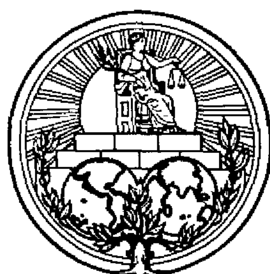
AFFAIRES DU SUD-OUEST AFRICAIN

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

VOLUME IX



The present volume contains the continuation of the oral arguments on the merits in the *South West Africa* cases and covers the period 27 April to 15 June 1965. The beginning of the oral arguments on the merits (15 March to 26 April 1965) is published in Volume VIII, pages 105-712. The proceedings in these cases, which were entered on the Court's General List on 4 November 1960 under numbers 46 and 47, were joined by an Order of the Court of 20 May 1961 (*South West Africa, Order of 20 May 1961, I.C.J. Reports 1961*, p. 13). Two Judgments were given, the first on 21 December 1962 (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319), and the second on 18 July 1966 (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6).

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

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Le présent volume contient la suite des plaidoiries sur le fond relatives aux affaires du *Sud-Ouest africain*, et porte sur la période allant du 27 avril au 15 juin 1965. La première partie des plaidoiries sur le fond (15 mars-26 avril 1965) est publiée dans le volume VIII, pages 105 à 712. Ces affaires ont été inscrites au rôle général de la Cour sous les n°s 46 et 47 le 4 novembre 1960 et les deux instances ont été jointes par ordonnance de la Cour le 20 mai 1961 (*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 13). Elles ont fait l'objet de deux arrêts rendus le 21 décembre 1962 (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319) et le 18 juillet 1966 (*Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966*, p. 6).

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La Haye, 1966.

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PART II *(continued)*

SECTION B

ORAL ARGUMENTS

PUBLIC HEARINGS

held from 15 March to 14 July, 20 September to 15 November and 29 November 1965, 21 March and on 18 July 1966, the President, Sir Percy Spender, presiding
(continued)

PARTIE II *(suite)*

SECTION B

PLAIDOIRIES RELATIVES AU FOND

AUDIENCES PUBLIQUES

tenues du 15 mars au 14 juillet, du 20 septembre au 15 novembre, le 29 novembre 1965, le 21 mars et le 18 juillet 1966, sous la présidence de sir Percy Spender, Président
(suite)

ANNEX TO THE MINUTES *(continued)*
ANNEXE AUX PROCÈS-VERBAUX *(suite)*

9. ARGUMENT OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARINGS OF 27 AND 28 APRIL 1965

Mr. President and Members of the honourable Court, on 30 March 1965, prior to commencing its statement concerning legal issues involved in the cases at bar, Respondent addressed to the honourable Court a proposal, or application, which in Respondent's phraseology envisages: "an inspection *in loco* as a means of assisting this Court in coming to a just conclusion on the factual aspects of the case" (**VIII**, p. 271).

Pursuant to leave granted by the honourable President the Applicants reserved the right to deal with the matter at a later stage, as appears from page 280 of the same verbatim record. As the Applicants stated at that time, Respondent's proposal requires consideration of issues concerning the merits, or certain of them, with which the Parties have not dealt in the light of the agreed procedure of treating at this stage of the Oral Proceedings essentially with questions of law. The justification advanced by Respondent for raising at the outset of arguments addressed to legal issues a proposal described by Respondent as—in its words—"canvassing of the factual side of this case" was that, in the event the Court were to accept the proposal, arrangements would have to be made, and again I quote from Respondent's language, "well in advance in order to serve their purpose and in order to avoid unnecessary delay", and in that connection Respondent referred to several weeks or more of possible delay which might otherwise ensue. Mr. President, the purported justification for submitting the proposal out of context accordingly presupposes that the Court could and should decide, *in limine*, prior to hearing or considering the merits, whether the suggested procedure would in fact assist the Court, or could do so, in reaching a judgment concerning the validity of the submissions. As will readily appear from an examination of the proposal itself, however, such a presupposition is not founded in the Applicants' respectful submission. Indeed, unless the Applicants misconceive the terms upon which Respondent has submitted its proposal, Respondent itself suggests that certain previous decisions of an unspecified nature would have to be made by the Court before Respondent's proposal would become relevant for consideration or ripe for decision.

Before turning to an analysis of Respondent's proposal, however, certain preliminary observations may be in order. It is assumed by the Applicants that no adversarial issue appropriately could arise, in respect of the proposition which seems elemental to the Applicants, that any method, or any measure, which the Court might consider to be an aid to the performance of its function would fall without the ambit of its judicial power. Equally axiomatic is the premise that the Parties—all Parties—would wish to co-operate with each other and with the Court to assure that all requisite means and facilities would be placed at the Court's disposal to effectuate such a purpose. The Applicants accordingly fail to understand the significance of Respondent's comment made in the course of the oral argument in the verbatim record of 14 April 1965 that Respondent has great difficulty, that Respondent attributes to the

Applicants "great difficulty with a proposition that there is to be an inspection to compare comparable standards", in Respondent's phrase at **VIII**, page 625. The Applicants, as a matter of fact, have not hitherto expressed views concerning this matter. Furthermore, the Court in evaluating the merits and feasibility of the proposal would no doubt, in the Applicants' assumption, weigh in the scales of justice the factors of delay, expense and undoubted inconvenience which the Respondent's unusual proposal would entail, and one of the elements to be weighed in such scale would of course be the time and manner of its presentation, as well as a consideration of the issues of fact and law which enter into the Court's decision thereupon.

With respect to the manner of Respondent's presentation, it seems to the Applicants pertinent to recall that the Applicants' Reply was filed with the Registry of this Court in June of 1964. Respondent's Rejoinder was filed in December of the same year. No mention was made, either in correspondence with the Court on the part of Respondent or in its Rejoinder, of a proposal which Respondent now asserts would be essential to an adjudication by the honourable Court of the validity or otherwise of the Applicants' submissions. On the contrary, the first mention of the proposal so far as the Applicants are aware—certainly the first mention which was brought to their notice—was in the form of a letter from Respondent's Agent following a meeting with the honourable President of the Court earlier the same day, on 12 March 1965, two days prior to the scheduled commencement of Oral Proceedings in this case; and in the course of that letter, and pursuant to the information received by the Applicants, Respondent's endeavour at that time was to present its proposal as a matter of the gravest haste and urgency to the honourable Court, even prior to the commencement by the Applicants of the presentation of their case. Whether the proposal submitted in this manner by Respondent reflects an afterthought on its part, or a change of position with respect to a necessary element in its submission of proof in this case or of evidence thereon, is beyond the realm of the Applicants' speculation; but it does, with respect, appear strange that a matter thus proposed for the first time, under such circumstances and out of context, should be indeed as important to Respondent's case as it maintains.

Respondent's proposal, Mr. President, comprises four essential and interrelated elements. The first is the timing of its presentation; the second, its asserted purposes; third, the areas proposed to be inspected; and fourth, the conditions implied or suggested. For the sake of convenience each of these may be treated separately, keeping in view, however, their essential interrelationship. First, the timing of the presentation of the proposal—indeed, the first aspect of the proposal arising for consideration is its timing.

In addition to the factors I have already mentioned relating to the precipitate, ostensibly urgent, manner in which it has been placed before the Court, there is, with respect to the question of timing, a dual question of whether the Respondent has introduced the matter prematurely, even from the standpoint of its own theory of the case, and whether the honourable Court could at this stage of the proceedings, in any event, reach a valid and reasonable conclusion other than perhaps to defer a decision as to methods or measures, if any, which the Court might consider helpful to an adjudication of the issues in these proceedings. Respondent itself has interposed pre-conditions to action by the Court upon the pro-

posal for the so-called inspection. In its address to the Court on 30 March 1965, Respondent, referring to the alleged violation of the sacred trust provisions of the Covenant of the League of Nations and of the Mandate, declared:

> "There are of course certain legal issues to be dealt with before this fundamental, crucial issue is reached [referring to the sacred trust]. Depending on the outcome of those legal questions, it may be that this particular charge may not arise for decision at all." (**VIII**, p. 270.)

Although Respondent did not specify the legal issues which it had in mind in this context, it may be appropriate to speculate concerning this matter in the light of Respondent's written pleadings and oral argument. Respondent, no doubt, will clarify the matter further if the Applicants have misconceived its actual intention.

On the basis suggested, several legal issues appear to call for determination prior to decision by the Court upon the proposal under discussion. The first of these is the issue posed by the Respondent's contention, presented as an alternative argument in the Counter-Memorial and Rejoinder, that the Mandate, as a whole, has lapsed on the basis that Article 6 and Article 7 (1) providing for international accountability allegedly have lapsed. In this connection it will be recalled that Respondent has contended that the 1950 Advisory Opinion should not be followed, and the 1962 Judgment on the preliminary objections reversed, in this respect.

Acceptance by the Court of Respondent's contention, with respect to total lapse of the Mandate, would, of course, carry with it the demise of Article 2 of the Mandate itself. In that event, no issue of fact or law with respect to Article 2 would arise for decision, again quoting Respondent's phrase. Moreover, Respondent's alternative contention, in respect of lapse of the Mandate, would not itself arise for decision unless the Court should hold, contrary to the Applicants' submission, that the provisions of the Covenant and of the Mandate regarding international accountability themselves have lapsed. The foregoing contentions and counter-contentions are, at the present phase of the Oral Proceedings, still in the course of presentation to the honourable Court. With respect to the legal issues relating to the asserted lapse of international accountability furthermore, the Applicants have sought to point out that the issue of survival, or otherwise, of provisions regarding international supervision is related to a consideration of the *facts*. Pursuant to arrangements readily agreed for the Court's convenience, presentation and full treatment of such facts has been reserved for subsequent presentation by the Parties at a later stage. As the Applicants stated, in the course of their address to the Court on 18 March 1965:

> "The Applicants will set out, at a later stage of these proceedings, the facts, and related considerations, which make clear, in our respectful submission, the practical necessity for administrative supervision. Such practical necessity, as we believe will emerge clearly from the facts, reinforces and confirms the legal considerations supporting the Applicants' submission, that administrative supervision is of the essence of the Mandate and must continue so long as the Mandate itself endures." (**VIII**, p. 122.)

A similar relationship between fact and law inheres in the legal issue joined by the Parties in respect of the survival, or otherwise, of Article

7 (1) of the Mandate, which requires the consent of the supervisory organ for any modification of the terms of the Mandate. As the Applicants sought to make clear, the consent to which Article 7 (1) refers must be an informed consent, only the same organ charged with administrative supervision over the Mandate could be in a position to exercise an informed judgment in respect of proposals for modification of the Mandate's terms.

The link between Article 6 and Article 7 (1), accordingly, as perceived by the Applicants, is made clear by the logical nexus between the two, as well as by the Advisory Opinion of 1950, from which relevant passages have been quoted in **VIII**, pages 216-218. The references to the Advisory Opinion of 1950, are at pages 141-143.

Respondent contends that Article 7 (1) was dependent for its operation on organs of the League, and that it has become inoperable and, consequently, has lapsed. That is the contention submitted to the Court by the Respondent in **VIII**, page 523. The Applicants, to the contrary, submit that Article 7 (1) remains in effect and that, in accordance with the unanimous holding of this honourable Court in the 1950 Advisory Opinion:

> "... the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations". (*I.C.J. Reports 1950*, p. 144.)

Hence, Mr. President, a legal issue has been joined between the Parties, the resolution of which has a direct bearing upon Respondent's contention that the Mandate, as a whole, has lapsed, along with Article 2 thereof, a contention which would require adjudication prior to the proposal of Respondent for an inspection becoming a live question for consideration or decision.

It will be noted that in the foregoing discussion the Applicants have searched Respondent's written pleadings and oral arguments for indications concerning the possible speculative nature of the unspecified "legal issues", which is the only way Respondent characterized them, upon which decisions are said by Respondent to be necessary before the issue of alleged violations of Article 2 of the Mandate, in its language, "is reached", and which otherwise, as Respondent said, "might not arise for decision at all". That, as I have said, is from the verbatim record, **VIII**, page 270. But, Mr. President, the matter does not rest there.

Equally relevant to the question of prematurity, or otherwise, of Respondent's submission, at this time, of its inspection proposal, and, consequently, of the question whether the proposal is ripe for consideration or decision, is yet another pre-condition interposed by Respondent to a decision upon the proposal, but this time, however, in more specific form than in the case of its earlier reference merely to "certain legal issues", as I have previously mentioned. In explaining its proposal, Respondent summarized, in selective and truncated form, certain arguments it intended to present to the Court at an appropriate stage of the proceedings. In respect of factual and related issues, Respondent's summary distorted the Applicants' position on the merits, possibly because of the perceived necessities of the occasion, or possibly for other reasons, perhaps inadvertently. Such distortions will be dealt with shortly, in

connection with a consideration of the second aspect of Respondent's proposal, to wit, the purposes which Respondent asserts might be served by the production of expert testimony and by the proposed inspection *in loco*.

In the course of its presentation, however, Respondent referred to the alleged violation of Article 2 of the Mandate and stated, in the course of its presentation of the proposal under discussion:

> "As the Court knows, our first contention in that regard, as to the basis or criterion for adjudication, is that on a proper construction of the Mandate, and on viewing the probabilities in that regard, this Court was not intended to adjudicate on issues of that nature at all. Of course [said Respondent], if that proposition is to be accepted then no further question as to a decision of disputed facts, or of evaluating those facts, or of applying policies to those facts, would arise for this Court." (**VIII**, p. 275.)

In other words, if the Court should accept Respondent's first alternative contention, to wit, that issues concerning alleged breaches of Article 2 of the Mandate are not justiciable, then its proposal under discussion would not arise for consideration or action.

Respondent has thus interposed another, and this time specific, pre-condition to the necessity or timeliness of a decision by the Court whether the taking of testimony, either at the seat of the Court or elsewhere, or the exercise in some other form by the Court of its functions elsewhere than at the seat of the Court, whether such a decision would be relevant or appropriate at this time, prior to the accomplishment of the pre-condition, or satisfaction thereof, to which I have just referred.

Under these circumstances, it is far from clear why Respondent in fact deemed it necessary, at this stage of the proceedings, to submit its proposal for a so-called inspection in respect of issues which its first contention holds to be non-justiciable. The only justification advanced by Respondent for introducing the question of an inspection, prior to the completion of argument either on legal issues or on facts, or the presentation of the latter, is that the matter should not be delayed unduly, as I have already said, and I have just quoted from the verbatim record, **VIII**, page 271.

Needless to say, the Applicants share with Respondent the conviction that there should be no undue delay in any phase of the present litigation. As the Applicants pointed out at the commencement of these proceedings—and I take the liberty of quoting from the verbatim record, **VIII**, page 109:

> "Few, if any, legal issues underlying an international dispute referred to this honourable Court or to the Permanent Court of International Justice . . . as well, for resolution by judicial means, can have consumed so much of this honourable Court's time and attention during the course now of almost 15 years."

And I refer, Mr. President and Members of the honourable Court, to the commencement, the antecedents of the present litigation in the form of the Advisory Opinion of 1950. As the record of these proceedings must make clear, the Applicants always have sought to co-operate toward the end that the issues herein might be justly and expeditiously determined. They have faithfully observed self-imposed, stringent time limits, always subject to the Court's consent, upon the preparation and filing of written

pleadings. They have hoped and continued to hope that decisions by this honourable Court will not be the subject of continuous and repeated re-argument of the same issues, often in the same form. In short, the Applicants adhere to the conviction that although litigants have a right to a day in Court, there must some time be an end to litigation.

These comments, as to which there can be very little difference of opinion, are occasioned by Respondent's course in submitting to this honourable Court prematurely and out of context, a proposal which Respondent on the one hand contends is not ripe for decision until certain specified and unspecified legal issues are first disposed of and on the other hand, which Respondent asserts should now be decided to avoid what would cause undue delay in making arrangements for procedures, which would not be relevant or appropriate if Respondent's legal contentions and premises are sustained by the Court.

I should now like to turn to the second aspect of the matter, the purposes asserted by Respondent to underly its proposal. The Applicants have referred to the axiomatic premise that the Parties would wish to assure full and expeditious co-operation in respect of any measure or any method which the Court might consider appropriate to the exercise of its judicial function in these cases. Toward that end, and assuming that to be all a part of the reason for the haste and the timing of Respondent's proposal, there may be, to do full credit, an assumption implicit that although premature the Court might wish to set in train certain preliminaries, at least with respect to the possibility that the Court might, at some later stage and on some assumptions now hypothetical and contingent, decide that the arrangements might lead to facilitating and expediting actions or measures by the Court which it might come to conclude at that future time are relevant to and in aid of the exercise of its judicial function. Such an assumption would, of course, be based upon the contingency that the Court decided adversely to Respondent's legal contentions relating to the lapse of international supervision, ineffectiveness of the compromissory clause, lapse of the Mandate as a whole, and the asserted non-justiciability of Article 2 of the Mandate.

On the basis of the foregoing assumptions or pre-conditions, it is necessary then to examine the purposes which Respondent asserts would be served by production of expert testimony and more specifically, in the context of the present discussion, the proposed exercise by the Court of certain of its functions, elsewhere than at the seat of the Court.

Consideration of Respondent's proposal at this stage of the Oral Proceedings, Mr. President, poses something of a dilemma in confining the discussion to matters strictly relevant to an appraisal of Respondent's proposal without, at the same time, anticipating issues which are still in the course of rebuttal and response. The Applicants have adverted to the fact that Respondent itself found it necessary to anticipate some such issues prior to their having been reached in the regular order and in doing so has, unfortunately, not wholly been able to resolve the dilemma of selection and truncation without distortion, which the Applicants would be very anxious to avoid. It seems, Mr. President, that in attempting to present the proposal for the sake of avoiding undue delay, Respondent has indeed created a risk of undue confusion. With respect to the Applicants' submission of considerations relevant to the discussion under proposal, it appears to the Applicants that there are three principal grounds which Respondent advances in support thereof. Taking these in

order, the first is the alleged motivation underlying the Application filed in these proceedings in November 1960; the second, the contentions of the Applicants in respect of fact issues as described by Respondent and thirdly, the asserted legal basis of the alleged violations of the Mandate and the Covenant of the League, again as ascribed by Respondent to the Applicants. Each of these three factors or reasons advanced in support of the Respondent's proposal will, with the President's permission, be considered in turn.

First with respect to the alleged motivation of the Applicants, which figured largely in the presentation by Respondent in support of its proposal in its address on 30 March 1965. Charges launched at impeachment of the Applicants' motive in seeking judicial recourse echo a theme often voiced by Respondent's highest officials. The charges gain neither dignity nor weight nor credibility by repetition before this honourable Court. In the language employed by Respondent in addressing the Court on 30 March 1965:

> "The proceedings, as the Court would know from the pleadings, are the culmination of a vehement campaign which has been waged against the South African Government for a long period and persistently in the international political arena, particularly in the United Nations ...
>
> From the South African point of view we see that campaign as being one of abuse and vilification, motivated on the part of its leaders by purely political objectives with very little, if any, bearing on the real merits of administration of the Territory of South West Africa, or the real interests and needs of the population of that Territory." (**VIII**, pp. 272-273.)

Mr. President and Members of this honourable Court, characterization of recourse to judicial process as the culminating act of a "political campaign" as it is called, is more than a contradiction in terms. Such a charge strikes at the heart of the judicial process itself. Public confidence in the rule of law and in the institutions essential to the maintenance of a just and peaceful order should not be corroded by recrimination concerning the motives of those who seek resolution of legal disputes in accordance with international law.

There is no room for doubt that weighty social, economic, political and moral questions underly the issues joined in these proceedings. We must all anticipate and hope, Mr. President, that this honourable Court will continue to be the forum for arbitrament of legal issues which inhere in many clashes of view affecting the lives and welfare of men and of nations. Parties to the Charter of the United Nations have undertaken no less an obligation than this. In this very case, the United Nations General Assembly by an overwhelming majority has seen fit to refer to this pending litigation. The resolution has been quoted in the Memorials (**I**) at pages 84-85 and the Court's attention is respectfully addressed to the substance of that resolution from which I should like to take the liberty of reading for the record at this point. It is resolution 1565 (XV) of 1950:

> "*The General Assembly*,
>
> *Recalling* its Resolution 1361 (XIV) of 17 November 1959, in which it drew the attention of Member States to the conclusions of the special report of the Committee on South West Africa con-

cerning the legal action open to Member States to submit to the International Court of Justice any dispute with the Union of South Africa relating to the interpretation or application of the provisions of the Mandate for the Territory of South West Africa, if such dispute cannot be settled by negotiation,

"*Noting with grave concern* that the administration of the Territory, in recent years, has been conducted in a manner contrary to the Mandate, the Charter of the United Nations, the Universal Declaration of Human Rights and the resolutions of the General Assembly, including [certain resolutions which are then set forth, and then skipping several paragraphs]

1. "*Notes with approval* the observations of the Committee on South West Africa concerning the administration of the Territory as set out in the Committee's report to the General Assembly at its fifteenth session, and finds that the Government of the Union of South Africa has failed and refused to carry out its obligations under the Mandate for the Territory of South West Africa;
2. *Concludes* that the dispute which has arisen between Ethiopia, Liberia and other Member States on the one hand, and the Union of South Africa on the other, relating to the interpretation and application of the Mandate has not been and cannot be settled by negotiation;
3. *Notes* that Ethiopia and Liberia, on 4 November 1960, filed concurrent applications in the International Court of Justice instituting contentious proceedings against the Union of South Africa;
4. *Commends* the Governments of Ethiopia and Liberia upon their initiative in submitting such dispute to the International Court of Justice for adjudication and declaration in a contentious proceeding in accordance with article 7 of the Mandate."

Mr. President, the course of this very litigation and its antecedent proceedings during the past 15 years demonstrates how one-sided indeed has been the remission of such issues to the judicial process and it is difficult to see what more eloquent, if mute refutation, there could be of Respondent's charges of political motivation than recourse to judicial settlement of a protracted dispute which has not found solution through the processes of debate and negotiation. And this honourable Court has held that the issues in dispute are of a legal nature, that they involve interpretation and application of an international agreement and that the Applicants have an interest of a legal nature in their resolution.

This honourable Court as long ago as 1950 held with unanimity that Respondent's contention that the Mandate over South West Africa has lapsed and I quote:

"... is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself".

That is from the 1950 Opinion, page 132.

In 1962, the honourable Court reaffirmed its prior opinion holding that "the Mandate as a whole is still in force"—that is from the 1962 Opinion at page 335.

In the teeth of these repeated decisions, Respondent persists today in its contention that the Mandate is not in existence and asserts a right of administration and possession over the Territory unfettered by international obligation and unanswerable to international accountability and

at the same time Respondent levels against the Applicants accusations of improper motive in seeking judicial recourse.

Mr. President, it is distasteful to deal with charges which call more for disdain than for denial, but denial there must be of the charge and denial must justly be recorded at this point.

Several comments may be additionally relevant to a true perspective of the position of the Parties to these proceedings. The first is that, so far as is relevant in the context of this discussion of Respondent's proposal, and the weight and significance to be attached to evaluation of evidence herein, as well as of the practicability or suitability of proposed procedures by which the Court should exercise its functions elsewhere than at the seat of the Court, the first of these considerations to which I refer is Respondent's practice—indeed, one may say tradition—of applying two yardsticks for measuring the views of the many governments, organizations and individuals who criticize or, more accurately, express revulsion concerning the policy and practice of apartheid.

Those whom Respondent asserts lack first-hand knowledge of what it variously describes as, in its words, "African circumstances" "African realities" and "African standards"—and I shall have more to say about this in a moment—are measured by a yardstick of ignorance and discredited for that reason. On the other hand, those critics who are admittedly and undisputedly knowledgeable are measured by a yardstick of hostility, a rather unworthy perspective or motive and discredited on that ground. Both yardsticks, indeed, are often brought into play at the same time: it does not matter so long as the result is impeachment.

A striking illustration, and it is, in the Applicants' respectful view, relevant to a consideration of all the circumstances and implications of the Respondent's proposal under discussion—a striking illustration of Respondent's method and approach in the respect just described is to be found in Respondent's comments concerning the views of governments in respect of the policy of apartheid, which the Applicants have cited in the form of illustrative examples in the Reply, **IV**, at pages 295 and following. It is not the intention of the Applicants to burden the record at this point with more than a reference to the citation. Further reference has been made in the earlier proceedings at this stage.

Governments whose views are there recorded are: the United States, the United Kingdom, France, Norway, Ireland, Poland, Japan, Malaya, Greece, China, Mexico, the Netherlands and Pakistan. Many more could have been cited. So far as the Applicants are aware, none of these are African States.

Now Respondent's comments with respect to the views expressed by these Governments, officially before international bodies, may be found in the Rejoinder, **V**, at pages 382-383 and at pages 389-390, *inter alia*. Respondent takes as a point of departure the alleged "hostility of the non-White world"—to use its own characterization—and "particularly many of the newly independent States of Africa towards South Africa". Such "hostility", in Respondent's phrase, Respondent goes on to aver—

> "... has increasingly and avowedly been directed towards alienating the Western nations from South Africa, and in the process the new nations have made full use, as bargaining factors, of their voting strength in the United Nations, as well as of their actual and potential economic and strategic importance". (**V**, p. 382.)

Proceeding from this conspiratorial premise, and this is the way the facts and circumstances of this case appear to be evaluable, in Respondent's submission, advanced in support of this proposal under discussion, Mr. President—proceeding from this conspiratorial premise Respondent continues:

> "In the result the African States [and here it is to be noted parenthetically the qualifying word previously used 'many' is omitted by Respondent] have managed to obtain a long list of condemnations of Respondent's policies even by nations with close ties with South Africa." *(Ibid.)*

The apparent relevance of these references, all taking place in the context of the presentation by Respondent of its proposal under discussion, the apparent implications and significance of these comments, and comments similar to them—I have quoted from the Rejoinder, I am referring to Respondent's comments concerning hostility—are that they have some bearing of an unspecified nature, left to innuendo and implication, with respect to the so-called "African reality" with which I shall deal.

Respondent does not, however, stop with a mere blanket indictment of the motives of the many governments which have long condemned the policy and practice of apartheid on legal, moral and humanitarian grounds. Again, the yardsticks of impeachment are brought into play by Respondent in this context as follows:

> "However, on analysis, the list [that is the list of condemnations, selectively but representatively quoted in the Reply] becomes considerably less impressive. In the first place, even a cursory examination shows that most of the statements, if sincerely meant, were based on entirely fallacious assumptions . . . In the second place it is questionable to what extent the expressions of views really represent the considered opinions of the governments expressing them, in particular since the statements quoted by Applicants are all negative in character—they oppose or condemn a policy, without indicating or suggesting that the spokesmen have given any real thought to possible alternatives." (**V**, pp. 382-383.)

The full import and implication of Respondent's comment concerning fallacious assumptions is made explicit in a subsequent passage in the Rejoinder, to which the comment just quoted is linked by a footnote.

In the latter passage Respondent wields the yardsticks of bias, as well as of ignorance, in appraising the views of governments, as follows:

> ". . . in the passages quoted by Applicants, it is apparent that the speakers concerned either had no accurate conception of the true nature of Respondent's policies, or deliberately exaggerated, misrepresented, or distorted them". (**V**, p. 389.)

In respect of the significance attributed by Respondent to failure to indicate or suggest alternatives, that too, Mr. President, is a factor involved, apparently, in Respondent's theory of this litigation, and is asserted to be relevant to the Court's judicial function, the proposition, as the Applicants understand it, being that unless the Court is in a position to suggest alternatives then the Court cannot judge the merits; and that the Court, by reason of the very nature of the judicial process, cannot be expected to be and is not in a position to consider matters in

sufficient detail and with sufficient continuity to suggest alternatives better than the policies and practices in the Territory of South West Africa, specifically the policy and practice which are characterized by the Applicants as "apartheid", in Respondent's own phrase.

In respect of the significance attributed by Respondent to failure to indicate or suggest alternatives, as I say, the Respondent has, to say the least, itself scarcely created a climate conducive to such a course. As will be made clear shortly, Respondent itself concedes, and this appears from the statements already made by Respondent, that this is precisely the function properly to be served through processes of international supervision, notwithstanding the fact that Respondent persistently and energetically has rejected such processes and has denied its obligation to submit to international supervision of any character. That has been its position since 1950 in the teeth of the repeated opinions and judgments of this Court to the contrary.

Respondent's highest officials, indeed, have stressed the unilateral character of Respondent's approach towards this matter, and if the views and expressions of Respondent's highest officials are to be taken at face value, they present aspects which appear to be relevant to the judicial task which the Court would confront in the acceptance of the proposal under discussion and the exercise of its functions, as proposed, elsewhere than at the seat of the Court. One example may suffice of what I think might fairly be called the unilateral character of Respondent's approach towards its authority over the Mandate.

Thus, in explanation of its concept of the so-called "spirit of the Mandate" as applied to the Territory, Respondent's Prime Minister has recently stated—and I quote from the House of Assembly Debates of 4 May to 8 May 1964, at columns 5636-5637—the following:

> "It is perfectly clear that the Government adopts the trusteeship principle; the Government accepts its position as trustee; it acts in the spirit of the mandate, and in accordance with that spirit it has taken certain obligations upon itself; it has taken upon itself the obligation to promote the well-being and the progress of those people [referring to the inhabitants of South West Africa]. It has to do what it regards as being in the best interests of the inhabitants. It was appointed as trustee and its duty is not to ask what others want or how it can secure peace for itself with other States; the question which it has to ask basically is this: How can I promote the best interests of the inhabitants? Our policy is based on our belief that whatever others may say, the only way in which we can test our policy and our actions is by asking ourselves whether we are *honestly and sincerely doing what a Christian guardian can be* expected to do for the peoples entrusted to his care."

In its written pleadings and oral argument, Respondent has elevated this theme to the status of a legal principle. Respondent indeed has adopted the concept of self-enquiry and self-appraisal as the essential measure and test of its compliance with the obligations of Article 22 of the Covenant and Article 2 of the Mandate, assuming, against its contention, that such obligations have legal existence at all, which Respondent continues to deny in the face of this Court's repeated holdings to the contrary.

Mr. President, in terms of Respondent's presentation to the Court of

its proposed inspection *in loco* there appears to be an inter-relationship, although of a somewhat elusive character, perceived as linking the Applicants' alleged political motivation in seeking judicial protection of the Mandate, a true appreciation of so-called African "circumstances, realities and standards", to use the Respondent's phrase, and Respondent's asserted motive, state of mind, or purpose with respect to appropriate policies for promoting to the utmost the welfare and progress of the inhabitants of the Territory.

Each of these three factors and elements appears to be relevant, in Respondent's submission, in some connected, or disconnected way that is far from clear. All of these elements are involved in and part of the presentation of Respondent of its proposal for an inspection *in loco* and that is why it is necessary, and has been necessary, for the Applicants to refer to matters which, on their face, might seem to be unrelated and indeed logically would also seem to the Applicants to be very questionably related indeed to the proposal under discussion, yet which are asserted by Respondent as major purposes or reasons underlying the proposal.

The first of these reasons, or purposes, the one which impugnes the Applicants' motivation in bringing the proceedings at all, has been referred to and little more need be said about it. Respondent's effort to portray the litigation as a subversion of judicial process rather than a recourse to judicial protection is, as I have said, neither credible nor worthy of the important issues which remain unresolved despite years of frustrated negotiation, and Respondent has not shown any relevance of this groundless charge in any event to the proposal under discussion, although it asserts it as a primary reason for the Court exercising these functions, whatever they may be, elsewhere than at the seat of the Court.

The second factor, Mr. President, which might be for convenience described as the appreciation of African reality, will be considered briefly here and then again in relation to the areas proposed to be visited and the considerations underlying this aspect of the proposal.

The third factor, to wit the alleged desirability for the Court to exercise certain of its functions elsewhere than at the seat of the Court in connection with its determination of Respondent's motive, or state of mind, remains for consideration.

Proper appraisal of this asserted justification of the proposal requires elucidation of the true nature of the Applicants' contention with respect to factual and legal issues presented by the alleged violations of Article 22 of the Covenant and Article 2 of the Mandate. Although argument upon these matters, and their legal aspect, is still under way in another context, an effort must be made to select for discussion those questions of fact and law which are directly relevant to full and timely consideration of Respondent's inspection proposal.

The Applicants' objective is avoidance of the necessity for undue repetition of the same points at later stages of the Oral Proceedings, while at the same time dispelling error and confusion introduced, or which might be sought to be introduced, by Respondent's mis-statements of the Applicants' actual contentions and theories.

Before turning to an appraisal of the fact and law questions actually in issue in the context of the discussion of the Respondent's proposal, a preliminary comment is in order concerning an inherently inconsistent aspect, among others, of Respondent's proposal itself.

One of the puzzling features of the proposal, as presented to the Court, arises from Respondent's alternative suggestion that "an inspection be undertaken, either by the Court, or by a committee of the Court, whichever may be preferred". That is the way in which the proposal is formulated in the verbatim record at **VIII,** page 278.

At the same time Respondent asserts, as a reason, and apparently an important reason, for such an inspection being held at all, that "African reality requires to be seen in order to be appreciated properly and effectively". (**VIII,** p. 272.)

Respondent asserts further that personal inspection is particularly desirable because of "the importance of seeing African reality, as distinct from just reading or hearing about it". (*Ibid.*, p. 278.)

The alternative suggestion that a committee of the Court, rather than the full Court, might wish, or prefer, to exercise judicial functions outside The Hague, elsewhere than at the seat of the Court, pays due deference to the Court's possible wishes and preference in the matter. That is clear.

At the same time, it is difficult to see how the purposes asserted by Respondent, and the importance attached to personal observation of African reality, could be served by a procedure of a committee of the Court engaging in such an experience. The result could only be that those Members of the Court who did not have the opportunity to obtain first-hand appreciation of African reality would perforce have to reach conclusions about the matter from reading or hearing about it from others, however respected.

By Respondent's hypothesis, however, such a procedure of appreciating African reality is not possible *and the reliability of the source* is irrelevant.

Even if, for reasons yet to be explained, such a procedure, however, of a committee of the Court conducting the inspection for the purpose of witnessing African reality, would satisfy the requirement of first-hand knowledge, apparently not for that purpose necessary to be appreciated through visual evidence, a still more formidable obstacle would arise after the processes of observation and appreciation have taken place. Upon Respondent's premise that personal inspection of the African reality is a pre-condition to a full appreciation, how could the Court, or any Court, appropriately record, or explain, the part which such personal inspection has played in arriving at its judgment?

As a phenomenon which cannot be understood merely on the basis of reading or hearing, there would appear to be no practical method, in other words, by which the Court could accomplish the mission, in the sense described by Respondent, and for the purposes assigned by it, unless all Members of the Court participating in the decision were to do so.

This is a feature of the proposal which may perhaps justify clarification in due course.

For reasons which will more fully appear, and basically striking now at the heart of the matter, the Applicants do not consider that resolution of the issues actually and truly joined in these proceedings requires, or justifies, exercise by the Court, elsewhere than at the seat of the Court, of its functions.

Moreover, as will be shown, the undoubtedly dilatory, inconvenient, cumbersome and expensive project to which reference has already been made is, in the Applicants' respectful view, wholly unnecessary, inasmuch

as the legal issues before the Court can, and should, in our view, be resolved upon the basis of the undisputed facts of record.

The Applicants' contentions in these respects obviously justify and require at least summary analysis of such legal and fact issues in this context. In turning to a consideration thereof, the Applicants may be permitted to advert once again to the difficulty of assuring that all relevant law and fact questions are adequately and fairly presented in the limited, though important, context of the inspection proposal itself. Renewed reference to this problem appears to be doubly justified: first, because the terms of Respondent's proposal on its face indicate its prematurity, for reasons already discussed, and secondly, because of the very reason that all Parties would wish to do all in their power to assist the Court in arriving at a timely decision concerning the proposal, on the basis of full consideration of all issues, fact and law, germane to the proposal for an inspection.

And I turn now, with the President's permission, to the contentions of the Applicants in respect of fact issues, as such contentions bear upon the proposal under discussion and the purposes asserted by Respondent to justify it.

Respondent's characterization of the Applicants' contentions in respect of fact issues is distorted to a degree which not only justifies, but requires attention. In its version of the Applicants' contentions with regard to fact issues, Respondent appears totally to have ignored the Applicants' directly relevant submissions embodying the cause of action in which judicial relief is prayed. For the Court's convenience, such submissions and prayers for relief may be set forth at this point of the record—I should like to read Submission No. 3:

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

Submission No. 4:

> "the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfill its duties under such Articles;". (**I**, p. 197.)

Mr. President, at least two salient points emerge with inescapable clarity from these submissions.

The first of these is that Submission No. 3, which I have just read, relates to and describes Respondent's factual conduct complained of, to wit, the practice and measures of implementation of the policy of apartheid; furthermore, that the essential character of the practice is ex-

plicitly described, to wit, distinction as to "race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory".

Secondly, Submission No. 4 refers to generally enumerated policies, more specifically described in the sections of the Memorials cited in the submissions, and the submission alleges that, by virtue of such policies, Respondent has failed to promote the well-being and progress of the inhabitants of the Territory.

Mr. President, even the most cursory reading of these submissions must make it crystal clear that the basis of the Applicants' contention with respect to the alleged breach and abuse of Article 2 of the Mandate and of Article 22 of the Covenant consists in the policies and practices of Respondent in the Territory. Whatever the explanation may be for Respondent's efforts—they have been persistent efforts—to construe the submissions in a different sense, there is no real basis, in the Applicants' respectful view, for confusion whatever concerning this matter. Neither submission rests, in whole or in part, directly or by implication, and this has been repeatedly stated, upon the premise of Respondent's good faith, purpose, motive or state of mind with respect to the policies and practices therein described. The Applicants' contention that such policies and practices violate Respondent's obligations in accordance with and pursuant to the relevant provisions of the Covenant and of the Mandate does not place at issue Respondent's motive or state of mind and such submissions do not, explicitly or implicitly, request the Court to take such motive or state of mind into account, nor to adjudge and declare with respect thereto. On the contrary, as the Applicants repeatedly have sought to make clear, the basis of their case with respect to the alleged breaches and abuses of these articles renders any such considerations irrelevant and foreign to the cause of action truly embodied in their submissions.

Respondent's persistent and indeed laboured effort, in its written pleadings and in its oral arguments, to distort or alter the true meaning and significance of these submissions will be examined in more detail in the course of Applicants' subsequent response to the Respondent's arguments which have just been completed as of last evening. In the context relevant here, in respect of the Respondent's proposal for inspection which is under discussion, it is necessary for the Applicants to clear up confusion engendered by Respondent's misconstruction of the submissions in order that the Court may consider and pass upon Respondent's proposal—if not now, then in due course—in the light of the submissions as they actually are, rather than as Respondent represents them to be.

For the purpose of such clarification, and in the light of Respondent's effort to reconstrue the Applicants' submissions, reference must be made to Chapter V of the Memorials and to the summarization in paragraphs 189 and 190 thereof which are referred to in the submissions themselves. Chapter V concerns the policies and practices which are the subject of complaint, and the continuance of which is asserted to be in violation of Respondent's obligations in terms of the relevant articles of the Covenant and of the Mandate.

Respondent's distortion of the intent and meaning of such submissions rests upon the device or procedure of selecting certain words and phrases in the chapter of the Memorials in question. It is, accordingly, pertinent

now to call to the Court's attention the nature, purpose and effect of the Memorials in this respect so as to establish a true perspective thereof.

Mr. President, at the close of the early part of the session this morning I was referring to the Respondent's distortion of the Applicants' submissions, through the device or procedure of selecting certain words and phrases, usually out of context, from Chapter V of the Memorials, and that it is, accordingly, pertinent now to call to the Court's attention the nature, purpose, and effect of the Memorials in this respect, so as to establish a true perspective thereof.

Chapter V of the Memorials (**I**) commences at page 104 thereof, and the chapter opens, as the Court will note, with a statement of law on pages 104-108. The true significance of the legal propositions set forth therein, as distinguished from Respondent's characterization of them, has been noted in the Applicants' written pleadings and in their oral arguments, and this matter will be subject to further consideration in the context of the Applicants' response upon resumption of the argument on legal issues. It is sufficient to note here, we believe, that the Applicants contended in the Memorials, as they continue to contend, without any change of position, addition of any so-called new cause of action, or otherwise, that in the words of the Memorials, "clear and meaningful norms marking the duties of the mandatory exist", and these are "legal norms", again I quote from the Memorials, and that Respondent's policies and practices should be adjudged on the basis of such existent, clear and relevant legal norms.

Chapter V of the Memorials thereupon sets out, in considerable detail, relevant facts establishing how Respondent's policies are applied in practice. This section of Chapter V is headed: "B. Statement of Facts: Policies and actions relating to the second paragraph of Article 2 of the Mandate." (**I**, p. 108.) It will be noted that no reference is made in the caption to Respondent's purposes, motives, or state of mind. The omission of any such reference is not inadvertent; the Applicants, in formulating the Memorials did not, never have, and do not now consider that Respondent's policies and actions are to be weighed and measured against the state of mind of Respondent, as a Government, to the extent that a Government has a state of mind, or to the intentions, motives, purposes, or sincerity of Respondent's governmental officials who may be in office from time to time. The true purport and significance of Chapter V in this respect clearly appears from the Memorials themselves, and is not left to conjecture.

Evidence of the accuracy of the statement just made to the Court is found in the opening sentence of Chapter VI of the Memorials themselves, which may be quoted here for the Court's convenience:

> "Chapter V of this Memorial sets out facts establishing the Union's violation of its duty to 'promote to the utmost the material and moral well-being and the social progress' of the inhabitants of the Territory. These facts have been derived principally from official sources, including laws, proclamations, and administrative decrees in force in the Territory. As stated in Chapter V, the interlocking and all pervasive nature of the above laws, proclamations and decrees establish their regular and systematic implementation in the Territory." (**I**, p. 167.)

That quotation from the Memorials stands as a clear, unequivocal inter-

pretation of the meaning and purpose of Chapter V, in the respect relevant to this discussion.

The attention of the Court is respectfully drawn to the last sentence of the paragraph which I have just quoted from page 167 of the Memorials. The Applicants therein set forth their conclusion that the laws and practices complained of "establish their regular and systematic implementation". Much of Respondent's effort to fashion the submissions in its own image, rather than to accept them in their true and intended form, rests upon the Applicants' use in certain contexts in Chapter V of words and phrases such as "systematic", "deliberate", or other characterizations to the same effect, or having the same purport. One instance thereof, cited repeatedly by Respondent in the course of its effort to portray the Applicants' theory of the case in a sense different from that in which the Applicants themselves visualize the matter, occurs in the concluding paragraph of Chapter V, in the following context:

> "The meaning of the Mandatory's conduct revealed in the foregoing factual record is clear, as is the meaning of Article 2 of the Mandate in this case. When the latter [that is, Article 2] is applied to the former [that is, the factual record], the legal consequence is clear and unmistakable. It is an understatement to say that the Mandatory has violated its obligations. In its administration of the Mandate over the territory of South West Africa, the Union, as Mandatory, has knowingly and deliberately violated the letter and spirit of the second paragraph of Article 2 of the Mandate and of Article 22 of the Covenant upon which Article 2 of the Mandate was based. In respect of its obligations thereunder, there is a polar disparity between the duties of the Union under the foregoing provision of the Mandate and its conduct in the administration thereof." (**I,** p. 166.)

It will be noted that, in the context, the Applicants have set out their own characterization, conclusion, inference or judgment, that the undisputed facts of record set forth in the Memorials, in considerable detail, so clearly demonstrate the pervasive, consistent and systematic application and implementation of the admitted policy of apartheid in the Territory, that it would be, again in the Applicants' view, "an understatement to say that the Mandatory has violated its obligations", upon the basis of the Applicants' view of the applicable, legal criteria which we have submitted to the Court for its judgment and adjudication. Even a brief survey of the factual material, Mr. President, set out in the relevant section of the Memorials, makes it unmistakably clear how systematic and pervasive is, indeed, the application of the admitted policy of apartheid in the Territory, and with what rigid and thoroughgoing consistency it is effectuated throughout the entire life of the Territory. The intention, the motive, the state of mind of Respondent's officials from time to time have nothing to do with the case. The factual analysis commences by reference to the terms in which Respondent classifies the inhabitants of the Territory rigidly and systematically into four groups. It is on the basis of this classification that the status, rights, duties, opportunities and burdens of the population are undisputedly determined and allotted in factual respects set out in the Memorials. The so-called groups are classified and categorized by Respondent as follows, in terms of its census:

"(a) *Whites.*—Persons who in appearance obviously are, or who are generally accepted as white persons, but excluding persons who, although in appearance are obviously white, are generally accepted as Coloured persons.

"(b) *Natives.*—Persons who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa.

"(c) *Asiatics.*—Natives of Asia and their descendants.

"(d) *Coloureds.*—All persons not included in any of the three groups mentioned above." (**I**, p. 109.)

For purposes of these cases, the category "Asiatics", although, no doubt, of interest to the persons directly concerned, is relatively unimportant in view of the fact that, as of the 1960 census, only two persons in the Territory appear to have fallen within this description. That appears from the Counter-Memorial, **II**, page 401.

The rigid and thorough-going systematic qualities inherent in the policy and practice of apartheid, which is the admitted policy, emerge, *inter alia*, from the de-personalized formulas which exclude from the so-called "White" group individuals "who, although in appearance are obviously white, are generally accepted as Coloured persons", as well as what may be called the basket clause, which classifies as "Coloureds", "all persons not included in any of the ... groups mentioned above". The word "obviously", in this context, in terms of appearance, indicates and reveals the basic factor, and assumption, and premise, which could not be varied by an inspection *in loco*, that it is appearance that enters into the determination along with the acceptance, whatever that may mean.

The legal, moral and political significance of such methods of categorization arises from the *undisputed* fact that life-long and important personal consequences attend them. Individual rights, privileges, burdens and duties flow from them, from birth to burial. Choice of schools and methods of education depend upon them. Degree of participation in the political life of the community is determined if not conditioned, by them, and economic opportunities are substantially affected by them, and there is a procedure by which a person in one category can, with permission of a certain bureau or agency, be changed to another category, thereupon obtaining a different allocation of rights, burdens, etc.

Now, Mr. President, the fact that all, or any, of such consequences could, as a result of official policy and practice, be visited upon a person by reason of the circumstance that, although "obviously white", he is "generally accepted as a Coloured person", to quote again, illuminates the admitted premises of apartheid with lightning clarity. The matter does not rest there; as is shown by the undisputed facts of record herein, individual status, rights, duties, opportunities and burdens, are determined and conditioned even more drastically in the case of "Natives", that is, those "who in fact are, or who are generally accepted as members of any aboriginal race or tribe of Africa".

Chapter V of the Memorials deals with the facts, none of which in any material respect is disputed, which relate to Respondent's policies and actions in the implementation systematically, as described, of the admitted policy of apartheid. The Applicants have made clear that their purpose of setting forth in considerable detail the facts concerning the measures of implementation, the laws, regulations, administrative practices—none of which is in dispute, and if any is in dispute, the Applicants do

not rely upon them—that these facts, systematically applied, in the Applicants' submission, do establish a violation of the international legal norm, for which the Applicants contend, and if the Applicants' views in that respect are not correct, if the Applicants' case upon its own theory is not made, the result must be obvious.

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

Nor does the matter rest there. The Applicants have cited public statements by Respondent's highest officials, for the purpose of demonstrating how Respondent, not Applicants, in its own terms formulates the premises, purposes and objectives of the policy of apartheid. There is no question of fact concerning the premises underlying the policy upon which the Applicants rely, those premises are stated in the statements set forth in statements by Respondent's highest officials—no dispute about the fact that they were made and even further, where the Respondent has contended that Applicants have taken excerpts out of context, or otherwise distorted, unwittingly or otherwise—and it is not otherwise, the Court need not be assured—in any such cases, the Applicants accept Respondent's own context. In some instances indeed the context, the full context, impresses the Applicants as even more strongly persuasive of the validity of its conclusions and characterizations of the facts than were the original shorter excerpts as included in the Applicants' written pleadings.

On the basis of the averments of the facts in Chapter V of the Memorials, added to in the Reply, together with the averments of facts in Respondent's written pleadings, including the official statements as aforesaid in the context in which Respondent sets them forth in its own words and with its own imprimatur, the Applicants repeat and reaffirm the following legal conclusions set forth in the Memorials, **I**, page 161:

> "187. The factual record of the Mandatory's conduct, as hereinabove more particularly set forth, has a desolate but remarkable consistency. Whatever segment or sector of the life of the Territory may be examined the import of the facts is identical. Each part of the record supports and confirms every other part. The record as a whole supports and confirms the record in detail. Indeed, the record taken as a whole has an impact greater than that of a mere arithmetical sum of the several parts. The record as a whole reveals the deliberate design that pervades the several parts."

I pause there for a moment—the last sentence if I may repeat "the

record as a whole reveals the deliberate design that pervades the several parts". The word "deliberate" is selected out of this context and is made to appear as the essence of the Applicants' charge or complaint. It is clearly—and those who wrote the section in question presumably know what was intended by it—it is clearly a conclusion, characterization or judgment in the context of, and under a heading of, legal conclusions. Paragraph 188 of the Memorials then goes on:

> "It might be possible for the Mandatory to explain or extenuate this or that detail of the factual record, if it were merely an isolated event or phenomenon. As a matter of speculation, such a possibility may be acknowledged. But the details are not isolated events or phenomena. They are significant not only in themselves but in their mutual and multiple relationships and their cumulative effect. Taken as a whole, the weight of the factual record cannot be materially diminished by attempts at extenuation. Particular laws and particular practices, particular orders and particular acts are all parts of a cohesive and systematic pattern of behaviour by the Mandatory which inhibits the well-being, the social progress and the development of the overwhelming majority of the people of South West Africa, in all significant phases of the life of the Territory."

And Mr. President, I pause there for a moment and refer to the reference in the sentence "cohesive and systematic pattern". Out of this context Respondent selects the word "systematic", holds it up triumphantly as evidence of its strenuous contention that the Applicants' case is based essentially on the use of words in such a context, the use of words such as "deliberate" or "systematic". Paragraph 189 reads as follows:

> "As the Applicants have previously pointed out, the policy and practice of *apartheid* has shaped the Mandatory's behaviour and permeates the factual record. The meaning of *apartheid* in the Territory has already been explained hereinabove. The explanation warrants repeating. Under *apartheid*, the status, rights, duties, opportunities and burdens of the population are fixed and allocated arbitrarily on the basis of race, colour and tribe, without any regard for the actual needs and capacities of the groups and individuals affected. Under *apartheid*, the rights and interests of the great majority of the people of the Territory are subordinated to the desires and conveniences of a minority. We here speak of *apartheid*, as we have throughout this Memorial, as a fact and not as a word, as a practice and not as an abstraction. *Apartheid*, as it actually is and as it actually has been in the life of the people of the Territory is a process by which the Mandatory excludes the 'Natives' of the Territory from any significant participation in the life of the Territory except insofar as the Mandatory finds it necessary to use the 'Natives' as an indispensable source of common labour or menial service."

Now, Mr. President, and Members of this honourable Court, if from this context and if on the basis of the fair construction, the intended construction of the excerpts in question and other related excerpts with which I have burdened the Court's patience do not establish that the Applicants rely upon and rest their case upon the record of fact herein, and if these statements which I have quoted and similar ones appearing in the Applicants' pleadings do not make clear that the Applicants submit

and indeed contend that the application of these facts so set forth to the legal norms for which the Applicants contend, pursuant to Article 22 of the Covenant and Article 2 of the Mandate, if these propositions do not clearly emerge from the words and phrases used in the Memorials, the Applicants again reaffirm that intention, as they have sought to do in the Reply, although not to Respondent's satisfaction.

The Applicants likewise repeat and reaffirm that neither their Submissions 3 or 4, nor the legal conclusions, which I have just quoted from the Memorials, nor any other statements or arguments made by Applicants, that neither Submissions 3 or 4, nor the legal conclusions which flow from the undisputed facts of record, directly or indirectly, explicitly or implicitly, place in issue Respondent's motive, purpose, objectives or state of mind or that of any of Respondent's officials from time to time in office.

As stated earlier, Mr. President, the Applicants have deemed it necessary to call these matters to the attention of the Court in order to reduce or eliminate confusion engendered by the terms in which Respondent has presented its inspection proposal, since the Applicants have endeavoured not to lose sight of the fact that this is the matter under discussion at the moment with due regard to the difficulty of selection posed by anticipation of similar or even indeed identical material which is relevant to the uncompleted discussion upon the legal issues.

The Applicants refer, more specifically, in the context of the terms in which Respondent has presented its inspection proposal, to Respondent's comments, arguments or statements made to the Court during the course of the presentation of the proposal under discussion on 30 March as follows:

1. Respondent's erroneous statement that—

> "... the only possible basis upon which there could be an allegation of an abuse of power would be of the nature which appears to be suggested in the Applicants' pleadings, namely that of bad faith on the Respondent's part". (**VIII**, p. 275.)

2. Respondent's erroneous characterization of the Applicants' "charge", as they call it—by which it is assumed Respondent intended to refer to the submissions—as involving an issue of bad or good faith on Respondent's part. *(Ibid.)*

3. Respondent's erroneous construction of the same submissions, repeated at *ibid.*, page 276.

4. In general, the Applicants would take the same position, and do, with respect to any other comment, statement, argument or implication which may be found in Respondent's presentation of its proposal, or elsewhere, involving a similar misconstruction of the Applicants' submissions.

Respondent's repeated and unwarranted characterizations of the Applicants' submissions and pleadings in the foregoing respect have been, apparently, relied upon heavily by Respondent as a reason for and justification of the inspection proposal now under discussion.

The Applicants, on the other hand, have sought to make it clear, at all stages of these proceedings, commencing with the filing of the Applications embodying the relevant submissions in the identical form in which they stand today, that the validity of their submissions rests upon two central contentions, which were stated at the opening of the Applicants' presentation to this honourable Court on 18 March 1965 as follows:

"1. The policy of apartheid, as practised in South West Africa, is repugnant to the Mandate.

2. The incompatibility of apartheid with the Mandate, in terms of Article 2 thereof, is judicially determinable on the basis of objective legal criteria." (**VIII**, p. 113.)

As the Applicants likewise have consistently sought to make clear, in the words of the Memorials:

"Since this section of the Memorial [that is, the section of Chapter V headed 'Statement of Facts', to which I have referred] is concerned with the record of fact, it deals with *apartheid* as a fact and not as a word. 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, and not as a theoretical abstraction." (**I**, p. 108.)

And I might add at this point, Mr. President, "and not as perhaps Respondent's officials from time to time may view it in their own state of mind".

On the Applicants' view of the cases, and upon the basis of the legal propositions which they assert support their submissions, therefore, no purpose would or could be served, of which they are aware or which they can perceive, in aid of the Court's adjudication upon these submissions, by reason of the exercising of its functions elsewhere than at the seat of the Court. Moreover, and for the same reasons, no purpose would be served, in the Applicants' view, by the production of witnesses at the seat of the Court, or the taking of testimony, expert or otherwise, either at the seat of the Court or elsewhere.

If Respondent deems it necessary for any reason which is sufficient to itself to introduce additional factual material, or evidentiary material, into the record of these already voluminous proceedings by reason of some factor not yet apparent to the Applicants, in the form of witnesses, then, subject to the permission and consent of the honourable President and the Court, the Applicants would be prepared to stipulate, with the Respondent, that any material, statements, matters which could be testified to by persons if physically present in the courtroom, could be taken in the form of depositions and submitted to this honourable Court, in extension and amplification of the already bulky record thereof. But if the Court should deem it necessary, or desirable, to observe the demeanor of such witnesses, or to ask questions of them on the basis of any material which might be included in depositions, taken at the time upon the time of Respondent rather than upon the Court's time, then of course it would be understood, naturally, that the Court could call such witnesses, ask for their appearance, or take whatever other action or measures the Court deems necessary.

So far as the Applicants are concerned, and so far as they are aware, on the basis of any information yet supplied to them with respect to the nature of the witnesses apparently proposed to be brought before the Court, or the nature of the points apparently proposed to be covered, there would be no basis and no reason for cross-examination on the part of the Applicants with respect to such matters.

The Applicants would waive any right they otherwise might have, pursuant to the rules, practice, or pleasure of the Court, not to be present at the taking of such depositions, not to request the right of examination in the form of interrogatories or otherwise.

But, having said all this, Mr. President, I should like to revert to the essential point at issue, of which this is another illustration to support and confirm, that the Applicants rest their submissions, hence their case, upon the legal theory for which they contend and which underlies their submissions, upon the record of fact as made and presented to this honourable Court in the pleadings and documentation now before it, subject to such addition as might be made, for example, by depositions, subject to the Court's approval, on the basis I have suggested. There would of course, needless to say, be no need or justification for the Applicants to stipulate other than with respect to the proposition and the fact that had the witness or witnesses in question appeared before the Court personally, they would have stated what is set forth in their depositions, prepared, as I say elsewhere, outside the time of the Court.

However, to revert now to the proposal specifically under discussion, which is, of course, the proposition to make an inspection *in loco*, it seems to the Applicants that the same conclusion, with respect to the non-suitability, the inappropriateness, the unfeasibility of the proposal made, would apply equally, if not more so, if one proceeds from Respondent's misconstruction of the Applicants' submissions and the factual and legal considerations on which they rest, or from Respondent's own contention that its obligations under Article 22 of the Covenant and under Article 2 of the Mandate are adjudicable, if indeed justiciable at all, which Respondent denies, upon the basis set forth in its explanation of the second alternative contention.

It will be recalled that the second alternative contention, to which reference is made, which has been summarized and described in the written pleadings and in the Oral Proceedings, is based upon the proposition that if the obligations under Article 2, paragraph 2, and Article 22 of the Covenant are justiciable, they are justiciable, they are adjudicable, only on the basis, as understood by the Applicants, that the conduct of the Respondent must be viewed and reviewed in terms of the purpose with which it approaches, or pursues, the task of achieving the objectives stated in Article 2, paragraph 2. I shall refer in a few moments to Respondent's own explicit, agreeable characterizations of its proposition in that respect, and if I have distorted its meaning—it is not clear from the Oral Proceedings, it is not clear to the Applicants in any event, for reasons which I will explain, why it is not easy to be certain whether one is misconstruing the intentions or not—then, of course, the words will have to be re-examined—the words which they used.

Mr. President, it appears to be relevant, and indeed inescapably relevant, to a consideration of Respondent's proposal under discussion for the inspection *in loco*, to consider the judicial task which inevitably would confront the Court, or Members thereof if the alternative proposal were accepted, if the Court or Members thereof were to embark upon an inspection trip for the purposes apparently envisaged by Respondent's legal theory of its obligations under Article 22 of the Convenant and Article 2 of the Mandate.

The Applicants will endeavour to appraise that judicial task without reference, in this context, directly to the in any event elusive relationship apparently perceived by Respondent to exist between a judicial determination of its purpose, on the one hand, with the alleged political motivation of the Applicants on the other, and an appreciation of African reality as still a third element.

Looking at the matter from the standpoint of the task which the Court would confront in respect of the legal theory upon which Respondent apparently rests its case, what would be the task of the Court? Several problems leap to mind which appear to have generated some perplexities for Respondent as well.

It may be convenient to the Court to refer, as a preliminary matter, to Respondent's own formulation of the proposed task in this respect. After adverting to the Applicants' alleged untoward motivation, to understate the matter, and the need for personal appreciation of African reality, Respondent contends:

> "We submit that in the practical considerations which apply to this case, the only possible basis upon which there could be an allegation of an abuse of power would be of the nature which appears to be suggested in the Applicants' pleadings, namely that of bad faith on Respondent's part—bad faith in the sense that the Respondent has been granted powers with a trust purpose, with a purpose of promoting well-being and progress of the inhabitants, and that that power is now being abused and applied with a different purpose, namely the purpose of oppressing certain of the inhabitants of the Territory for the benefit of other inhabitants." (**VIII**, p. 275.)

Needless to say, this is a wholly incorrect reading and distortion of the Applicants' case.

Then, omitting a passage irrelevant in this context, Respondent continues:

> "The question whether, in the sense I have described, a governmental power is imbued with good faith directed at the authorized objective of the powers given to it, or whether it is imbued with bad faith directed at an unauthorized objective, that surely, Mr. President, must under *all* circumstances be a question of *fact*." *(Ibid.)*

This then is a question of fact which would confront the Court in exercising its judicial task outside, and away from, the seat of the Court.

After further elaboration of the point, that motive or purpose is a fact, a self-evident proposition to which any psychiatrist would attest, Respondent falls into somewhat deeper waters. Respondent takes up for consideration the basis upon which a Court conducts an enquiry into good or bad faith, which is the task obviously envisaged by Respondent which would confront the Court in the implementation of the proposal for an inspection *in loco*.

> "It [that is, the task] calls for the determination of disputed issues of fact, where necessary. It calls also, and under all circumstances, for a proper ***understanding***, for a proper ***evaluation***, for a proper ***assessment***, of ***all*** the facts involved in a given situation. Now, that is particularly the case where the allegation of the party alleging bad faith takes a particular form, which it very often does in proceedings of such a nature." (**VIII**, p. 276.)

I pause here to remind the President, and the Members of the Court, there is no allegation of bad faith on the part of the Applicants. This is merely an inverted form of statement, that this is the form in which the issue is actually posed by the Respondent itself and the theory upon which it rests its case.

> "The form of the allegation is very often this, that the action,

or decision, of the person or body concerned, is so manifestly wrong, so obviously unfair, so clearly inhumane, or something similar, that that authority could not honestly and genuinely have come to its conclusion; that as a matter of inference there must have been something of the nature of bad faith, or an ulterior motive on the part of such an authority or person. That is the form that an allegation of this type very often takes." *(Ibid.)*

There follows in Respondent's statement, which may or may not be related to what I have just quoted—I will admit that the statement itself is highly confusing—*passim* references to the necessity for "evaluation of the facts", "knowing all aspects of the facts involved in a particular situation" (*ibid.*, p. 277) understanding "all facets of the factual situation" *(ibid.)* and comments of a similar nature, all appearing in the context of Respondent's presentation of its proposal under discussion, and presumably related thereto in some manner.

Mr. President, several propositions of a legal nature are tangled up in the foregoing comment, which require unravelling.

Before turning to these, however, it may be well briefly to clear up one point of confusion injected by Respondent's apparent misconception that any of the Applicants' reasons, or arguments, reflect their assumption that state of mind, motive or purpose is something other than a fact. This seems to have been dragged across the trail of the proceedings.

Many situations of course are known to the law in which motive, or intent, is not merely a relevant fact but, indeed, may be a decisive one. This was precisely the point of the Applicants' references earlier in these proceedings to the well-known doctrine of *mens rea* and the part which it plays in criminal law. Further discussion of so elementary a matter as to whether motive, or state of mind, is a fact, and provable as such, would be a waste of the Court's time. In any event, it is completely wide of the mark.

The point at issue here is a wholly different one. Assuming for the sake of argument the validity of Respondent's submission, or proposition, which, in the Applicants' respectful view, is wholly untenable, that the only issue of fact which could arise for adjudication in respect of asserted violations of Article 2 of the Mandate, and Article 22 of the Covenant, must be based upon an examination and an evaluation of Respondent's purpose, in terms of state of mind in connection with the pursuit or accomplishment of its objective: on what basis could the Court arrive at a judicial decision concerning the legal significance and character of Respondent's state of mind with respect to the facts, undisputed facts, of record in these proceedings.

The facts, in the Applicants' submission, speak for themselves and are beyond dispute. The inferences which have to be drawn from them have nothing in common with whether or not the Respondent's governmental or public officials intend to accomplish certain results or know, indeed, what the results are that they are actually said to intend. The objective criteria must be applied to the purposes of the Mandate itself. The answer to this question appears to the Applicants to be not merely relevant to, but dispositive of, the Respondent's proposal that the Court exercise its functions elsewhere than at the seat of the Court.

Respondent's analysis of this matter casts more shadow than light upon it.

In the first place, Respondent's statements, which I have quoted, in

presenting its proposal that such adjudication would involve evaluation or assessment of "all the facts involved in a given situation" begs a major question: what facts are involved in, or relevant to, "a given situation"? Clearly they are not all the facts which any party, fancifully or otherwise, asserts are relevant and therefore must be enquired into. Judicial administration, the normal operations of judicial process, do not turn matters of that sort over to the parties.

The Applicants contend that all facts relevant or necessary to adjudication upon its submission are not only in the record of the proceedings but are, indeed, undisputed. That I have sought to make clear.

Respondent accordingly draws a false issue, or at least evades the real one, by the very form of its statement "the Court must assess or evaluate all the facts involved in a given situation". Is the weather relevant? Clearly this Court, or any court, cannot reasonably be expected to exercise its functions, either at the seat of the Court or elsewhere, merely on the basis of assertions, by one or more parties, that the Court should take certain testimony, adopt certain evidentiary procedures, or exercise its functions in a certain way, all on the basis that it must assess all the facts involved in a given situation. The Applicants fail to see the feasibility, or even the common sense, of such a proposal. Who is to determine what all the facts are, except on the basis of what facts are relevant. The question what facts are relevant obviously and necessarily involves the determination of the nature of the submissions and the legal issues upon which they are grounded. There is no other way to tell what all the facts are or, as Respondent says in another context, all facets of the situation.

The Court must clearly adopt the normal posture that any court would, and it is inevitable, it is inherent in the nature of the judicial process, to consider what the Applicants' submissions stand for, what legal propositions they are grounded upon, what facts are contended by the Applicants to be relevant, in order to sustain their submissions, and, acting upon that basis, to decide whether the submissions are, or are not, well founded.

The selection of procedures, the designation of what facts are within the preview of the litigation, is essentially, as I say, a matter for the exercise of judicial discretion, in the light of the factors I have mentioned and weighing in the scales of justice the requirements of expedition, expense, to the Court as well as to the parties, and the burden of cumbersome procedures which are contended for here and which would represent such a radical departure from the practice of this Court and its predecessor.

A survey of the history of the Court in this respect has revealed only one situation of which the Applicants have been able to find record in which the Court exercised its function elsewhere than at the seat of the Court, and that was in the case of *Diversion of Water from the Meuse (P.C.I.J., Series A/B, 28 June 1937)*, in which the Court with the consent or aquiescence of both parties visited the river and took a trip on the river to examine the workings of the locks.

In the terms of the proposal, which is truly unprecedented, and revolutionary, if I may use that word, one must consider what "all the facts" implies in the task of judicial selection, either here at the seat of the Court or elsewhere, *in loco*, to use Respondent's phrase.

It is a little too easy to say, with a sweep of the hand, that the Court

should enquire into all the facts and all facets of the factual situation. But such questions arise, as where the Court should go in pursuit of so elusive a mission as that defined in the task of examining "all the facets of the factual situation". There are many facets of the factual situation, although that is hardly a legal term of art, which emerge from the pleadings, and particularly Respondent's form of pleadings, which involve areas other than any mentioned or suggested in the Respondent's proposal.

The question arises not only where the Court should go, but what is the Court, or Members thereof, to look at; what is the Court, or Members thereof, to look for? Let us assume, for example, just as an illustration, that the Court, or Members thereof, should decide to visit Windhoek, *the capital city of the Territory of South West Africa, in order to enquire* into "all facets of the factual situation" there, in the words of Respondent.

Let us assume further, by way of example, that the particular facet under enquiry involves the legal inferences to be drawn from the undisputed, and unquestionably relevant, fact or facet that a "Native", however capable he might otherwise be, is not permitted to receive training, or to qualify as an engineer in the Territory; and that, in any event, if he should succeed in reaching that status, perhaps by being able to leave the Territory for that purpose to complete his education, government policy would prohibit him from having a so-called "White" assistant; and that, if he qualifies as assistant engineer therefore, this sets his lifetime ceiling of opportunity in the profession, whatever his merit or capacity—this is from the Memorials **(I)** at pages 157-158; that is based upon undisputed facts of record, facts appearing from an uncontroverted and uncontrovertible statement by Respondent's Minister of Bantu Education made in 1960.

Now let us assume further that the Court, in Windhoek or elsewhere in the Territory, desires to evaluate this facet of the facts of apartheid as applied in the Territory in the light of Respondent's own explanation thereof—that is set out in the Counter-Memorial, **III**, at page 528 as follows, and the whole context is respectfully drawn to the attention of the Court—it will be found at **III**, pages 527-531 of the Counter-Memorial, and the Court, with respect, deserves to read it in full in order to assure itself that, as the Applicants believe, what I shall read is not quoted out of context. This is the explanation advanced by Respondent in respect of the paragraph of the Memorial which sets out the undisputed fact to which I have referred, that a "Native" may not qualify as an engineer, and that if he should succeed in doing so, by circumvention of the policy and practice in the Territory, he would not be permitted if he returned to the Territory to have the services of a "White" assistant engineer. Now let us look at the explanation advanced by Respondent to attempt to see what the Court's function would be, what the Court's judicial task would be, if it sought to evaluate this facet of the factual situation, and I read from page 528—*(c)*:

> "A fact of which Respondent must, and does, take cognizance, is that there has, throughout South Africa's history, been social separation between the White and Bantu groups; that the members of each group prefer to associate with members of their own group; and that certain kinds of close contact between members of the two groups, particularly in the more intimate spheres, tend to create friction."

Paragraph *(d)*:

"The aforementioned factors, accentuated in all probability in the case of the European group by the fact that they have for a long time occupied a position of guardianship and leadership over the Bantu groups, also in the economic field, have limited relationships between Europeans and Bantu largely to those of tutors and employers, on the one hand, and pupils and employees, on the other, and have, furthermore, as at the present stages of development of the respective groups, resulted in the factual situation that many Europeans, in all probability the vast majority, are not prepared to serve in positions where Bantu are placed in a position of authority over them."

And *(e)*:

"A further important facet of the aforementioned factors is that a Bantu who qualifies himself for a profession in which he will, because of the stage of advancement of his own group, have to depend for his livelihood on the services of European employees, or on European patronage, runs a grave risk of total frustration."

This latter part of the explanation the Applicants have, for convenience, referred to as the doctrine of inevitable frustration.

The attention of the Court respectfully is drawn, as I have said, to the full context at **III**, pages 527-531 of the Counter-Memorial from which these excerpts are derived. The facts in this case, and the purported explanation thereof, accordingly—both are set out in the record of these proceedings upon the basis of direct and indisputable sources. Reverting now to the questions relevant to a consideration of the Respondent's proposal, what would the Court look at, what would the Court look for, in aid of an evaluation of this facet, assuming that the Court should embark upon the task which is suggested by the Respondent? Upon completion of the tour of the city of Windhoek and its environs, the receptions of officials, inspection of selected or representative public facilities or other installations and enterprises, parks and so forth, the question still remains: how does the Court meet the judicial task posed in respect of the most important facet of all, if I may call it a facet—to wit, the effect of Respondent's policy and practice of apartheid, on the undisputed facts, upon the well-being and progress of the individual person who is affected by the admitted policy, and who is told, presumably: "*It is a temporary disadvantage; it may be life-long, but it is* temporary, transient; some day something else will be done in the Territory"?

The Applicants find genuine difficulty, Mr. President, in perceiving in what respects—and ask for clarification, invite clarification, upon this—the so-called "inspection" of the city of Windhoek and environs, for example, or other areas of the Police Zone of the Territory as a whole, could aid in a judicial evaluation of the degree or quality of frustration which is either avoided or inflicted, depending upon the point of view, by a policy which for any reason based upon race, or tribal accident, inhibits or forbids the realization of individual capacity, merit and potential. In the Applicants' submission there is no intention, there is no purpose, there is no state of mind, there is no circumstance which could justify such a policy anywhere in the world, South West Africa or otherwise. Respondent's contention that such evaluation inherently is not a proper

judicial function at all, or that, if it is, the only applicable test is the measure of the intent, or purpose, or state of mind with which Respondent's officials from time to time seek to achieve a broadly defined objective—that is at least, although wholly erroneous, a proposition of law at least intelligible. The reasons underlying the Applicants' submission that the Court should reject Respondent's contention in this respect have been, and will be, more fully discussed in another context upon the resumption of the legal issues. The Applicants are, of course, aware that Respondent's proposal under discussion is based upon a so-called alternative contention, which would arise for consideration only if its first alternative contention should be rejected, that is, that asserted breaches and abuse of the relevant provisions of the Covenant and Mandate are not justiciable. The point relevant in the present context, Mr. President, however, is that consideration of Respondent's proposal under discussion could be materially affected by the Court's reason for rejection of Respondent's first alternative contention, as well as the possible decision on the part of the Court that it be rejected. Apart from that conclusion, the reasoning upon which the Court should base such a conclusion, if that indeed should be the Court's conclusion with respect to Respondent's first alternative contention, would be, and might be, highly relevant to a consideration of the suitability or feasibility or relevance of Respondent's proposal for an inspection. It is not quite as easy as Respondent would like to make it appear to be merely to say that its proposal would fall to be considered only in the event the Court should reject its first alternative contention; although the statement is undoubtedly a correct one, it does not fully meet the problem. The principal basis advanced by Respondent in support of its first alternative contention, that is to say "non-justiciability of its obligations under Article 2 of the Mandate and Article 22 of the Covenant", has already been analysed by the Applicants at an earlier stage of these proceedings, and the basis advanced by and the theory upon which the Respondent supports its first alternative contention will be dealt with again upon resumption of argument upon legal issues.

[Public hearing of 28 April 1965]

Mr. President and Members of the honourable Court, at the conclusion of the session yesterday I had referred to the fact that it was not quite as easy as Respondent would like to make it appear to be merely to say that the proposal for the inspection would fall to be considered only in the event that the Court should reject its first alternative contention.

Although the statement is undoubtedly a correct one, as I remarked yesterday, it does not fully meet the problem, because there is also to be considered as an aspect of the problem the matter of the reasons which might underlie the Court's rejection of the first alternative contention. It was for that reason that it was necessary to refer to the principal basis advanced by the Respondent in support of its contention of non-justiciability, that is to say, its first alternative contention. An analysis of the basis advanced by Respondent has been made at an earlier stage of these proceedings and will be dealt with again upon resumption of argument upon the legal issues.

In the light of the relevance in this context of Respondent's reasoning, however, in support of its first alternative contention, that is of non-

justiciability of obligations under Article 2 of the Mandate and of Article 22 of the Covenant, it may be convenient to refer, in the context of the proposal under discussion at this point to Respondent's argument, or a portion thereof, in support of its first alternative contention of non-justiciability in terms of the Respondent's own formulation, and for that purpose I quote from the Counter-Memorial, **II**, pages 384-385. Respondent there says:

> "... it is foreign to the essential nature and purpose of a Court of Law to entertain matters of a purely political or technical nature, such as might well arise if the Court were required to adjudicate on disputes arising from an alleged breach of the obligation to '... promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory ...'."

That argument, or point, is repeated in the Rejoinder, **V**, at page 144.

The Applicants have already referred to the question-begging nature of the assertion and use of the term "purely" in the context of the quoted passage. What is a purely political question is, of course, a major element of the answer to the question itself.

Apart from this, however, the point of major relevance in this context is the legal and logical consequence which would necessarily flow from the Court's possible conclusion that, contrary to Respondent's reasoning, disputes arising from alleged breaches of Article 2 of the Mandate involve matters essentially of a legal nature as well as those of a political or technical nature. In other words, the matters involved here are not purely of a political nature.

Such a conclusion, it is submitted, involves the consideration of, and decision upon, the very nature of Respondent's obligations pursuant to Article 22 of the Covenant and Article 2 of the Mandate. This in turn bears directly upon the principal matter at issue in the context of the present discussion, to wit, would procedures suggested by Respondent in aid of the Court's adjudication upon the legal dispute, involving the interpretation and application of such obligations, would such a course of inspection aid, or would it not aid, adjudication of such issues. That is the question before us at the moment.

As has been said, and must be assumed as an axiomatic premise, the Parties to the present proceedings share in common a desire to assist the Court in respect of any measures or procedures the Court may conclude to be helpful to such an adjudication. It is on the basis of such an assumption that the Applicants have confessed difficulty in understanding Respondent's earlier reference to the difficulty alleged to be perceived by Respondent with respect to our position on the matter.

A major source of doubt and confusion implicit in Respondent's formulation of its first alternative contention does arise, as I have said, from the ambiguity of the phrase "purely political". Thus Respondent contends that:

> "... it could never have been the intention of the authors of the Mandate to vest the Court with jurisdiction relative to matters of a purely political nature ... under Article 2, paragraph 2, of the Mandate ..." (**V**, p. 147).

It would seem clear that it could not very well have been the reasonable intention of anybody to vest the Court with jurisdiction over matters of a purely political character.

This honourable Court, however, has held that the questions at bar and the interest of the Applicants in the obligations of the Mandate involve questions of a legal character and are, therefore, adjudicable.

And now, reverting for a moment to the illustration to which I have referred of the problems arising of frustration or otherwise in connection with the educational policies and economic policies of apartheid underlying limitations placed upon levels of accomplishment, regardless of individual merit or capacity, I referred to the fact that inhabitants of the Territory classified as Natives do not qualify to become engineers because of the inevitable frustration which such a qualification would import into their lives: reverting to such an illustration, which we believe is characteristic of the policy, the premises underlying it and its method of implementation, would consideration by the Court of the facts and explanations in terms of visual observation of phenomena and facts in the Territory itself assist the Court in evaluating the legal consequences to be drawn from this particular aspect, or facet, of the matter, in Respondent's terminology? Is it a purely political question, is it a purely political matter in terms of Respondent's formulation? Is it open to inspection? Is it within the Court's jurisdiction to consider? If not, the question *would be on* what basis could the Court adjudicate the issues at bar.

There would be, it seems to the Applicants under hypothesis, no issues, indeed this is the way the formulation reads, no matters, except those of a purely political character, which would underlie the decision with regard to this question and, therefore, it is on that basis that the Respondent argues there is no possibility that the authors of the Mandate could have intended these obligations to be justiciable at all.

The question of sorting out political matters from legal matters with respect to the proper ambit of the Court's enquiry should it accept Respondent's proposal, does not, unfortunately, receive much clarification by reference to the Respondent's written pleadings. In fact, the comments made by Respondent in its written pleadings regarding its concept of the distinction between politics and law, in this context, rather add to the perplexities and do not carry the question any distance along the road to solution.

Other possible logical methods of sorting out the distinction which Respondent may perceive in this respect, for such bearing as it may have on the analysis of the task, the judicial task, which the Court would confront in carrying out an inspection of the sort proposed, would be to consider the respective tasks which, for example, would confront the Court in an enquiry of this nature and what sort of tasks would confront an international administrative supervisory agency embarked upon the same mission.

Such a method of analysing the significance sought to be drawn by Respondent between political and legal considerations, however, is not illuminated by Respondent in its written pleadings. To the contrary the pleadings merely compound the confusion.

In Respondent's discussion of the references made by Applicants to reports and resolutions of the United Nations organs, in the course of which discussion parenthetically Respondent incorrectly characterized the purpose for which the resolutions had been cited by the Applicants, Respondent stated:

> "... it rather appears as if Applicants now wish to use these reports and resolutions as authority on the crucial question at issue, namely,

> whether Respondent's policies are indeed deliberately directed at the purpose alleged by Applicants. This is a question involving contested facts and disputed inferences therefrom, on which resolutions of a political body, which has in the nature of things never attempted a judicial enquiry into the matter, cannot be of any assistance to the Court." (**V**, p. 113.)

The Applicants' citation of the United Nations resolutions in question, of course, was not directed at all to the purpose described by Respondent. However, Respondent's mis-statement in this respect is irrelevant in the present context.

The point here lies in Respondent's contentions, or apparent contentions, that judgments of a political body, with respect to what Respondent has described as the crucial question at issue, cannot be of any assistance to the Court on the ground that such a political body has had "in the nature of things never attempted a judicial enquiry into the matter". It is of course, by definition, true that a *political* body does *not* in the nature of things conduct judicial enquiry. But it would be new doctrine indeed to say that political bodies do not, or cannot, take into account and reach judgments upon the basis of questions involving matters of a legal nature.

On the other hand, courts frequently do and must reach judgments upon issues which include matters of a political nature.

The attempt to distinguish, without definition, between matters of a political and legal nature, which underlies Respondent's first alternative contention, imports a confusion, or at least perplexity, into an analysis of the task which would confront the Court in an inspection on the basis of the reasoning advanced by Respondent in support of its first alternative contention. The Court's view with respect to such reasoning would be, therefore, relevant to the nature of the task which the Court might envisage it would confront in carrying out an inspection *in loco*.

Another illustration may be cited in respect of the same question from a broader standpoint. The Applicants have set out in their Memorials at **I**, page 150 a series of laws, regulations and practices bearing upon the factor of freedom of movement of persons classified as "non-White" in the Police Zone, the economically developed 50 per cent. or more of the Territory. The catalogue of such restrictions is introduced by the Applicants for the purpose set forth explicitly in the Memorials, as follows:

> "In their cumulative effect, the multiple restraints upon the movement of 'Natives' and the vulnerability of the 'Natives' to arbitrary arrest press upon the individual 'Native' with an almost suffocating weight. To appreciate the burden, it may be helpful to try to envisage the situation from the angle of vision of any individual 'Native'." (**I**, p. 150.)

It may be relevant to mention at this point, Mr. President, that it is indeed difficult to understand the true nature of the premises and effects of the policy of apartheid in the daily lives of the inhabitants, except on the basis of envisaging the situation from the angle of the individual.

There follows on the same page of the Memorials an enumeration of the restraints in question to which the Court's attention is respectfully directed.

In terms of Respondent's first alternative contention, or the reasoning

underlying the formulation, including the allegation that these are matters of a purely political nature and not therefore legal, would the Court's evaluation on the basis of an inspection trip, on the spot or elsewhere, involve matters of a purely political nature, or of a legal nature, or of a combination of the two, in respect of the observation and inferences of law to be drawn from the series of restrictions which are undisputed and set forth in the record as facts?

It may be pertinent at this point to advert to a feature of the present discussion which has implications both serious and ironic. For many years Respondent has engaged in a dispute with the Applicants and numerous other States throughout the world, similarly situated, centering on the question of the relevance of, and necessity for, international supervision over the mandated territory. Respondent's failure and refusal to admit, or to submit to, obligations of international accountability, is a major reason for recourse on the part of the Applicants to judicial protection in terms of Article 7 of the Mandate. Although disclaiming a legal obligation to submit to international supervision, Respondent nonetheless concedes that such international supervision over its administration of the sacred trust was intended by the authors of the mandates system to be an essential and integral element of the system itself.

It cites this in support of its second alternative contention in another context, to wit, that if international supervision has lapsed, as Respondent insists, the Mandate as a whole must be deemed to have lapsed for that very reason.

The importance of continuing supervision, including the consultations between a supervisory agency and the Mandatory on a continuing basis, is conceded in principle by Respondent in contexts which will be referred to in the course of rebuttal, when that is resumed on the legal issues—such importance, the importance of such inspection, or relationship, or consultation, or supervision, is conceded by Respondent. In addition, Respondent asserts that, in the light of the nature and importance of such continuing international supervision to the scheme of the mandates, the authors of the system could not have intended to engage the judicial process in respect of the mandatory's obligations under the sacred trust. They are non-justiciable—Respondent's first alternative contention. A fuller examination of these theories and bases upon which Respondent rests its conclusions will be examined in the course of resumed discussion of legal issues.

In the light of the history of the dispute regarding the necessity and obligation of international supervision over the Mandate, it seems needless to say that questions raised by the Applicants concerning the suitability, feasibility and relevance of Respondent's proposal under discussion, for an inspection, obviously are not in any way intended to reflect a modification or weakening of the Applicants' historic position, still maintained, on the matter of the vital importance of international supervision over the Mandate. On the contrary, the Applicants perceive that Respondent's proposal for inspection by its very nature confirms the Applicants' long-standing conviction that unilateral and unsupervised administration of the Territory is not compatible with the objectives of the Mandate itself, or that questions involved in disputes concerning the administration of the Mandate cannot be resolved on the basis of unilateral and unsupervised analysis of the consequences thereof.

The Respondent's proposal, as well as the terms in which Respondent

has presented it, not only supports the validity of the Applicants' submissions with regard to the essentiality of international administrative supervision on a continuing basis; it also underlines the full weight and significance properly to be attached to the holding of this honourable Court in its 1962 Judgment, in which the Court referred to the 1950 Advisory Opinion and concluded in the following words:

> "The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." (*I.C.J. Reports 1962*, p. 334.)

As the Applicants have pointed out at an earlier stage of these proceedings, acceptance of Respondent's contention that the provisions of the Mandate relating to international administrative supervision lapsed upon dissolution of the League, such a contention, if accepted by the Court, would confront the Court with the necessity—unforeseen and unintended by the authors of the mandates system—to serve as the first and only means of international supervision or protection over the Mandate, rather than as the final bulwark to safeguard against breaches and abuse of the Mandate.

If disputes should arise in the future concerning the administration or interpretation of the Mandate, in the light of constantly changing circumstances, in the light of constantly shifting officials concerned with the pursuit of the objectives of the sacred trust—and it seems inevitable that such disputes could only be expected if the processes of international administrative supervision were not in force and faithfully complied with, in terms of their intended purposes—the Court frequently might be confronted then with the recurrent task of judicial protection of the Mandate.

If resolution of such disputes, which it is to be hoped will not arise, were not adjudicable on the basis of factual issues and legal contentions set forth in the written pleadings and oral arguments, but necessitated the exercise of the Court's function elsewhere than at the seat of the Court, it would follow that the Court's judicial function would be converted into that virtually of a continuing administrative supervision over the Mandate, a function indistinguishable in decisive aspects from that envisaged in the mandates system to be performed by the administrative organ, as what this Court has called the "normal security".

And the Court furthermore, as I have said, would under such circumstances confront a continuing necessity to maintain on-the-spot contact with Respondent's officials who, in the natural course of events, would be replaced from time to time, and yet whose motives and states of mind, in Respondent's theory, would be relevant to a judgment upon the obligations and disputes concerning them.

Full analysis of the reasoning which underlies Respondent's contention concerning the nature and scope of its obligations under Article 2 of the Mandate will have to await resumption of argument upon legal issues. But certain aspects which do fall to be considered in the present context of the proposal under discussion will and must be referred to.

During the course of Respondent's presentation of its proposal on 30 March, after referring to its first contention regarding the non-adjudicability of the alleged violations of Article 2 of the Mandate, Respondent stated as follows:

> "But, Mr. President, our alternative is that if the Court finds there is a basis upon which it can adjudicate, that basis is, in our submission, confined to testing whether there has been a legal use, a proper use, of the discretionary powers conferred upon the South African Government in that regard, or whether there has been an abuse of power. We submit that in the practical considerations which apply to this case, the only possible basis upon which there could be an allegation of an abuse of power would be of the nature which appears to be suggested in the Applicants' pleadings, namely that of bad faith on the Respondent's part—bad faith in the sense that the Respondent has been granted powers with a trust purpose, with a purpose of promoting well-being and progress of the inhabitants, and that that power is now being abused and applied with a different purpose, namely the purpose of oppressing certain of the inhabitants of the Territory for the benefit of other inhabitants.
>
> That is the nature of the charge as we understand it, as it was brought against us in the Memorials of the Applicants; that is the way in which we have analysed it . . ." (**VIII**, p. 275.)

And I would call the Court's attention to these words because, if I may insert parenthetically, up to this point this has been couched in the customary manner applied by the Respondent, of attributing positions to the Applicants becoming to its formulation of its position, and ignoring for the moment its attribution of its position to the Applicants. Respondent continues:

> ". . . that is what we suggest as a matter of law to be the only possible basis upon which there could be adjudication on the question whether the discretionary power, the discretionary function, the discretionary obligation of the mandatory power has in this respect been violated" *(ibid.)*.

Ignoring, as I have said, the misrepresentation of views to the Applicants, and the misstatement of the Applicants' legal theories, Respondent's formulation of what would, as a matter of law, be the only possible basis upon which there could be adjudication of the question, would, necessarily, constitute the jural framework within which the proposed inspection *in loco* would have to be conducted. The true significance, therefore, of the phrases used by Respondent, and in particular the phrase "bad faith", must be looked at carefully. This measures the judical ambit of the Court's function with respect to this case, and, by necessary inference, measures the nature, extent and all other factors relevant to the inspection and procedures which would be followed in connection therewith.

Respondent employs the term "good or bad faith" in different senses and contexts throughout the written pleadings and oral arguments, and this has, as I will show in a moment, produced confusion throughout the course of this litigation, which confusion is reflected, unfortunately, in the written pleadings of both Parties, and it is difficult to tell in which set of pleadings the confusion is more compounded by the variant forms of expression and meaning which are used by Respondent in respect of the good or bad faith concept. That is a statement which obviously calls for and demands explanation and justification, and I should like now to proceed to demonstrate the basis upon which these statements have just been made by the Applicants.

Certain formulations of the concept of good or bad faith, in Respondent's terminology and usage, appear to have no intelligible meaning at all. At least three variations of formulation in this respect are to be found in Respondent's written pleadings and the oral arguments. Thus, in several instances, the formulation appears in the following form—in each case, Respondent's own language—"The question before the Court can therefore in essence only be one of intentions, or purpose, or good faith". This is from the Counter-Memorial, **II**, page 391.

The same formulation is repeated in the same volume at pages 392 and 477, *inter alia*.

This formulation appears to equate or attribute synonymous significance to the conceptions of intention, purpose and good faith. However, this cannot be the intended signification in reason, one must assume, inasmuch as intention or purpose, on the one hand, is clearly a state of mind, a fact, whereas good faith, on the other hand, is a legal character or quality, attributable to a state of mind or intention in a given context. That seems clear. In the form of the expression used which I have just quoted there is, as I say, an apparent equation of the words, "intention", "purpose" and "good faith".

Since it is not the purpose of the Applicants to engage in a speculative word game, this aspect of the analysis, indeed, should not be thought to be a substitute for analysis rather than a genuine attempt to clarify the meaning intended by Respondent in presenting the major thesis upon which its legal case rests.

Another formulation, a variant presumably of the one I have just quoted, may be found in several contexts in the written pleadings as follows "good or bad faith, in the sense of an authorized or unauthorized purpose"—Counter-Memorial, **II**, page 392.

Such a formulation likewise is difficult to comprehend and on its face seems meaningless. The concept of bad faith on the one hand and of authorized purpose on the other relate to two entirely different things—bad faith is a quality of mind, an attribute of conduct—authorized purpose relates, if these words mean anything in this context, to the objective of the Mandate itself to the purpose sought to be achieved by conduct. Therefore, this formulation would seem to be unintelligible as well as the first. Yet another formulation, a third variant, is to be found in various portions of the written pleadings to the following effect: " 'bad faith' in the sense of pursuing an unauthorized purpose"; this may be found, for example, in the Rejoinder, **V**, page 106.

In one formulation, bad faith seems to be equated to intention or purpose. In another formulation, bad faith is used in a sense of an authorized or unauthorized purpose and in a third formulation it is used in a sense of pursuing an unauthorized purpose.

Now assessment of the judicial task which would confront the Court in conducting an inspection *in loco* or indeed, of course, in passing upon the validity of the Respondent's legal contention, necessitates a clear unambiguous understanding, both of the judicial objective to which such an inspection would be directed and the judicial, the juridical elements which would measure and determine its scope. Appraisal of Respondent's formulation of good or bad faith in the exercise of duties, the apparent judicial target aimed at by Respondent's proposal, at once raises the question of the meaning properly attributable in this third

formulation, which seems at least on its face to be intelligible, to the words "pursuing" and the phrase "unauthorized purpose".

In this formulation, as the Court will recall, Respondent speaks of bad faith in the sense of pursuing an unauthorized purpose. Pursuit of an objective or purpose could only mean, in the normal usage of the word, the methods, the processes, the measures or the forms of conduct by which a stated definable, recognizable purpose is pursued. Such methods, measures and so forth only could be evaluated and appraised in the light of the defined purpose at which they are directed, the objective which they apparently serve. The legal significance attributable to conduct directed towards a stated objective must depend essentially upon a legal evaluation of the objective itself. The evaluation of the objective in turn presupposes the attribution of a meaning, nature and content to the objective, which makes possible judicial appreciation, appraisal and application of legal principles to the conduct in question. The objective cannot be evaluated in terms of motive, or state of mind, or purpose of the officials in charge of carrying out the tasks which point to the objective or lead to its accomplishment.

On the assumption that the state of mind, subjective motivation or purpose of the individuals composing Respondent's Government is a relevant fact at all, an assumption of a validity which the Applicants deny, it would be impossible for the Court to arrive at any conclusion concerning the legal quality or character of such a state of mind or of motive in any respect in connection therewith, except upon an objective evaluation on the basis of definitely established and existing criteria of the nature and scope of the objective, which Respondent's officials in its formulation had in mind or assert they had in mind, or think they have in mind in the pursuit of the objectives, whether those officials be legislative, administrative or judicial or any other.

When we turn to Respondent's contention with respect to the Court's proper function of evaluation of the authorized purpose or the authorized objective in terms of the formulation in question, we find the following theory expounded by Respondent—I am referring now to its conception of the Court's relationship to the authorized purpose or authorized objective which is the object of pursuit by the conduct in question. The Respondent comments as follows:

> "The 'full power of administration and legislation' granted in terms of the Article [that is to say Article 2 of the Mandate] covers the whole field of government, the only limitation (apart from Articles 3 to 5) being the element of purpose. And both the power and the purpose are defined in such a manner as to preclude any possibility of misunderstanding ... The question before the Court can therefore in essence only be one of intentions, or purpose, or good faith."

This is from the Counter-Memorial, **II**, at page 391. It will be noted that in the passage just quoted, clearly intended by Respondent as a key one and presumably carefully formulated for that reason, the word "purpose" appears to be used in three entirely different senses, the third of which seems to be nonsense.

The first use, that is to say, the element of purpose in the quoted passage, appears clearly to refer to the purpose of the Mandatory. The second use of the word "purpose", in the context of "the power and the

purpose", appears clearly to refer to the Mandate's purpose. The third use, which mistakenly equates purpose with good faith, has been referred to but is repeated again in this connection only to show that it makes clear that the word "purpose", as used here the first time in this passage, does indeed refer to the purpose of the Mandatory, the state of mind of the Mandatory or its officials in pursuing the authorized objective.

Respondent's formulations, and its theory underlying them therefore seem to oscillate between Respondent's purpose and the Mandate's purpose, in the manner of a metronome. When one looks at the purpose authorized by Article 2 of the Mandate, one is told to look instead at the purpose of the Respondent. Evaluation of the objective of the sacred trust, according to the apparent meaning of Respondent's formulations on the matter, does not properly involve a judicial appreciation or judgment upon undisputed methods and procedures by which Respondent pursues its objective, but has some reference to the state of mind, the intent or the purpose which animates Respondent's officials, or at least conclusions with respect to the matter have some connection with Respondent's state of mind or purpose, otherwise why all the references to that—where is it relevant?

This brings us full cycle to the third of Respondent's "simple propositions" as it called them, on which the second alternative contention is founded. This is paragraph *(c)* in the list of paragraphs which has been the subject of previous discussion and which is found at the Rejoinder, **V**, page 157, and which reads as follows:

> "*(c)* The only limitation placed by Article 2, paragraph 2, on the discretionary power vested in Respondent was that such power should be exercised for the purpose of promoting to the utmost the well-being and progress of the inhabitants of the Territory."

It is of particular importance to understand what significance is attributed by Respondent to the use of the word "purpose" in this context, equally a key passage in its analysis.

The Applicants have, it is true, referred to the phrase "for the purpose of" in the paragraph I have just quoted in "simple proposition" *(c)*, as a gratuitous gloss by Respondent upon Article 2, which contains no such provision or qualification. The Applicants go further and characterize the insertion of such a qualification as a unilateral amendment of the article, a modification of one of its most important terms. The Applicants contend that the definition and determination of the nature, scope and content of the "authorized purpose", the authorized objective envisaged by Article 22 of the Covenant and Article 2 of the Mandate, depend upon the application of objective legal criteria. Acceptance of Respondent's theory would confront the Court with the necessity, in a proposed inspection or otherwise, of exercising a judicial task of evaluating evidence the relevance of which itself would presumably have to be determined on the basis of some relevance still dimly perceived by the Applicants of Respondent's purpose, Respondent's intention, Respondent's state of mind. The Applicants do not perceive how the Court could exercise its functions elsewhere than at the seat of the Court, or at the seat of the Court, on the basis of Respondent's legal theory of the case first stated in the formulations which have been read to the Court in Respondent's own language.

The Applicants contend that the "authorized purpose" in terms of

these articles and their proper interpretation and application is to be measured by the legal norm, which the Applicants contend exists and which the Applicants submit governs Respondent's conduct or the methods by which it pursues the authorized objective.

Respondent, in another context, appears to suggest that the enquiry would be designed to establish whether or not Respondent's administration of the Territory so far exceeded any reasonable concept of "full power of administration and legislation" that it would be necessary to conclude that Respondent's officials, from time to time, were motivated by personal considerations or others of a character so outrageous or otherwise that no reasonable person could differ as to their *mala fides*, and which indeed, would be of such a character as to disqualify them from office in the first place and, no doubt, call for their impeachment—I have not quoted Respondent's language, I have tried to distil what the Applicants perceive to be its meaning.

If this is a correct analysis of Respondent's position, the Court's task would be continuing and perpetual, as new officials succeeded to office or became subject to improper influences or succumbed to improper motives, but more particularly in the light of changing circumstances in which their motivation, or to which their intent or state of mind, would be applied.

The legal scope and content of Respondent's obligations under the sacred trust of both the Covenant and the Mandate, under Respondent's theory, would be measurable essentially by its own purposes, rather than by objectively determinable purposes of a measurable nature, as contended by the Applicants. The objectives of the Mandate would become, in effect, whatever Respondent, in the exercise of its full power of discretion, defines them to be, provided only that they are defined and applied in a manner which does not arouse this sense of outrage of the world. At least, this seems to account for the apparent inconsistency between the statement by Respondent's Prime Minister, for example, which has been quoted on a previous occasion in these proceedings, and the position taken by Respondent as litigant before the Court. In the words of Respondent's Prime Minister, which I have quoted, the only test of Respondent's policy and action is whether, upon asking itself the appropriate question, the answer comes back that it is "honestly and sincerely doing what a Christian guardian can be expected to do for the peoples entrusted to his care".

If honesty of purpose is found to be present in such a self-examination, the matter ends there, according to this viewpoint. The conduct is to be evaluated in the light of the motive, not the other way round. The grant of power is to do what the guardian thinks right, and the exercise of power is to be adjudged on the basis of the guardian's perceptions and attitudes. The trustee, on the basis of the statement publicly proclaimed by Respondent's Prime Minister, audits his own books, examines his own conduct, and evaluates his own accomplishments.

The position taken by Respondent as litigant before the Court does not appear to be entirely consistent, to say the least, with the position Respondent announces publicly through its highest official. It is difficult to conclude from an examination of Respondent's formulation of the matter in its written pleadings, however, where the distinction begins and ends in respect of a pronouncement, such as I have quoted, and the legal theory and its reasoning, as advanced by Respondent in its written

pleadings. The oscillation between the use of purpose in different senses—one pertaining to the Mandatory, the other pertaining to the Mandate—is merely indicative of the confusion. The criteria of international standards which Respondent now appears to concede or contend to govern its conduct presumably would have to be stated in terms such as, what would a reasonably honest or genuinely sincere mandatory do in all the circumstances? Weighed against such standards, the Court would then conclude whether Respondent's officials or their successors *from time to time in office could have* "honestly and genuinely" come to the conclusions to which they did come (I quote those words from Respondent's pleadings) or, whether to the contrary, they are, again in Respondent's words, "manifestly wrong" or "obviously unfair". For example, in the verbatim record, **VIII**, page 271, these phrases are used in connection with the judicial task which would confront the Court in respect of the inspection proposal. The judicial task—without becoming too facetious—of evaluation would become even more complex if the successors to those now in office should ask themselves different questions, or give themselves ambiguous replies.

Further consideration of these matters will await resumption of argument dealing with legal issues and fact questions germane thereto, because we are here at the heart of an evaluation of Respondent's legal theory in support of its principal contention, which we assume the second alternative contention to be, without attempting to assign priorities.

With the Court's permission, Mr. President, I turn now to the legal *basis of alleged violations of the* Mandate, in terms of the Applicants' submissions, and with emphasis thereon. As has been stated, the Applicants' submissions, and the legal contentions upon which they are based, are full and fairly adjudicable, in the Applicants' view, upon the basis of the written pleadings and Oral Proceedings, in accordance with the normal, traditional, practice of this honourable Court. The record is more than a usually full one. The Parties have been accorded adequate opportunity, during the course of more than four years since the Applications were filed in these proceedings, to submit and prepare their respective cases. In the absence of a clear showing that the procedures suggested by Respondent could reasonably be expected to aid the Court in deciding whether the Applicants' submissions are well founded, the Applicants respectfully urge that the Court follow its traditional practice of exercising its functions at the seat of the Court with a view to expeditious consideration and determination of the litigation.

Consideration of the central theory upon which the Applicants rest their submissions may be cited in support of their view that the Court *would exercise a sound discretion, consistent with the* requirements of justice and proper judicial administration of these proceedings, if it were to reject Respondent's proposal or, in any event at least, defer decision and action thereon pending completion of, and in the light of, the further proceedings in these cases, although such deferment would not, in the respectful view of the Applicants, be preferable to a decision thereon earlier than the completion of the proceedings. The Applicants' submissions relevant to the proposal under discussion rest upon the theory, as the Applicants have sought to make clear, that an international legal norm exists which is objectively determinable and generally applicable as a *minimum* legal norm, and that it is accepted by and

regulates the official policies and actions of governments throughout the world. Such a norm, referred to in the Memorials, and there summarized at **I**, pages 104 and following, is elaborated in detail in the Reply, at **IV**, pages 491 and following. Such an elaboration in the Reply introduces no new element not previously present in the Applicants' original "cause of action", in Respondent's phrase, nor has the Applicants' submission with respect to the nature or content of such a norm been modified or amended in any respect, notwithstanding strenuous labour on the part of the Respondent to convey a contrary impression to the Court.

Respondent, on the other hand, contends that disputes concerning the interpretation and application of the articles in question are not justiciable—alternative contention number one. If that contention should be sustained by the Court, Respondent concedes and contends, no further question concerning the interpretation or application of the relevant articles would arise, and Respondent's proposal, which is in any event premature, would be moot.

On the basis of Respondent's second alternative contention, the Court's functions with respect to the matter under discussion would be limited to or confined within the ambits of an enquiry in which subjective considerations—intent, purpose, motives or state of mind—would play some role.

The Applicants further submit that the international legal norm, as formulated and described in their pleadings, is applicable to the Territory of South West Africa. By its acceptance of Article 22 of the Covenant, and in particular Article 2 of the Mandate, Respondent undertook to administer the Territory and undertook to interpret and apply its provisions on a basis consistent with international legal norms as they evolved and became applicable to changing conditions and circumstances in the Territory. The Applicants will have more to say on this subject in the course of examination of the legal issues, when that phase of the proceedings is resumed, in the light of Respondent's comments during its Oral Proceedings.

The Applicants further contend that the policy and practice of apartheid, as described in their pleadings, in which now all averments of fact in Respondent's pleadings are incorporated by reference, violate the relevant and applicable international legal norm, and accordingly that such policy and practices are repugnant to the Covenant and the Mandate and should be enjoined by this honourable Court. There is no relevant factual issue in dispute between the Parties concerning the measures and the practices by which the Respondent gives effect to the admitted policy of apartheid. Moreover, the *rationale* or premises upon which such policy and practices are based are set out in the record in the form of undisputed official statements, laws and regulations of the Respondent, and the official statements of Respondent's highest officials which are accepted by the Applicants in terms and in contexts set forth in Respondent's pleadings themselves. There is no dispute of which the Applicants are aware with respect to the statements made by Respondent's highest officials; the question is: what legal conclusions are to be drawn from them in the light of the whole context set forth in the written pleadings on issues of fact?

The Applicants in their pleadings have set out measures and practices which may fairly be described as illustrative in order that the Court may

have the benefit of adjudging the policy of apartheid as a whole rather than merely judging it in parts. Moreover, the Applicants accept as correct, and incorporate by reference into their own pleadings, as I have said, such additional factual averments as Respondent considers relevant to a fuller understanding of the policy and practice of apartheid as set out in their written pleadings and documents thereto attached.

The Applicants have stated, and reaffirm, that the validity or otherwise of their submissions may and should be adjudged upon the basis of the facts as aforesaid. Upon the Applicants' theory of the case no further testimony, evidence or opinion, expert or otherwise, is required for an adjudication of their submissions, nor would it be appropriate or necessary for the Court to exercise its functions elsewhere than at the seat of the Court for the purpose of adjudging whether the Applicants' submissions are or are not well founded. In maintaining and affirming that the facts of record and the discussion of legal issues relevant thereto may fully and adequately present the case upon which judgment may and should be rendered, the Applicants do not intend in any manner to imply that Respondent's proposal for an inspection would be necessary or desirable on Respondent's theory of the case, as now understood by the Applicants. Such a theory, as we now understand it, particularly in the light of Respondent's statements made during Oral Proceedings, is based upon the proposition that, although no international legal norm exists relevant to the interpretation and application of Article 2 of the Mandate, there nevertheless do exist international standards applicable, and that Respondent's obligations under the sacred trust may be judged in accordance with them. The Applicants respectfully submit that, in such event and on that basis, the undisputed facts of record likewise would establish a violation of such international standards, as described by Respondent, and that the Court should adjudge the Applicants' submissions in accordance therewith in the event that the Court should decide against the Applicants' contentions that an international legal norm does exist, and is applicable, in the terms and in the manner contended for by the Applicants.

Mr. President and Members of the honourable Court, before turning to a discussion of the remaining factors which I was about to discuss in connection with the Respondent's proposal, I should like, with the President's permission, to endeavour an answer to the question of the learned judge, Sir Gerald Fitzmaurice, which, if in the event it proves to be not responsive in the terms in which it is intended, it would be, I hope, attributable to the fact that for reasons of expedition and convenience of consideration the Applicants venture to undertake a response on the basis of the consideration which they have given to the matter during the interval since the question was asked and addressed to the Applicants because, Mr. President, it appears to the Applicants in the light of their theory and understanding of the case upon which they rest, and the implications which they infer from the question of the learned judge, that the answer the Applicants perceive could be rather simply formulated in terms of several propositions.

In the respectful submission of the Applicants in response to the first question, a policy which differentiates among individuals as such, or as members of identifiable groups, would be permissible and indeed desirable in appropriate circumstances. We have in that connection cited the minorities treaties, among other examples, in which it is just, prudent,

and wholly desirable for governments to take account of differences between individuals and between individuals as members of groups, thereby leading to the conclusion that differences are permissible with respect to the treatment of groups as such. There are instances known to all of us in all of our countries of such examples of differentiation of groups, the protection of minors, the protection of other segments of the population, arranged in accordance with their choice, normally—sometimes by reason of other considerations, in which their choice, where possible, plays a very important and, indeed decisive role—their choice as individuals.

The problem therefore, in the Applicants' respectful submission, is not summarized in terms of, or is it answerable in terms of, the expression "group differentiation" except in a sense which is mutually understood between the questioner and the responder. There is, in this case, no submission on the part of the Applicants which condemns or attacks, or criticizes, differentiation between individuals as such, or as members of groups, in, for example, the aspects which I have mentioned as illustrations.

Respondent has paraphrased, ostensibly for the convenience of itself or for the convenience of the Court, the characterization of the legal norm for which the Applicants contend as a norm of non-differentiation, in Respondent's phrase.

The Applicants' formulation does not rest upon the use of that word at all. The Applicants' formulation relates to the policy of discrimination and separation and the distinction is more than a verbal one between those words and the general concept of differentiation. Members of churches, organizations of various kinds—I have mentioned minors, those of non-age and so forth, as groups, are differentiated among and within themselves frequently, in terms of the protection which they are offered as a matter of good government and decent society. This is just part of the human condition and human experience.

A policy of differentiation, however, which allots rights, burdens, status, privileges, and duties on the basis of membership in a group by reason of race, colour or other circumstance of a similar nature, whether called ethnic, tribal or otherwise, on such a basis which does not pay regard to the individual quality, capacity, merit or potential is, in the Applicants' view, an impermissible premise and an impermissible policy at all times, under all circumstances, and in all places.

The policy is defined in the written pleadings, and the practices thereunder are undisputed in the written pleadings and constitute the factual basis upon which the Applicants contend the relevant legal norm should be applied and upon which they ground their submission.

There is therefore, in the Applicants' view, a difficulty presented in putting into juxtaposition a policy which reflects differentiation as such and the question of promotion of welfare. It is the Applicants' case, rightly or wrongly, that the policy and practices complained of, as a matter of the international legal norm and the universally accepted standards upon which that legal norm is based and which it reflects, that such a policy cannot inherently promote the welfare of individual inhabitants of the Territory. Any contention to the contrary is an attack upon the norm itself. Of course it is permissible for the Respondent to question the validity, existence and content of the legal norm; that is a principle issue joined in these proceedings. But any conception that

would lead to a doubt or an inference or an assumption that promotion of the welfare and progress of an individual is compatible with the allotment of the rights, burdens, duties and privileges, upon the basis of his membership in a group rather than upon his quality, merits and potential as an individual person is impermissible, inconsistent and such a policy is repugnant to the legal norm which we assert covers the situation.

The condition of the individuals health, his happiness, ostensible happiness, or other factors which are frequently referred to, do not, in these circumstances, have a relevance to the validity and content of the norm if it exists, as the Applicants respectfully submit that it does.

In view of the fact that the practice and policy complained of is inherently incapable of promoting the welfare and progress of the inhabitants, that it inherently and *per se* is repugnant to and violates the international legal norm; this makes it necessary to conclude that the phraseology "irrespective of any other steps taken by the Mandatory for promoting the welfare of the inhabitants of the Territory" does not, in our respectful analysis, have any bearing.

It would seem to rest upon the assumption that considerations of the promotion of the welfare of the inhabitants of the Territory must be and can be evaluated in some manner other than against the admitted conduct as applied to the norm contended for.

The consequences of Respondent's admitted policy and practice constitute and impose irrevocable status, rights, privileges and so on, upon an individual by reason of his allocation to a certain category rigidly set forth. I have referred to the census categories in this connection. They are based upon a combination of appearance and of assumed ethnic origin in terms of "general acceptance". This is merely illustrative of the rigid categorization and the inevitable and irrevocable consequences which attend classification of individuals in this system.

On this basis, therefore, in view of the inherent incompatibility of the practice and policy of apartheid, as defined in the written pleadings, as they appear from undisputed facts of record, there would be no basis, in response to the second question, addressed by the learned judge, for an investigation of the factual situation whether by hearing evidence or by local inspection. That would be, again, inherently, a superfluous form of inquiry in either form. It would be superfluous because of the inherent, assertedly inherent, repugnance and incompatibility of the admitted and undisputed facts of record regarding the policy and practice of apartheid with the legal norm, for which the Applicants contend, and upon which their submissions rest.

The point at issue in the discussion which the Applicants have endeavoured to analyze for the Court, the legal theory (including the rather discursive comments I fear I made this morning in respect of the confusion engendered by the various uses of the phrases "purpose" or "bad faith", and so forth)—the objective of the consideration of the legal theories in the case and the respective contentions of the Parties—whether they are stated in confused or clear terms is in this context beside the point—was to attempt to demonstrate, as I shall attempt to continue to do in the resumption of the discussion in respect of the proposal for inspection, that the factual situation which is to be investigated in the sense of the second question by the learned judge is that contained in the body and within the four corners of the written pleadings—that is the factual situation, that is the statement of facts which

describes the policies and the practices; and that those policies and practices as thus described, when applied to the legal norm which is asserted to exist, compel the conclusion that such policies and practices thus described are incompatible with the legal norm applicable to the Mandate, and hence repugnant to the Mandate itself.

I should like if I may to reserve, as I attempted to at the outset, the right to regard the completion of my argument, to which I will now address myself with the Court's permission, as relevant to the response, and as a part of the response, to the learned judge's question, because it seems to me that all aspects of the considerations which the Applicants respectfully place before the Court are indeed relevant to a complete response to the learned judge's most important question.

Mr. President, turning to the areas proposed to be examined and the conditions of inspection implied or suggested by the Respondent, I should like first to say that in addition to the appreciation of African reality, condition *and circumstance, through personal observation,* which Respondent avers to be necessary to adjudication of the issues herein, Respondent's proposal lays special emphasis upon the necessity to "compare comparable standards", in its own words (**VIII,** p. 625).

The Applicants have referred to certain implications of Respondent's references to African reality which, it asserts, is unique and must be seen to be appreciated, rather than merely heard about or read about. The factor of "comparable standards", in the phrase of the Respondent, introduces into the proposal an element which may be linked to the consideration of African reality, although the nexus, if any, does not clearly appear from Respondent's statement in support of its proposal.

Questions raised in this context can be disposed of quite briefly, in the Applicants' respectful submission.

Respondent, in its written pleadings, refers to what it describes as "standards of achievement in comparable territories and States in Africa"—that is quoted from the Rejoinder, **V**, at page 116. The statement is relevant to the point under discussion, which concerns the areas proposed to be examined, in Respondent's terms, and the conditions of inspection implied or suggested by Respondent.

The standards of achievement in comparable territories and States in Africa, to repeat Respondent's words, would seem, in the Applicants' submission, to be irrelevant to any issue presented to the Court by the Applicants' submissions, or the legal propositions on which they are grounded. As the Applicants have sought to make clear in their written pleadings and oral arguments, and now re-affirm, their case rests upon the contention, to which I have just referred, that the policy of apartheid in itself, as described in the written pleadings, is repugnant to Article 2 of the Mandate on the basis of the minimum international legal norm and standards which exist, and which govern the interpretation and application of Article 22 of the Covenant and Article 2 of the Mandate. The policy of apartheid is defined in the submissions and written pleadings, and its character emerges with clarity on the basis of the undisputed facts of record.

No standard of achievement anywhere in the world would be high enough or low enough, as the case may be, to justify and extenuate *the policy of apartheid, in the Applicants' submission.* The international legal norm and standards which exist are not subject to, or conditioned by, or affected in any manner by, any question concerning standards of

achievement. A contention to the contrary does not and cannot be asserted in extenuation or explanation of the policy and practice of apartheid. Rights, duties, burdens, obligations, cannot be allotted on the basis of race, tribe or membership in a group, without regard to individual merit, capacity or quality.

With respect to the Territory and South Africa itself, we now turn to a consideration of other aspects of Respondent's proposal, with a bearing upon the choice of territory, and South Africa explicitly, in Respondent's proposal.

With respect to the Territory and South Africa itself the Applicants submit that, for reasons already set forth, an inspection there is not necessary or justified, in either place, inasmuch as all the relevant facts upon which the Applicants rest their case are undisputed. The same reasoning applies on the same basis to the Respondent's proposal that the Court inspect areas other than the mandated Territory, or South Africa itself.

In so far as conditions concerning African reality may be related to the matter of comparable standards, an observation may be pertinent to any such possible relationship in the context of the proposal under discussion—that is, relationship between comparability of standards, so-called, on the one hand, and appreciation of African reality, so-called, on the other. The observation which I shall venture to put before the Court illuminates the judicial task which would confront the Court if the proposal were carried to limits suggested by strictly logical considerations, and is in no way intended to suggest or imply a *reductio ad absurdum* of the proposal itself.

Respondent's averment that appreciation of the African reality is an important aspect and element of its proposal, underlying its proposal, and that such appreciation presupposes personal observation, raises the following question. How is it possible, and on what basis is it feasible, fully to appreciate African reality, African circumstances, as a unique phenomenon, so unique, indeed, that it defies hearing about or reading about but must be seen to be appreciated? How is one to appreciate such a quality *sui generis*, as it is claimed to be, without personal comparison of African reality with the reality of other areas and continents as well?

The question is far from captious, Mr. President, and is not intended to be querulous.

In its written pleadings, Respondent has referred repeatedly to numerous States or areas *outside* Africa, in the context of legislation, practices, situations and conditions there prevailing, which it asserts have relevance to issues joined in these proceedings. The Applicants contest the relevance of these facts as averred by Respondent, although for the purpose of these proceedings the Applicants are prepared to accept these facts as undisputed as set forth in the form of averments in the Respondent's written pleadings.

According to the Applicants' calculation, at least 22 such non-African States and territories have been cited by Respondent, with an apparent bearing upon the issues in the case, with apparent relevance, in Respondent's view, to such issues. Representative examples may be found in the Counter-Memorial and the Rejoinder copiously; for example, the Counter-Memorial, **III**, at pages 201-211, among others, pages 219, 263-265 and 266; the Rejoinder, **VI**, pages 192-199, *passim*, etc.

Upon Respondent's theory, accordingly, certain situations in such non-African States or territories are relevant elements or facets within the ambit of what Respondent presumably regards as, in its own term, "all the facts". Respondent nonetheless omits such States and territories from its proposal without explanation for the omission.

Another aspect of Respondent's proposal, relevant in the context of a discussion concerning the judicial tasks which would confront the Court in an attempt to inspect areas of any sort, anywhere, would be illustrated by certain questions which arise hypothetically in connection with the investigation or inspection of South West Africa, the mandated Territory. Respondent's proposal calls for an inspection. This word, it is to be assumed, envisages the taking of testimony and hearing of witnesses in areas proposed to be visited. This would follow naturally and inevitably from Respondent's premise of the necessity of examining all facets of the situation, as the Respondent puts it, *in loco*. Undoubtedly the views of persons affected directly would be relevant, if not decisively important, factors, facets, or elements of the factual situation which would be in question.

Respondent's employment of the word "inspection", therefore, in terms of its proposal, must be assumed to bear something other than its literal significance. Except in a medical sense, or the like, "inspection" is normally applicable to places and objects and *things*; *people* are consulted or heard. Unless the views of people are not factors or facets of the situation, then, of course, the Applicants misconceive completely the intent or purport of the proposal.

Considering the proposal for inspection of the Territory of South West Africa in the light of this premise, the following questions, among others, become pertinent in appraising the judicial task implicit in a fair reading of the proposal: How many members of the population would be heard? How would they be selected for this purpose? What procedure would be appropriate for ascertainment of their views? Would they be consulted in the form of a plebiscite, or by any other means, to assure a fair appreciation and evaluation of an important fact, to wit, their own assessment of Respondent's policies and practices of apartheid?

Numerous petitions from time to time have been submitted to the United Nations' agencies by inhabitants of the Territory. They illustrate the manner in which the daily lives of the inhabitants are affected by the systematic implementation of the apartheid policy. Examples are set out in the Memorials, **I**, page 167 and following. The Applicants have not relied upon the accuracy of statements in such petitions; the Applicants have cited such petitions for the bearing they may have as confirmatory of the reasonably predictable consequences of the practices and policies which are undisputed. And such petitions have been received unfortunately in a context in which Respondent's co-operation has not been forthcoming in their transmission. Nor has it been possible to have continuous, effective supervision over the Mandate of the sort envisaged in the mandate system. Mr. President, some petitioners have been among the numerous inhabitants who have managed to leave the Territory for the purpose of pursuing educational advantages not permitted to them in the Territory under the admitted policies and practices of apartheid. Would the views of such petitioners, or other persons similarly situated, be sought as relevant facets of the factual situation? Some of them presumably are not permitted to return, or to return only under certain

conditions unacceptable to them. Would their views be excluded as being irrelevant facets of the situation, as not being part of the facts with which the Court should be concerned?

In raising such questions, the Applicants, of course, do not intend thereby to make any suggestions or proposals of their own. These matters are cited merely to demonstrate or to confirm the validity of the Applicants' submission, that it is not enough, and not of genuine assistance to the Court, merely for Respondent to make a sweeping assertion that "all facets" must be examined, all facts. Any judicial enquiry or inspection couched in such terms, *ex hypothesi*, would be interminable and unlimited and of course it cannot seriously be contended; that is obvious. It might be said and presumably would be said that a rule of reason could be applied and that time, place, substance could and should be fixed by the exercise of a sound judicial discretion. That no doubt is what Respondent might say or what the Applicants certainly would say if confronted with a statement of the sort I have just made to the Court. However, this begs the question in terms of the submission by Respondent of its proposal. The exercise of a sound judicial discretion in this respect is precisely what the Applicants are urging upon the Court as the prime necessity. The selection of criteria by which such discretion would be required to be exercised is the very point at issue, and the answer to the selection of relevant facts rests upon the criteria which must be applied and are applicable in terms of the legal theory advanced by the Applicants, and such theory read in the light of their submissions and contention often referred to in the course of these proceedings, and in the written pleadings, that the relevant facts upon which they rest their case are the undisputed facts of record in these proceedings.

The foregoing questions, therefore, are adduced, and the questions raised, for the purpose of demonstrating that the term "all the facts, all facets of the situation" begs the question and is not helpful.

It has been the Applicants' respectful endeavour to place before the Court considerations of law, some selected, we hope not too arbitrarily or digressively, in anticipation of legal argument which will be resumed in due course. The considerations which the Applicants have respectfully placed before the Court demonstrate, in the Applicants' view, that the proposal is inherently undefinable and indeed, unintelligible in the terms in which it is presented.

Before concluding, Mr. President, it will be necessary to refer to the next category of question for brief consideration, and that is the conditions expressed or employed in the Respondent's proposal. This bears, particularly, upon the proposal with regard to an inspection in the Republic of South Africa itself. In its presentation of the proposal under discussion, Respondent stated as follows:

> "In addition to such an inspection of South West Africa, this part of our proposal encompasses, as a distinct sub-part thereof, a limited visit to the Republic of South Africa itself—limited, that is, in the sense of being confined to matters that are relevant in respect of South West Africa. As the Court will readily appreciate, there are reasons of principle and relevancy why this part of the proposal cannot be so completely unlimited and unqualified as in respect of South West Africa itself." (**VIII**, pp. 278-279.)

In this context we have reference to unspecified limits, principles of

relevancy, qualification, etc., which this part of the proposal envisages, for which are not included in other parts of the proposal, with respect to other areas, certainly not in these terms. In the same place, Respondent states that—

> "... as the pleadings show, there are matters within the Republic which, within a limited sphere, are relevant to the adjudication in respect of South West Africa" (*ibid.*, p. 279).

What do the pleadings show Mr. President, in this respect?

In the Counter-Memorial, **II**, at page 457, Respondent states that in forming its "considered views", as it describes them, in regard to—

> "... finding such methods of achieving the ideals of the Mandate as might best be suited to circumstances and conditions in the Territory ... Respondent was frequently influenced by experience gained in South Africa itself in regard to comparable problems and policies aimed at their solution, and also by instructive indications afforded by events, tendencies and policies in other parts of Africa and the world at large."

Further in the same volume, Respondent states that it—

> "... has been cautious about applying to the Territory any policies operative in South Africa, even with adaptations to local conditions, without first having established their soundness in practice in South Africa itself" (**II**, p. 476).

More specifically, the following examples may be cited or derived from Respondent's written pleadings which relate to facets or factors in terms of experience, events or conditions in South Africa itself, which Respondent asserts have influenced it in the formulation of its policy for the Territory and have some relation to it therefore in respect of the measures of implementation adopted in the Territory for the policy of apartheid. Specific examples among many are as follows—in Respondent's own words, at **II**, page 476, of the Counter-Memorial, Respondent refers to—

> "The application to South West Africa of the new methods and policies introduced in Bantu education in South Africa affords an example in point ..."

"In point", that is, as a matter relevant to the Territory whose soundness has been established by Respondent in South Africa.

Secondly, with respect to diamond mining legislation in South West Africa, which is, of course, as the record shows, an important element in the economy of the Territory. Respondent refers to the knowledge and experience gained in South Africa, with respect to—

> "regulation and control of the mining and marketing of diamonds [which] present extremely complex problems" (**III**, p. 54).

Next, in the same volume at pages 64-66, Respondent describes its policy of so-called "job reservation" in the Railways and Harbours Administration in the Territory, whereby the welfare and progress of inhabitants are promoted by denying to them certain types of jobs which they are otherwise qualified for, on the basis of their race. And in this reference to the policy in question, Respondent has this to say—

> "Inasmuch as the social and economic relationship between the different population groups in South West Africa is basically the

same as that which pertains in South Africa, the application of a similar policy of a Territory, with adaptation where necessary, is only natural." (*Ibid.*, p. 66.)

Mr. President, the Applicants, in making these references, are not of course engaging at this moment in any aspect of these citations which involve the merits or inferences to be drawn therefrom. The only purpose of this citation is to match these pleadings in the Respondent's formulations against its proposal for a limited qualified inspection of the Republic of South Africa in connection with the inspection of all facts and all facets of the situation in the cases at Bar.

Continuing very briefly with two or three more illustrative examples to show how pervasively relevant Respondent has made its policies, practices, experience and so forth in South Africa in connection with the case—on its own initiative—we may cite the Counter-Memorial, **III**, in which Respondent contends in the following terms:

> "Throughout South Africa's history there has been social separation between the members of the White group and the members of the non-White groups; the members of each group preferring to associate with members of their own group, and avoiding contact in spheres where friction could be created.
>
> By reason of the difference in their stages of general development, the relationship in the economic field between members of the White group and the members of the non-White group has in the past generally been that of employers and employees. [We are talking here, Mr. President, about South Africa] In this factual situation many Europeans, in all probability the vast majority, are not prepared to accept a relationship in which non-Whites could be in positions of authority over them." (**III**, p. 65.)

In the quoted passage there is a remarkable similarity, indeed, a virtual identity, of formulation with the language quoted, specifically with reference to the Territory of South West Africa, in the Counter-Memorial, **III**, at page 528. I have quoted from that passage, in context, in the address to the Court yesterday.

One more example may suffice. At page 131 of the Counter-Memorial, **III**, Respondent has referred to the success of Bantu authorities in South Africa, by way of suggesting that a similar system may fruitfully be applied in the Territory itself. At page 173 of the same volume, Respondent avers that it has adopted in the Territory the policy applied in South Africa with respect to the centralized control of so-called "Native" policy. At pages 174-176, of that volume, Respondent has recounted the background of "Native" urban areas legislation in South Africa, and has described the application of such legislation, with some adaptations, to the Territory.

At page 185, Respondent has averred that it "envisages the early establishment in the Territory also of a system similar to that [in South Africa] . . . relative to the local government of Natives in urban areas". Similar examples may be multiplied, but it is not necessary to burden the record, at this point, with references of different character than those quoted—they all come to the same point. That point, in the context of the discussion of Respondent's proposal for an inspection, is that the proposed, or purported, limitations, qualifications, or conditions, which are envisaged *as a matter of law* in the Respondent's proposal, which I

have quoted from **VIII**, pages 278-279, that those qualifications, limitations, implied or expressed conditions, undefined as they are, are not intelligible, do not permit or enable the Court to exercise a sound judicial discretion concerning what Respondent may, or may not, regard as elements relevant to "all facets", or "all the facts". From the examples I have cited from the pleadings, the Applicants do not perceive where a line could reasonably, or feasibly, be drawn, it would appear that an unconditional, unqualified examination of the Republic would be relevant, or none at all. The Applicants submit and perceive that none is necessary. It would, therefore, appear to the Applicants that it remains to conclude only with a repetition of the assurance, stated at the outset of the Applicants' presentation of views on this proposal, that it is assumed as axiomatic that the Parties would wish to co-operate in every manner to facilitate and expedite any measures or steps which the Court should conclude to be relevant or useful in reaching a decision upon whether or not the Applicants' submissions are well founded.

The quality of the proposal—and I do not join with Respondent in its apparent attempt to place into issue in these proceedings a contest between the Applicants' motives, on the one hand, and its motives, on the other in this litigation, Mr. President—involves no competition of motive. It does seem, however, that in evaluating the proposal in its essence, some significance may be drawn from the fact that when the proposal was originally submitted, so far as the Applicants were aware—at least the first notice they had of the proposal, or the intention to submit it, in the form of a letter dated 12 March 1965—no reference to an inspection of South Africa was included. What has now become, or is asserted as, a relevant and important aspect of the proposal, was not included in its first form. It seems that further comment is unnecessary in reaching a fair evaluation of the proposal and the manner of its presentation, particularly in the light of the factors previously mentioned with regard to the timing—precipitate timing—of a proposal which Respondent now asserts should be acted upon quickly, say in a few weeks, and is of essential materiality and relevance to the adjudication of these proceedings.

The Applicants, Mr. President and Members of the honourable Court, therefore respectfully submit that the proposal for the inspection *in loco* is unnecessary, expensive, dilatory, cumbersome and unwarranted, that the weighing of the proposal and its asserted reasons in the scale of justice, alongside the length of time which this litigation has consumed, in respect of the antecedents of this legislation, in respect of the voluminous pleadings which, for more than four years, have been prepared, collated, and are now submitted in unusually bulky form—that in the light of all these considerations the Court should reject the proposal and, on the basis of that submission, Mr. President, there remains only for me to thank the Court and the honourable President for the gracious audience which it has given to the remarks which the Applicants have submitted. Thank you.

10. ARGUMENT OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA
AT THE PUBLIC HEARING OF 28 APRIL 1965

Mr. President, I shall be very brief. The sole reason for raising anything at this stage is that we also have genuine difficulty about one aspect of what we have to reply to. I will deal with the details at a later stage—but my learned friend, as I understood him, founded his basic contention for rejecting the suggestion of an inspection *in toto* on considerations of relevancy. He referred the Court in that regard to the Applicants' case and represented to the Court that that case was of so narrow a nature (the Applicants' case in regard to Respondent's policies) as to require no further enquiry into the facts by way of either oral evidence or an inspection. That is the difficulty I have in this regard. He repeated several times that, for that purpose—the purpose of the Applicants' case in that regard—there are no relevant facts in dispute.

Mr. President, what I want to put very briefly is this:

If the Applicants can make it perfectly clear to us and to the Court that their case in regard to the Respondent's policies in South West Africa does not call for any value judgment by this Court upon those policies, then, and in that event, we can readily agree that the basis upon which we have envisaged the calling of evidence, and upon which we have proposed an inspection will fall away altogether.

What I mean by a value judgment in that regard is a judgment which would relate to the question whether those policies are good or bad, in relation to promotion of well-being and progress—good or bad in respect of their objective, or in respect of their effect in that regard, or in respect of both. We have contended that the only legal basis upon which the Court could adjudicate in that regard would be one of objective, but, nevertheless, as long as there are allegations on record, even in regard to the effect of the policy—factual allegations inviting the Court to make a value judgment in that regard—and before the Court has decided that such a matter is, as a matter of law, irrelevant for its consideration—we must, with respect, insist upon an inspection and the hearing of this evidence.

Mr. President, it is relevant to note in that regard that the Applicants still have on record a number of allegations, for instance, that the distinctions drawn by the Respondent's policies are arbitrary, that they ignore the needs and capacities of the persons concerned, and that they subordinate the interests of the majority to the preferences of a minority. Now, in answer to a question put by an honourable Member of the Court, we heard the Applicants' learned Agent adding that the policies, according to their theory, are inherently incapable of promoting well-being and progress. That again, Mr. President, is, in our submission, a submission of fact—a submission inviting this Court to pass a value judgment on the policies.

Now, if the Applicants can make it clear that we misunderstand them in some way or other in that regard, then, of course, as I have said, the basis of our proposal, as it stands thus far, will fall away. If they can

demonstrate that they rely solely on a norm, or on norms, or on norms and standards of a technical nature—technical in the sense that it or they prohibit differentiation according to some definition which applies irrespective of whether the differentiation, in fact, has a good or a bad objective, or a good or a bad effect in regard to well-being and progress; if they can do that, Mr. President, if they can make it clear that they withdraw all their allegations about arbitrary differentiation—all their allegations to the effect that the policies ignore the needs and capacities of the individuals involved—all their allegations to the effect that the policies subordinate the interests of some inhabitants of the Territory to the interests or the wishes or the preferences of others—then we shall have clarity. As long as they do not do that, as long as these invitations to the Court to make a value judgment in any of the senses I have indicated stand on record we must insist upon the relevance of the evidence which we wish to tender, and on the relevance of the inspection. I wonder whether it might not be possible for my learned friend, who can have his wishes in that regard, to make that clear to us because that might affect the manner of the rest of our presentation in this regard; it might even affect the total length of these proceedings.

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11. ARGUMENT OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARING OF 28 APRIL 1965

Mr. President, although I listened as carefully as I was capable of doing, and with as much interest as I could muster, I am not sure that I have all the elements or implications in mind of the questions addressed by the Respondent. For such assistance as it may be, the question asked in terms of "value judgment" involves, it seems to the Applicants, the classical problems with which a court of law is always confronted. I do not know what the Agent for the Respondent has in mind precisely in the concept of "value judgment". If I may paraphrase, to see whether I understand the meaning correctly, the Court would obviously apply a judgment of values, and that the judgment would be based upon the facts, the inferences which the Court drew from the facts, and the application of those facts and inferences to the ascertainable, existent and legal norm which governs the conduct of the Mandatory. It would seem difficult, however, to respond to the question in the terms in which the Respondent's Agent has submitted it, without reminding the Court once more, and through the Court the Respondent, that the essence of the case of the Applicants is that the admitted practices and policies—admitted and undisputed as facts of record—call for, demand, compel the value judgment, the inference, the legal judgment, whatever phrase is acceptable to the Respondent, that these policies and practices there set forth are incompatible with and repugnant to the Mandate as the Applicants respectfully view its obligations.

Now if value judgments, in the sense perhaps intended by Respondent, includes value judgments concerning the existence, or character, or content of the international legal norm, then of course that is an entirely different question. The Applicants are either correct or incorrect, they are either right or wrong, in their submissions with regard to what the international legal norm applicable to this case stands for, what its content is; and we are prepared to stand upon the proposition that all averments of fact in the record call for an adjudication on the basis of a value judgment, on the basis of a legal conclusion, on any other psychological basis by which courts or judges conduct their business. But these undisputed facts call for a judgment, which I would call a value judgment, that these facts are repugnant to the Mandate in the terms in which we construe the Mandate as explained in our written pleadings, and upon which construction the Applicants' case stands or falls. It is difficult to understand how the Applicants can do more. Whether or not the policy of permitting or prohibiting—I do not intend to reopen the question of merits—but whether a particular policy or practice of permitting or prohibiting, as the case may be, an individual from exercising his capacities, his merit, his potential, his God-given qualities in order to accomplish and realize his life—if that can be open to the question whether or not it promotes his welfare, then of course the Applicants lose their case—there is no question about that, if the concept of promotion of welfare of the inhabitants permits that as an element. By reason

of the international legal norm for which the Applicants contend, there is no question that can arise with respect to value judgment as to whether such a policy, such a practice (which is merely one of many, it is only one part of many, all undisputed in the record as facts) does or does not promote his welfare—that is not a question, a value judgment in any sense other than it is a compelled, legal judgment on the basis of the Applicants' submission.

Now if this answer, read in the light of the pleadings and what the Applicants have respectfully placed before the Court, does not help our worthy opponents, the Respondent, to prepare a requisite answer, it will not I regret to say be the first time in the history of this litigation in which the Parties have been unable to find a common orbit for the presentation of their views and the legal hypotheses upon which those views rest. There is, of course, an open question as to who is, or what is, the prime source of confusion; perhaps the Applicants are the guilty party in that respect—that is a question with which I do not deal. But as stated in the outset of the Applicants' presentation, it was made explicitly clear by the Applicants that one of the prime difficulties in this proceeding, which has marked it from the beginning, is that the Respondent's conception of the Mandate, and in particular the sacred trust, is wholly different from that contended for by the Applicants; that their views with respect to this, as I said at the outset, circle in different orbits. There can be no question of promotion of welfare that could be relevant to the practices and policies which are complained of and which are the subject of the undisputed factual content of this record. How many times is it necessary to repeat that is the heart and soul of the Applicants' case, and if the Applicants are wrong, they will be told so, of course, by this honourable Court in due course? The Applicants have confidence in the legal propositions upon which they rest their submissions and will, it goes without saying, Mr. President, endeavour to clarify those submissions to the fullest extent of their capability to do so. But on the basis of the submissions, as the Applicants intend and respectfully present them—on the basis of the undisputed facts of this record, the Applicants respectfully submit, and accordingly through the Court advise the Respondent, that the Applicants rest their case upon the propositions asserted, and that the acceptance of those propositions would make irrelevant, unnecessary, for all the reasons the Applicants have endeavoured to explain, the introduction of further evidence, either at the seat of the Court or elsewhere; and if I may take just a very brief moment to refer in conclusion to a point which might be implied in the request addressed by the Respondent's Agent for clarification with respect to the Applicants' position, I should, if I may be permitted to, Mr. President, like to address myself to the proposed procedures with regard to a certain aspect of Respondent's proposal which, in its presentation, it linked with its proposal, in terms of the presentation of 30 March, and that is the calling of witnesses—a point, a procedure, to which the Respondent's counsel has again referred this morning in the same context.

In terms—and this can be very briefly stated, Mr. President—of Respondent's presentation on 30 March, Respondent referred to the important purpose to be served by its proposals as stated, as set out, at **VIII**, page 15, and said that—

"... it is mainly for this very important purpose ... that we

[Respondent] intend to call witnesses and experts and for which we are proposing this inspection *in loco*";

and I refer in this context, Mr. President, to the proposal that, for the Court's convenience, for the sparing of an unnecessary burden upon the Court's time and patience, to say nothing of expense to both Parties and to the Court itself, the Applicants for that reason were prepared to make any necessary stipulations with Respondent so that its further material might be presented in documentary form prepared, collated and gathered on its own time, and not on the Court's time; and that if any questions of demeanour of witnesses should possibly be involved, then the Court would of course be free to call or request the attendance of such witnesses in person; they will not be subject to cross-examination, nor will the Applicants consider it necessary to participate in the taking of depositions leading to their statements for submission to the Court. This I repeat as a possible assistance to the Respondent in reply to his questions addressed to the Applicants, if that was indeed intended by him to be an element for further clarification.

[Public hearing of 30 April 1965]

Mr. President and Members of the honourable Court, during the course of the proceedings of 28 April 1965 the honourable President addressed to the Applicants a question to which the Applicants now respectfully endeavour to respond. The question addressed to the Applicants by the honourable President appears in **VIII**, Minutes, page 22. In their response, the Applicants will have in mind remarks made in relation to the question put by the honourable President during the same session of the Court. These remarks appear at **VIII**, pages 22 and 24.

The question posed by the honourable President requests explanation of any distinction which may exist between Submissions 3 and 4, which are set out in the Memorials at **I**, page 197. The response of the Applicants to the question addressed to them by the honourable President may be formulated concisely: there is no distinction intended by the Applicants to be made, or sought to be drawn, explicitly or implicitly, which has any bearing upon their theory of the case. Although expressed in different form, for reasons which will be explained, the submissions rest upon exactly the same legal basis. The legal basis of the Applicants' case, upon which Submissions 3 and 4 both are founded, is that the laws, administrative measures, and the official methods and measures by which they are carried out, which comprise the policy of apartheid, constitute a *per se* violation of Article 2 of the Mandate and of Article 22 of the Covenant of the League of Nations.

The foregoing response to the question addressed by the honourable President to the Applicants is based upon and reflects the following considerations explanatory thereof. As a preliminary matter, for the convenience of the honourable President and the Court in following the remarks about to be made, the attention of the Court is respectfully drawn to the terms in which Submissions 3 and 4 are couched. The Court will note that Submission No. 3, unlike Submission No. 4, incorporates the word "apartheid". Submission No. 3 describes the sense in which the word apartheid is used in that context, by means of an explanatory phrase which I take the liberty of quoting; this is at **I**, page 197 of the Memorials:

"... *apartheid*, i.e., has distinguished as to race, color, national or tribal orgin in establishing the rights and duties of the inhabitants of the Territory ...".

Submission No. 3 requests the Court to adjudge and declare that such practice—the practice of apartheid—violates Respondent's obligations, as stated in the relevant articles of the Mandate and of the Covenant. This, of course, is intended to express a legal conclusion. Submission No. 3 concludes with a prayer for relief, namely that the Court should adjudge and declare that Respondent has the duty forthwith to cease the practice of apartheid in the Territory.

Submission No. 4, on the other hand, does not incorporate the term "apartheid". Submission No. 4 does, however, refer to the economic, political, social and educational policies applied within the Territory without a descriptive label. The economic, political social and educational policies refer to the same legislative and administrative measures, and the same official methods and measures by which they are put into effect, as are described in Submission No. 3 by use of the term "apartheid".

Both Submissions 3 and 4 refer to the fact that the relevant practices and policies are described in Chapter V of the Memorials, and both Submissions 3 and 4 refer to summarizations thereof in paragraph 190 of that Chapter.

It is to be noted that Submission No. 4 makes no reference to paragraph 189, which is set out in the Memorials at **I**, page 161. The reason for omission from Submission No. 4 of reference to parapgraph 189 is, we think, self-evident, inasmuch as paragraph 189 solely is concerned with a discussion of the term apartheid, which does not appear in Submission No. 4.

Mr. President, the reason why the two submissions were included in the Memorials, although formulated in different terms, but with precisely the same intendment, is simply stated. Respondent has for many years described the policy in question which it has applied in the Territory by the designation "apartheid". More recently, Respondent apparently has come to prefer the phrase "separate development" to describe the same policy. The fact that the expressions "apartheid" and "separate development" are used interchangeably by Respondent, and not as words of art with a technical meaning, appears clearly from the record. As pointed out in the Reply at **IV**, page 263, *inter alia*, the phrases are synonymously employed. For many years, however, public international organizations concerned with the premises, application and consequences of the policy of apartheid increasingly have employed the term "apartheid" to describe the series of legal and administrative measures, and official methods and measures by which they are put into practice, the totality of which is characterized and termed "apartheid". This appears in many resolutions of the United Nations, for example, as well as other documents, recommendations, decisions, and resolutions of a public nature.

It seemed to the Applicants appropriate, accordingly, to incorporate in the submissions a request to the Court to adjudge and declare that the policies and practices generally described by, and commonly known as, apartheid, are violative of the relevant articles of the Covenant and the Mandate, and that Respondent has the duty forthwith to cease the practice of apartheid in the Territory. In the light of common usage of that term, as I have said, the Applicants conceived that if it should please the honourable Court to adjudge and declare in favour of Applicants'

Submission No. 3, the term "apartheid", as employed and described in the pleadings and in public usage, might well be referred to explicitly.

In order to make clear, however, that the only significance attached to the use of the word apartheid arises out of its popular usage as a description of the practices and policies which it describes, the following sentence was included in paragraph 189 of Chapter V of the Memorials, at **I**, page 161:

> "We here speak of ***apartheid***, as we have throughout this Memorial, as a fact and not as a word, as a practice and not as an abstraction."

Paragraph 189 of Chapter V is designed to serve as a summary of the conclusions, characterizations and inferences which, in the Applicants' view, are properly to be drawn from the laws, regulations and official methods and measures applied by Respondent in the Territory; this is made explicitly clear in the opening sentence of paragraph 187, on the same page of the Memorials—that is, page 161—under the same heading:

> "The factual record of the Mandatory's conduct [and I stress the term 'factual record of the Mandatory's conduct'], as hereinabove more particularly set forth, has a desolate but remarkable consistency."

It is on the "factual record of the Mandatory's conduct", comprising the laws and regulations, and the official methods and measures by which they are put into practice, the existence of which is undisputed, weighed against the relevant and applicable international legal norm and international standards, described by the Applicants in their written pleadings and in these Oral Proceedings, that the Applicants rest their case.

Both Submissions 3 and 4, although formulated differently in terms, for reasons which I have endeavoured to explain, have the same intendment. There is no distinction between them in any respect relevant to the Applicants' basic and consistently held theory that the factual record of the Mandatory's conduct constitutes a *per se* violation of Article 2 of the Mandate and Article 22 of the Covenant, read in the light of the international legal norm and international standards which the Applicants contend exist and which govern the interpretation of the articles in question.

In respect of the formulation of the Applicants' Submission 4, it was considered both expedient and appropriate to refer to precisely the same body of laws, regulations and official methods and measures by which they are put into practice without, however, explicit use of the term "apartheid". As has been said, although such laws, measures and practice are commonly and popularly described by that name, that term in and of itself has no precise significance, apart from the laws, the regulations and methods and official practices which put it into effect, and pursuant to which the rights and duties of the inhabitants of the Territory are allotted on the basis of membership in a group, class or race, rather than on the basis of individual merit, capacity or potential.

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

Both Submissions 3 and 4 are intended to refer to the same practices and policies, accordingly, all of which are described in Chapter V of the Memorials and summarized at paragraph 190 in terms in the form of averments of fact.

There is, of course, Mr. President, also included in Chapter V of the Memorials a considerable body of explanatory, inferential, and argumentative material. It was for this very reason that the Applicants regarded it as a possible convenience and clarification to include—strictly speaking what was unnecessary—a paragraph in Chapter V, to wit, paragraph 190, which is designed, *inter alia*, to collate and categorize the averments of fact which are set out in more discursive form in the remainder, the body, of Chapter V itself.

It is to be noted, Mr. President, that paragraphs 189 and 190 of Chapter V are set out under the caption "C. Legal Conclusions".

Paragraph 190 itself commences with a paragraph of argument and characterization. There follows a series of three legal propositions, each of these introduces a brief summary of factual averments. The latter are set out in the Memorials at **I**, pages 162-166.

It is relevant to note in this connection that Chapter VIII of the Reply, relating to Submissions, states, in part, as follows:

> "Upon the basis of the allegations of fact in the Memorials, supplemented by those set forth herein or which may subsequently be adduced before this honourable Court, and the statements of law pertaining thereto, as set forth in the Memorials and in this Reply, or by such other statements as hereafter may be made, Applicants respectfully reiterate their prayer that the Court adjudge and declare in accordance with, and on the basis of, the Submissions set forth in the Memorials, which Submissions are hereby reaffirmed and incorporated by reference herein." (**IV**, p. 588.)

In order to avoid any possible misunderstanding which might arise from the fact that Submission 3 refers to "practice", whereas Submission 4 uses the term "policies", the Applicants think it appropriate to state, without qualification, that both words are used in a synonymous and interchangeable sense.

The word "policies" as used in Submission 4, is to be taken as having the same meaning as if it read "practices". As the written pleadings both of the Applicants and of Respondent make clear, the two terms are used interchangeably in many contexts in the written pleadings of both Parties. Where they are used conjunctively, the word "policy" refers to a continued or repeated course of conduct.

The Applicants rest their case, therefore, upon laws and regulations, as well as official measures and methods by which they are effectuated, the existence of which is conceded by Respondent. Such laws and regulations and official measures and methods are set out in the written pleadings of the Parties.

In the event Respondent should assert doubts as to the laws, regulations, and official measures and methods which comprise the policy of apartheid, the Applicants, at an appropriate stage of these proceedings, or at any time, will be pleased to furnish citations of illustrative examples. Respondent itself uses the term "apartheid".

Reverting to the terms in which Submission 4 is formulated, the submission avers that Respondent, by virtue of the enumerated policies applied within the Territory, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory. Mr. President, this formulation is not intended, in any manner, to suggest an alternative basis upon which the Applicants seek to make

their case, other than the basis upon which Submission 3 itself rests. Submission 4, accordingly, is intended to mean, and should be read as if it stated in terms, that Respondent's policy and practices in the Territory, read in the light of the applicable international legal norm and international standards, fail to promote the well-being and progress of the inhabitants of the Territory within the meaning of Article 2 of the Mandate and Article 22 of the Covenant.

To put the same point in a different way, Submission 4 is intended to be read and understood precisely in the same sense as if it were formulated in the following manner:

> "4. The Union, by virtue of the economic, political, social and educational measures and practices applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at paragraph 190 thereof, has, in the light of the applicable international legal norm and international standards, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory ..."

The Applicants respectfully maintain and reaffirm that Submission 4 at no time was, and is not now, intended to be read in a sense different from that made explicitly clear in the re-formulation just quoted.

In the Rejoinder, V, Respondent states the following, with regard to Submissions 3 and 4 and the norm of non-discrimination, or non-separation:

> "If it [that is the norm of non-discrimination or non-separation] possesses the content ascribed to it by Applicants, and if it can be regarded as embodied in the Mandate, Respondent's admitted policies of differentiation would be in contravention thereof, leaving no further dispute between the parties as regards Applicants' Submissions Nos. 3 and 4." (V, p. 175.)

In respect of the question addressed to the Applicants by the honourable President, it follows that no issue is presented thereunder which would call for, or make relevant, an inspection to appraise, evaluate or make judgments concerning whether, or to what extent, Respondent's policies of administration in fact applied by the Respondent in the economic, political, social and educational life of the Territory are compatible with, or repugnant to, Respondent's legal obligations as Mandatory under the sacred trust.

The Applicants' case stands or falls on its theory and submission that the laws and regulations and official methods and measures, the existence of which is undisputed in the record, are inherently and *per se*, as a matter of law, in violation of the obligations of Article 22 of the Covenant and Article 2 of the Mandate, read in the light of, and interpreted in accordance with, the applicable international legal norm and international standards which are defined and described by the Applicants in their written pleadings and oral arguments, the latter not yet, of course, having been completed.

In respect of Respondent's proposal for inspection which, of course, is the context of the honourable President's question, and in the response thereto, the Applicants have sought to demonstrate, *inter alia*, that nothing the Court, or a committee thereof, could do, see or hear in the Territory, or elsewhere, could or would aid the Court to adjudicate upon the validity of the Applicants' submissions.

Such inspection only could serve, perhaps, the purpose of judicial enquiry into the value of the international legal norm and international standards.

In the course of his remarks in relation to the question addressed to the Applicants, as set out at **VIII**, pages 22 and 24 the honourable President adverted to the possibility that if the Applicants could clarify the matter under discussion, it may well be that a great deal of the evidence which has been foreshadowed by Respondent could become unnecessary.

Mr. President, in the light of the voluminous pleadings and documentation which have been filed, together with the oral arguments which have been made, and remain to be made, addressed to the issues joined in these proceedings, the Applicants have profferred co-operation with Respondent and with the Court in the event that Respondent perseveres in its indicated intention to adduce further evidence in the form of oral testimony.

The Applicants respectfully reaffirm their desire to co-operate in this respect by any feasible method which might result in saving the Court's time, as well as undue expense in this already very protracted litigation.

In the Applicants' respectful view, there appears to be even less justification for presentation of oral testimony than for inspection. The Applicants have suggested a procedure pursuant to which they would stipulate that any depositions, properly authenticated, of any witnesses or experts whose testimony Respondent, subject to the Court's permission, would wish to add to the documentation of these proceedings, will be accepted by the Applicants as full and correct statements of what such witnesses or experts would have testified had they been present personally in Court. The Applicants would waive all right to be present during the taking of such depositions, for any purpose, including the purpose of cross-examination.

Such stipulation, of course, would be subject to the Court's possible wish to observe the demeanour of any such witnesses or experts in the course of giving testimony or to address questions personally to them in Court, if that should be the Court's wish.

The Applicants, moreover, would waive all right to examine such witnesses or experts appearing personally in Court.

The Applicants, in terms of Rule 50 of the Rules of Court, would reserve the right to comment upon any depositions or other documents filed, or upon any evidence given.

Mr. President, this concludes the Applicants' presentation of their response to the question addressed to them by the honourable President, as well as of certain observations which the Applicants hope may be relevant and helpful in connection with the honourable President's remarks relating to the question. If, and to the extent consistent with the Statute and Rules of Court, it is desired by the honourable President to request further clarification, it would be an honour and an opportunity, on the part of the Applicants, to attempt immediate response thereto.

Mr. President, it remains for the Applicants to comply with their duty on this occasion, which they gladly do, to address themselves to certain queries raised by Respondent during the course of the session on 28 April 1965. Respondent's queries and comments are set out in the verbatim record at pages 54-55, *supra*.

In the course of the presentation of its queries, Respondent assured the Court that the basis upon which it has envisaged the calling of evidence

and upon which it has proposed an inspection would fall away altogether if the Applicants could make it clear to Respondent and to the Court that their case (Applicants' case) in regard to Respondent's policies in South West Africa does not call for any value judgment by this Court upon those policies—that was the phrase used "value judgment".

Respondent went on to say:

> "What I mean by a value judgment in that regard is a judgment which would relate to the question of whether those policies are good or bad, in relation to promotion of well-being and progress—good or bad either in respect of their objective, or in respect of their effect in that regard, or in respect of both." (P. 54, *supra*.)

Mr. President, perhaps it will be clear from what the Applicants have had to say in their response to the questions addressed by Judge Sir Gerald Fitzmaurice, as well as by the honourable President that, in the Applicants' view, the value judgment whether apartheid is "good or bad", in Respondent's phrase, already has been made. It has been made as a normative judgment by the organized international community, acting and speaking over the years through the competent organs, including the United Nations, the International Labour Organisation, and other Specialized Agencies, as well as other general and regional institutions and authorities and in international agreements pertaining to this subject. Many examples are set out in the Applicants' written pleadings. They will be referred to upon resumption of argument upon the legal issues, which has been suspended momentarily for the discussion of the proposal of inspection.

Mr. President, in concluding this brief, but I venture to hope adequate, comment concerning Respondent's queries, it remains only to be added that Respondent itself has given the clearest possible answer to its own question in its own written pleadings. This it has done not only once, but repeatedly.

In the Rejoinder, V, and I refer to page 119, Respondent concedes, or contends:

> "If this alleged norm [that is, the norm asserted by the Applicants] exists as part of the Mandate, it would have the consequence that Respondent's admitted policies of differentiation would constitute a contravention of the Mandate even if the Court were to hold that such policies were intended to enure, and did in fact enure, to the benefit of the population as a whole. Consequently the sole issue between the Parties on this aspect of the case is a legal one, viz., whether or not the Mandate contains such a norm."

With this comment, of course, the Applicants agree fully. The word "contain", we would construe as an interpretation of the obligation.

For the purpose of interpretation and application, the following passage in the same volume of the Rejoinder removes any vestige of doubt that Respondent clearly understands the basis of the Applicants' case:

> "It is true that by reference to their alleged 'norm of non-discrimination or non-separation' Applicants can plausibly contend that evidence tending to show an absence of any intention on Respondent's part other than one to promote the interests of the inhabitants, would be immaterial. If indeed Article 2 of the Mandate must be read as containing an absolute prohibition on 'the allotment,

by governmental policy and action, of rights and burdens on the basis of membership in a "group", Applicants would sufficiently establish a violation of the Article by proving such an allotment, irrespective of whether it was intended to operate, or does in fact operate, for the benefit of the inhabitants of the Territory. The legal position would then be similar to that pertaining, for instance, to the prohibition in Article 3 of the Mandate on the supply of intoxicating spirits and beverages to the Natives. And since Respondent's policy is avowedly based to a considerable extent on an allotment of rights and obligations on the basis of membership of the different population groups in the Territory, there would exist no dispute of fact between the Parties. The position would then indeed be, as stated by Applicants, that 'the decisively relevant facts concerning Applicants' Submissions 3 and 4 are undisputed'.

But all this would be so only with reference to the case now sought to be built by Applicants on the alleged 'norm of non-discrimination or non-separation'. None of it would be or is true of Applicants' case as advanced in the Memorials." (V, pp. 105-106.)

For the purpose of this presentation the last comment is, of course, irrelevant. If it is relevant, or conceived so to be by Respondent in respects not clear to the Applicants, it is clear and must be from what has been said often during the course of these proceedings, and in the written pleadings, that this is not a fair and accurate statement of the case as advanced in the Memorials. But, leaving that aside completely, as that is not a point at issue in this context, the submission of the Applicants is that these very quotations from the Rejoinder, which I venture to place before the Court, show very clearly Respondent's understanding that the legal theory advanced by the Applicants does rest upon the application of the relevant international legal norm, and international standards, defined by the Applicants in their pleadings and in their oral arguments, to the legal administrative regulations, to the measures and methods by which, through official action, Respondent applies such laws and regulations in the Territory, the existence of which is not disputed, and that the Court should, in our respectful submission, conclude that Article 2, paragraph 2, of the Mandate, and Article 22 of the Covenant have been, and are being violated by Respondent's practice and policy of apartheid.

I thank the Court for patience in attending to these remarks and I would re-affirm a willingness and desire to respond, by way of clarification, to any further question. Thank you, Mr. President.

12. ARGUMENT OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARING OF 30 APRIL 1965

Mr. President, I should like to concentrate first on the basic reason given by my learned friends for opposing the proposal in regard to an inspection *in toto*. I leave aside for the moment minor questions such as the timing of the proposal—that it came both too late and too early, apparently, according to my learned friends—and points of that nature. The basic question is the submission by my learned friends to the effect that their case rests on so narrow a basis that the factual enquiry which we envisaged, both in regard to the prospective calling of witnesses and in regard to this inspection, would be legally irrelevant to a consideration of their case, and their only case, in regard to Article 2, paragraph 2, of the Mandate. For the purposes of ascertaining whether that submission is sound, it is of course necessary to have absolute clarity as to what the Applicants' case exactly is. Does it rest on the one basis only or does it rest on more than one basis, legally speaking? Does it rest on a norm only to the exclusion of norms and standards in the plural or does it rest in the alternative on a norm or on standards? Does it rest only on a legal norm which automatically and technically renders certain described forms of conduct illegal, or does it rest in the alternative upon factual allegations in respect of which they ask this Court to pass an adverse value judgment either as to the purpose or as to the effect or as to both the purpose and the effect of the Respondent's policies in South West Africa?

Now, Mr. President, when we have clarified that situation as to whether there are alternatives or not, then whatever remains—must be further examined in order to see what the content of that legal norm exactly is or whatever that legal basis may be for the Applicants' case, because it is only when we have ascertained clearly the content of this legal proposition for which the Applicants contend, that we can see what appropriate further factual enquiry, if any should be necessary.

Now it seems that we have made progress Mr. President, in certain respects, particularly this morning. We know now that as between Submissions 3 and 4 there is no distinction: that they are not suggested as alternatives, the one to the other, or as two different allegations, the one added to the other. They rest, as I understood my learned friend this morning, on a legal proposition or propositions which are common to both. We understand, Mr. President, that independently of that legal basis which is said to be a norm or, alternatively, standards, the Court is not asked in respect of Submission 4 to make an enquiry into the fact with a view to pronouncing a value judgment, of any of the kinds which I have mentioned, on the policies as such and purely on a factual basis. I understood my learned friend to say that that value judgment has already been made by the organized international community and various persons and organizations to which he referred, in other words, that question is not submitted to this Court for adjudication, however ready and however willing—and however anxious—the Respondent

might be to have that case fully examined and pronounced upon by this Court in an independent, fair and impartial enquiry of its own. But my learned friends apparently make clear that they do not ask this Court to do that; they rest their case on what the organized international community has said; that is the last word; that constitutes a norm, and they say that the Court has merely to apply that norm to facts which, for the purposes of that norm, are undisputed.

Mr. President, we understood my learned friends to make it clear that that proposition applies even if the facts should be that Respondent's policies, viewed as a whole, are intended to enure, and in fact do enure, to the benefit of the population as a whole.

The Court will recall the fact that my learned friend referred to two passages in our Rejoinder, viz., **V**, at page 119 and again in the same Volume at page 105, in both of which the Respondent addressed itself to the proposition of the norm as then defined in the Reply. The Court will recall that the definition is given in the Reply, **IV**, at page 493; and I shall refer to that definition at a later stage. On the basis of the definition there, we understood it to refer to absolute prohibition against any form of differentiation on the basis of membership in a group, class, race, etc. On that basis of understanding of the norm, that it was absolute, in that respect, we made certain remarks. We then said that factual enquiries by the Court *in order to weigh* the advantages against the disadvantages of the policy and so forth, would be wholly ruled out, the sole question would be whether such a norm existed so as to be binding in law upon the Respondent as part of the Mandate, and we added explicit words to the effect that even if the Court should find that the norm was intended to enure and did in fact enure to the benefit of the population as a whole. That, my learned friend says, he is in emphatic agreement with. Let me refer to the formulation at **V**, page 119 of our Rejoinder. We referred to the formulation at page 493 of the Reply and we then said this:

> "If this alleged norm exists as part of the Mandate, it would have the consequence that Respondent's admitted policies of differentiation would constitute a contravention of the Mandate even if the Court were to hold that such policies were intended to enure and did in fact enure, to the benefit of the population as a whole. Consequently the sole issue between the Parties on this aspect of the case is a legal one, viz., whether or not the Mandate contains such a norm."

My learned friend also read the passage at page 105 of the same Volume which, although in very slightly different wording, has exactly the same purport and effect, and he expressed his emphatic agreement also with that proposition.

So, Mr. President, we have at least made that progress. The difficulty is that that clear statement of his position this morning still appears to be in conflict with other features which stand on the record and to which my learned friend did not specifically address himself this morning so as to indicate the Applicants' attitude in that regard.

The first important question, or problem, which arises in this regard, is this: do the factual allegations made by the Applicants in the Memorials and reaffirmed by them in the Reply which imply a condemnation on the facts, of the Respondent's policies, still stand or do they not?

Mr. President, I should like to begin by referring the Court to those very paragraphs of the Memorials, which are still incorporated, by reference, in the Applicants' Submissions 3 and 4. They are the paragraphs in respect of which my learned friend emphasized that they stand, under the heading of "Legal Conclusions", at **I**, pages 161-162 of the Memorials. I leave out of consideration for the moment, Mr. President, the question whether these paragraphs concentrated on the element of purpose, or good or bad faith, or not—that has been made a strenuous issue by my learned friend. I still submit that there can be no question about it that our interpretation of what was said in that regard in the Memorials, is perfectly correct, but I leave that dispute for the moment. Let us simply see whether they asked for any value judgment of the kind I have described, in regard to purpose or in regard to effect or in regard to both, whether they asked for a pronouncement on the facts by this Court. We find, in paragraph 187 (Memorials, **I**, p. 161), the first one of the "Legal Conclusions", ends off by saying—"The record as a whole reveals the deliberate design that pervades the several parts." Then paragraph 188 (of the Memorials) refers to the possibility that the Mandatory might "explain or extenuate this or that detail of the factual record, if it were merely an isolated event or phenomenon". But they go on to stress the cumulative effect of the record and state this conclusion in the final sentence:

> "Particular laws and particular practices, particular orders and particular acts are all parts of a cohesive and systematic pattern of behavior by the Mandatory which inhibits the well-being, the social progress and the development of the overwhelming majority of the people of South West Africa, in all significant phases of the life of the Territory." (**I**, p. 161.)

Mr. President, it will be noted that the reference is not to an inhibition, a hampering, or a disqualification pertaining to particular isolated individuals in particular isolated circumstances which form a relatively minor part of a big whole, but that Applicants refer explicitly and, in so many words, to inhibiting "the well-being, the social progress and the development of the overwhelming majority of the people of South West Africa, in all significant phases of the life of the Territory".

Paragraph 189 of the Memorial continues (that is one of the paragraphs expressly incorporated by reference):

> "As the Applicants have previously pointed out, the policy and practice of *apartheid* has shaped the Mandatory's behavior and permeates the factual record. The meaning of *apartheid* in the Territory has already been explained hereinabove. The explanation warrants repeating. Under *apartheid*, the status, rights, duties, opportunities and burdens of the population are fixed and allocated arbitrarily on the basis of race, color and tribe, without any regard for the actual needs and capacities of the groups and individuals affected." *(Ibid.)*

I pause for a moment, and point to the factual nature of the allegation that the fixing of the status, and so forth, is arbitrary—arbitrary in the sense that it is without regard to the actual needs and capacities of the groups or individuals affected. The quotation proceeds:

> "Under *apartheid*, the rights and interests of the great majority

of the people of the Territory are subordinated to the desires and conveniences of a minority."

This is, to use my learned friend's expression, Mr. President, a flat allegation of fact. I continue with the quotation:

"We here speak of *apartheid*, as we have throughout this Memorial, as a fact and not as a word, as a practice and not as an abstraction. *Apartheid*, as it actually is and as it actually has been in the life of the people of the Territory is a process by which the Mandatory excludes the 'Natives' of the Territory from any significant participation in the life of the Territory except insofar as the Mandatory finds it necessary to use the 'Natives' as an indispensable source of common labor or menial service." *(Ibid.)*

These are, again, pure allegations of fact, Mr. President.

Now, we come to paragraph 190, incorporated by reference in both Submissions 3 and 4, but the only one relied upon in Submission 4, as originally formulated. It reads:

"Deliberately, systematically and consistently, the Mandatory has discriminated against the 'Native' population of South West Africa, which constitutes overwhelmingly the larger part of the population of the Territory. In so doing ..." (*Ibid.*, p. 162.)

and I pause here for a moment, Mr. President. "In so doing"—in doing what, Mr. President? In discriminating, in discriminating "deliberately, systematically and consistently", against the Native population. I proceed:

"In so doing, the Mandatory has not only failed to promote *'to the utmost'* the material and moral well-being, the social progress and the development of the people of South West Africa, but it has failed to promote such well-being and social progress in any significant degree whatever. To the contrary, the Mandatory has thwarted the well-being, the social progress and the development of the people of South West Africa throughout varied aspects of their lives; in agriculture; in industry, industrial employment and labor relations; in government, whether territorial, local or tribal, and whether at the political or administrative levels; in respect of security of the person, rights of residence and freedom of movement; and in education. The grim past and present reality in the condition of the 'Natives' is unrelieved by promise of future amelioration. The Mandatory offers no horizon of hope to the 'Native' population." *(Ibid.)*

I end the quotation there, for the moment.

Mr. President, if that is not asking for a value judgment in respect of the whole of the policy referred to, of the policies and practices referred to, then I do not know what would amount to asking for such a value judgment.

The question is, do those allegations stand, or do they not stand, as part of my learned friend's case, as part of what he asks this Court to pronounce upon?

The same paragraph, paragraph 190, proceeds, and it says in italics:

"The Mandatory has violated, and continues to violate its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant in the following respects: ..." (Ibid.)

And then follows, Mr. President, a summary of allegations previously made in Chapter V in respect of various aspects of life—economic, political, educational, rights of residence, freedom of movement, security of the person, and so forth. I do not have to run through them; it would be a tedious business, Mr. President. On analysis it appears that each and every one of them is a factual allegation of discrimination against the Natives.

We find that, in the Reply, these and similar allegations were reaffirmed, and I should like to refer the Court to a few of those formulations.

We find at **IV**, page 257 a general formulation in regard to Submissions 3 and 4, given in the course of explaining that the Applicants' case was intended to be based, not upon an allegation of bad faith, but upon an objective evaluation of the Respondent's conduct, and it is said that—

> "Applicants' Submissions 3 and 4 accordingly are hereby reaffirmed in the sense stated and intended therein, *viz.*, that Respondent's policies and practices, as set forth in Chapter V of the *Memorials* and in ... Chapter IV of the Reply, characterized and described by the terms '*apartheid*' or 'separate development', have violated, and do violate, Respondent's obligations towards the inhabitants of the Territory in terms of Article 2, paragraph 2, of the Mandate." (**IV**, p. 257.)

I wish to emphasize the words "Respondent's policies and practices, *as set forth* in Chapter V of the Memorials and in ... Chapter **IV** of the Reply". In Chapter IV of the Reply, at **IV**, page 256 and running on to page 257, it is stated:

> "Applicants' Submissions 3 and 4 are, on the contrary, based upon the conclusion, amply supported in the *Memorials* that:
>
> '... By law and by practice, the Union has followed a systematic course of positive action ...'."

I have previously read this to the Court. All the allegations are repeated about systematic conduct inhibiting well-being, arbitrary allotment, ignoring the needs and capacities of the individuals, subordinating interests and rights of the majority to that of the minority, and so forth. And it ends by saying:

> "*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, and not as a theoretical abstraction* ..." (**IV**, pp. 256-257.)

We find at page 258 of the Reply a general formulation to the following effect:

> "As is demonstrated in the *Memorials*, and reaffirmed in this Reply, the policy of *apartheid* is injurious to the genuine interests and welfare of the *entire* population, including those whose benefit and privilege are purported to be served thereby."

Now, those are general formulations; there are others, but I give examples only.

I wish to refer the Court to some specific formulations on particular aspects of the factual case. In regard to education, we find the following at **IV**, page 364, in the second paragraph:

"In Applicants' submission, Respondent's policy of educational *apartheid* with respect to the children of 'Native' persons within the Territory inevitably distorts the social perspective and political moral outlook of the children of 'Coloured' or 'European' inhabitants. As such, the Native education policy is, in itself, a violation of Respondent's obligation to promote to the utmost the material and moral well-being and the social progress of all of the inhabitants of the Territory."

It contains a factual allegation, Mr. President, that the policy "inevitably distorts the social perspective and political and moral outlook", and again "*all* of the inhabitants of the Territory" are referred to.

At the bottom of page 370, we find the following, still about education:

"The education policy in the Territory segregates all of the inhabitants by race, separates the 'Native' inhabitants by tribe, and prepares the 'non-European' inhabitants for a subordinate role in the social, economic, and cultural life of South West Africa. This last description is true both of the limitation on opportunity within the areas considered by Respondent to be 'European' and of the development of any reasonable opportunities within prospective 'homelands' in the Territory."

Again, Mr. President, I emphasize the factual nature of these allegations, which, as the Court with be aware from a reading of our pleadings in this regard—our Counter-Memorial and our Rejoinder—are so directly and strenuously contested by us as questions of fact.

At **IV**, page 380 of the Reply, still about education, which is now elevated in the Reply to the basic complaint from which the others emanate, we find the following:

"Applicants contend that such policies have as their purpose and inevitable consequence, restriction of the 'Native' inhabitants of the Territory to their isolated, pre-industrial, tribal groups and that such policies will exclude the 'Natives' from meaningful participation or consultation in the life—social, political, and economic—of the Territory as a whole."

Comment is unnecessary, Mr. President.

I can refer the Court to passages of a similar nature in regard to the economic aspect at **IV**, pages 424 and 425. The conclusion stated at the end of the section on the economic aspect (at p. 424) reads:

"Applicants have demonstrated that Respondent's policy of economic *apartheid* is inconsistent with the Mandate in that it degrades and frustrates what Respondent is obliged to promote."

At the very end of this conclusion, at page 425, we find the sentence:

"It [that is, apartheid] reflects and assures domination of the many by the few, of the underprivileged by the privileged, of the ward by the guardian."

Mr. President, that is the matter which was made the fundamental issue of fact between the Parties—the question whether the policy of separate development envisages continued domination of one group by another, or a development which will get away from any form of group domination, the one by the other, the latter being the Respondent's case, as a matter of fact, and the former the Applicants' case, as a matter of fact.

In regard to government and citizenship, we find the following conclusion stated at **IV**, page 450:

> "It is submitted that, by virtue of the policy of *apartheid*, as applied in the Territory with regard to government and citizenship, Respondent has failed in any degree to promote the well-being and social progress of the inhabitants of the Territory ..."

That, I think, is sufficient.

In regard to freedom of movement, rights of residence and security of the person, I refer to only two very brief statements, in order to demonstrate the nature of Applicants' case. At **IV**, page 469, towards the bottom of the page, we read:

> "The inescapable fact is that the entire complex of legislative and administrative restrictions implementing *apartheid* by restricting freedom of movement, residence, and security of the person is designed for the convenience of the 'European' inhabitants of the Territory. Almost without exception, the provisions complained of by Applicants in part 5 of Chapter V of the *Memorials* keep 'non-Whites' and 'Whites' apart, except for labour demanded of the former."

Again, Mr. President, this is the subject of a most strenuous issue on the pleadings.

And then, finally, at page 475 there is a statement in regard to the Legal Conclusions. It commences by stating that "Applicants reaffirm the Legal Conclusions, set forth in the *Memorials*", and so forth. It refers thereafter to the norm, but it begins with a formal reaffirmation of "the Legal Conclusions, set forth in the *Memorials*"; and those, when one refers back to them, Mr. President, in the footnotes given, at **IV**, pages 354-355, will be seen to include these factual allegations which I have just read, and particularly the one that these laws and practices were designed exclusively for the convenience of the mandatory Government, or the "European" population, or both, and subordinated the interests of the "Natives" to those interests and that convenience.

So, Mr. President, the first question which arises and which, in our submission, or, at any rate, as far as we can see, has not been properly clarified, is: do these factual allegations still stand—these and similar ones—or do they not? Do they still stand on the record so as to leave to the Applicants the best of two worlds—so that if the Applicants' case on a norm might fail, these allegations might still stand there as an invitation to the Court, or some of its Members, to pass a judgment on Respondent's policies in terms of these allegations? That would, of course, be a contradictory attitude to the one which was indicated before, namely that Applicants' case is that they must succeed on the basis of their norm even if Respondent's policies as a whole were intended to enure, and in fact enured, to the benefit of the population as a whole. But, Mr. President, as long as we do not know what the position about these factual allegations is—i.e., do they stand, are they persisted in, or are they not persisted in?—we have no clear answer to that contradiction. If clarity could be obtained in that regard, then my difficulty might fall away. But I should like to point out that what the Applicants now have, in effect, is the best of two worlds, in the way in which they formulate their case in regard to this norm. They ask the Court to determine on the basis of the suggested existence of a norm. The norm is so formulated that it refers only to what

has now turned out to be a handful of relatively minor adverse aspects of a policy—relatively minor, I say, when they are considered in their context, when they are considered in regard to their possible scope—in regard to the possible number of persons whose lives may be affected by them, and in the light of the total context of the policies as a whole.

I shall illustrate to the Court with regard to one of the examples used by my learned friend how relatively minor such aspects are. My learned friend referred the Court to the case of the engineer, and in his address to the Court on the question of an inspection he made repeated reference to this question of the disabilities placed upon Natives who wanted to *become engineers—how it would affect them permanently* throughout their lives, although the system might be subject to modification at some stage in the future. And, he asked, what is the Court going to see in that regard in South West Africa? Mr. President, let us see that matter in perspective. The restriction is one not of the nature of a prohibition making it impossible for a Native under any circumstances to become an engineer, or to practise as an engineer if he should obtain the necessary qualifications through correspondence, or through going to a university outside of South Africa, as the case might be; there is no prohibition against his practising as an engineer, if he wishes to do so—no prohibition, even, against a European being an assistant to him as an engineer; there is nothing of that kind. In essence the whole incident, which has been so blown up, relates only to the question whether particular students were, in particular circumstances which obtained in 1959 in South Africa, to be encouraged to take an engineering course at a university in preference to other courses, and the considerations which played a part in that regard were: what are the prospects for you if you should qualify in your course? There are many respects in which opportunities are specially created for higher economic and professional endeavour on the part of the Native—the non-White—and indeed of all parts of the population in South Africa and in South West Africa. In many of the spheres of the positive application of the policy of separate development to the non-White groups in South Africa and in South West Africa the need is for leadership—leadership not only in a political sense, but also in a technical sense on the part of people who can serve the community in professional and semi-professional capacities. Therefore, a government exercising what it considers to be a necessary, although an unpopular, control system in these respects finds it necessary at a particular stage to say "I have to point out to students that if they become engineers, the opportunities for them are, at the moment, very limited" by reason, not of government policy, but of social circumstances existing in the community, by reason of the fact that a Native engineer who qualifies would experience difficulty. I must make it clear, perhaps, to avoid confusion, that an "engineer" in this context means one who is fully qualified as a professional engineer through taking the necessary courses at a university for five years or longer. There may be confusion because the word "engineer" is sometimes used as designating various kinds of technicians; that is not the sense in which it was used here. The difficulty that would apply in the community, as was pointed out by the Minister, would be this: that if that engineer should practise on his own he might find it difficult to do so, because he would need assistants, and he would, as a fact, find that there are no engineering assistants in the Native population, and that Europeans would in all probability not be willing to serve under him. He

would have the difficulty that firms who would have to employ him if he wanted to go into employment as an engineer, in the private sector, and independently of government policy, would have that same difficulty —that they would have to consider the difficulty: if we employ this man as an engineer, who are we going to employ as assistant to him; are we not going to have difficulties in that regard?

Mr. President, that indicates the nature of this particular matter; it indicates the real purpose at which it was aimed. It was a matter raised at a particular stage, and was an indication to the student that there were other spheres in which he would have much wider scope—in which he would have a protected scope—for the application of whatever qualifications he might get.

A further indication, Mr. President, of the nature and the scope of this factor relates to the number of individuals that could possibly be affected, and to the time for which they could possibly be affected. We made enquiries in South Africa to the best of our ability, and if necessary we could produce evidence about it. We found that up to the time of this speech, which was 1959, if I remember correctly, there was no difficulty or impediment in regard to Natives becoming engineers if they so wished. Despite the fact that there are in South Africa over 3,000 Natives, who graduated at universities in one branch or other of learning—it may be stated in passing that most of them are in constructive employment or occupation; and that their number compares most favourably, Mr. President, with the rest of Africa—it has been established that that number exceeds the total number of graduated Natives of Africa in the whole of the rest of what was formerly British Africa—in all those territories which were comprised in that concept—yet, as far as we could ascertain, of all those 3,000 there was only one who had qualified as an engineer.

I can mention this fact also, on which there can be evidence, if necessary—perhaps the Members of the Court have more knowledge about it than I—I spoke to an engineer in South Africa who does work all over Africa—all types of engineering work—and comes into contact with the engineering profession wherever it exists in all territories of Africa. He has taken a special interest in this matter and he assures me that he has never seen or heard of any Native engineer in any territory of Africa. There may be one, or a few, somewhere but he does not know of any—that is engineers in the sense we are speaking of.

In South West Africa the first Natives to matriculate through the ordinary channels of schools did so in 1960, if I remember correctly—a year after this particular speech. A handful had qualified before that through correspondence courses and so forth.

So, Mr. President, that gives an indication of the possible scope and effect of a measure of this kind. Nobody has said that if circumstances develop in such a way that there will be proper scope for the services of Native engineers in the circumstances of South Africa or South West Africa, that the need will not be properly met. In fact, the whole implication, the whole purport, of all the statements about the relative policy, the whole rationale of it, all point in the direction that that is to be encouraged, provided there is the necessary scope.

When we speak of schemes for engineering development—the building of roads and dams and so forth—in Native homelands, such as the Transkei when we think of water schemes—hydro-electric schemes, irrigation schemes, through pumping systems and what not—in South West Africa,

in Native territories, when we think of the erection of new townships on modern lines, in which the necessity for a proper layout, for reticulation systems, water and sewerage and so forth would exist—when we bear all these things in mind, it becomes apparent immediately that the scope is tremendous; a protected scope in terms of this policy for Native engineers of the future, when the present phase of difficulties has been overcome—this particular stage of development has been superseded.

Yet, Mr. President, my learned friend's norm is of this nature that he looks at an element of that kind in the policy and he takes a few others and he says: well, here they are; you look at these only; you do not look at anything else in the policy; you do not look at compensatory factors; you do not look at any factors in the policy which create opportunities for these people in exchange for this particular one; you do not look at the question whether politically and socially any alternative policy could work in the Territory at all; you do not have regard to the contention, which is raised so strenuously by Respondent, that if any other course were to be adopted in South West Africa, the only possible, practicable course would be one tending in the direction of integration between all the peoples of the Territory (that is indeed the very course being advocated by the Applicants in their pleadings and by these international bodies to which they have referred) and to the fact that the South African Government says, and says on very good evidential grounds, that that course is likely to lead to complete chaos and misery for all the peoples concerned. In order to avoid that—in order to have this policy which involves the very difficult task of balancing conflicting interests, in trying to draw dividing lines where necessary, in order to create a basis for harmony and co-operation between all these peoples the said Government has in some ways to do things which are unpopular. It has, in some ways, to draw a boundary line which affects particular individuals.

Its decisions in that regard may be such, in particular instances, that everybody would not agree with them. And very often people do not, in fact, agree: they protest and they think that the particular decision is wrong, very often not knowing all the facts.

Sometimes it may be wrong, sometimes it may be unnecessary for the particular situation. It is a difficult problem which is similar to problems encountered in any situation in which an authority has to exercise, or operate, a control system.

If in times of scarcity there is a rationing system in a country, or a system of import control, or both combined, everybody might be agreed on the necessity for having that control system; but who has ever heard of everybody being satisfied with every decision taken by such a controlling authority? The controlling authority has to take its decisions. Very often they are unpopular and somebody else thinks: I would have decided this or that point differently.

But, Mr. President, that is the rationale of the policy with respect to these isolated, negative aspects. They are considered necessary as part and parcel of this whole policy which is intended for the benefit of the whole of the population. Incidentally it is showing spectacular results in that respect.

But my learned friend says no. His norm is such that that view of the situation is impossible. He says: we must look only at the negative aspects, even if they be only a handful, and the rest becomes irrelevant; the organized international community has passed its value judgment

and the Court is to act as a rubber stamp; these other things are not to be considered, they just blur the picture.

In that regard my learned friend still relies upon what he calls the "revulsion" expressed by other peoples, by other governments, by organizations, at this policy of apartheid. He wants to introduce this, Mr. President, into a discussion of a pure legal norm. He wants to have the full psychological benefit of that description of the situation, and then retreat into his shell and say: but the Court must please not institute a full enquiry into these facts to see whether that value judgment is justifiable or not; the Court must accept the judgment of the organized international community, it must decide on the basis of a norm that excludes consideration of the positive aspects of a policy and concentrates only on a handful of negative aspects.

That is why it is so important, Mr. President, to have absolute clarity in this respect. Do the Applicants still rely on these allegations which I have read from the record; do they still stand as part of their case; do they still stand there as a basis on which the Court may be asked to pass a value judgment on our policy, if his norm should not succeed? Do they therefore, in effect—with regard to the attitude which Applicants take about evidence and about an inspection—do they stand there as an invitation that the Court is to make some finding on some basis or another on what it has before it in that regard, without availing itself of the opportunities offered by the Respondent for making a proper and a full factual enquiry?

That, Mr. President, is a matter which I suggest still requires clarification.

Then there is another factor. The norm is not stated as being the only basis upon which the Applicants rely. They indicated in the verbatim record at page 44, *supra*, that they have an alternative; and my learned friend in his formulations this morning, by implication, clearly referred to that alternative, namely standards, as an alternative to a norm.

Now I am afraid that we have no clarity yet as to what those standards, on the basis now put to the Court, entail.

The Applicants refer at page 44, *supra*, to "Respondent's theory of the case, as now understood by the Applicants". They proceed to say:

> "Such a theory, as we now understand it, particularly in the light of Respondent's statements made during Oral Proceedings, is based upon the proposition that, although no international legal norm exists relevant to the interpretation and application of Article 2 of the Mandate, there nevertheless do exist international standards applicable, and that Respondent's obligations under the sacred trust may be judged in accordance with them. The Applicants respectfully submit that, in such event and on that basis, the undisputed facts of record likewise would establish a violation of such international standards, as described by Respondent, and that the Court should adjudge the Applicants' submissions in accordance therewith in the event that the Court should decide against the Applicants' contentions that an international legal norm does exist, and is applicable, in the terms and in the manner contended for by the Applicants."

So, we have the alternative that if the Court should decide against the contention of the Applicants about the international norm, then the Court is still asked to find on the basis of applicable international stan-

dards. It has, I am afraid, not been made clear on what basis it is suggested that those international standards would be applicable.

The Applicants refer to such international standards "as described by Respondent".

Now, Mr. President, it will be recalled (I need not state the argument again, I am stating the effect of the argument, that we delivered to the Court in that respect), that we say that when one speaks of standards one speaks of matters, or precepts, which are not *per se* binding in law—that is the distinction which we draw between standards, on the one hand, and norms, on the other.

We admitted that standards of governmental practice and policy of fairness and equity in that regard, do exist in modern circumstances—standards practised by governments, standards spoken of by governments, standards mentioned by moralists, by various scientists in the social, the political and the natural sciences, and by various other commentators. We pointed out that they, in themselves, are not binding in law but that they could have an effect in a value judgment if, for instance, this Court were to determine the case on the basis which we suggested as the only relevant one in law, namely whether Respondent's purpose is bona fide an honest one for promotion of well-being and progress.

We indicated how standards could help in that regard, i.e., that if Respondent could be said to be out of step with the whole of the modern world in respect of the applicable standards then that might be an indication which could assist the Court in coming to a conclusion that perhaps the Respondent's purpose is not an honest one. We indicated also that that type of allegation would again necessitate a full enquiry into all necessary facts, into the content of the suggested standards, into whether the standards are qualified, whether they are absolute, how they apply, whether they are justifiable in fact, or not, or whether they would be subject to modification with experience.

Then where there is a conflict between the Respondent's policies and practices, on the one hand, and those standards, on the other, one has to see what the conflict consists of. Does it relate to the basic underlying precepts of justice, fairness or morality which are involved, or does the conflict relate purely to questions of method which could not, in any true sense, be elevated to standards?

That was the sense in which we suggested that standards could be relevant in such an enquiry. If my learned friends speak of standards, as described by the Respondent, do they suggest then that the Court is to indulge in that kind of enquiry, despite the fact that they said repeatedly in other instances that their case does not rest on a proposition of *mala fides* in that sense?

Or have they some other alternative basis in mind, Mr. President, for the application of these standards? If so, would that basis be one which lets in any enquiry into facts, or would it not be such a basis? And if it would not be such a basis, then what is the basis upon which they suggest that these standards would apply? That is the other matter which, I submit, still requires clarification before we can know with certainty that a factual enquiry of the type envisaged is and would be irrelevant.

Then, Mr. President, there is this other factor, namely that of the contents of the norm relied upon by the Applicants. I pointed out before that the definition of the norm at **IV**, page 493 of the Reply

appeared to indicate an absolute norm—we made it clear that we understood the definition in that way and indeed my learned friend this morning confirmed our understanding when he said that the definition is intended in that way. May I just refer to the wording again—

> "... the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such." (**IV**, p. 493.)

That indicated, Mr. President, no qualification to the norm at all. Although the terms "non-discrimination" and "non-separation" were used, by description they, in effect, referred to the absence of any differentiation on the basis of membership of groups or classes or races, as described. That is the sense in which we understood it, that is the sense in which we made it clear in our Rejoinder that we understood it, that is the basis upon which we said that if the Court were to find that this norm is binding on Respondent then it would find in favour of the Applicants independently, and even in the event of the policy as a whole enuring to the benefit of the population as a whole.

Now, in the course of his address on the legal argument, my learned friend indicated (I forget the date of the passage, but I referred to it before and the Court will be aware of it), that he no longer regarded that norm as being an absolute one, i.e., as relating to differentiation absolutely and *per se*. He indicated quite clearly that there was to be introduced a qualification which he then very vaguely and broadly referred to as one of protection being authorized, but not compulsion. I do not have to refer to the terms of it because we have a further explanation on record, and that first reference was a very bald and a very broad one. It was in **VIII**, at page 262.

Now, in reply to the first part of the question put by Sir Gerald Fitzmaurice on 28 April, my learned friend reverted to this question. In the first part of the question, it may be recalled, Mr. President, it was, amongst others, specifically asked—

> "... is the Applicants' contention about 'apartheid' to be understood in the sense that a policy of group differentiation is in all circumstances, necessarily and in itself, contrary to Article 2 of the Mandate, irrespective of any other steps taken by the Mandatory for promoting the welfare of the inhabitants of the Mandated Territory?". (**VIII**, p. 22.)

My learned friend's reply to that, and also to the second part of the question which went on to pose the supposition that "if the Applicants' contention does not go so far as that, and if there may be circumstances in which measures of group differentiation might have some justification" *(ibid)*, went on to indicate, at page 44, *supra*, that "a policy which differentiates among individuals as such, or as members of identifiable groups, would be permissible and indeed desirable in appropriate circumstances".

Therefore, Mr. President, the norm is now not an absolute one, it is not one which would apply necessarily and *per se*, in itself, to all cases of differentiation on the basis of group and so forth. And my learned friend indicated:

> "We have in that connection cited the minorities treaties, among other examples, in which it is just, prudent, wholly desirable for governments to take account of differences between individuals and between individuals as members of groups, thereby leading to the conclusion that differences are permissible with respect to the treatment of groups as such." (P. 44 *supra*.)

But, Mr. President, the passage proceeds:

> "There are instances known to all of us in all of our countries of such examples of differentiation of groups, the protection of minors, the protection of other segments of the population, arranged in accordance with their choice—normally—sometimes by reason of other considerations, in which their choice where possible, plays a very important and, indeed decisive role—their choice as individuals."

Now, I shall just analyse that for a moment. The exceptions mentioned are clearly not stated as being exclusive. My learned friend does not attempt or purport to define all circumstances in which exceptions to a norm of non-differentiation might be permissible. He mentions certain exceptions and he mentions, in that regard, the important element played by choice *normally*, but he also indicated, "*sometimes* by reason of other considerations" (italics added), and these are, for the moment, not defined. My learned friend proceeded that "The problem therefore, in the Applicants' respectful submission is not summarized in terms of, or is it answerable in terms of, the expression 'group differentiation', except in a sense which is mutually understood between the questioner and the responder. There is, in this case, no submission on the part of the Applicants, which condemns or attacks, or criticizes, differentiation between individuals as such, or as members of groups, in, for example, the aspects which I have mentioned as illustrations" (p. 45, *supra*) again making it clear: "for example", "aspects which I have mentioned as illustrations".

Then my learned friend went on to say that for that reason our description of non-differentiation was not a good description of the norm at all, and he said, further, that—

> "The Applicants' formulation relates to the policy of discrimination and separation, and the distinction is more than a verbal one between those words and the general concept of differentiation. Members of churches, organizations of various kinds—I have mentioned minors, those of non-age and so forth, as groups are differentiated among and within themselves frequently in terms of the protection which they are offered as a matter of good government and decent society. This is just part of the human condition and human experience."

But then comes the contrast, Mr. President:

> "A policy of differentiation, however, which allots rights, burdens, status, privileges, and duties on the basis of membership in a group by reason of race, colour or other circumstance of a similar nature, whether called ethnic, tribal or otherwise, on such a basis, which

> does not pay regard to the individual quality, capacity, merit or potential is, in the Applicants' view, an impermissible premise and an impermissible policy at all times, under all circumstances and in all places." (P. 45, *supra*.)

Now, Mr. President, we have, on the one hand, the statement of some examples where group differentiation "would be permissible, and indeed desirable, in appropriate circumstances". We have, on the other hand, the statement that what is described as discrimination and separation, as defined here, when no regard is paid to individual quality and so forth, is impermissible at all times, under all circumstances, and in all places. Now, what is the suggested dividing line to be? That is not clear to us yet. Is it to be a dividing line of fact, involving a value judgment of the Court to the effect that this is a case in which group differentiation serves a good purpose or a bad purpose, or that it has, or is likely to have, a good effect or a bad effect? Is that the basis of distinction between the permissible and the impermissible, or what is to be the basis? What is the role played by this formulation: "on such a basis as does not pay regard to the individual quality, capacity, merit or potential?" Is it an assumption, Mr. President, that as soon as you base your differentiation on membership in a group then that does not pay regard to individual merit or capacity, or does it involve an independent factual enquiry into the totality of a particular situation, to ascertain whether the distinction is of such a nature, of such a purpose, or of such an effect that it does or does not pay regard to individual quality or capacity? Those things are still not clear.

If the qualifications in the norm itself are to be such that the Court is to indulge in a factual enquiry, then it would, *par excellence*, be necessary, Mr. President, to have this further enquiry into the facts, and the evaluation of the facts, which we envisage by way of evidence and by way of an inspection. But if my learned friend makes it clear that that is now no longer his case—that that is not contradictory to what he said this morning, when he again reverted to his norm as defined at **IV**, page 493 of the Reply, and when he reverted to our statements in that regard that the norm would then apply independently and irrespectively of whether the Court found that the policy as a whole enured to the benefit of the whole of the population—then, of course, if that can be made clear, it seems that it would purely be a question of adjudication whether the norm exists or not, and this particular difficulty would fall away—the possible factual enquiry involved in an application of the very norm for which my learned friend contends.

Therefore, Mr. President, applying, by way of summary, these remarks which I have made on the question of hearing witnesses and the question of having an inspection, it is submitted that the hearing of such evidence and the holding of such an inspection could be necessary in various eventualities. It could be necessary, firstly, if there should still, on the basis of the factual allegations that still stand on record, be an invitation on an alternative basis, to the Court to make a value judgment condemning Respondent's policies on a factual basis, whether in regard to its purpose or its effect, or both. That, for the reasons I indicated this morning, we understand has fallen away, although my learned friend has not clearly said what his attitude is in regard to those statements still standing on record.

Secondly, if the very existence of the norm, Mr. President, is sought

to be justified—the existence or the creation of the norm or the content of the norm is sought to be justified on a factual basis which relates, *inter alia*, to disputed allegations in regard to South West Africa—in other words, if the Court is to engage upon an enquiry whether such a norm is a factually valid and a justified one—then, of course, it would still be necessary to have expert testimony in that regard, and particularly expert testimony relating to South West Africa and other territories and people in Africa. We understand, Mr. President, that that possibility also falls away. As my learned friend says, that question of justification for the norm is not to be decided by the Court, it has been decided by the organized international community and the organizations referred to. That is an understandable legal contention, whatever its merit may be, and whatever its moral effect may be on the whole factual situation in this case. If in municipal law there were to be say, a law of Parliament, an Act of the legislature, has proceeded on a certain factual assumption, which has incorporated a certain norm into the Statute and has made it the subject of a peremptory provision, then a person who is accused of contravening that statutory provision cannot come to court and say to the court: "Well, the factual basis upon which this norm was taken up by Parliament and put into its Statute is an erroneous or a false one and, therefore, I am not guilty of contravening this Act of Parliament." The court would then say to him "But Parliament exercised that judgment, Parliament made this peremptory provision, and I, the court of law, must apply it and you, as somebody to whom the law applies, must obey it. It is for Parliament to review the situation and when Parliament finds that this norm is not a sound one, then the Statute itself is to be repealed or modified." The same is possibly true in the case of a contract; a contracting party cannot come and say: "Our bargain was a bad one and for that reason I am no longer to be bound to the obligations."

Mr. President, it seems, in effect, that that is the nature of the Applicants' contention here. My learned friend in effect says that in some way or other an alleged view on the part of the organized international community, as he called it, must be seen as creating a law, a norm, which is to apply here, and whether that judgment was a good or a bad one is not for the Court to decide. Even if the Court should think it was bad, that judgment is binding upon it, it has created a norm which is to apply here. If that is the sole contention, then of course, Mr. President, the factual enquiry or the need for it would fall away and it would be merely a question of decision by the Court whether in law such a contention could possibly be sound—but we are not concerned with that for the moment.

If that is the position, the only further point that he would have to make clear, Mr. President, is that in support of his norm he no longer relies upon what he calls the "overwhelming weight of scientific authority", because that is an aspect upon which again, as I have pointed out to the Court before, there is a vital dispute of fact between the Parties on the record, viz., as to what *is* the overwhelming weight of scientific authority in this regard. If my learned friend relies on factual justification for his norm, then obviously we would like to bring in that evidence on our side and that evidence might well be very vitally illustrated by examples and by what one can see in South West Africa and in other parts of Africa. But if my learned friend makes it clear that all that

would not be relevant, and he appears to do so, Mr. President, if that could be absolutely, firmly established, then, of course, this difficulty would fall away.

The third possibility, in which the factual enquiry through evidence and an inspection may be necessary, would be on the basis of the alternative in regard to standards. My learned friend would have to make clear exactly what he means in that regard.

The fourth possibility would relate to the very application of the suggested norm in a qualified form. That would require a factual enquiry and a value judgment on the part of the Court. Again it seems, in the light of what my learned friend said this morning, that those qualifications may no longer appear to be adhered to; and it would seem that he now says that in the making of allotments, differentation *per se* must be regarded as being violative of the norm.

If clarity could be obtained, Mr. President, on all these aspects of the matter, then the need which we envisaged for the evidence and the inspection would fall away; but that is an important proviso. I cannot take the responsibility of saying that on what I have heard thus far, my learned friend's case is indeed crystal clear in regard to these questions and queries. It would, with respect, be a matter for the Court on which to satisfy itself, if the Court should also feel that further clarification is required, through the asking of questions or otherwise. The Court has, with respect, facilities at its disposal which I have not. If the Court could be satisfied that no factual enquiry on any one of these alternative bases would be necessary, and could make a decision to that effect, then the whole basis for the leading of evidence or for an inspection as I envisaged them thus far would fall away, but that finding on the part of the Court—that satisfaction which, with respect, the Court would have to attain for itself—would have to make it quite clear, Mr. President, that the Applicants' case leaves no basis upon which the Court could find adversely to the Respondent on the factual allegations, i.e., no possibility that the Court could itself still pronounce an adverse factual judgment either on the basis of purpose or on the basis of effect, or even on the basis that the Court might assume the correctness of the adverse factual allegations which stand on record and which are of the nature of a condemnation on a value basis of the policy as a whole.

If the Court could satisfy itself that that is the position, that there is nothing further left which could provide a basis or a necessity for a factual enquiry or which could leave a basis for a Court upon which to make a finding, then the question will solely be a legal one: do the norm as now contended for and the standards as now contended for, exist, do they bind the Mandatory? What legal justification is there for the argument? That would have to be the implications of the Court's finding.

On the other hand, as long as it appears, even on a contingent basis, that there may have to be an enquiry of that nature, then my application and my tendering of the evidence must stand.

Mr. President, that concludes the general remarks I wish to make on this subject of relevancy and I think that is the crux of the matter. There are matters of practical detail which would now have to be dealt with only on a contingent basis. I do not know whether the Court would like me to continue with those when it resumes, or whether it would prefer to leave those over for further consideration, after we have had further clarity about the legal aspects. I could adapt myself to either of those possibilities.

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13. ARGUMENT OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARING OF 3 MAY 1965

Mr. President and Members of the honourable Court, during the proceedings of 30 April 1965, following the reply of the Applicants to the question addressed to them by the honourable President on 28 April 1965, Respondent presented to the Court a reply on the issue of the request by the Respondent for inspection.

In its address to the Court, Respondent adverted to the possibility that, in the light of the Applicants' response to the question of the honourable President—and possibly also in the light of other arguments advanced by the Applicants—the factual enquiry envisaged by Respondent both in regard to the prospective calling of witnesses and in regard to inspection, might, after all, be legally irrelevant to an adjudication of the submissions alleging breach of Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant of the League of Nations.

In the comments which follow, Mr. President, the Applicants address themselves to the queries propounded by Respondent in the course of its address to the Court on 30 April 1965. These queries are to be found in the verbatim record, *supra*, pages 66 and following. The Applicants will endeavour to keep in mind that the Court is now considering solely the request of Respondent for inspection, and that the Applicants are not now called upon, nor may they appropriately at this stage endeavour, to resume the argument on legal issues, which argument has been suspended in order that the Court may give consideration to Respondent's inspection proposal. This is, in any event, the situation as the Applicants understand it. This posture of the proceedings inevitably creates a certain difficulty of selection of such considerations as may be reasonably relevant to the inspection proposal as such, without on the one hand unduly anticipating the resumption of argument on the legal issues, which is still under way, and on the other hand, producing sufficient clarity and completeness so that the Court may consider and decide upon the inspection proposal itself.

Nevertheless, on the basis of considerations which the Applicants will endeavour to make clear, discussion of the inspection proposal may be helpful to a fuller understanding of the Applicants' consistently held theory of the case and certain fundamental issues underlying that theory.

Turning now to Respondent's queries with regard to clarification, and its appropriate suggestion of the necessity to these proceedings of absolute clarity, in all respects, the Applicants start by pointing out that the submissions, as set forth in the Memorials at I, page 194, open with a request for adjudication and relief in respects set forth in the submissions, "whether the Government of the Union of South Africa is present or absent".

The Applicants considered then, as they do now, that the Memorials made out a *prima facie* case of breach of the Mandate.

With respect to Submissions 3 and 4—those immediately relevant to Respondent's inspection proposal—the Applicants have advised the

honourable Court that described laws and regulations, and the official measures and methods by which they are put into effect in the Territory, the existence of which is conceded by Respondent, constitute a *per se* violation of the sacred trust and, more particularly, that embodied in Article 2, paragraph 2, of the Mandate for South West Africa.

The Applicants, therefore, rest their case on the basis of such laws, regulations and official methods and measures of implementation, which comprise the policy and practice of apartheid, and the Applicants limit themselves to those laws, regulations, measures and methods, the existence of which is conceded by Respondent.

The Applicants contend that apartheid constitutes a *per se* violation of Article 2, paragraph 2, of the Mandate. The characterizations of Respondent's policies and practices which comprise apartheid, as they are set forth in the Applicants' pleadings, are those which, the Applicants understand, correspond to the judgments reached by the organized international community and its constituent institutions.

In the Applicants' written pleadings, they have characterized apartheid in a manner identical with or analogous to characterizations which have been made over the years by competent international institutions dealing with problems of racial discrimination, and most particularly, although not exclusively, the organs of the United Nations and its specialized agencies, including of course the International Labour Organisation. The judgments of these international institutions are set forth in the Applicants' pleadings at some length. They present the Court with evidence of the existence of the international legal norm and international standards for which the Applicants contend. That norm, and those standards, are precisely the outcome of the collective processes of the competent international institutions. It is the competence of such institutions to render authoritative characterizations of Respondent's policies and practices in the mandated Territory. It is these policies and practices which, as the Applicants have repeatedly pointed out, underlie the Applicants' contention that apartheid is *per se* a violation of Article 2 of the Mandate, and which accounts for the characterization thereof in the Applicants' pleadings.

The laws and regulations, and the methods and measures of their implementation, the existence of which is conceded by Respondent, have been characterized by Respondent in its address to the Court as "a handful of relative minor aspects of a policy", a figure of speech repeated with variations in the proceedings of 30 April 1965.

Mr. President, I will say with regard to that comment only that the Applicants obviously do not share this view of the matter, and moreover, more to the point perhaps, arguments on the merits have not yet commenced. The Applicants turn to another matter, as to which they understand Respondent has made a renewed query with regard to clarification.

During the Oral Proceedings of 28 April 1965, Respondent requested clarification of certain matters. One of these was that certain consequences relevant to the inspection proposal and the calling of witnesses might follow—

> "If they [that is, the Applicants] can demonstrate that they rely solely on a norm, or on norms and standards of a technical nature—technical in the sense that it or they prohibit differentiation according to some definition which applies irrespective of whether the differentiation, in fact, has a good or a bad objective, or a good or a bad effect in regard to well-being and progress." (P. 54, *supra*.)

On the same day Respondent likewise requested clarification as to the question whether Applicants' case does or does not call for what Respondent called a "value judgment" by the Court with respect to its policies. Respondent explained its use of the phrase "value judgment" as follows:

> "What I mean by a value judgment in that regard is a judgment which would relate to the question whether those policies are good or bad, in relation to promotion of well-being and progress—good or bad in respect of their objective, or in respect of their effect in that regard, or in respect of both." (P. 54, *supra*.)

The Applicants sought to address themselves to the foregoing queries immediately following their response to the questions addressed to them by the honourable President. The Applicants' remarks will be found in the verbatim record, *supra*, pages 63 and following.

Queries posed by Respondent on 30 April referred, *inter alia*, to the Applicants' response to a question put by Judge Sir Gerald Fitzmaurice on 28 April 1965, which is set out in the verbatim record. In this connection, Respondent appeared to be renewing or restating its query concerning the bearing, if any, of the Applicants' theory of the case upon the question whether it would involve the Court in a so-called value judgment, as to whether "group differentiation serves a good purpose or a bad purpose, or that it has, or is likely to have, a good effect or a bad effect". That is in the verbatim record, at page 80, *supra*.

Mr. President, if the Applicants understand aright, accordingly, Respondent has renewed its query regarding the necessity, if any, for a so-called value judgment, although the query is expressed in slightly different terms than the formulation of the query on 28 April 1965. In partial explanation of the basis of its renewed query, Respondent referred to the Applicants' comment concerning minorities treaties in the course of the Applicants' response to the question of Sir Gerald Fitzmaurice. I refer to the verbatim record, at page 79, *supra*.

Respondent appears to understand the Applicants' contention to be that the minorities treaties are to be regarded as "exceptions" to the international legal norm and international standards described by the Applicants as that of "non-discrimination and non-separation", as defined in the Reply at **IV**, page 493. Respondent likewise characterized the Applicants' view of the minorities treaties and other examples, in the same verbatim, not only as "exceptions", but also as "qualifications of the norm itself". (**VIII**, pp. 663-664; p. 80, *supra*.)

In this context, Respondent has repeated its use of the term "norm of non-differentiation" which, as the Applicants have pointed out, does not appropriately describe the norm and standards for which the Applicants contend. The Applicants clarify this point not as a matter of mere terminology, but, as will appear, in order to aid in clarification of underlying considerations, which the Applicants will endeavour now to set forth.

As has been said, Respondent appears to understand the Applicants' position to be that the minorities treaties, for example, stand as exceptions to, or qualifications of, the norm of non-discrimination or non-separation. On such an assumption, Respondent cites the minorities treaties apparently for the purpose of showing that no such norm or standards as those for which the Applicants contend exist, or, if they do

exist, are not of the content or scope described by the Applicants. Respondent also appears to suggest that if the Applicants conceive the minorities treaties to be exceptions to, or qualifications of, such legal norm and/or standards, it would follow that differentiation on the basis of membership in a group is permissible under certain circumstances and, hence, that the Court should make a "value judgment" concerning whether an exception likewise should be made with respect to the policy of apartheid. That is the way the Applicants understand the Respondent's position.

The Applicants, in fact, cite the minorities treaties, not as exceptions to the norm of non-discrimination, not as amendments of qualifications therein, or thereof, but as an element relevant to an understanding as to how the norm and standards have developed in the international organized community. It is for this reason that it seems relevant to point out that the Applicants' view, concerning the true distinction between the nature and purpose of the minorities treaties and apartheid, in relation to the international legal norm and international standards governing Article 2, is confirmed by, and reflects, the judgment which has been made by the competent international institutions speaking for the organized international community.

The word "differentiation", accordingly, appears to be used in different senses, or, in any event, to reflect a wholly divergent significance as between the Parties to these proceedings. That such divergence is seriously held, and sincerely contended, on both sides, is not questioned by the Applicants, so far as Respondent is concerned. We know what we think we mean by it. On the contrary, the question arises: what is the source of the divergence, which is a striking one, and which could only account for the contrast in the treatment accorded by the respective parties to the relevance of the minorities treaties and their significance in these proceedings?

At an earlier stage of this discussion, the Applicants referred to the obvious, and, in the Applicants' view, inescapable difficulty confronted by Respondent in its effort to demonstrate what facts would be relevant to judicial enquiry *in loco*, or elsewhere. Reference was made to repeated use by Respondent of such generalizations as "all the facts", or "all the facets". The same difficulty (which is inescapable, in the Applicants' respectful view) is manifest from Respondent's use of the expression "all necessary facts" in Respondent's address to the Court on 30 April in which it posed its queries for clarification. (*Supra*, p. 80.)

From a legal and a logical point of view, it seems to the Applicants that such a generality begs the question. Unless the Court is cognizant of the facts or facets which it would be looking for, or looking at, or listening to, in a judicial enquiry either by inspection or audition of witnesses, the purpose of such an enquiry would be obscure, and it would be impossible for the Court to determine where to go, how long to stay there, what to do when they got there, or how often to return.

These considerations, in the Applicants' view, have a direct bearing on Respondent's query concerning the nature of the judgment, if any, which the Court is asked to make on the basis of the Applicants' theory of the case. In the Applicants' view, certain judgments would, indeed, have to be made by the Court, but these would relate, Mr. President, to the purpose and relevance of the enquiry itself.

Such judgments by the Court would necessarily presuppose certain

considerations or reflections fundamental to the theory of the Applicants' case and of the Respondent's theory of the case, as well, as the Applicants understand it. And it is in this sense, and for this reason, that although in our respectful view the inspection proposal was laid before the Court out of context in an untimely manner, it nevertheless may have served, or may yet serve, to clarify fundamental propositions as to which the Applicants would now like to submit, with respect and with humility, their reflections concerning the basic issues with which this momentous litigation deals.

The considerations to which the Applicants refer in this connection relate to the clearly divergent views between the Applicants and the organized international community, speaking through its competent organs, on the one hand, and Respondent, on the other, concerning the role of the individual, the group and the social order. The Applicants and the international community, speaking through its competent organs, on the one hand, and the Respondent, on the other, view these inseparably related factors of the individual, the group, and society, from wholly different perspectives.

The Applicants believe it necessary, in this context, to undertake to comment, as briefly as possible, upon the character of this divergence of perspective.

Another fundamental divergence relates to the nature and scope of international institutions with regard to the development of legal norms and standards, and the basis upon which such norms and standards are applied in the international order, nascent as it is. The significance to these proceedings of this latter divergence of view, with respect to the function and role of international organs in the normative process, will be more fully developed in the Applicants' further arguments when the legal issues are discussed again concerning the origin, content and nature of the international legal norm and international standards for which the Applicants contend. The Applicants will also endeavour, at an appropriate stage, to analyse the basis upon which, and the processes by which, the norm and standards relevant to these proceedings have been developed by the organized international community, through its competent organs. This matter the Applicants will reserve also for consideration at a more appropriate stage of these proceedings, when discussion of legal issues is resumed.

In respect of the initial divergency of view concerning the individual, the group, and the social order, the Applicants, and, we believe, the organs of the international community, proceed from the perspective (and I speak of perspective) of the *individual person* as the basic social unit. Respondent, on the other hand, proceeds from the perspective of the *group* as a basic social unit.

The angle of vision of the Applicants' case, which we believe is also that of the organized international community, through its competent organs, proceeds, Mr. President, from the perceived requirement for protection of the status and needs of the *individual person*. The angle of vision of Respondent's case, on the other hand, proceeds from the perceived need and requirement for the protection of the status and needs of a *group*, or groups. For this purpose, I refer to all groups as such, leaving aside the question of whether or how preferences, privileges, duties or burdens are allotted.

If one starts from the premise of the individual person, rather than

from the premise of the group, important consequences follow, even with respect to the usage and meaning of words. Even more, logical and psychological processes are affected by the perspective by which the entire matter is approached. Thus, the word "differentiation", as applied in the context of the minorities treaties, centres on the protection of the individual, as such—as an individual. The treaties are perceived as a means of assuring that the individual does not suffer by reason of his membership in a group. He is entitled to claim protection as an individual person. He can, as an individual, normally, quit his group. He is not irrevocably assigned to a group by legal fiat. The true significance of the minorities treaties, as the Applicants view the matter, is that the individual person is considered to have the right not to suffer as an individual on account of his membership in a group. In so far as his personal welfare and progress are concerned, this right protects him from differentiation from other individuals by reason of the colour of his skin, the language he speaks, the tribe in which he was born, or the form of worship in which he chooses to engage, or not to engage.

The minorities treaties established the rights of an individual to fulfil his individual merit, quality and capacity, against any modification or restriction thereof, which might otherwise be brought about by reason of his membership in a group—whether ethnic, linguistic, religious, or national.

Under apartheid, on the other hand, and I simply point the contrast for the moment without referring to its quality, the individual person is subject to burdens, restrictions or duties precisely because of his membership in a group—a group moreover, of which he is made an irrevocable life member. Such membership is determined by the circumstances of his birth or, what comes to the same thing, and I quote from the census, "general acceptance"—it comes to the same thing, Mr. President, because such acceptance is officially determined in case of doubt. The individual who is obviously "White" in the language of the census, but generally accepted as "Coloured", is "Coloured".

In the Applicants' use of the term "coercion", and this was the term used in the context of the discussion of the minorities treaties, the imposition or allotment of burdens, restrictions or duties upon such a basis, for the avowed or assumed, and perhaps genuinely and sincerely assumed, protection of a group or groups, *is* coercive upon the individual. The theory and premise of apartheid, as the Reply seeks to point out, involves the promotion of the welfare and progress of "groups of inhabitants" rather than of "individual inhabitants" (**IV**, p. 269). This is the theory of the Applicants' case, consistently held from the beginning.

The welfare and progress attained by each group under apartheid, *measures and determines the welfare and progress of the individuals* assigned to or belonging to that group.

Accordingly, Mr. President, the perspectives of the Parties to these proceedings clash; attempted legal definitions blur. The Applicants and the organized international community, on the one hand, look at the group in terms of protecting the individual; Respondent, on the other hand, looks at the individual in terms of protecting the group. This contrast of perspective underlies the philosophy and vocabulary of apartheid, as the Applicants and we believe the organized international community understands it and has judged it. Whether such a perspective is right or wrong, good or bad, is not in question at the moment. It is

clear from the record however, that in the mandated Territory, in the respect under discussion, the individual is essentially looked upon as a "Native"; the "Native" is not looked upon as an individual.

Reverting to the divergent perspectives of the Parties concerning the significance of the minorities treaties in this litigation, the legal distinctions sought to be drawn by the respective Parties thus reflect a conflict of meaning concerning the nature and objective of the so-called "differentiation" envisaged in the minorities treaties, as distinguished from that implicit in apartheid.

Under the minorities treaties, as has been said—and this was the point which the Applicants respectfully sought to make in the response to Sir Gerald Fitzmaurice's question—an individual may claim protection of his individual rights, if they are thwarted by reason of his membership in an ethnic, religious, linguistic or other group, which he normally is free to disclaim. Under apartheid, by definition, the individual's membership in a group largely determines his rights—Respondent said this is a good thing. If the controlling authority says to the individual, "You may not form or join a labour organization because you are a Native", it is not permissible for the individual to re-act by saying: "Well then, I would rather not be a Native." He may not say to the controlling authority, "I really don't appreciate or understand the kind of protection you are giving me".

These considerations, and others of a similar nature, underlay the Applicants' comment, in the context of their discussion of the minorities treaties and of the 1929 Declaration of the Rights of Man, and I quote from the verbatim:

> "... the point relevant in the context of the discussion at this moment, Mr. President, is that although the concept of genuine 'group protection' for those who desired and required—protection as distinguished from coercion—was widely accepted, as it is today, such a concept has, in the process of evolution, now become a generally accepted, basic, international, human rights norm, which is described by the Applicants as a norm of non-discrimination or non-separation." (**VIII**, p. 263.)

The Respondent, no doubt with genuine misunderstanding, characterizes this reference to protection as distinguished from coercion as an exception to or a qualification in the norm. It was a source of surprise, Mr. President, to learn that Respondent had interpreted the passage just quoted in the sense indicated. The origin of the norm was then in the course of being described. The legal norm and the international standards universally prevalent in the international community, as the Applicants understand it, say:

The approach, the policy, and the practices which characterize apartheid are inherently and *per se* incompatible with the objectives of the social order in contemporary society anywhere in the world, under all circumstances, and at any time. The individual, not the group, is the decisive unit of the social order. Fulfilment of individual capacity, full realization of individual quality, full recognition of individual merit—these are the supreme ends of the social order.

In the Applicants' view of the case, it is not relevant or open for the Respondent to reply—"This is all right as a moral, political or social doctrine; it does not, however, constitute a legal norm or applicable standard relevant to our duties as Mandatory."

In the situation which prevails in the society of a mandated territory, Respondent in effect says, in the light of its history, taking into account the attitudes of the people in the Territory and of all other facts and facets of the situation, it is in the interest of the individual to allot restrictions, burdens, rights and privileges to him on the basis of his membership in a group.

We, say the Respondent, are working toward the end that in the future his personal welfare and progress will be promoted to the utmost, that welfare and progress will be promoted to the utmost that way.

If now we give too much weight to the capacity, merit or quality inherent in an individual Native or other person grouped on that basis, if we give too much weight to such factors in a person as an individual and not as a Bantu, as a Coloured or as an Asiatic, our social order would disintegrate, friction and tension would mount and everyone, particularly the Natives, would suffer.

That appears to be Respondent's argument as Applicants understand it.

Mr. President, the Applicants have referred, merely as an illustrative example, to Respondent's policy in respect of Natives qualifying as engineers and an explanation made by the Minister of Bantu Education in May 1960. This was set forth in the Memorials, **I**, pp. 157-158.

I will say no more about this except to say that in the course of Respondent's comments requesting clarification to which the Applicants are addressing themselves on 30 April, Respondent referred at some length to this matter describing it, *inter alia*, as a "relatively minor" example.

It may, accordingly, help to clarify the Applicants' underlying purpose in citing this example, which the Applicants in any event perceived to be significant rather than minor, another illustrative example, and I will do so briefly. The Memorials set out, at **I**, page 156, the following illustrative example:

> "175. Separate registers and rolls are kept 'in respect of white persons, coloured persons and natives'. [This is reference to the Nursing Act of 1957] It is made a criminal offense to cause or permit any 'white person' registered or enrolled as a nurse or as a student auxiliary nurse to serve under the 'control or supervision of any registered or enrolled person who is not a white person, in any hospital or similar institution or in any training school,' except in an 'emergency'."

This averment of fact is undenied in Respondent's written pleadings. Respondent's only comments concerning the Nursing Act, 1957, from which the quoted passage has just been derived, are set forth in the Counter-Memorial, **III**, at pages 468-474 and pages 523-525. No reference whatever is made in Respondent's written pleadings to the provision of the Nursing Act making it a criminal offence to cause or permit any "white person" registered or enrolled as a nurse, or as a student auxiliary nurse, to serve under the control or supervision of any registered or enrolled person who is not a white person, except in a case of emergency, presumably a matter of life and death, where the *highest skill* would normally be required.

In respect of Respondent's proposal for inspection or the proposed taking of testimony, there is nothing the Court could look for in the

Territory which might assist it in forming a value judgment or, in the Applicants' respectful view, *any* judgment concerning the significance of this criminal provision, if it does not speak for itself. What testimony, and what witness could be of assistance to the Court in arriving at a value judgment on this matter? I would refer in this connection to the provisional list of proposed witnesses in which it appears tentatively that a nurse is to testify.

Respondent says to the Court, "Come and inspect the Territory. The Court, or a Committee thereof, will then see the whole problem from our point of view when it has viewed all the facts and facets of the situation."

The Applicants say to the Court, to the contrary: "We ask the Court to look at the record of laws and regulations and the official methods and measures, the existence of which is conceded by Respondent. If that is not sufficient to persuade the Court of violation of the international rule of Article 2 of the Mandate, read in the light of the applicable legal norm and the international standards for which the Applicants contend, the Submissions 3 and 4 must fall."

The Applicants, of course, are aware that the question still remains concerning the validity of their submission that the international legal norm and the international standards for which they contend is an essential element of their case. The Applicants are aware that the nature, scope and content of such an international legal norm and international standards must be defined by them to the satisfaction of the Court if their Submissions are to prevail. The argument is still in progress on legal issues, Mr. President, in which the Applicants are anxious to address themselves to these very questions and this phase of the proceedings has been suspended by reason of Respondent's injection for the proposal of inspection. The Applicants accordingly confront some difficulty in addressing themselves to Respondent's query for clarification concerning the nature, scope and the content of the international legal norm and the international standards, for which the Applicants contend. And Mr. President, in a very few moments I shall conclude, with your permission, Sir, my remarks addressed to this aspect of the Respondent's queries.

In the course of Respondent's address to the Court on 30 April 1965, requesting clarification, Respondent raised certain questions which appeared to relate, *inter alia*, to the content, nature and scope of the norm or standards for which the Applicants contend. Reference has been made to the difficulty of dealing with Respondent's queries concerning the nature of the scope and the content of the legal norm and international standards contended for, in anticipation of the resumption of the arguments addressed to legal issues in these proceedings.

In Respondent's address on 30 April 1965, Respondent asked the following questions, which I should like to quote in the record:

> "Does it [the Applicants' case] rest on the one basis only or does it rest on more than one basis, legally speaking? Does it rest on a norm only to the exclusion of norms and standards in the plural or does it rest in the alternative on a norm or on standards? Does it rest only on a legal norm which automatically and technically renders certain described forms of conduct illegal, or does it rest in the alternative upon factual allegations in respect of which they ask this Court to pass an adverse value judgment either as to the

> purpose or as to the effect or as to both the purpose and the effect of the Respondent's policies in South West Africa." (*Supra*, p. 66.)

These queries need to be sorted out.

With respect to the last sentence quoted, there would seem to be no basis for renewed clarification; the Applicants have stated explicitly that the conduct described—and by "conduct" the Applicants refer to the laws and regulations and the official methods and measures by which they are effectuated, the existence of which is conceded by Respondent—constitutes a *per se* violation of the relevant provisions of the relevant Article of the Mandate. It necessarily follows that the Court is not requested by the Applicants to pass an adverse "value judgment" either as to the purpose or as to the effect or as to both, of the Respondent's policies in South West Africa. The Applicants intend, Mr. President, to demonstrate the existence, content and applicability of the international legal norm described in the Reply, IV, at page 493. In addition, the Applicants intend to demonstrate the existence of international standards having a content similar to that of the international legal norm. These alternative formulations are the same international rule of conduct governing the interpretation of Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations—these are alternative formulations.

The Applicants intend to demonstrate that Respondent's obligations, pursuant to the foregoing Articles of the Mandate and Covenant, are governed by this international legal norm and, alternatively, that if this honourable Court should hold that no such international legal norm exists or is applicable to the relevant Articles, then, in any event, the interpretation and application of Article 2 of the Mandate is to be governed by the relevant international standards. This theory and approach is in accord with the approach and theory consistently advanced in the written pleadings and oral arguments of the Applicants.

One further comment in conclusion, Mr. President, and by way of clarification, appears to be desirable. At page 80, *supra*, of the verbatim record, Respondent commented as follows:

> "Secondly, if the very existence of the norm, Mr. President, is sought to be justified—the existence or the creation of the norm or the content of the norm is sought to be justified on a factual basis which relates, *inter alia*, to disputed allegations in regard to South West Africa—in other words, if the Court is to engage upon an enquiry whether such a norm is a factually valid and a justified one—then, of course, it would still be necessary to have expert testimony in that regard, and particularly expert testimony relating to South West Africa and other territories and people in Africa."

If the phrase "an enquiry whether such a norm is a factually valid and a justified one" is intended to suggest that the Court should conduct an enquiry, or hear expert testimony, as to whether the norm and standards are "justified", then the Applicants, respectfually, disagree. On the other hand, if the Respondent merely intended to re-phrase an earlier question involving the *per se* nature of apartheid, the Applicants consider that they already have furnished clarification in regard to this query. Therefore, in conclusion, Mr. President, it has been the endeavour of the Applicants to confine themselves within the bounds of such considerations and underlying perspectives, as seem to them their duty to present to

the Court in the content and context of the inspection proposal, which has, so obviously, opened up the heart of the issues in these proceedings, and has, in the Applicants' respectful view, thereby served a useful purpose in this litigation indeed.

Thank you, Mr. President.

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14. ARGUMENT OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 3 AND 4 MAY 1965

Mr. President and honourable Members of the Court, let us consider in what context this questioning and the series of answers to the questioning started. It is, Mr. President, in the context of an application, or a proposal, by the Respondent that, in the course of conducting a factual enquiry into the facts which appear to be in issue between the Parties, the Court should inspect the Territory of South West Africa, conduct a limited visit to South Africa itself, and also undertake limited visits to certain other Territories in Africa, notably to Applicants' Territories, and to others of the Court's own choosing.

My learned friend submitted a contention to the Court in that regard, in which he displayed anxiety that the Court should not exercise judicial functions "elsewhere than at the seat of the Court". I think that expression must have been used about 20 times. I stopped counting in the record when I came to 12. Numerous and varied reasons were given, Mr. President, but the main theme was this—that the Applicants' case rests on so narrow a basis as to render unnecessary such a factual enquiry, of which such an inspection would form a part. The Applicants emphasized in that regard that even the enquiry through the medium of calling witnesses, of producing to this Court oral testimony of witnesses and experts, would be unnecessary because of this limited basis upon which, Applicants say, their theory of this case, and their contention or contentions to the Court, rest. It was in the course of the debate on *that* question that these various queries were raised, viz., what portion of the Applicants' case, as it was originally made to this Court, still stands, and what portion does not stand; in how far, in particular, do certain factual averments made by the Applicants, not only in their Memorials, but also in the Reply, and in the oral argument on the legal issues of this case, still stand?

Those queries were raised in a dual context. The first relates to the question whether, apart from the norm, or the norm and standards, upon which the Applicants say they rest their case, there exists an alternative basis on which the Court would be invited to make a value judgment of the policy in the respects under discussion a value judgment as to its purpose or effect. That was the *one* aspect of the enquiry. The other aspect related to the very nature of the case which the Applicants say they are making in regard to a norm, or a norm and standards, which is such as to require a factual enquiry on the part of the Court, in which this evidence we intend calling, and the inspection which we offered in respect thereof, would be relevant.

The Applicants, obviously, in order to succeed on this basis in their objection to the inspection proposal had to satisfy the Court that their case was so narrowly conceived as to exclude the factual enquiry in both the senses, or contexts, I have mentioned.

There have been attempts at clarification in answer to questions put by honourable Members of the Court and the honourable President, and

in answer to queries which I put. We did not obtain full clarity on Friday, and I am afraid we still have no complete clarity on either of those two aspects, or contexts, of the query which I have mentioned.

Let us take the first one. My learned friend says, in so many words, that he rests his case on his norm, or his norm and standards, but, Mr. President, he never answers me explicitly on my query whether those factual allegations, to which I referred on Friday, do, or do not, stand. Does he, or does he not, ask the Court to find in terms of those allegations? My learned friend gave a part of the answer to that question in indicating that those statements are, as he said today, "characterizations which correspond to the judgments reached by the organized international community and its constituent organs", or words to that effect—I have quoted them as best I could take them down today.

He proceeded to say that these judgments are set forth in length in the pleadings. In other words, Mr. President, the case seems to amount to this. Those judgments of the organized international community are set forth in the pleadings. The Applicants take sides in this dispute against the Respondent with the organized international community. Those judgments have been made, and they stand. They have been set forth in the pleadings, and they stand as far as the Applicants are concerned. They are not willing to withdraw those allegations, nor to make it clear to the Court that those allegations do not form a necessary part of their case, i.e., that the Court is not required to take them into account, whether by pronouncing in favour of them or by enquiring into them, or by assuming them to be true or untrue. That is the equivocation which is still left in regard to this part of the query. I can demonstrate it in another manner, which I shall do in a moment.

Other aspects of the enquiry, Mr. President, relate to the role which a factual enquiry might possibly play in regard to the Applicants' legal basis of its case, namely its norm, or its norm and standards, or, in the alternative, its standards. Now, Mr. President, before passing over to that, may I just indicate for a moment how unclear the position still is in regard to the first of the two queries which I mentioned, namely about those statements still on record. I think I can demonstrate the same problem by referring to the counterpart of that question, i.e., by referring, not to the question as to those allegations as they stand, but to the question of what the Applicants mean when they say that the facts which the Respondent has adduced—has placed on record—are admitted, save where otherwise indicated.

The Court will recall—and I quote from the verbatim record of 27 April, at page 21, *supra*—that the Applicants said the following:

> "The Applicants have advised Respondent as well as this honourable Court that all and any averments of fact in Respondent's written pleadings will be and are accepted as true, unless specifically denied. And the Applicants have not found it necessary and do not find it necessary to controvert any such averments of fact. Hence, for the purposes of these proceedings, such averments of fact, although made by Respondent in a copious and unusually voluminous record, may be treated as if incorporated by reference into the Applicants' pleadings."

They confirmed this, Mr. President, in the verbatim record of 28 April, at page 44, *supra*, and now the question arises: what do the Applicants

mean by the expression "averments of fact"? As I have said, the question may be said to be the counterpart of the questions I put on Friday as to whether certain statements still stand on the record, i.e., statements to the effect that the policy discriminates deliberately and systematically against the Native population; that it subordinates their interests to those of the Europeans; that it assures their domination by the Europeans; that it offers them no horizon of hope; that it is injurious to the interests of the whole population—the whole population—and so forth. I gave the quotations in the verbatim record of 30 April at pages 68-72, *supra*; I need not give them again. I should like, in this context, Mr. President, and especially in the light of the distinction which my learned friend sought to draw today between approaching the matter from the point of view of the individual, and approaching it from the point of view of the group, to refer the Court to one formulation in that regard in the Memorials at **I**, page 161, in paragraph 189. The Court will then see that this theory, said by the Applicants to be so consistently held—this approach, diverging to such a large extent from that of the Respondent, certainly did not apply in the Memorials. We find in paragraph 189 the statement made that—

> "Under apartheid, the status, rights, duties, opportunities and burdens of the population are fixed and allocated arbitrarily on the basis of race, color and tribe, without any regard for the actual needs and capacities of the groups and individuals affected." (**I**, p. 161.)

What do those words "of the groups" do in that sentence, if the Applicants' concern was mainly with the individuals affected? What, Mr. President, was the purpose of all these statements which related to the Native population as a whole which, so it was said, "constitutes overwhelmingly the larger part of the population of the Territory"—the words used in paragraph 190? Mr. President, we cannot get clarity upon this matter unless the Applicants are prepared to admit, as they must admit, if they want to limit this case in the manner which they now suggest to the Court, that they are changing their case, and that they are running away from factual allegations they made to start off with. Before they make that clear we cannot have the clarity which, the Applicants say, the Court must have in regard to the question whether there is, or is not, to be any further factual enquiry. It is, I may emphasize, for the Applicants to satisfy this Court in this opposition of theirs to the inspection proposal that their case, whenever it may be decided or further considered, is so narrow that it does not require any further factual enquiry. Mr. President, they do not succeed in doing so as long as we have these equivocations.

May I refer also, Mr. President, to the fact that in Submissions 3 and 4, which stand on record, which are reaffirmed by the Applicants, and which, as far as we know, they do not intend to amend, except in regard to Submission 4 to the extent indicated the other day, we still have incorporated by reference the allegations set forth in Chapter V and summarized in paragraphs 189 and 190 of Chapter V of the Memorials. The Submissions 3 and 4 are at page 197. Submission 3 reads, to begin with:

> "the Union, in the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practised *apartheid* . . .", etc.

And No. 4 reads:

> "the Union, by virtue of the economic, political, social and educa-

tional policies applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost ..."

Mr. President, the Applicants rely on the basis of a norm, or a norm and standards, which they tried to make as narrow as they can for purposes of their opposition to the inspection proposal. They say they rely on that basis only for their case, and on that basis they still ask for adjudications by the Court in terms of Submissions 3 and 4—in other words, they say statements which incorporate value judgments and condemnations as set forth in Chapter V, and particularly in paragraphs 189 and 190, are to stand, although, as they make clear now, they do not ask the Court to enquire into the question whether those condemnations and those judgments are correct. They say the organized international community has decided, and the Court is not to embark upon such an enquiry at all. The Court is apparently, it now seems, on analysis, to accept that judgment and to incorporate it into its own judgment merely upon the basis of finding that the norm itself is a sound one in law, i.e., the norm, or the standards, or both.

Mr. President, it will be seen that allegations of the kind to which I have referred do not hinge simply on questions of fact. It is not simply a question whether there are two or three schools in a particular area, or whether 50 or 70 bore-holes have been sunk in a particular area. They concern evaluations of facts. They concern also contemplated future developments. They concern the intentions of the Respondent in regard to such developments. When I say they concern future developments, I have in mind statements to the effect that the policy contains no horizon of hope for the Native population. The difficulties, Mr. President, can also be demonstrated by reference to some other examples. Let us take cases in which we offer, or offered, in our Counter-Memorial and in our Rejoinder, explanations of certain events or developments of the past. We can take an example from the realm of education. We dealt with various factors which in the history of the Territory retarded the development of Native education; the Court will find that, *inter alia*, in the Counter-Memorial, at **III**, pages 407-424. We showed amongst, other things, what an immense problem the training of Native teachers has been. We showed how there was, initially, an attitude of non-interest in modern education on the part of the bulk of the Native population. We showed, also, that similar problems and attitudes revealed themselves in other parts of Africa, and still do so to some extent. Now, Mr. President, what was the Applicants' attitude in regard to this review which we gave? The attitude was in general, that Respondent's policy was one of *laisser-faire* and that Respondent was to blame for the slow development of which it speaks. And in so far as we showed that similar problems existed, and in a measure still exist, in other territories of Africa, the Applicants' simple attitude was that that was not relevant. We dealt with this subject generally, Mr. President, in the Rejoinder, **VI**, at pages 121 and following, where the relevant references will be found.

The question arises, Mr. President: what do the Applicants now say in that regard? Do they agree that there is substance in our explanations? Do they agree that the circumstances attending on the life of the Natives 40 years ago, and for many years thereafter, were such as to retard education, and that our view in that regard is an acceptable one? Do they agree, Mr. President, that similar retarding factors existed, and in a

measure still exist, in other parts of Africa? We do not know. And this question arises, not only in regard to education, but also in regard to the complaints made by the Applicants under various headings such as economics, government and citizenship, freedom of movement, rights of residence, security of the person, and so forth. My learned friend has specifically reserved argument dealing with the factual side of the matter to a later portion of his argument. If there is to be no factual enquiry at all, one wonders why it should be necessary to deal with the factual portion of the evidence at all. And, in any case, to come back to examples which illustrate this difficulty of determining what is now common cause in regard to the facts, and what are still in issue: what do the Applicants say of our averment that members of the Native groups have so far not shown themselves ready, or mature enough, for individual ownership of land because their traditional system of ownership has been different—that it has been a system of communal ownership: that they have not desired (and that for the greater part they still do not desire), and they are not ready to make a transition to individual ownership of land; and that the matter must, if success is to be achieved, be approached with caution, and with the maximum of co-operation on the part of the Native population concerned? Do the Applicants accept that, or do they not? What do they say of our averment that uncontrolled admission of Natives to urban areas has such disadvantages that there must be a system of control of movement, not only in the interest, Mr. President, of groups of the population, but in the interest and for the protection of the very individuals about whom my learned friend and his theory are so concerned? The law-abiding citizens of a community, each and every one of them, and their families, need, for reasons which we set out in our pleadings, to be protected by a system of what we call "influx control". We deal with that matter in detail, and indicate why that is so: is that now accepted, or is it not accepted, Mr. President?

We could multiply such questions, but it is unnecessary to do so. The important thing to remember is that they often involve considerations concerning the level of development, the ways of life, and so forth, of the Native population.

It is obvious that the answers which have to be given in such circumstances involve evaluations; they are not straightforward questions of fact and detail; it is not merely a matter of admitting or denying that a particular fact does or does not exist. But there are other matters, Mr. President—more fundamental matters. In the pleadings we set out the various advantages which the policy of separate development has, in our submission, as facts. These are summarized broadly in the Rejoinder, V, at pages 244-247 and the question arises: do the Applicants concede that our policy of separate development indeed possesses these various advantages? In the light of the distinction which my learned friend sought to draw today between the approach from the point of view of the individual and the approach from the point of view of the group, I should like to refer the Court to the wording of our summary in that respect in the Rejoinder, V; it is not much to read—I must ask the Court's patience and indulgence to listen to the quotation, because this matter is of crucial importance. We said at page 244, paragraph 6:

> "When considering Applicants' detailed points of criticism, the Court should, it is respectfully submitted, bear in mind the above considerations, the cogency of which is increased in the present case

by the fact that Applicants do not seriously attempt to meet Respondent's case regarding the advantages of separate development as compared with attempted integration as a possible policy for South West Africa. These advantages were discussed in the Counter-Memorial and may be summarized as follows:

(a) Separate development is not a policy of domination, but the very antithesis thereof—it contemplates evolutionary termination of guardianship in a manner calculated to lead to peaceful co-existence. Attempted integration, on the other hand, must, in the circumstance prevailing in South West Africa, inevitably lead, at least, to domination of some groups by others.

(b) The aim of separate development is justice for all, not only for some. It seeks to avoid a situation where the exercise of self-determination by some of the inhabitants would involve the denial of self-determination to others.

(c) Separate development seeks to prevent a situation in which the more developed groups, which are at present responsible for the economic progress and high standards of administration and prosperity in the Territory, may be swamped and probably forced out of the Territory by much less advanced groups with entirely different values and outlooks.

(d) Moreover, separate development would not involve, as attempted integration would, the abdication of the sacred trust regarding the least developed groups, which would under the latter policy be left at the mercy of a new majority government with competing interests and possible hostile inclinations or intentions, as was the position in the past.

(e) Separate development avoids the deleterious results of ignoring ethnic differences, loyalties and reactions which manifest themselves strongly when one people feels its existence or basic interests threatened by another. Such results, as noted above, have often included tension, unrest, hostilities and bloodshed, and, in some cases, the *imposition of ruthless dictatorial* rule in order to suppress the tensions in question."

Then the question arises, Mr. President: what remains of this distinction in such circumstances between the approach from the point of view of the individual and that from the point of view of the group?

Mr. President, I am reading from pages 244 to 246 of the Rejoinder **(V)** a summary given by the Respondent of what it considers to be the advantages of the policy of separate development as a whole, and the disadvantages of the only possible alternative, namely a policy of integration as suggested by the Applicants. My reason for doing so is to enquire whether these statements are accepted or not by the Applicants when they say that they admit all relevant facts, save where otherwise indicated. I proceed to read at page 245:

"*(f)* Avoidance of tension and group reactions of self-preservation is secured by separate development not only in the political sphere, but also in the economic life of the country. This policy provides parallel, protected spheres of economic interest for the various groups, in which their members can advance without constituting or being regarded as a threat to other groups, as compared with well-known forms of discrimination and resistance almost invari-

ably encountered where integration between differing groups is sought to be attained against the wishes of one or more of such groups.

(g) Separate development renders possible constructive co-operation between White and non-White groups, on a basis of equality, to their mutual benefit—in contrast with the fate which has befallen White minorities, in other African countries handed over to Native rule—to the detriment of all.

(h) Separate development renders possible the achievement of self-determination by various groups at different points of time. This implication avoids unnecessary delay in the attainment of self-determination by more advanced groups merely because of lack of advancement and maturity on the part of other groups. Conversely, it involves for the latter groups the safeguard of retention by Respondent of the sacred trust obligations towards them even after other groups may have chosen independence in the exercise of their right of self-determination.

(i) Finally, separate development leaves to the free will of the groups concerned the ultimate decision whether, and in what form and to what extent, they will link up or co-operate with others, *inter se*, politically, economically and otherwise—as opposed to forcing upon them a pre-determined system whether unitary or federal, which some may feel to constitute a threat to their existence, interests or identity." (V, p. 245.)

Mr. President, that is a summary of advantages of Respondent's policies, and of disadvantages of the only possible alternative, and the question arises, do the Applicants accept it? We summarize the whole situation finally at page 246 as follows:

"In short, separate development is intended and calculated, negatively, to avoid the human tragedies which have occurred, and are occurring, in African territories such as the Congo, the Sudan, Rwanda, and others, as well as in the systems of ruthless dictatorship found necessary in so many other territories with a view to maintaining even a semblance of order. Positively, separate development envisages the establishment of a system of peaceful and friendly co-existence, based on mutual respect for one another's identity, culture, right to existence and human dignity, coupled with fruitful co-operation in matters of common concern. Attempted integration, on the other hand, involves inevitable injustice to minority groups—the highest and the least developed ones—inevitable retrogression in standards of economy and administration, and a very high degree of probability of a repetition of the human tragedies of other territories, or ruthless dictatorial rule or both."

Mr. President, there is implicit in these statements the question of the total effect of these policies not only as far as total populations or groups are concerned, but also as far as the individuals, each and every one of them, comprising those groups are concerned. Now, do my learned friends accept that or do they not?

There is implicit, also, the question of Respondent's state of mind. Do the Applicants accept that Respondent, in framing and in executing this policy, is and has always been imbued with an intention of promoting to the utmost the material and moral well-being and the social progress

of all the inhabitants of the Territory? On this point the answer would seem to be in the affirmative. The Applicants have conceded that motive or intent is a fact—they stated that in the verbatim record of 27 April, at page 27, *supra*. And they say at various places in the record that they do not allege bad faith on Respondent's part, and that they do not ask the Court to adjudge or declare with respect to Respondent's state of mind. That we have explicitly in passages such as those in the verbatim record of 27 April, at page 17, *supra*, and in the same record at pages 26, and 22, *supra*.

Mr. President, there is another aspect of this matter which demonstrates how far we are lacking in clarity in regard to the factual situation. The Court will recall that my learned friend, on 28 April, in dealing with the inspection proposal, posed the question, amongst others, whether there would be an ascertainment of the wishes or the views of the members of the various population groups in regard to the policies applied to them, or to be applied to them. He even asked, rhetorically, whether there would be a plebiscite in that regard.

In the Rejoinder, **V**, pages 281-291, we demonstrated, contrary to what the Applicants alleged in the Reply, that the vast majority of the population, White and non-White, of South West Africa favoured the policy of separate development. If my learned friends are serious in saying that they accept statements of fact, or explanations, and that they can be incorporated by reference into the statement of the facts, do they accept this factual conclusion at which we arrive, or do they not?

We have alleged, Mr. President, that various interim measures, which involve what may be called a negative type of differentiation between various groups, are to be seen not only as transient but also as being required, and as being necessary, to bring about the preponderant advantages of the system of separate development to which we have just referred. The Court will find those points dealt with in the Rejoinder, **V**, pages 307-308, and, also, in the same volume, at page 246.

In other words, Mr. President, these negative elements to which I referred—and, I repeat, correctly referred—as a handful which my learned friends would distil from the whole picture, constitute the main target of attack on the Applicants' part. We have said as a fact that they are to be seen as temporary—as being required to bring about an orderly transition to the advantages which we see in the system as a whole. Do the Applicants accept those statements of fact, or do they not? If they do, Mr. President, if they accept all the averments of fact to which I have just referred, then the Applicants' case would seem to amount to this.

Firstly, that there are certain differentiating provisions of what may be termed a negative type; that those have been imposed as transitory measures by the Mandatory, acting in good faith, and that those measures are, in fact, necessary in order to secure the advantages of the policy as a whole. The policy as a whole is considered by the Mandatory, and is, in fact, markedly preferable to the alternative suggested by the Applicants. In addition, the great majority of the population desire the implementation of the Mandatory's policy. Nevertheless, the Applicants say, the whole policy should be abandoned because of the existence of the provisions in question, although such abandonment would probably result in bloodshed and chaos. And this course, according to the Applicants, is dictated by a process of interpretation of a provision which

requires the promotion to the utmost of the well-being and progress of the inhabitants.

That would seem to be the case made by the Applicants, Mr. President, if they really mean what they say about accepting our factual averments. We should like to know exactly where we stand in that regard.

Mr. President, all that relates to the question of factual averments over and above the case which the Applicants say they are making on the basis of a technical norm. Last week a thought worried me in this regard, namely that even if the Applicants relied solely on a norm, or a norm and standards could one then necessarily say that the factual enquiry which we envisaged by way of evidence and inspection would be excluded? I could not quite place my finger on the difficulty, but during the weekend, in a discussion of the matter with my colleagues, it became as plain as a pikestaff.

The Applicants' contention in regard to their norm and their standards rests on a factual basis which is the very antithesis of what the Respondent wishes to demonstrate with its evidence and the inspection offered. The Applicants indicate that they rest either on a norm, or, alternatively, on standards. The norm, they say, is distilled from the standards, and if the norm is said not to be established in law then, nevertheless, they still rest, in the alternative, on the standards. How do they describe those standards, Mr. President? They describe them as standards "universally accepted". They rely on the standards for the purpose of distilling the norm therefrom and, in the alternative, they rest on them *per se*. And they made it clear—so we understood them in their pleadings, and, also, in my learned friend's oral argument—that, when they speak of standards in that regard, they derive those standards from the spheres of the political and social sciences—from the weight of scientific authority, from the practices of governments and from the standards currently operative in modern society in regard to methods of government, fairness, equity, and so forth.

Now, Mr. President, is not the question of the universal acceptance of those standards, in itself, a question of fact?

And, Mr. President, if one looks at the evidence which we intend to lead before this Court, one will find that the preponderant part of it will, in its effect, be directed towards showing that the assumption of the universal acceptance of the type of standards relied upon by my learned friend is totally wrong, and totally unfounded.

We propose, Mr. President, to call the evidence of experts in the political and social sciences. We propose to call the evidence of practical men on the application of those sciences. We propose to call the evidence of practical observers of events, which confirm the view of the experts. And the proposed inspection would serve to illustrate, and to confirm and to support, the evidence of all these people—of the experts, of the practical men on the application of the sciences, and of the practical observers.

Mr. President, in regard to the evidence, we propose, as the Court will see from the list which we have handed in, to call, apart from witnesses and experts from South Africa, a number of witnesses and experts from outside South Africa—from the Continent of Europe, from the United Kingdom, and from the United States. Our list has not been completed in that regard, but, in general, we can say that we propose calling men of the highest standing in their particular branches of the

theory and practice of the political and social sciences. They include eminent sociologists and political scientists, who have made a special study of the subject which is here in issue—of the particular type of question which is here in issue—namely whether one ought, or ought not, in all circumstances all over the globe, to adopt an approach of integration, of ignoring differences between people, and of not allotting rights, status, burdens, etc., on the basis of membership in a group.

Our list includes persons from outside South Africa who have occupied some of the highest political offices in their countries, and of the highest diplomatic offices as representatives of their countries. We propose calling journalists of very high standing as observers. We propose to call other observers in various branches of learning and achievement, who have seen African reality, in many cases including South West Africa and South Africa itself.

From South Africa and South West Africa we intend bringing a variety of persons of high standing, representing similarly wide fields of learning, achievement and experience. They will include theologians who will deal with the moral questions involved, and with the attitude of religious leaders in general. They will include, further, persons who are engaged in the practical application of aspects of the policies in issue, and men of learning who will support and give evidence similar to that of witnesses from overseas.

Mr. President, the evidence will be directed specifically at showing, amongst other things, that a general principle of non-discrimination or non-separation, in the sense relied upon by the Applicants, cannot, in all circumstances, be applied to produce beneficial results. The evidence will be directed at showing that such an approach often would not, and often does not, produce beneficial results, but that it, in fact, often leads to detrimental results for all concerned. The evidence will show that the overwhelming weight of authority, and the actual practice of States in that regard, certainly does not support an absolute principle of the nature of Applicants' norm or standards—standards which, my learned friend said, are to be seen as having as content similar to that of the norm. And, finally, Mr. President, the evidence will show that circumstances, as they exist in South West Africa, *par excellence* call for a policy of differentiation, and not for a policy of attempted integration, in the interests of all concerned, including every individual.

So, Mr. President, if I have correctly analysed the Applicants' case in regard to their norm and their standards, this evidence will be 100 per cent. relevant to the question whether that norm and those standards are factually in existence as alleged by the Applicants, and whether they have universal application and universal acceptance. And yet my learned friend says that in some way or another such an enquiry is to be excluded, and that even if an inspection can aid the witnesses by illustrating and demonstrating points they make to the Court even more fully and adequately than they can by the spoken word, such inspection, also, is to be excluded.

In other words, Mr. President, even for the purpose of seeking to apply their norm, and for the purpose of seeking to apply, in the alternative, their standards, the Applicants cannot escape this factual enquiry unless they are prepared to do one thing, and that is, they would have to say and make it explicitly clear that all that is relevant to their legal contention is what international bodies have said—what States have

said in those international bodies and in the political context—that that is the only relevant thing. And the Court looks no further: it does not look at what the States *do*, in practice; it does not look at what is contained in the relevant constitutions; it does not look at actual practice in States. It does not look at what is *thought* in political and social sciences, what the views of the authorities concerned are, where the weight of opinion lies in those spheres, and at what is actually being demonstrated in that result by factual events and trends in various parts of the world. If my learned friends make it clear that that is their proposition, viz., that one does not look at the factual picture at all; one says the organized international community has spoken, through political judgments, in its organs, and through political judgments expressed by, or on behalf of, various governments, then, of course, this enquiry would be an irrelevant one, and one should merely look at the suggested legal merits of that contention.

It is clear also, Mr. President, that if the Court should accede to the legal argument, which we addressed to the Court earlier on the question of the suggested norm and the suggested standards, and if the Court should find it convenient to come to a decision on those questions of law before proceeding with the rest of the case, then, of course, also on the basis of such a decision, the suggested factual enquiry might fall away. But that is entirely a matter for the Court to decide in its own discretion and for its own convenience. In other words, what I want to make clear is this, that it seemed to us from the reactions of the Applicants to this proposal for an inspection that there may possibly be a short-cut in this case—there may possibly be a method of rendering unnecessary the factual enquiry which we envisaged, both in regard to evidence and in regard to an inspection. That possibility could come about in one of two ways. One way would be for the Applicants to make it perfectly clear to the Court, and for the Court to satisfy itself, that the contention, and the sole contention, or contentions, relied upon by the Applicants do not involve any invitation to the Court, do not involve any basis, which would make relevant a factual enquiry into this situation. We have tried, by way of questions, and by way of getting answers to questions, to clarify the situation, i.e., to ascertain whether that is really so. I can only submit to the Court that, as far as we are concerned, we cannot see clarity yet. If the Court can satisfy itself that there is clarity in that regard, that may be a different matter, but, as far as we are concerned, it seems that the one explanation after the other still carries within itself, in some form or another, the same equivocations as before, and we still cannot have clarity that, on the basis proposed by the Applicants, no factual enquiry would indeed be relevant.

The other possibility of cutting the matter short would be if the Court should decide that it ought to go into the legal questions first—that it ought now to decide the legal questions before it decides whether there is any further need for a factual enquiry. If it should decide upon that course as a matter of convenience, the Court could possibly come to the conclusion that the whole of the Mandate had lapsed. The Court could possibly come to the conclusion that Article 2, paragraph 2—alleged violations thereof—were not intended to be justiciable at all. The Court could, possibly, conclude in favour of our alternative contention as a matter of law—that the only possible basis upon which alleged violations could be judged would be one of alleged bad faith in the sense of policies

directed at an unauthorized objective. If the Court came to that conclusion then the Applicants' specific denial that they bring any case on that basis would, in itself, be sufficient to conclude this whole part of the case. That conclusion would, of course, carry within itself a rejection of the Applicants' case—their suggested case—based on the existence of suggested modern norms and standards, or a norm and, in the alternative, standards. The legal question particularly to be decided in that regard would be whether any such norm or standards could be binding in law upon the Respondent, upon a mandatory, without the consent of the Respondent or the mandatory. And, if the Court should conclude those legal questions in favour of the Respondent, then, of course, that would be a basis upon which no further factual enquiry would be necessary.

A further alternative could be, Mr. President, that if the matter is viewed on the basis of the Applicants' premise that there could arise in law a binding norm or binding standards (as apparently they suggest) based on what is generally accepted in the modern international community, quite independently of the consent of the mandatory, and if the Applicants suggest to the Court and the Court agrees that it is not itself to indulge in that factual enquiry as to whether such a norm exists, that the Court must only take as its guiding factor the pronouncements which have been made by political bodies in the organized international communities—then, again, Mr. President, it would be a pure question of law, and if that contention of the Applicants is rejected that is also the end of the question. Then there would be no necessity for a factual enquiry.

But, Mr. President, if the Court should, as a matter of convenience, find it better to hold over all decisions, including decisions of law, until the end of the proceedings, the Court must now, on that basis, determine in advance whether a factual enquiry is a necessary one or not. Then the question becomes a very difficult one—it becomes very difficult to say that the Applicants have now made the position clear that such a factual enquiry could not, on any view of the situation, be, in law, relevant. If it wishes to go into the matter piecemeal, the Court could decide that, looking at the evidence on record, it becomes perfectly clear that the Applicants cannot establish any factual basis for saying that these suggested standards and these norms are universally accepted, and that no further evidence on the Respondent's part, or no inspection, would be necessary to demonstrate that. That could be a further basis upon which the Court could come to the conclusion that such an enquiry would not be necessary, but that, again, would entail that the Court is to go into that question now at this intermediate stage of the proceedings. I am merely putting those possibilities to the Court to see where we stand because, as my learned friend has said, the nature of this objection to the inspection has really opened up the heart of these very proceedings, and those seem to us to be the implications involved.

Our submission is that if the Court does decide to hold over its decisions on all questions, including the questions of law, until the whole enquiry has been conducted—until the end of the enquiry—then it is not possible for the Court, on the analysis which we have given so far of the Applicants' attitude, to say that such an enquiry could not, on any basis of the legal questions involved, be a relevant one, and that we would, therefore, insist upon the relevance of the whole of that factual enquiry. If the Court could satisfy itself by additional means that we

are wrong in that respect and make a decision to that effect, then, of course, it would be different.

That, Mr. President, brings me to an allied consideration, one which the Applicants suggested in regard specifically to the inspection proposal and in which they took up the strange and contradictory attitude that our application in regard to that inspection was both too late and too early: too late because it was never raised in the pleadings or by way of correspondence at the pleadings stage (that complaint we find in the verbatim record of 27 April at p. 4, *supra*), and in the very next breath—too early, because the matter was, as they said, introduced prematurely at a stage while the Court was still considering the legal basis of the case. They said it should have been held over until later. That we find stated in the verbatim record of 27 April, at page 4, *supra*, and also a conclusion stated at page 7. The argument in that regard was apparently this, Mr. President: it was said that the Respondent itself contemplated certain contingencies that might make it unnecessary for the Court to go on an inspection or to have a factual enquiry at all, whether in regard to evidence or in regard to an inspection. In our submission, these conflicting complaints made by the Applicants failed to take any account of the purpose intended to be served by written pleadings. The rules of the Court provide that Memorials and Counter-Memorials shall contain statements of fact, statements of law and submissions—that we find in Article 42 of the Rules. The object of the pleadings, Mr. President, would seem to be, as in municipal systems, to clarify the issues of law and of fact which are presented in each case to the Court. The purpose is to clarify those issues before the Court proceeds with the hearing of the issues. It is only after the issues have been crystallized in the pleadings that the Parties are in a position to decide at all what further factual enquiry may be necessary by way of evidence or an inspection or both. The Rules of Court, particularly Article 49, contemplate that situation in that it requires that notification should be given to the Court in regard to the calling of witnesses and experts, not during the pleading stage but in sufficient time before the commencement of the Oral Proceedings.

There is no specific provision regarding inspections *in loco* but on the analogy of that rule, Mr. President, it is evident that a proposal in regard to an inspection cannot be said to be too late because it is made at the oral hearing stage and not during the pleading stage. Indeed, during the pleading stage one would be as unable to say whether an inspection would be necessary as whether evidence would be necessary.

By the same token, Mr. President, on the other hand, an inspection proposal cannot be said to be premature merely because it has been made at the very outset of the Oral Proceedings. As an ordinary matter of considering the convenience of the Court and again on the analogy of the rule in regard to oral evidence, this would indeed be the most opportune time for a party to notify the Court of its intentions in that regard, or of raising a proposal in regard to an inspection. It does not matter that decisions on particular questions of law may possibly render a factual enquiry unnecessary at all. That position, in fact, applies at the pleading stage already. In the pleadings, the party must raise its questions of law, its contentions of law and its contentions of fact, and some of those contentions of law may be such that if they are accepted, no enquiry into the facts will be necessary but yet a party is required to go ahead and to

set out its contentions of facts in the pleadings on the contingency that the question of law is not decided in its favour.

So also, when it comes to the trial stage, Mr. President, the parties are required in terms of Article 49 to give notice before the commencement of the Oral Proceedings of the evidence which the parties intend to lead, despite the fact that a decision on particular issues of law raised in the pleadings may render such evidence wholly unnecessary. And in principle there can be no distinction in that regard between the notification regarding evidence and a proposal in regard to an inspection. The inspection itself would just be part of the factual enquiry to which the oral evidence would be addressed. So, in both cases we find that the notification to the Court is a provisional one; it is provisional upon the factual enquiry being found to be necessary at all. The Court's procedure in regard to deciding whether the factual enquiry will be a necessary one is, of course, entirely a matter for the Court to decide in its discretion. The Court may, in appropriate cases, consider it convenient and best to come to a decision on the legal issues first and thereby to determine whether further factual enquiry will be necessary at all for the purpose of finally disposing of the case. On the other hand, the Court may proceed to hear the evidence and the argument on all the issues and postpone a decision on all the issues until the end of the whole case.

In the present case, the Court might also follow either of these courses. It is entirely a matter for the Court to decide and we fully contemplated that in our proposal as appears from our very statements, which the Applicants quoted on 27 April, at pages 5 and 7, *supra*, of the verbatim record, where we indicated, Mr. President, that on a particular decision in regard to the particular questions of law, the factual enquiry may fall away and then the evidence and the inspection may not be necessary and I dealt with that a moment ago.

It is quite true that if the Court should follow the course of first deciding on the legal questions, then certain possible decisions at which the Court might arrive would make the evidence and the inspection unnecessary. I have given the examples of the cases in which conclusions arrived at by the Court could bring about that conclusion. On the other hand, if the Court should follow that course, consider the legal questions first, reject our legal contentions, and conclude at least provisionally in favour of the Applicants' legal contentions, subject to due proof of certain factual premises, then, of course, the factual enquiry would be necessary. Alternatively, the Court might prefer to hold over all decisions for simultaneous final determination and in that event too, the factual enquiry would have to proceed. And, Mr. President, to bring this point to bear again on the question whether we came at the right time or at the wrong time with this proposal, for the mere sake of enabling the Court to decide on a balance of convenience which course it ought to pursue, i.e., whether it ought to decide the legal questions first or at least to attempt to decide them first or whether to hold over all decisions until the end of the case, it may be a matter of the greatest importance to the Court to know—now what would be the practical implications of these two courses? What would be the practical implications of holding over all decisions until the end? Would that involve an enquiry into facts, with evidence and with the possible inspection which may take a very long time, which may be expensive and so forth, and which may, in the light of an ultimate decision on a legal question, be shown to have

been unnecessary? That is certainly a factor which the Court will take into account in deciding whether it will follow the one course or the other, and for that reason it is so essential in our submission to inform the Court beforehand whether we intend to call witnesses, how many witnesses we propose to call, and whether we make any proposal in regard to an inspection.

We do find, however, that the Applicants' objection to the inspection proposal in this particular case, based on a consideration of relevancy, in effect invites this Court to consider at this interim stage (I take it to be the end of the argument on the legal questions), what its attitude is on the legal basis of the case—at least provisionally, to see whether there can be any basis at all upon which it can be said whether the legal issues —the conflicting contentions of the parties in this regard—are of such a nature that it can be concluded in advance that an inspection will not be necessary. As I have said before, the Court could come to the conclusion that no factual enquiry would be necessary, either on the basis of a decision of legal questions which have that result, or on the basis of satisfying itself that the Applicants' case invites no factual enquiry whatsoever, but the second would, in my respectful submission, seem to have been excluded for the reasons which we have given.

I can, therefore, Mr. President, continue to deal with the various points which my learned friend has raised in regard to the inspection issue only on a contingent basis. I have to put this contingency to the Court that if it should find in one way or other that a factual enquiry would be necessary, then the further question would arise—should an inspection be included in that factual enquiry? That would be a sound basis for enquiring into the validity of the various other points raised by my learned friends on this question whether there ought or ought not to be an inspection.

The Applicants gave a number of what I might call "minor reasons" why they said even on this basis, there ought not to be an inspection at all. When we analysed them Mr. President, we found that they can best, in our submission, be described as frivolous and vexatious as far as the preponderant number of them is concerned. They contain the suggestion, which I have dealt with that we were both too early and too late, that the whole case should first be disposed of by the Court, both in regard to the legal questions and in regard to the factual questions, before there is to be a decision on the inspection question at all. They also raised the question why a committee of the Court only is proposed as a possibility, when we have said that it is so important for everybody to see African reality. They raised that question, Mr. President, although in almost the same breath they expressed concern, amongst others, about the expense and cumbersomeness of the proposed inspection. They said that the visit to South Africa, which is proposed, ought to have been unqualified and unconditional, but they said that in spite of the fact that their real attitude is that there should be no visit to South Africa at all, or, indeed, to any other African territory. They went to the lengths, Mr. President, of saying that an inspection would necessarily involve the taking of evidence, and that that would have some fantastic results. This is the nature of the objections which were raised.

Mr. President, before I deal with any of them, I would suggest, with the greatest respect, that the real reason for this attitude why there is to be no inspection at all, is a perfectly obvious one. It is perfectly obvious

that the Applicants cannot face up to this factual enquiry, they cannot face up to a comparison of standards of well-being and progress in their own countries and those in South West Africa. They had to find a formula to rule out the whole proposal and, in doing so, they emphasized the fundamental weakness of their case in law, in fact, and in morals. My learned friend said the whole heart of the case has been torn open. When I say these things, Mr. President, they may sound hard, but I am not hitting at individuals, I am hitting at my learned friends least of all or at anybody bringing this case against us. I am hitting at the case itself, a case which is, in its essence, a hypocritical case, one which cannot stand up to enquiry by this Court but which invites this Court to act as a rubber stamp, in the way in which I have indicated before. It is against that background that I deal with these objections, because it throws a considerable light upon the whole situation.

I might as well deal first with the last one—the suggestion that an inspection will necessarily involve the taking of evidence, and then the building of some really fantastic results upon that suggestion. Those results we find set out in the verbatim record of 28 April 1965, page 49, *supra*, where my learned friends say that if one has an inspection in South West Africa, then there must necessarily be an enquiry into the views of the peoples concerned, and they pose the questions of how many of these peoples are to be heard—how many of the individuals concerned? Is there to be a plebiscite? What is the position about petitioners, who, the Applicants say, have fled the country? Are they to be allowed to return to give evidence? And so forth.

Now, Mr. President, let me immediately make this clear. I have never heard of the concept of an inspection including necessarily, or otherwise, the taking of evidence. An inspection is one particular manner in which a court informs itself by looking, not by taking evidence. The court looks at what it considers to be relevant, and what it considers to be informative for the purpose of any factual enquiry upon which it may have to indulge. There is no suggestion that if one inspects, then one must hear evidence, and there was never any such suggestion from our side. There was never any suggestion that if the Court is to inform itself about the ways in which people live, about their standards of living, about the differences between them, and so forth, the Court is to talk to those people or to hear any evidence in that regard. The Court will see those things for itself. There may have to be some identification, somebody may have to say to the Court that it is now looking at a Damara township and not at a Nama township, or similar, and if there should be any dispute about that, it would have to be a subject of evidence, when the Court resumes again. But normally one finds no difficulty about things of that kind.

Normally, a court, or inspecting committee if it may be so decided in this case, will record what it has seen, in so far as it regards that as being important. And what is recorded is normally, in the practices that I am acquainted with, read out to the parties first in a provisional form, when the case resumes in open court again, so that the parties can offer comment, whether the recordings are accurate or not, before the court comes to a final conclusion that that is to be the record of its observations on inspection. So, therefore, all these fantastic questions as to how many people are to be heard, whether there is to be a plebiscite, whether petitioners are to be heard, and so forth, all fall away.

Mr. President, I should like to say something further about this ques-

tion of the petitioners. First, my learned friend made this statement:

> "... some petitioners have been among the numerous inhabitants who have managed to leave the Territory for the purpose of pursuing educational advantages not permitted to them in the Territory under the admitted policies and practices of apartheid". (*Supra*, p. 49.)

I should like, Mr. President, to hear proof or evidence in substantiation of this wild statement about the "numerous inhabitants who have managed to leave the Territory for the purpose of pursuing educational advantages not permitted to them in the Territory ...". I do not know of any possible justification for an averment of that kind.

We heard more, Mr. President. We heard that the Applicants have not relied upon the accuracy of statements in such petitions—that is at the same page—and yet, later in that same sentence we are told that the Applicants have cited such petitions for the bearing they may have as confirmatory of the reasonably predictable consequences of the practices and policies which are undisputable. Mr. President, if petitioners cannot be believed, if *any* person cannot be believed, how can their statements be relied upon as being confirmatory of anything? I could say this about the petitioners. The whole basis upon which the suggestion was dragged across the trail, falls away, of course, because the proposed inspection does not envisage the taking of any evidence. We certainly do not propose to call petitioners, either here or elsewhere, as witnesses because we know, and we have demonstrated on the pleadings already, that no reliance can be placed upon their evidence. We could consider quite seriously, if my learned friends should wish to call them, whether we ought not to offer to pay their witness fees so as to allow us the privilege of cross-examining them. That is all I think I need say about the petitioners.

Next, Mr. President, I must refer to my learned friend's suggestion that Respondent advanced three principal grounds in support of its proposal. He said that the first of these grounds was the alleged motivation underlying these proceedings—the alleged motivation on the part of the Applicants. That we find in the verbatim record of 27 April, at page 9, *supra*.

Mr. President, nothing is further from a true analysis of what we said. We did *not* rely on the alleged motivation on the part of the Applicants as a reason *per se* why there ought to be an inspection. We referred to that motivation in a completely different context. We referred to it as demonstrating a part of the tremendous conflict of fact which there is between the Applicants, on the one hand, and the Respondent, on the other. That becomes perfectly clear if we look at the verbatim record of 30 March, **VIII**, page 272 and again at page 277, where I was putting the proposal in regard to the inspection. At page 272 we made it clear that the attitudes of the two Parties in that regard were such poles apart that the leaders of the campaign against the Respondent Government:

> "... like to portray that campaign as something in the nature of a holy crusade of modern times—as something required to liberate fellow human beings from conditions which are said to be worse than slavery".

I omit a sentence, and proceed:

"From the South African point of view we see that campaign as being one of abuse and vilification, motivated on the part of its leaders by purely political objectives with very little, if any, bearing on the real merits of administration of the Territory of South West Africa, or the real interests and needs of the population of that Territory." (*Ibid.*, p. 273.)

In reading out this latter portion to the Court, my learned friend omitted the first portion. He omitted the whole point of it, the comment which is directed at demonstrating that at that stage there was that dispute. There was no intention, as I made clear immediately afterwards, of going into the merits of the dispute at this particular stage, because, quite clearly, those merits had no bearing upon the question whether there ought to be an inspection or not. It is the fact of that dispute, which was part of the background of the application, which was one of the reasons why it was said that this was a case where the Court should leave no stone unturned to have an absolutely full enquiry into all relevant facts.

That is made clear at page 277, where we said:

"It is against the background of the extraordinarily wide divergence between the Parties, both in respect of the motivation behind these proceedings and in respect of the merits of the solution to be arrived at as regards policy. It is also because of the importance of appreciating all aspects of the facts and particularly the factor which I mentioned earlier, the importance of seeing African reality, as distinct from just reading or hearing about it." (*Ibid.*, pp. 277-278.)

That made it clear in what context we raised this matter, Mr. President.

My learned friend need not be afraid, I shall, in due course, when we come to that part of the proceedings, deal fully with, and I shall substantiate fully, what we said in that regard—in regard to this motivation—but it is not relevant at this stage to go into the merits of that. What is relevant is the fact that there is that wide divergence.

Then, Mr. President, my learned friend asked what this Court is going to look at in South West Africa, either on the basis of the Applicants' contentions, or on those of the Respondent. On either basis, he said there was no need to see anything; there was nothing the Court could see which could be of assistance to the Court.

Now, Mr. President, in order to answer the question of what the Court will look at in South West Africa, it is sufficient for me to make the very simple statement that we invite the Court to look at all phases of the material and moral well-being of the peoples concerned, and at all surrounding circumstances which have a relevant bearing upon the promotion of that well-being and progress.

We ask the Court to look at all the phases raised by the Applicants in their pleadings—political, the rights of residence, freedom of movement, security of the person, education, economics. We shall ask the Court in the political sphere, Mr. President, to have regard to this alternative policy which the Applicants suggest to the Respondent Government, on the basis of the norm or the standards on which they rely. I refer the Court to the Reply, **IV**, page 441, where the Applicants state the following, under the heading "Statement of Law":

"With regard to political rights, the relevant and generally accepted norms by which the obligations stated in Article 2, paragraph 2, of the Mandate should be measured, have been established

> by the United Nations. These include the institution of universal adult suffrage and the promotion of participation on the part of all qualified individuals in all levels of government and administration, within the framework of a single territorial unit."

In other words, this means complete, or an attempt at complete, political integration of all those various peoples of South West Africa into one political unit.

Mr. President, the inspection could be of tremendous value to the Court, or to its committee, if it were to observe for itself what are indeed the differences between the various groups; what are indeed their various standards of living, their various modes of living, and so forth. We talk about those things on paper; we give descriptions as far as we can; we say there are these differences; but, Mr. President, those are mere words. Those words have to be brought to life in order to evaluate them with reference to a proposition such as this: that all those people are to be thrown together into one political unit in an attempt to integrate them all, and into a system which is then expected to work for the benefit of them all, and particularly for the individuals about whom my learned friend is so concerned. Those things have to be brought to life. There is always some aspect of a situation of that kind which has to be evaluated, as distinct from merely spoken about, which is not contained in a description on paper, which is not contained even in a description by a witness telling about it in the witness-box. There are always various elements in the situation which one sees, but about which one does not talk. If a valuator has to value a farm, he may get all the details on paper about the size of the farm, the improvements that exist, descriptions of the improvements and the type of land and so forth, but still, Mr. President, he does not rely on that alone; he goes to the farm and sees for himself; he makes the various elements live; he brings them into conjunction with each other, and then he evaluates. It need hardly be necessary to emphasize to the Court the importance of seeing those things for oneself before one makes a value judgment of that kind.

In regard to rights of residence, freedom of movement and security of the person, my learned friend rather challenged me to suggest anything which the Court could see in that respect. Then he himself spoke of the alleged suffocating weight with which the various pass laws and so forth rest upon the shoulders of the persons affected by them. He invited this Court to put itself in the position of persons affected. Mr. President, that in itself is a false comparison, unless one puts oneself completely into that person's position. It is not for somebody from outside South West Africa, from outside the life, the traditions and the background of the people concerned, to try to put himself, with his different background, into the position of those people. What is to be judged is the weight, the suggested weight, or the effect of those provisions on a person with that particular background, with those particular circumstances, with the modes of living to which he is accustomed. Mr. President, that is what I suggest the Court could observe in an indirect way, very validly and in a valuable way, for itself. The Court can see whether there is to be observed in the bearing of the people, in the way in which they move, in the way in which they live, and so forth, any suggestion of such suffocating weight, any indication that these people are mere slaves, that every movement of theirs is controlled from dawn till dusk, as is suggested in that particular portion of the Memorials which, inci-

dentally, we analyse in the Counter-Memorial, and which we show to be materially incorrect in so many respects.

Mr. President, in regard to schools—the school-children of the various Native peoples of the Territory; where they go to school, where they learn, where they are taught, where one sees them in their actual life—surely one can get an impression whether they are really children of whom it can be said that they are being educated for slavery, or for servitude; whether they make the impression of being repressed or oppressed; or whether they are being taught in a practical and an effective way, which develops their personalities and their minds in all relevant respects of their lives; which looks at them, in other words, as individuals in their particular circumstances, and not in terms of a norm which says that there is to be a manner of educating them which is to be applied irrespective of whether it benefits them or not.

If it comes to the economic sphere, Mr. President, surely the Court will be able to see whether it is true to say that the Natives are merely employed as menial labourers; that they are not allowed to rise above that level at all. Surely it will be possible for the Court, or the inspecting committee, to see what the primary economic needs are of the people that it sees there; whether the primary needs are that one or the other should be able to become an engineer, or whether those needs are of an entirely different kind; whether Respondent's policies really relate to the problem of assisting those people to overcome the difficulties of a hard and a harsh Territory, as far as making a living out of its soil, and out of its climate, and out of its conditions is concerned. The Court can see and evaluate for itself what degree of technology is required in order to make any economic progress at all out of the soil and out of the conditions of South West Africa in regard to the combating of cattle diseases; in regard to exploitation of the mineral wealth of the Territory for the benefit of the whole population; in regard, Mr. President, to overcoming difficulties of water scarcity; in regard to overcoming difficulties of poorness of the soil, or of soils that have been spoilt by salt content and that sort of thing; matters which all require the application of modern techniques, modern technology, in order to enable any progress to be made at all.

An inspecting committee is able to evaluate whether it is true to say that there is a population pressure on the land in the Native areas, and that that population pressure makes it necessary for the Natives to come out to work as menial labourers for the Europeans. The inspecting committee can see for itself whether those Native areas are indeed, as is alleged, the poorest areas, or whether they are, as we say, of the best areas of the Territory. It is not merely a matter of accepting the one statement or the other; there is still the question of degree involved; there is a question of evaluating that, and of observing the degree to which those territories are, in fact, better than any of those occupied by the Europeans.

Mr. President, the Court will see—the inspecting committee will be enabled to see—the good with the bad. It can look at elements; it can look for evidence of what is alleged to be bad in the whole system, to see whether it finds anything of that kind, whether it finds a system of slavery, of oppression, or what have you, or whether it finds a situation of various peoples growing in stature, growing in confidence, growing in the degree of trust and co-operation which they have in one another

when they know that the one's existence is not threatened by the other. The visiting group, whether it be the Court or a committee, will be able to see in what respects it could possibly be said that the Mandatory could have improved upon what it has done; in what respects all is not exactly as it should be; but how that is to be evaluated in the total picture. I am not going to suggest to the Court that the Mandatory Government has been faultless in every respect, that there is nothing which a committee will see, or which the Court will see if it goes as a whole, which it will not find to be unfavourable. But I do suggest, Mr. President, that the Court or that committee will find that, viewing the whole situation, it is one in which there is a real endeavour to promote well-being and progress to the utmost; where one can see, and where one can feel the pulse of it, and the manner in which the whole situation is growing in the way foreseen in the basic principles of this policy. That is what I suggest the Court may see, very beneficially, for itself. In general, Mr. President, in South West Africa or in any of the other territories which I have suggested, it will be possible for the Court to see instances where the standards of development of the indigenous peoples may be below that of the Europeans. The committee or the Court will be able to judge for itself whether that is to be attributable to a particular policy, or whether it is to be attributable to African reality; and in that respect particularly it will be so useful to the Court to be able to make the comparison between territories in which this policy has been applied and is being applied, and territories in which it is not and has not been applied.

[Public hearing of 4 May 1965]

Mr. President, at the conclusion yesterday, I was dealing with the Applicants' question as to what the Court would see on an inspection that could be helpful and relevant, either from the point of view of the approach of the Applicants in the case or from the point of view of the Respondent. I had virtually concluded what I had to say in that regard, provided that it is borne in mind that I was giving examples only. I was not trying to state what a full itinerary would look like—that would be a matter for later consideration.

I may revert to the fact that my learned friend asked the Court yesterday, in that regard, whether an inspecting body would look at the operation of a penal provision in the Nursing Act. It seems that my learned friend, not being able to obtain complete satisfaction from the engineers' example which he used, tried to turn to this one. Mr. President, from what I know of the situation in general, it seems most unlikely that it would ever be found necessary to apply this provision at all, so it seems most unlikely that the Court would see this provision in operation. But what the Court would see in regard to nurses, would be the training of Native and Coloured girls as nurses, both as fully qualified nurses and as auxiliary nurses. The Court would see the facilities, the Court would see the people involved, and the Court would be able to judge for itself whether it would be a fair judgment to say that there is any sign of proclaimed inferiority in that regard. I could conclude, Mr. President, on this aspect by saying that in view of the allegations of deliberate oppression which are still on record—the allegations of the suffocating weight of restrictions,

the allegations of subjugation, the allegations of the absence of any horizon of hope coupled, Mr. President, with allegations made with regard to alleged militarization, and with the allegations of the arming of the European population with a view to the suppression of the Natives—in the light of these allegations it might be very instructive for the inspecting body to see for itself whether there exist any of the signs of a police state or the signs of tension or unrest that one would expect to be associated with a situation as so described.

Now, Mr. President, I proceed to deal with another query raised by my learned friends, to this effect, that if African reality requires to be seen in order to be appreciated, why do we suggest the possibility that a committee of the Court might go on this inspection as distinct from the whole Court, according to the Court's own preference. This point was made by my learned friend in the verbatim record of 27 April, at page 15, *supra*. Now, Mr. President, it is quite true that if one were to look only at the strictly logical consequences of the desirability of seeing for oneself—if one were to look only at that consideration—then it would be preferable for the whole Court to go. Surely there are other practical considerations also to be brought into the scales and it is for the Court to decide, because we left this to the Court's preference, what weight is to be assigned to such practical considerations to the contrary. My learned friends themselves referred to the factors of expense and cumbersomeness. In addition, there is this important factor which came to mind from our side, viz., that for personal reasons of health and strength it might well be that in the case of individual members of the Court it would be unfair and unreasonable to expect of them to undertake a strenuous task—undoubtedly a strenuous physical task—such as an inspection of the nature envisaged. It was for reasons of this kind that we thought that the Court might well consider that it might be preferable, weighing the pros and the cons of the situation, to have an inspection by a committee rather than by the whole Court, but we still leave the decision and the preference in that regard entirely to the Court.

We also considered Mr. President, with submission, that if the Court should find it undesirable that the whole Court should go then it would still prefer that there should be an inspection through a committee rather than no inspection at all.

Surely the difficulty which my learned friend raised about how the committee would convey its impression to the Court, is highly exaggerated. Surely it would make a very big difference to the Court to be informed in that respect as to the total impressions, and the reasons for those impressions, of a body consisting of its own Members: that would surely mean very much more to the Court than merely being informed by one or other of the Parties or by a witness for one or other of the Parties.

Then our learned friend raised the question, in the same context and on the same page of the record, as to how impressions gained on an inspection by the Court, could be adequately recorded. Mr. President, that question, in my submission, is merely a facetious one. There are so many instances in life and in the legal process itself in which it is impossible to record every minute aspect that goes into an impression, and yet the impressions themselves, as a whole, are treated as being highly relevant and highly important in many instances. To take an example from the legal process itself, there is the illusive question of the

demeanour of a witness in a trial, and the whole atmosphere of the trial, factors to which a court of appeal, sitting on appeal against a judgment of a court of first instance on a trial on fact, always give the greatest weight in considering whether there is justification for it to differ from the finding arrived at by the court of first instance. It is quite impossible, and it is accepted that it is impossible, to describe every aspect and detail of what goes into those impressions as to the demeanour of a witness or the atmosphere of a trial—and yet they play important parts. It is the totality of the impressions honestly and thoroughly arrived at by a process of investigation which counts, and some indication of the reasons why that totality of impression was arrived at is always possible.

Equally facetious, Mr. President, is the next point to the effect that if the Court sees other territories in Africa other than South West Africa itself, why should it stop there? Why should it not see territories outside Africa as well? That we find in the verbatim record of 28 April, at page 48, *supra*.

Mr. President, we did not suggest that a comparison of general conditions in countries *outside* Africa would, in any way, be helpful or relevant in this case, as we suggested in respect of territories *in* Africa. We spoke, in the course of our pleadings, about particular points of relevance in such countries, specific facts, for instance, about migrant labour, manifestations of group reactions, and so forth, but we nowhere suggested that, for the purposes of the points we wish to make in that regard, it would be at all necessary or desirable for the Court to make an inspection in that regard. If one were to go through the list of items laboriously and analyse each one, item by item, it might be found that in the case of some item it would perhaps assist the Court if it could have an inspection, but surely there are degrees of relevance and degrees of importance in regard to questions of this nature. We refer to such countries in respect of isolated points in regard to such questions, but there could never be a serious suggestion, as far as we could see, that there should be an inspection of the countries concerned. If it had been my learned friend's case that there should be an inspection of such countries, one could still understand a point of this kind being raised, but his case is, in truth, that there is to be no inspection at all. Indeed, on this aspect his case is that consideration of the questions which arise in regard to these other countries is totally irrelevant.

Mr. President, I think we can now leave that point. A good friend of mine has a description for points of that kind. He calls them "talking points", and I think that description could, with submission, well apply in respect of this particular point.

We have a similar manifestation of inconsistency, Mr. President, in regard to our suggested visit—a limited visit—to South Africa itself. My learned friend says that that inspection, or visit, should be an unconditional and an unqualified one, or nothing at all. That point we find dealt with at some length in the verbatim record of 28 April, at pages 50-53, *supra*. Again, Mr. President, this comes very strangely from a party who says there should be no inspection at all. The fact that there are special limitations with regard to relevance, as far as South Africa is concerned, as compared with South West Africa, is so obvious that it does not, in my submission, require any demonstration or elaboration. It is also quite wrong to suggest, as my learned friend did, that we did

not indicate a similar limitation with respect to the other territories in Africa, other than South West Africa. Of course we did not indicate a limitation based on the same grounds, but we did indicate a limitation in the sense that the inspection, or visit, should be a limited one, limited to a particular purpose.

I should like to refer the Court to the verbatim record of 30 March, where we dealt with the matter, at **VIII**, page 279 in the paragraph beginning "Secondly", i.e., the proposed visit to the Applicant States, Ethiopia and Liberia. We said that that was to be:

> ". . . for the purpose, and to a sufficient extent, to enable the Court or its committee to form a general impression of comparable conditions and standards of the material and moral well-being and social progress of the inhabitants concerned; a limited purpose, limited to what I have just mentioned".

I need not quote any further.

Then, when we came to the third part of the proposal, i.e., in regard to other territories in Africa, we expressly linked it up with what we had said in regard to Ethiopia and Liberia. We said at page 280 of the same record:

> "Thirdly, Mr. President, we propose that a visit should be included to one or two further sub-Saharan countries of the Court's own choosing, also for the purpose of gaining a general impression regarding comparable standards of the same nature as I have just mentioned in regard to the Applicant States."

I do not think I need say anything further in that regard.

Mr. President, we then heard a contention by my learned friend that an inspection, as proposed, would virtually convert this Court's function into one of administrative supervision. We find that in the verbatim record of 28 April, at page 36, *supra*. At page 41, of the same record, the further suggestion was made that if this enquiry were to relate to bona or *mala fides*, it might well have to be a continuous enquiry because what would be found in one year, might not necessarily apply in the next. This last suggestion, Mr. President, of course, would apply to any factual enquiry, not only an enquiry in regard to bona or *mala fides*. Any factual enquiry by a court or by a visiting group or inspecting body on a question of fact would carry that implication with it.

My learned friend seems to have forgotten that these and similar considerations were the very ones that we stressed in regard to our main contention on the justiciability of issues arising under Article 2 (2) of the Mandate—the very considerations why we suggested and we submitted that this Court was never intended to exercise a function of that kind; but I need not enlarge upon that in the context of this inspection proposal.

My learned friend further emphasized that certain factors of convenience, expense, and time were to be considered and to be weighed in the balance. We fully agree that they are to be weighed in the balance, Mr. President, and we submit that they surely cannot be regarded as outweighing the importance of a proper and full investigation into a case of this kind which, in my learned friend's own description, is one which affects the lives of such a multitude of individual human persons. Surely, when that consideration is brought into the balance, it must outweigh the relative considerations of time and expense and convenience referred to by my learned friend.

In this regard, I could make it clear that the test of convenience would certainly play an important part in respect of various of the practical arrangements which would have to be made for the purposes of conducting an inspection, and I want to emphasize, Mr. President, that in regard to detailed matters or particular points involved in our proposal, if the Court should have any difficulty about those, as distinct from the general principle of the proposal as a whole, then our suggestion is, as we tried to indicate initially, that those are matters for further consultation between the Court and the Parties through the ordinary channels. We cannot, by way of a discussion in open court, decide upon every detail. They would certainly have to be dealt with in a practical way by a more direct form of negotiation. What I do want to make clear is that if anything we have mentioned as a matter of detail on a particular point may present the Court with some difficulty, the Court is not to assume that its difficulty in that respect ought necessarily to wreck the whole scheme.

Mr. President, this ties up with another question of convenience, in regard to which the Court also has to weigh the balance of convenience. It is a matter to which I referred yesterday and to which I wish to revert very briefly by way of conclusion in this regard. It is the balance of convenience between, on the one hand, deciding certain legal questions at the stage of completion of the legal argument, and, on the other, holding over all questions until the end of the factual enquiry.

I indicated in that regard, Mr. President, that if the former course is followed, i.e., if the Court decides that it is now more convenient to consider whether it can come to conclusions about the legal questions, then it may well be possible for the Court to reject the Applicants' contention, or contentions, based on norms, or a norm, or norms and standards, without further factual enquiry, and I want to make it perfectly clear what we mean in that regard. We contend that there could be such a rejection of the Applicants' contention, without further factual enquiry, but that there could not be a finding in favour of that contention without further factual enquiry, at least not on a basis of giving effect to the principle of *audi alteram partem*. The first basis upon which the Court could decide that there would be no further need for a factual enquiry, could be the legal basis we suggested, namely that no such norm or standards could be binding upon the Respondent independently of its consent. That would entail no further enquiry because it is common cause that no such consent has been given—the Applicants do not attempt to establish any such consent to such a norm or such standards. An alternative basis upon which the Court could come to a similar conclusion from a practical point of view would be a factual one, even without further factual enquiry. This could happen in one of two instances. One of these could be if the Applicants were to make it clear to the Court, and the Court were clearly to understand them as saying, that for the purpose of finding in their favour on this norm and upon these standards, the Court should look only at the decisions and the statements of international bodies such as the United Nations and its specialized agencies, and at statements possibly also made by certain governments upon which they rely to the exclusion of any further factual enquiry into relevant sources of norms or standards, of any relevant factual enquiry of the kind I indicated yesterday with reference to expert evidence, and evidence of people who deal with the matters indicated in practice and in life. If the Applicants

should make it clear that that is the narrow basis upon which their case rests, and the Court is satisfied that that is not a sufficient factual basis upon which one could possibly come to the conclusion contended for by the Applicants, then that would again be a reason for the Court to say that no further factual enquiry is necessary.

Finally, there is a further alternative, and that is that the Court may look at what is already on record in regard to the question whether the standards relied upon by the Applicants from which they wish to distil their norm, are in truth universally accepted or not; and the Court may well, if it should find that convenient, ask the Parties to address it specially on that question, because my suggestion is that upon consideration being given to that question, the Court might very well come to the conclusion that it is perfectly plain on the record, which the Applicants have made clear they do not want to supplement by way of evidence, that it is impossible for them to establish a contention that those standards upon which they seem to rely are, in truth, universally accepted.

Alternatively, Mr. President, if the Court should find that the matter is not decisively answered in our favour by the facts already on record, then I submit that the Court could not make a finding against us in that respect without considering the further evidence which we wish to tender in that regard—the evidence and the proposed inspection.

Now, Mr. President, as regards the other possible approach on the part of the Court, viz., that it should decide to hold over all decisions until everything has been disposed of—in other words, that everything should be decided at the conclusion of the proceedings, if that should be the approach, Mr. President, I submit that it is very clear that the factual enquiry would have to proceed, except for one further possibility, and that is that the Court might make one exception to its policy, its suggested policy, of not making any decisions at this stage, that the Court does make this one decision—namely that the Applicants have made it clear that they do not, and that they will not, make any case beyond of saying that the decisions of the political international bodies and the statements of the governments are the only relevant factual considerations. If they make it clear that they rest, as a matter of fact, only upon what the United Nations and other international organizations may have decided and said, plus what certain governments may have said, and that they do not rest their case on any other factual consideration whatsoever, then the Court might conclude that even if it were to hold over all its other decisions till the end, it would be already clear that no further factual enquiry would be necessary. But the only possibility of coming to such a conclusion, would be if that course of procedure should be adopted by the Court.

There is a further point raised by the Applicants in this respect to which I should refer briefly, and that is a suggestion which they made in the verbatim record of 27 April, at page 5, *supra*. That was a suggestion to this effect: that the Applicants have reserved to themselves the right to show in the factual phase of the proceedings how important the so-called requirement of international supervision is; and they went so far, if I understood them correctly, Mr. President, as to suggest that for that reason the Court would have to wait until the end of the factual phase of the case before it could even make a decision on the question whether an inspection would be relevant at all. Mr. President, surely that point could not be sound. Surely, if my learned friends wish to refer to any

facts as being illustrative of a legal argument, they can do so while they put the legal argument. It is not necessary to have an enquiry about the facts first, or that the facts should be found to be established by the Court, or that they should be common causes between the Parties. If one illustrates a legal argument by reference to a factual situation, one postulates that situation, and one says "Let us assume the facts are so-and-so", and that is a sufficient illustration of the legal argument. There is no reason whatsoever why my learned friend need find it necessary to reserve such illustrations of his legal argument to the factual phase of the case. He will have a full opportunity, during the presentation of his legal argument which he will continue in the course of his reply to the Court, of stating any fact he wishes by way of illustration of his argument, and he can make any assumption he likes for that purpose.

That, Mr. President, concludes my argument strictly on the question of the inspection. There is one point which my learned friends raised in close conjunction with the inspection proposal—they referred to it several times—and it may be convenient if I were to react to it straightaway. It is a practical point, namely the suggestion that the evidence which we propose, if the Court should find it necessary to have regard to that evidence, could or should be put before the Court by deposition and not orally. Now, Mr. President, if we had wanted to put more facts in writing before the Court than we have done already by referring to people who can be quoted as authorities for those facts, then we would have done so, and if we had required more time, then we would have asked for the time. That is not the purpose of the calling of the evidence at all. The purpose of suggesting that the Court might find assistance from the oral evidence is an entirely different one. It is that the Court would, through the very process of having evidence presented to it, *viva voce*, by witnesses in open Court, be placed in the best position to evaluate the conflicting contentions on questions of fact—to evaluate the facts to be weighed in the scales against one another. The Court would have an opportunity of observing the personalities of the witnesses who express particular views, particular conclusions, particular opinions to the Court—the results of their experience, and the like. The Court would be able to judge whether those persons are to be seen as fanatics or crackpots, or whether they are balanced persons, i.e., persons with a reasonable and balanced judgment. The Court would have the facility of questioning the witnesses and the experts on their reasoning, to test them as far as may be necessary—as far as that may be of assistance to the Court. Then there would be the facility afforded to the opposition to cross-examine if they wished to use that. My learned friend has indicated he does not wish to make use of that facility, but, Mr. President, there is that facility, and if the opposition does not use it, it would still be open to the Members of the Court to put questions. And it would be exactly by those processes, Mr. President, that the Court would be placed in the best position to evaluate. That is the basis upon which we suggest that it would be of considerable assistance to the Court, if the further factual enquiry were found to be necessary, to hear these persons giving their evidence in open Court.

Mr. President, that concludes my argument. Before I sit down I would like to indicate—it may be convenient to you—what our intentions are in regard to answering the remaining questions put by Members of the Court: by Judge Jessup and by Judge Koretsky. In regard to the question

put by Judge Koretsky, which was put to us alone, it seems to us to be fair that we should answer that before my learned friends commence the reply on the legal argument, because although the question was put to us only it may be that they would like to have an opportunity of commenting on our answer in the course of their reply. Therefore we propose, Mr. President, subject to your approval, to answer that question at the beginning of whichever hearing may be determined for the commencement of my learned friend's argument in reply on the legal issues. Our answer should take a very short time; we propose to deliver it at the beginning of whatever session the Court determines, and then my learned friend could continue straight afterwards with the commencement of his reply on the legal question.

In regard to the question put by Judge Jessup, we have had a discussion, my learned friends and we, on the question of the order in which the Parties ought to answer that, and we are agreed that it may be more convenient if the Applicants answer first. My learned friends have indicated also that they intend giving that answer fairly near the beginning of their reply on the legal questions, and it will then be a matter for the Court to determine a convenient time afterwards for us to reply. We shall be ready at any time provided we are given, say, a day in which to consider the answer given by my learned friends.

15. STATEMENT BY MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARING OF 4 MAY 1965

The comments which the Applicants would wish to address to the Court will be brief, to the point, factual and unpolemical. If these remarks cannot be completed within ten minutes, they will have failed of their purpose. The purpose is as follows, two-fold: (1) to place a formal proposal before the Court, without argument, and (2) to call to the Court's attention certain citations from the record, without argument or characterization, which bear directly upon a statement made by Respondent in the course of his address to the Court yesterday. On behalf of the Governments for which I speak, it seems important to call such citations to the Court's attention by way of brief reading at this point in the record; this will be completed within five to ten minutes.

In the course of the verbatim record of 30 April 1965—that is, page 63, *supra*, the Applicants suggested the possibility of a stipulation on depositions to which reference has just been made by the Respondent. The Applicants would respectfully submit this as a formal proposal to the Court.

In view of my undertaking, Mr. President, not to elaborate or argue upon the matter, the proposal is made in this form and it remains only to say that its central basis is to balance the preference of the Respondent against the inconvenience, burden and expense upon the Applicants.

Secondly, with regard to the matter of Respondent's statement in the Oral Proceedings of 3 May 1965, may I refer the Court, without comment or characterization, to page 108, *supra*, of the verbatim record from which I should like to read to the Court at this moment for the record, without comment.

> "It is perfectly obvious that the Applicants cannot face up to this factual enquiry, they cannot face up to a comparison of standards of well-being and progress in their own countries and those in South West Africa. They had to find a formula to rule out the whole proposal and, in doing so, they emphasized the fundamental weakness of their case in law, in fact and in morals."

Mr. President, without comment, I refer the Court to the Reply, **IV**, at page 364, from which I quote.

> "... Respondent's frequent references to practices in other African States, including those of Applicants, are wholly irrelevant to the present proceedings, inasmuch as there is no other African State subject to Mandate, nor any other State, anywhere in the world, which practises the policy of *apartheid*".

That is from the Reply, at which time no reference to an inspection had been made.

I now quote from the Rejoinder, **V**, at page 116.

> "Applicants' second reason for contending that practices in other States in Africa are irrelevant, is that no other State practises the

policy of *apartheid*. This attitude would be pertinent in so far as Applicants rely on the existence of an alleged legal norm, which would by itself render Respondent's admitted policies violative of the Mandate."

I refer the Court to the other portions on that page so that it can be read in context. "In fact Applicants themselves make copious reference in their Reply to circumstances in other territories." This is asserted as a reason in opposition to the Applicants' contention.

The footnote appended to the quoted comment calls attention to the Reply, IV, pages 398-403, pages 426-430, and pages 451-457. These are references to United Nations views upon certain territories and areas, both inside and outside Africa, United Nations views with respect to education policies, economic life, government and citizenship. They do not refer, Mr. President, as the passages make clear upon reading, to Applicants' views concerning those territories, but to the relevance of United Nations views thereon.

The formal proposal, Mr. President, is to place before the Court, respectfully, the proposed stipulation, the terms of which are outlined on page 63, *supra*, of the verbatim record of 30 April 1965, and to respectfully request the Court to consider it with the Respondent's preference for personal testimony, for the reasons advanced by way of its response to my earlier proposal. That is to say, as I understood, that such evidence should be read into the record, *viva voce*, and that the demeanour and personality of witnesses should be available.

Evidence could indeed, in terms of this stipulation, be read *viva voce* into the record by Respondent's Counsel or by anybody else who Respondent felt could do the job dramatically.

So far as the demeanour of personality, or personality, of witnesses is concerned, it is part of the stipulation proposed that if the Court should, upon reading the depositions, regard the demeanour or personality of expert witnesses as of help, that it would be within the terms of the stipulation that those witnesses would be presented in person at the request of the Court but not as a general proposition which will be, in the Applicants' view, utterly unnecessarily consuming of time of the Court and, more particularly our concern, the time, undue expense and, of course, the burden upon us of being present in the courtroom and not being busy about other duties.

These are, of course, considerations of a highly professional nature in terms of the balance of convenience and interest of representatives of the Parties concerned.

The preferences of the Respondent are entitled to full weight and consideration but, Mr. President, it seems to me that there should be a reasonable basis for such a request and if the Court considers that the basis which has been advanced by Respondent is reasonable then the Applicants would naturally abide by such a decision.

Therefore the proposal formally placed before the Court is that the Court pass upon the desirability of the stipulation being entered into between the Parties. Or, if failing such stipulation on those terms, that the Court as an exercise of sound, judicial discretion decide to uphold the submission and issue an order accordingly.

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16. REPLY OF MR. GROSS

AGENT FOR THE GOVERNMENTS OF ETHIOPIA AND LIBERIA AT THE PUBLIC HEARINGS OF 7-19 MAY 1965

Mr. President and Members of the honourable Court, during the Oral Proceedings on 14 April 1965 Judge Jessup addressed to both Parties the following question:

> "*In the interpretation and application of Article 73 of the Charter* of the United Nations, is South West Africa to be considered one of those territories whose peoples have not yet attained a full measure of self-government, as this phrase is used in that Article?"

The Applicants will now endeavour, respectfully, to give their reply to Judge Jessup's question.

For the purposes of clarity and convenience, the Applicants will set forth first their general conclusions and the basic considerations which they believe to be most directly related to, and in support of, these conclusions and, secondly, a general survey of historical considerations which are in support of, and illuminative of, these general conclusions.

The historical considerations will be presented within the context of the Applicants' analysis of the establishment of United Nations supervision over the administration of South West Africa. The analysis itself will consist of the major portion of the Applicants' reply with regard to the survival of administrative supervision over the mandated Territory. In the Applicants' respectful submission, the question addressed to the Parties by the learned judge involves for a complete answer and consideration the entire matter of the history of events and transactions which mark the assumption by the United Nations of an administrative supervision over the Mandate.

However, as I have said, for the sake of clarity and concision there will, at the outset, be a statement of conclusions on the part of the Applicants which represent the direct response to Judge Jessup's question and what will follow will be explanatory thereof.

First, dealing with the question in terms of presenting the Applicants conclusions thereon, the Applicants respectfully submit that South West Africa is to be regarded neither as a trust territory under Chapters XII and XIII of the United Nations Charter in view of South Africa's exercise of its legal right to withhold the Territory from the trusteeship system, nor as a non-self-governing territory subject to the reporting requirement stated in Article 73 *(e)* of the Charter.

South-West Africa, however, is subject to international supervision by the General Assembly, as well as to the jurisdiction of the International Court of Justice, in accordance with Article 7, the compromissory clause of the Mandate. The international supervision by the General Assembly has been, and is to be, exercised in accordance with a special system designed to meet the unique situation presented by this sole surviving Mandate for South West Africa. Such United Nations supervision is to conform, as far as is practicable, with appropriate adaptations to meet changed circumstances, to the form of supervision previously exercised by the League of Nations.

Mr. President, the foregoing conclusion, it is respectfully submitted, reflects the intentions of the authors of the United Nations Charter, the Advisory Opinion of this honourable Court in 1950 and the consistent practice of the General Assembly of the United Nations throughout the years.

That ends the conclusion by way of direct response to Judge Jessup's question.

I turn now, with the Court's permission, to a discussion of the considerations which relate to, and are in support of, the foregoing conclusions. This discussion encompasses matters of a historical nature and other relevant matters which are directed towards the support of the conclusion just stated by the Applicants in response to the question propounded by Judge Jessup.

For the sake of convenience of the Court and clarity of presentation and fullness of analysis of the considerations relevant to an answer to Judge Jessup's question, these remarks to follow are, in addition, designed to serve as the Applicants' reply on the issue of survival of international supervision over the Mandate.

The inhabitants of South West Africa undoubtedly are, along with those of trust territories and colonies or dependencies of every variety, entitled to enjoy an administration conforming to at least the minimum standards laid down in paragraphs *(a)-(d)* of Article 73 of the Charter. By virtue of its special status under the Mandate Agreement, which continues in full force and effect, however, the inhabitants of the Territory of South West Africa are also entitled to the protection of an arrangement for international supervision of its administration which goes well beyond the limited scheme envisaged in paragraph 3 of Article 73.

The standards of administration of non-self-governing territories stipulated in the first four paragraphs of Article 73, that is paragraphs *(a)-(d)*, apply to South West Africa in the sense of providing a floor below which the treatment of the inhabitants of the Territory cannot be permitted to fall.

The procedure of international accountability stipulated in paragraph *(e)* of Article 73 does not, however, satisfy the requirement of effective international supervision under Article 6 of the Mandate Agreement which was originally exercised by the Council of the League of Nations and which now falls within the competence and under the responsibility of the General Assembly of the United Nations.

The Applicants submit, therefore, that Article 73 *(e)* does not apply to South West Africa but that an arrangement for international supervision, more closely analagous to that exercised by the Permanent Mandates Commission and the League Council, is required in view of the unique legal status of the Territory.

There is no room for doubt, in the Applicants' respectful view, that the framers of the United Nations Charter hoped and intended that all territories would be placed under the trusteeship system, for which provision was made in Chapters XII and XIII of the United Nations Charter. That system was designed to give continuing expression to the purposes of the League mandates' system and the supervisory arrangements contemplated under the trusteeship system were deemed fully appropriate for mandated territories, as extended and enlarged in the trusteeship system itself.

The authors of the Charter did not restrict this new system to mandated territories nor, as the Court held in 1950, did they make it legally obligatory for such territories to be converted into trust territories. But, Mr. President, the authors of the Charter manifested the conviction that the normal and proper procedure would be for the mandatory powers to conclude trusteeship agreements in every case, thereby assuring to the mandated territories the benefit and protection of an improved and expanded system of international supervision. Thus the authors of the Charter expressed the aim of providing a more effective system of international accountability, applicable to the mandated territories, and any others that might be placed under it.

The San Francisco Conference, moreover, produced the significant innovation of Chapter XI which represented an attempt to provide a meaningful expression of international concern in respect of the administration and development of all non-self-governing territories.

In Article 73 *(e)* the United Nations initiated the implementation of the *principle* of trusteeship in a limited way in respect of colonies in general, thus beginning to extend the benefits of this principle beyond the limits of the coverage of the mandates system. The scheme of Article 73 *(e)* was intended to introduce a new element into the general colonial situation, to provide at least a minimum degree of international accountability with respect to the administration of non-self-governing territories which had never been placed under the mandates system, and which might not now be placed under the new trusteeship system.

The central objective of the San Francisco conference in this matter was to maintain, and even to increase, the effectiveness of international supervision already developed with respect to the mandated territories, and to begin side by side with that development the process of providing international supervision with respect to all other non-self-governing territories. This, in any event, is the way the Applicants read the history of the events attending the formation of the Charter. Read literally, and apart from the context in which it was formulated and adopted, Article 73 *(e)* appears to apply, in terms, to all non-self-governing territories other than those which are actually made the subject of trusteeship agreements. Read within the context, and with the understanding of the spirit and hopes of the authors of the Charter, however, Article 73 *(e)* must be seen, in our view, as an evolutionary plan to provide some measure of international accountability for the benefit of dependent territories which had enjoyed none before.

Article 73 *(e)* was not conceived as meeting the requirements of mandated territories, or as providing an adequate basis for giving effect to the obligations of mandatory powers, in the Applicants' respectful view. The trusteeship system itself, not the scheme for restricted reporting "to the Secretary-General for information purposes"—the phrase is quoted from Article 73 *(e)*—was conceived as the appropriate and necessary device for implementing the continuation and improvement of the arrangement previously represented by the mandates system. To place a mandated territory merely under the regime stipulated in Article 73 *(e)* would have been, contrary to the spirit and intention of the authors of the Charter, to reduce rather than to maintain, to say nothing of increase, the degree of international supervision to which the territories had been subject during the League period, and it would have allowed international accountability to fall below the level required by

the mandate agreements, which, it was understood at the same time, were to continue in force until superseded by other agreed arrangements.

The Charter thus provided a trusteeship system, conceived as the legitimate heir of the mandates system, and an arrangement for reporting of information to the Secretary-General under Article 73 *(e)*, conceived as a means of initiating the extension of the trusteeship idea to dependent territories previously excluded from that historical process, a very important development indeed.

Failure to obligate the mandatory powers to put their mandated territories under the trusteeship system left open the possibility that particular mandated territories might not come within the purview of the Trusteeship Council. Such a lacuna obviously could have such a foreseeable result. The authors of the Charter, although recognizing that possibility, evidenced no intention whatever, so far as the Applicants have been able to discover, that international responsibility pertaining to such a residual mandate could properly be, and adequately be, exercised under the terms of Article 73 *(e)*. We have found no evidence to support such a proposition which, in our respectful view, is inherently likely in any event, given the spirit and aim of the founding fathers with respect to the extension of international accountability to dependent territories not theretofore receiving the benefit of international supervision or reporting in any form.

To the contrary, the founding fathers of the Charter met the contingency posed by the lacuna by leaving open the possibility to the United Nations of devising, under Article 10 of the Charter, special arrangements for carrying out the function of international supervision as might be required in any particular case. Article 10 itself is broadly drawn and, as the Court found in 1950, does establish the competence, the power of the Assembly to deal with this situation.

As noted by the Court in the 1950 Advisory Opinion, the Charter "did not contemplate or regulate a co-existing mandates system" (*I.C.J. Reports 1950*, p. 140). And, as the Applicants perceive it, the Respondent cites that quotation in precisely the opposite sense in which it strikes the Applicants. The San Francisco Charter, in our reading, assumed that failure to place a mandated territory under a trusteeship agreement would be an exceptional phenomenon: Rather than undertaking to formulate Charter provisions applicable to such a phenomenon, the conference left this matter, like many others, to be dealt with on a pragmatic basis, within the flexible framework of principles and procedures provided by the Charter, and the competence with which the General Assembly was endowed. There were, as has been made clear, other reasons, in addition, why interim arrangements were not made, and these will be considered in the course of the remarks to follow.

Respondent thus far has converted the contingency, foreseeable at San Francisco, of a lacuna, into an actuality, by refraining from placing South West Africa under the trusteeship system. The fact that definite arrangements in anticipation of this actuality were not made at the San Francisco conference, nor in the Preparatory Commission of the United Nations, nor at the final session of the League of Nations Assembly itself, in no way, as the Applicants see it, debarred the United Nations from meeting that contingency when it arose, and from continuing to meet it so long as it continues. It could, of course, be ended any day, any moment, by the Respondent submitting a trusteeship

agreement: it is not an irrevocable or permanent contingency, by reason of any legal operation, in any event.

The Organization has never renounced its indisputable competence, nor has it declared its unwillingness to meet such a contingency if it should arise, and it was under no obligation or compulsion to provide in advance for dealing with an exceptional situation which it hoped, strongly hoped, might be avoided.

The record shows that the United Nations did respond to the abnormal situation thus thrust upon it by Respondent by developing in a pragmatic manner an appropriate special arrangement for effectuating its responsibility to exercise international supervision over South West Africa. Recognizing that the trusteeship system could not apply in the absence of a trusteeship agreement, and recognizing equally that the system of reporting under Article 73 *(e)* was not appropriate to the case of a mandated territory, the General Assembly met the problem by improvising a special system, a kind of third system, specially applicable to South West Africa, a unique phenomenon in this whole enterprise.

The Assembly did not consider, nor did South Africa invite it to take the position, that it was either necessary or proper to subsume the Territory under the heading of Article 73 *(e)*. It has never been suggested by Respondent, and careful reading of many records by the Applicants has never revealed an instance in which such a possibility was ever adverted to in the United Nations, and in fact South West Africa has never been included in the list of non-self-governing territories on which information is transmitted under Article 73 *(e)*. Citation may be made at this point to the book by Mr. Sady, *United Nations and Dependent Peoples*, published by the Brookings Institution in 1956, at page 80, which comments on this matter—authoritatively in the Applicants' view—and sets forth the list of non-self-governing territories regarded as falling within the purview of Article 73, paragraph *(e)*. Rather, the Assembly took action consistent with its view that it had both the competence and the responsibility to carry out supervision of the administration of South West Africa in a manner comparable to that which had characterized the operation of the mandates system under the League.

The General Assembly's development of a special system for exercising supervision over the mandated Territory of South West Africa—what I have called a "third system", falling between the arrangement for reporting on non-self-governing territories, under Article 73 *(e)*, and the more elaborate procedures conducted by Trusteeship Council, with respect to trust territories—this special system received the endorsement of this honourable Court in the Advisory Opinion of 1950. The Court held that all the obligations of South Africa under the mandate agreement continued in full force and effect, explicitly including the central and essential obligation to submit to international supervision of its administration of the Territory. Reference is made to the *I.C.J. Reports 1950*, at page 136.

The Court went on to find that—

> "... the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation

> to submit to supervision and control of the General Assembly and to render annual reports to it". (*I.C.J. Reports 1950*, p. 137.)

Having thus confirmed the competence of the Assembly, which the Court declared was derived from the provisions of Article 10 of the Charter, the Court refrained from prescribing the mechanism which the Assembly should utilize in the performance of its supervisory function. Instead, the Court laid down several criteria, which it held to be essential to the proper performance of that function, and I quote from page 138 of the Opinion:

> "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions." (*I.C.J. Reports 1950*, p. 138.)

Mr. President, within the framework of these standards the Court left the Assembly free to devise an appropriate system for exercising supervision over the Territory. In this respect, the Court's conclusion coincided with the view expressed in the written statement of the United States Government submitted to the Court in 1950 from which I quote:

> "The Union of South Africa continues to be obligated under the Mandate to submit reports on its administration of the territory, submitting these to the United Nations for consideration by the organ which the General Assembly designate for this purpose." (*International Status of South West Africa, Advisory Opinion of 11 July*, at p. 111.)

The Court noted that reference had been made, in a number of statements presented to it, to Chapter XI of the Charter, but the Court observed as follows:

> "Having regard to the results at which the Court has arrived, the question whether the provisions of that Chapter are applicable does not arise for the purpose of the present Opinion. It is not included in the questions submitted to the Court and it is unnecessary to consider it." (*I.C.J. Reports 1950*, p. 138.)

These holdings combine with the Court's assertion that the question of the applicability of Chapter XI "does not arise for the purpose of the present Opinion" to indicate, in the Applicants' analysis, that the Court did not wish to be understood as holding that the international supervision of South West Africa should be carried out under Article 73 *(e)* of the Charter. At least that is a fair inference to be drawn, to say the least, in our view. If the Court had intended to hold or suggest otherwise, it could have said so, it seems to the Applicants, by way of invoking Chapter XI rather than declaring it irrelevant to the problem under discussion. Moreover, the Court's definition of the requirements of the supervisory process, its findings that supervision should not exceed but should be comparable to that exercised under the mandates system, and that supervision should include annual reports and petitions, provides further evidence that the Court could not have had in mind resort to the arrangement provided for in Article 73 *(e)*, which does not contemplate or include—does not, in any event, include—petitions, or annual reports of the sort envisaged in the mandates system.

As the Court was aware, and as had been pointed out in a statement before the Court by the Representative of the Secretary-General of the United Nations, Dr. Ivan Kerno—"The system of reporting under Article 73 *(e)* did not conform or measure up to the standards of supervision defined by the Court". (*Oral Arguments, International Status of South West Africa, Advisory Opinion of July 11 1950*, pp. 223-224.)

It seems evident that the Court was, in effect, endorsing a line already being followed by the General Assembly, that of asserting the Assembly's competence and responsibility to supervise the administration of South West Africa, and developing a special system—a third system—unique to these circumstances, distinct from that growing out of Chapter XI, and, in this way, exercising its responsibility to supervise the Mandate as a sacred trust which had been laid upon the League as an organized international community.

Moreover, the Court found that South Africa had acted within its legal rights in refraining from placing South West Africa under the trusteeship system (p. 139 of the Opinion), and thereby acknowledged that the supervisory arrangement provided for in Chapters XII and XIII could not be applied in this instance. The Court went on to note that the Charter was silent as to the system of supervision to be applied to mandated territories which did not acquire a different status, and, as I have said, it was in that connection that the Court said the Charter "did not contemplate or regulate a co-existing mandates system" (p. 140 of the Opinion).

The Court thus endorsed the course followed by the Assembly prior to 1950 in beginning the development of a special system of supervision applicable to the mandated territory of South West Africa, specifically and as a special case. If the Assembly was to carry out the supervisory function attributed to it by the Court, either it had to develop such a special system, or it would have had to deal with the mandated territory pursuant to Article 73 *(e)* of the Charter. But the Court, as I have said, dismissed Chapter XI as irrelevant to its consideration of the case, which it would not have done if the Court had intended to suggest that international supervision of South West Africa should be carried out under the provisions of that Chapter. By brushing Chapter XI aside, therefore, rather than by invoking it, the Court evinced its endorsement of the propriety of the Assembly's action in improvising a system, on the basis of the broad and flexible competence conferred upon the Assembly by Article 10 of the United Nations Charter, for performing the exceptional task of supervising the administration of a residual mandate—the one residual exception.

Moreover, the findings of the Court as to the nature and degree of the supervision to be exercised by the United Nations with respect to South West Africa confirm that the Court was not suggesting recourse to the reporting arrangement provided for in Article 73 *(e)* of the Charter, for, as will now be shown, that arrangement fell far short of meeting the requirements of a proper supervisory system for South West Africa, as defined by the Court.

An important measure of comparison between League supervision under the mandates scheme and the United Nations processes under Article 73 *(e)* of the Charter is that of the type of information transmitted pursuant to the respective systems. The information required of mandatories was more extensive in scope than that required by Article 73 *(e)* of the

Charter. The broad scope of the annual report requirement for mandatory powers was initially rendered clear by the Belgian representative to the League Council in what came to be known as the Hymans Report. An excerpt from this report has been quoted already by the Applicants at **VIII**, page 145. Particular attention of the Court is respectfully directed to the following passage from the Hymans Report:

> "The annual report stipulated for in Article 7 [that is to say, Article 22, paragraph 7, of the Convenant of the League of Nations] should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration." (*League of Nations Council P.V. 20/29/14, 8th Session*, p. 187.)

The purpose thus envisaged or conceived to be served by the reports confirms the necessity for the breadth and scope of the information required to be submitted to the competent organ. This relationship between the purpose and scope of the reports has been confirmed by scholarly authority. Thus, one of the leading authorities on the mandates system frequently cited by both Parties to these proceedings, Mr. Hall, has commented—"The annual reports of the mandatory powers and their examination by the commission were the heart of the mandates system". (Hall's *Mandates, Dependencies and Trusteeship*, p. 186)

The fact that the whole administration, in the words of the Hymans Report, was covered by the reports required of mandatory powers is very clear from others—on the basis of other sources, as well as scholarly authority. Thus, the League of Nations publication, *The Mandates System* states that—

> "All fields of the administration and all aspects of the life of the mandated territories, administrative organizations, political systems, public finances, justice, economic conditions, agriculture, trade communications, social, moral, and material conditions of the Natives"—

all these were to be covered by the annual reports of the mandatory powers. I quote from the League of Nations publication, *The Mandates System—Origin, Principles, Application*, published in Geneva in 1945, page 47.

This aforegoing scope of mandatory reporting contrasts with the reporting requirement under Article 73 *(e)* of the United Nations Charter. That section of Article 73 *(e)* might, for the convenience of the Court, be read into the record at this time. I quote from 73 *(e)*:

> "To transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible, other than those territories to which Chapters XII and XIII apply."

The omission from Article 73 *(e)* of any mention of political information is of prime significance. Other limitations are to be noted as well. The information referred to in Article 73 *(e)*, which I have just quoted, is confined to that of a "statistical" or "technical" nature, and is "subject to such limitation as security and constitutional considerations may require".

As will be known to the Court, pressures were exerted by non-adminis-

tering authorities at the United Nations between 1946 and 1949 for transmission of political information under Article 73 *(e)*, but it was argued in reply that such information was in a wholly optional category. Thereafter, in 1947, the General Assembly decided that the voluntary submission of political information would be in accordance with the spirit of Article 73 *(e)* and should be encouraged. This is evidenced in General Assembly resolution 144.II, 3 November 1947.

The Assembly, in a 1949 resolution, likewise expressed the hope that administering authorities which had *not already done so would submit* political information in their reports under Article 73 *(e)*. (General Assembly resolution 327.IV, 2 December 1949.)

These General Assembly resolutions reflected increasing awareness of the importance of political information in any supervisory plan, however limited in other respects. The evolution of Article 73 *(e)*, in other words, confirmed the validity of that element of the mandates scheme which recognized that the progress and welfare of inhabitants of dependent territories could not be evaluated without political information. But even this salutary evolution has left the scope of Article 73 *(e)* significantly narrower than the supervisory plan embodied in the mandates system, and which itself was improved and enlarged in the trusteeship system.

Under the mandates system, the mandatory transmitted annual reports to the Permanent Mandates Commission, through an authorized representative, who, in turn, participated in the discussions by the Commission of the report. The Mandates Commission, after discussion of each report, would submit observations thereupon, both to the Council of the League and to the authorized representative. The reports of the Mandatories also were forwarded by the Commission to the Council, together with the Commission's observations, together with any which the representatives of the mandatory powers might wish to make and have endorsed thereon.

The Commission attached great importance to the questioning of representatives of each Mandatory with regard to annual reports under discussion. Recommendations and observations as well as criticisms were made by the Commission directly to the mandatory power whose administration was under discussion. It may not be without a tinge of irony that Respondent refers to these procedures as evidencing the peculiarly special significance attached to the Permanent Mandates Commission in the form of experts to accomplish the purposes which I have just described. Of course, Respondent draws different conclusions from that premise but the premise, the description of the role of the Permanent Mandates Commission, for which Respondent contends, precisely corresponds to the description which I have just outlined and which establishes with certainty the special requirements of the type of administrative supervision, required under the Mandate, as compared with reporting to the Secretary-General technique envisaged by Article 73 *(e)*. Reports under Article 73 *(e)*, as I have said, are transmitted to the Secretary-General of the United Nations. The information is summarized by the Secretary-General and his summaries and analyses are transmitted to a committee established by the General Assembly for its further consideration. The Committee originally known as the *Ad Hoc* Committee was replaced in 1947 by the Special Committee on Information transmitted under Article 73 *(e)*. This Committee later became known as the Committee on Information from non-self-governing territories. The Committee is authorized by the General Assembly to examine

the summaries and analyses prepared by the Secretariat and "To submit such substantive recommendations as it may deem desirable relating to functional fields generally but not with respect to individual territories." This is General Assembly resolution 993 (X), 8 November 1955. This of course differs significantly as to both scope and procedure from the system of administrative supervision exercised by the League over Mandates. As one scholar has observed:

> "Unlike the Mandates Commission of the League of Nations or the Trusteeship Council of the United Nations, the Committee on Information does not examine the basic information transmitted on each territory—only occasionally is it even referred to. The Committee attempts to gain insight into trends, mainly through the summaries, analyses and special studies of the Secretariat and from statements by experts in non-selfgoverning territories generally. Since 1950 the Committee has given special attention in rotation each year to educational, economic and social conditions."

I quote again from Sady's book, *The United Nations and the Promotion of the General Welfare*, the Brooking's publication to which I have already referred—this quotation is from pages 885-886.

Mr. President, another measure of comparison between supervision under the mandates plan and supervision under Article 73 *(e)* of the United Nations Charter is the right of petition or as the scholar already referred to, Duncan Hall, has described it: "the natural right of petition"—that phrase is used in the cited work of Hall, at page 198.

Under the mandates system, petitions by inhabitants of mandated territories were submitted to the Secretariat of the League through the mandatory governments, and petitions from outside the territories could be sent directly to the chairman of the Permanent Mandates Commission. In both cases, the Commission discussed the petitions, along with the authorized representative, and the Commission's observations thereon were reported to the Council. The mandatory powers submitted observations on the petitions transmitted from, or with regard to, territories under its administration.

On the other hand, Article 73 *(e)* of the Charter, both in wording and in implementation and practice, made no provision for the right of petition. When the United Nations, because of a default in reporting from Respondent, granted a hearing to a petitioner from South West Africa, the Organization not only went beyond the limited requirements of Chapter XI of the Charter, but established a form of supervision over the mandated territory at least as extensive as the supervision formerly exercised by the League of Nations in accordance with the League of Nations Council Rules. The historical evolution has been such as to place South West Africa under a special regime of United Nations supervision as a mandated territory, rather than as a colonial territory under the more limited requirements of Article 73 *(e)* of the Charter.

The General Assembly thus has continued the development of its special procedures for supervision of South West Africa, in the face of Respondent's refusal to submit to supervision and the Assembly has twice sought to and obtained the advice of this Court regarding the consistency of the elements of the procedure adopted with the criteria laid down in the 1950 Advisory Opinion—I refer of course to the Advisory Opinions of 1955 and 1956. All these Opinions have been accepted by the

General Assembly, although of course not by Respondent. Hence, it is evident that the General Assembly has expressed in action its adherence to the conviction, endorsed by the Court in 1950, that the General Assembly is competent to apply a special system of supervision, a third system, to the mandated Territory of South West Africa. The General Assembly has taken care to follow the standards prescribed by the Court in 1950 with regard to the nature and degree of international supervision to be exercised.

It is submitted, respectfully, that all these considerations, to which I have referred, directly and immediately are relevant to and support the conclusion as set out in the first part of this response to Judge Jessup's question.

However, it is essential, in the Applicants' view, for a full understanding of the considerations to which I have addressed myself, to incorporate as a part of the Applicants' response to Judge Jessup the material which I shall now endeavour to lay before the Court, which shows the plan in action and the events and transactions which, in the Applicants' view, conclusively demonstrate that it was not the intention and could not have been the intention of parties concerned to consider the mandated territory of South West Africa to be within the purview of Article 73 *(e)*. What I am about to say, therefore, Mr. President, will be part of the response to Judge Jessup's question but will also comprehend the complete reply of the Applicants to the rebuttal on the issue of survival of administrative supervision—this is necessary for a full understanding of the Applicants' response to the learned judge.

The central intent expressed in the San Francisco Conference debate and proposals, relating to dependent areas was to establish more effective and more extensive international supervision of dependent areas than had been the case under the League of Nations. This aim was implemented by the formulation of Chapters XII and XIII of the Charter, to carry forward the ideas expressed in Article 12 of the League Covenant. On the other hand, Chapter XI of the Charter including Article 73 *(e)* was designed to give fuller expression to the commitment contained in Article 23 *(b)* of the Covenant of the League of Nations; Article 23 *(b)* in this sense was the precursor, the progenitor, if I may put it that way, of Article 73 of the Charter of the United Nations. The mandates system was the progenitor of the trusteeship system; Article 23 *(b)* of the Covenant of the League was the progenitor of Article 73 *(e)* of the Charter of the United Nations.

The trusteeship system was intended, of course, to represent an improved version of the mandates system, and the Declaration regarding non-self-governing territories, Chapter XI, was conceived as the basis for a more meaningful and effective international effort to deal with the general colonial problem, as I have already said.

It is clear from the records of the San Francisco Conference that the founders of the United Nations did not envisage that international supervision over a mandated territory would be limited to, or satisfied by, reports to the Secretary-General under Article 73 *(e)* of the Charter—I have endeavoured to explain why the Applicants are forced to this conclusion. Sub-sections *(a)* through *(d)* of Article 73 represent an advance over the standards of the mandates system, but section *(e)* of Article 73 carries a less onerous obligation of accountability than was involved in the mandates system. Mere reporting under Chapter XI would have

been a step backwards in the light of the type of supervision, and the procedures attending it, provided for under the mandates system.

That the United Nations founders intended to continue international supervision in so far as mandated areas were concerned is obvious, in the Applicants' respectful view—obvious to the Applicants at least. The proposals and discussions at San Francisco were entirely consistent in that mandated territories were discussed solely within the context of trusteeship; in so far as Chapter XI was debated at all, mandates were never mentioned.

Thus, the "Working Paper" presented to the Conference by the five major powers as a basis for discussion was divided into two sections; the first was a general statement of policy applicable to all dependent territories, while the second outlined a proposed international trusteeship system. The general policy section of the paper did not mention mandates; the trusteeship section included "territories now held under mandate" as one of the categories to which the trusteeship system itself should apply. (*UNCIO*, Vol. 10, pp. 677-678.) The general policy section of the "Working Paper" eventually became Chapter XI of the Charter; the trusteeship section became Chapters XII and XIII—this was the fork in the road.

The "Working Paper" was itself based on proposals made by the United Kingdom, which are to be found in the *UNCIO Documents*, Volume 3, pages 609-614. The British paper divided itself also into two sections; the first dealt with general principles of administration in dependent areas and the second stated a proposal for a trusteeship system. Immediately following the statement of general principles in paragraph 1 of the Proposals submitted by the United Kingdom, the statement continues as follows and I quote from page 609, of the *UNCIO*, Volume 3:

> "2. For certain territories in each of the categories mentioned below, it is desirable to establish special machinery to ensure the application of the principles stated in paragraph 1 of this Chapter. These categories are—
>
> *(a)* territories administered by States Members of the United Nations under Mandate from the League of Nations;
>
> *(b)* certain territories which as a consequence of the present war may be removed from the sovereignty of Mandate of States not Members of the United Nations;
>
> *(c)* any other territory to which the special machinery prescribed in this chapter may be applied voluntarily by the State under whose sovereignty or protection the territory is administered."

Category *(a)* in the United Kingdom scheme, from which I have just quoted, as in the Five Power Working Paper and in the text of Article 77, as finally adopted, comprises a finite and definite group of territories—the territories under mandate. Thus, these preparatory papers, as well as the ultimate Charter provision, demonstrate clearly that the San Francisco Conference was intent upon the application of the maximum or optimum degree of international supervision to the mandated territories. The debates in Committee 4 of Commission 2, Trusteeship, at San Francisco, were entirely consistent with the ideas first propounded in the British proposal, and to be found in the Working Paper. That is to say, mandates were discussed in that Committee only within the context of the proposed trusteeship system, and I refer to part B of the

Working Paper which formed the basis of the discussion in the Committee, and not at all were they discussed within the context of the general principles of colonial policy, which is part A of the Working Paper, from which Article 73 emerged. There are no indications that the Applicants have been able to find, despite most careful survey of the matter, that the delegates were prepared to place the mandated territories under the general principle section of the Working Paper, that is, the section which eventually became Chapter XI of the Charter.

As the discussions of section A of the Working Paper continued, the details of what then became Article 73 *(a)* through 73 *(d)* were gradually filled in. On 19 June 1945, the delegate for the United States of America moved the adoption of a completely new sub-paragraph *(e)* in the following terms:

> "To transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories, for which they are respectively responsible, other than those to which Section B of this chapter applies." (*UNCIO,* Vol. 10, p. 563.)

The delegate of Greece proposed, and the Committee agreed, to insert the word "territories" after the word "those" in the passage I have just quoted from the draft United States proposal. Sub-paragraph *(e)* was then adopted without discussion and without dissent. It seems clear that this provision, which became Article 73 *(e)* of the Charter, was not intended or designed to cover the requirements for international supervision of mandates, inasmuch as those territories were expected to be placed under the trusteeship system envisaged in section B of the Working Paper, which would provide a supervisory arrangement comparable to, but even more extensive than, that of the mandates system. The reference to territories "to which section B of this Chapter applies" obviously related to mandates. In fact, as already mentioned, Mr. President, mandated territories were the *only* territories to which section B applied specifically, and section B, of course, became Chapters XII and XIII of the Charter of the United Nations. The only clearly known finite and identifiable territories which fell within the scope of section B, then under discussion in this context, were the mandated territories themselves.

After the adoption by Committee 4 of sub-paragraph *(e)*, the delegate of Australia presented an analysis of the progress which had been made in respect of the original text of the Committee's Working Paper. According to the *UNCIO Documents,* Volume 10, page 563, the delegate of Australia "stressed the importance of statistical information as a measure of the progress of the inhabitants of dependent territories". This supplies one more indication, the Applicants believe, that the founders of the United Nations made no connection between mandated territories and Article 73 *(e)* of the Charter. The information supplied by mandatory powers, as has been pointed out in the earlier portion of this response to Judge Jessup's question, went far beyond the requirements imposed by Article 73 *(e)*.

Accordingly, it is reasonable to assume that the "measure of the progress", to which the Australian delegate referred, related not to

mandated areas, but rather to other non-self-governing territories. There would be little "importance" to be perceived in a requirement that mandatory powers, who did not submit trusteeship agreements, would become responsible or liable to a reporting system less significant than that that they had been submitting to since the inception of the League of Nations.

The view of the Australian delegation on these matters is significant for at least two reasons, in the Applicants' view. First, it will be recalled that Australia was of the opinion at San Francisco that the mandates *necessarily* had to be placed under the trusteeship system. Thus, at the second meeting of Committee II/4, Trusteeship, on 10 May 1945, the Australian delegate stated as follows (this is from a summary of the record):

> "The principal issue before the Committee, in his opinion, was whether the application of the trusteeship system to territories other than League Mandates and ex-enemy dependencies should be left to the voluntary action of the powers responsible for their administration. In the Australian view, a merely voluntary procedure was inadequate." (*UNCIO*, Vol. 10, pp. 428-429.)

In the view of the Australian delegate, therefore, at that time, there seems to be no question concerning the appropriate disposition of the mandated territories, other than by way of trusteeship. The same was true of ex-enemy dependencies, in the Australian view. The only question perceived by Australia was the application of the trusteeship system to all other non-self-governing territories, and, even in this area, the Australian delegate expressed the opinion that "a merely voluntary procedure was inadequate".

Given the view that mandates *must* be placed under trusteeship, in the sense which I have just described the Australian delegate's view, then the "importance" which Australia attached to reporting under section B of the Working Paper could not be reasonably thought to have referred to reporting by mandatory powers. The designation, or use of the word "importance" in that respect would have been out of context of the Australian views about the whole proposition.

It will be recalled also that the Australian delegation wished the reporting requirement for non-self-governing territories, under section A of the Working Paper, to be more onerous than the limited requirement finally agreed upon. Thus, on 25 May 1945, Australia proposed a new Part C to be added to the Working Paper, and paragraph 2 *(a)*, of the new Part C, is as follows:

> "In order to give fuller effect to the general principles declared in Section A, the General Assembly may specify territories in respect of which it shall be the duty of the states responsible for their administration to furnish annual reports to the United Nations upon the economic, social, and political development of the territories concerned." (*UNCIO*, Vol. 10, p. 696.)

The Court will note the reference to the word "political", which was omitted from the United States draft proposal, the one which became Article 73 *(e)* of the Charter in its final form.

The Australian proposal, of course, was not accepted in the form in which it was proposed, and the reference to political reporting was, as I have just said, deleted from the final concept or notion. However, the

Australian proposal demonstrates that if the reporting requirement for mandated territories was thought to be more stringent even than the proposal implicit in the new proposed Part C, then it would seem to follow that it could not have been reasonably thought by the Australian delegate that the reporting for mandatory powers could be less onerous. In other words, in this attempt to establish the reasonable inferences to be drawn from the Australian delegation's position at that time, these considerations are respectfully submitted for what they may be worth in the context and in the light of the Australian views as expressed at that time, and the Australian approach toward the relationship of Article 73 *(e)*, the trusteeship system itself, and the importance, indeed, the necessity, which the Australian Government then perceived that all mandates should become trusteeships; and the only problem was with respect to other non-self-governing territories: what would happen to them? Article 73 *(e)*, of course, is less burdensome than Australia would have wished. The Australian Government at least—at least—wanted those States administering non-self-governing territories to report on economic, social and political developments, and the Australian delegation therefore could not have been satisfied to have mandated territories, which it thought must come under the trusteeship system, supervised only under the limited obligations of Article 73 *(e)*.

This analysis, Mr. President, is further supported by the comments made by the Deputy Prime Minister of Australia, Mr. Forde, at the third meeting of Commission II held on 20 June 1945. The Deputy Prime Minister stated as follows:

> "Although our proposal to include an obligation to report to the United Nations on administration in colonial territories has not been agreed to, a very important forward step which we suggested as an alternative has been adopted, namely: an obligation to transmit regularly to the Organization statistics and other information of a technical nature relating to the economic and social development of the inhabitants of non-self-governing territories . . . I regard the furnishing of statistical information as of great importance. From that source we can obtain the facts as to the health, nutrition, and labour conditions of the native people, and we shall be able to ascertain therefrom what has been achieved in their interest from time to time. This should result in a healthy competition between colonial powers for the achievement of better conditions for all the peoples under their care. We believe that many practical achievements will flow from this part of the Charter, and that the potentialities of the dependent peoples will have a much wider scope for development."

That is from the *UNCIO Documents*, Volume 8, at page 136.

It will be noted that the Deputy Prime Minister referred in the statement I have just quoted to administration in "colonial territories", and to competition between "colonial powers". This indicates that he perhaps had in mind the application of the reporting system envisaged in Article 73 to the general run of colonies, not to mandates. Moreover, the characterization by the Australian Deputy Prime Minister of Article 73 *(e)* as "a very important forward step" seems to make it clear that he could not have conceived of mandatory powers reporting thereunder—that would have been a backward step in terms of the

content and scope of reporting. Article 73 was obviously intended to be new and forward-looking; its progenitor was Article 23 *(b)* of the Covenant. Although Article 73 *(a)* through *(d)* had its precedent in that article of the Covenant, reporting itself was not as new and not as rigorous as reporting under the mandate.

In the course of his remarks the Australian Deputy Prime Minister characterized section A as finally adopted in the form of Chapter XI of the Charter as—

> "... 'the most important and far-reaching joint declaration of colonial policy in history. Its significance for the future could scarcely be exaggerated."

This was at the *UNCIO* volume, at page 135. Here again is evident a concept of a new, a forward-looking, step, the significance of which to the future could scarcely be exaggerated; but such a remark, Mr. President, hardly seems to be consistent with a view that Article 73 *(e)* would become the measure of the mandates' coverage with respect to reporting, because that would be a stepping backward, a reduction of the obligation of reporting on the mandates to the level stipulated in Article 73 *(e)*.

Yet another indication of this point came in the remarks of Mr. Peter Fraser, the distinguished Prime Minister of New Zealand who, as the Court will be well aware, was the Chairman of Commission II (4), the Trusteeship Committee. Referring to sections A and B as finally adopted by Commission II (4), Prime Minister Fraser stated:

> "Might I quote from the Bible and say that in this document, as in many others, 'The letter killeth and the spirit giveth life'. It is the spirit in which it will be operated that will count."

That is from *UNCIO*, Volume 8, page 152. Prime Minister Fraser went on to say:

> "What we have been endeavouring to do—and I think we have succeeded—is to point the way, although as Commander Stassen [of the United States] pointed out, and I would underline, the important thing is to take it. We have built the road. The important and essential thing is for all the nations who have mandated territories to take the road laid down for the mandated territories, and those who have other territories, colonial territories to do the same."

This is from *UNCIO*, Volume 8, at page 152; Mr. President, the fork in the road: mandated territories down the one road; the other—the colonial territories—down the long and vitally important road which Article 73 *(e)* opened up with its significant vistas for the future of the dependent territories.

Again one finds the distinction here, in what I have just quoted, drawn between mandated territories subject to intensive international supervision and other territories, colonial territories, subject to the more limited requirements of Chapter XI. The Prime Minister, Mr. Fraser, concluded with these remarks:

> "... whatever difficulties there are, the rule that we will be guided by—I know I speak for my own country, but I feel I speak also for every country in a similar position—is that we have accepted a mandate as a sacred trust, not as part of our sovereign territory. The mandate does not belong to my country or any other country.

> It is held in trust for the world. The work immediately ahead is how those mandates that were previously supervised by the Mandate Commission of the League of Nations can now be supervised by the Trusteeship Council with every mandatory authority pledging *itself in the first instance as the test of sincerity* demands, whatever may happen to the territory afterwards, to acknowledge the authority and the supervision of this Trusteeship Council that has been helped towards its formation this evening."

That is from page 154 of the same *UNCIO Documents*, Volume 8.

Mr. President, I had just read the remarks of the Chairman of Committee II/4, the Trusteeship Committee, that is, the remarks of Mr. Peter Fraser, Prime Minister of New Zealand. This statement by the Chairman of the Committee which I have just read, the very Committee which drafted the provisions of Chapters XI, XII and XIII of the United Nations Charter, is revealing.

First, it demonstrates that the authors of the Charter disclosed no intention that any mandatory power would report only on the basis of the limited scope of Article 73 *(e)*. The clearly essential requirement perceived by the authors of the Charter was the more thorough international supervision inherent in the mandates system itself.

Secondly, the reference in Prime Minister Fraser's statement to "every mandatory authority pledging itself" sheds light on the pledges made by the several mandatory powers in April of 1946. The statement affords evidence that the pledges then made must have been intended to include an acknowledgment of the supervisory powers of the United Nations over mandated territories. I shall deal with this point later.

Thirdly, and perhaps most important, the statement by the Prime Minister of New Zealand indicated that had the authors of the Charter considered the contingency that a mandatory power might not place its territory under trusteeship, they would have assumed that the United Nations nevertheless would carry out the most extensive international supervision of that Territory rather than rely upon the limited reporting obligation under Article 73 *(e)*.

The second half of Prime Minister Fraser's statement is a clear intimation that the founders of the United Nations may indeed have been aware that such a contingency could occur. The South African delegation to the Charter Conference had certainly indicated that, at least as a possibility, to put it mildly. The response was to emphasize the need for United Nations supervision of territories under mandate "whatever may happen to the territory afterwards". That is from Mr. Fraser's statement.

Taken in conjunction with his emphasis upon the quotation from the Bible "that the letter killeth and the spirit giveth light", it is clear that the preference of the founders was for mandated territories to be subject to the United Nations supervision, whether or not they were placed under the trusteeship system. Hence the founders of the United Nations evidenced in a clear manner the intention that mandated territories should be subject to international supervision and they planned for the inclusion of these territories in the trusteeship system.

There is no intention made apparent anywhere in the records, as far as the Applicants have been able to discover, either to leave mandated territories completely unsupervised internationally, as Respondent contends, or subject to the limited obligation of reporting under Article 73, paragraph *(e)*.

It will be noted in this connection, and presumably will be dealt with by Respondent in its reply to Judge Jessup's question, that it appears to be common cause between the Parties that South West Africa is not within the scope or purview of Article 73 *(e)* of the Charter. This was, as the Applicants stated in their earlier phase of these proceedings, why the Applicants did not make argument in 1962 upon this question of the construction of Article 73 *(e)* of the Charter and took the liberty to do so in these Oral Proceedings in view of the obviously important question of Charter interpretation thus presented.

The Chairman of the Committee which drafted Chapters XI, XII and XIII of the Charter indicated that the intent and the preference of the authors of the Charter was to place such mandated territories under United Nations supervision "whatever may happen to the territory afterwards".

Mr. President, I turn now to a consideration of the Preparatory Commission procedures and the system of pledges. This also has a bearing upon and direct relevance to the response to Judge Jessup's question.

The debates in the Preparatory Commission confirm the attitudes of the authors of the Charter, as I have attempted to describe them. The proposal for a temporary trusteeship committee indicated the importance attached to international supervision of mandated territories, even prior to the establishment of the Trusteeship Council. The proposal was turned down essentially for the pragmatic reason that it might tend to encourage delay in setting up the Trusteeship Council.

No one, however, so far as the Applicants are aware, disputed the principle that the United Nations was competent to supervise mandated territories until trusteeship agreements were entered into. Nor did anyone argue that Chapter XI, that is to say Article 73 *(e)*, provided a sufficient basis for such supervision.

Indeed South Africa, Australia and the United Kingdom, and this is to be marked, these three Mandatory Powers were in favour of the proposal for a temporary trusteeship committee. This appears from PC/TC/2 at pages 4-5.

The South African attitude was clearest of all. Mr. Nicholls, the South African delegate, stated that:

> "... it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report".

That statement was made on 29 November 1945, and is at page 4 of the document I have just cited.

So far as the Applicants have discovered from a reading of the written pleadings and attention to the Oral Proceedings, Respondent has not made mention of Mr. Nicholls, or the statement which I have just quoted. Mr. Nicholls has not found his niche in these proceedings.

This statement is worthy of emphasis. The statement illustrates the importance which the founders of the United Nations generally, and Respondent specifically, attached to international supervision of mandated territories, prior to the conclusion of other agreed arrangements. That is to say, the question was never one of supervision or no supervision, as the Applicants put it in the earlier phase of these proceedings with regard to legal issues, so far as the founders of the United Nations

were concerned and so far as Respondent itself was concerned. There was a presumption of supervision over the Mandate until some other arrangement was agreed upon and Mr. Nicholls' statement in the Preparatory Commission of 29 November 1945 did not have, and could not have had, any other significance.

Mr. Nicholls, speaking for South Africa, expressed the view that the mandatory powers were obligated to subject their administration of mandated territories to the supervision of the United Nations. He was so convinced of the fact, as appears from his own statement, that he advocated the creation of an interim United Nations body to undertake such supervision until the establishment of a permanent body. His statement permits of no other construction.

Mr. Nicholls did not say that no United Nations supervision of the mandates was necessary or permissible, he did not say that Chapter XI, or Article 73 *(e)* of the Charter covered the situation, rather he said: "countries holding mandates should have a body to which they could report".

The fact that the Preparatory Commission of the United Nations rejected this proposal in favour of an alternative means for dealing with the immediate situation can not be taken to imply rejection of the view so clearly expressed by Respondent's delegate, Mr. Nicholls, that effective United Nations supervision over mandated territories was a matter of direct, immediate and urgent importance and must be continued on an interim basis if necessary, prior to the creation of permanent machinery.

Furthermore, the statement by the South African delegate and the Preparatory Commission, apart from indicating what was Respondent's attitude in 1945, also sheds light upon the several declarations made by the mandatory powers in April 1946 and also illuminates the final League resolution of 18 April 1946.

The Preparatory Commission debates make clear that at least some of the mandatory powers, including Respondent, certainly Respondent, wanted United Nations supervision of mandated territories and asked for it, even before trusteeship agreements were entered into. This being so, the declarations made by the mandatory powers in April 1946 must be read in the light of the intentions of these powers as expressed at San Francisco and in the Preparatory Commission.

Thus, the last part of the South African declaration of 9 April 1946, read in the light of Mr. Nicholls statement in the Preparatory Commission becomes quite meaningful. I should like, with the President's permission, to quote briefly from the South African declaration of 9 April 1946.

> "The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission, and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory." (*League of Nations Official Journal, Special Supplement 194*, at p. 133.)

The meaning seems clear. Respondent in 1945 expressed the view, through Mr. Nicholls, "it seemed reasonable to create an interim body

as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report". The United Nations Charter, of course, was in existence.

On 9 April 1946 Respondent referred to the disappearance of the League's supervisory organs, and in its statement of 9 April said that "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate . . .". This was just a few months later than Mr. Nicholls' statement.

Reading both of these statements together it seems obvious that Respondent, at the time, expressed views entirely consistent with the expectations of the authors of the United Nations Charter, including the other mandatory powers, that is to say, to submit to international supervision until other arrangements were concluded. If Respondent was of the opinion that any mandate obligation had lapsed, there is no information in these proceedings to explain why they expressed a position to the contrary. This of course relates to 1945 and 1946. We will find many expressions to the contrary thereafter, that is true.

Another significant indication of Respondent's position at that period is to be found in the events connecting a proposal for a temporary trusteeship committee with the declaration made by the mandatory powers in April 1946. This relationship has already been touched upon in the analysis of the relation between Respondent's statement, Mr. Nicholls' statement in November 1945, and the April 1946 declaration to which I have referred and which figures in the Advisory Opinion of 1950 as well. But further analysis of this event or transaction or series of declarations is revealing.

As I have already noted, the authors of the Charter attached importance to international supervision, even prior to the establishment of the trusteeship system.

The historical record indicates that two basic methods were conceived of by the founders of the United Nations. One was the proposal for a temporary trusteeship committee, interim; the other was a proposal for a set of pledges to be made by each of the mandatory powers. There can be no question that these two proposals were linked to each other, and that each was viewed as a method for ensuring international supervision of mandated territories: this was their purpose. The second method was adopted in preference to the first, that is the technique of pledges, evidently because it was thought more in keeping with the spirit of the Charter to minimize the delay in giving effect to the trusteeship system than to develop arrangements, or risk developing arrangements, by the establishment of an interim, formal supervisory system.

The idea of a pledge by the mandatory powers first became important, obviously important, by reason of the speech made by Mr. Peter Fraser, the Prime Minister of New Zealand, who, as I have said, was Chairman of the Committee which drafted Chapters XI, XII and XIII of the Charter. The concept of a pledge was taken very seriously and the series of declarations made by the mandatory powers at the final session of the League of Nations was not merely a happenstance, it was not merely coincidental; it was the result of thought and planning.

Although the pledge envisaged by Prime Minister Fraser was one which would merely "acknowledge the authority and the supervision of the Trusteeship Council" until other arrangements were concluded "whatever may happen to the Territory afterwards", the pledge envisaged by

the delegates to the Preparatory Commission shortly thereafter went much further. The pledge would have required a declaration of willingness, on the part of the mandatories, to place mandated territories under the trusteeship system. That was the original thought, or concept, of the pledge. This would have been sufficient, of course, to ensure international supervision of mandated territories, but only as of the time that those territories were actually placed under the trusteeship system in a formalized way, that is, with a regularly constituted Trusteeship Council or other mechanism to carry out the supervisory function which the mandated territories, by such a pledge, would have agreed to submit.

The delegates at the April session of the League in 1946 made pledges which were more in line with Prime Minister Fraser's conception—to acknowledge the authority and the supervision of the Trusteeship Council when it came to be formed.

Although such pledges involved no commitments to place mandated territories under the trusteeship system, they nevertheless represented explicit undertakings to carry out all the obligations of the existing mandates. There could be no explicit pledge to acknowledge the authority and supervision of the Trusteeship Council, because at that time there was no Trusteeship Council: its establishment depended upon a requisite number of trusteeship agreements to be submitted and accepted.

There was, of course, nothing inconsistent in refusing to pledge that a mandated territory would be placed under trusteeship and at the same time pledging to carry out all the obligations of the mandate, including international supervision, until some other agreed arrangement was concluded. Indeed, this must have been the point underlying Mr. Nicholls' statement in November 1945 in the Preparatory Commission.

At the San Francisco conference, immediately prior to Mr. Nicholls' statement to the Preparatory Commission, the South African Delegation had reserved its country's position in so far as trusteeship was concerned. For the sake of completion of the record at this point I quote from the Counter-Memorial, **II**, at page 34:

> "The Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa.
>
> As territorial questions are however reserved for handling at the later Peace Conference where the Union of South Africa intends to raise this matter, it is here only mentioned for the information of the Conference in connection with the Mandates question."

It is not only for the sake of completeness but for the sake of balance and fairness that I have put into the record, at this point, this statement by the delegation of the Respondent at San Franciso. However, in addition it sheds light upon the developments with respect to the route taken via the pledge system as distinguished from the route proposed to be taken, but not taken, via *the temporary trusteeship procedure*.

That the method of pledges or declarations must be read and understood together with the proposal for a temporary trusteeship committee seems clear, as I have said, but it is confirmed by a substantial portion of the debates in the Preparatory Commission which linked these two methods of ensuring international supervision of mandated territories. The record abounds with examples: I shall take two or three representative ones. For example, the Yugoslav Delegation, after stating that the

difficulties inherent in the dissolution of the League "could be overcome in the spirit of the Charter without the formation of a temporary trusteeship committee", went on to make a recommendation towards this objective as follows:

> "Of the three categories of territories mentioned in Article 77 of the Charter, the territories under B and C remain uncertain [that is Sections B and C of the paper]. Only the territories under A, mandated territories, are certain.
>
> This delegation is of the opinion that a necessary step would be the adoption by the Preparatory Commission of a recommendation to the first part of the first session of the General Assembly, to invite the mandatory powers who are members of the United Nations to submit declarations of their willingness to put the territories over which they have so far been acting as administering authorities to the trusteeship system of the Charter, and at the same time to make known which powers they consider as States directly concerned with these territories." (PC/TC/4, p. 8.)

The Yugoslav proposal included the following:

> "An *ad hoc* Committee of the General Assembly to examine these declarations of the present mandatory powers could usefully be formed. After the Security Council or the General Assembly had approved the agreements a Trusteeship Council could then be formed. The need for a temporary trusteeship committee would thus be eliminated." (*Ibid.*, p. 9.)

The foregoing statement by the Yugoslav delgate on the Committee evidences the view of the founders of the Organization that the proposals for a temporary trusteeship committee, and for a series of declarations or pledges, were techniques for ensuring continued international supervision of mandated territories. The true significance of the declarations made by the mandatories in April 1946 thus can be clearly and fairly appreciated only when viewed in this historical context of the perceived relationship between the proposals for pledges on the one hand, and the proposals for a temporary trusteeship committee on the other hand, and the juxtaposition of the two as viewed by the founders of the Organization.

Another strong indication of the validity of this proposition—that the United Nations founders linked the temporary trusteeship committee idea with the notion of pledges—is found in a statement by the New Zealand delegate who said:

> "The Trusteeship Council could be set up on receiving a sufficient number of declarations of readiness to place territories under trusteeship and he [that is the New Zealand delegate] hesitated to agree that a temporary committee of any kind was necessary." (PC/TC/32, p. 25.)

In other words, inasmuch as international supervision of mandated territories would commence in any event upon the reception of a sufficient number of declarations, the specific machinery of a temporary trusteeship committee was viewed by the New Zealand Delegation as unnecessary. And similarly, other delegations: among them may be cited the Soviet Union. The Soviet Government was opposed to the idea of a temporary trusteeship committee and favoured the Yugoslav pro-

posal instead. Thus, the Soviet representative, Mr. Gromyko, stated:

> "He was not surprised that the mandatory powers were in favour of substitute organs, but if the problem were dealt with along these lines discussion could continue for months or years without any action being taken. It was, however, unnecessary for him to repeat the reasons which he had given on many previous occasions why it would be wrong to establish substitute organs. If the mandatory powers really adhered to the Charter, they should come to the General Assembly and state that they were to place territories under trusteeship, and at the same time present trusteeship agreements."

That is the summary of Mr. Gromyko's remarks in PC/TC/32 at page 26.

Likewise, the distinguished delegate of China stated as follows:

> "The Chinese Delegation also wanted the mandatory powers to declare their intentions of placing the mandates under the trusteeship system."

That appears at the same page. He stated further that—

> "... use should be made of the main Trusteeship Committee of the General Assembly, thus leaving the question of a temporary or *ad hoc* committee for the General Assembly itself to decide". (PC/TC/32, p. 27.)

Thus, the link between the temporary trusteeship committee proposal and the concept of pledges is evident. There was general agreement that the mandated territories should be under international supervision. The mandatory powers wanted that supervision to be carried out by an interim or temporary body prior to the establishment of the Trusteeship Council. Mr. Nicholls said so.

This clearly was Respondent's position at that time. However, other governments feared that this procedure would lead to delay in the establishment of the trusteeship system and pressed for pledges by the mandatory powers to place these territories under the trusteeship system. What occurred historically, upon the Applicants' careful analysis, was a compromise between these two positions. That is, pledges were made but not pledges to place the mandated territories under the trusteeship system: rather, the pledges were to carry out all the obligations of the mandate, including the obligation to submit to international supervision, the essence of the mandate, until other agreed arrangements could be made.

This is the answer to the problem posed by the Respondent's suggestion that 1945 and 1946 events are consistent only with, or even reasonably consistent with, the proposition that the essence of the mandate somehow became excluded along the road.

Viewed in this context, and from this historical perspective, the purpose of the declarations made by the several mandatory powers in April 1946 becomes crystal clear. Pledges had only been made as a means of ensuring the continuance of international supervision, and were undoubtedly made with the same problem in mind. The Nicholls' statement of 29 November 1945 and Respondent's declaration of 9 April 1946, a few months later although not so explicit, form part of a consistent pattern of behaviour by the mandatory powers generally, including Respondent. The pattern was to reject the idea of making an unqualified pledge that the mandated territories were replaced under trusteeship.

Of course, the South African Government had indicated its reluctance, if that is the right word, to do so—to take such a step—but the pattern was to pledge, without qualification, not that the mandated territories would be placed under trusteeship, but, all the mandatories would agree, in the meantime, to carry out all the obligations inherent in the mandates system, including its very essence—international supervision.

This interpretation, Mr. President, appears consistent with the entire historical trend, which has been mentioned repeatedly in these proceedings, and, more particularly, this morning—the entire historical trend concerning the relationships between administering States, dependent peoples and international organizations, which had begun with the inception of the League of Nations itself. As I have said, Chapter XI of the Charter was an expansion and an elaboration of the obligations contained in Article 23 *(b)* of the Covenant of the League. The trusteeship system, Chapters XII and XIII, were an expansion and development of Article 22 of the League of Nations Covenant.

These were the respective progenitors, as I have tried to point out, of these two notions of Chapter XI in the general colonial area, and Chapters XII and XIII—the extension and broadening of the mandates system.

The consistent direction of the historic trend has been towards more international supervision of the administration of dependent peoples, and never towards less supervision, towards diminished obligation. Respondent is the only State in the world, of which the Applicants are aware, which has attempted, by reason of what the Court in 1950 called "an erroneous conception of the legal position created by the dissolution of the League", to resist the trend of the historical development in the direction of increasing supervision by the international community over dependent peoples, and the Respondent has resisted a trend, by reason of its mistaken legal position, as in the terms of the 1950 Opinion, notwithstanding the opposition of Members of the United Nations—the huge generality of the membership—expressed in repeated resolutions and in the actual assumption by the United Nations of supervisory powers over this Mandate itself.

This historical perspective demonstrates also the incorrect nature of Respondent's analysis of the events of the period in question, which incorrect analysis emerged most clearly and vividly in Respondent's rebuttal during the course of these Oral Proceedings. The rejection of a proposal for a temporary trusteeship committee, far from being a new fact, which would have caused the Court in 1950 to come to a different decision, as Respondent maintained in 1962 and is reaffirming here, actually furnishes evidence which reinforces the 1950 Opinion in the light of the historical perspective and analysis which I have endeavoured to lay before the Court.

As I have already noted and as the record makes clear, the temporary trusteeship committee idea was favoured by the mandatory powers, including the Respondent—and it was supported by them. Its rejection and the substitution of a pledge to carry out all the obligations of the mandates until other arrangements were agreed—a pledge which fell short of the pledge to place mandated territories under trusteeship, as advocated by the Soviet Government and others, to which I have referred —cannot reasonably be interpreted as a rejection of United Nations supervision of mandates prior to the conclusion of trusteeship agreements.

The fact is that the temporary trusteeship committee proposal was re-

jected as inadequate, not as going too far and as threatening to interpose a factor which might encourage, or permit, delay or stalling in the development of the trusteeship system itself. The defeat of the temporary trusteeship committee idea, therefore, reflected the conviction that the most urgent thing, to which all efforts should be directed, was to expedite the establishment of the Trusteeship Council so as to minimize or obviate the necessity for temporary supervisory machinery. It was rejected because the majority view, which was evidently not shared by all the mandatory powers, and certainly not shared by Respondent, was that it would hinder, rather than ensure, international supervision of mandated territories. This was not felt to be the case in respect of the system of pledges, and hence that technique was adopted for the same purpose and to the same end.

Respondent's attitude before the Preparatory Commission, as expressed by Mr. Nicholls' statement, demonstrates that in 1945 Respondent had no doubt as to its obligation of international accountability, and it was not simply, as Respondent has since come to state, an obligation to report to a *specific* organ of a *specific* organization, with *specific* membership. Mr. Nicholls' statement that Respondent and other mandatory powers "should have a body to which they could report", notwithstanding the demise of the League, shows clearly the recognition by Respondent of the true basic nature of its obligation of international accountability under the mandates system.

The heart of Respondent's argument regarding the work of the members of the Preparatory Commission seems to lie in Respondent's statement that—

> "... the indications are that they considered that there was no provision in law for any such supervisory power on the part of United Nations organs—no provision for any machinery in that regard—and that if there was a desire to exercise such supervision, special provision had to be made for it. That indication is apparent from a number of circumstances, including the very wording of these proposals that were made in regard to a possible temporary trusteeship committee." (**VIII**, pp. 386-387.)

Again, Respondent stated that—

> "... everybody concerned knew there was no express provision for any supervision of mandates in the Charter, and if there was any intent to have supervision of that nature, then special provision would have to be made for it". (*Ibid.*, p. 387.)

I think this fairly distils or reflects the heart of Respondent's argument in this respect, in any event, so it is understood by the Applicants.

Now, of course, these statements by Respondent which I have quoted are purely speculative and opinion, not to be ignored for that reason, but they are supported by no evidence whatever. The fact that provisions for the United Nations supervision were drawn up, and advocated by the mandatory powers, and then rejected in the temporary form as having a lower priority than measures designed to expedite the formation of the trusteeship system, would point more toward the inference that the founders believed that the United Nations could assume supervisory powers over mandates if that should prove necessary, in exceptional situations, and hence that no special provision was required. This is a more reasonable inference than Respondent's. In fact, that appears to the

Applicants to be an understatement. It is an inference which seems to be compelled by the events and transactions themselves, by Respondent's statements at the time, Mr. Nicholls' and the later declaration, and by the trend of historical events which are so manifest from the record of the proceedings of San Francisco. The "special provision regarding exercise of supervision", to use Respondent's phrase, was dropped for reasons having no relevance whatever to the broader question of United Nations supervision *vel non* of mandates. Indeed, in so far as there was any bearing on the issue of United Nations supervision, the rejection of the proposal for a temporary trusteeship committee indicates rather more, than it does less, the interest of the United Nations in maintaining intact the principle of international supervision, and carrying it forward into implementation and practice in the new trusteeship regime as rapidly as possible. To conclude that the essence of the Mandate was excluded along the avenue of this approach seems to the Applicants a misreading of the events and transactions and undertakings of the period. There is no inconsistency between the decision of the United Nations at that time not to create temporary machinery for supervision of mandated territories, as suggested by Respondent and other mandatories, and its subsequent action in developing special supervisory machinery for the mandated Territory of South West Africa.

The former decision (that is the decision not to establish a temporary trusteeship commission) reflected the hope that prompt conclusion of trusteeship agreements would render an interim body unnecessary, notwithstanding the expressed reluctance of South Africa to submit a trusteeship agreement. The United Nations has, nevertheless, persisted for years to try to persuade Respondent to change its mind. They have never given up the hope, but the decision not to establish a temporary Commission based upon that hope is certainly no evidence that international supervision fell by the wayside—fell away somewhere along the route—or that it was replaced, or that it would take the form of the more limited provisions and scope of Article 73 *(e)*, for which nobody who participated in these matters (nobody at San Francisco and now the Respondent itself) contends for.

The special machinery, on the other hand, for supervising a residual mandate had become necessary, contrary to the hopes earlier entertained that no such special, or third, system would be necessary. It was not within the range of practical consideration at that time, because the practical consideration was to get the job done, set up the Trusteeship Council as rapidly as possible, hope that all mandatories including South Africa would submit trusteeship proposals, and not interpose any machinery, or procedures, which might work toward delay, or toward stalling tactics.

The United Nations, therefore, never confronted any problem in terms of the majority of the Organization when it became manifestly clear, after negotiations over a long period with Respondent, that a special third system had to be devised to meet this unique residual situation which could not be cured through the diplomatic processes of negotiation and persuasion.

The United Nations simply refrained from exercising its competence to provide such a special method until events demonstrated the necessity for the action, and, of course, the Court in 1950 fully confirmed the judgment and the power of the General Assembly in that respect.

The inconsistency lay on the side of Respondent which originally asserted in 1945, through Mr. Nicholls, that the creation of a temporary body to implement the accountability of mandatories was necessary. Respondent, of course, has since reversed itself to argue that the creation of such supervisory machinery was impermissible—that the administrative supervisory authority had lapsed. If Respondent's analysis is to be taken seriously, it must mean that the founders of the United Nations were content, as I have remarked, to permit dependent peoples, already under mandate, to lose the benefit of international supervision which had been theirs since 1920, since not even Respondent in 1945 or 1946 argued that the United Nations had no supervisory powers over South West Africa, and indeed, actually affirmed the necessity for supervision even in temporary form. Respondent's present analysis, to the contrary, does violence both to its own earlier and more meritorious position, as well as to the entire historical development beginning with the League of Nations itself.

Mr. President, Respondent presents a similar analysis with regard to the work of the *Preparatory Commission*. At **VIII**, page 382, Respondent argues as follows:

> "... the fact that there was no such provision [that is for United Nations' supervision over Mandate] has got not only a negative value but also has a positive value. It has the positive value, I submit, of showing by inference that that question was deliberately avoided—that the decision to have no agreement in that regard was a deliberate decision."

Stated this way, that of course begs the question—the question is what it was deliberate about, what the deliberate nature of the decision centred on. The fact that the Preparatory Commission rejected this specific provision for supervisory machinery for obvious reasons of expediency and policy, read in the light of the views of the mandatory powers, including Respondent, that there should be such machinery until other arrangements were concluded, is consistent with the inference that the members of the Preparatory Commission felt that there was no need for special provision and that the United Nations, if it wished and if it became necessary, would assume powers of mandate supervision in residual and exceptional situations, which is precisely the case presented by South West Africa and, as I have said, no one ever spoke against United Nations supervision over mandates in 1945 or in 1946; Respondent's representative, to the contrary, Mr. Nicholls, explicitly favoured it. Hence, as we have already noted, the relationship between South African support for the temporary trusteeship committee and the South African pledge to the League of 9 April 1946 become very meaningful, and precisely the same pattern may be seen in the pledges made by each of the other mandatory powers.

However, Respondent, in its rebuttal, has sought by dissection, the process of dissection, of these declarations, to minimize their significance in sundry ways, e.g., in an analysis by Respondent of the pledge made by the United Kingdom Government, Respondent argues that if it were *intended to submit to supervision* by the United Nations then—"the question immediately arises, why did he not say so? Why did he use these vague general words 'in accordance with the general principles of the existing mandates'?"—this is the question posed by Respondent quoting

the "vague general words", in Respondent's description, used by the British delegation at that time. I have just quoted from **VIII**, at page 394.

Surely Mr. President, the more pertinent question would be if the United Kingdom representative considered that every mandate obligation remained binding with the single exception of the essence of the mandate and its continuance of international supervision, then why did he not say so? The logical form of the question is to the contrary of the way it is posed by Respondent—the phrase "general principles" is not properly to be read as excluding the very essence of the mandate, the obligation of international accountability—if he was agreeing to anything, if he was pledging anything, he was pledging to follow the essence of the mandate. Respondent relies also on the fact that the United Kingdom pledge used the phrase "continue to administer these territories"—the stress is on the word "administer". The argument made by Respondent in its rebuttal is that the word "administer" refers to internal administration only and not, in the words of Respondent "to anything falling outside the concept of administration, such as the concept of accountability"; that is from the same verbatim report at **VIII**, page 394.

No evidence whatever is given by Respondent to support such an interpretation and indeed, the word "administer", it is submitted, cannot fairly be read out of context of the phrase in which it is included: "continue to administer these territories in accordance with the general principles of the existing mandates". On the contrary, this must reasonably be read as a pledge to administer the Mandate under the supervision of competent international organs and in accordance with each of the obligations of the Mandate including international supervision—there is nothing implicit in the word "administer", particularly in this context, to suggest exclusion of international supervision.

[Public hearing of 10 May 1965]

Mr. President and Members of the honourable Court, at the conclusion of the Oral Proceedings on 7 May 1965 the Applicants were referring to Respondent's interpretation of the United Kingdom pledge in April of 1946 to "continue to administer" (the mandated territories, that is) "in accordance with the general principles of the existing mandates". That was quoted in the verbatim record on this page above. Respondent, by a process of verbal shredding, urges upon the Court that the word "administer" in this context is pregnant with significance. Respondent asks rhetorically why the United Kingdom pledge related the phrase "general principles of the existing mandates" merely to the word "administration" of the Territory. "The concept of administration", in Respondent's phrase, excludes "the concept of accountability or the rendering of reports"; that is from the verbatim record, **VIII**, page 394. Hence Respondent concludes, and I quote from the same verbatim record:

> "If the intention was to comply in full with all the obligations prescribed in the various British mandates, including an obligation of accountability, then surely, Mr. President, the words 'in accordance with the general principles of the ... mandates' would have been inappropriate. They would not have been used."

Respondent then goes on to argue that if the United Kingdom had contemplated survival of the obligation of accountability, it is to be

expected that the United Kingdom would have adverted "to the problem *which would arise by reason of the fact that the only* supervisory body" (that is, the Permanent Mandates Commission) "would cease to be in existence". Hence, Respondent reminds the Court, and I quote again from the same verbatim record:

> "... the wording was confined to the question of administering these territories, and the basis upon which that was to occur, was said to be 'in accordance with the general principles of the existing mandate'. The wording of that statement itself, Mr. President [says Respondent], is therefore, in my submission, destructive of the Applicants' contention." (**VIII**, p. 395.)

In light of fact, Mr. President, that the Applicants' contention is nothing less than that international accountability, the essence of the Mandate, survived the League's dissolution, Respondent's argument boils down to the proposition that the United Kingdom, then responsible for the administration of five mandated territories—Iraq, Palestine, British Togoland, British Cameroons and Tanganyika—envisaged and intended its pledge in April of 1946 as excluding the obligation of international supervision which this Court has described as "the very essence of the Mandate", in the words of the 1962 Judgment, at page 334; in light of the fact that the United Kingdom, along with Australia and South Africa itself, expressed in the Preparatory Commission support for the creation of a temporary trusteeship committee, Respondent's interpretation of the phraseology employed in the British pledge made only a few months later is inherently incredible. The attitude of these three mandatories which I have mentioned has been described in the verbatim record, 7 May 1965, at page 141, *supra*. Respondent's construction of the intent of the British pledge is, of course, relevant to Respondent's contention concerning the limited scope of its own pledge, which was couched in similar terms. Respondent's pledge *in April 1946, indeed, was formulated even* more explicitly than the British pledge. Respondent then pledged, *inter alia*:

> "The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory." (*League of Nations Official Journal*, Special Supplement 194, p. 133, 9 April 1946.)

The Advisory Opinion of this honourable Court in 1950 quoted the language I have just placed into the record, along with other declarations made by the Respondent, and the Court concluded:

> "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government." (*I.C.J. Reports 1950*, p. 135.)

The history and purpose of the pledging procedure, read in the light of the rejection of the Mandatory's proposal for a temporary trusteeship committee, has been set out by the Applicants in some detail in the verbatim record at pages 140, *supra*, and following. Respondent, however, does not rest its construction of the British pledge solely upon a strained

interpretation of the terms of the pledge itself. Respondent goes on to argue in the verbatim record of 5 April **(VIII)** that its interpretation of the wording of the British pledge is confirmed by the actions of the United Kingdom during the following year in relation to the question of Palestine; this is set out at page 395 **(VIII)** of the verbatim record. The Applicants shortly will deal with the actual significance of the procedures attending the solution of the long and difficult problem of Palestine.

This honourable Court will be well aware of the complex issues which confronted the United Nations in respect of this matter, as well as the tragic events with which the road to solution was strewn. It is enough at this point merely to say, for reasons which we shall endeavour to make clear, that the United Kingdom not only consented to but, with understandable anxiety, insisted upon a full role for the United Nations in supervising and directing the disposition of the Palestine Mandate. United Nations activities, however, were rooted in the supervisory powers of the mandate instrument. Respondent's construction of the United Kingdom pledge of April 1946 not only is erroneous in the Applicants' submission, but indeed does injustice to the actual British attitude which at all times was marked by acknowledgement of the continuance of its obligations of international accountability with respect to all its mandates pending conclusion of other agreed arrangements. Only in the case of the Palestine Mandate, upon which Respondent placed unusually heavy reliance, did a special problem arise which called for an extraordinary regime of supervision, far transcending normal mandate procedures. The events and transactions which have been described, including the juxtaposition of the proposal for a temporary trusteeship committee made by three mandatory powers including the Respondent, and the pledging procedures—this juxtaposition sheds light on the true significance also of the League of Nations resolution of 18 April 1946, paragraph 4 of which took note—

> "of the expressed intentions 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 Powers". **(I,** pp. 42-43.)

The phrase "expressed intentions" in the resolution of 18 April 1946 refers to pledges, and that word was used in several of the statements made at the time; to the pledges which each of the mandatory powers made pursuant to a plan and design which was chosen in preference to the proposal for a temporary trusteeship committee to which they would have reported until other arrangements had been agreed between them and the United Nations—that was the plan.

Except for the Territory of South West Africa itself, such "other arrangements", in the words of the 18 April resolution, in fact have been agreed upon in the case of every one of the territories which were under mandate in 1945. In the case of South West Africa alone it has proven necessary to create a system of supervision appropriate to the sacred trust, a third system as I have called it, alongside the trusteeship system and the reporting requirements of Article 73 *(e)* of the United Nations Charter.

Mr. President, I revert now to consideration of the true significance of the pledge given by South Africa on 9 April 1946, which the Court in 1950 interpreted as "recognition by the Union Government of the continuance of its obligations under the Mandate", that is to say, an undertaking rather than a mere revocable statement of intention. Respondent, indeed, does not rest any part of its case upon the premise that it expressed any intention whatever, present, or revocable, or otherwise, with respect to the matter of continuing accountability. To the contrary, Respondent contends that an inference is to be drawn from the events and transactions of that period, to the effect that the obligation of all mandatories to submit to international supervision lapsed by force of the termination of the League, and that happened as a matter of law, and that no pledge given was intended to carry on the obligation of international accountability; that is the stand of the Respondent.

And Respondent at the same time has, of course, continued to retain the rights derived from the Mandate, a position which, the Court held in 1950, could not be justified.

During the Oral Proceedings of 5 April 1965, Respondent sought to bolster the contention that its pledge of 9 April 1946 was not intended to signify recognition of the continuance of its obligation of international accountability. In the oral argument on that day, reported in the verbatim record, **VIII**, page 396, Respondent placed reliance upon the following phrase in its pledge:

> "In the meantime the Union will continue to administer the territory scrupulously in accordance with the obligations of the mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held."

Laying stress on the clause, as she has done during the past six years when meetings of the Mandates Commission could not be held, Respondent argues that inasmuch as no reporting occurred during the period when the Permanent Mandates Commission could not meet, its pledge was intended merely to relate to an unsupervised obligation to promote the material and moral well-being and social progress of the inhabitants. This may be called the spirit of the mandate concept, according to which Respondent's highest officials have ever since continued to administer the Mandate on the basis of self-enquiry and self-appraisal.

Respondent's argument, set out in the verbatim record, **VIII,** pages 396 and following, proceeds along the following lines. Respondent quotes the second paragraph of its pledge of April 1946, which reads as follows (this is from the *League of Nations Official Journal, Special Supplement No. 194*, p. 33):

> "The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."

The quoted language, Mr. President—even read by itself, without reference to Mr. Nicholls' statement of November 1945, proposing, urging the establishment of temporary machinery to which Respondent might report—draws no distinction whatever between the two interdependent groups or kinds of obligations, to wit, those which corresponded to the sacred trust, in the words of the 1950 Opinion, and those which corresponded to the securities for the performance of the trust. Despite this, Respondent argues that the second paragraph just quoted from the pledge, read in the light of the earlier reference to the period during which the Mandates Commission did not meet, clearly indicates a contemplation that there would be no accounting or reporting under the Mandate in this interim period to which the statement of intent relates. That is Respondent's statement in the verbatim record, **VIII**, at page 397.

The second sentence of the quoted paragraph, in which Respondent pledged that it "will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the mandate", Respondent contends is to be taken as relating only to obligations regarding administration of the Territory and excluding obligations to account and report. Such a construction, which the words themselves do not bear, is explained by the Respondent by reference to the first paragraph of the pledge, the phrase relating to the period during which the Permanent Mandates Commission could not meet, when their meetings were in abeyance.

Mr. President, this exercise in semantics does not kill the spirit by the letter; it ignores both spirit and letter, and in addition it ignores Mr. Nicholls and his statement of November 1945.

Respondent throughout this phase of its rebuttal, as in its written pleadings, centres its argument on the question why should it have acknowledged accountability in view of the absence of United Nations supervisory machinery at that time, and in view of its announcement in San Francisco of an intention to take up at the Peace Conference the matter of the termination of the Mandate. Respondent makes this point at **VIII**, pages 398 and 399 of the verbatim record to which I have referred.

In the Applicants' respectful view the question answers itself. Respondent's Government at that time, as Respondent now concedes, considered that the Mandate would survive the dissolution of the League as a matter of law. Respondent, along with the other mandatories, including the British Government, suggested the establishment of interim machinery to which to report. Mr. Nicholls, indeed, urged such a course upon the Preparatory Commission. Instead, a pledging procedure was devised for the purpose of assuring that all legal obligations would remain intact until substitute arrangements had been agreed with the United Nations.

Article 80, paragraph 1, of the Charter confirms the understanding of the authors of the Charter that all such obligations would survive, although, as has been said, the Article is a saving clause and does not in itself maintain or create any rights or obligations. But it does, in the Applicants' view, confirm that the authors of the Charter assumed that rights would remain in existence until other agreements were concluded, and it was hoped, of course, that these would be trusteeship agreements.

Above all, the two groups of mandate obligations—administration

and accountability—were inseparably linked in Article 22 of the Covenant, as parts of a designed and integrated whole. Respondent adduces no evidence and, indeed, there is none to adduce, showing that any Member present at that time drew any distinction between the two groups of obligations. On the contrary, the assumption obviously was, and must have been, that they stood or fell together: there is no evidence to the contrary.

Respondent in its second alternative argument, to wit, that the lapse of Article 6 must collapse the Mandate as a whole, demonstrates awareness of this very basic proposition, the inter-related, inter-dependent nature of these two groups of obligations. In support of its interpretation of its pledge, Respondent again cites the United Kingdom pledge as confirming Respondent's present interpretation of its own pledge. This is in the verbatim record already cited at page 398.

Indeed, Respondent in this part of its argument goes even further than before. Respondent explores probabilities and then asks, rhetorically,

> "Why should the South African delegation alone, of all the mandatory powers, have manifested an intention of that kind? I have indicated a clear intent to the contrary on the part of the British delegation, and I shall proceed to indicate a clear intent to the contrary on the part of the New Zealand, the French and the Australian delegations, the Belgian delegation's statement being neutral on this particular point." (**VIII**, p. 399.)

The concession to Belgian neutrality, so-called, is not quite generous enough. The Belgian pledge, indeed, included the following declaration from which I quote—this is from the summary—

> "In the course of the same declaration of 20 January we expressed our confidence that the Trusteeship Council would soon come to occupy in the United Nations Organization the important place which it deserves. We can only repeat that hope here and give an assurance that pending its realization, Belgium will remain fully alive to all the obligations devolving on Members of the United Nations under Article 80 of the Charter." (*League of Nations Official Journal, Special Supplement No. 194*, p. 43.)

No distinction is drawn or implied between the two groups or kinds of inter-related obligations.

For its part, the Australian Government's pledge stated, *inter alia*:

> "Until the coming into force of appropriate trusteeship agreements, under Chapter XII of the Charter, the Government of Australia will continue to administer the present mandated territories in accordance with the provisions of the mandates for the protection and advancement of the inhabitants. In due course these territories will be brought under the trusteeship system of the United Nations. Until then the ground is covered not only by the pledge which the Government of Australia has given to this Assembly today, but also by the explicit international obligations laid down in Chapter XI of the Charter." (*Ibid.*, p. 47.)

The Australian pledge nowhere explicitly or implicitly distinguishes between the two groups or kinds of inter-related obligations.

It appears relevant at this point, Mr. President, to consider the possible significance of the reference in the Australian statement to

Chapter XI of the Charter. In the light of the question propounded by Judge Jessup, it may be appropriate to refer to the joint dissenting opinion of the honourable President and Judge Sir Gerald Fitzmaurice, appended to the Judgment of 1962 on the Preliminary Objections.

In the course of discussing the role of Article 73 of the Charter, the opinion cites, *inter alia*, the foregoing reference in the Australian statement to Chapter XII of the Charter as evidencing the intent of the authors of the Charter to provide the protective cover of Article 73 to mandated territories, the disposition of which might not otherwise be agreed upon pursuant to the League resolution of 18 April 1946. In respect of the point directly under discussion, that is, Respondent's contention that the pledge made by Australia excluded the obligation of accountability, the foregoing analysis of the joint dissenting opinion of the learned Judge and the honourable President would, of course, be irreconcilable with Respondent's interpretation of the Australian pledge. The question would be, what type of international accountability or reporting was intended to be referred to by the reference to Chapter XI.

The opinion of the learned Judges appears to assume, without question, so far as the Applicants understand it, that the Australian statement included within its ambit the obligation to report. The only issue left open then would appear to relate to the method of accountability, not to its inclusion in the Australian pledge. In respect of that issue, the Applicants with great respect, at an earlier stage of their response to Judge Jessup's question, sought to demonstrate why, in their submission, the territory of South West Africa was not to be regarded as a territory within the scope of Article 73 *(e)* of the Charter.

The reference to Chapter XI in the Australian pledge necessarily confronted Respondent with a certain dilemma. Respondent's case, on the issue now under discussion, rests upon satisfying the Court that the mandatories, including Australia, excluded the principle or the obligation of international accountability from the scope of their pledges in April 1946. In addition to all other *indicia* of the importance attributed by the Australian Government to the conversion of mandates into trusteeships, and the extension of international accountability to the general colonial area, the Australian pledge made reference to Chapter XI, which, of course, includes Article 73 *(e)*. Consistently with its objective of construing the pledges in a manner to exclude accountability, therefore, Respondent has now sought to construe Article 73 *(e)* itself in precisely the same manner, that is as excluding international accountability.

In Respondent's words, and I quote from the verbatim record, **VIII**, at page 402, Respondent argues, with respect to this matter, as follows:

> "And now, Mr. President, if we come to analyse what that explicit international obligation [that is, Chapter XI] is, as laid down in the Charter, we find that it is not an obligation of accountability under a mandate at all. It is not an obligation involving supervision on the part of supervisory organs. It is merely a very limited obligation of supplying information of a technical nature on economic, social and educational conditions in its dependent territories for the information of the United Nations."

In the course of the same address to the Court, the Respondent went on to say:

> "It [that is Chapter 73 *(e)*] is very clearly a very much lesser

> obligation—a very minor obligation—as compared with the obligation of reporting and accountability under the Mandate." (**VIII**, p. 403.)

And, then, Respondent adds:

> "... my learned friends who represent the Applicants, admit that this distinction exists as a matter of law. As a matter of law this obligation cannot be equated with one of accounting and reporting under the Mandate." *(Ibid.)*

Mr. President, the Applicants do indeed draw this legal distinction between Article 73 *(e)* and the reporting and accountability under the Mandate, but a more appropriate word for the Applicants' position might have been "insist" rather than "admit". In the Applicants' view, Respondent's analysis, however, attributes much too narrow a scope and significance to Article 73 *(e)*, which is not supported by the history of the Article, and, indeed, one which is contradicted by the views consistently expressed by the Australian Government itself during the evolution of Chapter XI, and these views have been set out in some detail by the Applicants at pages 137 to 139, *supra*.

Respondent's narrow interpretation of Article 73 *(e)*, designed to demonstrate that the Australian pledge did not include or encompass a continuing obligation of accountability, is, as I say, incompatible both with the views of the learned judges in the joint dissenting opinion of 1962 and with those of the Applicants, although for different reasons. If Respondent's narrow construction of Article 73 *(e)* were correct, it would support the Applicants' contention that Article 73 *(e)* could not have been regarded by the authors of the Charter as an adequate cover for residual mandates.

On the other hand, Respondent's analysis is inconsistent with the learned judges' view in the joint dissenting opinion, that Article 73 *(e)* was intended to provide just such a cover.

Respondent's argument falls between all stools. Respondent's analysis of Article 73 *(e)*, narrow though it be, does not, in any event, support Respondent's construction of the Australian pledge. Indeed, the distinction sought to be drawn by Respondent between accounting and reporting, in this context, is little more than a quibble. Article 73 *(e)* explicitly provides for the regular transmission of information within enumerated categories. Obviously, this is designed to be, and by definition is, a form of international accountability. In the words of the joint dissenting opinion, "It [that is, Article 73 *(e)*] provided for a reporting obligation to the United Nations".

The Applicants are, of course, aware that by stressing the proper significance to be attributed to Article 73 *(e)*, an aspect of the response to Judge Jessup's question is involved, but it is believed by the Applicants that the important Charter construction question here presented justifies as objective an analysis and evaluation of Article 73 *(e)* as lies within the Applicants' competence to present to this honourable Court. And Article 73 *(e)*, contrary to the Respondent's position, clearly, in the Applicants' view, provided for a form of international accountability although, in the Applicants' respectful submission, it was not contemplated that it would be adequate cover for the obligation under residual mandates.

But, Mr. President, in the Applicants' respectful submission, in sum,

the Australian pledge, on its face, made clear its acknowledgment that the obligation of international accountability continued, but that, until the trusteeship council commenced to function, the Australian Government would carry out all its obligations under the Mandate, as the pledge said, including the duty to report to the United Nations. Reference was made, in that connection, to Article 73. The question is open whether the reference was intended to include Article 73 *(e)*; it may well have been.

However, it is true, and the Court's attention is called to the fact, that the Australian Government, in response to the Secretary-General's request of 29 June 1946 for an enumeration of its non-self-governing territories, concerning which it intended to supply information under Article 73 *(e)*, did not list the Australian mandated territories, and this will be found in the *Repertory of United Nations Practice*, Volume IV, at paragraphs 21-23, pages 11-12.

It might be inferred from this fact, as I have said, that the reference to Chapter XI in the Australian pledge was intended to refer only to the substantive obligations of *(a)* to *(d)* of Article 73 notwithstanding the fact that the Australian Government, it is true, in an earlier reference in the same pledge, did refer to Article 73 *(e)* specifically. This, of course, will be found in the *League of Nations Official Journal* which I have cited, the *Special Supplement No. 194*, at page 47.

However this may be, whether the Australian Government intended to include in its pledge an interim obligation to report under Article 73 *(e)* or not, in either event there is no question but that it did include in its pledge reference to an obligation of international accountability.

Precisely the same thing was true in the case of all mandatory powers at the League's final session. The change of Government in South Africa in 1948 brought with it a reversal of Respondent's position with regard to Respondent's obligations towards the Territory, in the sense under discussion here.

Respondent now concedes that until 1948, and I quote from the verbatim of 6 April 1965, **VIII**, at page 428, there was "a conception on the part of the South African Government that the Mandate as such could be regarded as still in operation". Indeed, only several months prior to Respondent's pledge, as I have mentioned, the Respondent's representative at the Preparatory Commission, Mr. Nicholls, explicitly solicited United Nations supervision over mandated territories, and the question of "probabilities of interpretation of events", to use the Respondent's phrase—the question of probabilities in 1945-1946 was a very different question from that which it became after 1948, and has remained ever since.

In summary, then, Mr. President, the system of pledges adopted by the mandatory powers was carried out precisely for the purpose of ensuring international supervision of mandated territories without resorting to the alternative plan originally favoured by the mandatory powers, including Respondent, to establish an interim body, or interim machinery, which it was generally feared might result in delay in the establishment of the trusteeship system, and this system of pledges must be understood in this historical context and perspective.

Both alternatives, interim machinery and pledges, were viewed as a means of ensuring international supervision of mandates until other agreements were made. The first alternative, that is the establishment of interim machinery, was favoured by mandatory powers but was

rejected for reasons of expediency, and its rejection cannot be interpreted, as Respondent seeks to do, as a rejection of international supervision of mandates prior to the conclusion of other arrangements. This would, indeed, have been an implicit exclusion of the very essence of the mandate.

I turn now, Mr. President, to a consideration of the Chinese draft resolutions. The foregoing analysis sheds light also on the significance properly to be attached to the two Chinese draft resolutions presented to the League Assembly. These were referred to in League of Nations, 21st Assembly, 1st Committee, 2nd Meeting, *The League of Nations Official Journal, Special Supplement No. 194*, at page 58.

The first Chinese draft was, in essence, an attempt to return to the first alternative proposal favoured by mandatory powers in the debates of the Preparatory Commission. Indeed, the wording of the first Chinese draft was in close accord with Respondent's view conveyed at the time of the Preparatory Commission by Mr. Nicholls that—

> "it seems reasonable to create an interim body as the Mandates Commission was now in abeyance and the countries holding mandates should have a body to which they could report". (**VIII**, p. 152.)

The Chinese delegate's attempt to revive the alternative proposal favoured by the mandatory powers was rejected however, as it had been in the Preparatory Commission, and a second Chinese draft referred to the several pledges made by the mandatory powers. In short, the Assembly of the League of Nations, consistently with the action taken by the Preparatory Commission, rejected the plan of interim machinery supported by the mandatory powers and, instead, adopted the system of pledges. And this was done, of course, as the record makes amply clear, to prevent undue delay or to encourage delay in the establishment and flowering of the trusteeship system.

Respondent insists however, that the reason for the change was lack of unanimity among the States concerned; Respondent makes this contention in the verbatim record of 5 April at **VIII**, page 410. Respondent argues that Respondent itself could not agree to the first Chinese draft resolution and unanimity was required; yet, Respondent had stated four months previously, through Mr. Nicholls, that it favoured interim supervision, and there is nothing in the record to demonstrate that Respondent had changed its view in the interval. It is reasonable to assume on the basis of this record that the Respondent indeed would have preferred the first Chinese draft to the second but the record is silent on this point—this certainly would have been more consistent with the Respondent's position at that time than the strained and unsupported interpretation of the event which Respondent now advances. Respondent also speculates that the United Kingdom could not have agreed to the first Chinese draft, but again, in the Preparatory Commission, the United Kingdom delegates spoke in favour of the plan for a temporary trusteeship committee and hence, it is at least as likely as not, and indeed more likely, that the United Kingdom would have preferred the first Chinese draft resolution to the second—there being no evidence in the record to indicate a change of position on the part of the British delegation in that interval.

Respondent speculates also that Egypt could not have agreed with the first Chinese draft because of her views on Palestine, but Egypt did not agree with the second Chinese draft either; Egypt stood alone in

the view that mandates did not continue in force after the dissolution of the League and hence, it was quite natural for the Egyption delegation to voice objections to both Chinese draft resolutions. In short, the action of the League Assembly in adopting the Chinese draft resolution, is consistent with the reasonable hypothesis and reflected the same considerations that accounted for the decision in the Preparatory Commission to adopt the pledge system—the pledge technique—rather than the temporary trusteeship commission technique. The actions taken by the League Assembly are perfectly consistent with the historical development of international supervision of dependent areas. While the League of Nations broke new ground by instituting a system of international supervision of mandated territories, the United Nations extended the development still further by providing a more elaborate system of supervision and by creating important new obligations for colonial areas. Under no circumstances have the United Nations contemplated that the administration of dependent areas would be completely devoid of international obligations nor has it ever been thought that dependent peoples once having had the right of international supervision should be deprived of that right—this is simply counter to the historic trend—yet, this is precisely the proposition which Respondent urges upon this honourable Court. Respondent's contention is not only in the teeth of the position taken by it in the Preparatory Commission by Mr. Nicholls, it is not only in the teeth of the clear meaning of the text of its pledge of April 1946—it runs directly counter to the historical development of major historical significance, as the Australian delegation and many others pointed out at the time.

Mr. President, with your permission, I should now like to turn to a consideration of the Respondent's incorporation proposal and the General Assembly's treatment of it in the light of arguments made by Respondent during its rebuttal. Perhaps the most important historical development in respect of the evolution of the South West Africa problem was the establishment by the United Nations of a system of international supervision over the territory, a system which is neither trusteeship supervision nor colonial supervision, if I may use that phrase, under Chapter XI of the Charter. As noted by a scholar already quoted—Mr. E. Sady in his work found in *The United Nations and Dependent Peoples* published by the Brookings Institution, Washington D.C., in 1956, I quote from page 132:

> "The system for the international supervision of South West Africa is sufficiently different from that established by the Assembly for the implementation of Chapter XI of the Charter and from the International Trusteeship System to merit continuous study in the effort to improve international organization in this field."

The historical development in this respect is clear, Mr. President, and is consistent with the evolution of international supervision over dependent areas generally. Analysis of events during the years 1946 to 1949 at the United Nations makes it clear, in the Applicants' respectful submission, that the system of international supervision over the mandated territory of South West Africa was developed at first with the co-operation of Respondent and subsequently in the face of increasing opposition. It was, of course, well known that Respondent desired to incorporate South West Africa into the Republic of South Africa—this was never concealed,

and it would have followed, of course, that the Mandate would have been terminated. Now Respondent has conceded that in the opinion of the then Government—the Smuts Government—the Mandate remained in full force and effect, notwithstanding the dissolution of the League, on its legal interpretation of the situation at that time. The Smuts Government however, in accordance with its view that the mandate obligations continued byond the League's demise, quite clearly recognized the competence of the United Nations. Thus, on 22 January 1946, Respondent's representative to the Fourth Committee of the General Assembly stated that its Government's final decision on incorporation of South West Africa and I quote "would be submitted to the General Assembly for judgment", this was quoted by the Court in the 1950 Opinion, *I.C.J. Reports 1950*, at page 142. In the same statement the South African representative made reference to South Africa's asserted rights pursuant to Article 80, paragraph 1, of the Charter.

Accordingly, this may be a convenient moment, Mr. President, to reply briefly to Respondent's rebuttal on the question of Article 80, paragraph 1, although the matter is slightly digressive in respect of the main line of the Applicants' argument regarding the significance of Respondent's acknowledgment in 1946 of United Nations competence to which I have just referred.

In the statement of 22 January 1946, the South African delegate is reported as saying, *inter alia*: "Referring to the text of Article 77 [this is the summary record] he said that under the Charter the transfer of the mandates regime to the trusteeship system was not obligatory. According to paragraph 1 of Article 80, no rights would be altered until individual trusteeship agreements were concluded. It was wrong to assume that paragraph 2 of this article invalidated paragraph 1. The position of the Union of South Africa was in conformity with this legal interpretation." That is the statement of 22 January 1946 by the South African delegate. It is quoted in the Counter-Memorial, **II**, at page 42.

The Applicants accordingly take a different view of the proper construction of Article 80, paragraph 1, than did Respondent in 1946. The Applicants, as has been stated in an earlier phase of these proceedings are in respectful agreement with the views expressed on this matter in the joint dissenting opinion of the honourable President and Sir Gerald Fitzmaurice, at page 516 of the *I.C.J. Reports 1962*, that Article 80, paragraph 1, does not maintain or stabilize rights nor does it insure the continuance of those rights or increase or diminish them. Article 80, paragraph 1, as is pointed out at page 516 of the *I.C.J. Reports 1962*, figures in the Charter as an interpretation clause commonly called a "saving clause". The Applicants, at an earlier stage of these proceedings, expressed regret if their argument during the 1962 Oral Proceedings gave rise to a contrary impression as appears to have been the case. Respondent, after duly noting the Applicants' expression of regret at the misunderstanding for which they, the Applicants, were responsible, proceeded with an argument of its own which would deprive Article 80, paragraph 1, of any significance whatever following the effective date of the United Nations Charter.

Before turning to Respondent's specific contention in this respect however, the Applicants consider it may be helpful to set this matter at rest so far as their own views are concerned, to formulate their analysis of

the relevance in these proceedings of Article 80, paragraph 1, of the Charter in the following three propositions:

1. The term "existing international instruments" as used in Article 80, paragraph 1, includes mandate instruments. This interpretation of the Article seems to be undisputed.

2. The authors of the Charter would not have included a saving clause in the Charter pertaining to rights under mandates unless they assumed that such rights would continue to exist apart from anything in the saving clause itself.

3. The assumption underlying the phrase in Article 80, paragraph 1, "until such agreements [that is trusteeship agreements] have been concluded" demonstrates that the authors of the Charter, not only assumed that rights under the mandates would continue to exist, but they would do so until and unless superseded by other agreed arrangements.

Now, Respondent, in its own words, contends in the verbatim record of 2 April 1965, that there was—

> "... a contemplation on the part of the authors of the Charter, at the time when the United Nations was formed, and at the time when the Charter came into effect, that there were unaltered rights and obligations under mandates". (**VIII**, p. 388.)

Respondent, of course, in this connection, is necessarily faced with the problem of explaining the reference to Article 80 in Respondent's statement of 22 January 1946. Respondent, however, goes on to contend that, whatever the significance properly attributable to Article 80 (1), the Article became a dead letter when the United Nations Charter came into effect; that is the Applicants' characterization, not Respondent's. In Respondent's words, which I quote from this same verbatim, at the same page:

> "We must emphasize, Mr. President, that Article 80 (1) could clearly do no more than indicate which rights were, in the views of its authors, in existence as at the stage of its drafting and possibly the stage of its coming into effect." *(Ibid.)*

Respondent's argument, accordingly, seems to be, as understood by the Applicants, that the force and effect of the saving clause was spent at the moment the Charter became effective. If this is a correct interpretation of the phrase just quoted—and I am not sure that it is, I perhaps do not understand the phrase at all—it is, of course, an inherently incredible proposition. Respondent's contention, if this be the contention, ignores and fails to give any significance to the phrase in Article 80 "until such agreements have been concluded". But, apart from playing word games with the language used by Respondent, which is not clear on its face, in Applicants' view, on 12 November 1948, the Belgian Representative, in the Fourth Committee of the General Assembly, referred to the provisions of Article 80 in terms clearly evidencing that the Belgian Government assumed that the saving clause of Article 80 was still operative, as much as it ever had been and for the same purpose that it had been inserted in the Charter. This was in November 1948—more than two years following the dissolution of the League. The Belgian statement itself is quoted in relevant part in Respondent's written pleadings, and the reference to it is *General Assembly Official Records* of the 3rd Session, Part I, Fourth Committee, 79th Meeting, page 326. Two days later, on 16 November 1948, the Delegate of India said in the same committee:

"The provisions of Article 80 of the Charter, safeguarding the existing rights of the people of South West Africa until a trusteeship agreement had been concluded, had to be recognized." This is the same citation, the 81st Meeting, page 352.

The Uruguay delegation made a similar reference to Article 80 during the same session, at page 311, and in 1949 Cuba did likewise (4th Session, Fourth Committee, 21 November 1949, p. 216) and there was no question, apparently, that the saving clause was still alive at that time. The question of its relevance to these proceedings, however, has been respectfully submitted now in the form of three propositions in which the Applicants have attempted to formulate their understanding of the Article.

Mr. President, I revert now to the main line of the Applicants' argument regarding the significance of Respondent's acknowledgement in 1946 of United Nations competence.

Reference has been made to Repondent's statement in the Fourth Committee that the Respondent would submit its decision for incorporation of South West Africa *to the General Assembly for its judgment*. That was quoted in the 1950 Opinion at page 142.

Respondent also requested at that time that the question be placed on the agenda of the General Assembly for the Second Part of the 1st Session, in 1946, and on 4 November 1946, Marshal Smuts told the Fourth Committee:

> "... that ... [South Africa's] international responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South West Africa without proper consultation either of all the peoples of the Territory itself, or with the competent international organs". (*I.C.J. Reports 1950*, p. 142.)

As the Court pointed out in the 1950 Opinion:

> "By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter. The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946." (*I.C.J. Reports 1950*, pp. 142-143.)

This response was given by the honourable Court in the 1950 Opinion in answer to question *(c)*, which had been asked by the General Assembly, and which read in part "... where does competence rest to determine and modify the international status of the Territory?" That is quoted from page 141 of the Opinion.

The Court in 1950, of course, explicitly held that the organ vested with supervisory powers is also the competent international body to determine and modify the international status of a mandated territory. Thus, at page 141, of the 1950 Opinion, it is stated:

> "The international status of the Territory results from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in Article 22 of the Covenant and in the Mandate. It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules."

And the Court went on to say in the 1950 Opinion:

"Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates." (*I.C.J. Reports 1950*, p. 141.)

The Court evidently took the view that the vesting in the League Council both of a supervisory role and a competence with regard to modification of the terms of the Mandate, was not merely coincidental but logical, and the Court suggested that by the same logic the competence of the General Assembly to supervise mandates extended also to the matter of approving changes in the status of the Territory. It was given the authority to consent, if it thought fit, to a modification of the terms of the Mandate.

It may be relevant at this point to take note of Respondent's contention with regard to this matter, which was advanced in rebuttal. The Applicants had sought to show why it is essential that the same administrative organ should be vested with power to supervise and power to consent to a modification of status of a mandated territory. This must be so, in the Applicants' respectful view, because the consent to which Article 7 (1) refers clearly must be an informed consent. The modification of the terms envisaged, include, and encompass *all* the terms of the Mandate—*any* terms of the Mandate.

As we have noted earlier—I quote from the verbatim record, **VIII**, at pages 127-128:

"Only the same organ entitled to receive 'full information with regard to the territory', in the words of Article 6, *could* be in a position to exercise an informed judgment in respect of proposals for modification of the terms of the Mandate."

Clearly such modifications could include major or minor modifications of any or all provisions of the Mandate, not necessarily modifications relating to the basic status of the Mandate as an international territory. It follows, in the Applicants' view, that the lapse of Article 6 and the consequent falling away of Article 7 (1) of the Mandate would, as was pointed out, necessarily create one of two intolerable situations: either the Mandate would be frozen in its present form in perpetuity, for reason of the absence of an organ whose informed consent would be required to a modification, or Respondent would have the right unilaterally to modify the terms of the Mandate in the absence of an organ whose consent would have to be obtained before such modification—whose consent would have to be obtained, not whose consent could be obtained, if the Respondent decided unilaterally to seek such consent. It is obvious, in the Applicants' view, that the latter alternative—the right unilaterally to modify its terms, which would exist unless there were an organ in existence whose consent was required before modification—would carry with it the power to destroy unilaterally the international status of the Territory, thus annexing it both in law and in fact. This conclusion the Applicants thought was clear, in respect of the consequences which would flow from a lapse of Article 7, paragraph 1, and this seemed to the Applicants to confirm the essential nature of the retention of international supervision as a legal conclusion, and an organ competent to consent whose consent was essential, was required.

Respondent's answer, or discussion, of this analysis seems to the Applicants to be both ambiguous and evasive. In the first place, Respondent appears to misconceive the purpose of Article 7, paragraph 1. In the Oral Proceedings of 9 April 1965, VIII, at page 518, the Respondent stated:

> "The function of Article 7, paragraph 1, was simply to provide machinery of a useful and a practical nature whereby the terms of the Mandate could be modified with binding legal consequences. It was a useful procedure involving the consent, on the one hand, of the mandatory and, on the other hand, of a body of limited composition, the Council of the League."

Respondent proceeds by arguing that the lapse of the authorized machinery really would not be an important detail; there is nothing for the Applicants to get excited about, the Respondent says; the consequence merely would be, and I quote from the same verbatim record, at page 519, getting "the consent or the recognition of all who have legal interests in the matter". This general reference to "all who have legal interests in the matter" is then followed by an argument on the part of Respondent which seems to concede—just seems to concede—or imply the concession of necessity to obtain consent to modification. Thus, at page 519 of the same verbatim record, Respondent expresses the thought that—

> "if it [the Mandate] was still to be seen as a treaty relationship [the alternative argument so familiar in the proceedings]—all the interested parties, who would probably be all the Members of the League, would have had to give their consent. . . . [If] it was no longer to be seen as a treaty relationship, but as a continuing institution involving special status for the Territory the same *position would, in substance,* have applied.
>
> There are recognized international processes whereby a change of status of a territory can occur in such a way as to be legally recognized."

The last-quoted sentence as a legal proposition is unassailable, but it is wide of the mark. The question is wide open on the basis of Respondent's apparent analysis as to who all the interested parties would be; Respondent suggests they might be, as a tentative suggestion, probably have to be regarded as all the Members of the League. The Applicants' point, Mr. President, is that unless Respondent is obliged by the Mandate to obtain consent of an organ which has the information which is available only to a supervisory organ, then it must follow that at the very least utter confusion would mark the question as to whose consent, if anybody's, would be required; infinite debate would ensue at best; or Respondent would be free unilaterally to destroy its international status. Respondent's present position as expressed in its pleadings, and repeated in the Oral Proceedings, is that it has stated an intention voluntarily not to alter the international status of the Territory, in accordance with what it calls "the spirit of the Mandate". But this is a unilateral statement of intention and, of course, is revocable at any moment, without notice. This is not to say that the Respondent would do so—we are talking of the legal obligation inherent in the situation.

When we get to the basic question of Respondent's duty to obtain consent, which has been rather the subject of alternative hypotheses and

arguendo assumptions, we find that Respondent's argument really evades this crucial point. Respondent concedes at **VIII**, page 520, of the verbatim record that if the Mandate is in existence, Respondent is "not entitled as a matter of law to modify the status of the Territory unilaterally". Respondent then goes on to say, quite irrelevantly in our view, that in any event it is its expressed intention not to do so. But the Applicants' argument is that it is necessary that there be in existence a continuing obligation to obtain consent, a legal requirement, unless Respondent is free to annex the Territory; and it is this necessity that there be such a legal obligation fixed in the Mandate, with a specified organ competent to give its consent, and an organ which could give an informed consent—it is this series of considerations which, in the Applicants' view, seems to provide evidence to confirm the existence of the Mandate itself in general, and of Article 7 (1) in particular. The Applicants see the need for consent as proof of the existence of the Mandate; Respondent merely concedes that if the Mandate existed there would be an obligation to obtain consent.

But the matter goes further than this, and is indeed, in the Applicants' view, a very important matter to clear up. The Applicants, as has been stated, sought to make clear why the organ the consent of which is necessary also must be the same organ which has continuing supervision over the Mandate. As has been said, consent to modification of the terms of the Mandate, and this could refer to any term of the Mandate, including the substantive obligations, must be an informed consent. The Applicants accordingly see the need for an organ the consent of which is necessary for modification of the terms of the Mandate as evidence of the need for the existence of a supervisory organ. The Applicants think it, and respectfully submit it to be a logical proposition, that if Article 7 (1) must be considered to have remained in effect because of the intolerable alternatives which would follow if it were not, that if, as the Applicants submit, a competent organ must exist whose consent is required to modification, and if that consent must be an informed consent, then the survival of Article 7 (1) has a direct and logical relationship with the question of the survival of Article 6.

The argument at the close of the earlier portion of this session had just reached the point at which the Applicants contended that as a logical proposition, and as a matter of legal analysis, if Article 7, paragraph 1, is needed to preclude unilateral annexation, and if the organ relevant to the purpose of Article 7 (1) should be an identified organ, with continuing supervisory functions over the Mandate, and therefore in a position to give an informed consent to modification of terms of the Mandate, then as a logical proposition and as a matter of legal analysis the logical conclusion is that the same competent organ should be the supervisory agency over the Mandate with respect to Article 6. And that if Article 7, paragraph 1, survives, as it necessarily must, in the Applicants' view, it would follow that Article 6, for the reasons which have been advanced, must also be deemed to have survived.

The Respondent, so far as the Applicants noted, does not deal with this precise point, the real heart of the matter, at all. Respondent instead refers to the separate opinion of Judge McNair, which was appended to the 1950 Advisory Opinion, in the *I.C.J. Reports 1950*, at page 32. But Judge McNair dealt with the effect of lapse of Article 6 upon the fate of Article 7, paragraph 1, and the learned judge concluded that the lapse of

Article 6 "by reason of the ensuing impossibility of obtaining the consent of its [that is, the League's] Council" meant that Article 7 (1) also had lapsed. (*I.C.J. Reports 1950*, p. 162.)

Thus, as the Applicants understand the position, Judge McNair perceived a necessary interconnection between the two Articles, in precisely the same way as did the majority of the Court, although of course Judge McNair reached a contrary conclusion as to the survival of both Articles. He linked them as the Court had done, but, having concluded that Article 6 lapsed, for reasons set forth in his separate opinion, he concluded that Article 7, paragraph 1, also had lapsed.

It would seem clear that the Court in 1950 made no distinction between the international organ competent to determine and modify the status of the mandated territory and the organ competent to supervise the administration of the territory. Not only did the Court make no such distinction, but it indicated the linkage between the two Articles, and it would seem fair to conclude that the Court in 1950 at least indicated its view that the two must be one and the same—the organ under Article 7 and the organ under Article 6 should be the same organ.

In the Applicants' view, therefore, the Respondent's submission in 1946 of the question of the status of South West Africa to the competent international organ for a judgment, in the words of the submission, clearly evidenced Respondent's recognition of the United Nations as the international body competent to supervise administration of the Territory. There is nothing in the record to indicate a position contrary to the inherent logic of the position that if Respondent was submitting to the judgment of the Organization, the competent international organ, the question of modification of the terms of the Mandate, there is nothing to indicate that Respondent would have or could logically have drawn a distinction between the competent organ under Article 6 for supervisory purposes, and the competent organ under Article 7, paragraph 1, for the purpose of exercising a judgment with respect to modification of the terms of the Mandate.

But Respondent now insists on separating what the Court in 1950 placed together, and has devoted much argumentation in the rebuttal to an attempt in this context to avoid the significance of the actions of the Smuts Government at that time, at the time when the Respondent's Government considered that as a matter of law the Mandate's existence survived the dissolution of the League. Thus, Respondent argues that supervision and consent to modification are, in the words of the Respondent, "entirely distinct concepts". This is from the verbatim record, **VIII**, at page 430.

The Respondent seeks to draw the distinction between supervision on the one hand and consent to modification on the other, on the basis that since supervision is a continuing process, and is onerous, while consent to modification is "confined to a particular occasion", it is apparently less onerous. This is still from page 430 of the same verbatim record. The fallacy of the distinction has been made clear, it would seem from the Applicants' point of view, in any event, and the distinction loses any plausible significance in the light of the considerations which have been adduced concerning the crucial linkage between Article 6 and Article 7, paragraph 1, which have nothing to do with whether either is more or less onerous. It is a logical proposition with respect to the requirement that the organ under paragraph 1 of Article 7 be the super-

visory organ, so that it might be in a position to give an informed consent.

Respondent continues its argument by referring to the wording of the League resolution of 18 April 1946, in this context. The reference in the resolution to other arrangements to be agreed between the United Nations and the mandatory power is relied upon by Respondent as showing that certain issues could be submitted to the United Nations without submitting to supervision. This argument is set forth at **VIII**, pages 430-431 of the verbatim, to which I have referred.

As we have already noted, however, Mr. President, the very purpose of the mandatory pledges and the final League resolution was to assure the continuation of international supervision. These were the procedures used in lieu of the temporary trusteeship committee device which the mandatory powers had requested. The fact that the question of the status of several areas, other than mandated or trust territories, has been submitted to the United Nations has no relevance to Respondent's action in 1946.

Respondent's central argument, in this regard, seems to be that, even if the organ competent to modify or determine status must be in a position to make an informed judgment, the founders of the League provided for supervision in the Covenant—Article 22—whereas the requirement of consent to modification of the mandate was embodied only in the mandate. Respondent makes this argument at page 434 of the same verbatim.

Respondent concludes, *from this premise, that*—

> "... if one starts from the initial position that ... and there is an intention of making provision for a change in the status of the territory ... then the mere fact that that contèmplation involves going to a particular international organization about it, surely cannot possibly carry with it a contemplation that there must also be this more onerous obligation, about which nobody has said anything, namely that of international supervision by that organization over the actual administration of the territory". (**VIII**, p. 434.)

Among the many difficulties with Respondent's argument, in this respect, one of the greatest is that far from the Powers "starting from the initial position" in 1946, as Respondent phrases it, as Respondent now concedes, the Respondent's Government at that time understood that the Mandate had survived the dissolution of the League; there was not any starting from scratch. As for Respondent's contention that nobody said anything about international supervision over the Territory, it may be said only that Respondent consistently in this record has ignored the statement of Mr. Nicholls at the Preparatory Commission, in which he, on behalf of the then Government, urged the establishment of interim machinery, and Mr. Nicholls has not earned mention either in Respondent's written pleadings or in its oral arguments.

Respondent advances yet another argument to explain Marshal Smuts' use of the phrase "competent international organs". Respondent has said:

> "... there could, for purposes of bringing about a change of status of this nature, be a change in competent international organs, and there had, in his view, occurred such a change, there being a competent organ, that is, competent in the sense that when agreement was reached with that organ, an effective new arrangement would

come into effect—effective in the sense that it would be recognized by other members of the international community". (**VIII**, pp. 440-441.)

The position seems to be that Marshal Smuts was drawing what could only be called a subtle distinction between an international organization competent in fact but not competent as a matter of law. Marshal Smuts himself evidenced no such intention. He said:

"International responsibility precluded it from taking advantage of the war situation by effecting a change in the status of South West Africa without proper consultation either of all the peoples of the Territory itself or with the competent international organs."

He, thus, recognized the obvious legal bar to action without submission to a competent international organ.

Respondent's final argument regarding the legal significance of its submission to the General Assembly in 1946 of the issue of termination of the Mandate is that such submission cannot be taken as evidence of acceptance of international supervision, inasmuch as Respondent's willingness to report was limited by reference to reporting in terms of Article 73 of the Charter. Respondent's position with regard to the applicability of Article 73 in the verbatims, from which I have quoted, may, indeed, possibly be developed further in response to the question propounded to the Parties by Judge Jessup. In any event, on the basis of the verbatims and the treatment of the question of Article 73, it is interesting to note how Respondent actually treated the matter of its obligations, if any, pursuant to Article 73 *(e)* of the Charter, and this would directly bear, in the Applicants' respectful submission, on the question posed by Judge Jessup.

With regard to the procedures followed by Respondent in connection with this matter it is to be noted, first, that at no time in 1946 did Respondent, or anyone else for that matter, question the supervisory powers of the United Nations in any respect. Respondent first did so in 1947. In his statement, Marshal Smuts referred to Article 73 of the Charter in connection with Respondent's reports to the United Nations. Respondent contends that his statement contained what Respondent calls an "ambiguity"; that word is used in the verbatim, **VIII**, at page 453, and that this ambiguity, as Respondent calls it, was cleared up in 1947. The ambiguity relates to the question whether or not Respondent was obliged to report to the United Nations under Article 73 *(e)*, that is to say, whether Marshal Smuts intended to convey the impression in his statement that Respondent was offering a voluntary activity or whether it was, on the contrary, tending to acknowledge a legal responsibility. This was the ambiguity to which the Respondent refers.

Now this ambiguity, as Respondent refers to it, was cleared up in several statements made by Respondent's representatives at a later stage, stating explicitly that the Respondent did not regard the Mandate as falling within Chapter XI. This was, of course, at a time when Respondent's Government of the day considered that the Mandate was legally in existence. Respondent itself has cited these statements to demonstrate that the Territory does not fall within the scope of Article 73 *(e)*.

Thus, we have the statement made at the General Assembly, second session of the Fourth Committee at page 16—

"The Union of South Africa did not claim that South West Africa was a colony but it was willing to submit annual reports like those

required for the non-self-governing territories under Article 73 *(e)*."

Similarly, it was explained by the Respondent's representative, this was at the second session of the General Assembly as well—

"The annual report which his Government would submit on South West Africa would contain the same type of information on the territory as is required for non-self-governing territories under Article 73 *(e)* of the Charter."

This is from the *General Assembly Official Records*, the second session, Plenary, Volume II, page 538.

In the cases at bar, Respondent has adopted these positions as its own—the positions reflected in the two statements just quoted. Thus, at page 58 of the Counter-Memorial, **II**, Respondent states that the report actually submitted by Respondent in 1947 for the year 1946 contained "the same type of information on the territory as required for non-self-governing territories under Article 73 *(e)* of the Charter". On 7 April 1965 in these Oral Proceedings, Respondent's counsel stated "there was no conception that the case fell under Article 73 *(e)* as a matter of law"—this is from the verbatim record, **VIII**, at page 454. This proposition therefore, seems to be common cause. All this being so, Mr. President, the events of 1946 begin to emerge more clearly—the Government of South Africa was of the opinion that the Mandate for South West Africa continued in law. It also considered that its international responsibilities precluded it from unilaterally changing the status of the Territory and that the United Nations was the competent international organ in this regard. The only remaining question, if indeed it is separable from the competence of the United Nations to consent to a change of status is the question of survival of accountability itself; the matter becomes reduced to its essence in this formulation.

On 23 July 1947 Respondent advised the Secretary-General of the United Nations that the obligations of the Mandate prevented the South African Government from "flouting the wishes of those who under the Mandate have been committed to their charge". This is from United Nations document A/334, the second session of the General Assembly, Fourth Committee, page 135, and Respondent went on "inasmuch as the request for co-operation of the territory and the termination of the Mandate had been turned down by the General Assembly in resolution 65 (I) 'the Union Government have no alternative but to maintain the status quo and to continue to administer the territory in the spirit of the existing Mandate'".

Respondent's communication referred to a resolution adopted on 11 April 1947 by the House of Assembly of the Union Parliament, the letter to the Secretary-General, which contained the statement just quoted. The resolution by the House of Assembly of the Union Parliament stated as follows—

"Whereas in terms of the *Treaty of Versailles*, full power of legislation and administration was conferred on the Union of South Africa in respect of the territory of South West Africa, subject only to the rendering of reports to the League of Nations, and whereas the League of Nations has since ceased to exist and was not empowered by the provisions of the *Treaty of Versailles* or of the Covenant to transfer its rights and powers in regard to South West Africa to the United Nations Organization or to any other Organization or body

> and did not in fact do so; and whereas the Union of South Africa has not by international agreement consented to surrender the right and power so acquired, and has not surrendered these by signing the Charter of the United Nations Organization and remains in full possession and exercise thereof; and whereas the overwhelming majority of both the European and non-European inhabitants of South West Africa have expressed themselves in favour of the incorporation of South West Africa with the Union of South Africa. Therefore, this House is of the opinion that the territory should be represented in the Parliament of the Union as an integral portion thereof and requests the Government to introduce legislation, after consultation with the inhabitants of the territory, providing for its representation in the Union Parliament and that the Government should continue to render reports to the United Nations Organisation as it has done heretofore under the Mandate."

This resolution thus makes explicit Respondent's awareness of its responsibility to report to the United Nations "as it has done heretofore under the Mandate". Further it is evident from the wording of the resolution that the obligations to report to the United Nations were regarded as following from the fact that South Africa retained rights under the Mandate. It referred, as the Court will recall, in the preamble, that South Africa has not by international agreement consented to surrender the rights and powers so acquired under the Mandate.

Now Respondent seeks to evade the significance of the resolution just quoted by disclaiming an official character for it. Respondent contends in its rebuttal that the reference in the resolution to reporting to the United Nations and I quote from the verbatim record, **VIII**, at page 464, that the reference to reporting—

> "... is not a reference to anything said by, or on behalf of, the Union Government to the United Nations, or in any international context. It is purely a reference to a phrase occurring in a resolution, as it is here called, of the Union Parliament. It was not even a resolution of the Union Parliament. It was a resolution of one of the Houses of the Union Parliament—a resolution of the House of Assembly in the Union Parliament."

Respondent proceeds then to argue that it is not legally bound as a matter of constitional law to carry out or heed the opinion of one of the Houses of its Parliament, but Respondent nowhere, that the Applicants are aware of, adverts to or seeks to explain why this resolution was referred to in Respondent's official communication of 23 July 1947 to the Secretary-General. Respondent's communication to the Secretary-General commences as follows—

> "I have the honour to inform you by direction that the Resolution of the General Assembly has been duly considered by the Union Government and was discussed in the Union Parliament when a Resolution in the following terms was adopted."

This is the commencement of the communication from Respondent to the Secretary-General of 23 July 1947 and is in the *General Assembly Official Records*, second session, Fourth Committee, at page 134.

At that time, Respondent's Government attributed sufficient weight and legal significance to the resolution to communicate it textually to the

Secretary-General of the United Nations with an introduction which I have just quoted. There is no reason appearing from the record and no explanation as said by Respondent to deny or refute the fact that Respondent thereby in its communication intended to make official representation to the Secretary-General in terms of the resolution itself, the text of which was communicated, as I have said. It would be a perfectly obvious understanding of the intent of the letter by the Secretary-General and there is nothing in the record to indicate any explanation to the contrary. Indeed, in the last paragraph, of the very same communication, the Government explicitly associated itself with the resolution in the following terms—

> "I am finally asked to observe that in the Parliamentary resolution quoted above, the Union Parliament *inter alia* expressed the opinion that the territory of South West Africa should be directly represented in the Union Parliament and that, after consultation with the inhabitants of the territory, legislation should be introduced to that end. Steps will therefore be taken in due course to carry out the required consultation."

And the letter stated also—

> "The Union Government have already undertaken to submit reports on their administration for the information of the United Nations."

This is at page 135, of the record already quoted.

Thus, the Respondent associated itself directly and explicitly with the Assembly resolution in respect specifically of the representation in the Union Parliament of the Territory, and stated that the Union Government have already undertaken to submit reports on their administration for the information of the United Nations. The resolution made two requests for action on the part of Respondent's Government; in both cases the requests were carried out by the Government, were treated as obligations which the Government would implement or had already carried out, and the resolution was transmitted to the Secretary-General in the form and with the covering paragraph which I have quoted.

In the 1950 Advisory Opinion, this honourable Court took the letter under discussion as one of the declarations constituting, in the Court's words: "recognition by the Union Government of the continuance of its obligations under the Mandate", that is from the *I.C.J. Reports 1950*, at page 135. This was a finding by the Court and Respondent has deduced no new facts or any other kind of evidence to militate against this judicial finding.

In summary, up to the autumn of 1947, the South Africa Government had—

(a) recognized that in law the Mandate of South West Africa continued in full force and effect, notwithstanding the dissolution of the League, and this is now common cause;

(b) advocated the establishment of interim machinery for the supervision of mandates pending other arrangements since, in the words of Mr. Nicholls at the Preparatory Commission "the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report";

(c) taken part in the system of pledges by which each of the manda-

tory powers in terms undertook to carry out all of the obligations of the mandate until the conclusion of other agreed arrangements;

(d) submitted the issue of the incorporation of the Territory of South West Africa and the termination of the Mandate of the General Assembly as the competent international organization for judgment;

(e) associated itself in a letter to the Secretary-General of the United Nations with a resolution of the House of Assembly of the Union Parliament, calling for reports to be rendered to the United Nations as heretofore under the Mandate.

Not until September of 1947, did Respondent's Government begin to question openly the supervisory powers of the United Nations and only in 1948, did it for the first time begin to question the legal existence of the Mandate as a whole. Respondent's repudiation of its earlier acknowledgment of a continuing obligation to carry out its responsibilities laid upon it by the Mandate, as well as its reversal of its previous recognition of the authority of the United Nations to assume the task of international accountability with respect to the obligations of the Mandate, until other arrangements had been agreed with the United Nations, in the terms of the 18 April 1946 resolution—such a repudiation and reversal, Mr. President, has never been and are not now acceptable to the United Nations.

On the contrary, the United Nations has adhered to the position that it is endowed by the Charter with the competence and vested with the responsibility to give to the inhabitants of South West Africa no less and no fewer of the benefits of international supervision than the inhabitants had previously enjoyed under the League of Nations while it survived. There was never an issue with the United Nations—there never has been, in the Applicants' respectful submission, between exercising or not exercising international supervision over South West Africa. The only question which has ever arisen, except for Respondent's position, has pertained to the *method* by which that supervision would be carried out. There were, as we shall see, ambiguities, inconsistencies, confusion—much is made of that by the Respondent in this record, and I will refer to those matters in a few moments—and this is why the United Nations submitted its request to this Court to clear up the doubts and confusion and then accepted the Advisory Opinion overwhelmingly. The only question which ever arose pertained to the method by which the supervision would be carried out. The *supervisory arrangement*, which had been specifically designed for application to mandated territories generally, was that embodied in the trusteeship system. The expectation and the preference of the United Nations Members was that all mandated territories, other than those gaining independence, should be converted into trust territories, thus becoming subject to the normal supervisory procedures of the Trusteeship Council.

The United Nations, nevertheless, was vested by Article 10 of the Charter with competence to undertake the task of devising special methods for dealing with any mandated territory which might not be brought into the trusteeship system. The Court in 1950 raised no question and apparently entertained no doubt that this was within the scope of Article 10.

Respondent's rejection of the trusteeship principle created the necessity for the development of an exceptional scheme of supervision. When it became apparent and all too clear that continued effort on the part

of the General Assembly, of which the Applicants were and are members, to persuade Respondent's Government to submit a trusteeship agreement for South West Africa was not likely to achieve success, the Assembly showed no hesitancy in addressing itself to the task of developing arrangements for the international supervision, which it was clearly entitled to exercise, and which Respondent, in our respectful view, equally clearly was obliged by its own declarations and pledge to accept.

Mr. President, the Applicants shortly will discuss the development of the special system—or the third system, as I have previously styled it—for the implementation of the duty of Respondent to submit to, and the right of the inhabitants of the Territory to enjoy the protection of, international supervision. Before turning to that matter, however, which was raised at length in the rebuttal, it is necessary to deal with certain other contentions which were emphasized in the rebuttal relating to the disposition of the Palestine Mandate and its significance to these proceedings.

Palestine, of course, was the only other instance, other than South West Africa itself, in which the United Nations, in the mandate field, was confronted with a special and highly complex mandate problem. Obviously, the Palestine case was not analagous to the case of South West Africa. The mandatory power in that case, the United Kingdom, did not in any sense, of course, deny the continuing validity of its obligations under the Mandate, nor did it ever reject the authority of the United Nations to exercise supervision. The only references made by Respondent to justify its contention to the contrary, are its construction of the United Kingdom pledge—and, in the Applicants' view, a strained construction—and the course it followed with respect to the Palestine Mandate, and, therefore, the Palestine problem looms up large as a factor relevant to a fair and just appreciation of the Respondent's contention in this regard.

The United Kingdom Government never, as I have said, rejected the authority of the United Nations to exercise supervision over the Mandate for Palestine. Certainly, the United Kingdom never avowed, nor did it harbour, any design to incorporate or annex the mandated Territory—that goes without saying. The history of events relating to the disposition of the Palestine Mandate is a long and tortuous one, and the record of these proceedings need not be burdened with excessive detail, but one thing which stands out most clearly, in the Applicants' submission, is the warmth with which the United Kingdom welcomed the exercise by the United Nations of a supervisory role with respect to the Mandate with regard to its administration over the Mandate and the modification of its then legal status as a mandate.

The contrast between the attitudes of the United Kingdom Government and that of Respondent—present attitude of Respondent—with regard to their obligations as mandatory powers, is, in itself, dramatic evidence of the distinction between the two situations. Respondent alone among all mandatory powers has steadfastly rejected the processes of international accountability. The United Kingdom, in respect of the Palestine Mandate, accepted gladly an enlargement of the responsibilities to submit to international accountability, which it had always respectfully accorded under the Mandate.

In an important sense, however, the Palestine case is relevant, if not essentially analagous, to the case of South West Africa, inasmuch as the Palestine question, and its handling by the United Nations, provides a dramatic demonstration in the early years of the United Nations of the

Organization's willingness and competence to supervise mandated territories which were not placed under the trusteeship system. The United Nations, in the Applicants' view, did *not* deal with the Palestine case on the basis of a competence specially conferred upon it by the United Kingdom, as Respondent insists. The historical record appears to make amply clear, in the Applicants' view, that the United Nations acted on the basis of an authority which was rooted in the Charter itself, that the United Kingdom acknowledged and welcomed with relief the competence of the Organization, inasmuch as the complexity and explosive dangers inherent in the disposition of the Mandate confronted the United Kingdom with dilemmas which it could not resolve by itself, but required full consultation and co-operation with the international community, speaking through the competent organ, the General Assembly, and later, the Security Council.

The United Nations, indeed, was constrained to exercise far more extensive powers in regard to the Palestine question than the League ever had to exercise, and certainly more than the United Nations has yet had to assume with respect to South West Africa. The decisively important role played by the United Nations in the Palestine case may submerge, but does not alter, the fact that the basis of United Nations competence was rooted in the proposition that the United Nations was exercising supervision over a mandated territory, and the United Nations was doing so as a competent international organ which had replaced the League of Nations, and one upon which the sacred trust had been laid as an organized international community, in the words of the 1962 Judgment, at page 329.

In February 1947, Mr. Creech Jones, then United Kingdom Secretary of State for Colonies, said in the House of Commons:

> "We are not going to the United Nations to surrender the Mandate, we are going to the United Nations setting out the problem and asking for their advice as to how the Mandate can be administered. If the Mandate cannot be administered in its present form, we are asking how it can be amended." (*International Conciliation*, October 1949, No. 454, p. 614.)

On 2 April 1947, less than a year after the dissolution of the League and only a short while after the first session of the General Assembly, the United Kingdom Government addressed a communication to the acting Secretary-General of the United Nations, stating, *inter alia*:

> "His Majesty's Government in the United Kingdom request the Secretary-General of the United Nations to place the question of Palestine on the Agenda of the General Assembly at its next regular annual session. They will submit to the Assembly an account of their administration of the League of Nations Mandate and will ask the Assembly to make recommendations, under Article 10 of the Charter, concerning the future government of Palestine." (A/364, Add. 1, 9 September 1947, p. 1.)

The British communication, from which I have just quoted, also requested that a special session of the General Assembly be convened as soon as possible for the purpose of constituting and instructing a special committee to prepare for the consideration of the question at the next regular session to follow. The special session of the General Assembly, which was held in pursuance of the British request, established the United

Nations Special Committee on Palestine, commonly called UNSCOP, by resolution 106(S1) of 15 May 1947. This Committee was given extraordinarily wide powers with regard to Palestine, much beyond any which, of course, had ever been exercised under a mandate, within the concept of Article 6.

The breadth of powers given to the Committee is indicated by the following two or three paragraphs from the resolution which I have just cited:

> "Paragraph 2: The Special Committee shall have the widest powers to ascertain and record facts and to investigate all questions and issues relevant to the problem of Palestine.
> Paragraph 4: The Special Committee shall conduct investigations in Palestine and wherever it may deem useful, receive and examine written or oral testimony, whichever it may consider appropriate in each case, from the mandatory power, from representatives of the population of Palestine, from Governments, and from such organizations and individuals as it may deem necessary.
> Paragraph 6: The Special Committee shall prepare a report to the General Assembly and shall submit such proposals as it may consider appropriate for the solution of the problem of Palestine."

Of course the United Kingdom consented to this breadth of power; it needed the co-operation of the United Nations in carrying out a task of this magnitude. The efforts of the United Nations to carry out such a task would be frustrated without the co-operation of the United Kingdom. To interpret this as a grant of special power to the United Nations to carry out normal responsibilities of supervision under the Mandate, as if that did not exist without this grant of power, if it may be called one, would seem to me to involve a strange construction indeed of the British pledge and the British position historically.

While UNSCOP stated in its report to the General Assembly, dated 3 September 1947, that in the absence of the Permanent Mandates Commission, the mandatory power had no authority to which it might submit reports and otherwise offer an accounting "in accordance with the terms of the Mandate", and I lay stress upon the word "terms" of the Mandate—this is from A/364, pages 26 and 27—it seems evident from the terms of reference established for UNSCOP that the General Assembly was convinced that the United Nations possessed supervisory powers over Palestine—already possessed supervisory powers over the Mandate. Everybody concerned referred to the Mandate as still in existence—every document and every report demonstrates that assumption, that premise.

The actions taken by the Special Committee itself amply demonstrate that it shared in that conviction and assumption. Indeed, in the very next sentence, after the phrase just quoted from the UNSCOP report, the Committee buttressed the concept of the supervisory authority of the United Nations by doing what, Mr. President? By quoting from the United Kingdom's pledge to the last session of the Assembly of the League, and quoting from the Assembly's resolution of 18 April 1946 pertaining to the Mandate. The report of the Special Committee properly and sensibly called attention to the impossibility, clear impossibility, of adhering literally to the terms of the Mandate—these referred specifically to defunct organs of the League—those were the terms of the

Mandate. The Committee did not in any sense, visible sense, question the survival of the basic obligations of the Mandate, or deny the competence of the United Nations to serve as the international agency for giving effect to the central obligation of submitting to supervision and to control over the alteration of the status of the Territory—these were "givens" in the situation—the Assembly went far beyond them to meet the exigencies of the situation, the crisis situation. UNSCOP actually exercised, in accordance with its terms of reference as defined by the General Assembly, powers of unprecedented scope with respect to the mandated Territory of Palestine, and this fact, of course, will be well known to this honourable Court. Indeed, those powers went so far beyond the reporting requirement that the accounting which the United Kingdom had promised—had pledged—to submit to the United Nations became superfluous. Respondent's reliance upon the absence of such reports misses this central point. The detailed description of the work of the Special Committee in Palestine is contained in pages 4-7 of its report; for instance, one of the headings indicates that the Committee received "oral and written testimony from governments, organizations, religious bodies and individuals", and it is noted that the Committee took and acted upon the decision to visit various parts of the mandated Territories—this is from page 4 of the UNSCOP report. This went far beyond reporting—it made reporting superfluous. There was no problem in defining the investigative authority of the Special Committee; the then British representative, Sir Alexander Cadogan, had stated on behalf of the United Kingdom on 7 May 1947, prior to the establishment of UNSCOP, and I quote from the *General Assembly Official Records*, First Special Session, First Committee, at page 86:

> "Of course it is agreed by everyone here that the committee of investigation we set up will hear witnesses from all sides, representatives from all interests",

and the Committee did so.

Finally UNSCOP's recommendations themselves leave no doubt as to the Committee's conception of the supervisory power of the United Nations over the mandated Territory. For the period immediately prior to Palestine's acquisition of independent status, as contemplated by the Committee, it was recommended that: "The authority entrusted with the task of administering Palestine and preparing it for independence shall be responsible to the United Nations"; this is from A/364, page 43. The report of the Special Committee also stated that—

> "The relative success of the authority entrusted with the administration of Palestine during the transitional period in creating the proper atmosphere, and in carrying out the necessary preparations for the assumption of independence, will influence greatly the effectiveness of the final solution to be applied. It will be of the utmost importance to the discharge of its heavy responsibilities that, while being accountable to the United Nations for its actions in this regard, the authority concerned should be able to count upon the support of the United Nations in carrying out the directives of that body."

This is from the same document, at page 44.

But Respondent's attempt to deny the significance of the United Nations handling of the Palestine problem, aside from citing statements

of UNSCOP to the effect that the dissolution of the League meant that Great Britain could no longer discharge fully its obligations in accordance with the terms of the Mandate; Respondent's attempt to deny the significance of the United Nations activities with respect to the handling of the Mandate is premised—entirely premised—on the argument that the supervision came about solely as a result of what the Respondent calls "a specific arrangement" between the United Kingdom and the United Nations. In the verbatim record, **VIII,** pages 494-495, the Respondent states its key contention in this respect as follows, and relies very heavily indeed upon the line of argument, because it all goes back to the interpretation of the British pledge in April of 1946 which Respondent insists must be interpreted in the light of its construction of the Palestine case handling by the United Nations. Respondent argues:

> "Mr. President, as regards the supervisory powers in respect of Palestine, which the United Nations eventually obtained, it is true that shortly before Palestine was, in fact, divided and became independent on that basis, there was a brief period of United Nations supervision, but the very point which is emphasized by the record is this, that that supervision came about as a result of a specific arrangement, agreed to by the United Kingdom—and it was quite clearly the contemplation of all concerned that that specific arrangement was necessary in order to bring about that supervision. There was no contemplation whatsoever of a previously existing supervisory power on the part of the United Nations."

I have sought to make clear that the record in fact shows that the United Kingdom acknowledged and accepted the competence of the General Assembly, but it did not confer such competence upon the Assembly. The co-operation of the United Kingdom, as I have also said, was indispensable to the successful discharge of the difficult task which the United Nations undertook; but the fact that the Organization needed and obtained the collaboration of the member State most intimately concerned cannot be construed reasonably as indicating that the United Nations lacked authority to deal with the problem in the absence of special competence conferred upon it by that State. In offering its collaboration Great Britain designated itself as the Mandatory; in offering its collaboration Great Britain was carrying out its obligations as a mandatory beyond the bounds of the obligation; in order to deal with the exigencies of the situation, they went beyond the bounds of their obligations, as the United Nations undertook an extraordinarily wide responsibility. The Assembly was supervising a mandate—that is clear, obvious—but it was doing something much more, in addition, and the accomplishment of that additional burden and function depended largely upon the co-operation of the Mandatory Power, which was never withheld. Respondent's suggestion to the contrary has ironic, if not ludicrous, overtones; it conjures up a vision of what might have happened if the United Kingdom had followed the same course as Respondent, if the United Kingdom had rejected a role for the United Nations in the supervision and disposition of the Palestine Mandate; the head reels at the thought! What happened, fortunately, was that the United Kingdom accepted with relief a greater United Nations role and responsibility than the latter would have exercised merely as the supervisory organ

over the Mandate, pending an agreed arrangement to supplant the Mandate. The issue of the authority of the General Assembly to exercise supervision over the mandated Territory was raised and discussed in the *ad hoc* Committee on the Palestinian Question which met after the report of UNSCOP was released. This Committee, the *ad hoc* Committee on the Palestinian Question, after reviewing the recommendations of UNSCOP, made the final recommendations concerning Palestine to the General Assembly. The discussion of the competence of the General Assembly which took place in this body did not involve the issue, never involved an issue, concerning what power could be or had been bestowed upon the Assembly by any so-called "specific arrangement", to use Respondent's phrase, supposedly made on the initiative of, or in agreement with, the United Kingdom; rather, that discussion in the *ad hoc* Committee quite properly focused upon the question of the scope and extent of the powers relating to the supervision of mandated territories falling to the General Assembly by virtue of the Charter of the United Nations. Several member States, on the basis of special interest in the future of Palestine, contended that the United Nations had no competence whatever to deal with mandated territories, and accordingly lacked competence to pass upon the recommendations made in UNSCOP's report. A draft resolution was prepared, which would have submitted several questions to the International Court of Justice with a request for advisory opinion. Among the questions proposed to be asked—among them—were the following—I select those strictly relevant to the point under discussion here, in this context:

Question *(e)* whether the legal basis for the Mandate for Palestine has not disappeared with the dissolution of the League of Nations, and whether it is not the duty of the Mandatory Power to hand over power and administration to a government of Palestine representing the rightful people of Palestine;

(g)—whether the United Nations is competent to recommend either of the two plans and recommendations of the majority or minority of the United Nations Special Committee on Palestine, or any other solution involving partition of the Territory of Palestine, or a permanent trusteeship over any city or part of Palestine, without the consent of the majority of the people of Palestine; and

Question *(h)*—whether the United Nations, or any of its member States, is competent to enforce or recommend the enforcement of any proposal concerning the constitution and future government of Palestine, in particular any plan of partition, which is contrary to the wishes or adopted without the consent of the inhabitants of Palestine.

I have quoted these three questions proposed in a draft resolution circulated in the *ad hoc* Committee from the *General Assembly Official Records*, Second Session of the *ad hoc* Committee, pages 300-301. These questions were based upon the opinion expressed in a report drawn up by representatives of Pakistan, Syria and Saudi Arabia that—

> "The United Nations Organization has not inherited the constitutional and political powers and functions of the League of Nations, and that it cannot be treated in any way as the successor of the League of Nations insofar as the administration of mandates is concerned."

That is from the same report, page 276. These were the opinions expressed

by Pakistan, Syria and Saudi Arabia at that time, in connection particularly in the context of the Palestine Mandate in which they asserted a special interest, as the Court will know.

It will be noted at once that proposed question *(e)*, the crucial one, whether the legal basis for the Mandate for Palestine has not disappeared with the dissolution of the League, and so forth, related to the issue of lapse or survival of the Mandate upon the dissolution of the League. This is, however, no longer an open issue in these proceedings. Respondent and the Applicants have reached common cause, it would appear, that the Mandate did survive the dissolution of the League; as a matter of law that proposition was accepted by the then Government of Respondent. Respondent has conceded, in short, that the Government of South Africa, during the period of and at the time of the dissolution of the League, proceeded on the premise that the mandates system as a matter of law survived the League's dissolution; I cite the verbatim record, **VIII**, pages 428-429.

No question was raised concerning the lapse or survival of international accountability in the resolution of these three powers, to which I have referred, in the *ad hoc* Committee proceedings; no question was raised about the lapse or survival of international accountability apart from the so-called legal basis of the Mandate itself, in the phrase they use. Nor was any question raised on the basis of the assumption voiced by Respondent, to wit, that conferment of competence upon the Assembly was accomplished by a "special arrangement" with the United Kingdom. No such question was raised.

The only question raised was the survival or not of the Mandate upon the dissolution of the League of Nations.

Questions *(g)* and *(h)* which I have quoted referred merely to the competence of the United Nations to recommend or enforce any solution without the consent of the inhabitants of the Territory. That was the point of questions *(g)* and *(h)*. And obviously those questions assumed that such competence would exist if the inhabitants manifested consent to a proposed solution, if the question *(e)* had been submitted to the Court and answered to the effect that the legal basis for the Mandate had survived.

The majority of the members of the *ad hoc* Committee did not share the doubts voiced in the report of UNSCOP and reflected in the quotations relied upon by the Respondent, which I have just quoted. The decision of the *ad hoc* Committee not to request an advisory opinion followed release of the UNSCOP report, as I have said. In the *ad hoc* Committee discussions preceding the decision not to request an advisory opinion, in respect of these questions, or any of them, the views of the minority were refuted by several other members of the Committee. The Polish representative declared that—

> "... it was impossible to dispute the validity of the Mandate conferred by the League of Nations and confirmed by the terms of Article 80 of the Charter. Although the functions of the League of Nations had come to an end, that did not mean that all control was thereby abolished: that responsibility now rested with the United Nations."

This is from the record at page 162. I pause merely to note the reference to Article 80 of the Charter, a construction which appears to give an

affirmative, positive content, which was frequently done by Members but which the Applicants do not give to that article.

The Soviet delegation's views are reflected in the summary record as follows:

> "Mr. Tsarapkin, the Soviet representative, dealt with the question of the Assembly's powers in regard to the solution of the Palestinian problem. It was surprising and deplorable that those powers should have been called in question. Neither the United Kingdom, when it had made its request to the United Nations, nor the representatives who had attended the special session of the Assembly, nor the members of the Special Committee had had any doubts on that score. Such doubts as were being expressed in the *ad hoc* Committee were completely unjustified, because Article 10 of the Charter gave the General Assembly the right and duty to discuss the Palestine question [mark the word 'duty' to discuss]. It was in complete accordance with the provisions of Article 10 that the special session had been called, the Special Committee established and the Palestinian question considered by the General Assembly. Any recommendations which the Assembly made would have sound juridical foundations." (P. 84 of the record already cited.)

The Soviet Union thus expressed agreement with the position which had been expressed by the United Kingdom in its letter to the Acting Secretary-General on 2 April 1947, from which I have previously quoted in part. This was to the effect that Article 10 provided the basis for the Assembly's action regarding Palestine. Article 10, of course, also was cited by the Court in the 1950 Opinion as establishing the legal foundation for the competence of the Assembly to exercise supervision and to receive and examine reports concerning mandated territories (*I.C.J. Reports 1950*, p. 137).

Mr. President, the United States delegate's views are reported in the summary records of the Committee as follows:

> "He had wished to say that the legal competence of the United Nations having been called in question, he did not consider that it should be referred to a sub-committee while the principal committee waited for its judgment. He stated emphatically that there was no doubt in the mind of the United States delegation that the *ad hoc* Committee and the General Assembly had complete authority to deal with the issue." (P. 135 of the *ad hoc* Committee report.)

It is noteworthy that the views of the Syrian delegate, who opposed the Assembly's competence to deal with Palestine, are reported in the summary record as follows:

> "The mandatory could present the case to the General Assembly in one of two or three forms. The first way would be to recognize the independence of the mandated territory, since it is mature and entitled to that independence, and to notify the General Assembly to take note of that fact.
>
> The second way would be to come to a trusteeship agreement with the States directly concerned, as provided for in Article 79 of the Charter, and to present the trusteeship agreement to the General Assembly for its approval.
>
> The third way would be for the mandatory to come to the General

> Assembly and say—'The mandate which I have from the League of Nations has failed, it is unworkable. I give it up and return this trust to the General Assembly to manage it in whatever way it likes'." (*Official Records of the General Assembly*, 1st special session, Plenary, Vol. I, p. 136.)

The clear and specific assumption that the Mandate existed, that the United Kingdom as mandatory had duties under it, and the third alternative suggestion was that the United Kingdom might come to the United Nations and surrender the Mandate, return this trust.

In summary, Mr. President, the record provides evidence that, contrary to Respondent's contention, there was no evidence of a reliance upon a British so-called special arrangement to confer powers upon the United Nations over mandated territories. The question of the Assembly's competence was discussed in terms of the provisions of the Charter, notably Article 10, with respect to the scope of the exercise of its powers in this extraordinary situation which, as was evident to all concerned, far transcended the responsibilities ever exercised by the League, ever exercised by the United Nations in any other case with respect to a mandate. The Assembly affirmed a competence derived from and based upon the Charter by rejecting the suggestion that its authority was sufficiently uncertain even to require clarification by the Court, and by taking action reflecting confidence in its own view of the matter. This is to be contrasted with the 1950 action, in which the confusion prevailing in the Assembly at that time led to a decision to request the honourable Court for an advisory opinion, with respect to the range of questions involving the Mandate's existence itself and all the corollary factors, in view of the Respondent's obdurate refusal and failure to comply with its pledge of April 1946.

It will be recalled at this point that Respondent's version of the history of the Palestine question has a twofold significance in these proceedings. First, it is asserted as a so-called new fact, unknown to the Court in 1950, which the Respondent asserts must have led the Court to a contrary conclusion had it known of Respondent's version of the Palestine developments. And secondly, it is asserted in support of Respondent's construction of the United Kingdom pledge of April 1946, which in the Applicants' submission is a strained, distorted and wholly erroneous construction of that pledge.

Respondent seeks to bolster its contention with respect to the latter point, that is to say, that the United Kingdom did not in its pledge intend to recognize a legal duty to submit to United Nations supervision, by arguing that, at the outset of the Palestine question (and I quote from the verbatim record, **VIII**, at p. 495), "from the outset, the United Kingdom made it clear that it would not necessarily accept any United Nations recommendation". In proper context Respondent's argument may be unwittingly misleading. The British delegate, in fact, understandably drew a distinction between acceptance of the General Assembly's recommendations, on the one hand, and unwillingness to bear sole responsibility for carrying them out, on the other hand.

Thus, during the first special session of the Assembly, upon being questioned as to his Government's attitude, the British delegate replied as follows:

> "All we say, and I made this reservation the other day, is that

we should not have the sole responsibility for enforcing a solution which is not accepted by both parties and which we cannot reconcile with our conscience. Is there any other Member of the United Nations which, in our place, would not make so reasonable a stipulation? But, if the question is addressed to us concerning our acceptance of any recommendation which the Assembly may make, I suggest that it might also be addressed to other interested parties, and indeed to all other Members of the United Nations." (*Official Records of the General Assembly*, 1st special session, main committees, Vol. III, p. 184.)

That seemed to be his way of saying the question is superogatory.

[Public hearing of 11 May 1965]

Mr. President and Members of the Court, at the conclusion of the last session I had referred to the distinction to be drawn between the British delegate's acceptance of the General Assembly's recommendations, on the one hand, and Britain's unwillingness to bear the sole responsibility for carrying out such recommendations, and that, in the Applicants' submission, the failure of Respondent to draw this distinction might inadvertently create an erroneous impression of the significance of the transaction, and I had quoted a statement made by the British delegate during the first Special Session of the General Assembly in which he made clear, or so it seems to the Applicants, that Britain was pointing out very naturally that it should not have "the sole responsibility for enforcing a solution which is not accepted by the parties and which we cannot reconcile with our conscience". Those were the words of the British delegate. And I had said, Mr. President, that the distinction clearly was appreciated by other members. Thus, for example, the New Zealand delegate, Sir Carl Berendsen, said, and I quote from the records of the Second Session *Official Records* of the Assembly, the *ad hoc* Committee on the Palestinian question, the 28th Meeting, 22 November 1947, at page 166:

"The mandatory power must not be charged with the sole responsibility for the implementation of any partition plan. If the United Nations assumed the responsibility for partitioning Palestine then each member must assume proportionate responsibility for the implementation of that decision"—

a burden-sharing most appropriate in the circumstances.

An undertaking by Respondent in terms similar to those expressed by the British Government at that time would indeed be a historic forward step, with regard to the Mandate for South West Africa. The distinction made by the United Kingdom was explained in more detail by the then Colonial Secretary, Mr. Creech Jones, as follows, from the same minutes at page 97:

"It had been suggested that the United Kingdom should carry the full responsibility for the administration of Palestine and for enforcing changes proposed by the United Nations during an indefinite transitional period until independence was attained. The United Kingdom was to act under the supervision of the United Nations and to be assisted by a programme of aid as mentioned by the representative of the United States (11th Meeting) including

the possible assistance of a voluntarily recruited international police force. It would be unreasonable to ask the United Kingdom Government to carry sole and full responsibility during the transitional period."

And, as a final evidence of the fact that the true significance of the British position and the distinction sought to be drawn between bearing the sole responsibility and accepting the decisions or recommendations of the General Assembly, this distinction was perceived, among others, by President Masaryk of Czechoslovakia who added at the same proceedings at page 45:

"With the United Kingdom ready to withdraw from Palestine and not prepared to implement alone the decisions which the General Assembly might take on the basis of the recommendations of the *ad hoc* Committee, that Committee's responsibility had greatly increased since it would have to find a means of implementing the General Assembly's decisions in which everyone would have to help."

The true significance of the British position, therefore, Mr. President, was not that which is contended for by Respondent. The United Kingdom was merely asking for international implementation of any plan adopted for dealing with the difficult problem of Palestine, and it was accepting the authority of the United Nations even beyond the degree of supervisory power which the United Nations would have had the competence to exercise under the terms of the Mandate.

Respondent argues finally that the resolution of the General Assembly on the Palestine problem—the last one—and the attached plan of partition, and these are Respondent's words, "makes abundantly clear the need for consent thereto by the former mandatory power". This was in the verbatim record, **VIII**, at page 499. The inference which Respondent seeks to draw from this statement on the resolution is that a special consent was conferred—a special arrangement was entered into—upon the basis of which solely the United Nations had authority to deal with the matter.

The only evidence cited in support of Respondent's contention in this regard is that the final resolution, which is 181 (II), 29 November 1947, after noting in its preamble that the Assembly had met in special session at the request of the mandatory power, states in the first operative paragraph:

"Recommends to the United Kingdom, as the mandatory power for Palestine, and to all other Members of the United Nations the adoption and implementation [and so forth, that is to say, the plan that follows]."

Respondent, in its rebuttal argument, stresses and repeats the phrase "Recommends to the United Kingdom". This was in the same verbatim record at page 499, and again seeks to draw an inference of a special arrangement between the United Kingdom and the United Nations which solely was responsible for vesting authority or power or competence in the United Nations with respect to this matter. The word "Recommends", of course merely reflects the fact that the powers of the General Assembly, under Article 10 of the Charter, are recommendatory, as the Court would be aware. The use of the term "Recommends" in United

Nations General Assembly resolutions, of course, is customary and has no special significance in this context at all. What is unusual, however, about the quoted operative paragraph is not the element to which the Respondent draws the Court's attention, it is that the quoted paragraph addresses its recommendation not only to the United Kingdom, as mandatory, but to all other Members of the United Nations as well. The significance of singling out the United Kingdom is highlighted by it being addressed in the resolution as "mandatory". It was addressed in that capacity, as distinguished from all other Members of the United Nations, to whom the recommendation was also addressed. The General Assembly thus confirmed that the Mandate was in existence, that the United Kingdom was the mandatory, and, by the clearest implication, that the General Assembly considered that the legal basis for the exercise of the power was rooted in the Mandate itself. There would be no other reason for singling out the United Kingdom from among all the other Members of the United Nations to whom the resolution was addressed unless that legal fact had some significance in the context. And the quoted paragraph, accordingly, in the Applicants' respectful view, is to be accorded a significance quite the contrary to that for which the Respondent contends.

The General Assembly, at all times, evidenced a broad conception of its competence in the Palestine question, a competence which was based on the Assembly's supervisory powers under the Mandate, even though it went far beyond the limits of those powers to meet the exigencies of the problem. Perhaps the single clearest bit of evidence in support of this contention is to be found in the final resolution of 29 November 1947 itself. The General Assembly incorporated in that resolution a request directed to the Security Council urging the latter to assume responsibilities in connection with the recommended solution. This will be found in the second operative paragraph, U.N. Document A/519, pages 131-132. No reference whatever was made, in that operative paragraph addressed to the Security Council, to United Kingdom consent in this connection. It was clearly regarded as irrelevant. Nor was any reference made to United Kingdom consent in the partition plan itself, which provided, *inter alia*, that the Commission which was to be established in the plan "was to be guided in its activities by the recommendations of the General Assembly and by such instructions as the Security Council may consider necessary to issue". That is from page 135 of the document already cited. No reference was made therein to United Kingdom consent or the necessity for the United Kingdom's consent. The Applicants respectfully submit that only one conclusion can reasonably be drawn from the history of events and transactions which marked the course of the Palestine question from its origination to its solution.

This conclusion is that the British Government at all times manifested its awareness and acknowledgement of all its obligations as Mandatory, that it was fully alive to the burden which it was forced to bear as Mandatory by reason of the extraordinary complexities of the problem, that it proffered full co-operation to the United Nations to the end that a just and orderly solution might be found through the processes of the United Nations and the processes in this case went far beyond, but included its powers and competence under the Mandate. For its part, the General Assembly at all times manifested a very realistic awareness that a solution could not be found in the absence of

loyal co-operation on the part of the Mandatory, inasmuch as the responsibilities undertaken by the United Nations in this matter went far beyond the normal mandate burden as I have said.

The co-operative enterprise which resulted from the full co-operation between a mandatory power and the United Nations was indispensable to a successful resolution. References to consent of the United Kingdom in various contexts relevant here—and the phrase was used in various contexts, as Respondent properly points out—but the use of that phrase in those contexts will be seen to reflect mutual realistic awareness of the necessity for co-operation in processes far transcending those which normally had attended or would attend the supervision over a mandate. Such references to consent of the United Kingdom, read in the context of the problem itself, merely show that the United Nations was exercising a function which included and was rooted in its supervisory power over the Mandate but which, in addition, went far beyond the normal exercise of such administrative authority.

In the separate opinion of Judge McNair, appended to the 1950 Opinion, the learned judge stated as follows, and I quote from page 157, of the *I.C.J. Reports 1950*:

> "The dissolution of the League on 19 April 1946, did not automatically terminate the mandates. Each mandate has to be considered separately to ascertain the date and the mode of its termination. Take the case of Palestine, it is instructive to note that on 29 November 1947, the General Assembly of the United Nations adopted a resolution approving a Plan of Partition of Palestine, which was firmly based on the view that the Palestine Mandate still continued as is evident from Articles 1 and 2 of part *(a)* and Article 12 of part *(b)* of the Plan"

and Judge McNair went on to say—to point out again in the Peace Treaty with Italy of 10 February 1947—"it was considered necessary—Article 40—that Italy should renounce all her rights under the mandate system and in respect of any mandated territory".

Now of course it is common cause, or seems to be, that this Mandate over South West Africa and the mandate system in general was regarded by Respondent's Government, at the time, to have survived the dissolution of the League of Nations as a matter of law, and, of course, that is completely consistent with Judge McNair's opinion and needless to say, with the views of this honourable Court in its 1950 Opinion. It is interestingly enough a reversal, this concession by Respondent, of the position taken by Respondent through Dr. Steyn in his statement to the Court in 1950. At that time, the Respondent, as the Court will be aware, took the position before the Court that the Mandate had lapsed upon dissolution of the League and that the Respondent had the authority, the power and the confidence to do what it wished with the territory. Respondent seems, therefore, to have reversed itself back to the position that it assumed in 1946, that is to say, it now concedes that, at that time in 1946, Respondent's Government considered that the Mandate was in existence despite the dissolution of the League as a matter of law and has thereby withdrawn its presentation to the Court in that respect in 1950.

The foregoing discussion, Mr. President, it is respectfully submitted, sets into true perspective all three so-called new facts upon the basis of

which Respondent asks the Court to erase or to ignore, to review and reconsider the 1950 Advisory Opinion.

First, it has cited now again, as in 1962 in the proceedings upon the preliminary objections that had the Court been aware of the circumstances attending the decision on the part of the Preparatory Commission to reject the proposal for a temporary trusteeship commission, had the Court been aware in 1950 of these circumstances, the Court could not have reached the conclusion which it did. As a matter of fact, Mr. President, in the record of the presentation of the matter to the Court in 1950, as we pointed out to the Court in the Oral Proceedings of 1962, the submissions of the Secretary-General's representative, Dr. Ivan Kerno, at that time, included reference to the action of the Preparatory Commission in rejecting the proposal for the temporary trusteeship commission. A careful reading of the submissions before the Court in 1950, of the arguments before the Court in 1950, shows that there was not an elaborate or even a studied demonstration or representation to the Court in 1950 concerning the actual circumstances within the Preparatory Commission at that time—the Applicants have now endeavoured to lay these before the Court in perspective. It would seem reasonable to assume that if the Court in 1950 had known, for example, about Mr. Nicholls' proposal for the establishment of a temporary machinery to which to report, if the Court had known that other Mandatories had supported a similar procedure, if the Court in 1950 had known that there was substituted for this proposal the technique of the pledging procedures—if the Court had known this in 1950, it seems to the Applicants, far from changing their view with regard to the proper interpretation of the circumstances, they would have regarded their view to be fully confirmed and justified. Then, the Respondent has relied upon the two Chinese resolutions, as a new fact, which had the Court known in 1950, would have led to a conclusion contrary to that reached by the Court. The Court in 1950 it is true, so far as the record of the pleadings discloses, having not been advised of the circumstances in which the Preparatory Commission had rejected the proposal of the mandatory powers for a temporary trusteeship committee, there was no basis upon which the Court could then adequately evaluate the two Chinese resolutions, even if they had been called to the attention of the Court—this is obviously highly speculative at best—but the Respondent has placed so much reliance upon these new facts that they have repeated them here, at this phase of the proceedings, despite the fact that the Court in its 1962 Judgment had said "all important facts were before the Court in 1950". Even ignoring that however, looking at the new facts themselves on their merits and on their own bottom, the two Chinese resolutions are fully explained, as the Applicants have attempted to point out, by the fact that the first draft Chinese resolution was an attempt to revive the approach of the mandatories in the Preparatory Commission, which envisaged the establishment of a temporary trusteeship procedure, and was not accepted. It is purely speculative from anything appearing in the record—it is purely speculative—why it was not accepted. The inference sought to be drawn by the Respondent is contrary to what the Applicants consider to be the reasonable inference, in the light of the circumstances which preceded this particular event and I refer, of course, to the circumstance that in the Preparatory Commission the mandatory powers, including the Respondent, had proposed the estab-

lishment of just such a procedure as the first Chinese draft proposal envisaged should be adopted by the Assembly itself. It is therefore at least as plausible, in the Applicants' view *more* plausible, to infer that it was perhaps the Respondent or other mandatories or a group of them all acting together who were overruled when the Assembly decided not to accept the Chinese draft resolution which would have set up the very machinery the mandatories had proposed in the Preparatory Commission.

The second Chinese resolution, which was adopted, followed the pledging technique, adopted a procedure which the Preparatory Commission itself had considered more appropriate in order to avoid the possibility of temporary machinery being used, consciously or otherwise, as a reason for delay in the preparation and conclusion of trusteeship agreements.

Thirdly, the other so-called new fact which the Court did not have before it in 1950, according to Respondent's submission, is the Palestine Mandate history and the British attitude and actions with respect thereto. According to Respondent's version thereof, and as the Applicants have endeavoured to make clear by a review of the Palestine Mandate history leading to its disposition, it would seem that if the Court had known about the Palestine Mandate history in its proper context and setting, it would also have felt and deemed that its conclusion with respect to the survival of the mandate, and the survival of administrative supervision, were confirmed.

Indeed, Mr. President, the full story might have been persuasive to Judge McNair himself. This is speculative but it will be recalled that Judge McNair in his separate opinion described the several declarations and statements made by the Respondent during the period in question as being, and I quote from the learned Judge at page 161, of the *I.C.J. Reports 1950*, as follows:

> "These statements are in the aggregate contradictory and inconsistent; and I do not find in them adequate evidence that the Union Government has either assented to an implied succession by the United Nations to the administrative supervision exercised by the League up to the outbreak of the war in 1939, or has entered into a new obligation towards the United Nations to revive the pre-war system of supervision."

That was Judge McNair's comment on the basis of the record before the Court in 1950 which with the omissions which of course I have described with respect to these three new facts, that is the omissions with respect to the full circumstances, the full context, the full perspective necessary to an understanding of these three so-called new facts. Of course the majority of the Court, even on the basis of the more limited record then available to it reached a conclusion contrary to that reached by the distinguished learned Judges McNair and Read in the 1950 proceedings, but full appreciation of the facts, had they been available to the Court, including the position taken in the Preparatory Commission by Mr. Nicholls on behalf of Respondent as well as the attitudes of the other Mandatory Powers with respect to the proposal for the establishment of temporary machinery to which the Mandatories could account to pending other agreed arrangements—these matters were not before the Court in 1950 and had they been, as the Applicants respectfully submit, the Court

with a majority view would have been confirmed and not negated and even perhaps the learned Judges who dissented with respect to supervisory authority might have found in the circumstances a basis for the resolution of what Judge McNair called the aggregate of contradictory and inconsistent aspects of the statements read textually—the announcement that South Africa intended to submit proposals for termination of the Mandate, that they favoured annexation subject to the judgment of the General Assembly as General Smuts said and other statements of that sort indicating a plan or intention or design to terminate the Mandate, to annex the Territory subject to the necessary international consents and procedures. These were manifest.

But as has been said, up to the change of government and as the Respondent concedes, up to the change of government in respect of the replacement by General Smuts' government by the Malan government, there was never at any time any question raised about the continuance of international jurisdiction in a sense of survival of the Mandate and there was never any explicit reference made on the basis of which one would have to conclude that the Respondent was not fully aware of the continuance of all its obligations under the Mandate and never distinguished between the two until the change of government, and then of course its position changed markedly.

What will be related shortly—the proceedings in the United Nations itself—will I think, tend to confirm the reasonableness of these remarks submitted on behalf of the Applicants.

The development of the United Nations supervision over the Mandate for South West Africa is very revealing in itself, both in form, manner and content of the necessities perceived by the Assembly of a special system, a third system for supervision of this Mandate. The Territory of course, it was hoped, would be placed under trusteeship. That hope survived many storms, frustrations, and disappointments, and in the records of the proceedings of the time the Court of course will find constant efforts, persuasions, cajoling, pleas, addressed to the South African Government, to relent its view expressed at San Francisco, to relent and to follow the tide of history and the expectations of the founders of the Charter with respect to the orderly evolution and development and expansion of the mandate system into the trusteeship system toward independence and self-government on the basis of self-determination.

The differences in the nature of the role played by the United Nations as between the case of Palestine which has just been discussed, and of South West Africa—the striking differences in the nature of the role played by the United Nations should not obscure the essential identity of the competence asserted in both cases, the competence to give continuing effect to the principle of international accountability for the administration of and the international control over the disposition of territories, all territories, which had acquired the status of Mandates under the League of Nations. The first step in the developments relating to South West Africa was the refusal of the General Assembly in 1946 to accede to the Respondent's request for incorporation of the Territory and for the termination of the Mandate. By resolution 65 (I), the General Assembly affirmed its competence to modify, determine and consent to a change in the status of South West Africa, thereby beginning the movement toward the creation of a special supervisory arrangement, perceived to be necessary for the mandated Territory of South West Africa.

The next step in the process of development of United Nations supervision over South West Africa as a mandated Territory was the adoption by the General Assembly on 1 November 1947 of resolution 141 (II), in which the Assembly once more urged Respondent to propose a Trusteeship Agreement for the Territory and authorized, and I quote:

> "Authorised the Trusteeship Council in the meantime to examine the report on South West Africa recently submitted by the Government of the Union of South Africa and to submit its observations thereon to the General Assembly."

This is from the *Official Record of the United Nations General Assembly*, Second Session, A/519/1948, at page 47.

By this action, Mr. President—and this I think is apropos of the question propounded by Judge Jessup, as indeed many of the references to the subject interspersed through the history of this matter are relevant in the Applicants' submission, to the question propounded by Judge Jessup—the General Assembly indicated that the report submitted by Respondent was not to be treated as if it were a report under Article 73 *(e)* of the Charter, that is to say, merely for information purposes, in the language of Article 73 *(e)*.

Even though not a report relating to a trust territory, the reference by the General Assembly of the report to the Trusteeship Council with the instruction to that body, and I quote again: "to submit its observations thereon to the General Assembly", manifested the intention to treat the report as a basis of a more thorough procedure of supervision than could have been justified under the terms of Article 73 *(e)*. The disposition by the General Assembly of South Africa's report therefore, reflected the General Assembly's decision that its competence and duty with respect to South West Africa extended beyond the confines of Chapter XI of the Charter. It signalled the actual beginning of the United Nations supervision over a mandated Territory, other of course than the special circumstances of the Palestine question, which was the other example, but that was to lead to liquidation of the Mandate and of course in this situation, what was designed as a temporary situation with the hope and expectation of trusteeship has become, and is now, a continuing one.

The Trusteeship Council was not empowered of course to treat South West Africa as if it were a trusteeship territory, a point brought up quite clearly and explicitly by several members of the Trusteeship Council.

There was manifest disagreement among the members of the Council as to the extent of its supervisory powers over the mandated Territory of South West Africa. But there was no dispute as to the legal authority of the Trusteeship Council to carry out the instructions set down by the General Assembly in resolution 141 (II), that is to say, to examine the reports submitted by the Respondent Government and to submit observations thereon to the General Assembly.

Compliance with the instructions of the General Assembly, of course, involved and pre-supposed the existence of supervisory functions with respect to the Territory, which is consistent with no other assumption, obviously.

Respondent's present contention that the Trusteeship Council did not exercise supervisory powers, the present contention, was not Respondent's position at that time; to the contrary, the Government of Prime Minister Malan protested strongly against what it insisted was an un-

warranted exercise of supervisory powers on the part of the Trusteeship Council. Thus, before the Fourth Committee of the General Assembly in 1948, Respondent's representative, Mr. Louw, stated that:

> "... the Union Government could not admit the right of the Trusteeship Council to use the report for purposes for which it had not been intended. Still less could the Trusteeship Council assume for itself the power claimed in its resolution, that is to determine whether the Union of South Africa is adequately discharging its responsibilities under the terms of the Mandate. Furthermore, that power was claimed in respect of a territory which was not a trust territory and in respect of which no trusteeship agreement existed. The South African delegation considered that in so doing, the Council had exceeded its powers." (*Official Records of the Third Session of the General Assembly*, Part I, Trusteeship, Fourth Committee, p. 288.)

At that time Respondent—erroneously as a matter of law in Applicants' submission—but at that time Respondent protested the exercise by the Trusteeship Council of a supervisory authority on the basis of Respondent's contention that it exceeded its power. Today, Respondent appears to argue, as understood by the Applicants, that the Trusteeship Council was not at that time seeking to exercise or intending to exercise a supervisory authority. So we understand their contention, and perhaps we are wrong in the way we interpret it.

The South African Government's belief that the Trusteeship Council was not only asserting supervisory authority, but was actually exercising it, was made even more explicit by its representative, Mr. Louw, at the next meeting of the Fourth Committee. I quote from the record:

> "It was clear from the observations adopted at a later meeting, that is of the Trusteeship Council, and from the list of questions submitted to the South African Government, that the majority of the Council was not only very critical of the Union Government's administration, but that it considered that the Council had a supervisory function in regard to South West Africa, and that the Union Government was accountable to the Trusteeship Council for its administration of the territory."

That is from the same *General Assembly Official Records* already cited, at page 297. In 1948, therefore, Respondent complained that the majority of the members of the Trusteeship Council "considered that the Council had a supervisory function with respect to South West Africa". And in these proceedings, as I have said, the Respondent contends precisely the opposite.

Applicants' statement in this regard reflects the comment made by Respondent in the verbatim record, **VIII,** at page 468, from which I quote: "The Trusteeship Council did not consider that it was required to exercise a supervisory power in respect of this report." That refers to the report of 1946, submitted by Respondent to the United Nations.

It is clear, in the Applicants' respectful view, that Respondent's earlier position was correct, in so far as it recognized and understood that the Trusteeship Council asserted and exercised supervisory powers over South West Africa in this connection. Of course, Respondent's position, in our respectful view, is totally erroneous, that the Trusteeship Council, on reference from the General Assembly, lacked the power to exercise such supervisory authority as a matter of law—those, of course, are two

quite different propositions. But Respondent seeks to offset, or expunge, its earlier and more meritorious position, that is, its acknowledgement that the Trusteeship Council was, indeed, asserting and exercising a supervisory function—meritorious in the sense that it corresponded to the facts of the situation—but attempts to erase its position evidenced at that time by Mr. Louw, by reference to statements made by several representatives to the Trusteeship Council, and in its rebuttal Respondent places quite heavy reliance upon several of these statements. These statements are taken, therefore, as demonstrating the soundness of Respondent's new argument. As will be seen, however, most of the statements referred to seem to confirm quite clearly Respondent's 1948 position, rather than its current position, with respect to the type of activity in which the Trusteeship Council was engaged at that time.

It is true that of the 12 members of the Trusteeship Council, two—that is to say, Australia and the Soviet Union—made statements indicating the view that the Council did not have supervisory powers over South West Africa. The majority of 10 members, however, gave no indication in the Council debate that they supported Respondent's present contention, that is to say, gave no indication that they believed that the Trusteeship Council lacked power to review the report, or that it was not, in fact, reviewing the report under the proper exercise of the Assembly's competence under Article 10.

Even Respondent has had to concede that Belgium's attitude was what Respondent called "a kind of in-between", in the phrase used in the verbatim record, **VIII**, at page 471. In fact, analysis of the statement of the Belgian representative, Mr. Ryckmans, honorary Governor-General of the Belgian Congo, in the Fourth Committee (Mr. Ryckmans is quoted by Respondent at **VIII**, p. 471, of the verbatim record), the statement was not a statement of legal position at all, on its face, but rather an appeal for a politically acceptable resolution. Mr. Ryckmans suggested an exchange of United Nations recognition of Respondent's right not to place the Territory under trusteeship for Respondent's acceptance of the Trusteeship Council as the heir of the Mandates Commission in terms of reporting.

In stating the legal position, Belguim at no time intimated the trusteeship lacked supervisory powers, so far as the Applicants have been able to find statements and interpret them. Thus, in the very statement quoted by Respondent, Mr. Ryckmans said:

> "I do not think it advisable to tell the representative of the Union of South Africa that the Trusteeship Council will examine the report submitted by the Union Government as if it were a report from a Power administering a Trust Territory. This is a controversial question. We shall in fact examine this report as we examine any other, but in principle we should consider it in the same way as it would have been considered by the Permanent Mandates Commission." (United Nations, *Trusteeship Council Official Records*, 2nd Session, 1st Part, p. 124.)

This seems to be a reasonably clear statement that the Trusteeship Council was actually to exercise, and was actually exercising, a supervisory authority over the Mandate in terms of examining and recommending on the basis of a report regarding conditions in the Territory. The Belgian view was that the report should not be treated as a report

from a "trust territory", but should in principle be examined as the Permanent Mandates Commission had examined reports. The Applicants will show shortly that this is precisely the way this report was treated by the Trusteeship Council. In fact, Belgium was clearly willing to go even further and examine it as any other report—that is to say, as if it were a report from a trust territory—but in principle the Belgian statement indicated clearly that the Belgian view was that the United Nations was exercising supervision over a mandated territory, as had been the case in the League of Nations era and under the League regime. Indeed, the major issue discussed in the Council was, as I have said, the proper extent of its supervisory powers rather than whether the Council and the Assembly *had* such powers. Belgium was very clear on this point, Mr. President; Mr. Ryckmans said on 12 December 1947 in the Trusteeship Council:

> "We have now spent an hour discussing whether we shall examine anything else in addition to the report. If we begin with the report, and if during the discussion any member of the Council feels that he cannot examine the report without consulting other documents, we can ask the General Assembly for the authority to consult such documents. I believe that we should begin by doing what we have been asked to do, namely, to examine the report." (*Trusteeship Council Official Records*, 3rd Session, 15th Meeting, p. 482.)

Again, Respondent has been compelled by the record to concede that for Belgium there was no question of supervision versus no supervision, rather the question was an issue as to the form and method of the United Nations supervision to be exercised over the Mandate. Thus, before the Fourth Committee in 1948, Mr. Ryckmans stated as follows:

> ". . . felt bound to draw the attention of the South African representative and the Committee to the terms of Article 80, which provided that nothing in Chapter XII of the Charter should be 'construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples . . .'. That included the people of South West Africa, who, having had the benefit of international supervision under the Mandate System, could not be deprived of that right." (United Nations, *General Assembly Official Records*, 3rd Session, 79th Meeting, Fourth Committee, pp. 325-326.)

Of course, Mr. President, with respect to the reference to Article 80 by Mr. Ryckmans, the Applicants already have made their position clear and, in their view, which corresponds to that expressed by the honourable President and Judge Sir Gerald Fitzmaurice in the joint dissenting opinion of 1962, Mr. Ryckmans' statement transcended the bounds of interpretation of Article 80.

However, the significant point in his statement is not that; it is the reference to the "people of South West Africa who, having had the benefit of international supervision under the Mandate System, could not be deprived of that right".

The next member of the Trusteeship Council, cited by Respondent in rebuttal, was China, but, here again, it is difficult to perceive how the several statements made by the representative of China can reasonably be relied upon by Respondent in support of its contention, that is to say, its contention that the Council was not treating the matter pursuant to the exercise of a supervisory authority. In fact, Mr. President, the re-

presentative of China went so far as to argue that the report submitted by South Africa should be treated as if it were a report from a trust territory. Thus, Mr. Liu Chieh, who was the Chairman of the Council at that time, was the opening speaker in the 1947 Trusteeship Council debate regarding the question of South West Africa, and he stated in response to a question:

> "I would propose that, in accordance with the resolution of the General Assembly, this Council should undertake to examine the report in the same manner as it would examine a report from a Trust Territory. For that purpose, I am inclined to think that it would be quite proper for this Council to extend an invitation to the Union of South Africa, if the Government of the Union of South Africa so chooses, to help the Council by sending a representative here." (United Nations, *Trusteeship Council Official Records*, 2nd Session, First Part, p. 121.)

The strong resemblance to the procedures followed by the Permanent Mandates Commission is, of course, more than implicit in the suggestion of Mr. Liu Chieh, it is explicit. Furthermore, in answering the argument made by the Australian representative, Mr. Liu Chieh said as follows:

> ". . . the authority we derive from the General Assembly does not say that the Trusteeship Council can only look at the report from the point of view of information. The very fact that it was referred to the Trusteeship Council instead of being referred to the Special Committee on Information transmitted under Article 73 e of the Charter, which also has the right of examining and not just of receiving information, indicates that the General Assembly saw the propriety of a thorough examination of the report from the point of view of the interest of the inhabitants, and, as the Trusteeship Council has the function of looking after the interests of the inhabitants of territories to which the principle of trusteeship is applicable, definitely gave us the authority to examine the report and not just to look at it for information purposes." (United Nations, *Trusteeship Council Official Records*, 2nd Session, p. 478.)

The Chinese representative was there again distinguishing between the application of Article 73 *(e)* to the Territory, and the broader power, the broader authority, of reporting and accountability under the mandates system, and cited the reference by the Assembly of the South African report to the Trusteeship Council as evidencing the assumption that this Territory was not within the purview of Article 73 *(e)* of the Charter. Other members of the Trusteeship Council expressed the same view, including the French representative, as I shall shortly cite.

Again, in 1949, the representative of China to the Fourth Committee of the General Assembly referred to Respondent's letter of 11 July 1949 in which the Respondent's Government informed the Secretary-General that no benefit was derived from the submission of reports on South West Africa—this was the Respondent's letter. The delegate of China pointed out, and I quote now from the *Official Records* of the Assembly's fourth session of the Fourth Committee, at page 208, that the Respondent's letter—

> "explained that the Union Government could no longer see that any real benefit was to be derived from the submission of special reports

on South West Africa to the United Nations, and had regretfully come to the conclusion that, in the interests of efficient administration, no further reports should be forwarded. That decision by the Union of South Africa [said the Chinese delegate] had made it impossible for the Trusteeship Council to implement resolution 227 (III) of the General Assembly and to exercise the supervisory functions conferred upon it by that resolution."

The Chinese delegate explicitly described the function performed by the Trusteeship Council as a "supervisory function", which was precisely the position taken by the Respondent at the time, and precisely why it objected to the Trusteeship Council dealing with the report, namely the Respondent's position that the Trusteeship Council was erroneously as a matter of law exercising a supervisory function. Today Respondent says the Trusteeship Council was not intending to exercise a supervisory function. General Assembly resolution 227 (III) to which the Chinese delegate referred, it will be recalled, gave authority to the Trusteeship Council in almost identical language to resolution 141 (II), which has previously been referred to. The authorization in the resolution is: "Requests the Trusteeship Council to continue to examine such information and to submit its observations thereon to the General Assembly."

In the premises, then, China does not belong on Respondent's list of States which supported—are alleged to have supported—its newly adopted contention, that is to say, that the Trusteeship Council did not intend to exercise a supervisory authority over the Mandate. There are numerous States listed by Respondent, and during rebuttal Respondent placed heavy reliance on this and in a rather extensive argument went through the list. It is, in the Applicants' view, highly important, even at the risk of burdening the record before the Court at this point, to check through to see where this matter really stands, notwithstanding Respondent's heavy emphasis on the alleged significance of this list.

China has been referred to. The next State on Respondent's list is Costa Rica. Even the citation by Respondent supports the Applicants' view rather than the Respondent's present contention with respect to the Trusteeship Council's assumption and attitude with regard to the authority which it was asserting and exercising at that time. In the Trusteeship Council, Mr. President, the representative of Costa Rica made the following statement:

"The point under discussion is whether the mandate has expired or not. I do not know how far the Council can succeed in determining hastily whether or not the mandate is still in force.

It would be well to avoid the word 'mandate' and any reference to the spirit or letter of the mandate. Perhaps we could use some better word in conformity with the spirit of the Charter, for although we know the Charter is barely two years old, the Government of the Union of South Africa is one of the Members of the United Nations and, as such, is bound to fulfil the terms of the Charter. That would obviate the difficulty of using the word 'mandate', which is, as we have said, so controversial."

This was from the second session, first part, of the *Trusteeship Council Official Records*, at page 506. The point is that this exhortation, which was rather typical of the appeal implicit, the political appeal, the persua-

sion, the diplomatic effort, the undercurrent, which was manifest throughout these proceedings at that time, of which the record is redolent with examples of attempts on the part of tact, diplomacy—even the use of the word "mandate"—in an effort to persuade Respondent to carry out the historic mission of the time which was to convert mandates into trusteeships. Costa Rica simply wanted to avoid the use of the word "mandate" for fear of offending the sensibilities of Respondent, and that fact is now used by Respondent, impliedly, as evidence that Costa Rica implied doubts concerning the existence of the Mandate, or so this would seem to be the implication sought to be drawn—none other is apparent to the Applicants. But whether or not this is true—interpretation of Respondent's listing of Costa Rica—whether or not this is the reason, the reason is far from clear, in the Applicants' mind. The point is that at no time did Costa Rica ever express the view, at no time did Costa Rica ever indicate a view, that the Trusteeship Council should not consider, should not examine and should not submit observations on the report submitted by the Respondent. The Costa Rican statement demonstrated its support for the exercise of international supervision, whether or not the Territory were placed under the trusteeship system; at no time did the Costa Rican delegate ever express the view that South Africa need not submit reports, or that United Nations agencies could not examine them and submit observations upon them; to the contrary.

The fifth member of the Trusteeship Council on Respondent's list is France, and Respondent cites France as indicating the view at the time that the Trusteeship Council was not asserting or exercising a supervisory function.

The representative of France, throughout the debates in the Trusteeship Council, argued that the Council could not exceed the authority granted to it by the resolution of the General Assembly. Indeed, the representative of France stated—and I quote from page 480 of the document already cited, the Trusteeship Council official records—

> "That text [referring to the General Assembly resolution 141 (II)] was very carefully drafted after lengthy discussion because the Assembly, in referring the report of the Government of the Union of South Africa to the Trusteeship Council, wanted above all to take the first step in the direction of international supervision over the former mandated territory of South West Africa, pending reconsideration of the Assembly resolution by the Government of the Union of South Africa and a decision of that Government in that connection."

The French statement referred to "the former mandated territory": in the context that reference is very difficult to understand, particularly in juxtaposition with "the first step" toward international supervision, which obviously comprehended what the Trusteeship Council was doing at that time. France in no respect, from this record, in its pledge in 1946, in its adherence to the 18 April 1946 resolution, or in any other respect ever evidenced doubt that the Mandate continued in effect, and this reference to the former mandated territory is doubly confusing in the light of Respondent's concession, now made, that the Mandate as a matter of law survived the dissolution of the League in the opinion of Respondent's Government then in office.

Therefore, the reference by the French delegate to the former mandate is difficult to understand in the context. Stress is laid, however, particularly in the light of Respondent's concession that the Mandate did survive the dissolution of the League, upon the reference by the French delegate to "the Assembly wanted above all to take the first step in the direction of international supervision", and it will be seen again, shortly, from the way the Trusteeship Council dealt with this report, that the distinguished French member of the Trusteeship Council acted in very much the same way as a member of the Permanent Mandates Commission would have acted in an earlier day. We will come to that shortly.

The context of the debate, therefore, should not be ignored, as Respondent has ignored it. The issue under debate in the Trusteeship Council, to which the French statement just quoted is relevant, was whether or not, and if so to what extent, to go beyond the examination of reports in so far as South West Africa was concerned. I have referred to the Chinese delegate's proposal that the Respondent might be invited, if it chose, to send a representative to help the Council in examining the report and understanding it more intelligently. France, and certain other States, insisted on a strict reading of the General Assembly resolution 141 (II), and that resolution was regarded by many members as the literal limit to be read upon the Council's supervisory powers.

The second part of the French statement to the Trusteeship Council, the one just referred to, also contains the following statement, and it is from page 480 of the same record cited:

> "I should like to explain [said the French representative] for the benefit of the Chinese representative why M. René Mayer proposed that the report of the South African Government should be examined by the Trusteeship Council and not by the Fourth Committee. He [that is M. Mayer] feared that to entrust the examination of the report to the Fourth Committee would convey the impression that the General Assembly regarded the territory, which was formerly under South African mandate, as a Non-Self-Governing Territory and not as a Trust Territory or a territory that should be placed under the Trusteeship System. Hence, the French delegation proposed that the report should be examined by the Trusteeship Council but that it should not come under the regulations applying to reports on Territories for which there are trusteeship agreements . . .
>
> For the time being, the actions of the Trusteeship Council are strictly limited by the last paragraph of the Assembly resolution."

Here again, a fair reading of the context of the actual process, of the actual history shows that the problem of the uniquely residual character of this Territory, which was not fitting into the hopes and plans of the international community, was not being converted into a trusteeship, despite insistent pleas, tact, diplomacy, pressures, negotiation, that this was not happening. There was confusion and there was considerable discussion of a nature which, looked back upon now in these dusty records, is ambiguous: one reason for the request for the 1950 Opinion.

The French delegate made clear, as I have said, the view that the General Assembly "wanted above all to take the first step in the direction of international supervision over South West Africa" and the French Government considered that resolution 141 (II) was just such a step,

and that it marked the ambit, the four walls, of the authority of supervision which should be exercised by the Trusteeship Council, pursuant to that resolution.

The Council was limited by the terms of the resolution and in the absence of a trusteeship agreement it could not exercise powers beyond the stipulations in the resolution, and this was the context, and the sole context, within which the French representative was speaking. And Respondent's incomplete rendition and selective citation of his remarks is likely to convey, unwittingly, a distorted impression of the intention of the French delegate at that time.

Mr. President, the next State on Respondent's list, on which it relies so heavily, is Iraq. Once more Respondent has distorted the picture in order to support its new contention—new contention in the sense that at that time the Malan Government not only assumed that the Trusteeship Council was emphasizing a supervisory authority, but it protested that exercise. But in order to support its present contention, that the Trusteeship Council was not asserting or exercising a supervisory authority, Respondent cites Iraq, and according to Respondent, Iraq's attitude was described in the verbatim record, **VIII**, at page 475 in the following words:

> "The Mandate is dead and, therefore, there is no possibility of supervision in terms of the Mandate—only two possible alternatives—trusteeship or independence—nothing in between."

According to Respondent's interpretation of Iraq's position, Iraq was disagreeing with Respondent at that time, because Respondent at that time assumed that the Mandate was continuing to have legal effect and Iraq, according to Respondent, disagreed with Respondent at that time. In fact Iraq agreed with Respondent at that time, as Iraq's statements make clear if read in the context of the history and events of that time.

Mr. President and Members of the honourable Court, perhaps it might be regarded as appropriate for the Applicants respectfully to refer to the fact that we are here dealing with the very essence of the Mandate that Respondent has put in issue, and heavily relied upon, the significance of events and transactions and undertakings occurring during a period which has become a crucial factor in the resolution of the issues joined in the cases at bar. It is for that reason, and with the hope that the basic element of the problem at issue will not be lost to sight or submerged in a haze of detail—in a battle of words—that Respondent has indeed, in our view, placed before the Court an interpretation of semantics, without context, of events which are now receding from man's memory, of contemporary events. It is for that reason that, with respect, the Applicants think it necessary to place before the Court what they, in any event, view as the proper historic record and context of a very decisively important era in the development of the international protection of dependent territories.

I was referring, Mr. President, with your permission, to the statement of the representative of Iraq made in the Trusteeship Council on 12 December 1947, at the Second Session, First Part, at page 482. Iraq, it will be recalled, is listed by Respondent as one of the States which indicated or expressed a view that the Trusteeship Council was not asserting or exercising supervisory authority with respect to the Mandate. The Iraqui view, as was the case of so many others at the time, does indeed

reflect confusion, with all respect to the distinguished delegate of Iraq at the time, confusion and ambivalence but an underlying hope and expectation, which characterized the time and marked the proceedings, that this Territory would be placed under trusteeship, that its future would be resolved in accordance with the hope and intent of the authors of the Charter.

In the statement the Iraqui delegate, *inter alia*, said as follows, and in the context I think it is clear why he said what I am about to quote:

> "In my estimation the Territory is really hanging in the air and not even the Union Government is trying to hold it in the air. It might legally drop to the ground at any moment, if it has not done so already. I believe we all share the sentiment of our Vice-President that it is highly unfortunate that the Union Government has acted in the way it has. To me, it is all the more unfortunate that a member nation of this Organization finds it convenient many times in the General Assembly to take a certain position and a certain attitude towards various problems which indicates that it acts according to the principles and nobility of the Charter of the United Nations, and, not only that, but sometimes to shatter those principles."

The Iraqui delegate, cited by Respondent in its rebuttal, went on to say:

> "I think the position of the Union Government cannot be said to be free of motives and prejudice even if you give it the benefit of the doubt, but, if you do not, I think you can even say worse things, which I am not going to do at this time. The General Assembly resolution, which is under consideration, does not call for a visiting mission. The Territory in question is not a trust territory and we cannot send a visiting mission there. On the other hand, the information before the Trusteeship Council, in the form of the resolution of the General Assembly, does not tie the hands of the Trusteeship Council at all. The General Assembly asks the Trusteeship Council to make observations regarding a loop-hole. It authorizes the examination. Since it does not tie our hands, I believe we are entitled to seek other sources of information. The mere submission of this loop-hole by the Government of the Union of South Africa is, I take it, a confession of faith on the part of that Government that the matter is at least connected with the Trusteeship Council and the General Assembly by more than one tie."

This was the attitude expressed by the Iraqui delegation, listed by Respondent as among those who did not then feel that the Trusteeship Council was exerting supervisory authority. The Iraqui statement clearly shows that the representative of Iraq considered that there was the possibility of international supervision of the Territory, irrespective of a determination, from a lawyer's point of view, as to its status in law. Here again, we find, as in the case of the French statement, the Iraqui delegate describing the Territory as "hanging in the air" and not even the Union Government is trying to hold it in the air. Even giving that expression an implication of legal content, if it has a legal significance it is contrary to the viewpoint then taken by Respondent, that the Mandate as a matter of law continued in existence. This is common cause. As we have already noted, the key issue in the debates of the Trusteeship Council was whether or not the Council could go beyond the reports

submitted by South Africa in the search for information and whether or not, and if so to what extent, the Council could, in the same context, go beyond the literal four walls of the General Assembly resolution. Iraq clearly did wish to go beyond the report.

Thus, her representative asked at the same session, at page 483 of the document which I have just quoted—

> "How am I going to examine this report alone, and without any other information? I do not know the facts, I confess. The report is too concise and too abridged to permit me to obtain a sufficiently large fund of information. Therefore, at worst, not at best, but at worst, I believe we are entitled to seek other sources."

This fairly reflects the view, the sentiment, the attitude, not only of Iraq but of other members of the Trusteeship Council, including France and the others cited by Respondent.

Respondent next turns to views of Mexico, to support its presently advanced contention that the Trusteeship Council did not consider at that time that it had supervisory powers over South West Africa, but once more, Mr. President, an examination of the context of the Trusteeship Council debates reveals that Mexico never intimated that South Africa should be free of international supervision or was then free of international supervision. In the pleadings before this honourable Court in 1950, it will be recalled that a statement was submitted in this respect. However, going back to the Trusteeship Council proceedings, in the Council's division of opinion as to whether or not the degree of supervision should be limited by the strict terms of the General Assembly resolution, the delegate of Mexico took the stand that the enquiry should go beyond the confines of the report submitted by Respondent. Thus, on 12 December 1947, in the *Trusteeship Council Official Record* of the second session, first part, at page 484, the delegate of Mexico, Mr. Noriega stated that:

> "I feel that, in the interest of the Government of the Union of South Africa, it is important that we should acquaint ourselves fully with the whole background of this question and with the situation of the indigenous inhabitants. For as soon as the general public is informed that the Trusteeship Council refused to give ear to, or have knowledge of, or obtain reports from, other sources than the Government itself, they will think the Council is pursuing an extremely conservative policy which disregards the very objectives of the system which the United Nations has put into effect under the name of the Trusteeship System. For although the territory in question is not a Trust Territory, it has indigenous inhabitants who are in no less need of assistance than the inhabitants of other territories. I therefore believe and maintain that for the sake of the Council's own prestige and the greater efficacy of its work, we should be given the authority—which indeed we already have—to obtain such supplementary information as would help to enlighten us on this report from the Government of the Union of South Africa. Otherwise any resolution we shall be able to submit to the Assembly will be very weak and ineffective and this discussion will be reopened in the Fourth Committee at the next session."

So spoke the Mexican delegate and Mexico is on Respondent's list.

The delegate for Mexico left no doubt as to his view that the Trusteeship Council was competent to pass judgment upon Respondent's ad-

ministration of South West Africa. For that very reason he was insisting that the Council go beyond the report and obtain as much information as possible from other sources, and he said this was authority "we already have"—other delegates considered it beyond the four walls of the General Assembly's resolution and this was the context of the debate then going on.

At the same meeting of the Trusteeship Council, the Mexican delegate said, at page 475:

> "The point is rather whether or not the Council is in a position to present a good report to the General Assembly, expressing its opinion concerning the report from the Government of the Union of South Africa. Therefore, in carrying out the task which the General Assembly has entrusted to us, namely, that of considering the report and of submitting our observations on it, the Trusteeship Council is at liberty to avail itself of the best means of clarifying its judgment so that it may be able finally to express its opinion."

In sum, Mr. President, Mexico, just as the case of most other Members of the United Nations almost without exception, preferred that the territory of South West Africa be placed under the trusteeship system. It did not regard the fact that the Territory remained outside the system as a bar to the exercise of supervisory powers by the United Nations although the supervision would admittedly be more limited than if a trusteeship agreement were in effect. At the time of this particular Trusteeship Council debate, as the record makes clear, the nature and degree of supervision was limited by the terms of the General Assembly's resolution to which reference has been made.

The next member of the Trusteeship Council listed by Respondent as supporting its present view is New Zealand. Respondent refers to New Zealand in the verbatim record, **VIII**, at pages 478-479. A close reading of that excerpt in the verbatim record—a careful reading by the Applicants, in any event—reveals no trace of an opinion to the effect now contended for by Respondent, to wit that the New Zealand Government considered that the Trusteeship Council was not asserting or exercising a supervisory function over the Territory. All the delegate for New Zealand was saying in the Applicants' view, in the lengthy quotation set out by Respondent on pages 478-479 of the cited verbatim record, was that the Council's powers were limited by the terms of the General Assembly's resolution. That is to say, in the view of New Zealand, shared by other members as well, the Council's task was to examine the report submitted by South Africa and to submit its observations thereon to the Assembly. In the context of the Council's debate, New Zealand was taking what might perhaps be called a relatively conservative view that the Council could not go beyond the report in seeking information because the General Assembly had limited the authority of the Council to an examination of that report. This does not, in the Applicants' respectful submission, support in any way Respondent's contention that New Zealand thought, at that time, that the Trusteeship Council was not asserting or lacked the power to exercise supervisory function. New Zealand clearly favoured a strict and literal interpretation of the General Assembly's authorization, terms of reference of the Trusteeship Council in this respect. New Zealand never argued that the Council could not consider and pass judgment upon Respondent's administration in the mandated Territory,

and as will be shown shortly, New Zealand not only participated in the consideration of the matter on the substance of the report fully but, as the other members of the Council did, concurred in the final report of the Trusteeship Council to the General Assembly on this matter.

Mr. Reid, who was the deputy to Sir Carl Berendsen, at that time the member of the Trusteeship Council, said at the Third Session of the Trusteeship Council, at page 409:

> "He recognized with the U.S.S.R. representative that it would be very difficult to study the report in the absence of a special representative, but believed that it was the Council's duty to comply with the General Assembly's request and to supervise the treatment of the inhabitants of the Territory to the best of its ability with the limited means at its disposal."

The Respondent then turns to the Philippines, and the best that Respondent can do with respect to the Philippines is to concede that the views of the Philippine Government were in its own words, "inconsistent"—that is the characterization employed by Respondent in the verbatim record, **VIII**, at page 481. Yet once more, it is clear in the context of the Trusteeship Council's debate that the Philippine representative took a very strong stand indeed—it was just the other way from that contended for by the Respondent. Far from questioning the Council's powers, the Philippine representative wanted to go well beyond the limitations imposed by the General Assembly's resolution, and to accept petitions. He also expressed the view that the report from South Africa could appropriately be examined as if it were a report from a trust territory. The Philippine delegate said at the second session, first part, of the Trusteeship Council debate, at page 476, as follows:

> "The least that this Council could do, therefore, is to examine this report in the same *way that the* Permanent Mandates Commission used to examine the reports of the Union of South Africa. I say that is the least which the Council could do, because I also associate myself with the observations of the representative of China to the effect that the Trusteeship Council could examine the report as if it were a report from a trust territory."

I have previously cited the statement by the Chinese delegate on the Trusteeship Council, with which the Philippine delegate associated himself. The Philippine statement just quoted affords strong support indeed for Respondent's 1948 contention that the Trusteeship Council was asserting and exercising supervisory powers, which was the very basis for the objection by Respondent in 1948 with respect to the Trusteeship Council's inter-position in the matter in any respect. The remaining two members of the Council whose views are in dispute at this juncture are the United Kingdom and the United States.

So far as the Applicants have been able to see from a careful reading of the 1947 Trusteeship Council debate, the United Kingdom did not participate in the debates on this aspect of the matter, that is to say, on the question concerning the scope of the General Assembly resolution and the powers of the Trusteeship Council, the powers which appropriately could be exercised by the Trusteeship Council, either within the four walls of the resolution or beyond it, e.g., with regard to petitioners or inviting a representative of South Africa to appear. But, Mr. President,

Respondent's reliance on a 1948 statement to the Council by the British delegate is, in the Applicants' respectful view, entirely misplaced. Once again, one finds in the British statement in 1948 the view that the Council should limit its supervisory function to the precise terms of the General Assembly's authorization, leaving it to the General Assembly to go further if it wished and if it wished, to authorize or instruct the Trusteeship Council to go further in supervisory functions over the Mandate—go further than the Assembly resolution did.

The British delegate, the member of the Trusteeship Council at that time, as the Court will be aware, was Sir Alan Burns of the United Kingdom, and his statement confirms beyond doubt, in the Applicants' view, that this is the question to which he was addressing himself. The statement is as follows—it appears in the same Third Session, *Official Record*, at pages 531-532:

> "The Council had been asked to consider the report on the administration of South West Africa simply because that Territory was formerly under mandate, [again the same phraseology used by the delegate 'formerly under mandate', puzzling to interpret at this stage, the Mandate is conceded to have been in force at that time] and the General Assembly hoped soon to see it placed under the trusteeship system. It was important, therefore, to bear in mind that the Council's consideration of the report on the administration of South West Africa and its report thereon to the General Assembly were *sui generis*; the Council had no right to assume that the General Assembly would take any particular course of action on the basis of the Council's report.
>
> Moreover, in view of the very strong feelings which this question had aroused not only in the Territory of South West Africa, but in the Union of South Africa as well, it was important for the Council in complying with the Assembly resolution to avoid the use of words or statements which might give offence in South West Africa or in the Union of South Africa.
>
> Because of the special conditions under which the Council was acting and because of the possible repercussions which the Council's actions might call forth in South West Africa, it should endeavour to limit itself to observations, leaving it for the General Assembly itself to draw its own conclusions." (*TC/OR*: Third Session, pp. 531-532.)

Again part of the continuing tide of diplomacy of the effort to persuade the South African Government to submit a trusteeship agreement to avoid offence—these were implicit in the debates. They must not, Mr. President, be used as a basis for interpreting these statements in this context as implying the contrary of what Respondent itself, at that time, insisted and protested the Trusteeship Council was doing, namely exercising supervisory authority over the Mandate—this is not a correct reading or version of history.

The British representative, as will be made clear, took full part in the discussion in the examination of the report—I shall come to that in a few moments. To revert to the statement of the British representative, warning against using words or statements, as he said, which might give offence, the British representative expressed the view that the Council should limit itself strictly to the authorization of the General Assembly,

that is to say, that it should submit "observations" to the Assembly on the report of South Africa, with regard to the Territory.

Indeed, Mr. President, the only Government to argue that the Council could not even consider the report (notwithstanding the General Assembly's authorization to do so) was the Soviet Union. The Soviet position was that the Council could not deal with South West Africa because it had supervisory powers only over trust territories, but that Respondent had a legal obligation to place her territory under the trusteeship system —this was the Soviet position at the time. It was, of course, prior to the Advisory Opinion of 1950, in which the Court reached the conclusion contrary to the legal position then contended for by the Soviet Government. The Soviet Union stood alone in the view that outside of trusteeship under which it believed Respondent had a duty to place the territory, the Council would have no supervisory function. Later of course, this view was changed, after the 1950 Opinion. The point here is that an argument that the Council had no powers whatsoever with respect to the Territory means that the Council could not even receive the report, notwithstanding the General Assembly's resolution. In other words, the Soviet position was whole, it was consistent and it did not deal with the question of the manner of the exercise of supervisory power—it simply, because of the legal theory adopted by the Soviet Government at that time, believed that the Council should not deal with the matter and had no power to deal with the matter at all; the Council, of course, felt otherwise—that was what caused the protest from the Respondent.

Finally, we come to the views expressed by the representative of the United States as to the supervisory powers of the Trusteeship Council because, Mr. President, the United States has earned its place on the list of States, prepared by Respondent. The United States' attitude emerges from Respondent's treatment with the appearance of a somewhat curiously ambivalent or even distorted version of Respondent's new conception of what the Trusteeship Council thought it was doing at the time. The deputy representative of the United States to the Trusteeship Council was Mr. Benjamin Gerig, whose name has figured previously in these proceedings. He was the deputy to the representative of the United States on the Trusteeship Council, Professor Francis Sayre. Now, Mr. Gerig had one point in the record and this is quoted in the verbatim record, **VIII**, at page 483. Respondent quotes the following statement from Mr. Gerig and then makes a comment thereon, which I shall quote. Mr. Gerig's statement, quoted by Respondent at this place in the record of the Oral Proceedings is as follows:

> "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exist." (**VIII**, p. 483.)

This was the statement. Now from this quotation Respondent concludes, quite categorically, and I quote Respondent's statement, that Mr. Gerig—

> "... proceeded from the basis that the Mandate is in existence but had a clear and explicit view to the effect that the United Nations

had no supervisory authority in respect of the Mandate". *(Ibid.)* This is an interpretation of the statement of Mr. Gerig, that he proceeded from the basis that the Mandate is in existence as a clear and explicit view, and then proceeded to the view that the United Nations had no supervisory authority in respect of the Mandate.

Irrespective of what Respondent means by its characterization of the statement, it seems clear upon its face—and I do not intend to engage in controversy with Respondent as to what it meant by characterizing this statement—that what the Applicants think the statement shows is that there was doubt expressed by Mr. Gerig, there was a question raised as to whether or not the Mandate was in existence. He says "under the present Mandate, admitting that it exist". He was just doubtful about the whole proposition, if one looks at that statement alone, out of context. Of course, there are other things that Mr. Gerig said and other things that the United States delegation to the Trusteeship Council did which show precisely what their position was.

Respondent omits reference to the concluding paragraph of Mr. Gerig's same statement, at page 505 of the *Trusteeship Council Official Records*, Second Session, First Part, in which Mr. Gerig said:

> "I cannot help but feel that there are difficulties of this kind which we should not take up at this point. I am willing to consider it in June, but I do not now feel clear in my mind that the Trusteeship Council has implied or expressed supervisory functions over that territory. However, I should like to hear the thoughts of the other members of the Trusteeship Council."

Mr. Gerig was not clear in his mind, he admitted it, and he wanted to hear the views of the other members of the Council before he cleared up his mind. His expression of uncertainty was a candid confession. As to the legal position, at that moment the Trusteeship Council members had not yet exchanged views: there was a general desire and hope that the South African Government would alter its position and submit a trusteeship agreement. That was the preoccupation and that was the context of the remark.

So far as the powers of the Trusteeship Council were concerned with regard to the actual handling of the report, it will also be clear shortly that the United States delegation to the Trusteeship Council played a very affirmative and positive role indeed in commenting upon the report, in expressing its views. Mr. Gerig's admission, therefore, should not have persuaded Respondent that the United States representative took the view that the United Nations had no supervisory authority in respect of the Mandate, to quote Respondent's characterization. The conclusion to which the United States Government came after hearing the views of the other members, which Mr. Gerig invited, was presented to the Court in its written statement in 1950, in the Advisory Opinion proceedings of that year. And in the volume of *Pleadings, Oral Arguments, Documents, the Advisory Opinion of 11 July 1950*, at page 11, in the United States written statement it is stated that:

> "It is believed, therefore, that the Union of South Africa continues to be obligated, under the Mandate, to submit reports on its administration of the Territory, submitting these to the United Nations for consideration by the organ which the General Assembly designates for this purpose."

I shall refer shortly to Respondent's unwarranted characterization of that conclusion as special pleading. For the moment, however, in this context, I should, with the Court's permission, like to summarize the points just made with respect to the actual context of the debates in the Trusteeship Council, with respect to the extent of the supervisory powers appropriately to be used by the Trusteeship Council pursuant to the terms of the General Assembly resolution, in which as I have said, the only member of the Trusteeship Council which expressed a view that the Council did not have supervisory powers in this respect was the Soviet member of the Trusteeship Council, on the basis of its legal reasoning and assumptions at that time, prior to the decision, the Advisory Opinion, in which this Court spoke authoritatively on that matter.

In summary then, Mr. President, the best that can be said of Respondent's contention, in our respectful view, is that two members of the Trusteeship Council, for quite different reasons, expressed doubts—one expressed a conviction—whether the Trusteeship Council had supervisory powers outside of the trusteeship system itself. Nine States were of the opinion that the Council could examine and submit observations on the report of the mandatory power, Respondent in this case, and one State—the United States—said its mind was not clear on this subject. Many of the members felt that the Council could go much further and treat the report as if it were a report from a trust territory, and even accept petitions—China, Mexico.

The more conservative view was that the Council should limit itself strictly to the terms of the General Assembly's resolution. Thus, the correctness of Respondent's view in 1948—when it acknowledged that the Council was asserting and exercising supervisory powers over the Mandate, but objected to the course being pursued for that very reason—is borne out by the record. That is to say, in the words of Respondent's representative in 1948—I quote from the *Official Records of the Fourth Committee*, 3rd Session of the General Assembly, at page 297, Respondent's representative, Mr. Louw:

> "It was ... clear from the observations adopted at a later meeting [of the Trusteeship Council], and from the list of questions submitted to the South African Government, that the majority of the Council was not only very critical of the Union Government's administration, but that it considered that the Council had a supervisory function in regard to South West Africa and that the Union Government was accountable to the Trusteeship Council for its administration of the Territory."

This was the explicitly expressed view of Respondent contemporaneously with the events and it speaks for itself.

In addition to the significance properly to be attributed, in the Applicants' view, to the fact that the Trusteeship Council considered Respondent's report of 1946, and the fuller 1947 supplement, it is just as revealing to note not only that the Council considered it but to see what aspects of the report were considered by the Council; and how the Council went about the business of analyzing the report of the Respondent and its supplemental report, and the report of the Trusteeship Council itself to the General Assembly, pursuant to the resolution.

Striking conclusions are justifiably to be drawn from a study of the

record of the Trusteeship Council in this respect, as to striking similarities between the method of enquiry which the Council pursued and its range of concern expressed, and those of the Permanent Mandates Commission while it was in existence.

First, note might well be taken of the level of competence of the members of the Trusteeship Council. We have heard in these proceedings, and we see in the written pleadings of Respondent, references stressing the competence, unique competence, of the Permanent Mandates Commission as against the political character, etc., of the present situation. In the Trusteeship Council the representatives were—or at least some may be referred to in this context—Professor Francis Sayre, and his deputy Mr. Gerig, an outstanding authority, as the Court will know, on trusteeship and dependency matters, and author; Sir Alan Burns of Great Britain; M. Garreau of France; M. Ryckmans of Belgium, the honorary Governor-General of the Belgian Congo; Mr. William Forsyth of Australia, later to become Executive Secretary of the South-East Asia Commission; Sir Carl Berendsen, one of the stalwart founders of the United Nations itself; General Romulo of the Philippines; and so forth.

It will be observed from what follows in these remarks that many of the most anxious questions addressed to the Respondent's report and supplement, many of the most anxious questions directed toward the racial policies then pursued by Respondent, were addressed by representatives of administering powers themselves, and I think that this sheds some light on certain contentions now being advanced by Respondent with respect to some special considerations—we do not know what—with respect to African reality.

It is, of course, an irrelevant comment, and it is submitted with deference and diffidence, but there was not a single African State among the membership of the Trusteeship Council at this time—if that is relevant, which of course it is not.

The report submitted by Respondent for the year 1946 and the supplementary report requested by the Trusteeship Council were both examined closely, with particular attention directed to information relating to Respondent's obligations under Article 2, paragraph 2, of the Mandate. The statements made by representatives of members of the Trusteeship Council in 1947 reflected the need for more information from the mandatory power. *In every case* the additional evidence sought from Respondent related to its obligations to promote to the utmost the welfare of the inhabitants of the Territory in terms of Article 2, paragraph 2, of the Mandate. This was the preoccupation of the members of the Trusteeship Council in considering the report.

In 1948, the Council, having the supplementary report at its disposal, examined the data therein entirely for purposes of determining whether Respondent's administration of the mandated territory was in accordance with its obligations under the sacred trust.

A study of the Trusteeship Council's records for 1947 and 1948 demonstrates that the Council was primarily, as was to be expected, concerned with the political, economic, social and educational development of the inhabitants of South West Africa. This is evident both from the questions asked of Respondent and the observations made by the members of the Council.

The Council was clear that each of the substantive areas with which

it was concerned, that is to say, political, economic, social and educational advancement, was to be supervised within the context of what was then assumed to be axiomatic, and that is, no official separation or discrimination on the basis of membership in a group, class or race.

The records of the Council are replete with criticisms of Respondent's racial policy, and they evidence the Council's unquestioning assumption that the overriding purpose of the Mandate was found in Article 2, paragraph 2, of the Mandate, and this of course is reflected similarly in 1962 in the Judgment of the Court, where at page 329 the Court stated:

> "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. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote 'the well-being and development' of the people of the territory under Mandate." (*I.C.J. Reports 1962*, p. 329.)

This is precisely the attitude and the basis upon which the Trusteeship Council proceeded in examining the report and supplement in 1947 and 1948 respectively.

Appreciation of the nature of the supervision exercised by the Trusteeship Council and its axiomatic assumptions with respect to the question of racial separation and discrimination is most easily observed by reference to each of the substantive obligations subsumed under Article 2, paragraph 2, of the Mandate. To begin with, it is clear that the Trusteeship Council even then regarded Respondent's policies relating to the political advancement of the inhabitants of the Territory as discriminatory, and as such far short of the duty to promote to the utmost the material and moral well-being and social progress of the inhabitants. For example, the United States representative, Mr. Gerig, presented a list of questions concerning Respondent's report for the year 1946. It will be recalled that the report was considered by most members of the Trusteeship Council to be inadequate, inasmuch as it did not contain sufficient information to enable the Council to carry out the supervisory functions authorized by the General Assembly—resolution 141 (II) of 1 November 1947. Mr. Gerig's first question was, in relevant part, as follows—this is from the *Trusteeship Council Official Records*, Second Session, the first part, 12 December 1947, at page 490:

> "... with regard to the Legislative Assembly and the Advisory Council of the Territory, has the Union Government any plans to appoint Natives to represent Natives in either or both of those bodies, in line with policies pursued in other parts of Africa?"

At the same meeting of the Trusteeship Council the representative of Iraq previously mentioned set out several areas on which further information was needed. In the course of the presentation of his views the delegate of Iraq said as follows—this is at page 493 of the same report:

> "... Africans and Coloured people are debarred on the ground of race from voting for or sitting in the Legislative Assembly for South West Africa, although in the Union of South Africa itself they have certain restricted political rights in elections to the Union Parliament".

That was true at the time. Now the Iraqui delegate to the Trusteeship Council, in the course of his presentation, addressed his enquiry for further information on that proposition, on that question. By the 1948 Session of the Trusteeship Council, the supplementary report requested at the previous Session had been submitted by Respondent's Government, and the observations on the part of members of the Trusteeship Council with respect to the political aspects of the administration of the Territory were therefore both more informed and, as it turned out, more critical. Thus on 23 July 1948, and this is from the records of the Third Session at page 412, the representative of China, Mr. Liu Chieh, said:

> "The Chinese delegation was of the opinion that greater participation of the indigenous population in South West African public affairs should be the primary concern of the Trusteeship Council. According to the reply given by the Government of the Union of South Africa to question 1, page 1 of document T/175, franchise in South West Africa was restricted to Europeans; furthermore, in order to be eligible for election to the Legislative Assembly, a candidate must be enrolled as a voter . . . The result, therefore, was that the indigenous population was not represented on any legislative body of the Territory."

The same concern on the same basis and for the same reason was expressed by the representative of New Zealand, Mr. Reid. Shortly after the comments of the Chinese delegate to this Trusteeship Council the representative of New Zealand—itself, of course, a trust administering Power—said, and I quote from page 413 of the record:

> ". . . the New Zealand delegation was most concerned with the indigenous inhabitants having no representatives of their own, even down to the tribal level. More than that, they were not even represented by a European. The Legislative Council was composed of ten official members appointed by the Administration and of other members elected exclusively by European residents. It was essential to draw particular attention to that point."

It hardly seems necessary to say that in citing these views and questions the Applicants are not posing an issue with respect to the validity, or accuracy, or otherwise of the views then expressed, nor can the Applicants appropriately, or do they have the capacity of advising the Court at this moment whether or not any of these policies referred to specifically here are today in precisely the same form as they were then, for lack of familiarity with precisely how they were then. But the point, of course, of citing these statements is to show not only that the members of the Trusteeship Council *(a)* considered that they were exercising a supervisory authority over the Mandate; *(b)* that they were in a position and competent to deal with the substantive obligations implicit in Article 2, paragraph 2, but in addition *(c)* that the members of the Trusteeship Council were operating on the premise, and proceeding from the axiomatic point of departure, that discrimination on the basis of race, the allotment of burdens and duties on such a basis, was not permissible within the Mandate; they called attention to this factor repeatedly.

The need for administration of the Territory on the basis of non-discrimination, on the basis of race, was repeatedly stressed, among others,

by the Philippine delegate. The delegate of the Philippines, for example, stated at pages 413-414 of the reports already cited as follows:

> "... he had noticed with great regret that a policy of racial discrimination still existed in the Territory of South West Africa, despite the explicit stipulation of the Mandate that the Mandatory Power should do its utmost to promote the well-being of the indigenous population.
>
> . . . .
>
> He was very sorry, indeed, to notice that trend in the administration of South West Africa. He had thought that the Union of South Africa being one of the most advanced countries of the African continent, would have been in the vanguard of progress and would have led the way towards the development of the African indigenous population."

The axiomatic assumption that the policy of racial discrimination which still existed in the Territory I have just quoted, "despite the explicit stipulation of the Mandate that the Mandatory Power should do its utmost to promote the well-being of the indigenous population"—an implicit, nay, an explicit, assumption that this policy at that time was not consistent with the promotion of the well-being of the indigenous population. Similarly, in similar terms, the representative of France, M. Garreau, in the same proceedings at pages 415-416 made the following statement, in which he said, *inter alia*:

> "(1) education should remain the primary concern of the mandatory Power; (2) the restrictions imposed on various aspects of the life of the indigenous population should be progressively removed so far as the situation permitted. It was in the interest of the South African Government itself to pay the greatest attention to the lot of the indigenous populations and to promote their development, first from the intellectual, and then from the political point of view. It was the duty of the Government to ensure the representation of natives in the administrative bodies of the Territory.
>
> Lastly, the Trusteeship Council should express the wish that every sign of racial segregation should disappear as rapidly as possible."

There was of course no dissent from any of these views expressed by members of the Trusteeship Council. The Council members—the calibre, competence, expertise of whom I have already made reference to—the Council was expressing criticism of Respondent's then administration of the Territory in so far as the political advancement of the inhabitants was concerned on the basis of an axiomatic acceptance of the impermissibility of a policy of allotting rights and burdens and duties to individual inhabitants, on the basis of separation of groups or discrimination among individuals on the basis of race. At no time did any member of the Council purport in any way, or venture in any way, to defend Respondent's policies in this respect, either on their merits or on the basis of administrative or legislative discretion vested in the Respondent by Article 2, paragraph 1, or otherwise, and we will have more to say about this question in response in due course, *inter alia*, to the questions propounded by Judge Sir Gerald Fitzmaurice.

There was manifest agreement among members of the Trusteeship Council that nothing in Article 2, paragraph 1, of the Mandate inter-

fered with its exercise of supervisory authority with respect to the policies pursued by the Respondent in connection with the sacred trust, including that basic core of the sacred trust which is embodied in the second paragraph of Article 2 of the Mandate. There was, on the contrary, manifest and explicit assumption taken by members of the Trusteeship Council that the over-riding obligation, to use the word of this honourable Court in the 1962 Judgment, was contained in Article 2, paragraph 2, of the Mandate.

The members of the Trusteeship Council were also highly critical of Respondent's economic and social policy in the Territory. Again—and this is asserted now simply to indicate the manner in which they exercised their supervisory authority, the task which they conceived they had, all this, Mr. President, in the context of Respondent's contention on rebuttal that these members of the Trusteeship Council were not then asserting or exercising a supervisory authority—the members of the Trusteeship Council, as I have said, were also highly critical of Respondent's economic and social policy in the mandated Territory, and, again, the pattern was to seek further information in 1947 because of the inadequate and incomplete nature of Respondent's report in the conception of the members of the Council, and to criticize the policies during the 1948 Session of the Council, after they had had the benefit of the supplementary information submitted by Respondent, pursuant to the Council's request.

The Council's observations and criticisms in these areas of economic and social policies, just as in the case of its views expressed with regard to political obligations, were frequently made within the context of what the Applicants now describe as the international norm and international standards of non-discrimination and non-separation. The premises upon which the Trusteeship Council members proceeded at that time are consistent with no other interpretation—for example, the Chinese representative on the Trusteeship Council was one of those who sought further information with respect to Respondent's basic reserve policy—the policy with regard to the Native Reserves. The Chinese delegate stated, in part, as follows:

> "... on page 13, paragraph 54 [that is, of Respondent's report for 1946] it is stated: 'By 1924 the framework of a territorial Native policy had been laid. Much, however, remained to be accomplished within the Police Zone. The Natives were still scattered over the country outside the reserves and they had to be gradually sorted out and sent to the reserves selected for them.' [That is quoted from the report of Respondent, to which the Chinese delegate was addressing himself. Now the Chinese delegate proceeds, having specific reference to this sorting out proposition:] That is a point on which I definitely want more information. Why were these Natives sorted out and sent to different reserves? Is this a natural evolution or an arbitrary segregation?
>
> It seems to me that in a Trust Territory, as far as the indigenous inhabitants are concerned, this type of arbitrary sorting out into reserves is not conducive to the development of their capacity for self-government." (United Nations, *Trusteeship Council Official Records*, 2nd Session, First Part, pp. 486-487.)

The Chinese representative had several questions also with regard to

Respondent's policy of restricting freedom of residence in the Territory, in so far as the so-called non-white population is concerned, thus, at the same meeting of the Trusteeship Council the Chinese delegate said:

> "... on page 15, in paragraph 67 [that refers to the Respondent's 1946 report] it says: 'In rural areas outside the reserves, there is a considerable population working on farms and in mines. Their residence and movements are governed by proclamation in terms of which employment on farms and labour in mines are also controlled.' That seems to indicate [says the Chinese delegate] that there is a very rigid control of movements and residence of the Natives. It seems to me that that also calls for explanation.
>
> In paragraph 68 [of the 1946 report] again the same question arises. This paragraph states: 'In urban areas Natives reside in locations controlled by local authorities.' It seems to me that in certain rural areas there are reserves, and in urban areas there is control of the locations for Natives. Again there seems to be a very deliberate segregation." (United Nations, *Trusteeship Council Official Records*, 2nd Session, First Part, p. 487.)

I will refer in due course, Mr. President, to the use in the Applicants' pleadings of words such as these which appear in the Trusteeship Council reports; "deliberate segregation", "arbitrary segregation", these judgmental attitudes with respect to the policy.

Here, of course, we are dealing with the question of the scope of authority being exercised by the Trusteeship Council, the areas of the administration of the Territory with which the Council members were concerning themselves, and the axiomatic assumptions they made with respect to segregation and which, in their concept, justified adjectives such as "deliberate" and "arbitrary" as conclusions drawn by them from the policy.

Finally, the Chinese representative sought clarification with regard to still another of Respondent's manifold and various classifications and sorting-out procedures which were reflected in the supplemental report. Quoting from page 25 of Respondent's report, the Chinese delegate stated as follows:

> "... there is set out the system of passes for labour recruits. The classifications are, 'A Boys', 'B Boys' and 'C Boys'. I should like to have some clarification of these classifications." (United Nations, *Trusteeship Council Official Records*, 2nd Session, First Part, p. 488.)

This is cited at this point of the record, Mr. President, to demonstrate the area of concern and the obviously implicit assumptions upon which that concern was based.

The representative of Belgium, Mr. Ryckmans, Honorary Governor-General of the Belgian Congo, was particularly interested in Respondent's land policy and how it affected the well being of the indigenous inhabitants of the mandated Territory. On 12 December 1947 Mr. Ryckmans asks the following question:

> "In connection with the land question, which is of obvious importance to the indigenous inhabitants, paragraph 237 [of the Respondent's report] states that the 'system of allotment of land to settlers in South West Africa is similar to that obtaining ...'. I should like to know whether the land legislation of South Africa

which is applicable to South West Africa is consistent with the mandate system and the principle that the interests of the population should be the foremost consideration?" (United Nations, *Trusteeship Council Official Records*, 2nd Session, First Part, p. 489.)

The "allotment of land to settlers", to which he was referring of course included, but was not limited to, the aspect of not permitting *non-white* settlers.

[Public hearing of 12 May 1965]

Mr. President and honourable Members of the Court, at the conclusion of the Oral Proceedings yesterday I was referring to the statement of Mr. Ryckmans, the Belgian representative, in the Trusteeship Council in December of 1947, when the Council was considering the report submitted by Respondent with regard to its administration of the Territory of South West Africa. Mr. Ryckmans had referred in his question to the reference in paragraph 237 of the report relating to the system of allotment of land to settlers in South West Africa, and I had concluded yesterday by pointing out that the system was apparently then based upon the race or ethnic groupings of the population, or involved that element.

The significance of the question and, indeed, of the entire range of questions to which the Applicants are addressing themselves in this context does not in any sense involve the merits or otherwise of the policies which may then have been in existence in the Territory. On the contrary, without opening up that question at all, which is quite irrelevant in this context, the purpose of these references, as I have respectfully sought to indicate to the Court yesterday, is to demonstrate three factors—(1) that the Trusteeship Council was indeed asserting and exercising a supervisory authority over the Mandate; secondly, that it was in pursuance of that task, considering the sacred trust obligations, notably those within Article 2, paragraph 2; and thirdly, that in so doing it was manifesting the clear axiomatic assumption, never questioned, that a policy of discrimination on the basis of membership in a race or other group was not permissible or, at the very least, to understate it, was highly questionable, and that is an understatement. The context of Mr. Ryckmans' question demonstrates also, in the Applicants' respectful submission, that even where, as in that case, the legislation of the mandatory power itself is applied in the Territory, pursuant to Article 2, paragraph 1, the overriding obligations of the second paragraph of Article 2 remain dominant. In that case the legislation of South Africa itself was apparently applied in and to the Territory.

To revert to the main line of the discussion, however, the supervisory powers exercised by the Trusteeship Council in the years 1947 and 1948 were similar, closely analogous in all major respects, to the methods of enquiry, the range of enquiry, which were within the normal course of activity of the Permanent Mandates Commission itself during the League of Nations period. The only distinction, and an important one, as was pointed out by several members of the Trusteeship Council, as I indicated in an earlier stage of these remarks, was the absence of a representative of Respondent, and that of course was regrettable. Mr. Gerig, the deputy representative of the United States, as has been noted earlier, presented a list of several questions in which the United States delegate to the Trusteeship Council also sought further information from the Respon-

dent in pursuit of the exercise of this supervisory function, and it will be recalled that Respondent itself was complaining at that time of the fact that the Trusteeship Council was purporting to exercise a supervisory function. Among the questions which were asked by Mr. Gerig were the following, *inter alia*:

> "What is the effect of the reserve system as outlined in paragraph 59 [of the Respondent's Report for 1946, that is] on freedom of movement? Specifically, have Natives the right to move freely into or out of the reserves? What is the nature of the pass laws? What regulations govern the recruitment of labourers for the mines and farms of South West Africa, the wages of workers, and the conditions of employment? To what extent does the Native population of South West Africa seek employment in the Union and what regulations are now in effect for the protection of such labourers? What conventions of the International Labour Organisation have been ratified by the Union Government with respect to the territory?"

This is from page 491 of the report which I have cited yesterday.

It will be clear from the very range of this enquiry that the heart of the Mandate—Article 2, paragraph 2—was being subjected at that time to scrutiny, and the range of questions being addressed to Respondent by members of the Trusteeship Council did indeed go to the very heart of the Mandate, Article 2, paragraph 2.

In 1948, after receipt of the Respondent's supplementary report, the members of the Trusteeship Council continued their critical observations on and supervision of Respondent's administration of the Territory. Thus the response given by the South African Government to Mr. Gerig's question, which I have just quoted in part, regarding the applicability of international labour conventions in the Territory clearly was not at all satisfactory to the representative of China, Mr. Liu Chieh. On 23 July 1948 the delegate of China stated as follows—this is from page 412 of the records of the Third Session of the Trusteeship Council; he—

> "was surprised that the Government of the Union of South Africa had not offered any explanation of the fact that not a single international labour convention had been applied in the Territory of South West Africa. He also pointed out that native labour was recruited in South West Africa to work in gold mines in the Union of South Africa, and expressed the opinion that the Trusteeship Council should be informed with respect to working conditions in the mines [in South Africa, that is], inasmuch as the Union of South Africa had not ratified the International Labour Office conventions on the recruitment of native labour."

Again, this is cited to indicate the range and penetration of enquiry into the affairs of administration and administration in the Territory.

Throughout, of course, the observations made by members of the Trusteeship Council at that time were grounded on the basic idea that the Mandatory was obliged, and this was assumed apparently as axiomatic—it was never questioned or discussed—to apply a standard of non-discrimination on the basis of membership in a group or class or race; the questions could have been relevant to no other fundamental assumption. Later in the course of these arguments the Applicants, particularly in the context of the questions addressed by Judge Sir Gerald Fitzmaurice, will address themselves further to the processes by which the in-

ternational standards and the international legal norm have evolved, as well as the content and applicability of such a norm and such standards to the Mandatory. At this point we find, however, a clear manifestation of the responsible United Nations organ, the Trusteeship Council, operating under a resolution of the General Assembly, asserting and exercising a function of supervision over the Mandate which was conceded, now, by the Respondent to have survived the dissolution of the League in the view of the then Government of the Respondent, and in the course of its examination of the report expressing views and asking questions, positing the assumption that the Mandate obligations were to be read in the light of a standard which did involve the question of allocating burdens, status, privileges, duties upon the basis of membership in a group, particularly here on a racial basis.

Mr. Liu Chieh, the Chinese delegate, speaking immediately after the remarks of the Philippine representative which I have already cited, stated that—this is from page 414 of the same proceedings:

> "He had not dealt with that aspect of the question [that is, racial aspects of the Respondent's policy] because he thought that the Second Session of the Council had duly stressed the instances of remaining injustices. They included the prohibition for natives to own cattle, which was the main source of income of a country, their segregation in reserves, the restrictions on their freedom of movement, the restrictions concerning land ownership by natives, etc. Those were fundamental rights, and the Council would fail in its duty if its report to the General Assembly did not clearly draw the attention of the Union of South Africa to the need for granting such elementary rights to the indigenous population of the territory it administered."

That is from page 414 of the proceedings.

Finally, on this aspect of the matter, Mr. President, the Trusteeship Council was critical of the Respondent's educational policies in the Territory. Again, this reference is made not to place these policies before the Court—clearly not at this stage—but to indicate the basis upon which the members of the Council viewed the Respondent's obligations and proper performance of its responsibilities.

The representative of the United States of America, Mr. Francis Sayre, said that—and I quote now from the same record at page 411—

> "As to education, it [that is, the Council] might also call attention to the disparity between the amount spent per child in European schools and the amount respectively per native and coloured child, and point out that a sizeable increase in the amount earmarked for the education of African children would seem to be indicated.
>
> With respect to question 41 on page 210 [that is, of the report], to which the Union of South Africa had replied that the reason why there were no secondary schools for Africans was because they were not able to qualify for the courses, the Council might state that it appeared desirable to raise the standard and increase the number of primary schools."

Again, this is a penetration into the substance of the obligations implicit in Article 2, paragraph 2.

In sum then, Mr. President, these observations to which I have referred, as well as the official observations submitted by the Trusteeship Council

to the General Assembly in its report, in pursuance of the supervisory powers authorized by the General Assembly's resolution, marked the "first step"—as the French representative on the Council put it—in the direction of international supervision over the Territory of South West Africa. That is from the French delegate's remarks at the Second Session, First Part, of the Trusteeship Council, page 480 of the official record.

It was, as I have said, a supervision analogous in all material respects to that exercised by the Permanent Mandates Commission, and close attention was directed to Respondent's political, economic, social and educational policies, all within the context and on the basis of the axiomatic assumption of the application of a standard of non-discrimination and non-separation. There was no defence of Respondent's then policies in the Trusteeship Council, either on their merits or on the basis of the discretionary powers vested in Respondent pursuant to Article 2, paragraph 1, of the Mandate. There was no reference, parenthetically—and I shall have more to say about this in response to one of Judge Sir Gerald Fitzmaurice's questions—to the phraseology of Article 2, paragraph 1, referring to the administration of the Territory as an integral portion of the Republic; nor to the phraseology in Article 2, paragraph 1, that the mandatory power was given full power of administration and legislation over the Territory.

The questions were never posed or raised in the Trusteeship Council in that form in the course of their penetrating examination of the entire life and administration of the Territory. This will be dealt with in more detail subsequently.

The clear emphasis was on Respondent's obligations under Article 2, paragraph 2, of the Mandate, and, none of the Trusteeship Council members, Mr. President, undertook or referred to an inquiry concerning Respondent's intentions or good faith. The one theme that ran throughout the Council was the obligation, and this was the one central theme, to apply a non-discriminatory policy, a policy which did not discriminate and which did not separate on the basis of membership in a group. This was the thrust of the Trusteeship Council's supervisory observations and it has been the thrust of United Nations supervision over the Territory ever since.

As noted previously, Mr. President, the issue at the United Nations during the crucial years relevant here, that is to say 1947 and 1948, was not whether South West Africa should be subject to international supervision, but was related to the question of the appropriate form of that supervision. Most States wanted, hoped, expected, despite disclaimers by Respondent, that South West Africa would be placed under trusteeship. It was a forlorn hope but one which was clung to, and is manifest throughout the debates of the period, and marked many of the diplomatic attempts at persuasion which Respondent now would sometimes seek to interpret against the spirit of the proponents.

When trusteeship seemed to be out of the question, then the United Nations insisted upon exercising supervision over the Mandate. The only other alternative available to it would have been, or might have been, the application of reporting requirements pursuant to Article 73 *(e)* of the Charter. As has been pointed out, however, at an earlier stage, in response to the question propounded by Judge Jessup, no attention was paid, no consideration was given, to this possibility, so far as the Applicants have been able to determine from the record.

The confirmatory of this statement, which the Applicants have just respectfully presented to the Court, is that it is to be noted that the South West Africa question always has been treated as a separate item on the agenda of the General Assembly, and has never been discussed, so far as the Applicants have discovered from a careful reading of the records, within the context of non-self-governing territories under Chapter XI of the United Nations Charter. And, as I have said earlier, the reports submitted by South Africa were sent by the General Assembly to the Trusteeship Council, as explained by the representative of France—this was at the meeting of the Second Session, First Part, of the Trusteeship Council, reported at page 480 of the official records—the procedure had originally been proposed by the French representative M. René Mayer because, he said—

> "... he feared that to entrust the examination of the report to the Fourth Committee would convey the impression that the General Assembly regarded the Territory, which was formerly under South African mandate, as a non-self-governing territory and not as a trust territory, or as a territory that should be placed under the trusteeship system".

I have made parenthetical reference at an earlier stage to the phrase "formerly under South African mandate", a phrase used on several occasions, which can only be mystifying under the circumstances but which is irrelevant, in any event, by reason of Respondent's concession that its Government regarded the Mandate as having survived the dissolution of the League.

The third confirmatory indication of the accuracy of the Applicants' statement to the effect that the question had never been raised concerning applicability of Article 73 to the Territory, in debates in question, is that the Fourth Committee itself seemed to be anxious to avoid creating any basis for an impression that the Territory should be reduced to the status of a non-self-governing territory within the meaning of Chapter XI of the Charter. This was seen most clearly perhaps in the Fourth Committee in 1949, when draft resolutions were circulated proposing that the Court be asked for an advisory opinion on the status of the Territory of South West Africa. One such draft resolution proposed the following question—"Is South West Africa a territory to which the provisions of Chapter XI of the Charter apply?" This is in the *General Assembly Official Records*, the Fourth Session, Plenary, Annex, at page 109.

The question would have been asked in that form—it was never submitted, of course—in case of a negative reply to the question whether the Union of South Africa, as it was then known, was legally obligated to place South West Africa under the trusteeship system. Opposition to the presentation of this question, regarding the application of Chapter XI to the Territory, came almost at once. Thus, the representative of the Dominican Rebublic said:

> "... the Charter visualized the possibility of placing former colonies under the Trusteeship System but it did not provide that former mandated territories should be turned into colonies. The mandate system had been instituted precisely to avoid such a possible occurrence. For that reason, he considered that the provisions of Chapter XI of the Charter were not applicable." (*G.A.*, *O.R.*, Fourth Session, Fourth Committee, p. 276.)

Similarly, the representative of Brazil stated that he would vote against this clause in the proposed resolution—that is, the question I have referred to—because the acceptance of such a clause, he said, "would be tantamount to transforming a mandated territory into a non-self-governing territory and handing it over to the Union of South Africa". That is from page 278 of the same proceedings.

And in the plenary debate, the representative of Brazil stated that his delegation—

> "... had thought sub-paragraph (c) [this was the Chapter XI question] was extremely dangerous, as by referring to Chapter XI of the Charter the General Assembly would practically recognize that the Union of South Africa had a right of sovereignty which in point of fact it had never possessed over the mandated territory of South West Africa". (*G.A.*, *O.R.*, Fourth Session, Plenary, p. 530.)

And in the Fourth Committee the proposal to submit the question regarding Chapter XI to the Court was defeated by a substantial majority as will be seen from the *Annex to the Fourth Session of the Plenary Session of the General Assembly, Official Records*, at page 109.

Of course, Mr. President, the Applicants would not venture to express a view as to the wisdom or otherwise of the decision to refrain from submitting this question to this honourable Court. The views just quoted do, however, evidence feeling which was widespread among States that the supervision of the mandated territory should not be reduced to the minimal level applicable to the general run of non-self-governing territories under Article 73 *(e)*. These views reflected the conviction that the United Nations had a special supervisory responsibility with respect to the Territory, different and distinct from the responsibilities exercised in regard to non-self-governing territories in general, on the one hand, and trusteeship areas, on the other.

The Trusteeship Council in its discussion of the South West Africa question in 1947 and 1948 likewise avoided giving the impression that the mandated territory was to be treated as a non-self-governing territory within the meaning of Article 73 *(e)* of the Charter. In the same proceedings, the delegate of China in 1947, Mr. Liu Chieh, asked, in the course of a discussion of the standard by which South Africa's report should be judged:

> "What is the yardstick in this case? We are not examining it as a report on a Trust Territory, because from that point of view we might say that the report does not conform to the Questionnaire we sent out. We are not examining it as a report on a Non-Self-Governing Territory under Article 73e of the Charter, because we agreed that over those Non-Self-Governing Territories the metropolitan Powers exercise more sovereignty than the Union of South Africa has over this mandated Territory. The Government of the Union of South Africa itself states that it will continue to administer the territory 'in the spirit of the mandate' so the proper criterion in this case is whether it measures up to that mandate; otherwise we would have no criterion by which to measure it." (*Trusteeship Council, Official Records*, 2nd Session: First Part, p. 502.)

There was no dispute, manifest in the record at least, concerning the view of the Chinese delegate that the report should not be examined as if it were a report from a non-self-governing territory within the meaning

of Article 73 *(e)* of the Charter. There was, likewise, no dispute on this point in the Trusteeship Council Sessions the following year—1948.

The representative of France said:

> "Article 73e could not be invoked in support of the Council's competence as regards South West Africa because that Article referred exclusively to non-self-governing territories." (*Trusteeship Council, Official Records*, Third Session, p. 409.)

The Soviet representative, on the same day, at the same page of the record said that:

> "Paragraph e of Article 73 dealt with information concerning territories other than those mentioned in Chapters XII and XIII of the Charter, that is, non-self-governing territories and South West Africa did not fall within this category."

Now, it has been noted, Mr. President, that no question ever arose of the General Assembly explicitly rejecting or explicitly passing upon the application of Article 73 *(e)* to the territory for South West Africa. Careful study of the records seems to indicate the correctness of that statement. Respondent never itself took the step of initiating the inclusion of the Territory in any list of territories to be considered as falling within the scope of Article 73 *(e)*. Accordingly, there was no request from the side of the Respondent to be passed upon by the Assembly, to be discussed or to be accepted or rejected.

Respondent's behaviour, in this respect at least, was consistent with that of other States administering mandates. No mandated territory has ever been included in the official enumeration of non-self-governing territories for purposes of the reporting system under Article 73 *(e)* of the Charter. At most, as has been indicated, earlier in these proceedings, the Respondent undertook to supply information *like that* required under this provision of Chapter XI but refrained from adding the Territory of South West Africa to the list of non-self-governing territories.

It is true that the preponderance of opinion in the General Assembly coincided with that expressed by the Respondent, that the Territory does not fall within the category of non-self-governing territories for purposes of accountability under Article 73 *(e)*. That view has been expressed in these Oral Proceedings and may, no doubt, be further elaborated, perhaps, in response to Judge Jessup's question.

In any event, it is equally true that in the years up to 1950, as thereafter, there was no intimation by a significant number of United Nations Members that South Africa should be free from the obligation of international accountability for its administration of the Territory.

The history of this period, to the contrary, yields decisive evidence that, even though South West Africa had not been included either in the trusteeship system or in the scheme or lists of more restricted reporting for information purposes under Chapter XI, reports from Respondent concerning its administration of the mandated territory were considered requisite by the United Nations for the purpose of examination, pursuant to a supervisory function. And, nevertheless (and now we turn to an examination of a matter to which Respondent devoted much time and attention in the course of its rebuttal), in the face of the evidence Respondent still insists that between 1947 and 1949 (and in those years) 25 States expressed the view, clearly or by implication, as Respondent puts it, that in the absence of a trusteeship agreement there was no obli-

gation, on the part of a mandatory power, to report to and accept the supervision of the United Nations. It becomes necessary, therefore, in view of the decisive importance of the question of administrative supervision, to examine Respondent's technique and procedure with regard to this matter. Respondent has employed a singular technique in building up this list of 25 States. Six of the 25 were included merely on the basis of their signature of the report of the United Nations Commission on Palestine. That is the source of their qualification for listing. Inasmuch as that report, if anything, points in precisely the opposite direction—or at least the Applicants have submitted considerations to the Court which, in their view, justify such a statement—the inclusion of these six States, on the basis, really means nothing whatever. The Applicants would be more justified, indeed, in listing on their side of the case the 25 States which voted against asking the Court for an advisory opinion concerning the competence of the General Assembly with respect to the mandated Territory for Palestine. But the Applicants, respectfully, do not see validity in such a statistical technique.

Respondent's remaining 19 States require consideration as to their eligibility for retention on the list. Three of these, Cuba, India and Uruguay, were not consistent one way or another. Inasmuch as they occasionally expressed views clearly contrary to the position now held by the Respondent, they must be deleted. The Applicants should, perhaps add them to its own list of 25, which would raise the Applicants' list to 28, on Respondent's statistical approach.

Respondent also insists upon including the United States on its list, now reduced to 16 States, but justifies this on the basis of an incomplete rendition of a statement by Mr. Gerig before the Trusteeship Council, taken out of context, and this matter has been examined in an earlier stage of this argument.

Mr. Gerig, as has been pointed out, stated that he was unclear in his mind on the issue, he wished to have the views of other members, and when the United States Government expressed its considered and definitive position on the issue, in a written statement submitted to this honourable Court in 1950, it was a position strongly supporting the view that Respondent is obligated to render accountability to the United Nations.

Respondent dismisses the United States' view submitted to this Court on the following basis, in the verbatim record, **VIII**, at page 501—the Respondent characterizes the written statement of the United States submitted to this Court as—

> "... pure, special pleading, of the very same kind that we find in the arguments of the Applicants now being addressed to the Court. It was an *ex post facto* effort to achieve a desired result ..."

Mr. President, it is not clear, from the terms of Respondent's charge, who is intended to be the culprit and who is the victim of guilt by association between the Applicants and the United States position. But, barring the United States from the list, the list is now reduced to 15.

Respondent concedes that two of the States left on its list, namely China and the Philippines, were, as it says, "somewhat inconsistent". As has been shown, both these States actually considered that the Trusteeship Council should examine the report submitted by Respondent as if it were a report from a trust territory, and the Philippines Government

thought that petitions should be accepted by the Council. It is obvious, therefore, that, within the most relevant context, they expressed or indicated the view that the United Nations had, indeed, supervisory powers over South West Africa, and that the Trusteeship Council was, and should be, exercising them, and this, may the Court be reminded, was precisely the basis of the objection then made by Respondent's Government for the operations of the Trusteeship Council in this sphere at all.

If China and the Philippines are deleted from the list of 25, the list is down to 13 allegedly "consistent" States, in the word of the Respondent.

Respondent has devoted considerable time during its rebuttal to an examination of this matter. Even the "consistent States", so called, were hardly consistent, if one examines the record.

Respondent lists New Zealand, for example. Yet, as already noted, in the 1948 Trusteeship Council debate, New Zealand states as follows:

> "It was the Council's duty to comply with the General Assembly's request and to supervise the treatment of the inhabitants of the Territory to the best of its ability, within the limited means at its disposal." (*Trusteeship Commission, Official Records*, Third Session, p. 409.)

The Soviet Union has won its place on Respondent's list. The list, as will be recalled, is compiled both with reference to South West Africa and to other mandates. Yet, the Soviet Union asserted that the General Assembly had legal authority under Article 10 of the Charter to exercise supervisory powers over the Palestinian Mandate and, of course, the Assembly did so. This we have discussed fully. If New Zealand and the Soviet Union are de-listed, 11 States remain. Respondent lists Pakistan among the remaining 11.

In the Fourth Committee in 1948, the representative of Pakistan, Mr. Chaudhury, spoke as follows according to the summary record:

> "The Mandates Commission of the League of Nations had had supervisory powers for twenty years. Reports had been submitted annually by mandatory powers and scrutinized with jealous care by the Mandates Commission. The League of Nations had been replaced by the United Nations which had taken over the functions formerly exercised by the League; several provisions of the Covenant of the League of Nations relating to mandated territories had been included in the Charter . . . The Union Government could not claim its rights and reject its obligations."

Parenthetically, the language employed then by the Pakistan delegate is remarkably similar to the language employed by this honourable Court in the 1950 Advisory Opinion, with respect to the matter of claiming rights and rejecting or denying obligations. The Pakistan delegate went on to say:

> "When the League of Nations had gone out of existence had there been any provision that the Territory would revert to the Union of South Africa."

And then a short while later, in conclusion, Mr. Chaudhury stated that—

> "The United Nations should retain the responsibility of controlling the mandated territories and that the Union of South Africa

> was in no way justified in defying the repeated recommendations made to it to submit a trusteeship agreement."

This was the context, of course, of the discussions of the times—this was from the Fourth Committee, Third Session, pages 315-316, in the *General Assembly Official Records*.

In fairness to Pakistan's position perhaps Respondent will itself agree to de-list Pakistan. The list, however, on this basis is now reduced to ten—one of these is Respondent itself. This however, is a tenable listing only if the delegate of Respondent to the Preparatory Commission, Mr. Nicholls, is ignored, as well as the terms of its April 1946 Pledge, but we will permit Respondent to list itself if it wishes. Of the nine remaining on the list, excluding the Respondent, France is listed as a consistent State, but France, even in the absence of a trusteeship agreement, urged the submission of reports by Respondent. Thus, the French delegate to the Fourth Committee, M. Garreau, stated that the Respondent's representative, and I quote from the Fourth Session, Fourth Committee, at page 16, of the *General Assembly Official Records*, that Respondent's representative—

> "... had stated that his Government would continue to administer South West Africa 'in the spirit of the Mandate'. [M. Garreau] would have preferred it if he had also said 'and in accordance with the letter of the Mandate', for it was regrettable that the Union Government no longer deemed it necessary to transmit regular information as provided in the mandate system. He hoped that the Government of the Union of South Africa would review its position and start transmitting information again."

This was the summary record of the French delegate's statement in the Fourth Committee.

Furthermore, the statement made by M. Garreau in the Trusteeship Council upon which Respondent placed reliance in its rebuttal argument in no way supports Respondent's position or confirms the validity of listing France among the 25, as has already been demonstrated by specific reference to the remarks made by the French representative on the Trusteeship Council, which we have put into the record at a somewhat earlier stage.

The French delegation was merely insisting upon strict compliance with the terms of the General Assembly resolution, pursuant to which the Trusteeship Council was exercising a supervisory function and examining the reports submitted by Respondent at that time. The remarks of the French representative, M. Garreau, in that context cannot, it is submitted, be taken as evidence that France denied the competence of the Council or of the United Nations to exercise any form of supervision over mandated territories or that the Mandatory was not subject to the supervision, thus asserted and thus exercised, in which the French delegation on the Trusteeship Council took part and played an important role.

This far, Mr. President, the Applicants consider that the list may fairly be reduced to eight allegedly consistent States. As already noted, it was proposed in 1947 that the issue of the General Assembly's legal competence over the mandated Territory of Palestine be put to the Court for an advisory opinion. This proposal was rejected in view of the conviction expressed in the *ad hoc* Committee by a large majority of the

members, that there was no room to doubt the power of the Committee and of the General Assembly in this regard. Significantly, the Applicants submit, among the States which voted "not to ask the Court for an opinion on the issue" were Australia, Canada and Costa Rica—three of the remaining States on Respondent's list of eight. If these States had wished to challenge the Assembly's competence in the Palestine case, they might have been expected to support the request for an advisory opinion. However, I cite this merely to indicate the speculative nature of the enterprise upon which the Respondent has embarked in devising by this method a list of 25 States. Mr. President, I believe the matter can be dropped there.

In sum, all that Respondent's list demonstrates is that confusion and inconsistency, of course, attended the anomalous situation created by the single, residual Mandate other than Palestine itself, which confronted the United Nations with the necessity for making a decision which it hoped it would never have to make but which it possessed power to make if necessary, and which it did exercise, when it became necessary. And this situation of doubt, confusion and ambiguity, of course, led to the submission by the General Assembly of its request for an Advisory Opinion in 1950, and, as the Applicants took the liberty of remarking at an earlier stage of these proceedings, it must be unique in the annals of judicial procedure that confusion, which explained why recourse was had to judicial process, is itself asserted as an argument against the conclusion of the Court reached in 1950, upon the basis of the submission of the General Assembly.

Respondent disputes the contention that the General Assembly resolutions 141 (II), 227 (III) and 337 (IV), calling for reports from the Respondent, were designed to establish international supervision over the mandated territory.

This dispute is created by a process which, the Applicants believe, may fairly be described as parsing the words of the resolutions so as to squeeze out any obligation to submit to international supervision. The acid test of Respondent's analysis of the resolutions in question, it is submitted, would be to examine the reaction of the United Nations in so far as supervision is concerned. When Respondent made its decision in 1949 to send no further reports on its administration of the Territory, the reaction was swift and its direction was clear. The United Nations decided to hear in the Fourth Committee a petitioner from the Territory—this was the response. Having had information in the form of reports cut off, the Fourth Committee assumed even greater supervisory authority than had previously been exercised in the Territory—greater in the sense of form and procedure.

Several statements made by representatives in the Fourth Committee debates reveal the importance attached to hearing a representative of the inhabitants of the Territory. For example, the delegate of Cuba at that time stated—this was in the Fourth Session of the Fourth Committee, page 222 of the *General Assembly Official Records*:

> "He agreed with the French representative that the point was not expressly provided for in the Charter, but he did not think that the Committee would be creating a dangerous precedent. What did constitute a dangerous precedent in the Cuban view at that time was the fact that the General Assembly had not received any further information on the territory of South West Africa, and that

> the Mandate was to be set aside through unilateral action—not only did the right of petition exist in trust territories but also under the mandate system."

This, of course, assumed the positive existence of the Mandate to say nothing of the right of the United Nations to exert a supervisory authority over it.

In the same vein the delegate of Brazil, explaining why his Government supported the grant of a hearing to the petitioner of the Territory, said:

> "South West Africa was not a sovereign state but a territory placed under the mandate system of the League of Nations, and consequently, was under the supervision of the community of nations, namely, the General Assembly."

This is from pages 223-224 of the same proceedings.

The issue of setting a precedent was before the Fourth Committee, but it was not viewed by the majority of States as an issue of great concern from a constitutional or Charter point of view—that is the issue of hearing petitioners as a form of exercising a supervisory authority which the members assumed they had asserted and exercised. Thus, the then Foreign Minister of Thailand, Prince Wan, stated in the same proceedings, at page 232, as follows, in the Summary:

> "The Fourth Committee was entirely free to grant a hearing to the representative in question if it felt that there were good reasons for doing so. He did not think there was any occasion to worry over the fact that such a decision might establish a precedent. Such a decision would in fact be a precedent, but it concerned a very special problem, which had been before the General Assembly since its first session, and would continue to be considered by that body until a satisfactory solution could be found. The representatives were spokesmen of groups of inhabitants of a mandated territory and the precedent established by hearing them could only be fairly invoked in analagous cases, namely, only in cases concerning the peoples of mandated territories, but that was not likely to happen."

Of course not, it was not likely to happen, as the Foreign Minister of Thailand said. This was the single, residual Mandate and the third system—a special system for supervision—was then in the process of being formed. The greater need for information now that South Africa had ceased sending reports to the United Nations impressed many delegates as is clear from their statement. Thus, a representative of Mexico, Señor Noriega, said, and I quote from page 236 of the Summary Record:

> "He considered that in order to attain a clear picture of the situation in South West Africa the Committee should hear the views of the representatives of the minority and the majority. That need was all the more important since the Government of the Union of South Africa had notified the Secretary-General that it would discontinue to transmit information on the territory in question."

The Fourth Committee decided by a vote of 25 to 15, with 6 abstentions, that hearings should be granted to petitioners, and of course the Court in the 1956 Advisory Opinion confirmed the authority of the United Nations to do so, in terms of the 1950 Opinion.

The system of supervision, accordingly, was actually extended by the United Nations over the Territory in the face of Respondent's decision to cease submission of its reports. This, in turn, sheds light on the original purpose of the resolutions of the Assembly, calling for the submission of reports, and in the Applicants' view demonstrates that the General Assembly did indeed attempt through those resolutions to establish a system whereby Respondent's accountability to the United Nations would be made effective.

Of primary importance here is the relationship by the—in this respect, an interpretation of the General Assembly's resolution—the relationship, as I have pointed out, between the cessation of reporting and the decision to hear petitioners. The General Assembly must have viewed the examina tion and judging of reports as an exercise of supervisory powers for the Assembly, and its Committee dealing with this subject, the Fourth Committee, could hardly be said to have suddenly seized supervisory powers, upon being deprived of reports. The discussion in the Fourth Committee, of course, does make it clear that the system of supervision was being adapted to the changing requirements of supervision by reason of the refusal of the Respondent to submit reports. Thus, the international supervision of South West Africa, which had begun with the refusal of the General Assembly to accede to the termination of the Mandate in 1946, which continued through the examination and judgment by the Trusteeship Council of the reports submitted by the Respondent, developed still further in 1949 to the point at which the Fourth Committee of the General Assembly granted hearings to a petitioner from the mandated Territory.

This process of development was begun with the consent of the Respondent manifested in 1947 and was continued in the face of strong opposition by Respondent after that date. Of course, Respondent today denies this version of its actions in 1947. This is an issue in dispute between the Parties. The Applicants rely with conviction upon their record of those proceedings, particularly in the light of the Advisory Opinion of 1950 of findings with respect to them, and no new facts or any other kind of facts have been submitted to the Court which would justify the expunging or the obliteration of the 1950 Opinion from its status as judicial authority.

Respondent's position in the cases at bar is counter to the historical development of the international supervision of dependent areas. It is an evolution of historic proportions which began with the establishment of the mandates system of the League itself. Respondent's present position reverses its earlier position, to wit, that the Mandate was, according to the view of its Government of the day, from the legal point of view, in full force and effect notwithstanding the dissolution of the League. Respondent's position reverses this acknowledgment, and indeed the explicit insistence during the meetings of the Preparatory Commission itself, that, in the absence of the Permanent Mandates Commission, and until other agreed arrangements were concluded—and I quote once more and finally from the words of Respondent's representative to the Preparatory Commission, Mr. Nicholls—"countries holding Mandates should have a body to which they could report". Such a proposal moreover, as has been noted, was made by Respondent's representative in the Preparatory Commission in the context of a debate concerning a constitutional question involving the proper interpretation of the United

Nations Charter—a debate in which great anxiety was being voiced by members of the Preparatory Commission that the trusteeship system should be accelerated, and that the Trusteeship Council should be established as soon as possible. It was in this context that the Respondent along with other mandatory powers—two others expressly—urged the creation of a temporary commission and interim machinery, to which the Respondent, as also the other mandatories holding mandates, would have a body to which they could report.

Mr. President, the Applicants with respect have pointed to the risk that the central issue here involved may be lost to sight in the haze of events which occurred 15 to 20 years ago, and in the maze of argument which developed, necessarily so, concerning the interpretation of words and phrases quoted or passed without due regard to the context in which they were spoken, or the purposes for which they were uttered. The central issue pivots upon an elementary proposition which marks the very jurisprudence of this Mandate, to wit that international accountability is, in the words of this honourable Court in the 1962 Judgment, of the very essence of the Mandate.

It may be convenient at this point of the record and with the honourable President's permission, to set forth here, as a preliminary to the next series of the legal argument to follow, to set forth here what I have taken the liberty of referring to as the jurisprudence of the Mandate; to set forth certain basic propositions which are comprised within the law of the case, and which are the very foundation stones of the Applicants' position, with regard to the Respondent's obligation to submit to international administrative supervision, and to judicial protection for the sacred trust.

The following excerpts from the Advisory Opinion of 1950 may be of particular relevance in this connection and, with the Court's permission, I would like to set them forth:

> "It is now contended on behalf of the Union Government that this Mandate has lapsed, because the League has ceased to exist. This contention is based on a misconception of the legal situation created by Article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by that Government, a 'mandator' in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control... The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law... The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa." (*I.C.J. Reports 1950*, p. 132.)

Again on page 133 of the same Opinion there is a brief statement:

> "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.
>
> These international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponded to the sacred

trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the 'securities for the performance of this trust' referred to in the same article." (*Ibid.*, p. 133.)

One more quote from the Opinion to set and pour into the mould of the jurisprudence of the Mandate, the history and antecedents of the present phase of these proceedings:

"These obligations represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." *(Ibid.)*

Finally, from the 1950 Opinion, I quote from page 136:

"The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration [*required* that the administration] of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. 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." (*Ibid.*, p. 136.)

Mr. President and Members of the honourable Court, these are the words and the findings of this Court; they are not contentions submitted by the Applicants, although the Applicants could hardly find better words in which to submit their contentions.

In the 1956 Advisory Opinion, the Court set forth as follows, at page 28, as part of the jurisprudence of international supervision, a basic obligation:

"The general purport and meaning of the Opinion of the Court of 11 July 1950 is that the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory." (*I.C.J. Reports 1956*, p. 28.)

And then we come to 1962 and to references which would appear to suffice to consolidate the record of the mandate jurisprudence in this context:

"The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdevel-

oped 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 civilisation' 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.

These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. 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. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote the well-being and development of the people of the territory under Mandate." (*I.C.J. Reports 1962*, p. 329.)

Now from page 336, the final quote:

"The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the 'sacred trust' toward the inhabitants of the mandated territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate."

Mr. President, in contrast to the foregoing judicial interpretations and holdings of this honourable Court, with regard to the significance and scope of the role of international supervision in the mandate scheme, stand the *following contentions of the* Respondent, which are cited illustratively as several among many similar contentions.

Mr. President, in the context of the lapse of the Mandate as a whole argument in the Rejoinder, Respondent comes to grips with the real issue of the survival or not of international supervision, but the Respondent does so in an extraordinarily tentative and diffident manner in the light of the jurisprudence of the Mandate to which I have referred. In the Rejoinder, V, at page 59, the Respondent states:

"It cannot be said, and Respondent has not contended, that the element of League supervision possessed a quality of such absolute essentiality that the whole Mandate became objectively or mechanically inoperable upon the dissolution of the League. Indeed, most of the obligations under the Mandate are quite capable of existence and performance without any supervision."

And then, later on the same page, Respondent states as follows:

"Here again it must be conceded that the substantive purposes for which the mandate institution was created can still be advanced, even in the absence of supervision. But be that as it may, the question whether the Mandate as such *is to be regarded as still being in* force, in such a reduced form, is one the answer to which must depend on the intentions of the authors of the Mandate."

And then Respondent continues:

"However, inasmuch as the future dissolution of the League was in fact not contemplated at the stage of its foundation, it follows that the authors of the Mandate could not have had any actual intention regarding the continued existence or otherwise of the Mandate in the event of such dissolution. The present enquiry must, therefore, relate to their presumed rather than their actual intentions. And the main guide to the presumed intentions of the authors of the Mandate in the respect under consideration is afforded by an appraisal of the role intended to be played by, and degree of importance attached to, League supervision as an element in the Mandate System."

This is quite correct, in the Applicants' view. The importance of the international supervision obligation, does indeed shed light upon, and in fact is the basis for, the interpretation of Article 22 of the Covenant in this regard. At page 60 of the Rejoinder, V, Respondent goes on to say:

"Respondent must concede that the question thus placed before the Court is not an easy one. That the duty to account to, and submit to the supervision of, the League, formed an important element of the Mandate System, is not open to doubt. On the other hand, whether it was regarded by the authors of the System to be of such importance as to constitute a *sine qua non* of the whole system, must necessarily to a certain extent remain a matter of speculation, evaluation, or judgment, on which no definite proof either way can be produced."

And then finally, in the same volume of the Rejoinder at page 69, the following contention appears—or submission perhaps would be the more appropriate way to describe it; apropos of the respective contentions of the Parties, the Respondent refers to a statement in the Reply which reflected the Applicants' understanding that there was common cause between the Parties as to the essentiality of international supervision. Now the Respondent, as of course is its perfect right, refers to the matter in the following way:

"In the passage cited from the Reply in paragraph 11 above [paragraph 11 is to be found in the Rejoinder at p. 73], the 'common cause' suggestion in the first sentence paves the way for Applicants to represent the rival contentions of the Parties as if they mutually invite the Court to make a choice between two extreme findings only, viz., that the Mandate has lapsed *in toto* or that it survives *in toto*. In truth, although Applicants' argument does involve such an invitation, the representation is wrong of Respondent's argument, which specifically invites consideration by the Court of a third possible finding, lying between the extremes, viz., that the Mandate survives in part, i.e., as regards its substantive provisions but without procedural obligations of report and accountability to a supervisory body. Indeed Respondent respectfully submits that that is the only form in which it can possibly be found that the Mandate still exists."

In the light of the mandate jurisprudence, and of the findings and holdings of this honourable Court, this statement is a difficult one to assimilate. The Court's holdings appear without any possibility of doubt to have settled the legal proposition that international supervision in-

deed is the *sine qua non* of the whole system, and there is no room for speculation, so far as the Applicants are aware, and the Applicants consider this to be such an essential and fundamental proposition that, in the Applicants' view, as the Respondent correctly points out, the Court is confronted with the choice between the two extremes as the Respondent characterizes them; they are extremes in a debative sense, but from a juridical point of view it is the Applicants' respectful submission that the Court was quite correct in referring to the international supervision, accountability, as of the very essence of the Mandate, and that to hold in the third way suggested by Respondent would strip the Mandate of its very essence, and this the Applicants do not conceive as a realistic juridical alternative.

Mr. President, there is no room to doubt that the scope of judicial protection, the final bulwark against asserted breaches or abuse of the Mandate, is less broad than administrative supervision itself in scope. Supervision is the very essence of the Mandate precisely because it is essential to protect the sacred trust, and the sacred trust is embedded in Article 22 of the Covenant and Article 2 of the Mandate in its very essence. Such a scope of judicial protection, commensurate with the scope of administrative supervision, is a logical imperative. It flows from the fact that, as was explained in the Hymans report to the League of Nations Council—I regret I do not at the moment have the citation to the Hyman's report, but will supply it during the course of the day; I have referred to it and quoted from it at an earlier phase of these proceedings—the Council was empowered and required to consider "the whole performance of the Mandate".

Unless the judicial protection encompasses the same broad ambit, the Court would lack competence to serve as a bulwark of protection against asserted breaches or abuse of the Mandatory which the administrative organ might consider it essential to prevent or to remedy. There would otherwise be a hole in the Mandate as wide as the sacred trust itself, so far as judicial protection is concerned.

The Advisory Opinion of 1956, relating to the right of petition, is doubly illuminating in this respect. It confirms the authority of the administrative organ to exercise functions relative to the protection of Article 2, paragraph 2, of the Mandate, and demonstrates the judicial acceptance of the Court's power to pass upon the interpretation and application of the provisions of the Mandate, designed to authorize administrative supervision with regard to the sacred trust, the essence of which is embodied in Article 2, paragraph 2.

The inter-relationship between the administrative and judicial functions, which is the point to which the Applicants are now addressing themselves, with regard to the proper working of the normal securities for the performance of the sacred trust, has been adverted to at an earlier stage of these proceedings. The Court, on the one hand, may not be properly asked, or expected, to serve as the first and normal security, in the words of the Court itself, rather than as the final bulwark of protection. By the same process of reasoning, the normal security must exist and be vested with powers of supervision adequate to its purpose, in order that the Court may have the benefit of the processes and the conclusions of a competent international supervisory organ.

The Respondent itself has shown full awareness of the nature and role of administrative supervision in the scheme of the Mandate, and Re-

spondent has done so in the context of its effort to persuade the Court not to embark upon this area of activity. In the oral presentation on 14 April 1965, Respondent stated at page 624 of the verbatim record, **VIII**, that there was a—

> ". . . positive contemplation of the authors of the mandates system that in the functioning of this system mandatories would have the assistance and the collaboration of the Permanent Mandates Commission and the Council of the League—in other words, the assistance of those processes of administrative supervision, as well as the technical assistance and expert assistance involved therein, which would really constitute a process of continual consultation between the mandatory and those administrative supervisory bodies—a process of consultation which would lead it from step to step in the application of certain policies."

It is difficult to describe the concept of the authors of the mandates system and the requirements and scope of the administrative supervisory body in terms more clear and more neat than Respondent has itself described them in this quoted passage. The same considerations, of course, apply to the problems involved in the complex task of orderly remedies and procedures to resolve problems which have arisen, largely by reason of Respondent's *failure to accept and to co-operate* and to consult with such supervisory bodies.

These considerations, Mr. President, make relevant a discussion at this point—before leaving the argument on legal issues relating to administrative supervision—of the respective roles of administrative supervision and judicial protection, with specific reference to several decisively important issues presented in the cases at bar. Perhaps the most important of these relates to the question of the relief for which the Applicants pray, particularly in terms of Submissions 3 and 4 of the Memorials at **I**, page 197.

The Applicants refer in this regard to the prayer in Submission 3, that the Court adjudge and declare that Respondent "has the duty forthwith to cease the practice of apartheid in the Territory".

The Applicants likewise refer to the prayer in Submission 4, that the Court adjudge and declare 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", to wit, Article 2 of the Mandate and Article 22 of the Covenant.

Mr. President, effectuation and implementation of such an adjudication and declaration, if it should please the honourable Court so to decide, evidently would necessitate the effective functioning of a competent international administrative organ, vested with powers adequate to the purposes. Indeed, it is the very failure and refusal of Respondent to submit to such supervision in the performance of its trust, and its insistence upon unilaterally decreed and unilaterally imposed policies with regard to the Territory, which has necessitated recourse by the Applicants to judicial protection.

Respondent's course in this regard, moreover, has brought about a situation in the Territory which occasions the competent international organs deep concern for the present welfare of the inhabitants of the Territory and grave anxiety for their future. And this is manifest from the information now in the pleadings. Even more, Respondent has an-

nounced its support, in principle, of certain recommendations by the so-called Odendaal Commission which, if carried out, in whole or in part, in accordance with their intended purposes, would alter in fundamental respects the basic structure of the Territory by means of territorial partition.

Respondent has indicated its design so to do on the basis of a unilateral and unsupervised discretion. Respondent's Supplement to the Counter-Memorial sets out its views in this respect—they may be found, *inter alia*, at **IV**, pages 213 and following. Although action upon certain recommendations of the Odendaal Commission report has been held in abeyance pending outcome of these proceedings, Respondent has publicly proclaimed its acceptance of such recommendations "in principle" (p. 203 of the special Supplement).

Mr. President, whatever course may be followed by Respondent in future, the intimations of Respondent's policy in this regard underscore the imperative requirement for administrative supervision over the Mandate. This honourable Court, as has been said, may not appropriately be requested or expected to serve a function which the Mandate so clearly envisages for administrative supervision as the normal security.

The recommendations of the Odendaal Commission, as appears from the record, are not of official status. Apart from this, they are, as at present, hypothetical, contingent and concededly indeterminate as to their implementation. There is no realistic or sound basis upon which they could be considered by the Court. The reason for their addition to the documentation in these proceedings is obscure. The recommendations, however, on their face, would involve partition of the Territory, and this indeed is the avowed aim of the Respondent.

What Respondent has described as its "general attitude" is set out in the Supplement to the Counter-Memorial at **IV**, page 213, and reads as follows:

> "... it should be the aim, as far as practicable, to develop for each population group its own Homeland, in which it can attain self-determination and self-realization".

As has been said, judicial evaluation, or indeed any other evaluation, of so vaguely formulated and hypothetical an ultimate goal, would be inappropriate for judicial consideration, apart from its prematurity and unofficial status. The point at issue here, however, is that unilateral and unsupervised implementation of any plan of such a quality or character, embodying such an objective, would do far more than violate Respondent's obligations to submit to international supervision, in terms of Article 6 of the Mandate. It would also violate Respondent's obligations under Article 7, paragraph 1: it would involve a modification of a substantial nature of the terms of the Mandate without the consent of the United Nations thereto. And, Mr. President, as has also been pointed out, that consent, if sought, must be an informed consent, and that in turn presupposes a continuing supervisory authority.

Respondent's version of the avowed plan, the recommendation of the Odendaal Commission, was set forth in the verbatim record of 26 April, **VIII**, at page 697, in the following terms:

> "... there can be *no* objection to differentiation between different groups inhabiting a given territorial area, which is, for the time being, administered as a unit but which is destined to be split up into sepa-

> rate political areas, each with its own nationality and each capable of achieving autonomy".

This is proposed to be done, in Respondent's avowal, in the absence of international supervision of any type. And the Rejoinder contains an avowal in the following form:

> "Eventually the Homelands will become independent, and in the interim it is proposed that ultimate control should continue to vest in Respondent's Government, not in the European population of the Territory.
>
> . . . .
>
> Respondent concedes that the transitional stage to complete territorial separation is indeterminate, but it is absurd to call it permanent." (V, pp. 309-310.)

The Applicants conceive that in this context the distinction between "indeterminate" and "permanent" is hardly a substantive or serious distinction.

It would not be easy to imagine a more drastic modification of the basic nature of this Territory than to partition it in the precise form, or in any similar manner to that which Respondent avows as its ultimate aim.

The Territory was conferred upon the Mandatory, on behalf of the organized international community, as a trust to be administered as a single and unified territory.

On the other hand, if, as hypothetically, at least as likely, the avowed ultimate aim is not really the achievement of independence or separate nationality, in any sense of the word which corresponds to political, social or economic realities; if that should be the case rather than actual partition, then, this, of course, would represent an extreme form of apartheid, with an indefinitely continuing multiracially composed Police Zone. The Odendaal Commission report itself does not express or intimate any intention that the Police Zone, half the Territory, the advanced and modern sector, would be denuded of non-white inhabitants, as defined in the census categories. If, hypothetically, the Respondent was not actually intent upon—according to its avowal of intent—pursuing the plan of partition: then, as I say, this would be an extreme form of the application of apartheid territorially imposed by group separation in fragments of the Territory, and that would, on its face, confirm the violation of Article 2, paragraph 2, of the Mandate.

In the Applicants' respectful submission, if the plan avowed by the Respondent should be carried out unilaterally in accordance with its description, in Respondent's own formulation, it would violate Article 7, paragraph 1, with respect to consent of a competent international organ as a precondition to modification of the terms of the Mandate.

If, on the contrary, and hypothetically, it were not partitioned, as the Respondent insists, but were territorial apartheid in its extreme form, it would, in the submission of the Applicants, constitute an even clearer violation, if possible, of the Mandatory's duties under Article 2, paragraph 2.

It has got to be a violation under one or the other, on this analysis.

Reference has been made to the essentiality of administrative supervision in respect of the orderly effectuation of remedies which the Court might see fit to adjudge and declare, pursuant to the Applicants' Sub-

missions 3 and 4. It is, in the Applicants' respectful view, unreasonable and inappropriate to assume that, should the Court be pleased to adjudge and declare on the basis prayed for in Submissions 3 and 4, it would be possible for the Court to serve as the supervisory organ—the first and normal recourse to assure the effectuation in an orderly, evolutionary, constructive and realistic manner of the social, political, economic life of the Territory. This is the objective of the organized international community, as the Applicants view it. This imposes upon the organized international community a most solemn obligation of international responsibility, and, without the administrative supervisory organ in existence, it would seem to the Applicants, most respectfully, that the relief prayed for, which the Applicants believe is justified, would not be capable of implementation.

The Applicants consider, therefore, that there is an alternative with respect to Respondent's contention, and, that is, either the Mandate has survived with its essence or it has lapsed *in toto*.

Mr. President, identical considerations with respect to the scope and importance of administrative supervision underlie the Applicants 5th and 6th Submissions which relate, respectively, to the Respondent's asserted violation of the international status of the Territory and to the establishment of military bases therein. I refer the Court to the submissions set forth in the Memorials, **I**, at page 198.

It is regarded, respectfully, by the Applicants, as appropriate to consider and dispose of these submissions at this stage in the context of the requirement of administrative supervision which the Applicants contend as a matter of law must exist so long as the Mandate itself endures, because, Mr. President, the necessity for continuing administrative supervision is highlighted by considerations which relate to these Submissions 5 and 6.

In the first place, the facts with respect both to militarization and annexation, as disputed by the Respondent, and as subsequently accepted by the Applicants for purposes of these proceedings, demonstrate the need for continuing supervision and access to relevant information. The techniques and logistics of military science in 1965 are such that the Territory could effectively be militarized in two or three days, or a shorter time than that. Respondent has drawn into issue, as a decisive element with regard to the question of militarization raised in the pleadings, the purpose of the installations which concededly exist in the Territory. The assurance with regard to militarization, present or future, to which the international community is entitled, would appear to be clearly reflected in the following citations, which I shall not elaborate but to which I refer the Court respectfully: Memorials, **I**, pages 181-183, Counter-Memorial, **IV**, pages 47-66, Reply, **IV**, pages 553-571 and Rejoinder, **VI**, pages 351-389.

Mr. President, the Respondent makes a large point of imputing error to the Applicants' statement of facts which, under the circumstances, obviously are set forth on information and belief—to the best of the Applicants' knowledge and belief. Respondent, as often appears from the record, denies access, withholds information, and then criticizes the information which is necessarily derived from other and secondary sources as inaccurate, a course of conduct which hardly requires characterization. There is no reason why Respondent's obduracy in respect of refusal to submit to the processes of international supervision should

require this honourable Court to serve as the first and normal security, rather than as the final bulwark of protection. Why is this question raised before the Court at this time? It is clearly because of the failure of administrative supervision that the absence of effective consultation and information has created these doubts, these anxieties, and these recriminations, which should not be necessary to be laid before this Court and which transcend, although they include, the Applicants' request for a favourable determination on their 6th Submission, which, the Applicants believe, is warranted by the undisputed facts and the arguments of law which emerge from the written pleadings in this respect.

The facts, moreover, indicate, in the context of the militarization clause of the Mandate, the essentiality of such administrative supervision in the context of modern military technique, logistics and development, as I have mentioned.

First, with regard to Respondent's concessions—at least with regard to its rights—under Article 4 of the Mandate, in this regard, contemporary rather than 1920 standards are applicable. Respondent states in the Rejoinder, **VI**, page 371:

> "Finally, as regards the equipment used for training, Applicants surely cannot seriously suggest that such equipment as may be necessary for local defence and internal police purposes at the present time, is prohibited, and that only such equipment as was in fact used during the pre-World War II period is permitted."

Here in this context, when it serves the purpose of Respondent, contemporary standards are applicable without question. In regard to the sacred trust the emphasis is on the understandings as of 1920, the principle of contemporaneity is invoked—in that context, but not in this.

With regard, and more specifically, to this matter, the Respondent expresses surprise, in the Rejoinder, **VI**, at page 356, that the Applicants were not aware of certain facts in the Territory brought out by the Counter-Memorial, and Respondent says:

> "In the circumstances it is, to say the least, surprising that Applicants, who profess to have such a keen interest in what takes place in the Territory, were unaware until the filing of the Counter-Memorial that there is no military training of Natives in the Territory."

The Applicants were unaware—why? This manner of reply has a strangely counterfeit ring in view of the Respondent's long-standing refusal to co-operate with the competent administrative supervisory organ, or to comply with the opinions of this honourable Court in regard to the administrative supervision of the Mandate. In contrast to its refusal to submit to supervision, it is noteworthy, in the context of administrative supervision over the possible militarization of the Territory, that Respondent relies upon certain conclusions of the Permanent Mandates Commission, or to knowledge possessed thereby, which Respondent considers favourable to its position in these proceedings and reference need merely be made to the Counter-Memorial, **IV**, at pages 51 and 55-56 and to statements in the Rejoinder, **VI**, at seriatim, pages 355-385.

In contrast to the foregoing, Respondent disputes the Applicants' contention to the effect that the absence of administrative supervision in the case of doubt concerning the nature of an installation resolves such

doubt against the Mandatory. See the Rejoinder, **VI**, pages 371, 375 and 379.

Finally, in regard to the Regiment Windhoek, in the capital of the Territory, Respondent states:

> "The issue turns on the question whether the complex of what has been established and what is being done at the establishment constitutes a military base." (**VI**, p. 370.)

Mr. President, it is not the purpose of these references to enquire into the accuracy of the information, to weigh and evaluate its significance, to consider its merits in any respect; the question is why do these problems arise before this honourable Court at this stage? Why is there an issue in dispute between the Applicants and the Respondent, and why is that issue—that *identical* issue—similarly in dispute between the United Nations and the Respondent, although not, of course, as involved in these proceedings? It is precisely for the purpose of ascertaining what is being done at the establishment, in Respondent's phrase, that Applicants submit that administrative supervision is required for the future security and integrity of the mandated Territory. There should not be the necessity for a recurrence of doubt or dispute concerning this matter, and this, it appears to the Applicants, is a significant confirmation for the necessity for the continuance of administrative supervision as part of the very essence of the Mandate.

On the same basis of analysis and consideration, turning to the question of annexation, administrative supervision is here again seen to be of the essence. Respondent's refusal to submit to administrative supervision, indeed, is an underlying element of the Applicants' complaint in this regard. (See Memorials, **I**, pp. 187 and 189; the Reply, **IV**, pp. 573, 575 and 576; the Rejoinder, **VI**, pp. 401-403 and 444 and 415.) Respondent rejects the contention of the Applicants that such submission, though known to the authorized international supervisory authority, is an essential element entering into the consideration of respect for the separate international status of the Territory. Denial of submission—the duty to submit—to international accountability is a denial of the separate international status of the Territory. Indeed, at one juncture, Respondent states that if its acts of administration in the Territory "are in themselves unquestionable, the fact that there is no supervision cannot render them questionable". (Rejoinder, **VI**, p. 415.) This appears to the Applicants to be a classical form of *petitio principii*. The question, of course, is whether they are questionable or not. It is a question which must be resolved in the light of information available to the international organ—information on the basis on which it can supervise the trust, and if it is unable to supervise the sacred trust for lack of that information, then, in the Applicants' submission, the Mandate itself is being altered in a fundamental respect, and this is the theory underlying this submission.

The Respondent's analysis presupposes the possibility of a judgment of this honourable Court to the effect that such acts of administration are "unquestionable", and, as I have said and as the Applicants respectfully submit, all acts of administration, in the absence of supervision, must be "questionable". That does not reflect upon their merits; they are questionable because they are open to question because there is no information available upon which their merits, or otherwise, can be supervised and examined. This is why, in our submission, this formulation begs the question.

As Applicants state in the verbatim record of 22 March 1965, **VIII**, at page 195: "In the absence of such accountability, Respondent's function of administration would cease to be international." That is the essence of our contention in this regard.

As this honourable Court stated in 1962; and I quote from the *I.C.J. Reports 1962*, at pages 331 and 332, as follows: "The essentially international character of the function which had been entrusted to the Union of South Africa" (that is from p. 331) "is an international instrument of an international character" (p. 332), "a special type of instrument composite in nature and instituting a novel international regime" (p. 331). The Mandatory, therefore, exercises, in the words of the 1950 Opinion, "an international function of administration, in accordance with the international rules regulating the Mandate which constituted an international status for the Territory". That is from the *I.C.J. Reports 1950*, at page 132.

The absence, the denial, or the rejection of international supervision, alters the international status of the Territory; it deprives it of that character. This is the basis of our submission in this regard.

It is against the background of these considerations, of the determinations of the highest judicial authority—this honourable Court—that Respondent states in its Rejoinder:

> "If Respondent is correct in its contention—i.e., that its obligations to report and account to, and to submit to the supervision of, the Council of the League, lapsed upon dissolution of the League, and have not been replaced by any similar obligations relative to supervision—then, surely, its rejection of so-called 'international accountability' cannot constitute a violation of any obligation. If, on the other hand, it should be held that Respondent's aforementioned obligations did not lapse upon dissolution of the League, then that would signify that Respondent has erred in its aforestated rejection, and that Applicants' charge of a breach of Article 6 of the Mandate has been established, but not that the 'separate international status of the Territory' has in any way been affected. The substantive nature of the discretion conferred upon Respondent regarding the administration of the Territory can in no way be affected by the presence or absence of supervision." (**VI**, p. 402.)

If the Applicants conceive and appreciate properly the sense or purport of this argument, it rests upon alternative assumptions which ignore the basic principle, as perceived by the Applicants in any event, that the refusal of international supervision constitutes a violation of the Mandate, not only by reason of violations of Article 6, but also by reason of the fact that it alters and fundamentally impairs the international status of the Territory, on the basis of considerations which have been advanced in the written pleadings and summarized here. It is no answer for the Respondent to say, in commenting upon the need or otherwise for international supervision, that it has "*de facto* been acting as if all obligations relevant for present purposes were still in force, including abstention from unilateral incorporation". That statement is made in the Rejoinder, **VI**, page 397.

The Court's attention has respectfully been drawn already to the phrase "abstention from unilateral incorporation". It is a position which could be changed at any week, day, or moment, with or without notice. Equally irrelevant is Respondent's reliance upon findings of the Per-

manent Mandates Commission in this respect, when such findings, with regard to the question of possible annexation, appear to the Respondent to be favourable to its contentions herein. The Court's attention is drawn to many citations in the Counter-Memorial, **IV**, pp. 78, 94, 96; the Rejoinder at **VI**, pages 398-400 and through to 412, *passim*.

The Applicants submit that the facts conceded by the Respondent in the written pleadings, taken together with the statements of law contained in the Memorials in this respect, as well as in the Reply at **IV**, pages 573 and 586, demonstrate that Submission 5 is well-founded in law. Indeed, apart from the legal argument already addressed to this proposition in the verbatim record of 23 March, **VIII**, at pages 220-222, the Applicants respectfully submit that there is no further argument required on their part, other than the treatment, as aforesaid, in their written pleadings and in these Oral Proceedings, and that the facts, as they have become crystallized in the written pleadings of both Parties, support beyond doubt the legal conclusion that Respondent has treated the Territory in a manner inconsistent with its international status. In respect of militarization, that question is one which demands for resolution the access to information presently denied, and which only administrative supervision can find and resolve. With respect to the Submission 6, relating to annexation, the refusal and denial of submission to international administrative supervision impairs the international status of the Territory. It might be desirable at this point to say that the Applicants have submitted, and will continue to submit, that Respondent's subjective intent, motive, or purpose, with regard to its performance of its obligations under the Mandate, are wholly irrelevant factors, particularly so with regard to Article 2 (2), inasmuch as a *per se* violation of the international legal norm and applicable international standards is contended for by the Applicants.

With respect to the question of design or plan for use of military installations, or of methods of association between the Territory and the Respondent, here, as in the case of the sacred trust itself, in Article 2, intention, purpose, or plan, is to be inferred on a basis of the Respondent's conduct.

Finally, on the basis of the considerations of fact and law set forth in the Memorials at **I**, page 196, and the Reply, **IV**, page 587, the Applicants respectfully contend that their Submission 9 is well-founded; this is set forth in the Memorials at **I**, page 198. The necessity of administrative supervision, as has been said, is underscored by the avowed and declared design of Respondent to partition the Territory, as a so-called ultimate aim, on the basis of a unilateral and unsupervised plan. Such avowals and declarations with regard to the future of the Territory, taken at face value, which the Applicants do for the purposes of these proceedings only, manifest an admitted plan or purpose, one which need not be merely presumed as a reasonable inference from conduct.

It was on this basis and for this reason, in the light of these avowals, that Submission No. 9 is the only submission, which incorporates or is intended to incorporate reference to or relies upon Respondent's "intent". In respect of Submission No. 9, Respondent has explicitly avowed an intent to partition the Territory without the consent of the supervisory organs. In this respect, the intention so stated has no meaning other than the normal usage of governments when they, in formal or informal communications, announce a plan or an intent—it is a state-

ment, it is not a state of mind—it is a declaration of action, intended action. The Applicants accordingly have requested the Court to adjudge and declare that consent on the part of the United Nations is a condition precedent to the effectuation of such an avowed intention or plan.

Several points relating to the question of international supervision arise from Respondent's rebuttal which may be cleared up at this point with your permission, Mr. President. The Applicants would like to clear up any possible lingering doubts, by reason of statements in rebuttal by Respondent, which may exist regarding their position relating to the administrative supervision of the Mandate and the basis upon which it has survived and continues to survive as an obligation of the Mandatory.

In the first place, administrative supervision as an obligation is an essential part of the mandates system, inescapably linked to the due performance of the obligations of the Mandatory towards the inhabitants and the organized international community; again, in the mandate jurisprudence of this honourable Court, to exclude the administrative accountability of the Respondent would be "to exclude the very essence of the Mandate", at page 334, *I.C.J. Reports 1962*.

Secondly, the United Nations has replaced the League of Nations in the capacity as embodying or representative of—it matters not which way it is put—the organized international community upon which the "sacred trust was laid as a responsibility" in the words of the 1962 Judgment. The United Nations is endowed by Article 10, it is invested, by the Charter, with competence to supervise the Mandate.

Thirdly, Respondent has acknowledged—at the period when it was of decisive relevance whether it did or not—Respondent acknowledged and manifested its consent to the assumption by the United Nations of supervisory authority over the Mandate; Respondent manifested its consent, and acknowledged its submission according to the findings of the Court in 1950, on the basis, *inter alia*, of the statements made before the League of Nations in April 1946, its pledge to the League Assembly, its adherence to and support of vote for the League resolution of 18 April 1946, and as has been referred to often now, the position it took in the Preparatory Commission with respect to the temporary trusteeship machinery, and the reason assigned therefore by Mr. Nicholls.

Respondent has suggested that the Applicants' views, as set out, *inter alia*, in the verbatim record, **VIII**, at pages 132 and 133, represent a change of position on the part of the Applicants with regard to the relevance of Respondent's consent during the period 1945-1946, and in particular, that this is asserted to conflict for various reasons with previous interpretations placed by the Applicants upon the 1950 Advisory Opinion. Reference is made in this respect to the verbatim record, **VIII**, at pages 313-319. Respondent contends there that this position, as it is attributed to the Applicants, lends support to the proposition that the 1950 Opinion should, in the Respondent's words "be thoroughly reconsidered *de novo*"; that is at page 320 of that verbatim record. It came as something of a surprise to the Applicants to learn that any proposition which they could seriously advance could furnish the basis for a reconsideration *de novo* or otherwise of the 1950 Advisory Opinion—we are still at a loss to understand what such a motivation would be grounded upon. It is, of course, precisely to the contrary; the Applicants rely upon the 1950 Opinion and consider that it should be followed and if it is possible to make that contention any more clearly than the Applicants

have made it, the Applicants welcome this opportunity to assure the honourable Court to that effect. What has happened here is that the new facts contention which was first raised in 1950, and now again in 1962, has in the Applicants' respectful view, been utterly demolished by reference to the proceedings of the Preparatory Commission, by reference to an analysis of the alternative techniques discussed and resolved as between a temporary trusteeship machinery on the one hand and a pledging system on the other; had these facts been known to the Court in 1950, in the Applicants' view, they would have had to confirm the Court in utter assurance with respect to the conclusions they there reached. If anything, these proceedings have confirmed the desirability and necessity of accepting the Court's findings in 1950; they have, if vindication were necessary, completely vindicated those findings.

The Applicants have on another matter stated their basic premise as being that, "the obligation of international accountability is an essential and integral element of the Mandate" (**VIII**, p. 132) and this is, of course, in the Applicants' view, consistent with the Court's holding in 1962 that "to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate", at page 334. Likewise, as has been pointed out at an earlier stage, in fact, at that same stage of the proceedings, the honourable President and Judge Sir Gerald Fitzmaurice have defined and I quote from page 522, of the *I.C.J. Reports 1962*: "An obligation to report was regarded as being of the essence as a necessary part of *any* mandate system that was to fulfil the objects stated in Article 22." Respondent, on the other hand, has characterized the so-called "issue" drawn in this regard as being "the issue of a specific supervisory authority versus the contention of a general obligation of international accountability or to submit to international supervision"—that is the way Respondent characterizes the issue in the verbatim record, **VIII**, page 332. At best that is a pallid form of description of the issue, it has somewhat misleading implications, unintentional no doubt, in view of the fact that the Applicants' contention, of course, is that international accountability is of the essence of the Mandate and the contention of the general obligation of international accountability is really a contention that the Mandate cannot survive without it.

Further, Respondent contends that there never was an obligation "to submit to international supervision", since "the actual terms of Article 22 of the Covenant and of Article 6 of the Mandate, providing for supervision by League organs, were entirely clear and explicit". This, of course, obviously refers (I did not mean to quote it out of context or distort it) to a basic general obligation rather than an obligation to submit to a specific organ—I was referring to page 332 of the verbatim record which I have cited. This interpreted, which of course was the context, the reference was to a basic obligation, continuing obligation, rather than an obligation merely to report to a specific organ. To the contrary, in the Applicants' respectful submission, the terms of the Covenant establish the essential principle of a basic obligation of international accountability, which inheres in a mandate institution and which must survive so long as the mandate survives. Now the significance attached by Respondent to the presence of what Respondent calls "more clear and explicit provisions" referring to Article 22, paragraph 7, and Article 22, paragraph 9, demonstrates that the specific implementation of the essential principle was not left to chance, in the Applicants' submission.

Finally, in the verbatim record of 18 March 1965, the Applicants have described the logical effect of Respondent's first alternative contention with respect to administrative supervision. The first alternative contention was that the supervisory functions under Article 6 had lapsed without, however, collapsing the Mandate as a whole. It is I think clear, perhaps from what has been said, that this poses a square issue between the Parties and that there is no intermediate third ground for a decision, in the Applicants' respectful submission. At **VIII**, page 123 of the verbatim record, the Applicants noted that it would follow from the first alternative contention of the Applicants, according to which Article 6 had lapsed but the Mandate otherwise was in existence—this was the Applicants' formulation of the problem at that time, which perhaps bears repetition now in the light of comments made in rebuttal:

> "Judicial protection, which the mandate institution envisages as the final bulwark, in the Court's words, would thus become the first and only bulwark, inasmuch as judicial supervision, by reason of default of administrative supervision, would perforce take the place of the normal security."

This, of course, is a matter of inescapable logic unless it is assumed that the judicial protection sustained by the Court in 1962 is not to be recognized as legally effective.

[Public hearing of 13 May 1965]

Mr. President and Members of the honourable Court, the Applicants turn now to a consideration of the legal issues joined in respect of the asserted breaches of the sacred trust; in particular, the violations alleged with regard to Article 22 of the Covenant and Article 2, paragraph 2, of the Mandate. The considerations which the Applicants propose to place before this honourable Court will include an illustrative enumeration of Respondent's practices and policies germane to a consideration of the legal issues and, indeed, inseparably related therewith.

The Applicants, with great respect, conceive that these Oral Proceedings have served an unusually helpful and clarifying purpose. The procedures which have been followed pursuant to the intimation and guidance of the honourable President and the Court have, in the Applicants' view, facilitated the singling out and definition of central issues. Questions propounded from the bench have illuminated the way. In the course of the remarks to follow, the Applicants will endeavour also to respond to the important series of questions proposed by Judge Sir Gerald Fitzmaurice. For the convenience of the Court the Applicants think it may be helpful to indicate the scheme of the argument to follow.

In the first place, the Applicants will submit considerations of an introductory character. These will be designed to lead into a response to Judge Sir Gerald Fitzmaurice's questions 1, 2, 3, 9 and related aspects of questions 4, 5, 6 and 7. In the course of their introductory remarks the Applicants will endeavour to indicate their approach to the central legal issues concerning the existence, content and applicability of the international legal norm and the international standards which are described by the designation "norm of non-discrimination or non-separation", as set out in the Reply, **IV**, at page 493 and discussed in the following pages.

These introductory remarks, Mr. President, also will attempt to clear away certain misconceptions and distortions of the Applicants' true theories and contentions which may be engendered by Respondent's characterizations and formulations of certain of them, both in its written pleadings and in the Oral Proceedings.

Secondly, following the introductory remarks just described, the Applicants consider that it may be convenient and appropriate to respond to Judge Sir Gerald Fitzmaurice's questions Nos. 8 and 10.

Thirdly, thereafter, the Applicants, in an economical manner, will place before the Court, without elaboration or argument, a summary and illustrative catalogue of the laws and administrative regulations, as well as official methods and measures, the existence of which is undisputed by Respondent, and which are comprised within the policy and practice of apartheid in the Territory. As the Court will observe during the course of that presentation, concise as it will be, many—indeed, most—of the relevant laws, regulations, official measures and methods are derived from Respondent's own pleadings, and are normally cited thereto. These are included, as I have said, within the body of policies and practices upon which the Applicants ground their submission of Respondent's *per se* violation of Article 22 of the Covenant and of Article 2, paragraph 2, of the Mandate.

Fourth, the Applicants will then conclude with a description of the legal premises and considerations which demonstrate the existence, content and applicability to the mandate institution of an international legal norm and of international standards designated by the Applicants by the label or caption "non-discrimination" or "non-separation". This demonstration will be of particular relevance, we believe, to Judge Sir Gerald Fitzmaurice's questions Nos. 1, 2, 3 and 9, as well as to related aspects of questions Nos. 5, 6 and 7.

Mr. President, the Applicants will endeavour to show that the international standards established by the competent international organs charged with the duty of supervising and safeguarding the sacred trust govern the interpretation of the international rules regulating the Mandate as an international institution, including, and more particularly in this context, Article 2 thereof. As a cumulative and alternative proposition the Applicants will endeavour to show that an international legal norm of non-discrimination or non-separation exists, and that it should be found, declared and applied by this honourable Court to the Respondent, in terms of Article 38 of the Statute.

Five, upon the conclusion of the foregoing arguments the Applicants will formally place their submissions before the Court and rest their case, subject of course to the convenience and wishes of the honourable President and Judges, with reservation of their rights under the Rules of Court to comment upon any evidence adduced by Respondent and to make such further or other arguments or responses as it may please the honourable Court to allow.

The Applicants respectfully turn now to considerations of an introductory character. As has been said, these introductory remarks will, among other things, be designed to lead into a legal analysis of considerations pertinent to certain of Judge Sir Gerald Fitzmaurice's series of questions, which are the very climax in certain respects of the Applicants' case, and may indeed in a sense be a climactic phase of the litigation itself.

Mr. President, needless to say, those who have been entrusted with

the duty of presenting to this honourable Court arguments in support of interests of a legal nature which concern the performance of legal obligations, based upon an international institution of a fiduciary character; needless to say, those who appear before this honourable Court in such a capacity must endeavour to keep constantly in mind the fact that the legal issues joined in these proceedings have been remitted to the highest judicial body for adjudication on the basis of juridical principles. This is indeed the underlying premise upon which the Applicants have sought judicial protection envisaged by the Mandate as the final bulwark of protection against alleged abuse and breaches of the Mandate. At the same time it is evident that the very nature of the asserted abuse and breaches of the Mandate involve humane, moral, political, social and economic considerations of profound consequence to the lives and welfare of the inhabitants of the Territory, who are the beneficiaries of this international trust. Moreover, the very nature of the asserted abuse and breaches of the Mandate in the aspect now to be considered has engendered a universal condemnation often expressed by governments and others in terms which fairly may be said to reflect a degree of revulsion and of anxiety, the very discussion of which before a court of law may well import a colour of emotion or moral judgment which in and by themselves are extraneous to the judicial process. Such a danger, moreover, is compounded when unjust charges attributing improper motivation are levelled in respect of the very recourse to the judicial process itself. It has been, and remains, the firm purposes of the Applicants to focus upon the legal and juridical considerations pertaining both to fact and law which are relevant and decisive to adjudication of the dispute in issue here. The Applicants believe, and respectfully submit, that one of the major and perhaps unusual aspects of this litigation is the profusion, rather than the paucity, of legal roads to a judicial solution. Such legal roads, moreover, are marked by legal principles embodying traditional rather than innovative juridical premises. The Mandate may be viewed in the present context as a convention, as an institution, or as a combination of both; in the words of Lord McNair in his separate opinion appended to the 1950 Advisory Opinion, an instrument which creates obligations "in part contractual . . . in part 'dispositive'", at page 156 of the *I.C.J. Reports 1950*. The Mandate created an international status for the Territory, the obligations, the interpretation and application of which are regulated by international rules embodied in the Mandate, as this honourable Court has held. Mr. President, the Court moreover has developed a jurisprudence for the Mandate reflected in the three Advisory Opinions of 1950, 1955 and 1956, as well as the Judgment of 1962. Certain major aspects of this jurisprudence of the Mandate have been collated for the Court's convenience and incorporated into the record of these proceedings on 12 May in the verbatim record.

One route to a judicial resolution is via interpretation and application of the obligations and rights under the Mandate, including those embodied in Article 2, the essence of the sacred trust. The judgments of the competent international organs "upon which the sacred trust was laid as an organized international community", in the language of the Court, are unambiguous and categorical judgments.

They establish, in the Applicants' respectful submission, international standards of a clear and compelling character which should be accepted

and applied by the Court in the judicial interpretation of the nature and scope of the admittedly legal obligations and rights embodied in Article 2 of the Mandate and Article 22 of the Covenant.

Another route to judicial resolution of the legal dispute now before the Court, a route which is both cumulative and alternative to the first, is that which is marked by the legal proposition that the standards of non-discrimination or non-separation, on the basis of legal considerations which will be elaborated, have achieved the status of an international legal norm of the same content and scope. Such a legal norm, the Applicants submit, is applicable and controlling to the dispute at bar in terms of, and within the meaning of, Article 38 of the Statute of the Court.

The Applicants contend that Respondent's policy of group separation, labelled "apartheid", in South West Africa, is a *per se* violation of Article 2 of the Mandate and Article 22 of the Covenant. Such a policy of group separation or apartheid, manifest from the laws and regulations, the measures and methods of implementation, which are to be found in the pleadings, and the existence of which is conceded by Respondent, have been characterized repeatedly in the judgments of the competent international organs by the designation "apartheid".

The Applicants in these proceedings seek to demonstrate that apartheid, described by whatever term may be used to designate Respondent's policies and practices of separation, violates the governing international legal norm and the international standards relevant thereto. This demonstration has already been made in the Memorials and in the Reply but it will now be elaborated in the light of the oral argument which has taken place up to this time and in the light of the series of questions propounded by Judge Sir Gerald Fitzmaurice.

In the light of Respondent's persistent denial of the existence and applicability of the international legal norm and the international standards for which the Applicants contend, as well as of the normative processes and law-creating processes at work in the organized international community, the Applicants will endeavour, as I have said, to present to the Court several bases which confirm the existence and relevance of the international legal norm and the international standards which they allege govern the obligations of the Mandatory in terms of Article 22 of the Covenant and of Article 2 of the Mandate.

At the outset it seems desirable to dispose of a possible semantic hurdle. We describe for convenience the relevant international standards and the international legal norm by means of the designation, or label, "non-discrimination" or "non-separation". In the Reply and in the oral argument the Applicants have defined this norm and these standards in the following form:

> "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 absense 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." (IV, p. 493.)

However, the Applicants attach no particular significance either to the designation or to the precise words used in the definition of the norm and of the international standards having the same content and scope. What is relevant, and what is essential to understanding of the Applicants' case, is the submission that such international standards and such an international legal norm exist; that they have been found and declared by those responsible for its creation as being applicable to Respondent's policies of group separation in the Territory. Respondent's policy of apartheid, indeed, has outraged the organized international community to an extent which has generated its unanimous—but for Respondent itself—repeated and authoritative use of all normative processes at its disposal to bring the standards and the legal norm into being. In view of so indisputable a reality, there is no reasonable basis for Respondent's denial that such standards and norm are of uncertain application to the Territory. Almost any standards or legal norms have instances of uncertain application, but that fact does not provide a basis of attack upon their validity so long as they clearly cover the phenomena to which they are addressed.

The Applicants have tried to exclude this extraneous issue by their contention that the minimum content of the norm is the prohibition of apartheid; that if a norm of non-discrimination or non-separation exists, it applies, and clearly so, to the policies of group separation or apartheid applied by Respondent in the Territory.

An analogous consideration likewise should be noted, lest it confuse the central legal issue under discussion. The Applicants do not rest their case upon the degree to which the norm-creating process at work in international society has been correct or fair in its appraisal of the incompatibility between apartheid as practised by Respondent and the material welfare of the inhabitants of the Territory.

Although the Applicants have no doubt that the norm-creating process was fair and correct in its evaluation of the policy complained of, the Applicants do not ask the Court to say so. Nor do they suggest that the Court undertake the task of second-guessing the competent international organs responsible for the development of the norm. There is no question of the Court rubber-stamping the judgments of the competent international organizations, in Respondent's phrase, any more than the Court can properly be expected to veto such judgments, even though they are explicitly directed at conduct complained of in these cases.

If the standards and the legal norm for which the Applicants contend do exist, as a matter of law, then they should be applied by the Court as part of its duty to decide this dispute in accordance with international law, and in accordance with the international rule regulating the mandate institution itself.

On the basis of this reasoning, the Applicants do not regard it to be appropriate to this litigation to appraise the fact-finding procedures underlying the standards which have been evolved by the competent international organs, speaking for the organized international community. For this reason alone, the Applicants think irrelevant Respondent's proffer of evidence which, in Respondent's words "will be directed towards showing that that assumption of the universal acceptance of the type of standards" for which Applicants contend "is totally wrong, and totally unfounded" (p. 102, *supra*).

It is relevant perhaps to note at this point certain potentially mis-

leading aspects of Respondent's repeated imputations to the Applicants of positions which do not in fact or in law reflect the Applicants' contentions or theories.

A cardinal, though by no means exclusive, misinterpretation of the Applicants' theory of the case is implicit in Respondent's repeated references to the norm and standards under the designation of "norm of non-differentiation". This is, of course, more than a mere matter of semantic distinction. On the contrary, it strikes at the very heart of the true significance of the Applicants' designation of the norm and standards.

Although during the Oral Proceedings Respondent referred to its designation or caption of "non-differentiation" as one employed for so-called "convenience", it is, of course, in the Applicants' view, a misleading and distorted version of the basic concept underlying the standards and the norm for which the Applicants contend. Respondent's manner of description, in itself, for example, reveals the basic divergence between the Parties concerning the significance of the minorities treaties, as one example, in respects relevant to these proceedings.

As the Applicants stated in their response to the first question earlier propounded by Judge Sir Gerald Fitzmaurice, prudent and fair governments, as well as international institutions, often recognize the need for protection of individual persons in their quality as members of a class or group. Civilized social orders obviously and necessarily differentiate minors or incompetents from adults or competents, and accord them protection as individuals on that basis.

The question at issue is much more fundamental than so axiomatic a premise of the social order itself. The legal issue is whether the differentiation in question is based upon, or determined by, an official policy which allots burdens, privileges or status on the basis of membership in a group, class or race, rather than on the basis of individual quality or capacity. This type of differentiation is impermissible.

The fact that failure to perceive or avow the basic distinction—sought to be drawn by the Applicants—between the concepts is not a merely verbal one but that, on the contrary, it underlies Respondent's treatment of the subject on the merits, is demonstrated by the following conclusion, set out in the Rejoinder, V, at page 141:

> "For the reasons set out herein, it is submitted that Applicants have failed to establish that their alleged norm satisfies either of the two requirements which are essential for present purposes: i.e., they have not shown—
>
> *(a)* that any norm prohibiting a policy of differentiation exists in International Law, either generally, or as legally binding on Respondent; or, in any event,
>
> *(b)* that any such norm is embodied in Article 2 of the Mandate."

Mr. President, this formulation is a parody of the standards and norm for which the Applicants actually contend. The minorities treaties, for example, of course involve permissible differentiation on the basis of ethnic, linguistic, national or religious groupings. The minorities treaties do so, however, not upon the basis of allotting rights, privileges, burdens on the basis of group classification but for the reason—the essential reason—of protecting the individual member of a group, which normally he chooses to adhere to, from suffering adverse consequences by reason

of his membership in the group, which, as I say, he is normally free to quit. He can learn a new language if he wishes, he can join another Church if he wishes, he can assume another nationality if he wishes, normally.

The foregoing is but one example of many mis-statements or misinterpretations of the Applicants' true legal theory and position. Moreover, throughout Respondent's pleadings the Court will note numerous illustrations of Respondent's lapses into misconstructions of the Applicants' contentions in certain other respects. With regard to the matter of "differentiation", a striking example may be found in the Rejoinder, **V**, at page 104 in which the Respondent mis-states the Applicants' contention in the following manner:

> "Applicants introduce a far-reaching innovation in their Reply. This consists of a contention which is apparently to be understood as meaning that a mere differentiation between ethnic groups, without any intention to benefit one group at the expense of another would constitute a violation of Article 2, paragraph 2, of the Mandate."

It would be difficult to formulate the Applicants' actual contention in a more misleading manner.

Another illustration of Respondent's attribution of extreme and, indeed, unintelligible contentions to the Applicants appears from the Rejoinder, **V**, at page 243. Here, the Applicants are said to—

> "... urge, without any qualification, abolition of all differentiation between groups, treatment of the whole population as a unit, and universal adult suffrage—claims which have also been pressed by majority groups at the United Nations in recent years".

In fact, the Applicants have referred to judgments of United Nations organs with respect to standards for achievement and accomplishment included within such judgments—the judgments of the competent organs, not the judgments of the Applicants, and presented as such in these proceedings as judgments of international organs. "Universal adult suffrage" is a target for achievement—but obviously those words have a content with which the Court will be familiar and of which it may take judicial notice—subject to the normal restrictions and safeguards which attend all democratic principles of suffrage in all civilized societies; age, literacy and other factors are of course implicit in such a standard of achievement.

The Rejoinder is replete with similar instances of attribution to the Applicants of extreme or unintelligible views. An extraordinary example may be found at page 48 of the Rejoinder, **VI**, as follows:

> "For Applicants the [unacceptable] 'intention' [of Respondent's educational apartheid policy which is in issue] lies in the fact that the policy does not contemplate an attempt at the creation of one single and integrated society in which all individuals have identical rights. This they regard as basically wrong, and it is for this very reason that they seek to establish improper motives on Respondent's part."

That statement is, again, a parody of the Applicants' true contention and theory. There is no society this side of Utopia in which all individuals have "identical rights" and, of course, as the Applicants have sought to make clear repeatedly, they do not seek to establish improper motives

on Respondent's part; they regard the subjective intentions of Respondent's officials who may be in office from time to time as irrelevant to the basic legal proposition presented to this Court by the Applicants. Apart from the fact that the Applicants in these proceedings are not at all concerned with the subjective motivations of Respondent's officials, the Applicants are not aware of any society which could fairly or reasonably be described as one which is "single and integrated", whatever those words may mean. On the contrary, this appears to be one example of many in which Respondent attributes to the Applicants extreme views which, perhaps, may be designed to serve as off-setting the extreme racial policies by which Respondent administers the Territory and which are comprised within the concept of apartheid.

Again, in the Rejoinder, Respondent expresses its conviction that—

> "... it will be inadvisable to attempt to establish an integrated, or single, society in which group considerations will be absent, or count for nothing: a society, in other words, which will know only 'individuals', and not 'groups', or 'members of groups'" (**VI**, p. 54).

Mr. President, no such society has ever existed in the history of man.

Another even more extraordinary imputation of extreme and unintelligible views to Applicants is the following, which is read from the same volume of the Rejoinder, **VI**, at page 103:

> "Basic to Applicants' complaint, as has been indicated, is the philosophy that all group differences should be wiped out, no matter *what the wishes of those directly concerned may be*, and that all groups and their members should be transformed into one homogeneous English- or Afrikaans- (but preferably English-) speaking mass."

Again, comment is unnecessary. The Applicants would regard any such contention as absurd and unintelligible.

Still another illustration of the imputation to the Applicants of unintelligible contentions appears on page 240 of the Rejoinder (**VI**). Here, Respondent suggests that the Applicants intend to convey:

> "... that inasmuch as they advocate the attempted creation of one integrated nation in South West Africa, as being in fact the best method to promote well-being and progress to the utmost, distinctions between tribes and ethnic groups are for that reason to be eradicated".

How one would go about "eradicating" distinctions between tribes and ethnic groups is, of course, again, unintelligible to the Applicants. They have made no such contention. It all depends on what is meant by "distinctions".

One more illustration, of many, may be chosen, and this in many respects is the most revealing of all. By way of comment upon the Applicants' contention that the true wishes of the inhabitants are not consulted by Respondent in matters affecting their lives and welfare, Respondent states in the Rejoinder, **V**, at page 269:

> "Applicants' insistence that the consent of all groups in South West Africa must be obtained as a prerequisite to partition is unrealistic, and proceeds from fallacious premises ... Indeed, Applicants' contention, taken to its logical outcome, goes much further: it is tantamount to a demand that a particular section of the inhab-

itants must be afforded the opportunity, simply by virtue of their superior numbers, of choosing not only emancipation and control of their own affairs, but also control over the other smaller groups in the Territory and their affairs and possessions—including control over the most advanced group, which has been largely instrumental in developing the larger groups to the stage where they are capable of controlling their own affairs. With reference to the Republic, Applicants' contention involves the claim that the wards must even be able to demand control over the guardian's own affairs and possessions."

Reference has been made to the significance of the suggested plan to "partition" the Territory—the word used here again in the passage just quoted—in the context of the necessity for administrative supervision, as well as in the context of unilateral modification of the terms of the Mandate by way of fundamental alteration of the character and status of the Territory by way of partition. In the present context, however, the Court's attention is drawn to the obvious implications of the quoted comment in respect of the deprivation of the majority of the inhabitants of a voice in respect of the future fundamental organization of the Territory itself.

The foregoing illustrative examples of Respondent's attribution of extreme and unintelligible views and positions to the Applicants may tend to submerge the Applicants' true position.

It may be appropriate, however, to endeavour at this point to clarify another area of confusion, or possible confusion, which appears to have been engendered, as to the Applicants' purpose in adducing in the Reply, **IV**, at pages 302 ff., references to views of contemporary scientific authority. Such confusion as to the purpose of the Applicants in adducing these views is reflected in Respondent's treatment of the matter in the Rejoinder, **V**, at pages 400 ff.

The Applicants have referred in their Reply, *inter alia*, to (1) the judgments of qualified persons with first-hand knowledge of the Territory, (2) official views of governments, (3) the weight of authority in political and social sciences, and (4) the history and character of the system of territorial apartheid.

Respondent has treated the foregoing materials, as presented in the Reply, out of the context in which they are intended to be adduced and the purposes which they were designed to serve, and in a sense which is wholly extraneous and irrelevant to Applicants' purpose in adducing them.

Inclusion of the foregoing materials in the Reply does not, of course, modify or qualify, in any respect, the Applicants' contention that the policy of apartheid constitutes a *per se* violation of Respondent's obligations under Article 22 of the Covenant and of Article 2 of the Mandate.

Each of the four categories of materials, to which I have just referred, is adduced in the Reply as directed at certain specific contentions, or premises, or general propositions, expressed or avowed by the Respondent, as understood by the Applicants—as so avowed by Respondent and as so understood by the Applicants, which are, in the Applicants' view, clearly untenable, on their face.

Consistently with its course of attributing extreme or unintelligible views to the Applicants, as I have just described, Respondent adduces materials designed to refute assumptions or contentions never made or

advanced by the Applicants. This is clear from Respondent's conclusions in the Rejoinder in respect of each of the propositions referred to. Thus, at page 408 of the Rejoinder, **V**, the Respondent refers to "compelling groups to surrender their identities, or forcing them into an unwanted pattern of integration". Of course, the Applicants' references to views of scientists or others had no connection whatever with any such proposition.

Similarly, at the conclusion of page 419 of the Rejoinder, **V**, Respondent avers that "socio-cultural differences between racial and ethnic groups may, in part at least, be the consequence of differences in genetic potential". The phrase "genetic potential" is admittedly unintelligible to the Applicants, and, in any event, it could, under no circumstances, in the Applicants' theory, justify a policy of allotting burdens or denying rights, on the basis of membership in a group rather than on the basis of individual merit, quality or capacity, in the case of individuals whose so-called "genetic potential" (whatever that may mean) endows them as individuals with qualities or capacities, the fulfilment of which is denied or inhibited by governmental policy or action.

It appears, on the basis of this contention, explicitly set out in the Reply and reaffirmed in the Oral Proceedings that apartheid is *per se* repugnant to the Respondent's obligation under the relevant articles of the Covenant and Charter.

The propositions summarized in the Respondent's conclusions, which have just been referred to, are manifestly and clearly untenable and impermissible premises of governmental policy and would be so in all places and under any circumstances. The views of governments and of scientific authority confirm the self-evident and axiomatic nature of this proposition—the "genetic potential" proposition; it ignores the individual whose "genetic potential" may or may not correspond to that of the group to which he is assigned, whatever the quoted phrase may mean.

Finally, the Applicants addressed themselves to Respondent's avowed general proposition and again in the phrases used by the Respondent, that as a so-called "realistic" function, leaving aside "idealism", governments should refrain, in the Applicants' view, from adopting laws, regulations or official practices, designed to encourage or to foster prejudice. On the contrary, in the Applicants' view, governments must act in a manner which "realistically" and "idealistically" seeks to protect and further the equal protection of the laws and the fulfilment of the individual persons quality and capacity. The Respondent's contention, as understood by the Applicants, was precisely to the contrary that, as Respondent said, leaving "idealism" apart, a "realistic" government must refrain from adopting laws, regulations or official measures or methods, which are designed to modify or relax such prejudices, contentions and pressures within the society. Each of these three propositions, as understood by the Applicants, are general propositions which, as stated by Respondent, tend to confirm and support the *per se* nature of Respondent's violation of the applicable legal norm and the standards of non-discrimination and non-separation for which the Applicants contend.

As has been said, if and to the extent that Applicants have misunderstood or incorrectly formulated Respondent's general propositions, as set forth in their written pleadings, and if the Respondent denies that was their intended meaning, then of course the materials adduced by the

Applicants in this regard become irrelevant. On the other hand, if the Applicants have correctly understood the purport of the contentions, then it would seem to me that there is no question, there is no room to question the appropriateness of the materials which have been adduced by the Applicants in refutation of these general propositions as so understood.

Again, the views set out in the *written pleadings of the Applicants*, with respect to the views of persons of undoubted first-hand knowledge, are addressed to Respondent's proposition that its policies and practices can only be evaluated or appreciated by persons possessing first-hand knowledge—the inference clearly being that anyone with such knowledge must inevitably disagree or could disagree with the validity of the norm and standards reflecting the judgment of the competent international organizations. To put that more simply, that persons who lack first-hand knowledge are simply not in a position to form a judgment with respect to the inherent qualities of the policy of apartheid, from a legal point of view. The Applicants show that such a contention regarding the necessity for first-hand knowledge is unfounded and adduce the views of persons who undoubtedly have first-hand knowledge, and who have reached a conclusion different from that for which the Respondent contends. So far as the Applicants are concerned, the views of persons with first-hand knowledge may or may not be correct. They are views of persons with first-hand knowledge, who express emphatic disagreement with the position of the Respondent, and the purpose in making such demonstrations is not to pit the views of such persons against the views of others; it is addressed to a much narrower point, and that is the untenability of Respondent's implied premise that everyone with first-hand knowledge must agree with and approve of the policy and that lack of first-hand knowledge will lead to misunderstanding and rejection.

Similarly, as I have said, the purpose for adducing the views of scientific authority is to demonstrate the untenability of certain general propositions advanced by the Respondent, as understood by the Applicants. Such general principles or propositions are understood by the Applicants in the sense set out in the Reply, which does not qualify, or modify in any sense the *per se* nature of the violations complained of.

Now, Mr. President, Respondent does not merely hold the Applicants theory and contentions against a cracked mirror; Respondent in its second alternative contention posits the measure of its obligations under Article 2, in the light of a good faith test. The essence of Respondent's legal theory upon which it appears to rest its case with regard to the asserted breach of Article 2, is stated in the Counter-Memorial, **II**, page 391, as follows:

> "The 'full power of administration and legislation' granted in terms of the Article [that is Article 2] covers the whole field of government, the only limitation (apart from Articles 3 to 5) being the element of purpose. And both the power and the purpose are defined in such a manner as to preclude any possibility of misunderstanding. (Indeed as will be shown later, the Applicants do not allege or suggest any possibility of misunderstanding.) The question before the Court can therefore in essence only be one of intentions, or purpose, or good faith."

As the Applicants have sought to make clear, they do indeed suggest a possibility of misunderstanding and in fact the Applicants suggest that the intentions or purposes of Respondent's officials, who may be in office from time to time, are irrelevant to the question of the legal quality of the administration of the sacred trust. In the face of the misunderstanding or mis-statement of the Applicants' position in its pleadings, thus reflected in the Counter-Memorial, the Applicants sought to enlighten Respondent in the Reply. The Applicants refer for example, to—

> "... the legally cognizable norms according to which Respondent's obligations under Article 2, paragraph 2, can and should be judicially determined" (**IV**, p. 476).

Again, in the Reply, in respense to this misconstruction of the Applicants' true theory evident from the Counter-Memorial, the Applicants state:

> "Given the basic and fundamental nature of the norm of non-discrimination on the basis of group or race, it would seem evident that the violation of this rule by Respondent is *ipso facto* a violation of Article 2, paragraph 2, of the Mandate." (**IV**, p. 511.)

And on page 518, the Applicants made again explicitly clear—

> "... that the norms, in accordance with which Respondent's obligations as stated in Article 2, paragraph 2, of the Mandate are to be judged, are the relevant norms currently and generally accepted".

And these of course, are described and defined in the Reply.

Respondent, in its Rejoinder, and again during these Oral Proceedings, nevertheless insists upon the position or representation of the Applicants' theory in this case as being that the Applicants are posing the issue of good faith. Respondent tenaciously adheres to that construction of the Applicants' view, at the same time insisting, that it is the only tenable legal theory upon which the Applicants could hope to win their case in any event—that it is the only basis upon which the Court could judge the Respondent's conduct. It is somewhat unusual to find a party *insisting* upon attributing to another party a legal theory which is the only one upon which it could hope to win its case, when that other party vehemently insists that that is not the theory upon which it is proceeding; it is an anomalous situation thus created.

The Applicants have declined to accept this theory and have, indeed, insisted and do now re-affirm insistance that they reject the good faith test, notwithstanding Respondent's warning that the Applicants cannot hope to prevail in this litigation unless they follow the road indicated by the passage I have quoted from **II**, page 391, of the Counter-Memorial.

The chain of Respondent's mis-statements, and one must say "distortions" of the Applicants' standards and norms, the legal theory underlying their case and the views, social and other, which they advance, all form a setting for Respondent's analysis of the Court's proper judicial function or lack thereof under the sacred trust. Oscillating between the purposes of the Mandatory and the purposes of the Mandate, Respondent proceeds by positing: "... intentions, or purpose, or good faith", all in juxtaposition (**II**, p. 391).

With respect to this matter, I should like to read from Counter-Memorial, **II**, at page 391, a passage which begins with the conclusions stated in the previous paragraph, and I pause parenthetically to point out that

the paragraphs referred to are on pages 390 and 391, and that in these paragraphs Respondent contends, *inter alia*:

> "That no act or omission on Respondent's part would constitute a violation of this Article 2, unless such act or omission was actuated by an intention or directed at a purpose, other than one to promote the interests of the inhabitants of the territory."

That is in one of the previous paragraphs to which the quotation I shall now read to the Court refers:

> "The conclusion stated in the previous paragraphs, is supported by a further consideration. The Court is a judicial organ and can accordingly not come to decisions otherwise than in accordance with legal norms. If the Court were to decide whether in fact a particular policy promoted the "well-being" of the inhabitants "to the utmost", it would have to consider that policy and weigh it against other policies which might be followed in an attempt to achieve such a purpose. In order to arrive at a decision, the Court would thereupon have to decide which policy it considers best. The Court's function in so deciding would be one which is, in its very nature, not a judicial one. No legal criteria can be used in such adjudication. The decision can only be based on social, ethnological, economic and political considerations." (**II**, p. 391.)

If the Applicants understand this paragraph correctly it is certainly correct to the extent that a court could not undertake to perform the functions of a government in the Territory or any place else. This of course has nothing in common with the Applicants' true contention, and it is, in the Applicants' submission, a perversion of the issue truly presented with respect to the Court's proper judicial function in respect of the protection of the sacred trust.

Respondent's interpretation or analysis of the proper role and scope of judicial protection of the Mandate is, in the Applicants' view, a wholly false reading of the Mandate and of all its essential and inter-related component parts, including the compromissory clause itself, the supervisory functions explicitly provided for in Article 6, the consent requirement of Article 7, paragraph 1, and the essence of the sacred trust itself embodied in Articles 2 through 5 of the Mandate. These are all inter-related, they inter-penetrate. The judicial function of protection of the Mandate extends to all of them. The question of course is, as stated at the outset, by what juridical principles, on the basis of what legal propositions, is the Court to interpret and apply the obligations of the Mandate and the rights of the inhabitants? And in this respect the Applicants also submit that no legal distinction is properly drawn between Article 2 of the Mandate and Articles 3 to 5 of the Mandate.

All are comprehended within the sacred trust. The requirement in Article 5, for example, that the Mandatory, "shall ensure freedom of conscience", is no more-or-less specific, no more-or-less subject to the application of relevant legal norms and standards, than are the obligations of Article 2, paragraph 2. Compliance with both is judicially determinable by reference to objective criteria.

Respondent explicitly concedes this proposition with respect to its obligations under Article 5, which includes the protection of freedom of conscience. Respondent's concession in this respect may be found in the Counter-Memorial, **II**, at page 387. Respondent at the same time denies

the applicability of this proposition, in respect of Article 2, and instead asserts the good faith test in respect of Article 2, and then squeezes judicial protection out of the sacred trust, its essential component, by its analysis of the judicial function. This interpretation of the judicial function, contended for by the Applicants, I have just quoted from the Counter-Memorial, **II**, at page 391. The distinction is untenable.

The norm and standards for which the Applicants contend are not based upon, nor do they reflect, abstract and undefinable concepts, such as "integration" or "differentiation", so stated.

The norm and the standards, to the contrary, embody the results of a universal assessment of the evils inherent in racial discrimination and group separation, as such evils have been found determined, and adjudged by the competent organs of the international community, vested not only with the right but the duty of administrative supervision and safe-guarding of the sacred trust.

Standards relevant to interpretation of legal instruments or institutions are not to be attacked as based upon faulty appraisal of the underlying facts; once the standards are established by the competent organs, then in the Applicants' view the Court should accept them as part of "the legal given" and not as themselves subject to judicial redetermination. The processes, the continuity of attention, the inter-action of relevant social and political forces—these factors are relevant and peculiar to the competent political international organs which constitute the normal security of the Mandate.

Judge Sir Gerald Fitzmaurice, in the course of lectures delivered in 1957, has discussed such considerations, pointing out that the ultimate validity of law is always itself an extra-legal question not susceptible to judicial review. The learned Judge quoted a celebrated passage from *Salmond's Jurisprudence*, 10th Edition, page 155, an excerpt of which reads as follows:

> "But whence comes the rule that the Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. The historian of the constitution knows its origin, but lawyers must accept it as self-existent. It is the law because it is the law, and for no other reason that it is possible for the law to take notice of."

As Sir Gerald went on to comment:

> "This classic passage shows that even in the domestic field the law is in the last analysis binding simply because it is the law, and if this is true even in that field, it is *a fortiori* true on the international plane." (This is quoted from Vol. 92 of the *Recueils des Cours* at p. 46.)

It is in this spirit that the Applicants respectfully submit the standards should be regarded which have emanated from the competent institutions of the organized international community and which, moreover exist today as a legal norm of non-discrimination or non-separation.

Respondent and the Applicants obviously differ as to the applicability *of the judicial function with respect to international legal norms*. Respondent contends, for example, from the verbatim record, **VIII**, at pages 694-695 "that condemnation in *expressis verbis* of apartheid" by the norm-creating organs has no relevance for the Court. Thus Respondent argues at page 695 of the verbatim record I have just cited:

"This Court is not assisted in any way by such a condemnation as far as the standards involved are concerned, because the Court must make its own determination and will, in my submission, make its own determination, on the evidence presented to it, whether that evaluation, that judgment, that the policy is based on a concept of racial superiority or racial hatred, is correct or not."

The Applicants respectfully disagree; the competent organs have perceived and characterized Respondent's policies of group separation as based upon a concept of racial superiority or racial hatred, and have done everything within their competence to indicate the incompatibility of apartheid with international standards governing the Mandate and with international law itself.

What more could the organized international community do by way of characterizing Respondent's policies and practices as impermissible under the mandate and as illegal under international law? What more could they have done or said?

The issue before the Court, accordingly, is whether the processes of the organized international community have or have not eventuated in international standards or an international legal norm, or both. It may be helpful at this point to emphasize that the Applicants will endeavour to establish by means of a series of cumulative theories that apartheid is a *per se* violation of Article 22 of the Covenant and of Article 2 of the Mandate, as well as of the applicable international legal norm. The Applicants will endeavour to show that the international rule embodied in Article 2 of the Mandate, an international institution with an international status, must be interpreted as prohibiting the policy and practice of apartheid. Such policy and practice are set forth in the written pleadings, largely in Respondent's pleadings, and comprise laws and regulations and the official methods and measures, the existence of which is conceded by Respondent. Such a policy and practice are contended by the Applicants to constitute a *per se* violation of the Mandate rule itself, of the Mandate norm itself, and of the general international legal norm which exists in terms of Article 38 of the Statute as well.

Secondly, as an additional and cumulative proposition, the Applicants contend that Respondent's adherence to the United Nations Charter and membership of that organization constitute consent to the norm of non-discrimination and non-separation, as defined in the Reply, **IV**, at page 493.

Thirdly, the Applicants contend that an international legal norm of non-separation and non-discrimination so defined exists and is applicable as an international legal norm, irrespective of Respondent's opposition thereto, or otherwise.

Note may be taken at this point of the juridical significance properly to be attached to the legal consequences arising from Respondent's failure and refusal to submit to international accountability in respect of the very development of the norm and standards at issue here. Apropos of such failure and refusal to submit to international accountability, it was said in the 1950 Advisory Opinion:

"When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision." (*I.J.C. Reports 1950*, p. 136.)

The aspect of the present litigation, in the context of the point immediately under discussion, is foreshadowed by this honourable Court in its Advisory Opinion of 1956 on the *Hearing Petitioners by the Committee on South West Africa.* The Opinion bears directly upon the "effective performance of the sacred trust", in the words of the 1950 Opinion. The point at issue concerns the effect upon the normative processes of Respondent's refusal as Mandatory, to co-operate with the institutions of the organized international community, "upon whom the sacred trust was laid", in the words of the 1962 Judgment.

In considering whether it was consistent with the 1950 Advisory Opinion for the United Nations to grant petitioners a right of hearing, the Court said in 1956:

"It appears from Resolution 749 A (VIII) that the Mandatory was refusing to assist in the implementation of the Advisory Opinion of the Court and to co-operate with the United Nations concerning the submission of reports and the transmission of petitions in accordance with the procedure of the Mandates System. As the Mandatory continued in its refusal to co-operate, the Committee found itself handicapped in the examination of petitions. It lacked both the Mandatory's comments on the petitions and the supplementary information which the Mandatory might have been expected to supply to the Committee directly or through its accredited representative. These were the circumstances prevailing at the time that the Committee requested the General Assembly to decide whether or not the oral hearing of petitions by the Committee would be admissible." (*I.C.J. Reports 1956*, p. 26.)

At page 30, the Court went on to say:

"It is in the interest of the Mandatory, as well as of the proper working of the Mandates System, that the exercise of supervision by the General Assembly should be based upon material which has been tested as far as possible, rather than upon material which has not been subjected to proper scrutiny either by or on behalf of the Mandatory, or by the Committee itself." (*I.C.J. Reports 1956*, p. 30.)

"The Court notes that, under the compulsion of practical considerations arising out of the lack of co-operation by the Mandatory, the Committee on South West Africa provided by Rule XXVI of its Rules of Procedure an alternative procedure for the receipt and treatment of petitions. This Rule became necessary because the Mandatory had refused to transmit to the General Assembly petitions by the inhabitants of the Territory, thus rendering inoperative provisions in the Rules concerning petitions and directly affecting the ability of the General Assembly to exercise an effective supervision." (*Ibid.*, p. 31.)

In 1956 the Court concluded by Saying:

"The particular question which has been submitted to the Court arose out of a situation in which the Mandatory has maintained its refusal to assist in giving effect to the Opinion of 11 July 1950, and to co-operate with the United Nations by the submission of reports, and the transmission of petitions in conformity with the procedure of the Mandates System." (*Ibid*, pp. 31-32.)

The Applicants contend that this judicial cognizance of the legal con-

sequences of Respondent's non-co-operation is also relevant to an appraisal of the contention that apartheid is a *per se* violation of Article 2 on the basis of international standards and a legal norm developed by the supervisory organ. Within the organized international community speaking through its competent organs, there has evolved an authoritative criterion, whether called norm or standards, as to the content of moral and social well-being with respect to race relations in the Territory. This criterion has emerged as part of the condemnation of Respondent's admitted practices and policies, but the legal interests of the organized international community in the protection of the well-being of the inhabitants have not been realized as a consequence of Respondent's persistent defiance of supervision and non-co-operation with the competent organs.

It is in the face of this frustration of the will of the competent organs that the Applicants have had no alternative but to seek recourse to this honourable Court to obtain a judicial interpretation of the obligations of the sacred trust, including Article 2, thereby making use of the judicial remedies contemplated in Article 7, and by this means to re-establish the basis for effective international supervision. Recourse to judicial remedies to uphold the sacred trust in the past was rendered unnecessary by the collaborative relationship which existed at one time between the Mandatory and the organized international community, and it is hoped by the Applicants, at any rate, that the Respondent will relent in its continuing refusal and failure to submit to such processes and to withhold its co-operation. It is, in part, in response to the failure and refusal of collaboration that the competent supervisory organs in the international society have evolved a clear view of the incompatibility of the obligations of Article 2 (2) and of apartheid itself.

The clear view concerning apartheid, which is held by a prevailing consensus in the organized international community, in the Applicants' submission, also constitutes an overwhelming demonstration of its *per se* character. The non-co-operation of Respondent, together with the manifest incompatibility between Respondent's conduct and the international standards governing Article 2, underly the Applicants' contention that this Court should hold that apartheid is a *per se* violation of the Mandate and of international law, as a cumulative and alternative argument.

Mr. President, it is in part in response to the failure and refusal of collaboration by Respondent that the competent supervisory organs have evolved a clear view of the incompatibility of the obligations of Article 2, paragraph 2, in relation to apartheid. The essence of the point under discussion here, Mr. President, is that the Respondent contends, on the one hand, that a good faith test is applicable by which its performance of the sacred trust should be judged, while on the other hand it denies its co-operation to the normal security, to the supervisory organ responsible for the safeguarding of the sacred trust—a position of inconsistency which the Applicants are now endeavouring to bring to the Court's attention.

Respondent's thesis is that its performance must be judged on the basis of its purpose, intent, motive and a good or bad faith inference be drawn. On the other hand, the Respondent refuses to co-operate with the normal processes by which such a judgment, if it were relevant, could be reached. Of course, the Applicants do not believe it relevant in any event, but it is an untenable position for the Respondent to present to the Court. The clear view of the international community regarding

apartheid which is held by a prevailing consensus constitutes an overwhelming demonstration of a *per se* violation. The non-co-operation of Respondent, together with the manifest incompatibility between its conduct and the international standards governing Article 2, underlie the Applicants' contention that apartheid could not by its nature possibly have a beneficial effect in any meaningful sense of the term, but that, to the contrary, as found by the competent organs, it is inherently and *per se* incompatible with moral well-being and social progress. The legal significance of Respondent's denial of co-operation or consultation with the supervisory organs, notwithstanding its special responsibilities as Trustee, is confirmed and illuminated in the separate opinions of Lord McNair in 1950 and of Sir Hersch Lauterpacht in 1956—I refer specifically to the *I.C.J. Reports 1950*, at pages 149-150, and the *I.C.J. Reports 1956*, at pages 55 and following of the late Judge Sir Hersch Lauterpacht's opinion. Both opinions relate to the flexible canons of interpretation appropriate to give maximum effect to the trust characteristics of the mandate instrument, whether the instrument be viewed as a treaty, or as a convention, or both. Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant embody the essence of the sacred trust, and their effectuation demands the combination of techniques, in juxtaposition, of the appropriate functioning of the administrative organ and the protection of the judicial organ, both of which are vested with complementary and mutually reinforcing responsibilities with regard to the safeguarding and protection of the sacred trust.

The duties of the Mandatory have been described by an authority recognized as such and cited by Respondent in another context, who has written—I refer to Georg Schwarzenberger, *International Law*, Volume I, third edition, at page 100, 1957—that among the three major duties of a mandatory—

> "The first is the general international responsibility for any breach of the terms of the mandate treaty or trusteeship agreement in question and for all other infringements of international law which are imputable to the authorities of any such territory."

The Applicants contend that both Article 22 of the Covenant and Article 2 of the Mandate are to be interpreted as imposing a minimum obligation to administer the Territory without violation of the standards established by the organized international community, which standards prohibit discrimination and separation as a matter of official government policy.

Moreover, as a cumulative and alternative contention, the Applicants argue that Respondent is under a duty to administer the Territory in accordance with international law, in accordance with an international legal norm of the same scope and content as the standards in question, which likewise prohibits official separation or discrimination. In either or both respects, cumulatively and alternatively, in the Applicants' respectful submission, Respondent is violating either or both the international rule of the Mandate itself or the applicable international legal norm; under either or both legal premises, cumulatively and alternatively, the undisputed facts of record constitute a *per se* violation of the Covenant and Mandate, and it may be unnecessary to remind the Court that by the phrase "undisputed facts of record" the Applicants refer to legislation, administrative regulations and methods and measures adopted officially in implementation thereof, the existence of which is conceded by Respon-

dent. In respect of the international legal norm and standards for which the Applicants contend, the foregoing cumulative and alternative submissions appear to be self-evident.

Respondent in its written pleadings concedes—this is from the Counter-Memorial, **IV**, page 68—that—

> "Respondent admits that it was a basic principle of the Mandate System that the territories placed thereunder would each, during the existence of the particular Mandate, have a distinct international status or indentity."

Even a sovereign State is obliged to govern its territory and people in accordance with international law. Certainly something more is to be expected of a mandatory, which is performing the duties of a trust on behalf of the organized international community upon which that trust was laid, and which the mandatory is exercising without an independent legal title. Respondent cannot be heard to say that its obligations as Mandatory are not affected by the international legal norm and international standards evolving "outside the Mandate", to use its phrase. Such a contention would be equivalent to arguing that if the Mandatory were engaging, let us say, in genocide in the Territory, it would not be a *per se* violation of Article 2 and Article 22 of the Covenant. It would be equivalent from legal point of view to arguing, as does Respondent, that it would be necessary to demonstrate its bad faith, or that the method, in its word, it was employing in the exercise of its discretion could only be appraised by an independent inquiry into whether genocide, as practised in the entire context of the Territory, was good or bad, or whether it was not promoting to the utmost the welfare of the inhabitants. To state the matter another way, it might be viewed by some—indeed, by many—that the denial of rights and status on the basis of indivual quality or capacity is a mutilation of the personality and potential of the individual person, a mutilation of talents, which the organized international community perceives to be equivalent in a legal as well as a moral sense to physical mutilation. However that may be, what is at issue here is the Respondent's concept of the wide ambit of its discretion, a concept which indeed seems to be a strange sacred trust of civilization for the international community to have bestowed. A good faith test is inherently an incredible test. If, and hypothetically, a mandatory should come under the control of a person or leaders obsessed, then what would be the relevant standard under the good faith test? There is a basic difference between the Parties as to the character of international standards, as they bear upon this phase of the legal argument. Respondent attributes to Applicants the following conception of international standards, and I quote from the verbatim record:

> "And they [the Applicants, that is] made clear—so we understood them in their pleadings, and, indeed, in my learned friend's oral argument—that, when they speak of standards in that regard, they derive those standards from the spheres of the political and social sciences—from the weight of scientific authority in that regard as well as from the practices of governments, from the standards which are currently operative in modern society, standards pertaining to methods of government, to considerations of fairness, equity and so forth ..." (*Supra*, p. 102.)

Such a misunderstanding of the Applicants' position arises from a

confusion between the evidence used to demonstrate the existence of standards and the content of the standards themselves. When the Applicants speak of standards governing Article 2 they refer to rules of conduct having a content similar to, but not an equivalent degree of legal authoritativeness of a legal norm. Such standards may be formulated in terms of generality which correspond to the norm of non-discrimination and non-separation which the Applicants contend exists, or such standards may be formulated with respect to a component element of the subject, for example, educational policies, and hence be stated in more specific terms than the general standards or the legal norm possessing the same content but of different legal qualities.

The theories of experts have been brought into these proceedings for the purpose and in the context which I have sought to explain to the Court. Theories of experts and views of governments are indicative of the social facts which give rise to the standards but they do not constitute the standards themselves.

The Applicants regard standards, as I have said, as rules of conduct which in this case govern the interpretation of the Mandate, and are differentiated from a legal norm only in the respect that adherence to them may not itself be a matter of independent legal duty pursuant to an international legal norm which would govern even in the absence of the sacred trust obligation of the Mandate, and the Applicants contend as a cumulative and alternative argument that Article 2 is governed by an international legal norm itself, that this legal norm is to be applied on the basis of the relevant norm of non-discrimination and non-separation, which has been created independently of the Mandate, and which is of universal application. Pursuant to this alternative and cumulative theory, the existence of an international legal norm prohibiting separation and discrimination, or either of them, would indeed be of universal application.

In the case presented here which, of course, is the only issue of coverage of the norm, that is with respect to the Territory itself, the Applicants submit that the application of the international legal norm to the sacred trust is *a fortiori*. In the Applicants' submission the principal link between an evolving international society and the regime created by the mandate instrument consists of such evolving international legal norms and international standards. Indeed a major restriction upon the discretion of the Mandatory flows from the possibility of comparing its policies with applicable international legal standards relevant to the well-being of the inhabitants, and it is a restriction which courts are peculiarly competent to supervise and protect. Such a judicial function allows the compromissory clause to serve as an important means by which the organized international community, of which this Court is the judicial arm, may uphold the welfare, the progress, the moral well-being of the inhabitants of the Territory.

Upon this analysis it is obvious to the Applicants that the allotment of rights, burdens and status upon the basis of membership in a group rather than on the basis of individual quality or capacity, wherever and whenever officially practised in the territory under mandate, constitutes an *a fortiori* application of the international legal norm.

Respondent, in the Rejoinder and again in the oral argument—I refer at this point to the Rejoinder, V, pages 130-133—stresses its contention that the norm of non-discrimination as the Applicants describe it does

not exist as an international legal norm. The Respondent's argument in this regard is that the norm contended for by the Applicants has not arisen by any of the accepted processes by which international legal norms are formed. Respondent expressed its view in explicit terms in the proceedings of 23 April where Respondent said:

"... that the large number of the conventions, resolutions, and so on, referred to by the Applicants were matters to which the Respondent was never said to be a party, and to which, in fact, the Respondent never was a party. Only two instruments fell to which the Respondent had been a party, to be specially considered in this regard. One was the United Nations Charter, and the other was the Constitution of the International Labour Organisation ... we indicated that the provisions of those instruments were not such that it could be said that Respondent had ever consented to a norm ..." (**VIII**, p. 675.)

This contention is emphasized inasmuch as it reveals in striking fashion the wide divergence of the Parties regarding the functions served by the organized international community in the creation and development of international legal norms. This divergence between the Parties is manifested in at least three respects. First, the Applicants contend, and will elaborate shortly, that formal acts on the part of international institutions are significant evidence of the character and existence of international standards and of international legal norms. Secondly, that the will of the organized international community, expressed particularly by virtue of unanimity, may serve as a quasi-legislative substitute for the consent of each and every State. Applicants advanced this as an alternative and cumulative argument apart from the mandate norm itself as an international ruling and, in doing so, proceed from the premise advanced by Judge Azevedo in his dissent in the *Asylum* case (*I.C.J. Reports 1950*, p. 337). Quoting from the learned Judge's dissenting opinion:

"It is then very dangerous for a State to proclaim that it is bound only by the treaties which it has signed and ratified. This purely gratuitous declaration is rather daring, particularly at a time when the contractual element is undergoing an obvious and deep change by virtue of the para-legislative action of an international character which is being developed even at the cost of substituting the majority principle for the principle of unanimity."

Thirdly, the Applicants contend that Respondent's consent to the organic law of the United Nations and the International Labour Organisation Constitution likewise entail consent to the processes of such institutions for giving authoritative, evolving and dynamic content to the provisions of a constituent charter, or ordinance, of such institutions.

In so far as the Applicants rely on the existence of an international legal norm created through the processes of the international organized community, they perhaps rest upon a law-creating process which has not heretofore been considered or passed upon by this honourable Court. In so far as they rest upon the legal norm created by the mandate institution itself, the rule regulating the mandate, the Applicants rely upon traditional canons of interpretation and of application which in their view are unassailable.

The jurisprudence of the trust instrument, the Mandate itself, join with the categorical, universally accepted—but for the Respondent—and explicit judgments of the competent international organs, to compel the interpretation and application of Article 2, paragraph 2, in a sense and on a basis which proscribe, *per se*, the policy and practice of apartheid.

The standards thus prescribed by the organized international community, which is vested with the responsibility and which bears the burden of supervision and safeguarding the sacred trust, are so clear and so firmly rooted as to obviate any basis for a reasonable doubt concerning the proper interpretation of the Mandate in the sense contended for by the Applicants.

As the Memorials, **I**, pages 104 and following, make clear, the mandate obligations are to be read in the light of the Charter undertakings—I refer of course to the United Nations Charter.

With respect to the existence of an international legal norm, as well as of the international standards governing the interpretation of the Mandate, the three points already enumerated may be referred to again. These are: the status properly to be accorded to judgments of the competent, supervisory, international institutions; secondly, the role of consensus, as distinguished from unanimous consent, in the norm-creating process and, thirdly, the legal consequences of Respondent's consent to the obligations of the United Nations Charter, of the International Labour Organisation Constitution, and similar competent international institutions.

The Applicants will attempt to deal with these considerations in more detail shortly in this stage of the Oral Proceedings. Their arguments will be based on, and will reflect, the demonstrations previously made in the written pleadings and in these Oral Proceedings of the undoubted existence of international standards as well as of an international legal norm of non-discrimination or non-separation.

The decisive relevance of the issue thus posed to the Court is manifest from Respondent's contention that the judgment of the competent supervisory organ, and I quote from the Counter-Memorial, **II**, page 3, "are of no relevance whatsoever to this Court's judicial functions".

The crucial relevance of these considerations likewise is manifest from the Respondent's contention that it is not bound by the norm of non-discrimination or non-separation—

> ". . . inasmuch as the basic principles of international law involve that legal rules are not enforceable against States which, during the period of the coming into general acceptance of the rules in question, openly and consistently made known their dissent therefrom". (**VIII**, p. 676.)

Accordingly, the Applicants shortly will endeavour to address themselves to an elaboration of the legal considerations which, in their respectful submission, support their contention that neither Respondent, nor any other State, possesses a veto over the normative processes at work in the organized international community, either as to standards for interpretation of its undertakings in the trust instrument of the Mandate, or as to the creation of legal norms applicable to conduct which is generally condemned as a fundamental invasion of the rights and status of the individual person, in this case the inhabitants of the mandated territory, entitled both to the protection of the sacred trust

and to administrative supervision thereover and to judicial protection thereof.

Mr. President, it may now be convenient, having concluded these somewhat discursive introductory remarks, to address responses to Judge Sir Gerald Fitzmaurice's questions 8 and 10.

First, with respect to question 8, propounded by the learned Judge. In the Oral Proceedings of 7 May 1965[1], question 8 was propounded by Sir Gerald in the following terms:

> "There are certain differences between the English and French texts of Article 2 of the Mandate. Instead of 'shall *promote*' ('promouvoir', 'favoriser'), the French text says 'accroîtra' (shall *increase* well-being, etc.). Instead of shall promote 'to the *utmost*' ('au plus haut point'), the French text says 'par tous les moyens en son pouvoir' ('by all the means in its power' or 'by all available means'). What significance do the Parties respectively attach to these differences? What is the resultant of the combined texts, as a matter of legal interpretation?"

The Applicants have ascertained that the English text of the Mandate agreement is, and always has been, the authentic text for purposes of interpretation and application. The text of the Mandate for South West Africa was originally drawn up and discussed in English, while the French version of the text was the result of translation by the League of Nations Secretariat.

Thus, in a letter from the Secretary-General of the League to the Members of the League, concerning the terms of C mandates, the Secretary-General made a statement on this subject, which is found in the *League of Nations Official Journal*, January-February 1921, at page 84, and reads as follows:

> "As the text of the Mandates has been discussed and drawn up only in English, the English text alone can be considered as authentic. The French version has been done by the Secretariat."

Further, Mr. President, at the Eleventh Session of the League Council on 18 December 1920, the Secretary-General of the League suggested that the word "translation" be put at the head of the French text in order to demonstrate that the English text was the original and authentic text. This citation is to the *League Council, Eleventh Session, Procès-Verbal*, 18 December 1920, page 39.

Accordingly, since the inception of the League of Nations, so far as the Applicants have been able to ascertain, there has never been any question about the authenticity of the English text, or a discussion, of which we are aware, as to the relationship of the two texts. The English text appears always to have been taken as authoritative and authentic, and the French text, as I have said, is a Secretariat translation of the original and authentic English text.

Neither the Permanent Mandates Commission nor the League Council itself, and indeed, so far as we have been able to ascertain, any Members of the League of Nations, have expressed doubts concerning differences in wording or meaning, if any, between the English and French texts, nor have they questioned the legal authenticity of the text in English.

So far as the Applicants are aware, there has never been a so-called

[1] See Minutes, **VIII**, p. 32.

French interpretation of the obligations under the Mandate as distinguished from an English interpretation thereof.

Applicants conclude, in response to Judge Sir Gerald Fitzmaurice's question No. 8, that there presumably are no differences of substance or meaning intended between the English and the French texts of the mandate agreement; although, of course, the Applicants profess no expertise on the matter, they have sought the advice of persons fluent in both languages. But on the question whether the French translation is a faithful rendition of the authoritative English text, the Applicants defer on this point to those better qualified to express a judgment in that regard.

I think it remains only to be said that the Applicants respectfully submit that even if the English text were not authentic, and even if there were differences in wording, it would be difficult, as the Applicants understand both texts, to detect a significance relevant in these proceedings. But this, as I say, is a matter which requires a degree of expertise on the faithfulness of the French rendition or interpretation of the English text, which the Applicants cannot profess to have accomplished.

In response, then, specifically to Judge Sir Gerald Fitzmaurice's question No. 8 in the series propounded by the learned Judge, the English text being the authentic one, differences of meaning, if any, between that text and the French translation thereof by the Secretariat would not be relevant to, or govern in respect of, the Applicants' submissions or theories of the case.

It may be convenient now, Mr. President, if the Applicants would endeavour respectfully to submit their response to Judge Sir Gerald Fitzmaurice's question 10. In the Oral Proceedings of 7 May 1965[1], the honourable Judge Sir Gerald Fitzmaurice addressed the following question to the Parties:

> "Article 2 of the Mandate provides not only (by its second paragraph) for the promotion (or increase) of the well-being and social progress of the inhabitants, but also (by its first paragraph) that the Mandatory is to have 'full power of administration and legislation over the mandated territory' as an 'integral portion' of its own territory, and may apply its own laws 'subject to such local modifications as circumstances may require'. What do the Parties respectively consider to be the exact relationship between these two sets of provisions? Neither is specifically subordinated to the other. Should either nevertheless be read as being so subordinated, and if so in what sense and to what extent? If not, and if the two clauses are independent of one another, what is the resulting legal situation?"

The Applicants will endeavour to answer question No. 10 by stating their conclusion first, respectfully, and then the considerations upon which their conclusion is based.

The Applicants respectfully submit by way of response to Judge Sir Gerald Fitzmaurice's question No. 10 that Article 2, paragraph 1, of the Mandate should properly be read as subordinated to Article 2, paragraph 2. The subordination of the first paragraph to the second is of importance only when the application of the Mandatory's own legislation and adminis-

[1] See Minutes, **VIII**, pp. 32 and 34.

trative policies in the mandated territory are in conflict with the objective legal criteria which measure the Mandatory's obligations under Article 2, paragraph 2.

Thus, Article 2, paragraph 1, is subordinated, or should be read as subordinated to Article 2, paragraph 2, of the Mandate, in the sense and to the extent that the application of legislative or administrative policies of the Mandatory, or the exercise of its powers in the Territory, in terms of Article 2, paragraph 1, are in conflict with objective legal criteria which the Mandatory is obliged to apply in carrying out its responsibilities under Article 2, paragraph 2, of the Mandate. And one may add, similarly, and for the same reasons, Articles 3-5 of the Mandate.

It would appear to the Applicants that Article 2, paragraph 1, of the Mandate, although textually set forth as the first paragraph of a two-paragraph article, that is to say, Article 2 as a whole, nonetheless applies to Articles 3, 4 and 5, and the placement textually of Article 2, paragraph 1, within the framework of Article 2 does not limit its applicability to that Article. This, of course, is a question separate from the content, or substance, or meaning, or legal effect to be attributed to the first paragraph of Article 2.

The considerations upon which the Applicants' conclusions just stated are based may be set out as follows.

The Advisory Opinion of this honourable Court in 1950 on the *International Status of South West Africa*, as well as the Judgment of the Court on the Preliminary Objections in 1962, state that the principles of Article 2, paragraph 2, of the Mandate are fundamental and of essential importance in the mandates system. Thus the Court, in the 1950 Advisory Opinion, stated that when a decision was to be taken with regard to the establishment of the mandates system itself—

> "... two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'.
>
> With a view to giving practical effect to these principles, an international régime, the Mandates System, was created by Article 22 of the Covenant of the League of Nations. A 'tutelage' was to be established for these peoples, and this tutelage was to be entrusted to certain advanced nations and exercised by them 'as mandatories on behalf of the League'." (*I.C.J. Reports 1950*, p. 131.)

Further, in its 1950 Advisory Opinion at page 132 the Court stated:

> "The terms of this Mandate [that is the Mandate in question in these proceedings], as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants." (*Ibid.*, p. 132.)

The theme running throughout the mandate jurisprudence, as evidenced by the statements of the honourable Court in 1950, is that—although not explicitly referred to in these terms—the rights given to the Mandatory, the powers vested in the Mandatory, pursuant to

Article 2, paragraph 1, are basically and essentially of an administrative nature and are given and vested for the purpose of facilitating administratively its accomplishment of the substantive obligations embodied in the sacred trust including, of course, the core of those obligations, Article 2, paragraph 2.

The tutelage established by the mandates system was for the purpose of giving what the Court called "practical effect" to principles which were of "paramount importance", and the Union Government, the Respondent, had no sovereignty, but was merely exercising what the Court described as an "international function of administration" for purposes of promoting to the utmost the welfare of the inhabitants of the Territory. The objectives were the promotion of the welfare of the inhabitants—I am referring to the purposes of the *Mandate*, not the purposes of the *Mandatory*.

These citations from the 1950 Opinion in themselves are persuasive, in our submission, as demonstrating the necessity of the propriety of subordinating Article 2 (1) of the Mandate to Article 2 (2). But there is much more to be said.

The Court, in the 1950 Advisory Opinion, was even more explicit, and stated:

> "In accordance with these terms [the Mandate], the Union of South Africa (the 'Mandatory') was to have full power of administration and legislation over the Territory as an integral portion of the Union and could apply the laws of the Union to the Territory subject to such local modifications as circumstances might require. On the other hand, [said the Court] the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled." *(Ibid.)*

This quoted statement appears to the Applicants to be reasonably susceptible only to one construction—given the application of the Mandatory's own legislative or administrative measures in violation of substantive obligations under Articles 2 to 5 of the Mandate: the discretionary powers of the Mandatory must be viewed as subordinated to the obligations found in the Mandate provisions. Notwithstanding the rights of the Mandatory vested in it for administrative convenience, as will be demonstrated shortly, such rights must be subordinated to the obligations specifically found in Article 2 (2), which are those in issue in these proceedings.

The analysis is confirmed, it appears to the Applicants, by the judgment of this honourable Court in 1962 on the Preliminary Objections. The Court stated as follows:

> "The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a régime 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 civilisation' laid upon the League as an organized international community and upon its Member States. This system [said the Court] 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.

> These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. 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. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which [and I stress the words 'overriding purpose of which'] is to promote 'the well-being and development' of the people of the territory under Mandate." (*I.C.J. Reports 1962*, p. 329.)

The tool is seen most definitely in Article 2 (1) and it is a tool which, as the Court pointed out, is entrusted to the hands of the Mandatory for the sole purpose of enabling it to fulfil its obligations. It would seem difficult to find a more persuasive indication of the relative roles of subordination of the first paragraph to the second paragraph than the clear meaning, to the Applicants at least, of this metaphor employed by the Court.

The same point, it is submitted, is to be found in the separate opinion of Judge Bustamante, appended to the 1962 Judgment. Thus, the learned Judge states:

> "The Territory is handed over to the Mandatory only temporarily for administrative purposes, and in no category of mandate can this be taken to signify a transfer of sovereignty." (*Ibid.*, p. 352.)

Again we have explicit reference to administrative convenience for "administrative purposes", in the words of the learned Judge, a convenience or purpose which, as a tool given to the Mandatory to discharge its obligations, must be subordinated to the primary and overriding substantive obligations found in Article 2 (2) of the Mandate. And, again, the Court's attention is respectfully called to the use of the word "overriding" in the 1962 Judgment in respect of Article 2 (2) obligations.

[Public hearing of 14 May 1965]

Mr. President and Members of the honourable Court, at the conclusion of the Oral Proceedings yesterday I was referring to the considerations underlying the Applicants' response to the tenth question propounded by Judge Sir Gerald Fitzmaurice in his important series of questions, and this of course related to the question whether the first paragraph of Article 2 of the Mandate is subordinate to, or if not, what is its relationship with the substantive obligations under the Mandate, specifically Article 2, paragraph 2. This is a rough paraphrase, I believe an accurate one, with all respect, of the intent of the question to which I will continue, with the Court's permission, to address myself.

In addition to the considerations adduced at the Oral Proceedings yesterday, the Applicants submit that another indication of the subordination of the first paragraph of Article 2 to the second paragraph thereof, as well as to the substantive obligations embodied in Articles 3, 4 and 5 of the Mandate, is to be found in the wording of paragraph 6 of Article 22 of the Covenant of the League of Nations itself.

Article 22, paragraph 6, of the Covenant may perhaps, for the convenience of the Court, be inserted into the record and I shall read it:

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

Paragraph 6 of Article 22 of the Covenant, which I have just read, indicates quite clearly, in the Applicants' submission, that the rights given to the Mandatory are a matter of administrative convenience and subordinate to "the safeguards above-mentioned in the interests of the indigenous population" in the final clause of paragraph 6 of Article 22. The purpose underlying the clause's integral portions wording, as used in the text, is made clear by the text of Article 22, paragraphs 1 and 2, particularly, and also, as a corollary thereof, paragraphs 6, 7, 8 and 9, with the specific safeguards provisions.

The explicit references in paragraph 6 of Article 22 to the remoteness, smallness of size and so forth of the territories destined to become C mandates would seem to indicate that what the phrase refers to are matters of administrative convenience, which arise out of the enumerated factors. These enumerated factors of sparseness, remoteness, etc., are qualities which peculiarly pertain to administrative considerations. They do not in themselves bear upon, nor indeed do they seem relevant to, considerations of substantive nature, of obligational nature. The fact that a territory is remote, or the fact that it is sparsely settled, poses problems of a classically administrative nature, and has nothing to do with the content of an obligation in respect of policies which are or are not conducive to the promotion of the welfare of the inhabitants of such sparsely populated or remote areas. Quite the contrary—such sparseness of population, such remoteness, such other factors impose a greater burden and a greater duty upon the Mandatory to exert greater efforts to achieve the desired result.

This is a reason for giving administrative tools, procedures of an administrative and legislative nature, which facilitate the accomplishment of the sacred trust. I shall have more to say about that in a few moments, in terms of the mandate jurisprudence as it has developed since 1950 onwards.

Perhaps the most significant indication that the authors of the Covenant intended to refer to matters of administrative convenience is the wording of the last clause of the paragraph to which I have referred, namely "subject to the safeguards above-mentioned in the interests of the indigenous population". This is a proviso of decisive consequence in the context. The stress here, of course, is on the phrase "subject to", and these are words of subordination, in the Applicants' view.

Now the safeguards referred to are those set out in Article 22, paragraph 1, and Article 22, paragraph 2, of the Covenant. Article 22, paragraph 1, provides:

"That the well-being and development of such [that is, dependent] peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant."

And then Article 22, paragraph 2, in words which have become so familiar, ordains and establishes as "the first method of giving practical effect to this principle", the device and the processes of a fiduciary institution, one in which the Mandatory exercises tutelage "on behalf of the League", that is to say, on behalf of the organized international community, and this is described in the Covenant by the simple, single but profoundly significant word in this context, "civilization".

Paragraphs 7, 8 and 9 of Article 22, of course, specify the safeguards for implementation of the securities for the performance of this trust as a decisive element of the principle—I stress the word "principle"—promulgated in Article 22, paragraph 1. This is the scheme of the mandates system, and the heart. The mandate instrument, of course, as the very word implies, is an instrumentality, an institutional device, for carrying out the trust laid upon the League as an organized international community.

The Council itself had the right and duty to define the conditions of the mandate. It did so, in the words of the Court, in 1962, by giving the mandatory "tools with which to fulfil its obligations"—that is from page 329 of the 1962 Judgment. Lord McNair dealt with the matter in his separate opinion, appended to the 1950 Opinion, at page 150, and this seems highly relevant indeed to the question of subordination of paragraph 1 to paragraph 2, because the basic question of sovereignty is involved here. The Mandatory, the Respondent, has referred to Article 2, paragraph 1, as giving the Mandatory a *de facto* sovereignty—that phrase is used in the pleadings. The concept of sovereignty is related to this question, raised in Judge Fitzmaurice's question, by the very terms of the pleadings of Respondent itself, and inevitably so. This raises the question of *de facto* sovereignty versus the concept of the tools given to the mandatory to carry out its obligations. This is the juxtaposition which reflects the question of where the spirit of the mandate really lies.

Lord McNair said:

> "Upon sovereignty a very few words will suffice. The Mandates System (and the 'corresponding principles' of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends on the international agreements creating the system and the rules of law which they attract. Its essence is that the Mandatory acquires only a limited title to the territory entrusted to it, and that the measure of its powers is what is necessary for the purpose of carrying out the Mandate. [And then Lord McNair quotes from Brierly] 'The Mandatory's rights, like the trustee's, have their foundation in his obligations; they are tools given to him in order to achieve the work

assigned to him; he has all the tools necessary for such end, but only those'." (*I.C.J. Reports 1950*, p. 150.)

Now, the reference to Professor Brierly is to the article by Mr. Brierly in the *British Yearbook of International Law, 1929*, at pages 217-219, and this is to the effect that the governing principle of the mandates system is to be found in the trust itself.

The Court in 1962, as has been noted, adopted, and in a sense ratified, the metaphor and reinforced its legal significance, and really made it part of the mandate jurisprudence. Article 2, paragraph 1, was not intended as a means whereby the tool might become a double-edged device with which the Mandatory could further its own interests as well, and here we turn to Judge Bustamante's opinion, appended to the Judgment of 1962 in the *I.C.J. Reports* of that year at page 357, and the words of the learned Judge seem to be of profound relevance in this context from a variety of perspectives. Judge Bustamante pointed out:

> "An international Mandate is, by its very nature, temporary and of indeterminate duration. Its duration is limited by the fulfilment of the essential purpose of the Mandate, that is to say, by the completion of the process of development of the people under tutelage through their acquisition of full human and political capacity. It follows that any Mandate agreement remains in force until such time as the people concerned attain the desired degree of structural organization as a nation."

And then Judge Bustamante goes on to say:

> "The function of the mandatory is a responsibility rather than a right. It is for the mandatory to refuse the trust if it cannot bear the burden."

And Judge Bustamante concludes, as a corollary to the foregoing propositions through which tutelage is exercised, that an international mandate through which tutelage is exercised "does not and can never imply a transfer of sovereignty to the Mandatory or the annexation of the mandated territory by the tutelary State". Unless Article 2, paragraph 1, is indeed subordinated to the obligations of the sacred trust it becomes a tool, at least, for in the Respondent's phrase, "*de facto* annexation".

Still quoting from Judge Bustamante, however, from page 358 of the same opinion:

> "It is true that C Mandates (Article 22, paragraph 6, of the Covenant) brought the mandated territory into a closer relationship with the Mandatory by the fact that the latter applied its own laws to the territory in question; but this extension of the legislative powers of the Mandatory does not imply an act of sovereignty on its part, but simply the application of a prior authorization with regard to administration contained in the Mandate agreement, with a view to adapting the territory to the legislation of a more advanced country."

Again, the administrative, the tools concept—the stress is on the word "administration", in the Applicants' view.

And then to complete the circle of reasoning of Judge Bustamante, and now I quote from page 358:

> "The only way of safeguarding the rights of the people under Mandate is to entrust the supervision of the Mandatory's acts to

the Mandator or tutelary organization which, on the one hand, represents the ward and, on the other, personifies the interest of the States of the world assembled in an association. Absence of a supervisory organ would be tantamount to unilateral and arbitrary exercise of the Mandate and would inevitably lead to annexation. A Mandate so mutilated would be of an essentially different nature from that provided for in Article 22 of the Covenant."

This is a circle, a chain of reasoning, and it relates to Article 22, paragraph 1, in the context of the Mandate, to the question of sovereignty, *de facto* or otherwise. It relates that issue to the question of the essence of the Mandate in respect of supervisory administration—supervisory authority—the necessity of which is underscored in this context by the fact that the tools given to the Mandatory in order to do its job could be construed by the Respondent, as it now has done, not permissibly but actually, as equivalent to a grant of *de facto* sovereignty. This underscores the necessity for continuing supervisory authority and reveals a conflict of basic nature between the organized international community, the supervisory authority, and the Mandatory itself, a conflict of view which is being resolved by the Mandatory on the basis of a unilateral, unsupervised and self-appraising administration of control of the Territory.

This is a chain of reasoning and this is the real spirit of the Mandate which Judge Bustamante, which Lord McNair, which this honourable Court has described from 1950 onwards, in the jurisprudence of the Mandate; this is the spirit of the Mandate. It is not the spirit of the Mandate in the mutilated sense in which it is pronounced by Respondent's highest officials as self-enquiry, self-appraisal, asking oneself the questions, and giving oneself the right answers. This is a travesty of the spirit of the Mandate, as viewed by this honourable Court, for the past 15 years, and, above all, the Mandatory advises the Court, standing here not merely as litigant but as trustee, that it is voluntarily abstaining from annexing the Territory as part of the spirit of the Mandate—an abstention which, at best, is of most uncertain duration.

The jurisprudence of the Mandate, accordingly, combines with, and illuminates the clear text of Article 22 of the Covenant to demonstrate that Article 2, paragraph 1, is subordinated to the obligations of the sacred trust in the second paragraph of Article 2, as well as of Articles 3, 4 and 5.

The organized international community, speaking through its competent organs—and this again is raised in the question of the relationship between Article 2, paragraph 1, and the substantive obligations of the Mandatory—the organized international community categorically has stated its judgment in respect of the question of policy, official action, governmental action, based upon the avowed premises of apartheid. No clearer judgment probably has ever been expressed by any international community on any question in the history of the international community. It is no longer a matter, in the Applicants' view, upon which reasonable men can differ, that a policy which allots rights, burdens and privileges, on the basis of membership in a group rather than on the basis of individual merit and capacity and quality, is permissible. It has moved into the domain of genocide, in the Applicants' view, and, certainly, the concept of mutilation of personality, of the individual potential, is regarded widely, if not universally, as similar to the concept, or

the consequences, of mutilation of a more physical character. This is a basic difference of philosophy between the Respondent and the rest of the world, and, to state it even in these terms, implies a degree of moral judgment and emotionalism which is implicit in the characterization by the international community of the practice itself. It is a fact of international life and not to present it thus to the Court would do less than justice to the problem itself. But we are speaking in purely juridical terms here—a trust, tutelage—called by whatever name of a fiduciary institution—must be construed in the light of its major purposes and, here again, as the Court brought out in the 1956 Opinion, Respondent has refused to co-operate or to defer, in administrative supervisory respects, to the judgments of the United Nations, the International Labour Organisation, the other competent organizations of the international community upon which this burden was resting.

This lack of co-operation, to understate it, in the very area of race relations, it seems to the Applicants, bears heavily on the degree, the method and the scope and importance of accountability, as well as on the justiciability of this dispute. Where administrative remedies are removed, judicial remedies must emerge in such an inter-related and integrated scheme, and this is at the bottom, it seems to the Applicants, of its interpretation in the light of the so-called paramount purpose. To use the language of the Court in the 1956 Opinion, at page 28, the Court said "It is clear that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time during the regime of the League of Nations" but that the Council was competent to do so and the United Nations was competent to do so, to adapt the needs of administrative supervision to the objective consequences of Respondent's failure and refusal to submit to international accountability and this bears, of course, essentially, in this context, on Respondent's good faith test contention.

As was said yesterday, the good faith test in any event is irrelevant legally in the Applicants' view but it is obliterated from consideration in this case by reason of the fact that Respondent has failed and refused to submit to international accountability for 15 years following this Court's Advisory Opinion in 1950, yet asserts now that it must be evaluated and appraised on the basis of good faith.

The wording of the mandate text for South West Africa is completely consistent with, and indeed shows the same pattern as the Covenant itself. Article 2 in its entirety is in essence a repetition of Article 22, paragraph 6, of the Covenant. First, the full powers of the Mandatory are set out, that is to say, in terms of Article 2, paragraph 1, and then comes the basic obligation of the sacred trust in the second paragraph of the Article, as well as in the succeeding Articles 3, 4 and 5. Although the phrase "subject to" is not textually employed in the Mandate, its omission quite obviously was not intended to amend the Covenant in that respect or in any other. Full powers are granted in the terms of legislation and administration but subject to the obligations of the sacred trust as surely, and as fully, as if the same phrase, which appears in Article 22 of the Covenant, was incorporated in the Mandate—the only reasonable inference is that the framers of the mandate instrument must have assumed that the phrase in the Covenant was over-riding and was, of course, part of the obligation. We have always maintained that the Mandate must be read in the light of the Covenant because this is what

the Court has said. The "integral portion" language of Article 2, paragraph 1, is a matter of administrative convenience and this is confirmed by the history of the Permanent Mandates Commission itself; instances are cited in the Memorials, and one in particular might be called to the Court's attention, at **I**, page 38 of the Memorials, from which perhaps excerpts should be read into the record here—it is a brief quotation; it is from the Memorials, **I**, page 38, which cites the Permanent Mandates Commission minutes on the point: "Because of the fundamental importance of this question". "This question", parenthetically, related to the concern expressed by the Commission by reason of the fact that in the preamble of one of a series of agreements concluded between Respondent and Portugal concerning the boundary between Angola and South West Africa, a phrase was used which stated that the Respondent had "full sovereignty over the territory of South West Africa, lately under the sovereignty of Germany". Now addressing itself to that proposition, the Permanate Mandates Commission, at its Eleventh Session, raised the question in this form, part of which is quoted here—the Court's attention is directed to the full text from which this is excerpted. The Commission, as I started to say before, said as follows:

> "Because of the fundamental importance of this question the Committee feels obliged to bring it to the attention of the Council ... In the first place, the parallel drawn in the above mentioned preamble between the sovereignty assumed by the Government of the Union of South Africa over the territory in question and the sovereignty over that territory previously held by Germany, seems to imply a claim to legal relations between the mandatory Power and the territory it administers under its mandate, which are not in accordance with the fundamental principles of the mandates system." (**I**, p. 38.)

This was without specific reference to Article 2, paragraph 1, but it is cited here as an illustration of the concern constantly and continuously expressed by the Permanent Mandates Commission, with respect to the question of sovereignty, *de facto, de jure* or just plain sovereignty.

Another pertinent consideration is the history surrounding the submission of, and agreement upon, the several trusteeship agreements entered into by the mandatory powers. This area of enquiry is extremely illuminating in the Applicants' view because in the trusteeship agreements themselves identical or entirely similar language appears and, of course, the Court will know that the trusteeship agreements were not intended to vest sovereignty on the part of the trustee administrator in the territory under trusteeship, that, of course, is a self-evident proposition. Therefore, when one looks to the trusteeship agreements and the circumstances of their authorship and formulation, the significance attributed to the very same words or words so similar as to obviously compel the same meaning would be significant in interpreting the use of the words in the context of the Mandate; of course, that would be true if, as is the case, no debate, no discussion ever indicated or intimated that the words were being used in the trusteeship agreements in a sense different from that in which they were used in the mandate agreements—there is an absence of any such intimation, and in the Applicants' view, it is not a supportable hypothesis.

Therefore to look at the circumstances of the formulation of the trusteeship agreements in the precise context of Judge Sir Gerald Fitzmaurice's question No. 10, one finds illuminating evidence of the significance attached to the phrases in question in Article 2, paragraph 1, by the former mandatory powers, by the new trusteeship administrators and by the international community in the debates accompanying or attending the creation of this system and its operation. In the fall of 1946, to be more specific, the debates in the Fourth Committee of the General Assembly shed considerable light upon the "integral portion" phrase in the Mandate; the Governments of New Zealand, Australia, France, Belgium, and Great Britain used nearly identical wording in the draft trusteeship agreements which they submitted and in doing so, they insisted, they did not merely aver, that such wording was intended merely as a matter of administrative convenience because, as might have been expected, the words were questioned—the formula was questioned. Thus, for example, Article 3 of the trusteeship agreement proposed by New Zealand for Western Samoa, provided that the territory should be administered as "an integral part of New Zealand"—the word "part" is used there instead of "portion". I have quoted here from the *General Assembly, Official Records*, First Session, Second Part, Fourth Committee of Sub-Committee 1, at page 11—this was in 1946.

The delegate of New Zealand, Sir Carl Berendsen, addressed the Fourth Committee, and the following appears from the document just cited, at page 46:

> "New Zealand had never claimed that Western Samoa was an integral part of New Zealand and disclaimed all intentions that it ever should be. His Government merely desired to use the same administrative mechanism as if it were an integral part of New Zealand ... Although his Government wished to avoid the necessity of establishing a separate administration for Western Samoa, Sir Carl agreed that it would be wise and proper to attempt to avoid mis-apprehensions concerning the phrase 'as an integral part of New Zealand'."

The statement, it would seem, makes quite clear that New Zealand was primarily concerned, and understandably so, with problems of administrative convenience. The wish to avoid the necessity of establishing a separate bureaucratic structure or separate administration for Western Samoa as administrative devices, would be understandable and the significance attributed by Sir Carl to the "integral portion, integral part" wording of the proposed trusteeship agreement went no higher than that level of meaning, and he explicitly stated so.

The view was expressed in the Fourth Committee by some members who desired to be re-assured lest the phraseology "integral part" or "integral portion" might lay some sort of basis for a claim to the right of annexation or *de facto* or *de jure* sovereignty; but the mandatory powers, that is those with the greatest knowledge and experience in these very matters, themselves insisted that this was not the intended meaning and gave explicit re-assurance that the use of such phraseology would not bear such a signification. One example is the statement by the Australian representative, Mr. Bailey, in the same proceedings previously cited, at page 44, where according to the Summary, Mr.

Bailey said that such a view, that is to say the annexation concern, would have to assume that:

> "The original proponents of that language at the Conference of Versailles and even the Permanent Mandates Commission had not completely understood its significance. The entire history of this concept eliminated the suggestion that 'as an integral part' conveyed or intended to convey the power of annexation."

This was a demonstration of the continuity of meaning to be attached to the phrase or similar phrases, and that there was no thought on anyone's part that by using the same or similar language, the meaning to be attributed to the phrase had been changed in some way during the course of the years—quite the contrary, the continuity of meaning and significance was explicitly declared in statements such as these and particularly this one. However, again as confirming the validity of the general statement I have just made, the French delegate, M. Naggiar, made it quite clear that his understanding of the phrase "as an integral part" was the same as that of the New Zealand representative. The trusteeship agreement proposed for the territories under mandate provided in the draft that the administering authority, France in this case—

> "Shall have full powers of legislation, administration and jurisdiction in the territory and shall administer it in accordance with French law as an integral part of French territory, subject to the provisions of the Charter and of this agreement." (Trusteeship Agreement/5, 13 December 1946, p. 4.)

This provision was designed to facilitate the administration by France of its trust territories, in precisely the same manner, and precisely for the same reasons and extent to which the mandatory powers had been vested with similar legislative and administrative scope for purposes of administrative convenience, and as a matter of fact, M. Naggiar, on behalf of France, said:

> "As for the suggestion that there was a sinister significance in that wording, [he] inquired why, if such were the case, his Government had offered to place the territories under trusteeship at all. The proposed wording was useful *as a matter of legislative convenience . . .*"

Further in the Summary, the French representative declared that "he would be willing to have inserted in the Rapporteur's report, the interpretation of his Government that the words 'as an integral part' were necessary as a matter of administrative convenience and were not considered as granting to France the power to diminish the political individuality of the trust territories". (*General Assembly, Official Records*, First Session, Second Part, Fourth Committee, Sub-Committee 1, p. 11.)

And at page 162 of the same Sub-Committee proceedings M. Naggiar commented further that the "integral part" language—

> "had appeared in the mandate and was still necessary. There was a real need for this provision which would facilitate administration. The French Government did not consider itself authorized, by this language, to diminish the personality or individuality of the Trust Territories in any way."

Actually, I must correct myself, Mr. President—this was made in the Fourth Committee itself; I had mis-stated and referred to the Sub-

Committee; the previous statement referred to Sub-Committee 1 of the Fourth Committee; what I have just quoted at page 162 relates to the proceedings in the Fourth Committee itself.

Likewise, in the Fourth Committee the General Assembly records for the First Session, second part, page 1541, the representative of Australia referred to "convenience of administration". The United Kingdom delegate at page 119, *General Assembly, Official Records*, First Session, Second Part, Fourth Committee, Sub-Committee 1, spoke of "the only practical method of administration"; and Mr. Ryckmans made the same point at page 120 of the document last cited, when he argued that without the wording in question particular social legislation involved in Belgium at that time "could not have been applied without special enactments". This was an explicit description of a situation in which administrative convenience, legislative convenience, was advanced in explanation of the fact that this was a device for convenience and not a device for *de facto* or other kind of annexation or extension of sovereignty, or in any other way, in the language of the French delegate, designed "to diminish the political individuality" or the personality "of the Trust Territories".

Finally, the Chairman of the Sub-Committee, in the same document at page 123, discussing the same problem, suggested that a vote be taken on the proposal that—

> "there should be included in the Rapporteur's report a statement that the phrase [integral part, or integral portion] was included only as a matter of administrative convenience without prejudice to the sovereignty of the Trust Territories".

And the vote was taken, and the vote was 14 in favour and none against; that is from the same page of the previously cited document, the record of the vote; there were three abstentions, I should add.

The mandatory powers, with Respondent not participating inasmuch as its Government had submitted no trusteeship agreement, of course, felt that the "integral part" phraseology of their proposed draft was necessary or desirable as a matter of administrative convenience; this is the highest value and the only significance ever placed upon this wording by any representative, by the very representatives of governments which had had the most continuous experience and knowledge of the mandates system as mandatories, and in at least one case they were at pains to point out that the use of the phrase meant nothing different, more or less, than it had as used in the mandate instrument; this was asserted as a method of reassurance that the trusteeship agreements would move forward, and not backwards, and it also illuminated the significance of the same or similar wording used in the mandate instrument itself.

Therefore it is very relevant indeed to note that the several trusteeship agreements followed the same pattern as the Covenant of the League and of the Mandate itself in making it clear that the rights of administration were subject to, or subordinate to, obligations under the trusteeship system. In the trusteeship agreements to which I have referred, the phrase was included explicitly that the obligations were subject to the Charter and the trusteeship provisions of the Charter.

In the case of the mandate instruments, Article 2, paragraph 1, did not contain so explicit a proviso; none was necessary, because of the fact

that the Covenant itself contained the proviso; it had overriding legal significance, and it was not necessary to include the same proviso in the mandate instrument, although possibly, as a matter of draftsmanship, conceivably it might have been preferable; it certainly was not necessary from the point of view of legal analysis of the use of phrases in this context; there only one legal conclusion could be drawn, in the Applicants' respectful submission.

The Belgian Trusteeship Agreement for Ruanda-Urundi, for example, provided in Article 5 that the Administering Authority—

> "shall have full powers of legislation, administration and jurisdiction in the Territory of Ruanda-Urundi and shall administer it in accordance with Belgian law as an integral part of Belgian territory, subject to the provisions of the Charter and of this Agreement". (*Trusteeship Agreements*, Series No. 3, 13 December 1946 at p. 3.)

The stress here is laid on the phrase "subject to the provisions of the Charter and of this Agreement", and again, as with the Covenant of the League, and as with the mandate agreement, the administrative rights of the administering authority are made subordinate to the substantive obligations, in this case explicitly in the mandate agreement itself implicitly, but in the Covenant, Article 22, explicitly.

In summary, then, by way of concluding the reply to question No. 10 propounded by Judge Sir Gerald Fitzmaurice which obviously, at least in the Applicants' submission, raised fundamental questions pertaining to the very jurisprudence of the Mandate itself and has been treated accordingly with all respect by the Applicants—in conclusion of the response, it is to be said, in our view, that the 1950 Advisory Opinion, the 1962 Judgment, the Covenant of the League of Nations, the mandate instrument itself, considerations of logic and necessity confirmed by League history, the events surrounding the establishment of the trusteeship system in 1946, to which reference has been made, all combine to support the conclusion which is reached by the Applicants in response to question 10 put to the Parties by Judge Sir Gerald Fitzmaurice.

Applicants respectfully submit, in response to that question, that Article 2, paragraph 1, of the Mandate must be read as subordinated to Article 2, paragraph 2, as well as to the other provisions and elements of the sacred trust in the Mandate and in the Covenant. The rights given to the Respondent under Article 2, paragraph 1, are mere tools given it to enable Respondent to carry out its obligations and to bear its burden, and that burden includes accomplishment of the objectives of the sacred trust set forth most centrally in Article 2, paragraph 2. This being so, the first paragraph of Article 2 is to be read in subordination to the obligations of the sacred trust, and is to be read as extending as a matter of administrative and legislative convenience to the Mandatory the facility of applying in the Territory its own legislation and administrative practices which, however, under no circumstances may as a matter of law violate its substantive obligations under the Mandate, and it is not a device by which such evasion, violation, breach or abuse can be accomplished, because it is a tool and not a weapon.

This, Mr. President, concludes the response of the Applicants to question No. 10 propounded by the learned judge, and I would now, with the honourable President's permission, turn to a new subject.

The purpose of the Applicants now, in accordance with the scheme of

argument outlined at the beginning of this reply, and which is designed, *inter alia*, to comprehend responses to questions asked by Judge Sir Gerald Fitzmaurice at an earlier stage and, of course, now will also include the questions more recently propounded by the honourable President and by Judge Sir Gerald Fitzmaurice, and any other questions which may be propounded in the future. It is the purpose of the Applicants now, en route to resting their case at an appropriate moment, subject to the wishes of the honourable Court, to include within the plan of their argument the brief enumeration of the legislative and administrative measures and laws, and the official methods and measures by which these laws and regulations are put into operation, which are comprised within the concept or policy or label of apartheid, or separate development, and in terms of the standards and the norm for which the Applicants contend, placing before the Court at this point of the record a catalogue of an enumerative and illustrative character, so that there can be no question in the context of this litigation precisely what it is that the Applicants mean when they refer to undisputed facts, what it is upon which they rely to establish the *per se* doctrine for which they contend.

There has been considerable enlightenment in the course of these proceedings, but there also have been some shadows cast, which is inevitable in the course of such a proceeding; but it seems part of the duty of the Applicants to lay before the Court an enumeration of the laws and measures, methods and practices, of an official character, by which these laws and regulations are put into effect, all of which—the existence of all—is conceded by Respondent and, indeed, will be cited to the Court largely in terms of Respondent's *own* written pleadings.

By way of preface to the enumeration—illustrative cataloguing, which will consume something less than one hour of the Court's time, but which will be concise, unelaborated, and presented without argument or characterization—it may be pertinent, by way of attempted clarification of discussions preceding this morning's presentation, to refer to blatant sources of confusion in the Respondent's characterization of certain contentions, arguments, judgments, opinions expressed in the Applicants' written pleadings. Without reopening the question of clarification, or requests for clarification, reference is made, respectfully, to use of phrases which, from the standpoint of the Applicants' appreciation of legal formulations—of formulations in a legal context—are difficult to assimilate and, therefore, easy to misconstrue on the part of the Applicants. For example, in the verbatim record, *supra*, page 54, a phrase is used in a hyphenated form, as it appears in the verbatim, "policy—factual allegations". On that page an averment is made that "policies . . . are inherently incapable [I stress the word 'inherently'] of promoting well-being and progress" and is, in the Respondent's phrase, "a submission of fact"; a "submission of fact" that it is "inherently incapable" of promoting well-being and progress.

In the Applicants' conception of the legal significance of the word "inherently", it is an argument, a judgment, an opinion; it is a conclusion which is reached on the *basis* of fact, it is not a "submission of fact"—it was never conceived of by the Applicants as a "submission of fact".

Similar expression is used in the verbatim record, at page 67, *supra*, where reference is made to "factual allegations . . . implying a factual condemnation". From a legal point of view, the Applicants have tried,

but failed, to perceive what the significance is of "a factual condemnation"—the phrase is meaningless to the Applicants and we have endeavoured to comprehend it. "A factual condemnation" would seem to be an ambivalent expression—"condemnation" is a judgment—"factual condemnation" could only mean the fact that a condemnation has been made of a certain character—it is difficult to evaluate. However, in order to avoid further proliferation of such an argument—and Applicants concede lack of comprehension, from a legal standpoint, of what phrases such as these mean legally in a court of law, never having heard them applied in these formulations or in this context—it may be useful for clarification to avoid the implication of a word game, in which the Applicants do not wish to engage, to state to the Court what the Applicants think they are doing when they use certain words and phrases in a legal context. We think that there are three different elements involved here—we think there are averments of fact; we think there are judgmental or opinion statements—aspects which may or may not be related to averments of fact, but if they are stated in the same context do not lose their character or quality as characterizations, as judgmental or opinion statements. The parties to a proceeding, so far as the Applicants are aware, have every right and justification to use whatever characterization of a fact they please. The Court does not have to do so. And then, of course, there is argument, and sometimes we find—or think we find—the Respondent confusing these three and treating an argument as if it were a submission or an averment of fact. When the Applicants say that a certain practice, or a certain undisputed policy, measure, or law, is "inherently" whatever it is, the Applicants think they are making a legal argument and not a submission of fact, and they appreciate it to be part of their duty to convince the Court, if possible, that on a basis of standards and norms applicable, whose content the Applicants are responsible for presenting to the Court, the particular undisputed *fact* in that sense—in the sense of a legislative measure, in the sense of an administrative measure, in the sense of a practice or policy or method which is undisputed—the policy and practice are "inherently" *per se* violative of the applicable norm and applicable standards. If the Court should decide that there is no international legal norm of the same content and character as the international standards for which the Applicants contend, in that case it would be the submission of the Applicants that the Court should interpret the mandate instrument on an *ipso facto, per se,* "inherently" applicable basis. We use these terms interchangeably so that the mandate instrument should be interpreted in the light of and on the basis of its nature as a trust instrument, its character as a constitutional type document, its human rights character, and the judgment, unanimous to an extraordinary degree, that a particular undisputed body of practices and policies constitutes a violation of that trust. These are the elements of the alternative form in which the Applicants have respectfully submitted this matter and which, of course, will be elaborated before resting, in the context of the establishment of an international legal norm, as well as of international standards for interpretation—authoritative and clear beyond doubt—of the mandate instrument itself, in the light of the unanimous judgment of the supervisory competent international organ.

Therefore, it will be the purpose in turning now to the cataloguing, illustrative enumeration of the legislative and administrative laws and

measures, the official practices and procedures, and techniques, by which the Government applies these laws and measures, so that there will be no room for doubt as to what it is, what pattern of conduct, what pattern of policy and practice it is upon which the Applicants rely in urging upon this Court the judicial conclusion that this pattern of policy and practice, the existence of which is conceded by Respondent, is a violation of Article 2 (2) of the Mandate, and is a violation of an international legal norm applicable to the Respondent's duties or, and alternatively, either, is the legal conclusion to be reached.

[Public hearing of 17 May 1965]

Mr. President and Members of the honourable Court, in their Memorials at I, page 107, after setting out relevant provisions of the United Nations Charter, the Applicants have submitted that Article 2 of the Mandate and Article 22 of the Covenant—

> "read in the light of the terms and stated purposes of Chapters XI, XII and XIII of the Charter, establish clear and meaningful norms marking the duties of the Mandatory".

The Memorials then continue as follows:

> "In accordance with these legal norms, the Mandatory's duties to safeguard and promote the 'material and moral well-being', the 'social progress' and the 'development' of the people of the Territory must reasonably be construed to include: . . ."

And there follow, there are set forth at that point, eight generally formulated duties of the Mandatory—Memorials, I, pages 107-108. Each of these generally formulated duties was conceived in the light of the necessity of "respect for human rights and for fundamental freedoms for all without distinction as to race". That, as the Court will know, is quoted from Article 76 of the United Nations Charter, and the phrase I have just quoted is set forth in italics immediately preceding the paragraph in which the reference is made to "meaningful norms", and which in turn introduces the eight enumerated categories of duties.

The purport, the intention, as would seem clearly to be indicated by the context, and particularly in the light of the introductory paragraphs to which I have referred—the purport and intent of these eight enumerated duties is to set forth for convenience sake in categories eight general ranges of duties, each of which must be carried out in accordance with the norm and the standards for which the Applicants contend. The eight categories of duties thus set forth, all of which are to be read in the context of and subject to the norm against discrimination and/or separation, are as follows:

> "(1) Economic advancement of the population of the Territory—and notably of the 'Natives' who constitute the preponderant part of the total population in agriculture and industry;
>
> (2) Rights and opportunities of members of the population employed as labourers in agriculture or industry;
>
> (3) Political advancement of such persons through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions;

(4) Security of such persons and their protection against arbitrary mistreatment and abuse;

(5) Equal rights and opportunities for such persons in respect of home and residence, and their just and non-discriminatory treatment;

(6) Protection of basic human rights and fundamental freedoms of such persons;

(7) Educational advancement of such persons;

(8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings." (**I**, pp. 107-108.)

Mr. President, if the Applicants correctly understand the purport of Respondent's *critique* and comments in this regard—for example, in the verbatim record of 23 April, **VIII**, at page 655 and following, Respondent appears to interpret and to read these eight categories of duties as setting forth standards of achievement in themselves, or, in Respondent's words at page 657 of the verbatim record I have cited, "an aim . . . a result to be achieved". Respondent apparently construes the eight categories in themselves as constituting standards or norms for achievement. On the basis of this apparent misconstruction the Respondent comments at page 657 of the same verbatim record that such norms are "poles apart from that of the alleged norm of non-differentiation", which of course is the characterization which the Respondent fastens upon our norm of non-discrimination and non-separation.

These eight categories of course are not set out as norms, and they are not incorporated in the context here as standards of achievement; they are read, and to be read, and can only be read subject to the introductory paragraph which I have quoted. The enumeration is preceded and introduced by a paragraph which, as has been said, begins with the words "In accordance with these legal norms", and then the duties set forth in a general range of eight convenient categories are the areas of social life, the complete existence of an individual in the social order, in eight convenient categories which are of course the areas of the relationship of the individual to the State in which it is of decisive consequence whether or not he is being treated in accordance with the norm of non-discrimination and norm of non-separation. This is not a quantitative measure of achievement with respect to the various categories set forth. There appears to have been a misunderstanding or a misconstruction of the purport, intent and scope of these eight categories because of the fact that they have not been related to the introductory paragraph which itself, of course, is the context, the prescription, of the legal norm or, as used in the plural there, legal norms, against which or within which these eight categories are to be measured and which are set forth, as I say, to comprehend the range of the individual life in the society.

The reference to the Charter provision regarding racial discrimination or, in the words of the Charter, "respect for human rights and for fundamental freedoms for all without distinction as to race", immediately precedes the introductory paragraph, the one which refers to the norms—these norms refer to the Charter norms—the reference to "without distinction as to race" is, for emphasis, italicized on that page of the Memorials.

An official policy and practice of allotting rights and burdens on the

basis of membership in a group rather than individual quality or capacity has been adjudged by the competent organs of the international community to be inherently incapable of promoting the moral well-being and social progress of peoples anywhere. The Applicants' pleadings proceed from this premise—they always have—and the eight duties, as I have said, are categorized as a matter of convenience in the Memorials; they could have been set forth in many different, other classifications; these are duties which, in the Applicants' submission, must be discharged in the conduct of the Territory without violation of the norm of non-discrimination and non-separation.

That is the norm referred to in the Memorials at **I**, page 107, although it was not there labelled in the same style and under the same title as we came to clarify it and re-style and re-title it in the Reply, **IV**, at page 493. And in conclusion on this point it is therefore essential to make clear that the eight duties are not set out as standards of achievement in a weights and measures sense. They categorize, for convenience and analysis, areas of the social order which in their totality make up the life of the person in the society, in any civilized society, and in respect of which racial discrimination or group separation are embodied or embedded in Respondent's policy of apartheid.

It is that aspect of it, and only that aspect of the duties, which is in question here.

Respondent starts from the premise of discrimination or separation among individuals on the basis of membership in a group. Respondent clearly assumes that this is not only a permissible premise but an imperative one: that seems to be their contention. Having sorted out and classified all inhabitants in groups, on the rigid basis of the census categories which I have referred to in an earlier phase of the proceedings, and having allotted, substantially, individual rights and burdens on that basis, the Respondent asks the Court to weigh and measure quantitatively the extent to which the material welfare of the inhabitants has been promoted—houses, road, irrigation projects and so forth, are to be put in the scales alongside the handful of negative aspects, in Respondent's phrase.

But the Applicants and the competent organs of the international community say to that, no: promotion of moral well-being and of social progress is part of the mandatory's burden, and moral well-being and social progress are not functions or characteristics of an abstraction known as a group. They are, in very essence, a quality of the individual person as such or they do not exist at all as qualities. The elemental truth of this proposition, interestingly enough from the Applicants' analysis, is to be found in the treatment and perspective from which the Respondent views Article 5 of the Mandate.

Article 5 of the Mandate includes within its scope the duty of ensuring "freedom of conscience". Now, throughout its pleadings the Respondent has sought to draw a legal distinction between its obligations under Article 2 of the Mandate and those under Articles 3, 4 and 5. The Respondent in its written pleadings contends as follows:

> "Some significant differences between Article 2 (2) of the Mandate, on the one hand, and Articles 3 to 5, on the other, illustrate the *essentially different origin* and purpose of these provisions. Thus the wording of Article 2 (2) is wide and general, which is in keeping with its nature as an expression of an idealistic objective. The

'safeguards' contained in Articles 3 to 5, on the other hand, being specific obligations, are couched in relatively clear and precise language—they prohibit or enjoin particular acts or omissions and provide objective criteria by which the Mandatory's administration may be judged." (**II**, p. 387.)

Now, Mr. President, Respondent nowhere seeks to explain, nor is it really explicable, in what respect the duty to ensure freedom of conscience is more clear and precise or more susceptible to judgment on the basis of objective criteria, in Respondent's phrase, than is the duty to promote moral well-being of the inhabitants. Neither, of course, is quantitatively measurable; both are qualitative concepts and both apply to the individual person. The conscience is not a collective concept, it is not a group quality; the conscience is an individual characteristic and it is, of course, subject to, or susceptible to, precisely as much or as little objective criteria as is the phrase "moral well-being". In fact, the Applicants perceive some difficulty in drawing any precise line between moral well-being and freedom of conscience; it would seem that one is an element of the other.

However that may be, the Respondent draws a distinction of a legal nature between Article 2, paragraph 2, and Article 5, characterizing one, as I say, as specific, clear and precise, and the other as being too broadly formulated to provide objective criteria of the sort, in any event, for which the Applicants contend.

As stated at **I**, page 108 of the Memorials—I will not read the text but summarize it—the Respondent is alleged by the Applicants to have followed and to be following, by law and practice, a course of action which inevitably inherently inhibits the well-being and prevents the social progress, and inherently thwarts the development, of the majority of the people of South West Africa. And then the Memorials go on to define apartheid on the basis with which the Court is now familiar—the allotment of status, burdens, and so forth, on the basis of membership in a group rather than on the basis of individual quality and capacity.

The norm of non-discrimination or non-separation, when broken down into its component parts—and we shall have more to say about this shortly—for example, in the economic field, in the economic life of the community, could be, properly is to be, conceived and spoken of as the norm of non-discrimination or non-separation in economic affairs. In the area of education it is a norm against discrimination and separation on racial grounds in the educational field. Similarly, in the political and civil liberties fields, they become norms or sub-norms, whichever phraseology is preferable, rules which prohibit discrimination or separation in respect of the particular area of human activity or human intercourse which is involved.

Taken together, the norm of non-discrimination or non-separation, or the international standards covering the same subject-matter, having precisely the same content, would of course extend to the entire life of the community in its total aspect. This is the theory of the Memorials and it is explicitly set forth as such, although it had not at that phase of our pleadings the name, the style; the title was not yet formulated or incorporated in the pleadings. It was, however, precisely the same scope and content and applicability of the international standards and the legal norm, as described at **IV**, page 493 of the Reply for the first time in those terms.

It is the Applicants' purpose now to present to the Court the *corpus*, the pattern of laws and regulations, of official measures and methods, the existence of which is conceded by the Respondent and which in large part are derived from and cited to the Respondent's own pleadings. This *corpus* of fact, this body of laws and regulations and measures and methods, upon the basis of which the Applicants contend the norm and/or the standards (which will be explained shortly as to content, source and coverage), the conduct complained of, which will now be summarized without argument or elaboration, is to be judicially determined, to be *per se* and inherently in violation of such international norm and international standards, or either.

The Memorials, **I**, at page 111, set out the Mandatory's duties with respect to the economic aspect of the life of the inhabitants of the Territory, all, as I have said before, to be carried out and in the context of the international standards and the legal norm of non-discrimination or non-separation:

> "(1) Economic advancement of the population of the Territory—and notably of the 'Natives' who constitute by far the preponderant part of the total population in agriculture and industry;
> (2) Rights and opportunities of members of the population employed as laborers in agriculture or industry; ...
> (3) Social development of such persons, based upon self respect and civilized recognition of their worth and dignity as human beings." (**I**, p. 111.)

At pages 112 through 131 of the Memorials (**I**) the Applicants have set out a series of laws, regulations, measures and methods of an official character by which these laws and regulations are implemented in the economic lives of the inhabitants of the Territory. And the Applicants have submitted in the Memorials, and now reaffirm their submission, that these constitute *per se* violations of the international legal norm of non-discrimination or non-separation and of the standards which govern the interpretation and application of the Mandate itself.

The illustrative examples of the laws, the regulations and the official measures and methods—the existence of all of which has been conceded by Respondent—include the following, and they will be stated, if it please the Court, without elaboration, without argument, without characterization. This is the body of fact upon which the Applicants rest their case:

1. "Natives are not entitled to obtain permanent residential rights or ownership in the urban areas in the Police Zone." (**III**, p. 294, para. 205; see also Memorials, **I**, p. 113, para. 21 *(a)* and *(b)*, and Counter-Memorial, **III**, p. 25.) This restriction also applies to "any association, corporate or unincorporate, in which a Native has any interest" and relates to rural townships as well as urban areas.

2. Probationary leases contain conditions providing for their immediate cancellation in the event that a lessee should marry a Native or Coloured person, and prohibiting any transfer of the lease to "natives, Asiatics or coloured persons". (Memorials, **I**, p. 116, para. 27.) Respondent explains, for its part—

> "... that White farmers should not, at any rate while ownership in the farms remains vested in the Administration, be entitled to

cede or assign their leases to non-Whites" (**III**, para. 30, p. 33).

Likewise, at page 33 of the Counter-Memorial, **III**, Respondent avers that:

> "The condition regarding miscegenation in the probationary lease cannot by itself be relevant to 'well-being, social progress and development in agriculture', except to the extent that it indicates a contemplation that such leases would, while the relevant regulations remain unamended, be granted to Europeans only. That this has indeed been the contemplation, is admitted."

3. "Within the area of the Police Zone, excluding the Native reserves and the Rehoboth *Gebiet*, licences to prospect for minerals may be issued only to European companies." (**III**, p. 59, para. 40; see also **I**, p. 119, para. 40.) This includes approximately 50 per cent. of the Territory, which is thus reserved for approximately 14 per cent. of the inhabitants (Odendaal Commission report, tables XI and XII, at p. 29).

4. In all mining enterprises owned by "Europeans", "Natives" may not occupy the highest posts, in consequence of the provisions of the Mining Regulations. (See **I**, p. 121, para. 46; **III**, pp. 55-57 and 62; **IV**, pp. 405, 412 and 420; **VI**, pp. 230-235.)

To quote from the Rejoinder, **VI**, at page 231:

> "The posts which Natives may not be appointed to in such enterprises [that is, mining enterprises] are the following: Manager; Assistant, sectional, or underground manager; Mine overseer; Shift boss; Ganger; Engineer; Person in charge of boilers, engines and machinery; Surveyor; Winding engine driver; Banksman or onsetter."

5. The posts and positions in the Railways and Harbour Administration are classified and separated by race, and the "Native" inhabitants are restricted to a specific series of work positions. The highest posts contemplated by Respondent as available for "Natives" are restricted to the railways and harbours in what is termed by Respondent "their own areas" (**III**, p. 67, para. 14), by which term Respondent appears to refer either to "the existing Native areas" or the "Homelands for the different population groups" recommended by the Odendaal Commission, or both. See Rejoinder, **VI**, page 236, paragraph 85, and, to complete the citations, see **I**, page 122, paragraph 48; **III**, pages 64-69; **IV**, pages 412 and 420, and **VI**, pages 235-238.

6. Legislation in South West Africa provides for differing amounts and methods of payment with respect to workmen's compensation, including burial expenses, as well as to social pensions, depending upon the racial "group" classification of the individual worker concerned. (Rejoinder, **VI**, pp. 270-273; Reply, **IV**, pp. 416-417.)

7. The legislation in the Territory relating to the registration of trade unions and the settlement of industrial disputes defines a "trade union" as "any number of employees in any particular trade", but for the purposes of the chapter applying its provisions concerning the registration of trade unions, collective bargaining and conciliation, such legislation defines the term "employee" as meaning "any person employed by, or working for any employer . . . but does not include a Native". The term "Native" is defined to mean "a member of any aboriginal race or tribe of Africa". (Memorials, **I**, pp. 129-130, para. 75.) Consequently, "The provisions concerning labor disputes and conciliation do not apply

to disputes among or between 'Native' laborers and others". (See Memorials, **I**, p. 130, para. 76.)

Thus, it is conceded that "there is no provision for the registration of Native Trade unions and no provision for conciliation of disputes in terms of the [relevant legislation] . . . in so far as Native employees are concerned". (Counter-Memorial, **III**, p. 92, para. 32; see also Memorials, **I**, pp. 129-130, para. 75; Counter-Memorial, **III**, pp. 91-94; Reply, **IV**, pp. 423-424; and Rejoinder, **VI**, pp. 295-299.) "Native" workers in the Territory are represented in labour disputes solely by government officials (Counter-Memorial, **III**, pp. 93-94). Respondent, in its Rejoinder (**VI**, p. 298), concedes "the factual situation that a European inspector represents the interests of Native employees in proceedings of Conciliation Boards, the members of which can be only European or Coloured persons".

8. In conjunction with the foregoing are to be read the provisions of the Master and Servants Legislation, conceded by Respondent to apply in the Territory. Such legislation is generally applicable to "White", "Coloured", and "Native" persons, as well as specifically applicable, in addition, to "Natives" in the case of employees of the Administration of South West Africa, of the Railways and Harbours Administration, of any Local Authority, or of any contractor who constructs railway or harbour works. (Counter-Memorial, **III**, pp. 81-82, paras. 5-7.)

The legislation in question renders it a criminal offence for an employee to refuse to commence service under a contract of service at a stipulated time, to absent himself from his master's premises "without leave or other lawful cause", to refuse to obey any order of his master, or to depart "without lawful cause . . . from his master's service with intent not to return thereto". An employee charged with desertion may be arrested and sentenced to imprisonment, and, following his term of imprisonment, he must, in Respondent's words—

> "return to his master on completion of his term of imprisonment, unless the contract of service has been cancelled. Should he neglect to do so, he may be sentenced to successive periods of further imprisonment, provided that no servant may be imprisoned continuously for longer than six months in all." (**III**, p. 85, para. 17.)

(See also Memorials, **I**, pp. 124-126, paras. 60-63; Counter-Memorial, **III**, pp. 81-85; Reply, **IV**, pp. 421-423; Rejoinder, **VI**, pp. 287-294.) And, finally under this heading—

9. Only Europeans may enter into contracts of apprenticeship in the Territory under the applicable legislation. (Reply, **IV**, pp. 419-420; **VI**, pp. 279-282.)

Continuing with this factual cataloguing, the Memorials, **I**, at page 131, set out the Mandatory's duties with respect to the political life of the inhabitants of the Territory, all to be performed in accordance with, and in the context of, the international standards and international legal norm of non-discrimination and non-separation:

> "(3) [that is paragraph 3 in the Memorials:] Political advancement of such persons through rights of suffrage, progressively increasing participation in the processes of government, development of self-government and free political institutions . . ."

At pages 131 through 143 of the Memorials (I), Applicants have set

out a series of laws and regulations, and official measures and methods by which they are implemented in the political lives of the inhabitants of the Territory. These, in the Applicants' submission, constitute a *per se* violation of the international legal norm and international standards of non-discrimination or non-separation. Illustrative examples of the laws, regulations, official measures and methods, include the following:

1. Respondent concedes that:

> "... only White persons are allowed to vote at an election of members of the Legislative Assembly ... that non-Whites are excluded by law from serving as members of the Legislative Assembly, the Executive Committee or of the South African Parliament and excluded by practice from being appointed as Administrator of the Territory." (**III**, p. 132, para. 110; see **I**, pp. 134-135, paras. 86 and 87; **IV**, pp. 442-445; and **VI**, pp. 11-13.)

Respondent states that these are "political institutions devised and intended solely for the White population group". (**III**, p. 132.) The competence of the Territorial Legislative Assembly is set out by law, and extends to certain specified matters in the Territory, including—

> "... mines, minerals, mineral oils, precious stones, etc.; primary or secondary education in schools supported or aided from the revenues of the Territory; the establishment, management or control of any land or agricultural bank in the Territory; and the allotment, sale or disposal of Government lands in the Territory". (**III**, p. 111.)

This is the competence of the Territorial Legislative Assembly.

Native affairs and other matters are reserved to Respondent's Government, whose legislative organ is the Parliament in which, however, so-called "non-Whites" are excluded by law from serving. (See Counter-Memorial, **III**, p. 132.)

At page 188 of the Counter-Memorial, **III**, "the framework of Respondent's policy" is characterized as being "that political rights and power *are to be exercisable by the Native groups within their own respective* homelands and not within the area of the White group as such".

According to table XXV, at pages 39-43, of the Odendaal Commission report, which has been added to the documentation in these proceedings, as the Court will be aware, there is no Magisterial District in the entire Territory where Natives compose less than 42 per cent. of the population. Four-fifths of the Native Police Zone population live outside so-called "Reserves" or "home areas" in the Police Zone. Including contract labourers, there are twice as many Natives in urban and rural areas in the Police Zone, outside of "Reserves", than there are White persons in all of South West Africa. Excluding contract labourers, there are 40,000 more Natives in the Police Zone outside "Reserves" than there are White persons in all of South West Africa. This is derived, of course from the Odendaal Commission report. Respondent refers to areas of the Police Zone outside the "Reserves" as constituting the "area of the White group as such". (**III**, p. 188.)

2. Secondly, no person other than a European person may vote in any municipal council elections, or qualify for election to a municipal council (Counter-Memorial, **III**, p. 188-190; Rejoinder, **VI**, pp. 23-27; in the Applicants' pleadings, Memorials, **I**, pp. 137-138 and Reply, **IV**, pp. 446-447).

3. Thirdly, the only local government institutions for Natives in the urban areas, in all of which the number of Native inhabitants is almost equal to the number of White inhabitants (see Odendaal Commission report, table XIX, p. 41) are "Native Advisory Boards"—these are the only local government institutions for Natives in the urban areas. The Native Advisory Boards possess no legislative or executive powers whatever (Counter-Memorial, **III**, pp. 181-185; Memorials, **I**, p. 139, and Reply, **IV**, p. 446).

Respondent, in its Rejoinder, refers to a recommendation of the Odendaal Commission: "which, when implemented, will ensure to the Native inhabitants of urban areas wide legislative and executive powers in respect of their own areas"—Rejoinder, **VI**, page 26, paragraph 50, referring to page 3, paragraph 3 *(g)* of the Odendaal Commission recommendations. The relevant sections of the Odendaal Commission report are paragraphs 449 through 451 thereof, at pages 117-119. The so-called "wide legislative and executive powers" contemplated to be given to the Natives, in the recommendation of the Odendaal Commission report itself when implemented, are to be the following powers I am quoting now from pages 117-119 of the Odendaal Commission report—paragraphs 449 through 451:

> "That before the White urban authority makes any by-laws or regulations relating in any way to the non-White residents of the township, such by-laws and regulations, as well as the part of its estimates for non-Whites should first be referred to the constituted council [that is to say, the urban non-White councils recommended] for its comments, these to be considered by the white urban authority (which, however, shall not be bound to their acceptance) before its final decision on the matter.
>
> 450. That the White urban authority delegate such functions, powers and authorities to the said Council as the Minister concerned may approve.
>
> 451. That with the consent of the Minister of Justice, consideration be given to the delegation of the following functions to the said Council:
>
> (i) the settlement of civil disputes between its inhabitants according to their customs and traditions;
> (ii) the hearing of criminal offences of a non-serious nature in its area by non-Whites;
> (iii) the appointment of community guards for—
> *(a)* the preservation of the safety of the inhabitants of the area concerned;
> *(b)* the maintenance of law and order; and
> *(c)* the prevention of crime."

These all relate to urban areas.

Turning now to the next catalogue of the laws and regulations and official methods and measures—the Memorials, **I**, at page 143, set out the Mandatory's duties with respect to the civil liberties of the inhabitants of the Territory, all of which are to be carried out in a manner consistent with, and in the context of, international standards and the international legal norm of non-discrimination and non-separation. These duties, thus defined, which are to be carried out, to be discharged and subject to the

norm or standards for which the Applicants contend, include the following broadly categorized duties:

"(4) Security of such persons and their protection against arbitrary mistreatment and abuse;

(5) Equal rights and opportunities for such persons in respect of home and residence, and their just and non-discriminatory treatment;

(6) Protection of basic human rights and fundamental freedoms of such persons;

*

* *

(8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings." (**I**, p. 143.)

A reading of these duties will indicate that they are not scientific; they are not systematic; they are categories for convenience of presentation and analysis. No doubt the Applicants might have formulated these categories in a more compelling and perhaps convincing manner. The categorization itself, the method of categorization is really extraneous to the point here which is the examination of the application or failure of application of the norm and/or of the standards; such categorization merely, is the framework within which that issue is being examined and appraised.

At pages 144 through 152 of the Memorials (**I**), the Applicants have set out a series of laws and regulations and official methods and measures by which they are carried out with regard to the civil lives of the inhabitants of the Territory and which, the Applicants respectfully submit, constitute *per se* violations of the international legal norm of non-discrimination and of non-separation and the international standards covering the same subject, having precisely the same content. Illustrative examples of the laws, regulations and official measures and methods in question, the existence of all of which has been conceded by Respondent, include the following:

1. At page 222 of the Counter-Memorial (**III**) Respondent quotes, in paragraph 97, from the regulations which allow a magistrate, with the approval of the Administrator, to order any resident of certain Reserves in the Police Zone who shall in his opinion be an "undesirable person", to leave such Reserve within a specified time. Respondent states that this regulation is "designed to overcome a problem which would exist only in certain Native areas, [and thus] obviously not . . . appropriate for White or Coloured persons". This is from Counter-Memorial, **III**, page 223—see also the Rejoinder, **VI**, pages 347-349, and the Memorials, **I**, page 145 and the Reply, **IV**, page 472.

2. The Superintendent of certain "Native" Reserves within the Police Zone may order "any male resident of a Reserve", who is believed by the Superintendent to have "no regular and sufficient lawful means of support" or to "lead an idle existence", to take up "employment on essential public works or services within or without the Reserve at a sufficient wage to be determined by such Superintendent", under criminal penalties for failure to obey. (Memorials, **I**, pp. 127-128 and 144; Counter-Memorial, **III**, pp. 98 and 220-222; Reply, **IV**, pp. 466 and 472; Rejoinder, **VI**, pp. 347-349.)

In the Counter-Memorial, **III**, at page 220, paragraph 92, Respondent states with regard to the foregoing Regulation that:

> "92. Regulation 27 *(bis)* forms part of the regulations pertaining to Native Reserves within the Police Zone, and thus inevitably applies to Natives only. Idle White and Coloured persons are in a sense in a worse position than idle Natives in such Reserves, since they can only be dealt with as criminal offenders under the Vagrancy Proclamation, 1920."

3. Under applicable legislation, and in Respondent's own words, this is from the Counter-Memorial, **III**, page 214:

> "... an authorized officer may, whenever he has reason to believe that any Native within an urban or a proclaimed area is an idle person within the meaning of paragraph *(a)* of sub-Section (1), without warrant arrest that Native and cause him to be brought before a Native commissioner or magistrate who shall require the Native to give a good and satisfactory account of himself. If any Native who has been so required to give a good and satisfactory account of himself fails to do so, the Native commissioner or magistrate enquiring into the matter shall declare him to be an idle person."

Furthermore, and again in Respondent's own words, quoted from the Counter-Memorial, **III**, page 215:

> "If a Native commissioner or magistrate declares any Native to be an idle person he shall:
>
> *(a)* by warrant addressed to any police officer order that such Native be removed from the urban or proclaimed area and sent to his home or to a place indicated by such Native commissioner or magistrate, and that he be detained in custody pending his removal; or
>
> *(b)* if such Native agrees to enter and enters into a contract of employment with such an employer and for such a period as that Native commissioner or magistrate may approve, order that such Native enter into employment in accordance with the terms of that contract."

That is, as I say, cited from the Counter-Memorial, **III**, and see also Memorials, **I**, pages 126-127 and 145; Counter-Memorial, **III**, pages 97 and 214-218; Reply, **IV**, pages 465-466, 468, 472 and the Rejoinder, **VI**, pages 343-348.

4. At page 276 of the Counter-Memorial, **III**, paragraph 148, Respondent concedes that applicable law provides that "Natives recruited from the northern areas for labour within the Police Zone may remain within the Zone only for the period of employment provided for in the contract, and in no case exceeding two-and-a-half years". (See also **I**, p. 147, para. 140; **IV**, p. 465; **VI**, pp. 324-327.) No matter what the desires of an individual Native from the northern areas may be, he will be returned to his tribal area "after a fixed period of employment in the Zone". (**III**, p. 276, para. 149.) To quote from the Rejoinder, **VI**, page 321: "It is also true that Natives from the northern territories are not entitled to take up permanent residence in the Police Zone."

5. At page 289 of the Counter-Memorial, **III**, Respondent relates that a new section of relevant legislation "now provides that no unexempted

Native may remain for more than 72 hours in an urban area unless permission to remain has been granted to him by a designated person".

Respondent further continues, at paragraph 189, page 289 of the Counter-Memorial:

"The effect of this section is that a Native who comes from outside an urban area, and who does not fall within one of the exemptions, has *seventy-two hours within* which to secure permission to visit that area, or to look for employment therein. . . . he may then obtain permission to seek work for a further period of fourteen days, which does not, however, mean that he must actually assume duty within that period."

On this point see also Memorials, **I**, page 148, the Reply, **IV**, page 465, and the Rejoinder, **VI**, pages 332-333.

6. The next item. A similar provision, in Respondent's words, requires that:

". . . all unexempted male Natives entering a proclaimed area must report within 72 hours and, if seeking employment, they can be issued with permits valid for not less than seven and not more than fourteen days. If employment is not found within the period of validity of the permit, an order to depart from the proclaimed area within a period of not less than two days may be issued." (**III**, p. 289, para. 190.)

Respondent further states, "If there is a reasonable prospect of the Native concerned finding employment, further permits are granted as a matter of course". (Rejoinder, **VI**, p. 331, para. 19.) (See also on this whole matter **I**, p. 148; **III**, p. 290; **IV**, p. 465 and **VI**, pp. 232-234.)

7. A pass or a certificate of exemption is required to be produced on demand by an adult male Native when he "travels outside his location or Reserve or away from the farm or place where he resides, or is employed". (**VII**, p. 315; and see also **I**, p. 148; **IV**, p. 465; and **VI**, pp. 333-337.)

The consequence of the foregoing is described by Respondent as being, and I now quote—

". . . an unexempted male Native over the age of fourteen years is not permitted to travel beyond his place of residence or employment in the Police Zone unless he is in possession of a pass issued by an authorized person". (**III**, p. 316.)

Likewise, Respondent refers to the power of summary arrest, mentioned at page 145 of the Memorials, **I**, by stating as follows:

"In order to enforce the pass system properly, it was, and is, necessary to confer on authorized persons the power to demand the production of a pass and to arrest a Native who fails to comply with such demand. The whole system would be rendered nugatory if there were no persons authorized to demand the production of passes in order to establish whether Natives travelling beyond their Reserves or areas of residence or employment have in fact permission to do so." (**III**, p. 317.)

In its Rejoinder Respondent has set forth the following reason for the maintenance of the pass system:

"In the absence of such machinery it would obviously be im-

possible to establish whether any particular Native travelling in the ['areas occupied by the White group'] is an extraterritorial Native, an inhabitant of the northern territories, an inhabitant of a reserve in the Police Zone, or a Native living in the areas inhabited by the White group; in other words, to establish whether such a Native is entitled to be in the Police Zone." (**VI**, p. 334.)

8. An adult male Native who is not exempted must obtain a pass to leave the Territory for the Republic of South Africa. This provision does not apply to White or Coloured individuals. (See **I**, p. 148; **III**, p. 320; **IV**, p. 471.)

9. In its Counter-Memorial Respondent relates the effect of certain legislation as providing—

> "... *inter alia*, that every Native whose domicile of origin is outside the Police Zone must be in possession of an identification pass when in that Zone, and ... such a Native must have his pass with him at all times and produce it on the demand of any authorised person, any police officer and any person to whom he engages or offers to engage himself as a servant". (**III**, p. 322; see also **I**, pp. 96 and 149; **IV**, pp. 465 and 475, footnote 3; **VI**, pp. 333-334.)

Respondent states also in the Counter-Memorial: "In the absence of such a provision it would be impossible to distinguish between labourers and visitors, and impossible to ensure the return of migrant workers after the expiration of their contracts." (**III**, p. 323.)

10. Respondent states in its Counter-Memorial:

> "The Administrator may also prohibit any Native female from entering a proclaimed area for the purpose of residing or obtaining employment therein, unless she is in possession of certain certificates. The provisions relating to such certificates are correctly set out in paragraph 151 of Chapter V of the Memorials." (*Ibid.*, p. 325.)

Paragraph 151 of Chapter V of the Memorials, to which reference has just been made, is set out at **I**, page 149 and states that "the provisions relating to such certificates" are as follows:

> "The Administrator may prohibit any female 'Native' from entering a proclaimed area for the purpose of residing or obtaining employment therein without a certificate of approval from an officer designated by the local authority for such proclaimed area, and a certificate from the magistrate or 'Native' commissioner of the district wherein she resides. If 'the necessary accommodation' is available, a certificate shall upon application be issued to any female 'Native' 'who produces satisfactory proof that her husband, or in the case of an unmarried female her father, has been resident and continuously employed in the said area for not less than two years'. Any such certificate may be for a limited period and may be cancelled at any time after one month's notice."

11. The Administrator may, at the request of any urban local authority, prescribe a curfew under which no unexempted Native (other than a female dependent of an exempted Native) may be present in a public place outside a Native residential area during curfew hours without a permit. (**I**, p. 149; **III**, pp. 327-329; **IV**, p. 471; **VI**, p. 338.)

With respect to the application to the curfew restrictions, Respondent states that "curfew notices have been issued in respect of fourteen urban

areas" and that "the usual curfew hours are between 9 p.m. and 4 a.m.". (**III**, p. 329.)

12. "Non-White" persons working in urban areas in the Police Zone are restricted to segregated areas of the cities and towns and are not permitted to reside in what are considered to be "White" areas, save for "hundreds of Native employees [who] reside on the premises of their employers in the White residential areas", and the like. (**VI**, p. 328; see also on this point **I**, p. 148; **III**, pp. 292-295; **IV**, p. 465; and **VI**, pp. 326-328.)

Likewise, again in Respondent's own words, from the Counter-Memorial, **III**, page 294:

"By reason of the ultimate objectives of Respondent's policy regarding Reserves and separate development, Natives are not entitled to obtain permanent residential rights or ownership in the urban areas in the Police Zone."

13. Still under the same heading, Applicants have set out in their Memorials the following paragraph:

"Under section 25 of the Natives (Urban Areas) Proclamation, 1951, entitled 'Removal of Redundant Natives from Urban Areas' the Governor General may 'declare any urban area to be an area in respect of which, on being satisfied that the number of natives within that area is in excess of the reasonable labour requirements of that area, he may . . .

(a) require the urban local authority within a specified period to lodge with him a list of the names of the natives who, in its opinion, ought to be removed from the urban area;

(b) determine which of the natives specified in that list shall be removed from the urban area;

(c) make provision for the accommodation of the natives so removed who are lawfully domiciled in the Territory.'

Thereafter, the urban local authority, acting under the Administrator's determination, must make arrangements for the removal of the 'Natives' concerned, in accordance with the prescribed procedure." (**I**, p. 147.)

In the Counter-Memorial, Respondent has dealt with the above legislation at **III**, pages 287-288 and at page 332. Respondent concedes the existence of the law in question, to which reference has just been made, but states the reason why it has never been invoked; paragraph 187, at page 288, states:

"This section was designed to give effect to Respondent's influx control policy by providing for the removal of unemployed Natives who had entered urban areas before efficient machinery to control their influx was created. In practice, however, Section 25 has never been invoked as it has been found that adequate action can be taken under Section 10 of the Proclamation and Regulation 2 of the Regulations for Proclaimed Areas, issued under Section 22 of the Proclamation."

On this point, see also Reply, **IV**, page 465, at footnote 4.

I now turn to the fourth general category of duties, set forth in the Memorials, **I**, at page 152, as duties with respect to the educational life of the inhabitants of the Territory, all to be carried out in a manner

consistent with, and in the context of, the international standards and the international legal norm of non-discrimination or non-separation. These are set forth for convenience, on page 152 of the Memorials as these categories:

> "(7) Educational advancement of such persons;
> (8) Social development of such persons, based upon self-respect and civilized recognition of their worth and dignity as human beings."

This is the way Applicants have chosen to describe these duties.

The point at issue, as I have attempted to stress, is, in this area (the area of the educational lives of the inhabitants), whether or not the norm and standards of non-discrimination and non-separation are applied and, if not, as is the case on the basis of the conceded laws, regulations and official practices, then, in the Applicants' respectful submission, that there is a *per se* violation of the norm and standards in question.

At pages 152-161 of the Memorials (**I**), the Applicants have, as in the case of the other areas of life and activity, to which I have referred—economic, political, and civil rights—referred to a series of laws and regulations, official methods and measures, by which they are implemented, in the educational lives of the inhabitants of the Territory, which, as I have said, in the Applicants' submission constitute *per se* violations of the international legal norm of non-discrimination and non-separation, or of the standards which govern the interpretation of the Mandate of the same content.

Illustrative examples of the laws, regulations and official practices, the existence of all of which is conceded by Respondent, include the following:

1. The educational system of the Territory is organized in three separate divisions, and the educational facilities and opportunities for any individual child in the Territory are made available or unavailable, as the case may be, on the basis of the child's classification as a member of the "European", "Coloured", or "Native" group, and the Court will recall the census categories which have been placed in the record on the basis of which these categorizations—this sorting-out process—of the population is fixed. The basis of classification or categorization in groups and the effect upon the facilities and opportunities made available or unavailable, as the case may be, taking into account the membership in the group rather than the individual capacity or quality of the child, are set forth in the Respondent's pleadings in the Counter-Memorial, **III**, pages 353-382, 512-514 and the Rejoinder, **VI**, pages 36, 64-77, and 149-165; in the Applicants' pleadings, Memorials, **I**, pages 152-153, and Reply, **IV**, pages 364, 367-374, 398-403. In Respondent's words:

> "... the Counter-Memorial clearly reveals that Respondent's system of having separate schools for the children of the different population groups is not based on tests of individual ability". (**VI**, p. 67, para. 6.)

The Court's attention, of course, is invited in all these cases to the full paragraph, page, or text cited, as there is inevitably a problem of selection of quoted material possibly, sometimes unwittingly, out of context; but there is the balance of convenience for the Court because, of course, to quote the whole Counter-Memorial would obviously be an impossible

task, and therefore the Applicants, in presenting this, are taking pains to cite where possible the paragraphs concerned, so that the context from which these quotes are derived may be evaluated in context. The Court's attention is respectfully drawn to this problem as it has placed an onus on the Applicants to make a judicious and fair selection of quotations with economy of presentation as the main target.

Mr. President and Members of the honourable Court, I shall conclude my summation and cataloguing of the *corpus* of the legislative and administrative measures, and the methods by which they are put into practice officially, in just a few moments, and hope that this is not too much of a trespass upon the Court's time, but it has seemed relevant and important to marshal this body of conceded fact in one place at this point of the record.

I had begun to refer to the broad categories relating to education and social development as constituting part of the framework of the eight broadly stated duties in the Memorial, within the context of which the policy of the Respondent was to be measured and evaluated against the standards and the norm of the character for which the Applicants contend. The first point had been, as the Court will recall, the division of the educational system of the Territory into three separate divisions.

2. The second point is that the establishment of three separate divisions of education naturally leads to the maintenance of separate school buildings and other material facilities. The needs and opportunities of any individual members of a group, are consequently served solely by the buildings and other material facilities reserved to that group—Memorials, **I**, page 153; Counter-Memorial, **III**, pages 367-369, 431-433, 434-438, 451-452 and 516; Reply, **IV**, pages 371-374; and Rejoinder, **VI**, pages 36 and 64-77.

3. Thirdly, this segregation and classification, solely on the basis of membership in groups, extends to living facilities for students away from home: "Native" pupils are restricted to the school hostels available for members of the "Native" group, and so on. Memorials, **I**, page 154; Counter-Memorial, **III**, pages 413, 455, 493, 519-521; the Reply, **IV**, page 374; the Rejoinder, **VI**, page 76.

4. Fourth, Respondent has not, during the years of the Mandate's existence, brought into being any compulsory education for the children of "Native" parents living in urban areas in the Police Zone. There are almost as many "Native" persons in such areas as there are "White" persons. See the Counter-Memorial, **III**, pages 390-406, 443-445, 500, 514-516; the Rejoinder, **VI**, pages 49 and 131-136; and in the Applicants' pleadings see Memorials, **I**, page 153; and Reply, **IV**, pages 390-393.

5. Inasmuch as the educational systems and school facilities are separated, the "Native" pupils in the "Native" secondary schools in the Territory are restricted in their choice of subjects to those available in the fewer number of "Native" secondary schools, and may not pursue the differentiated courses offered in "White" secondary schools. Inasmuch as there are few "Natives" in secondary schools, Respondent states in this regard, and I quote from the Rejoinder, **VI**, page 117: "small numbers hampered subject differentiation", the subject differentiation in question being the options offered to "Native" pupils in "Native" schools; see also Counter-Memorial, **III**, pages 437 and 450; Memorials, **I**, page 154; Counter-Memorial, **III**, pages 450-451, 501-503;

Reply, **IV**, pages 384-386; and Rejoinder, **VI**, pages 117-120; these generally relate to the problem just discussed of the subject differentiation problem brought about by the fact that there are fewer "Natives" in secondary schools than there are "Whites" in secondary schools reserved for "Whites".

6. The establishment of separate facilities for separate groups on a rigid basis, has also resulted in the fact that "Native" pupils are restricted to the vocational training opportunities intended for members of the "Native" group. It is a matter of record that such opportunities are not as numerous or varied as those offered to members of the "White" group. See Counter-Memorial, **III**, pages 466-468, 507-509, 521-523; see also the Rejoinder, **VI**, pages 118-119; and in the Applicants' pleadings, see Memorials, **I**, page 155, paragraphs 167-168; and the Reply, **IV**, pages 384-386.

7. Next, with regard to nursing; there are separate training facilities, separate training programmes and enrolment in separate registers, all on the basis of the census category of racial or tribal or ethnic grouping. Members of the "non-White" groups are excluded by law from participating in the functions of the Nursing Council and the Board of the Nursing Association, which control the profession as a whole. As has been mentioned earlier in the proceedings, it is also, under applicable law, a criminal offence to cause or permit any "White person" registered or enrolled as a nurse or as a student auxiliary nurse to serve under the—

> "control or supervision of any registered or enrolled person who is not a white person, in any hospital or similar institution or in any training school",

except in an "emergency". (**I**, pp. 155-156; **III**, pp. 468-474 and 523-525; the verbatim record of 3 May 1965 that is, p. 90; and the verbatim record of 4 May at p. 114, *supra*, which refer respectively to the Applicants' and the Respondent's comments on this subject.)

8. By applicable law, the only residential universities in South Africa open to "Native" or "Coloured" pupils from the Territory are those restricted to "Native" or "Bantu" pupils, and "Coloured" pupils, respectively. Respondent concedes, in the case of the "Native" or "Bantu" universities, that they were designed and are intended primarily for members of South African "Bantu" groups—the word "Bantu" is used here in quotation marks. There are no universities in South West Africa. See Memorials, **I**, page 157; Counter-Memorial, **III**, pages 474-489, 509-510, 527-528; Reply, **IV**, pages 373 and 382-383; and Rejoinder, **VI**, pages 105-106.

9. As has been mentioned in these Oral Proceedings, Respondent's practice has been to restrict opportunities in the field of engineering so as to foreclose the possibility of a "Native" student obtaining the necessary qualifications to become an engineer. Respondent has made available opportunities for "Native" engineering students to qualify as assistant engineers. The premises of this policy have been canvassed in the written pleadings and referred to at an earlier stage of the Oral Proceedings. The Court's attention is directed to the verbatim record of 27 April, at pages 29-31, *supra*, and the verbatim record of 30 April, at pages 73-75, *supra*.

The purpose is to qualify "Native" engineering assistants at the present time, leaving to an indeterminate future the qualification of "Native" engineers. The policy is asserted by Respondent to be necessary to avoid the existence of a "Native" engineer who could not find employment, or who could not exercise authority over a "European", rather than a "Native", engineering assistant. See Memorials, **I**, pages 157-158. In the Memorials the Applicants have referred to a speech on this subject by the Minister of Bantu Education in the House of Assembly of South Africa in May of 1960, and by reference to the Counter-Memorial, **III**, pages 527-531, the Court will find the Respondent's characterization of the speech of the Minister of Bantu Education in the following words:

> "The Minister referred to applications by Bantu students to follow engineering courses at European universities, and he pointed out that Bantu engineers could, in existing circumstances, only expect to be employed by the Department of Bantu Administration and Development, but that, since such employment would entail their being placed in positions of authority over European engineering assistants, there being no qualified Bantu in the country who could fill the role of such assistants, it was essential, as the initial step, first to establish a base of Bantu engineering assistants."

This, it will be noted, related to the possibilities of employment, and the reference is made to the employment in the Department of Bantu Administration and Development itself where, as appears from the statement of the Minister of Bantu Education, the Government policy prohibits the employment of "Native" engineers in the Department itself because it would be necessary for them to supervise "White" assistant engineers; that may be found in the Memorials, **I**, page 158. See also on this point the Reply, **IV**, pages 266-267.

10. And finally the Respondent, by law and regulation, provides differential salary scales for "White" and for "Native" teachers respectively, by which a "Native" teacher with the same or similar qualifications as a "White" teacher is paid less than his "White" counterpart—see Counter-Memorial, **III**, pages 452-457, 503-506 and 532-534; also the Rejoinder, **VI**, pages 139-147; and in the Applicants' pleadings, Memorials, **I**, page 158, paragraphs 182-183; and the Reply, **IV**, pages 394-397.

Mr. President, this concludes on behalf of the Applicants the presentation of the illustrative enumeration of the laws and regulations, and official methods and measures by which they are effectuated, the existence of all of which is conceded by Respondent. These, and similarly conceded existent legislation and administrative measures, and effectuating implementing policies and practices, form the *corpus* of factual material or describe the pattern of Respondent's conduct, which is known and characterized widely as "apartheid" or, more generally now, in Respondent's own usage, but referring to the same pattern, "separate development". Pursuant to such policy and practice, the Respondent allots status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or quality. In the Applicants' submission such a policy and practices are inherently incompatible with Respondent's obligations under Article 2 of the Mandate and Article 22 of the Covenant, and constitute *per se* and *ipso facto* violations of Article 2, the interpretation

and the application of which Article are governed by international standards and/or by an international legal norm, as described in the Reply, **IV**, at page 493.

In the Applicants' further submission, no evidence or testimony in purported explanation or extenuation thereof is legally relevant to the issues joined in these proceedings. In reserving their right formally to raise the question of such relevance, which the Applicants have not hitherto done, the Applicants respectfully also reserve their rights under Article 50 of the Rules of Procedure to comment in the event that any such evidence is adduced.

Mr. President, I turn now, with the permission of the honourable President, to a discussion of legal issues involved in and raised by and related to the series of questions propounded by Judge Sir Gerald Fitzmaurice in the verbatim record of 7 May[1]. The preamble to Judge Sir Gerald Fitzmaurice's very important, indeed decisively important, series of ten questions embodies a statement of the central issues of a legal nature involved in the dispute concerning the interpretation and application of Article 2 of the Mandate and Article 22 of the Covenant. The Applicants venture to express gratitude for the opportunity afforded by these questions to place before the Court the legal position of the Applicants in as clear terms as possible.

Sir Gerald stated, *inter alia*, that—

> "... both the Parties have invoked certain general international norms, standards and principles, of an *a priori* character, the existence or applicability of which they either affirm or deny".

The Applicants would point out an essential difference in approach between the Parties with regard to norms, standards and principles, which difference bears both upon the judicial function in this case as perceived by the Parties and upon the content and significance of Article 2, paragraph 2, itself.

The Applicants contend that international standards and an international legal norm of an *a priori* character exist which provide authoritative criteria of an objective nature for the interpretation of Article 2, paragraph 2, of the Mandate and of Article 22 of the Covenant. This theory of the case, if sustained, eliminates extra-judicial considerations. It has never been part of the Applicants' case that the Court make a subjective evaluation of Respondent's policies of discrimination and separation.

It seems to the Applicants that, *per contra*, Respondent's invocation of a principle of unreviewable discretion of an *a priori* character tends in the opposite direction. More will be said in a moment about this contention; using the phrase "unreviewable discretion" calls for a more exact reference to the Respondent's contention, and I shall attempt to cite the relevant contentions on the basis of which this characterization is made. For if the Respondent is upheld in its claim of inherent discretion of a breadth for which Respondent contends, or appears to contend, the only way the Court could pass judgment on an asserted breach of Article 2, paragraph 2, would be to make a choice between the Respondent's conception of well-being, moral and material well-being and social progress, and that of the Court's.

[1] See **VIII**, Minutes, pp. 30 and 32.

Such a decision, whatever the outcome, could not rest upon authoritative or objective criteria. It would not possess the juridical attributes properly to be associated with the tradition of this honourable Court.

The Respondent, in the verbatim record of 22 April, **VIII**, at page 627, stated as follows:

> "In the result, Mr. President, except for Articles 3 to 5, there is nothing which impairs the Mandatory's discretion to decide on specific actions, measures, or policies, or on methods to be applied in pursuance of measures, actions or policies which are directed at achieving this general, prescribed objective. In the result we contend further that as long as the Mandatory honestly attempts to achieve this objective, its conduct cannot be regarded as a violation of its obligation."

On the other hand, Respondent takes strong issue with the Applicants' attribution to the Respondent of the view that no legal norm exists by which a court can judge Respondent's good or bad faith. This is the way the Applicants have characterized the Respondent's contention, and the Respondenth as answered no, the Applicants have mis-stated, have distorted, our true position.

Now Respondent insists as follows in the verbatim record, **VIII**, at page 631:

> "We made it so clear, it seemed to us. We said that for that purpose a legal norm does exist. The legal norm is the one which we have indicated, the one, namely of an inquiry into the purposes of the mandatory, and of the mandatory's particular action or policy complained of. Is the purpose or objective the authorized one of promoting to the utmost, or is it an unauthorized ulterior objective or motive?
>
> That is a legal basis for adjudication, and that is the basis upon which we submitted that the Court could adjudicate the question of the Respondent's good or bad faith—in other words, of the legality of its action.
>
> The inquiry in this regard, Mr. President, i.e., whether a particular person, body or authority has acted in good faith with a view to achieving a certain objective, or whether he or it has acted in bad faith, is always an inquiry of fact, on the outcome of which certain legal consequences follow. The consequence . . . involves a distinction between a violation or abuse of power and acting within the terms of the power, or, in other words, acting legally."

Now there, as the passage quoted indicates, the Respondent does contend for a legal norm; the legal norm is described and the Respondent's description will speak for itself and would not be clarified or otherwise by our attempt to characterize it. But Respondent at the same time recognizes and concedes the legal issue squarely joined with respect to the significance of the standards and the legal norm for which the Applicants contend. Thus, in the verbatim record of 22 April, from which I have just quoted the passage regarding the legal norm as propounded by the Respondent, the Respondent comments as follows:

> "If we have regard to the alleged norm of non-discrimination and non-separation, as formulated in the Reply, and even as modified now in the oral argument before the Court, we find that it involves a suggestion of a different norm upon which the Court can adjudicate.

It would indeed, as formulated in the Reply, constitute an objective norm—a norm which could be applied objectively and precisely to the circumstances of a particular case in the same way as Articles 3 to 5 of the Mandate could be applied objectively and precisely to a specific case." (**VIII**, p. 634.)

The Applicants consider this to be a fair juxtaposition of the respective legal theories, one may say norm theories, of the Parties. For the sake of clarity, it only need be added that the Applicants consistently have maintained their theory from the outset, that in addition to the norm referred to in the last quoted passage, reference should also be made to the international standards of the same scope and content which the Applicants contend exist, whether or not they have reached the status of a legal norm, and which standards govern the interpretation and application of Article 2 of the Mandate.

The *corpus* of the mandate jurisprudence itself strongly reinforces the Applicants' contention that the sacred trust, the concept of moral well-being and social progress, are to be given content under the judicial protection of this honourable Court by means of true and applicable objective criteria, which the Respondent concedes exist.

As early as 1950 this Court affirmed the existence and applicability of "international rules regulating the rights, powers and obligations relating to the administration of the Territory" (*I.C.J. Reports 1950*, p. 147). If Respondent could set off its discretion, its motivation, its purposes against these international rules regulating the Mandate, which are found in the Mandate itself, then it would become impossible to uphold, by judicial means, the legal interests of the organized international community, in accordance with the safeguards set forth in Article 22 of the Covenant and embodied in the Mandate itself. And, as the Applicants put it the other day, there would be a hole in the mandates scheme as wide as the sacred trust itself, from the point of view of judicial protection.

Respondent's theory of the obligation in Article 2 puts in issue fundamentally the whole subject of international accountability, the purpose and scope of international accountability, which the Court has said is of the essence of the Mandate, which lies at the root of the mandate concept (the Mandate having been formulated in fiduciary terms with concepts of trust, tutelage, it matters little, as these terms are borrowed from municipal legal systems of various kinds) a universal concept of fiduciary obligation internationally supervised.

The Respondent's claim of broad discretion, a discretion to be appraised only in terms of its good faith, which obviously means the intentions of its officials from time to time in office—unless we are dealing with a pure abstraction here—the Respondent's claim of discretion to pursue an authorized purpose so broadly defined would be unjusticiable, and indeed the first alternative contention of the Respondent frankly poses that issue to the Court squarely, challenges the Court on the proposition of non-justiciability, and makes the good faith test a second alternative contention.

The content of the standards defining well-being, moral well-being and social progress, is dynamic, evolving with the changing attitudes manifest in international society. The characteristic feature of moral well-being and the attitude of the competent international organs with respect to it has an obviously direct relevance to Respondent's policies

of group discrimination or separation. On no subject possibly in history has there been a greater progression in attitude from disapproval to legal prohibition in the organized international community than in the field of race relations.

Forty years ago Respondent's theory that its racial policies lie within the ambit of its discretion conceivably might have been arguable, although even then, in the Applicants' view, not convincing. But the proposition is no longer debatable. With respect to Respondent's policies of racial discrimination and group separation, international standards and an international legal norm of non-discrimination and non-separation have achieved authoritative status during the very lifetime of the Mandate, so authoritative, indeed, that it is appropriate, in the Applicants' submission, to make them applicable as a matter of law *per se* to the interpretation of Article 2, paragraph 2, of the Mandate.

Judge Sir Gerald Fitzmaurice, in his preambular statement, has made reference to the fact that the Applicants "have invoked a norm said to prohibit absolutely any practice of apartheid". The Applicants do agree, respectfully, with this depiction of their theory of the case but seek to avoid risk of possible confusion by taking the opportunity to stress that this is not the whole of their theory. In this regard we shall endeavour to demonstrate the existence and applicability of standards and a norm of similar content on an alternative and cumulative basis. Thus, the Applicants would prefer, with deference, to reformulate Judge Sir Gerald Fitzmaurice's statement in the second sentence of his preamble as follows: "Thus the Applicants have invoked standards and a norm said to prohibit absolutely any practice of apartheid."

Some terminological difficulty, Mr. President, on this score may well have arisen from the Applicants' use in the Reply, IV, at page 493, of the word "norm" to cover both main branches of their argument, that is, with respect to standards governing the interpretation of the mandate instrument as well as a binding norm of international law existent independent of the Mandate but governing its interpretation. The Applicants have intended to suggest and do now state that the norm might be either regarded as embodied in the Mandate itself, in Article 2, or as existing independently of the Mandate; if it is regarded as embodied in Article 2 itself, it would have the character of a mandate norm—a mandate rule—the Mandate being an international institution regulated by rules, as the Court has said; Article 2 would be a mandate rule, a mandate norm prohibiting apartheid. This is a possible judicial method of approach to the matter of the existence of standards and the existence of a norm. Either or both could and should, in the Applicants' view, be regarded as governing the interpretation and application of the Mandate either as a treaty or as an institution or, as the Applicants believe, an institution which partakes of the character of a treaty and of an institution: in the words of Judge McNair, "a contract and a conveyance".

If the standards, for which the Applicants contend, have achieved the status of an independent rule of international law, an international legal norm, they, of course, would be controlling, with respect to the Mandatory, on the simple proposition that the Mandatory, in undertaking this arrangement obviously must be conclusively presumed to have undertaken and agreed to comply with international law in the exercise of the Mandate; that is on the assumption that the Applicants persuade this honourable Court to find and declare that the international standards

have achieved the status of a legal norm—a binding rule of international law. The Applicants' case does not rest on that proposition but if such an international legal norm exists, then of course, it would apply *a fortiori* to the Mandate, an international institution with international rules.

As matters stand, therefore, the Applicants will seek to establish the norm or rule of the Mandate itself, particularly in view of its fiduciary setting and the mandate jurisprudence, by showing that international standards of non-discrimination and non-separation exist which are applicable as a matter of conclusive authoritative interpretation of Article 2, paragraph 2—that is with respect to standards.

The Applicants likewise, as an alternative and cumulative proposition will seek to demonstrate that such standards have achieved the status of an international legal norm and that the existence of such an international legal norm has emerged and is binding upon Respondent in any event *a fortiori* in its role as Mandatory. Such a legal norm, in the Applicants' view, constitutes an *a priori* limitation upon Respondent's discretion in administering the Mandate. The Applicants' effort will be to demonstrate the existence of the international legal norm in terms of the sources of law enumerated in Article 38 (1), paragraphs *(a)-(d)*, of the Statute of the International Court of Justice. So as to clarify further this basic aspect of the controversy between the Parties, the Applicants feel it may be helpful now to place before the Court the main links in their chain of juridical reasoning on the subject of the interpretation of Article 2, or the Court's determination of its character as an institution in a normative sense with respect to the mandate rule.

The intention of the Applicants will be to develop a perspective which informs and illuminates the Applicants' responses to the several enumerated questions propounded to the Parties by Judge Sir Gerald Fitzmaurice. The three principle links in the Applicants' reasoning are as follows:

1. The character of the legal obligation contained in Article 2, paragraph 2;
2. the character of the legal criteria governing the interpretation of Article 2;
3. the character of defences available to Respondent in the face of the asserted violation of Article 2.

Dealing first with the legal obligation, the character of the legal obligation embodied in Article 2, of the Mandate, and Article 22, of the Covenant against which it must be read. The Applicants contend that the obligation of the Mandatory to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory embodies a minimum qualitative element. If such qualitative aspect of the obligation is not satisfied, a violation of Article 2 has taken place, no matter how much or how little as the case may be, the Mandatory's policy may benefit the material well-being and material or quantitative, social progress of the inhabitants in other respects. As a consequence, Applicants' contention that a qualitative violation of Article 2 had taken place renders it both superfluous and irrelevant to examine either the intentions or the good faith of the Mandatory or the context of the specific violation. Article 2, paragraph 2, as is true, of course, of any governmental relationship with inhabitants anywhere, contains both quantitative and qualitative aspects. A Mandatory, of course, as any

good government, has a continuing obligation to improve for instance, the health and educational facilities available to the inhabitants; its suffrage to do so limited to that aspect could be tested in a manner or appraised in a manner which resembles Respondent's defence in respect of the cases at bar; it might include comparative or comparable achievments in other parts of the world. Such a line of defence, however, has no relevance to a complaint of a qualitative violation, and moral well-being is inherently incapable of anything but a qualitative analysis. Such a complaint *ex hypothesi* presupposes that nothing the Mandatory does or does not do could compensate for or offset such an aspect of its conduct.

Secondly (this will be developed subsequently; this is a summary introduction), the character of the legal criteria which apply in governing the interpretation of Article 2, of the Mandate. It is, of course, in this context of the character of the legal criteria that the Applicants invoke the judgments of the competent organs of the international community with respect to the practice of apartheid in the territory. Now there are in this sense no disputed facts which enter into the *corpus* of facts, measures and so forth, on which the Applicants rely. The judgment of the competent organs are, moreover, endowed, in the case of the United Nations, in the Applicants' legal theory, with the supervisory responsibility over this particular Mandate. The judgment of those competent supervisory organs have been developed in a manner with which this Court will be familiar and with which the record is replete with examples. The judgments of the international community are analogous in many respects to those relative to the phenomena of international legal norms relating (without comparing the substance or quality of the conduct but from a legal point of view) and relative to the phenomena of piracy, slavery, genocide. The international community reaction of concern and outrage removed the practice from any possibility of a quantitative analysis and locates it in the qualitative realm where the prohibition becomes one of an *a priori* character, if it exists, as the Applicants do urge that it does. Whether the reaction of the competent organs of the international community merely have produced standards for authoritatively construing the Mandate or whether the force, the consistency, the categorical nature of these pronouncements and judgments have evolved a legal norm, this, of course, is not a decisive consideration in respect of the Applicants sustaining of its case, since the legal norm, if it exists applies *a fortiori* to the Mandate but the standards which we submit are authoritative govern its interpretation, whether they have achieved a status of legal norm or not.

The important point is that objective criteria exist, as Respondent concedes, although of course, vehemently denying that *these* exist. But that the possibility that objective criteria exist is admitted and since Respondent asserts its own, the Applicants maintain that it is common cause between the Parties that objective criteria of some sort do exist and govern this dispute judicially. But the Applicants' objective criteria, that is, the objective criteria for which the Applicants contend, if they exist, are, of course, clearly applicable to this situation because they were largely developed with specific reference to this situation; if they exist, then in the Applicants' submission, judicial enquiry into the Mandatory's motives, intentions or good faith is entirely irrelevant. The essence of the criteria, whether standards or norm, is to express the

incompatibility of apartheid with the moral well-being and the social progress of the inhabitants, and once this incompatibility exists, a violation in the terms of the Mandate has been *per se* established, and there is no further element of proof by way of evidence, oral or otherwise, which is relevant to a judicial decision of this adjudication upon this dispute, upon this theory. The only difference between the two kinds of governing objective criteria, standards on the one hand, the legal norm on the other, arises from whether they would be binding on Respondent independently of the Mandate or because of the Mandate—the distinction in this case is purely conceptual. If the principle of non-discrimination, non-separation finds embodiment in international standards authoritative with respect to the interpretation of this Mandate, then, it governs and the Mandatory is bound accordingly. If the rule of non-discrimination or non-separation has achieved a status of an international legal norm, then it is binding upon the Mandatory, simply by means of its general obligation to govern the mandated territory in accordance with international law, particularly, in as much as international law relates to the well-being of peoples. The fact that such an international legal norm would also be applicable with respect to Respondent's duties within South Africa itself, is irrelevant to the theory or position of the Parties in this case.

With respect to the Applicants' contention that the standards in question have achieved the status of an international legal norm, the existence of the Mandate, in addition to establishing the compulsory jurisdiction of the Court under the compromissory clause of Article 7, also means that the international legal norm, if it exists, as the Applicants contend, constitutes an *a fortiori* basis for the interpretation of the Mandate—that seems clear.

This consideration makes irrelevant Respondent's contention that its opposition to the legal norm could preclude the norm from coming into existence.

The Respondent does not stand before this Court solely in quality as a sovereign State. The Respondent stands before this Court as Mandatory, as trustee, accountable to the international community, accountable to the United Nations system, of which this Court forms a part.

The Applicants, as part of their argument under Article 38 of the Statute, suggest that the Court could conclude that a norm of non-discrimination has emerged, but that the Respondent, as sovereign within the Republic of South Africa itself, might conceivably claim an exemption under familiar doctrine—might itself claim an exemption from its application on the ground of its clear, open, consistent opposition to the norm. This conceivably might be claimed by Respondent with respect to its domestic jurisdiction as sovereign.

With respect to the mandate institution, however, the Respondent is not before the Court *qua* sovereign but as mandatory, and even if Respondent *qua* sovereign could exercise a veto over the international norm creating processes, which the Applicants do not concede, Respondent nonetheless, as a mandatory, may not claim exemption from a legal norm which has been created by the overwhelming consensus of the international community, a consensus verging on unanimity.

These considerations are supplemental and alternative to the Applicants' basic contention that an overwhelming consensus of State views, even in the face of opposition from Respondent, is capable of generating

a legal norm within the meaning of Article 38 of the Statute, apart from the Mandate.

Then, thirdly, the character of Respondent's defences: the limits upon Respondent's defences available to it on the basis of the theory advanced by the Applicants upon which they rest, in the light of the qualitative character of the violation of Article 2, which is charged, as well as the objective character of the criteria by which the interpretation of the Mandate is governed, Respondent's available lines of defence are limited. It might be open to Respondent to attempt a demonstration that no qualitative element is contained in Article 2, that the phrase "moral well-being" is of quantitative application, or is to be offset against material or quantitative weights and measures. It might be open to them to do that. Or, it might be open to Respondent to argue that no objective criteria exists—at least not in the form of the international norm or standards of non-discrimination. They themselves, if I understand the *verbatim* which I have cited earlier, conceded that some international legal norm of an objective character exists, applied to their good faith, but they might conceivably argue that no objective criteria exist which are applicable to the interpretation of its obligation. Of course, both of these possible arguments the Applicants would object to, would oppose and regard as untenable.

It likewise may be open to Respondent to contend that its policies do not violate the norm, although such an argument would in this situation be incredible, inasmuch as it is precisely Respondent's policies which have given rise to the standards and the legal norm as a large element of their generation—not entirely, not exclusively. Obviously the conduct of the administration of the Territory of South West Africa has not been the sole generating source of the international norm of non-discrimination and non-separation, but its policy has entered into the generation of the norm as a very important factor thereof. There is no problem here of *lex specialis*; it is a problem of the generation of the norm, including the source most directly and immediately concerned in this litigation.

The central consideration, in the Applicants' view, underlying the Applicants' replies to Judge Sir Gerald Fitzmaurice's several questions, is that the governing criteria, plus the character of the legal duty imposed by Article 2, paragraph 2, plus the incompatibility between apartheid and Respondent's legal duty, as it is defined by such governing criteria, all of these factors as a matter of law constitute a violation of the Mandate. In the light of these considerations the Applicants submit that there is no basis for balancing off the moral and social consequences of apartheid against material improvements, nor for assessing whether Respondent's officials sincerely, or indeed even passionately, feel that apartheid is calculated to promote the well-being of the inhabitants in some sense in which negative human aspects—"negative aspects" in the phrase of the Respondent—are offset by compensating material or other quantitative considerations. The moral and social consequences of racial discrimination and group separation, in the Applicants' view, cannot be calculated by a table of weights and measures, nor put into scales alongside irrigation projects or hospitals.

The Applicants now turn, Mr. President, with your permission, to an exposition of the evolution and the content, and the applicability of the international legal norm, and the international standards of non-discrimi-

nation or non-separation for which they contend, and which are defined in the Reply, IV, at page 493. It is the international standards and the legal norm (thus defined by whatever label one chooses to describe it) upon which the Applicants rely and which represents the core of their case—the heart of their case.

The considerations now to be adduced will be relevant particularly to a response to questions 1 through 4 and 9 in the series propounded by Judge Sir Gerald Fitzmaurice on 7 May 1965. However, having said that, it will be perhaps desirable to point out that other questions in this series are, in the Applicants' understanding, related in certain aspects to the questions I have enumerated, and, therefore, with respect, it would be the Applicants' intention, or conception, that in the considerations which are about to be adduced they will be regarded as generally relevant to the series of questions propounded, and then at the end thereof we will attempt to give more specific responses to the enumerated questions which are not expressly answered along the way. This is a difficult task because Judge Sir Gerald Fitzmaurice's questions have struck at the central issue and challenged us to expound our views.

1. Inasmuch as the Mandate "is an international agreement having the character of a treaty or convention" (*I.C.J. Reports 1962*, p. 330) it must be interpreted and applied as such. And, furthermore, and in addition, the Mandate constitutes a "special type of instrument composite in nature and instituting a novel international regime". (*Ibid.*, p. 331.)

2. By virtue of the "essential part Article 7 was intended to play, as one of the securities in the mandates system for the observance of the obligations of the Mandatory" (*ibid.*, p. 337), the relevant international law and international standards must be applied to the institution of the sacred trust and to the alleged violations of its institutional terms, described in 1950 at page 132 as "international rules regulating the Mandate which constituted an international status for the Territory". And this, if it may be repeated, is the capacity in which the Respondent stands before this Court.

3. There must be applied to the process of interpretation of the mandate, treaty or institution, the current body of internationally binding and valid rules, crystallized in the overwhelmingly accepted judgments of the competent supervisory international organs and embodied in what the Applicants have called "international standards".

4. It is the Applicants' contention that the international standards concerning racial segregation, separation or discrimination have evolved through the normative processes to the stage of having achieved the status and quality of an international legal norm, that is to say, a rule of international law of the same content but of a different quality. In the submission of the Applicants, such a legal norm is to be derived by this honourable Court from sources found in the application of Article 38, paragraph 1, of the Statute, paragraphs *(a)* through *(d)*, inclusively.

5. Whether the Court should adjudicate the issues regarding violation of Article 2 as a matter of treaty interpretation, or as a matter of protection of an international institution operating *a priori* in accordance with international law, the legal result, so far as the Applicants' case is concerned, is precisely the same. Interpretation of Article 2, either by reference to governing standards or to a legal norm, or to both, leads to

the same result—a finding of violation by Respondent of its duties under Article 2, paragraph 2, of the Mandate, and under Article 22 of the Covenant. And, similarly, application of international standards or an international norm, in the context of the Mandate as an institution rather than as a treaty, yields the same legal result.

The Applicants now return to the discussion of their theory with respect to the legal issues underlying the asserted violations of the sacred trust.

The Applicants respectfully point out, first of all, that the international, political, moral and other considerations which necessarily have entered into the development and crystallization of the standards and of the norm are not drawn into issue in this litigation—and cannot properly be drawn into issue in this litigation. This Court cannot be, and should not be, invited to examine the political, moral or other considerations which entered into the processes by which the competent international organs have developed their judgments in this respect.

In the Applicants' submission to the contrary, the norm and standards are themselves among the sources of objective criteria by which the obligations of the Mandatory may be measured and by which the interest of the organized international community may be upheld in regulating the minimum standard governing the interests of the well-being and the inhabitants of the mandated territory. But, Mr. President, the stress is constantly laid by the Applicants on the contention that this is a minimum standard we are talking about and the promotion to the utmost requirement makes the minimum standard of *a fortiori* application.

The function of courts in any social system, in our respectful view, whether national or international, is to give judicial application to standards and rules brought into being by the normative procedures in operation and, of course, it is of the essence of such processes by which such standards and norms are developed (and they can be developed in no other way) that social, humanitarian, political and other relevant considerations are reflected in the normative procedures in the developing of standards or norms and, of course, underlie the judicial application of the standards and norms thus developed.

It was in this respect that, primarily, we accounted for the *Brown* v. *Board of Education* decision as showing the process, not as establishing a precedent applicable to the international community—that is an American precedent applicable to the American national community and the Applicants are perfectly well aware of that—but the processes by which the highest court of the United States *arrived at a judgment*, leaving aside what the decision or judgment was, but the processes by which they arrived at the judgment are the processes which pertain to any judicial process inherently, characteristically. The Applicants respectfully urge that it is both a relevant and necessary element of the judicial function, serving in these cases as the final bulwark of protection against asserted breaches of the Mandate, in the words of the Court in 1962, at page 336, that full weight be given to the normative functions of the competent international organs, particularly as represented by or embodied in the great system of the United Nations and specialized agencies. That aspect of this honourable Court's high judicial function, in the Applicants' most respectful view, is signalled by the provision of Article 92 of the United Nations Charter itself, which declares that the International Court of Justice shall be the principal judicial organ of the United Nations.

The Court, in relation to the Mandate, is requested by the Applicants to vindicate the role of law in the settlement of international disputes, of which this has been, as the Court will be aware, a most protracted dispute. More concretely, in terms of the issues at bar, the Court is requested and urged, upon the basis of considerations which have been placed before the Court and which will now be placed before the Court, with the honourable President's permission, to confirm the existence of international standards governing the interpretation of the Mandate, as well as of an international legal norm, of which the violation of the Mandate is a *per se* violation. Such a conclusion, or conclusions, involve the application of canons of interpretations of the mandate instrument of a traditional nature, not innovative, in the Applicants' view, as well as judicial recognition of sources of international law, enumerated in Article 38 of the Statute, all of which reflect the evolving need and character of the international order.

Through these proceedings, in their written pleadings and in their oral arguments, the Applicants have referred constantly to this phraseology of international legal norm and international standards, and have attempted to point out that the content of the norm is precisely the same as the content of the standards, the only distinction consisting in the legal quality of the respective concepts. Both are addressed to government policy by which rights, duties, obligations and opportunities are allocated on the basis of membership in a group, class, or race, rather than on the basis of individual merit or capacity or potential. Both the standards and the norm are expressed in terms such as to render any violation thereof a *per se* violation, since under either heading of standards or legal norm they prohibit the very existence of the proscribed official action or policy in the form of laws, regulations, of official methods and measures by which they are implemented, and, as has been shown, the existence of which is conceded by Respondent.

Both the norm and standards, as will be apparent from the analysis to follow in response to Judge Sir Gerald Fitzmaurice's series of questions, are derived from the same sources and identical contexts. Both emerge, *inter alia*, from the authoritative interpretations given to the United Nations Charter and to the Constitution of the International Labour Organisation by the member States thereof by an overwhelming consensus approaching unanimity. Both the standards and the legal norm contended for likewise emerged from authoritative interpretations of Article 2 (2) of the Mandate itself by the competent organs of the international community over the years. Such sources may be described as Article 38 (1) *(a)*—sources in relation to the process by which the standards and/or the legal norm have been evolved. The norm and standards equally emerge, as the Applicants shall endeavour to demonstrate, from international custom as evidence of the general practice accepted as law within the United Nations and other public organizations, and from treaties and other international agreements in the relevant context—Article 38 (1) *(b)*. Likewise, the standards and the legal norm, for which the Applicants contend, emerge from the general principles of law recognized by civilized nations, as manifested in the same context of the organized international community particularly, and this, of course, refers to the rubric of Article 38 (1) *(c)*. Finally, they are expressed in judicial decisions and the teachings and writings of publicists, the sources specified in Article 38 (1) *(d)*.

The distinction between the international legal norm and the international standards therefore, as has been said, is of legal quality only. The legal norm is established as an independent rule of international law, and if so, in the cases at bar, the legal norm governs *a fortiori* the interpretation and application of the provisions of the Mandate viewed as a treaty or an institution or both.

The standards which, likewise of course, have the same content which similarly relate to non-discrimination and non-separation, govern the interpretation and application of Article 2 of the Mandate as authoritative interpretation by the competent international organs responsible for supervision of the Mandate, and which form a part of the network of protection of which the principal links are the administrative organ and the judicial body in this honourable Court. This was the point for which the Applicants cited the *Northern Cameroons* case in which the problem was presented of the judicial protection absent from the administrative organ, and the Court spoke of the concomitant relationship between the two bodies, and this, indeed, is of the essence of this particular point in view of the role assigned respectively to the administrative and judicial organ, as has been developed and as will be further developed in response to Judge Sir Gerald Fitzmaurice's questions.

The application of the canons, in the context of the Mandate, results in the interpretation and application of Article 2 on the basis of international standards or of the international legal norm, or both. Now, in respect of the legal norm, for which the Applicants contend, a legal consideration arises additional to that of mandate interpretation or regulation of the mandate institution. If a legal norm exists—an international legal norm—as the Applicants contend, which is, by its nature, relevant to and decisive of, the measures adopted for the administration of the Territory, then Respondent, by violating the international legal norm, has ceased to exercise the Mandate on behalf of the League of Nations or the United Nations (which has replaced the League)—in other words, on behalf of the organized international community, however it is embodied and by whoever it is represented. Actions which violate the international legal norm, if it exists, must, of course, be *ultra vires* the Mandate.

The full power of administration and legislation over the Territory, granted by the first paragraph of Article 2, is for the administrative convenience of the Mandatory, as the Applicants have sought to make clear in their response to the tenth question of Judge Sir Gerald Fitzmaurice. Such power of administrative and legislative discretion was granted by the community of nations acting in concert, and the modification of any such power in any manner, or modification of the terms in which it was bestowed and the methods of its exercise, must be subject to the consent of the organized international community. That proposition is crystallized in Article 7 (1) of the Mandate itself.

Administration of the Mandate or legislation with respect to the Mandate in a manner contrary to an international legal norm, if it exists, as the Applicants contend, is an abuse of the mandate institution and relationship, in addition to being a breach of the article in question. It will, of course, be recalled that this Court in defining the scope of judicial protection referred to it in 1962 as the final bulwark of protection against abuse, asserted abuse, or breaches of the Mandate.

[Public hearing of 18 May 1965]

Mr. President and Members of the honourable Court, the Applicants will commence discussion of the relevant international standards, with certain general observations. These observations are designed to demonstrate why accepted canons of interpretation, especially as applied to treaties and conventions, support the Applicants' basic contention that the international standards generated by the competent organs of the international community govern the interpretation of Article 2, paragraph 2, of the Mandate by providing authoritative, objective and relevant criteria which should be accepted and applied by this honourable Court.

A fundamental point in issue between the Parties is the extent and manner by which the obligation of Article 2, paragraph 2, evolves in response to changing conceptions in the international society of the concepts of moral well-being and of social progress. Respondent appears to contend that the meaning of Article 2, paragraph 2, as a matter of interpretation, remains fixed in accordance with the intentions of the authors as they must have been in 1920, when the Mandate was conferred, but that the application of the Mandate changes with changing times as a consequence, however, not of objectively applied criteria of change but of the Respondent's conception, the Respondent's purpose, the Respondent's intention, analytically and in good faith, as applied to values and circumstances and conditions in the Territory, as they change and as they evolve. As the Applicants understand Respondent's contention, and this has on occasion during the lengthy litigation caused some difficulty, and confusion, perhaps, in the Applicants' appreciation, the Respondent's reliance upon the good faith test, as we have called it in shorthand, appears to pose a certain problem which I have ventured to describe at an earlier stage of these proceedings as an oscillation between the purpose of the Mandatory and the purpose of the Mandate; the latter, according to the conception which appears to be advanced and which underlies the Respondent's case, the objective of the Mandate, is appraised and evaluated in light of the Respondent's intention or purpose or good faith, because these words are used in juxtaposition in the Respondent's pleadings. With respect to what that objective contemplates, basic to Respondent's theory, in other words, as we understand it, is that its discretion as Mandatory is fettered or restricted only by its obligation to pursue a broadly authorized ultimate aim, and in good faith, and that therefore its good faith is the criterion by which its performance should be judged, and by which it gives expression to the dynamic aspects of Article 2. It is a limitation, so to speak, of a subjective nature which creates and evolves the dynamic character of Article 2 in terms of, and in the light of, the Respondent's appreciation of the values and the demands of change. From one point of view it seems almost, in the Applicants' respectful submission, as a rather metaphysical concept, but this is perhaps a grossly unfair characterization of it; it has created difficulties in the Applicants' analysis and appreciation of the true significance of Respondent's theory of its case; the subjective analysis is, as the Respondent has properly pointed out, one which is susceptible of factual determination; as the Respondent has said repeatedly, it is possible for courts to ascertain state of mind; facts are determinable in terms of states of mind. In certain types of

legal problems—delicts, crimes—the state of mind is indeed the crucially relevant fact that determines the character of the crime. Therefore there is no question but that a state of mind is determinable as a fact. However, as applied to the objective of the Mandate, the state of mind with which the Respondent approaches its task, while a fact, nevertheless does not appear to the Applicants to be a fact which is determinative of the purposes of the Mandate itself; it seems to have no connections with the objectives of the Mandate as distinguished from the objectives of the Mandatory.

Now, without further elaboration and attempted reformulation, in the Applicants' terms, of the true significance, the underlying philosophy or *rationale* of Respondent's case (which of course is subject to unwitting distortion in an attempt at reformulation), it seems to the Applicants that at this stage, as we approach the final moments of the Applicants' case—subject to normal reservation of rights of comment on evidence and other rights under the Rules of Procedure—as we approach the final phases of the Applicants' case it would seem appropriate, and not an undue burden upon the record, to set forth at this point the Respondent's own formulation of its concept, its *rationale*, its philosophy underlying its concept of the Mandate. It would seem, from a careful search of all of the voluminous pleadings in this case, that the most revealing, the passage most pregnant with the philosophy and concept of the Respondent toward its obligations as Mandatory, appears from the Counter-Memorial, **II,** at pages 386-387, and with the President's permission the Applicants would like to incorporate in the record at this point the passage, which I fear may seem to have undue length but which should be perhaps set in this record at this time. Respondent, at page 386 of the Counter-Memorial, **II,** begins its discussion of what I have called its *rationale*, its philosophy, its concept of the obligations of the Mandate and the duties of the Mandatory, and at paragraph 7 on page 386 the Respondent states as follows:

> "The principle that the main objective of the Mandate was to promote the 'well-being and development' of the inhabitants (the 'sacred trust' principle) was given effect to in two essentially different ways. In the first place, provision was made in Articles 3 to 5 of the Mandate for the 'safeguards' referred to in Article 22 (5) and (6) [that is, paragraphs 5 and 6 of the Covenant]. These 'safeguards' (consisting mainly of the 'prohibition of abuses') placed certain limitations on the governmental powers of the Mandatory, and were in effect merely specific implementations, in certain defined spheres, of the overriding objective of the Mandate system."

I should like to pause here for a moment to comment very briefly on the fact that this, as I remind the Court, refers to the provisions in Articles 3 to 5, and these are set in a category which, again in Respondent's words, "placed certain limitations on the governmental powers of the Mandatory". Article 5, the Court will recall, embodies the duty to assure freedom of conscience. I think this point was brought up yesterday in the context of the discussion, that it was difficult and indeed it seemed to the Applicants really impossible to conceive of the duty to promote freedom of conscience as a specific implementation, so to speak, in a sense different from the promotion of moral well-being.

But continuing with the Respondent's formulation, on page 386 of the Counter-Memorial, Respondent goes on to say as follows:

> "Beyond making such provisions for the 'safeguards' it was, however, in the nature of things impossible (or at any rate not considered feasible) for the authors of the Mandate to reduce the objective of promoting the well-being and development of the inhabitants of the Territory to a series of specific injunctions or prohibitions, breaches of which would be capable of objective determination."

Parenthetically, again, this is offset in this context against Articles 3 to 5, which are *ex hypothesi* the approach of the Respondent, and are susceptible, are capable, of objective determination. Continuing with the Respondent's statement of its rationale or philosophy:

> "No comprehensive set of rules can be devised, the application of which in the sphere of government would inevitably and in infinity have a beneficial effect on the people governed. The authors of the Mandate consequently coupled the grant to the Mandatory of full legislative and administrative powers with a provision which required the Mandatory to 'promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory'. These words in effect merely constitute a paraphrase of the main objective of the Mandate system as expressed in the Covenant,—*i.e.*, 'the principle that the well-being and development of such peoples form a sacred trust of civilisation'—and in their context they consequently indicate the objective to be pursued by the Mandatory, or the spirit with which he should be imbued, in exercising his power of administration and legislation."

Parenthetically, again, Mr. President, the reference to "the spirit with which he should be imbued" leads logically to the good faith test; obviously it follows consequentially and derivatively from this philosophy. No other consequence could follow from this approach than the positing of a good faith test. Now continuing Respondent's analysis:

> "Some significant differences between Article 2 (2) of the Mandate, on the one hand, and Articles 3 to 5, on the other, illustrate the essentially different origin and purpose of these provisions. Thus the wording of Article 2 (2) is wide and general, which is in keeping with its nature as an expression of an idealistic objective. The 'safeguards' contained in Articles 3 to 5, on the other hand, being specific obligations, are couched in relatively clear and precise language—they prohibit or enjoin particular acts or omissions and provide objective criteria by which the Mandatory's administration may be judged.
>
> The general, overriding nature of Article 2 (2) as denoting the spirit in which, or the purpose for which, the Territory is to be administered, appears also from its position in the Mandate instrument: it is not inserted in a separate article, or included with provisions limiting the Mandatory's powers (as is the case with Articles 3 to 5), but is found in the same article as the *grant* of 'full power of administration and legislation' to the Mandatory." (**II**, p. 387.)

Parenthetically, again, Mr. President, this appears to derive a value

in interpretation, or an inference of logic or law, from the context in which the first paragraph of Article 2 appears in the mandate instrument. This, of course, is a matter which has been discussed by the Applicants in response to a question posed by Judge Sir Gerald Fitzmaurice. It was made clear at that time that the contextual arrangement, pursuant to which the authors of the Mandate incorporated the first paragraph of *Article 2 in Article 2*, is of no legal significance because it is imperative logic, and indeed I think not disputed, that the powers of legislation and administration conferred in terms of the first paragraph of Article 2 apply to Article 2, paragraph 2, and Articles 3, 4 and 5. Going back, however, and completing the quotation from Respondent's analysis, or theory, or philosophy of its case, we come to the conclusion on page 387 of the Counter-Memorial, **II**, in paragraph 9:

> "Reading Article 2 as a whole and in the light of the provisions of Article 22 of the Covenant, the intention of the authors of the Mandate becomes quite clear. Save for Articles 3 to 5, no limits in respect of subject-matter were placed on the full power of administration and legislation granted by the article; but the Mandatory was nevertheless required to exercise these full powers for the purpose of promoting to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory."

"For the purpose" refers, as the Applicants understand it, to the Mandatory's purpose, not the purpose of the Mandate, objectively determined, in a sense apart from the purpose of the Mandatory: not the purpose or objective of the Mandator, the competent international organs, but the good faith, the intent, the purpose of the Mandatory.

The Applicants will endeavour now to state why and on what basis they disagree with the Respondent's view as there set forth. In the conception of the Applicants, as we have sought to make clear throughout these proceedings and in the written pleadings, the content, the scope and the nature of the legal obligation in terms of Article 2 is measurable, and indeed governed by, objective criteria, and we believe those objective criteria have been fixed in a clear and categorical manner of an unusually explicit nature by the competent international organs; competent, that is to say, in specific relationship to the exercise of the sacred trust which, in the words of this Court in 1960, was "laid upon the League of Nations as an organized international community". Those words have struck the Applicants with great force and effect and are not, in our respectful view, to be dismissed lightly, as the Respondent does in its pleadings (by referring to the juxtaposition of the League as an organized community and its Members) as importing the significance that the reference to the League as an organized international community was merely intended by the Court to distinguish it as an organization from its Members. This is the way the Respondent appears to have interpreted that phrase.

Now, in the first place, the Applicants deny that Respondent possesses any discretion relevant to the obligations under the Mandate in the face of a complaint, of a charge, of a qualitative violation of Article 2—one which, in the submission of the Applicants, involves an inherently impermissible course of conduct.

Secondly, international standards, because of the fiduciary setting of the Mandate, are contended by the Applicants to govern both the interpretation and application of Article 2. As we shall endeavour to show,

briefly, there is no relevant distinction between interpretation and application in respect of a constitutional-type document, if, indeed, there is a distinction of that sort to be drawn in the case of a statute or any other type of *quasi* legislative or institutional document or arrangement.

Thirdly, the Mandatory, as agent of the international community, because it exercises its trust on behalf of the international community, explicitly in *expressis verbis* (that is its obligation and undertaking in the Mandate) as agent of the international community, on whose behalf it is acting, it is obliged to defer to international standards and is not competent to decline to apply these standards because it, whether in good faith or not, professes to or actually, subjectively speaking, in terms of its officials, does regard them (such standards) to be inappropriate in the light of its (Respondent's) appreciation of local conditions.

In particular, the Applicants contend that the organs of the United Nations, the supervisory agency, if the Applicants' legal theory is sustained—which is based upon that of the Court's holding in 1950 and, in our submission, reaffirmed by necessary implication in 1962—the organs of the United Nations, with such supervisory authority, have competence to define the standards of well-being which provide authoritative criteria for the interpretation of Article 2. As a background for the assessment of the competence of the international organs for which the Applicants contend, several factors must be taken into account.

First, the authoritative characterizations and judgments expressed by the competent organs of the international community have in this situation, in respect of the Mandate, been expressed with an overwhelming consensus, approaching unanimity, one which must be rare in the history of international organization.

Secondly, such characterizations and judgments, as I have said, have been expressed with particular reference to the Territory itself under mandate.

Thirdly, such characterization and judgments have included, more recently, in mounting form, the judgment that Respondent's policies in the territories constitute a threat to international peace and security. This is to be found in the resolutions to which reference has been made in the written pleadings.

Fourthly, Respondent has refused to co-operate with the international community to conform its policy in any respect to the judgments there expressed to submit reports or to open the mandated territory to normal administrative supervision, and all this refusal and denial, in the face of, in the teeth of, the Advisory Opinion of 1950, which was immediately and overwhelmingly accepted by the General Assembly, two interpretative Advisory Opinions, and the decision of this Court in 1962 which is now sought to be re-opened—*au fond* sought to be re-opened—even to the extent of arguing that Article 7 is no longer in existence.

What, then, would the presumed intentions of the authors of the mandates system have been, confronted with this series of historic, legal and factual realities? It would seem that the first thought in the minds of the authors of the Mandate would be a request to this honourable Court to interpret the Mandate, whether as a treaty, or as an institution, or as a combination of both, in the light of and on the basis of the judgments of the competent international organs; the authors of the Mandate would have rejected Respondent's contention that such a plea, such an

argument, constitute, in the Respondent's phrases "subsequent insertions in the Mandate" or "amendments to the Mandate".

The intention of the authors of the Covenant and the founders of the mandates system, in the Applicants' submission, would have nothing in common with Respondent's contention such as the following:

> "... this Court does not possess jurisdiction to determine whether Respondent has contravened objective principles of International Law existing independently of the provisions of the Mandate". (V, p. 140.)

Or, again in Respondent's contention, that there is likewise no jurisdiction for the Court to determine that Respondent has violated the mandate obligation, interpreted in the light of current norms and standards, even assuming they exist, which are expressed in and as a result of the United Nations Charter, inasmuch as Article 7 of the Mandate, according to Respondent's interpretation, and I quote from the same volume V, page 132 of the Rejoinder, "Article 7 of the Mandate, which bestows jurisdiction only in respect of disputes '... relating to the interpretation or application of the provisions of the Mandate'," and, this, the Respondent says, excludes reference to, or acceptance of, the standards built, *inter alia*, upon the United Nations Charter to which the Respondent is a Member because the standards are not relevant to the interpretation, or the application or the provisions of the Mandate, and hence do not fall within the compromissory clause.

The determination of presumed intentions of the authors of the Mandate can, perhaps, most convincingly be approached and appraised by the authoritative technique of interpretation of the Mandate which has already been applied by the Court, which, of course, is the normal, traditional concept or canon of giving words their natural and ordinary meaning. In the language of the Court in the 1962 Judgment, of course, this rule of interpretation is not an absolute one. "Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can validly be placed upon it." That is at page 336 of the *I.C.J. Reports 1962*.

In this case, it would seem that the normal and ordinary and natural meaning of the words used in the Covenant—in paragraphs 1 and 2 of Article 22, in the concept of the safeguards in paragraphs 6, 7 and 8 of Article 22, in the words of the mandate instrument itself, in the language of Articles 2 through 5, which constitute the core, of course, of the sacred trust—would exclude a good faith test. But the spirit, the purpose and the context of the instrument imperatively lead to the judgment that these words mean what they say.

The Mandate, as has been held and which is now part of the jurisprudence of the Mandate itself, is a unique form of treaty or convention, embodying a commitment to take account of the responsibility and the judgment of the international community. It thus should be construed in the light of the fact that, in the Court's words in 1962, at page 329, it established "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'". That, of course, was the context also in which, on the same page, this honourable Court said: "The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foun-

dation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations."

Is the Respondent to be heard to say that the purpose of the tool is to be determined by its intention as to how the tool should be used?

"The fact is that each mandate constitutes a new international institution", said the Court, "the primary overriding purpose of which is to promote the well-being and development of the people of the territory under mandate." These words, these findings of the Court, mark the "spirit, purpose and context of the clause or instrument in which the words are contained", as the Court said in 1962, and the "spirit, purpose and context" is one of the highest standards of fiduciary responsibility toward the inhabitants of the Territory, on the one hand, and toward the organized international community, on the other. And the presumed intentions of the authors of the Covenant and of the Mandate, must, it seems to the Applicants, be read in this light. "The international regime" was the way this Court has described the Mandate itself. The character of such a regime must conform to the changing needs of international life, as objectively determined, not as determined by the wishes, the will, or the whim of administrators or governors, who may be in office from time to time. This would be an intolerable standard for application by the international community. It would be inconceivable.

The concept of moral well-being and social progress involves the determination and the protection of internationally determined criteria and objectives. Each man's notion of moral well-being and of social progress is a reflection of his own subjective attitudes toward life, toward the role of the individual, toward the role of the group, and the relationship of both to the social order. How could an individual's state of mind, or purpose or intent, be marked in any other manner than by his personal appreciation and evaluation of his own role toward the social order. The very concepts of moral well-being and social progress demand and cry out for objective determination on the part of the competent international organs whose responsibility, rather than whose right, is fixed by the mandate itself and this is why the Applicants have respectfully submitted, and continue to submit, that it is unrealistic, indeed it is a fictitious distinction sought to be drawn between the interpretation of the Mandate and Covenant, on the one hand, and its application, on the other. The founding fathers of the mandates scheme, the Respondent itself as mandatory in undertaking the obligation, must conclusively be presumed to have undertaken the obligation of a content, scope and nature which the Applicants contend for. This is not a matter of application as distinguished from interpretation, it is a matter of interpretation *and* application, and the two are inseparable in any system which recognizes constitutional principles and that, indeed, of course, means every system, every civilized system.

In addition to the discussion in the Reply, centering on the phrase "promote to the utmost" in Article 2, paragraph 2, of the Mandate (Reply, **IV**, p. 512), the Applicants submit that the phrase "social progress" embodies two discrete elements: the word "social" and the word "progress" are discrete. The word "social" implies that the concept at issue centres upon social values and societal relationships. They are by definition fluid and not static since society itself, by definition and by all human experience, evolves and changes constantly. "Progress", by its terms, is not a constant but a variable, and predicates the natural

processes of dynamic change in both national and international society.

Applicants refer also to their analysis and discussion of the concept of evolving standards, as set out in their Reply at **IV**, pages 512-518, and the record will not be burdened with a quotation of that discussion. One sentence, or two sentences, may be useful, in this connection. At page 512 of the Reply, **IV**, the Applicants submit:

> "Discharge of the obligation to *promote* well-being and social progress necessarily involves continuous, dynamic and ascending growth. The requirement that *utmost* efforts be directed toward that end, adds both urgency and dimension to the undertaking. The proposition, implied by Respondent, that its obligation is to be measured by its so-called 'intentions' as of 1920 is manifestly incompatible with, and repugnant to, the essence and purpose of the obligation itself."

The mandate instrument must, as I say, be interpreted in accordance with the intentions of the Parties in 1920 but it must be interpreted thus in the light of its nature, spirit and purpose. When Respondent undertook in 1920 the obligation to "promote to the utmost" the well-being and "the social progress" of the inhabitants of the Territory of South West Africa, Respondent thereby undertook an obligation to apply evolving and developing standards in the light of modern conceptions and knowledge with regard to the well-being and development of dependent peoples, as appreciated by the international organs vested with the duty of supervision as a *safeguard* to effectuate the purposes of the sacred trust. The stress, Mr. President, is on the word "safeguard"—that is embodied and embedded in the Covenant itself. And, of course, the obligation undertaken by the Mandatory in 1920 must be interpreted as one which included the obligation to comply with rules of international law governing the well-being and progress of all peoples under its jurisdiction in the Mandate.

This is but to interpret the mandate instrument in accordance with the intentions of the Parties at the time when the obligations were conferred and accepted. This perspective toward the obligations embodied in Article 2, paragraph 2, of the Mandate is re-inforced by reference to Article 2, paragraph 1, of the Covenant, to which constant reference has been made by the Applicants in view of the fact that the Mandate is, of course, a mere measure, or method, of implementation of Article 22 of the Covenant. Article 22, paragraph 1, of the Covenant, as the Court will be well aware, speaks of applying "the principle of well-being and development" to "peoples not yet able to stand by themselves under the strenuous conditions of the modern world". This is described as a principle.

This fundamental Covenant provision implies a dynamic environment of international supervision; one that evolves with the contemplated progress of the inhabitants. The objective is under a sacred trust for which the Mandatory is given tools to enable it to carry on its obligations, not rights, but tools to carry on its obligations, the purpose of which is to make it possible for peoples not yet able to stand by themselves under the strenuous conditions of the modern world to meet the conditions of the modern world, and "the modern world" means what the phrase says—it means the world as it progresses, as it becomes more integrated. As possibilities for the individuals mature, flower and open

up, the restriction, the confinement of the individual person to a group categorization is a directly relevant consideration as to whether or not he is being developed to meet the strenuous conditions of the modern world—this is a challenge of utmost proportion to any government, certainly with respect to its own citizens, but with respect to a sacred trust and an international accountability it is an awesome burden. For such an injunction to become more than a pious wish, I refer to the quotation I have read from the Reply. In respect of the unfettered discretion, for which Respondent contends, it is imperative that international supervision is able to translate itself into obligations of the Mandate by means of the standards formally set forth by the competent international organ, and the capacity of the competent international organs to do so, under the scheme of the Mandate, rests in this Court's hands.

If Article 2, paragraph 2, has any meaning at all, therefore, it presupposes the application of evolving and dynamic standards as well as international rules of law governing the welfare of the inhabitants of the mandated territories, not as limited or conditioned by the intentions of the wielder of the tools of the trust but as objectively determined by the community upon which the trust was laid. Respondent has strenuously resisted the Applicants' submissions in this regard, by stating both in the written pleadings and in the Oral Proceedings, as follows: I take as an example the Rejoinder, **V**, page 140, which was cited during the course of the Oral Proceedings of 24 March, **VIII**, pages 260-261:

> "The only basis upon which *interpretation* of the relevant texts could produce a result whereby current norms govern the content of the Mandate, would be if Article 2 was *ab initio* subject to some qualification such as:
>
> 'The Mandatory shall, when exercising its full power of administration and legislation, give effect to such standards or norms as may at the time of such exercise be generally applied by other States'."

Except for the last clause which refers to "applied by other States", and evades the basic point of the competency of the international organs charged with supervision, this is precisely what the Applicants contend; in essence, that Article 2, paragraph 2, must be interpreted and read as if it did explicitly state *ab initio* and include the qualification that "The Mandatory shall ... give effect to such standards or norms as may at the time of such exercise be generally applied by other States"—I would substitute for "other States" "the competent international organs".

As Applicants have already pointed out in these proceedings, the international norm and standards of non-discrimination and non-separation for which they contend have been universally accepted and pronounced by members of the competent organs, reflected in judgments, resolutions and decisions by those organs, and members other than Respondent itself. Under these circumstances and in the light of the specificity of these judgments embodied in such resolutions and other instruments, it is not plausible or credible for Respondent to argue that such an obligation can be said to be of uncertain content—if there is one thing certain in this regard it is the content of the obligation. The difficulties of application are precisely why South West Africa is a mandated territory subject to a sacred trust and subject to international supervision; it is the very complexity of the task which creates the

main purpose, the main objective and the main burden of the trust. In so far as interminable dispute (the phrase used by Respondent) is concerned, there would be no dispute at all, and there would be no controversy of law submitted to this Court at this moment had Respondent complied, and was now in compliance with, its obligations of accountability. The legal dispute in the cases at bar has resulted in large measure because of, and in the light of, Respondent's refusal to comply with the international standards of non-separation and non-discrimination and its failure and refusal to co-operate and to consult with the competent international organs in the development of their judgments.

It is not only from the expressed terms of the Mandate that Applicants derive the Respondent's duties to conform to modern standards, as objectively determined, in promoting to the utmost the well-being and social progress of the inhabitants; it is also because of the quality of the Mandate as a constitutional type document, which it has been described as being by scholars who have been cited in the pleadings and by the Permanent Mandates Commission itself in references also cited in the Applicants' pleadings. Applicants refer in this respect to a discussion in the Reply, **IV**, at pages 513-516.

Throughout this discussion, Mr. President, it seems important to emphasize again that what is at stake here is the relative competence of the Respondent and of the organized international community to establish the authoritative content of the concept of moral well-being and social progress. Respondent contends that its discretion, constrained by its obligation to pursue authorized purposes as it views and interprets them in good faith, is the means by which to test its compliance with Article 2, paragraph 2, whereas the Applicants contend that Respondent's discretion is additionally constrained by international standards generated by the competent international organs. For if, as the Court said in its 1962 Judgment, at page 329, the mandates system involves, *inter alia*, "the recognition of a sacred trust of civilization laid upon the League as an organized international community", then it necessarily follows that that community requires the competence and possesses the responsibility for specifying the dynamic content of well-being and moral and social progress by the establishment of authoritative standards—*how else could it carry out its competence? How else could it discharge* its trust? If Respondent as Mandatory, rather than the organized international community upon which the trust was laid, has priority, if the intention of the Mandatory is paramount in standard evolving and standard setting, then the original, animating concept of the sacred trust, as laid upon the international community, is nullified. This discussion, therefore, is intended to fortify and confirm the Applicants' basic contention that the organized international community, rather than the Respondent, possesses the competence and the responsibility to determine the content of the obligation in the light of its nature and purpose and where the organized international community, through the competent organs, has set such standards in categorical, imperative and unusually clear terms, they take precedence over incompatible exercises of discretion by the Mandatory as a matter of law.

The approach of the Applicants with respect to the judicial process and its role in the interpretation and application of constitutional-type charters or ordinances is well summarized in the writing of the late Judge Benjamin Cardozo, of the United States, who I think is regarded as one

of the great scholars and jurists produced in that country, and it bears with particular emphasis upon the purported distinctions sought to be drawn between interpretation and application, which is a purported distinction which in all candour has baffled the Applicants in their attempt to analyse it to a legal or constitutional type significance. The phrases which I take the liberty of quoting are from Cardozo's *The Nature of the Judicial Process*, published in 1921, and I cite pages 82-85—the late Judge Cardozo wrote:

> "... the content of constitutional immunities is not constant, but varies from age to age. We must never forget, in Marshall's mighty phrase, that it is a *constitution* we are expounding. Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. In such cases, the meaning, once construed, tends legitimately to stereotype itself in the form first cast. A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens.
>
> The President of the highest French Court, M. Ballot-Beaupré, explained, a few years ago, that the provisions of the Napoleonic legislation had been adopted to modern conditions by a judicial interpretation in *'le sens évolutif'*. 'We do not inquire', he said, 'what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be'."

Judge Cardozo cites Munroe Smith, *Jurisprudence*, pages 29 and 30 and goes on—

> "It follows from all this, said Judge Kohler, that the *interpretation* of the Statute must by no means of necessity remain the same for ever. To speak of an exclusively correct interpretation, one which would be the true meaning of the Statute from the beginning to the end of its day, is altogether erronous." (Kohler, "Interpretation of Law", as translated in *Modern Legal Philosophy Series*, p. 192).

If this is true with respect to constitutions generally, it is all summed up in the historic phrase "It is a constitution we are expounding"; the word "expounding" means and it comprehends interpretation and application. The instrument is applied as it is interpreted, and as it is re-interpreted in constitutional systems throughout the years of its life. But if we start from this premise it seems incredible, on its face, to assume at the same time a right or capacity or competence on the part of the Mandatory, bound by the constitution, itself to interpret or re-interpret it on the one hand, or itself to determine its scope, content and manner of its application on the other.

To the extent that this would be permissible at all, it would constitute a form of annexation; indeed one would say it would constitute the essence of annexation. If the only test applicable were that certified by the Respondent, it would be the test of what one might call, "the outrageous test of the objective Mandatory". Its intention would be examined and its good faith evaluated in terms of the purpose, and the factual state of mind of the officials from time to time of its government.

The distinction sought to be drawn by the Respondent between inter-

pretation and application therefore, if it has any meaning at all, is one which is corrosive of the very purposes and nature of the instrument.

It is not only on the one hand formalistic and unreal, it is a constitution we are expounding; it is the clearest imaginable case of killing the spirit by the letter, and the letter is a false one.

In the first place, the contention is based upon and proceeds from the proposition that Article 2, paragraph 2, which is the core and essence of the sacred trust, merely states and sets forth an ultimate aim or an exhortation, in the words of the Respondent which I have read, an indication, a signpost, a marking, of the spirit with which it should be imbued. Indeed it does that, but that is where it starts. In the Applicants' view it starts there. In the Respondent's view, it ends there.

This construction of the intent of the authors of the system as to the meaning of the trust obligation, not only enables, but requires, by a logical imperative that the Respondent oscillate between its own purposes and the Mandate purposes. As I have said before, it construes the position which leads to a construction of Mandate purposes in terms of the Mandatory's purposes. The purposes of the Mandate become what the Mandatory says they are, subject only to the outrageous mandatory test. This is true, however, only with regard to Article 2, paragraph 2, in the Respondent's submission. This happens to be the essence and core of the trust. But, with respect to Articles 3 to 5, including the duty to assure freedom of conscience, Respondent concedes in its own terms, indeed contends, that these Articles have sufficient specificity not only to be justiciable, but to be governed by objective criteria. Respondent's argument comes to this: the more closely the Court approaches the heart of the trust, the less competence it has to protect the essence of the trust; the more closely one approaches the heart of the Mandate, which is Article 2, paragraph 2, and the more vitally concerned the competent international organs become in the protection of that trust, the less applicable are their judgments. This is the inescapable logic of the Respondent's position.

This is not what the Court could have meant by describing international supervision as the very essence of the Mandate. Is the essence of the Mandate to be found in the competence of the Court to supervise the sale of liquor to the Natives, as distinguished from the promotion of the moral well-being and social progress of the inhabitants of the territory?

In summary then, whether one interprets the mandate agreement in accordance with the intentions of the parties at the time when the agreement was entered into, or whether the Mandate is interpreted and/or applied in accordance with contemporary standards, the result is identical. Respondent's obligations under Article 2, paragraph 2, are to apply and to carry out the recognized and accepted minimum international standards of non-discrimination and non-separation, which in the Applicants' respectful view have been so clearly and emphatically established and with such overwhelming approximation to unanimity, that they have achieved the legal status and quality of an international legal norm.

The Mandate brought into being an international regime, the character of which is responsive to and determined by the evolution of international life, as international life and its requirements are understood by the competent organs, upon whom the trust was laid.

It is sufficient for the purposes of these cases at bar, that the standard

in question be clearly expressed by the competent organs; that the standards, in other words, need not have achieved the status and quality of an international legal norm; that is not necessary for the Applicants' purposes in these proceedings. But whether one accepts, as the Applicants call it, the existence of an international legal norm, or whether the Court should merely hold that the international standards govern the interpretation and application of the Mandate, the foregoing considerations would be relevant in either event.

All efforts to persuade the Mandatory to conform to the judgments of the competent organs, whether expressed as standards or as a legal norm have failed. All efforts to persuade the Mandatory even to conform with its duty of international accountability have failed. The violation of the standards in question by Respondent is so plain that they may be found to exist on a *per se* basis, *i.e.*, simply as a matter and on the basis of the terms and provisions of the laws and regulations and the official measures and methods by which they are put into effect, the existence of all of which is conceded by Respondent, and a summary of which has been marshalled, collated and presented to the Court in the record of these proceedings, for the convenience of the Court and the purposes of the record itself.

There are further reasons, based upon the jurisprudence of the Mandate as determined by this Court during a period of 15 years, why the judgment of the international community should be applied conclusively to the determination of this dispute.

Such considerations of, what I have called them, the jurisprudence of the Mandate, are to be found in excerpts from relevant decisions, judgments and opinions of this honourable Court which also have been marshalled, collated and, for the convenience of the Court, set into the record of these proceedings at a stage then deemed convenient. It will not, therefore, be necessary or appropriate for the Applicants to refer again at this point to that collation of relevant materials establishing the jurisprudence of the Mandate; it suffices to cite the 1962 Judgment, at page 331, in which the Court characterized the Mandate "as a special type of instrument composite in nature and instituting a novel international regime".

In the course of the same discussion the Court pointed out, and I stress these words, "the essentiality of judicial protection for the sacred trust"—that is at page 337 of the Judgment. The essentiality of judicial protection *for* the sacred trust. It is the sacred trust which is embodied and embedded in Article 2 (2) of the Mandate, *not* Articles 3-5 which the Court has characterized as marking the *essentiality* of judicial supervision for the sacred trust.

The Court went on to refer to "the rights of member States" under the Mandate, indicating that under the unanimity rule of the Covenant "the Council could not impose its own view on the Mandatory", and the Court then stated, and I am quoting from page 337 of the *I.C.J. Reports 1962*:

> "The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication."

Again, the reference to the protection of the sacred trust and the explicit

holding of the Court, the explicit finding of the Court, that it was for the protection of the sacred trust that Members of the League of Nations were given the right of recourse to this honourable Court.

Under the first alternative contention of the Respondent in the face of this holding, Respondent argues that Article 2 (2), the essence of the sacred trust, is not justiciable. The Court's finding thus confirms the contention of the Applicants that Article 7 of the Mandate includes protection of the sacred trust provision and, as if to put the matter beyond the peradventure of possible doubt, at page 337 of the 1962 Judgment, the Court, proceeding from the quotation I have just cited concerning the only effective recourse for protection of the sacred trust, stated:

> "It was for this all-important purpose that the provision was couched in broad terms embracing 'any dispute whatever . . . between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate . . . if it cannot be settled by negotiation'. It is thus seen what an essential part Article 7 was intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory." (*I.C.J. Reports 1962*, p. 337.)

And the obligations specifically refer and include the sacred trust. The Court went on to conclude:

> "While Article 6 of the Mandate under consideration provides for administrative supervision by the League, Article 7 in effect provides, with the express agreement of the Mandatory, for judicial protection by the Permanent Court by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose in each of the other Members of the League. Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important." (*Ibid.*, p. 344.)

The mandate jurisprudence as determined by the Court in 1962 establishes that the sacred trust (Article 2 (2) of which represents and embodies the heart and the essence, the primary and, indeed, essential purpose)—protection of the sacred trust is the essential purpose—for which the Court was empowered or endowed with the obligation—the right—to afford judicial protection to the Mandate in the case of alleged abuse or breaches thereof.

The compromissory clause thus has been established by and, indeed, demonstrated by the Court as underlying the very purpose and nature of the Mandate. The compromissory clause was, of course, in issue in the 1962 proceedings, and has been asserted, defined, and, indeed, elaborated in this respect by this honourable Court as showing the necessities, the perceived necessities, on the part of the authors of the mandates system for extending the judicial protection itself to the sacred trust. The antecedent history in the United Nations of the relationship between the Parties herein and the relationship between the United Nations on the one hand, and the Respondent on the other, is set forth at length in the Memorials at **I**, pages 54-87, and in the Reply, **IV**, at pages 222-230. This is under the heading of the history of the dispute, but the Court's attention is respectfully drawn to it at this point, at this stage, because

it is, of course, a history pregnant with significance in these proceedings; it is a history marked by repeated and there cited judgments of the competent organs, as well as a history of the endeavours to reconcile the issues in dispute, to find a settlement through negotiation, and these have been conducted by the Applicants in and through the agency of the United Nations itself. The Applicants stand before the Court fully aware of the fact that they speak for no-one but themselves, but it is perhaps relevant to point out that, both in the 1962 majority opinion and in other opinions appended thereto, note was taken, particularly in connection with the preliminary objections regarding the nature of the dispute, of the identity of the issues in dispute—on the one hand between the Applicants and the Respondent, and on the other hand between the United Nations and the Respondent.

The United Nations, as the records set forth in the written pleadings show, has been wholly unable to "impose its own view on the Mandatory". (*I.C.J. Reports 1962*, p. 337.) This was with specific reference to the situation prevailing at the time of the League of Nations when the veto rule was applicable in the Council, and the Court took note of that fact in arriving at its determination regarding the nature, scope and essentiality of the judicial protection.

Here, likewise, not as a result of any constitutional veto, as in the case of the League, but on the grounds, so to speak, of action and of conduct, the Respondent, by withholding its co-operation and its consent to international supervision has, in the sense, cast a veto over the operation of the United Nations no less effective than that which it might have cast constitutionally in respect of a similar exercise of supervisory capacity on the part of the League of Nations.

What has happened to "the machinery of administrative supervision" (again I quote from the apposite language of the Court in 1960) is, of course, not really that it has disappeared legally, as Respondent contends, but that Respondent has refused over the years, and even since 1950, to submit to international administrative supervision.

With these factors in mind, the Applicants reassert in this context the inter-relationship between administrative supervision and judicial protection, and more specifically and in this context the judicial role in applying the standards and judgments evolved by the competent administrative organ to which the Mandatory is accountable and upon which the sacred trust is laid.

Mr. President, I will now conclude the discussion of the introductory nature upon which I have been embarked this morning and then, with the Court's permission, turn to an elaboration of the processes by which the relevant standards have evolved, and of the content and form which they have been given. This is the scheme of what will remain of this morning's Oral Proceedings; this, of course, is all in the context of the response to the series of questions propounded by Judge Sir Gerald Fitzmaurice, as well as the reply of the Applicants to the rebuttal on the issues of law, with which now of course the Applicants have combined such factual material as it is their intention as presently advised to present to this honourable Court.

The considerations which have been adduced during the course of the discussion just concluded, all taken together, point to the *per se* violation of the international standards and the *a fortiori* violation in terms of the international legal norm for which the Applicants contend of the same

obligations under Article 2 of the Mandate. The considerations may very briefly be summarized as follows: the interrelationship between the sacred trust provisions of the Mandate and of the Covenant, and judicial protection, scope and purpose of judicial protection; the nature, the scope and the content of the international standards which have evolved through the processes of the organized international community, the competent organs of which have not only the right but the duty to supervise the Mandate and provide the safeguards for the effectuation of the sacred trust; the overwhelming consensus approaching unanimity which has marked the formulation of the relevant standards by the competent organs; the general and basic obligations of the Mandatory toward the organized community as a function of its special duty toward the inhabitants of the Territory, and its special duties with regard to co-operating with international supervision, submitting to such supervision and complying with supervisory measures and judgments thus formulated by the competent organs; the fact that Respondent has failed and refused to act in accordance with the principles enunciated by this honourable Court in the 1950 Opinion and subsequent judgments, and has failed to co-operate in submitting to international supervision, which in itself is a fact lending weight to the authority of the judgments reached by the organized international community which consist of minimum pronouncements on the Mandatory's duties in the respects relevant to this discussion; that such standards have been evolved with great effort and caution, despite the Respondent's failure to co-operate and consult and provide information. The failure and refusal to provide information, to consult and to co-operate cannot be asserted as a source of questioning of the judgments which have evolved; in the face of such failure to co-operate Respondent cannot be heard to challenge the validity of judgments reached with patience, with effort and with understanding, in the face of its continued refusal and failure to co-operate in the evolution of such standards in accordance with the clear spirit of intent of the Mandate—this is indeed having it both ways; the fact, added to the others I have just mentioned, that there is a structural and functional interrelationship between administrative supervision on the one hand and judicial protection on the other; that the applicability of criteria in the judicial form necessarily depends upon and presupposes their formulation in the administrative organ; that this Court, and no court, by reason of the very nature of the judicial process, has the facilities or the responsibilities to reach judgments, to formulate standards, of the sort which are uniquely within the competence of administrative organs and which reflect political and moral and social considerations of which they are specially competent to judge and evaluate.

Another consideration to be added to these is the fact that the General Assembly is legally bound, not merely permitted, to formulate criteria with respect to the conduct of the administration of the Territory.

All of these factors, in the Applicants' respectful submission, create overwhelming, indeed much more than persuasive, grounds for conclusive application of the international standard of non-discrimination and non-separation in the determination of whether there has been, as the Applicants contend, a *per se* violation by Respondent of Article 2 of the Mandate and Article 22 of the Covenant.

The Applicants now, Mr. President, turn to an elaboration of the

processes by which the relevant standards have evolved, and of the content and form which they have been given, and this, as I have said, is in response to the questions propounded by Judge Sir Gerald Fitzmaurice. At the conclusion of the comments which are to follow in this respect and related respects the Applicants will endeavour to summarize in more specific terms responses to each of the separate questions, of the several questions, propounded in the series of Judge Sir Gerald Fitzmaurice in respects which will not have been covered in the more general discussion which is designed likewise to relate to and bear upon the very important series of questions propounded by the learned judge.

The standards by which Respondent's obligations should be measured are the authoritative judgments which have evolved principally within the context of the United Nations Charter on the one hand and the Constitution of the International Labour Organisation on the other, of both of which organizations the Respondent has been a Member. The precise legal relationship between the Charter, or the constitutional provisions and the interpretation thereof by the Member States, the signatory States, will be considered at a somewhat slightly later stage, that is, tomorrow (when the Applicants hope to conclude) when Applicants turn to the question of the evolution of the legal norm of non-discrimination or non-separation. The existence and validity of the international standards emanating from the United Nations Charter and its interpretation and application to the Mandate are not open to argument. At pages 104 through 108 of the Memorials (I) Applicants have set out textually provisions of Articles 73 and 76 of the United Nations Charter. The Applicants there cite the text of the League of Nations resolution of 18 April 1946 which noted, *inter alia*—

> "that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League"—

that is quoted at page 106 of the Memorials (I); and, on the same page, the Applicants submitted—

> "that Chapters XI, XII, and XIII of the United Nations Charter are in *pari materia* with Article 2 of the Mandate and Article 22 of the Covenant, and, therefore, that the terms of the Charter may be employed in construing Article 2 of the Mandate and Article 22 of the Covenant".

At page 107 of the Memorials the Applicants have set out, *inter alia*, the provisions of Article 76 *(c)* of the Charter which, as the Court will be aware, provides that one of the "basic objectives of the trusteeship system" is "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race . . .".

Similarly, in the Reply, **IV**, pages 497 and 498, the Applicants have set out the provisions of the preamble to the United Nations Charter which state that one of the goals of the Organization is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small", together with the provisions of Article 1, paragraph 3, Article 13 *(b)*, Article 55 *(c)*, Article 56, and Article 62, paragraph 2, of the Charter and, as the Court will equally be aware, the Charter is studded with references to purposes and principles, down through the main body of the Charter itself, and to the rights of persons. Examples

thereof, as I have said—and this is cited in the Memorials—include the terms of Article 1, paragraph 3, providing that among the purposes and principles of the United Nations shall be that of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

Article 13 *(b)* of the Charter authorizes the General Assembly to initiate studies and to make recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Likewise, Article 55 *(c)* of the Charter states that the Organization shall promote "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Following these references in the Reply the Applicants stated that:

> "All of these provisions taken together make manifest the concern of the international community for the protection of basic human rights; the most fundamental norm—non-discrimination—is repeated no less than four times. Thus, even though the Charter does not make explicit the human rights and fundamental freedoms of which it speaks, it does make clear that, irrespective of the right in question, a fundamental norm lies at its base: official non-discrimination on the basis of membership in a group or race." (**IV**, p. 498.)

The Rule of the Court in relation to the effectuation of the purposes and principles of the Charter of the United Nations is of course prescribed in the Charter itself as follows:

> "Article 92. The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed statute, which is based upon the statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

Article 1 of the Statute of the Court, of course, provides that:

> "The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present statute."

The purposes and principles of the United Nations, in the Applicants' respectful submission, apply both to the member States and to all the organs of the United Nations.

The third purpose of the Organization, as rendered in Article 1, paragraph 3, of the Charter, is:

> "To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

This is embedded in the purposes of the Organization itself, not merely a substantive obligation, but a stated purpose.

In the exercise of its judicial function in determining Respondent's obligations under the Mandate, the Applicants respectfully submit that the Court should give full weight to the foregoing purpose of the Organization which has just been quoted. When a question in dispute before

the Court involves issues directly related to "human rights and fundamental freedoms", it is submitted that such issues should be determined by this Court in a manner consistent with that purpose which underlies the very existence of the Organization itself, with respect to such human rights and freedoms, that there should be "no distinction as to race" *among other categories.*

Likewise, this honourable Court, as an organ of the United Nations, is required to "promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"—in the words of Article 55 *(c)* of the Charter—as a substantive obligation of the Charter, not only as a purpose, but as a substantive obligation embodied in the Charter itself. The Court, as the judicial organ, can only implement such a purpose and such a substantive obligation in connection with the performance of its judicial functions, to wit, the determination of disputes which involve questions of human rights and freedoms for all. The Court can only perform such a judicial function by giving full application to the purposes and the substantive obligations of the Charter in the context of a dispute which involves alleged gross violations of obligations inherent in those Charter purposes and in those Charter provisions.

The Statute of the Court is, of course, as has been said, an integral part of the United Nations Charter, by its terms. The dispute now before the Court involves the application of international standards of non-discrimination and non-separation on account of membership in a race or group and, inasmuch as the Charter of the United Nations itself proscribes such discrimination and posits elimination thereof as a stated purpose of the Organization (Art. 1) as well as a duty of the Organization (Art. 55), it must follow in the Applicants' submission that the standards of interpretation and application to be applied by the Court to the international institution of the mandate must not only be consistent with such purposes and duties but must further reflect and embody all other provisions of the United Nations Charter in their formulation and determination.

Respondent's objections to the relevance or applicability of the United Nations Charter must be evaluated in the light of these considerations. The objections of the Respondent include, but go beyond, the legal question or bounds of the doctrine of *pari materia* upon which, as confirmatory evidence of constructional interpretation, the Applicants relied in the Memorials.

The Respondent's objections to the relevance or the applicability of the United Nations Charter, as understood by the Applicants, take essentially two forms. The first is that the Mandate may not be interpreted, in accordance with the intentions of its authors, by reference to a convention or charter drawn up 25 years later. This, in Respondent's contention, does away with the Applicants' references, or reliance upon, *pari materia.* I cite the Counter-Memorial, **II,** pages 395 to 396 in this regard.

The explicit reference which has been mentioned in the 18 April 1946 resolution of the League of Nations to Chapters XI, XII and XIII of the Charter, is in itself a clear indication of the relevance to and applicability of Charter provisions to the mandates scheme. Respondent itself is not only a party to the Charter of the United Nations, but supported and voted for the resolution of 18 April 1946, which on its

face establishes the relevance of the provisions of the Charter to the mandates system.

Closely related to the first argument of Respondent, just mentioned, is a correlative or subsidiary argument to the effect that Article 7, paragraph 2, the compromissory clause, would not give this honourable Court competence or jurisdiction to consider Charter violations in these proceedings. I refer to the Rejoinder, V, page 132. Of course, as is made explicitly clear in the written proceedings, the Applicants do not request this honourable Court to make findings or holdings that Respondent is in violation of the Charter provisions. We are talking about the relevance of the Charter provisions to the interpretation of its obligations under the Mandate and under Article 22 of the Covenant, two entirely different things. An interpretation of the Mandate must take due cognizance of relevant provisions of the United Nations Charter, so relevant indeed that they were referred to in *expressis verbis* in the very final resolution of the League of Nations pertaining to the subject of mandates.

When the issue complained of, moreoever, involves principles and purposes treated in the Charter, upon which the United Nations and its member States frequently have expounded, it seems clear that such treatment and exposition, moreover in the form of minimum standards, pronounced by the overwhelming consensus of the community, that all these factors taken together cumulate and render imperative, in the Applicants' submission, the conclusion that the Charter provisions and purposes are indeed relevant to a determination of the legal scope and significance of the Mandate, which is an international institution regulated by international rules and supervised and safeguarded by an international community.

Respondent's second argument, as understood by the Applicants, with respect to United Nations criteria and their asserted irrelevance to these proceedings, is again twofold. First, it appears to be argued that the standards contended for by the Applicants do not emerge from the Charter at all. This is the way we understand the Rejoinder, V, page 131, to which the Court's attention is drawn because it is, of course, unnecessary for the Applicants to attempt to re-formulate Respondent's contentions, but it is necessary to express the Applicants' understanding of what they mean in order to try to respond to them. But this is what we understand that Respondent means: that the standards contended for by the Applicants do not emerge from the Charter at all.

In this context, if this is the proper interpretation, Respondent has misconstrued the standards contended for by the Applicants and has ignored the Applicants' major premise, which is nothing more or less than that the policy complained of is contrary to Article 2, paragraph 2, of the Mandate and Article 22 of the Covenant, and that it is based upon the allotment of burdens and privileges by official action on the basis of membership in a group, class or race rather than on the basis of individual merit, quality or capacity.

The misconception implicit in Respondent's representation of the norm of non-separation as one of, in its phrase, "non-differentiation", has been the subject of extensive discussion in these Oral Proceedings. The verbatim record of 28 April 1965, at pages 44 to 46, *supra*, and that of 3 May 1965, at pages 85 to 89, *supra*, deal with the misconception of Respondent that seems to be built upon its re-statement of the norm of non-discrimination in the form and terms of non-differentiation, from

which misconstruction it apparently has been lead to certain absurdities, in the Applicants' view, for example with respect to the significance of the Applicants' reference to the minorities treaties, and the significance of the minorities treaties in these proceedings.

The extreme form in which Respondent's criticism attacks the norm contended for by the Applicants, and which perhaps arises from its misunderstanding implicit in the use of the word "non-differentiation" as distinguished from "non-discrimination", is found I think in the Rejoinder, **V**, at page 131, where the Respondent goes so far as to say that—

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

One hesitates to call this a travesty upon the effect and intendment of the Applicants' true position but it would be difficult to find another qualification or characterization.

Respondent contends at the same time that (this time from the Counter-Memorial, **II**, p. 396) its "policies have in fact been designed to give effect to the principles underlying" the provisions of Articles 73 and 76 of the Charter. It may be that special significance is intended to be attached to the word "designed" to give effect, since this presumably bears upon the underlying good faith or intent test, and this contention presumably is designed to create the conviction that Respondent intends by its action (intends as a subjective matter) to give effect to the principles underlying the provisions of Articles 73 and 76 of the Charter.

If this corresponds to the intention, the purpose, the design of the officials of Respondent's Government, one can only say that their design, their intention, their purpose, have fallen very far short of the mark indeed, and that there are very few, if any, Members of the United Nations who have interpreted or would interpret Articles 73 and 76 of the Charter in a sense which would even remotely correspond to the Respondent's construction thereof. And if its intention, or the intention of its highest officials, is to carry out the purposes and the principles of the United Nations Charter, they are indeed missing the target by a very very wide distance.

The pleadings of the Applicants abound with references to United Nations resolutions, to reports of United Nations Committees, to reports of the Secretariat of the United Nations, and other relevant material, which establish the incompatibility of Respondent's policy of apartheid with the relevant Charter provisions, in the light of which, as the Applicants contend in their Memorials, the Mandate should be read.

Applicants refer in this connection, *passim*, to the Memorials, **I**, at pages 44 to 85, 151 and 165; to the Reply, **IV**, at pages 341 to 361 and pages 362 to 475, *passim*, and more particularly including Annexes 5, 6 (1) and 7, as well as pages 497 to 508. In addition, as I have said before, the Reply chronicles the history of the dispute since 1960 at pages 222 to 230, and in so doing records the more recent history of the United Nations activities regarding the Mandate. Throughout the Memorials

and in the Reply, resolutions of the General Assembly are set out, as are various relevant quotations from United Nations sources.

The essential element linking all relevant reports, resolutions, communications, statements and conclusions of the United Nations bodies, including the specialized agencies directly concerned, is repudiation and condemnation of apartheid. This there is no room to doubt or dispute. As stated in the Reply:

> "Since the founding of the United Nations, there have been more than thirty resolutions of the General Assembly specifically condemning racial discrimination or segregation, whether in South Africa itself, South West Africa, or generally in Non-Self-Governing Territories." (**IV**, p. 502.)

Applicants have set out at page 502 of the Reply a list of such resolutions. Inasmuch as the purpose of citing such resolutions was to demonstrate the judgment of the organized international community with respect to separation or discrimination on the grounds of race or membership in a group, it is immaterial to the purposes of the present discussion that the resolutions apply to apartheid both as practised in the Republic of South Africa and in the Territory of South West Africa, as the pleadings make crystal clear and as is conceded by the Respondent. The fundamental policy and practices in force in the Territory and in the Republic are essentially the same in all respects relevant here.

Indeed, Respondent's only comment with regard to the numerous resolutions which were cited in the Reply at page 502, as far as the Applicants are aware, is that set forth at page 130, **V**, of the Rejoinder. There Respondent describes the resolutions I have cited, and the three Security Council resolutions which are cited at pages 503 to 504 of the Reply, **IV**, as being inapplicable, inasmuch as the resolutions "did not create legal obligations and for the most part were not applicable to South West Africa", and the Security Council resolutions apart from anything else, says Respondent, were "not applicable to South West Africa", and this is true.

But Respondent's conclusion with regard to such resolutions, *inter alia*, and now I quote from the same page of the Rejoinder, is as follows:

> "Inasmuch as all the above items are by their very nature incapable of affecting Respondent's rights or obligations in respect of South West Africa, Respondent will not unnecessarily devote time or space to considering whether they do indeed possess the content ascribed to them by the Applicants." (**V**, p. 130.)

"The content ascribed to them by the Applicants" in Respondent's phrase just quoted was the following as set out in the Reply, **IV**, at page 503:

> "Although resolutions of the General Assembly are not in themselves legally binding on Members of the United Nations, the repeated and strongly worded judgments by the General Assembly that racial discrimination, separation, or apartheid are in violation of the Charter, and in the case of South West Africa, also in violation of the Mandate, are significant evidence of the general acceptance of a legal norm of non-discrimination or separation on the basis of race."

These are the purposes for which these resolutions were cited and that

is set forth in the words I have just quoted from page 503, of the Reply.

Interpretation of the provisions of the Mandate, having regard to the purposes and obligations of the Charter, as reflected by and interpreted in the numerous resolutions of member States acting with virtual unanimity on this matter, would seem to supply authoritative guidance and governing principles for the interpretation of the obligations of the Mandate itself. The fact that Article 22, paragraph 1, of the Covenant itself provides for securities for the performance of the sacred trust indicates that the founders contemplated the responsiveness of the Mandatory to the judgment of the supervisory safeguarding organ; there would be no other reason for establishing the safeguards as an essential element of the mandate system in the Covenant itself.

In support of the existence of an international standard of non-discrimination or non-separation, with the content which, as contended for by the Applicants, is defined at page 493, of the Reply, **IV**, the Applicants have referred in their Reply to several resolutions of the Security Council with regard to apartheid as practised in the Republic of South Africa, not the territory of South West Africa. In two such resolutions, set forth at pages 503-504 of the Reply, the Security Council expressed its view that:

> "... the policies of the Government of South Africa in its perpetuation of racial discrimination are [skipping a few words from the resolution] inconsistent with the principles contained in the Charter of the United Nations and [contrary to] its obligations as a Member State of the United Nations".

This was from Security Council resolutions of 7 August 1953 and 4 December 1963, the citations of which respectively are S/5386 and S/5471.

Although the allegation of Charter violation through the practice of apartheid, using that name normally although not invariably, has been expressed in general terms throughout the years, it has also been specifically couched in relation to Article 56 of the Charter. General Assembly resolution 1178 (XII), of 26 November 1957, called upon the Respondent to observe Article 56 of the United Nations Charter, and reminded Respondent that it was "as much committed as any other member to the principles enshrined in the Charter". Similar references to Respondent's obligations to uphold the undertaking, the obligation of Article 56 of the Charter, may be found in resolution 1248 (XIII) of 30 October 1958, as well as resolution 1375 (XIV) of 17 November 1959.

In 1961, resolution 1598 (XV) of 13 April 1961 recalled "that South Africa has been in wilful breach of its obligations under Article 56", and reminded Respondent that Article 2, paragraph 2, of the Charter requires that "all members shall fulfil in good faith the obligations assumed by them in accordance with the present Charter", and also called upon Respondent to bring its conduct into conformity with its Charter obligations.

Indicative of the seriousness with which member States, with a consensus virtually approaching unanimity, have regarded the development and continuation of the policy of apartheid, both in the Territory and in the Republic itself (since the two are indistinguishable in the respects relevant here in the context of the General Assembly's appreciation of the policy as distinguished from the question before the Court in terms of the competence of the Court) is the characterization by the General

Assembly of the policy practised in both South West Africa and in the Republic itself, not only as a breach of the Charter obligations but also as a threat to international peace. Thus in one of the resolutions of the Security Council cited in the Reply, **IV**, at page 504, the Council expressed what it termed "its firm conviction" that—

> "... the policies of apartheid and racial discrimination as practised by the Government of the Republic of South Africa are abhorrent to the conscience of mankind and that therefore a positive alternative to these policies must be found through peaceful means ...".

This is a *Security Council resolution* of 4 December 1963, S/5471.

In its discussion, both in the written pleadings and before the honourable Court in the Oral Proceedings, the Respondent appeared at one point, and I have cited this at an earlier stage, to have posited an objective criterion of its own, which involved the objective determination proceeding from the fact of its state of mind, concerning its *mala fides* or *bona fides*—this is the theory of the Respondent's case. On the basis even of such an obligation so measured, of objective criteria so-called, thus defined, the Security Council resolution stamps even that obligation, vague as it is, with the characterization of "abhorrent to the conscience of mankind"—this is the Security Council of the United Nations.

Specifically with regard to South West Africa, Applicants have set forth in part, at page 222 of the Reply, **IV**, the text of General Assembly resolution 1596 (XV) of 7 April 1961, in which the General Assembly, without dissent, decided to call to the attention of the Security Council the situation of the mandated Territory itself, with the comment, "which, if allowed to continue, will in the General Assembly's view endanger international peace and security ...".

Again, the attention of the Security Council was drawn to the Territory on these same grounds by General Assembly resolutions 1702 (XVI) of 19 December 1961 and 1979 (XVIII) of 17 December 1963; these were cited respectively in the Reply, **IV**, at pages 224 and 229.

In addition to the resolutions of the General Assembly and Security Council, the Applicants cite also the many comments and characterizations, conclusions and recommendations, made by the various committees of the General Assembly throughout the years, with regard specifically to the question of racial separation and/or discrimination. These materials are set out in the Memorials, **I**, pages 54 through 84 *passim*, and in the Reply, **IV**, pages 341 through 475, *passim*. With regard to the simple questions of the violation of Charter obligations, inasmuch as the bodies are exercising the function of administrative supervision pursuant to the Opinion of 1950 of this honourable Court, these conclusions there referred to in the pleadings are of special relevance.

Two brief examples, among numerous possible, may be cited. These both occurred at a relatively early stage, and show thereby the long history of this dispute. The first comment to serve as an example for these purposes may be found in the Memorials, **I**, at pages 70 and 71; it is the report of the Committee on South West Africa for 1956—nine years ago (A/3151). In a concluding paragraph, which is reproduced at page 71 of the Memorials, the Committee stated as follows:

> "To this grave concern over conditions as they exist in the Mandated Territory, [parenthetically, the Court is reminded this is 1956] the Committee has felt obliged to add its profound mis-

givings as to the future course of the administration of the Territory. These misgivings arise from actions and statements of the Union Government itself: in particular, the transfer to a direct control of 'Native' administration in the Territory, and its stated aim that a policy of racial segregation be applied in the Territory . . .

In view of the foregoing account of conditions in the Territory, all of these elements constitute, in the Committee's opinion, a situation which is neither in conformity with the principles of the Mandates System nor with the Universal Declaration of Human Rights, nor with the advisory opinions of the International Court of Justice, nor with the resolutions of the General Assembly. Accordingly the Committee considers that the situation of South West Africa requires close re-examination at the present time by the Assembly, particularly in respect of the failure of the Union Government to co-operate *in the implementation of the advisory opinion* of the Court of 11 July 1950, as endorsed by the Assembly in resolution 449 A (V) of 13 December 1950."

Mr. President, it is perhaps relevant to note here that Respondent throughout the pleadings and again in the Oral Proceedings, has sought to evade the force of the resolution, and has sought to construe the findings of agencies of the United Nations, such as and including the Committee on South West Africa, in terms of allegedly improper motivation, in terms of political campaigns, in terms of conspiracy and in terms of trading among nations for position, or favours, or other considerations of unenlightened self-interest. The force and effect of these resolutions, of these findings, cannot, in the Applicants' view, be disposed on such a basis.

The results of the close re-examination by the General Assembly which is recommended by the Committee for South West Africa was, as was made clear in the report itself, undertaken in the light of Respondent's failure to co-operate in the implementation of the Advisory Opinion of 1950 which, of course, the Respondent has never characterized as a portion of a part, or part of, a political campaign or conspiracy.

The General Assembly took special note of the fact that the Respondent was failing to carry out its obligation as determined by the 1950 Advisory Opinion which was accepted by the General Assembly and, having considered the matter, the Committee itself concluded in the following year, that is to say in 1957, as follows:

"The Committee is of the opinion that the administration of South West Africa, in which political, economic, social and educational rights are governed by the practice of apartheid, or racial separation, operates to the detriment of the population, particularly *the 'Native' majority, and* is contrary to the spirit and purposes of the mandates system, the Charter of the United Nations, and the Universal Declaration of Human Rights." (**I**, p. 73, doc. A/3626.)

The conclusions of the South West Africa Committee and the resolutions and deliberations of the General Assembly have constantly and repeatedly referred to the incompatibility of Respondent's practices and policy of apartheid with its Charter obligations and *a fortiori* with its obligations under the Mandate itself. Applicants refer the Court to the passages in their pleadings to which specific attention has been called to this point, particularly in the chronicle of the history of the United

Nations Charter and of the Mandate, by the resolutions and conclusions of the Assembly and its committees, all of which are set forth in the written pleadings at the places to which I have called the Court's attention.

Also relevant to the interpretation and application of the provisions of the United Nations Charter and, consequently, to the interpretation and application of the terms of the obligations under the Mandate which must be read in the light of the Charter, are the conclusions and the proceedings of the Trusteeship Council and of the Committee on Non Self-Governing Territories. Reference already has been made in these proceedings to the 1947 treatment by the Trusteeship Council of Respondent's report on the Territory for South West Africa for the year 1946. (The citation is to the verbatim records of 11 May 1965, pp. 209-214, *supra*, and 12 May 1965, pp. 214-217, *supra*.)

Similarly, in the Applicants' Reply are set forth examples of the United Nations standards of non-discrimination and non-separation in the fields of education, economic life, and political development, all as expressed throughout the years by the organs of the United Nations with respect to dependent territories generally subject to the scope of supervision of the United Nations. This is one reason why the Applicants feel justified in characterizing apartheid under the heading of *minimum* applicability, *a fortiori* applicability, because the principle, the standard of non-discrimination and non-separation, has been applied by the United Nations in respect of territories in which the policy and practice of apartheid is not maintained. Such examples, referred to in the pleadings at the places cited, and for the convenience of the Court may I cite them again: the Reply, **IV**, pages 398-403, 426-430 and 451-457, are the examples of United Nations judgments. The Respondent has in numerous contexts characterized these judgments embodied in these annexes at the cited pages of the Reply as judgments or contentions of the Applicants—this is a misconstruction as the reading of the pages will show. These are not the Applicants' contentions, these are the judgments of the United Nations and they refer to other territories and areas not only of Africa but of the world. These are *not* the Applicants' judgments, these are *not* the Applicants' contentions, these do *not* involve questions of comparative standards of achievement; these are United Nations judgments with respect to policies relating to and focussing upon the problem of racial separation or discrimination.

These examples and a multitude of others all confirm the clear and accepted international minimum standards of non-discrimination or non-separation, which are set forth also in Chapters XI, XII, and XIII of the Charter and these, in turn, were, as I have said, explicitly referred to in the resolution of 18 April 1946, to which the Respondent adhered and for which it voted.

The Trust Territories Agreements themselves are concrete evidence and application of the directive of the obligation of Article 76 *(c)* of the Charter. Examples are adduced at **IV**, pages 501 and 502 of the Reply; for example, at page 501 the Applicants have stated:

> "Each of the eleven Trust Territories Agreements contains a provision which contributes to the universal acceptance of the norm of official non-discrimination, or non-separation on the basis of membership in a group or race. The various provisions are all worded with reference to Article 76 *(c)* of the United Nations Charter."

This standard, this obligation of Article 76 *(c)* is embodied in 11 international systems, institutions, designated as Trust Territories Agreements.

Finally, the declarations and draft declarations undertaken under the auspices of the United Nations and within the context of the United Nations Charter, although not binding in themselves, constitute evidence of the correct interpretation and application of the relevant Charter provisions. Examples of these for this purpose, and citations, are given in the Reply, **IV**, at page 501 and at pages 504-508, will not be elaborated here, but they include the Universal Declaration of Human Rights, the Draft Declaration on Rights and Duties of States, the Draft Covenant on Civil and Political Rights, the Draft Covenant on Economic, Social and Cultural Rights, the United Nations Declaration on the Elimination of All Forms of Racial *Discrimination, and the International Convention* on the Elimination of All Forms of Racial Discrimination.

It is possible, and for purposes of litigation almost anything is permissible, for the Respondent to take up one or the other of these resolutions or declarations and parse them and analyse them. The central point is that, taken in their totality as well as severally, they establish overwhelmingly the interpretation placed upon the relevant Charter provisions by the Members of the United Nations, speaking with a consensus which approaches unanimity. This is the significance of these resolutions and declarations. These instruments are all reflections of the standard of non-discrimination and non-separation, they are consistent with and illuminative of and interpretative of the relevant provisions of the United Nations Charter.

A further important conventional source for the standards for which the Applicants contend may be found in actions taken and judgments rendered in the context of *the International Labour Organisation*. As set forth at page 508 of the Reply, **IV**, Article II, paragraph 6, of the Constitution of the International Labour Organisation embodies the standard of non-discrimination and non-separation which was originally propounded and agreed to in the Declaration of Philadelphia which, as I recall, was in the year 1944, I believe:

> "... all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ..."

The very formulation employed, Mr. President, "material well-being and ... spiritual development in conditions of freedom and dignity" bears a close correspondence to the wording of Article 2 (2) of the Mandate. Respondent, arguing that it was not a party to this instrument, *and also that it is not "in terms inapplicable to* South West Africa", disposes of the constitutional provisions to which reference has been made in one paragraph of its Rejoinder. I refer to **V**, page 133, in which it equates the language of the I.L.O. Constitution "equal opportunity" (this is from the Philadelphia Declaration to which Respondent was not a party) with the obscure concept of "identical opportunity"—equates "equal" with "identical", and Respondent avers that:

> "It is a matter of impossibility to provide anything remotely approaching identical opportunities for material well-being and spiritual development of all inhabitants of a State—and, in any

event, such identical opportunities would give rise to great inequality." (V, p. 133.)

This is reminiscent, of course, of the repeated instances previously cited to the Court in which the Respondent has attributed extreme and often unintelligible positions to the Applicants, including specifically this very example in which the word, by some sleight of hand, "identical" is substituted for the word "equal".

Respondent misconceives the purport of a judgment accepted by the international community with virtual unanimity, both as to the relationships *inter se* and as to their municipal constitutional legislative practices in respect of the content and quality of the obligations (both in spirit and in substance) which are embedded in the Constitution of the International Labour Organisation.

Respondent argues further on page 133 that the Declaration of Philadelphia—"... shows an awareness of the necessity for differential treatment between various groups". Respondent cites a general provision relating to the progressive application of all the principles set forth in the Declaration with the following proviso: "... 'with due regard to the stage of social and economic development reached by each people' ..." (V, p. 133). Respondent relies upon the latter clause just quoted as demonstrating the awareness of the authors of the Declaration of Philadelphia of the necessity for differential treatment between various groups.

This, again, is redolent with the misconception which arises from the false equation of differentiation, as such, with discrimination or separation, which, of course, are forms of differentiation but happen to be impermissible forms of differentiation.

Respondent's reliance upon such an interpretation of the general provision relating to progressive application is refuted by the very sources which are set out in the Reply, and to which Respondent in its written pleadings does not address itself. Immediately following the provisions of Article 2, paragraph 6, of the I.L.O. Constitution, which relate to "equal opportunity", "irrespective of race", the Applicants have pointed out in the Reply:

> "According to the International Labour Office [and this is from a publication which is cited in the Reply] 'this principle, which, from the very beginning, has constituted one of the bases for all the standard-setting activities of the International Labour Conference, has been enunciated in greater detail in the Covention and Recommendation concerning discrimination in respect of employment and occupation, adopted by the Conference in 1958'." (IV, p. 508.)

The authoritative interpretation, according to the International Labour Office itself, of the "equal opportunity" clause of the I.L.O. Constitution is, again, also set forth in the Reply, on the same page just cited, that is, page 508, in which it is explained as—

> "... an attempt to achieve the elimination of 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation' ".

This is designed to *eliminate* distinction and the implication of Respondent's interpretation is that it is designed to *permit* distinction on the

basis of race or classification in group, which, of course, is a construction of the clause which is, on its face, obviously not its intent.

In view of the foregoing considerations, the Applicants submit that there can be no question as to the effectiveness or authority with which the standard of non-discrimination or non-separation has found expression in the Constitution of the International Labour Organisation. When added to the relevant provisions of the United Nations Charter, in the context particularly of their amplification by way of interpretation and construction by an overwhelming consensus of member States, approaching unanimity, the Applicants submit that the two basic ordinances, the Charter of the United Nations, on the one hand, and the Constitution of the International Labour Organisation, on the other, establish beyond a possibility of doubt the authority and relevance of the international standard of non-discrimination and non-separation with regard to the interpretation and application of a sacred trust laid upon the organized international community specifically designed and intended for the purpose of promoting to the utmost the material and moral well-being and the social progress of inhabitants not yet able to stand by themselves in the conditions of the modern world.

Reference already has been made to the Convention and Recommendation concerning Discrimination in respect of Employment and Occupation, one of the I.L.O. Conventions. Although not ratified by the Respondent, as appears from the Rejoinder, **V**, page 130, it is nonetheless an authoritative source for interpretation of the I.L.O. Constitution, which has been ratified by the Respondent. A further source may be found in the Convention concerning Social Policy in Non-Metropolitan Territories of 1947, which is cited in the Reply at **IV**, page 509.

A resolution unanimously adopted by the Governing Body of the International Labour Office, at the International Labour Organisation, at its 157th Session held in Geneva on 12-15 November 1963, referred in terms to—

> "... the grave concern expressed in the Conference and Governing Body on the subject of the odious policy of apartheid deliberately practised by the Government of the Republic of South Africa".

The Governing Body further found that—

> "... the Republic of South Africa is pursuing its baneful policy, which violates the fundamental principles of the I.L.O.".

It is not necessary to point out that the words "baneful", "odious", and "deliberate" are those of the I.L.O. and not the Applicants'.

The I.L.O. by resolution appointed a committee to consider the question as a whole, and to—

> "... endeavour to determine what contribution the I.L.O. could make to the complete elimination of apartheid and to suggest what action should be taken to secure the observance of the principles in the Constitution and to protect human dignity".

All conventions, reports, resolutions and conclusions emanating from the International Labour Organisation or its Governing Body must necessarily be consistent with the Constitution of the Organization, and where adopted unanimously there would hardly seem to be any room for doubt on that score—unanimously, that is, except for Respondent. If, then, such material discusses policy and practice relevant to the

"equal opportunity" provision of the Constitution, such discussion must, in turn, be consistent with the provisions. Being consistent, the substance of the respective conventions, reports, resolutions and conclusions of the I.L.O. must, in so far as they relate to the principle of non-separation and non-discrimination, be illustrative (illustrative at least) of the significance of the "equal opportunity" clause of the Constitution of the I.L.O. In the Applicants' view they are far more than illustrative, they form authoritative interpretations of the Constitution and, as has been said, if they are authoritative interpretations of a convention or constitution to which the Respondent has adhered—an organization of which it has been a Member—then such interpretations provide an authoritative basis for the interpretation and application of the standards embodied in the mandate instrument itself; these are taken in the context of the many resolutions of the General Assembly, of the I.L.O. Governing Body itself, in regard to this matter.

Material relating both to the Republic of South Africa and to the Territory of South West Africa has been adduced in the Reply on the basis of official International Labour Organisation sources. The reference to both the Republic and the Territory of South West Africa, notwithstanding the fact that the Republic of South Africa does not stand before the Court as the Republic of South Africa but as the Mandatory power over South West Africa, is justified and relevant because of the fact that, as determined by the competent agencies and organs, the allotment of rights and burdens and privileges on the basis of membership in a group, or race, rather than on the basis of individual merit, is a common feature, it is a basic aspect and feature common to the policy practised both in the Republic and in the Territory, as these resolutions, as these judgments make clear. These are not conclusions drawn by the Applicants; these are reflections of the judgments of the organs themselves.

The Applicants have made reference to official reports and conclusions, as well as conventions and the Constitution of the International Labour Organisation in their pleadings at various places, but specific reference is made in this context to the Reply, **IV**, at pages 406, 417-424, 431-438, and pages 508-509, and here, also, reference will be found to the Annex to the report of the Committee on questions concerning South Africa, which was the Committee set up by the resolution of the Governing Body of the International Labour Organisation on 15 November 1963, from which report the Applicants have quoted.

The Annex, which has been prepared by the Director-General of the International Labour Office, was entitled "An I.L.O. Programme for the Elimination of Apartheid in Labour Matters in the Republic of South Africa". Dated 1964, the Programme refers on its first page to reasons why it was concentrating on "three broad areas", namely—

> "Equality of opportunity in respect of admission to employment and training;
> freedom from forced labour (including practices which involve or may involve an element of coercion to labour); [and] freedom of association and the right to organise."

Among the reasons assigned in the Programme for focus of the Programme on the areas in question, to which I have just referred, were the following:

> "... they are the fundamentals of freedom and dignity; well-established standards approved by the International Labour Conference with near unanimity exist in respect of all of them; these standards give expression to principles proclaimed in the Declaration of Philadelphia as being among the aims and purposes of the International Labour Organisation ..."

The I.L.O. Programme, to which I am referring, likewise stated that such matters "have all been the subject of an exhaustive enquiry by authoritative I.L.O. bodies which affords an objective basis for the formulation of recommendations relating to them". So far as the Applicants are aware the functioning of the I.L.O. has not been impugned or brought into question in respect of motivation or otherwise by the Respondent in these proceedings.

In paragraph 148 of the Programme, the following principles were stated in the form of conclusions of the Programme itself:

> "South Africa should recognise and fulfil its undertaking to respect the freedom and dignity of all human beings, irrespective of race, and as a first step in this direction should:
>
> *promote* equality of opportunity and treatment in employment and occupation irrespective of race;
>
> *repeal* the statutory provisions which provide for compulsory job reservation or institute discrimination on the basis of race as regards access to vocational training and employment;
>
> *repeal* all legislation providing for ... any ... form of direct or indirect compulsion to labour, including discrimination on grounds of race in respect of travel and residence, which involves racial discrimination or operates in practice as the basis for such discrimination;
>
> *repeal* the statutory discrimination on grounds of race in respect of the right to organise and to bargain collectively."

Although these conclusions are, in terms, as I have said, which the Applicants realize full well, applicable to the Republic of South Africa itself which does not stand before the Court in its sovereign capacity, but stands before the Court as Mandatory, they, nevertheless—these findings, these recommendations—are equally applicable in meaning, in spirit, and in purpose to similar and, indeed for all purposes material to this litigation, identical practices and policies in the form of acts—legislative acts—, administrative regulations, and official methods and measures for implementation of the laws and regulations which pertain in the mandated territory, and which are subject to precisely the same standards of application, and the same judgments as have been set forth in the Programme of the International Labour Organisation "for the elimination of apartheid in labour matters in the Republic of South Africa" as recently as last year.

[Public hearing of 19 May 1965]

Mr. President and Members of the honourable Court, in addition to judgments expressed and decisions taken pursuant to the Charter of the United Nations and the Constitution of the International Labour Organisation, the Applicants respectfully refer the Court to further evidence of the general acceptance by the international community of standards

relevant to the proscription of governmental policies by which rights, privileges, burdens, status are allotted on the basis of membership in a group or race, rather than on the basis of individual quality or merit, and such further evidence may be found in the Reply, **IV**, at pages 493-510, and will not be read into the record at this point.

This, Mr. President, completes the Applicants' arguments that the procedures of the competent organs of the organized international community have evolved international standards of non-discrimination and non-separation which govern authoritatively the interpretation of Article 2 of the Mandate.

The Applicants turn now to their contention that these international standards, as defined in the Reply at page 493, have attained the requisite degree of authority so as to qualify as an international legal norm. The Applicants contend that the international standards pertaining to moral well-being and social progress operate by way of, by force of, interpretation and application of the mandate instrument, that they operate as *per se* restrictions, as authoritative interpretations of the mandate obligations, and that such interpretation and application applies irrespective of administrative and legislative discretion in respect of the Territory.

As the Applicants contend with respect to the international legal norm, such norm would, if it exists and if it is applicable as the Applicants contend, render irrelevant, as a matter of law, any issue with regard to the limits of the Respondent's discretion pursuant to the first paragraph of Article 2. Even as a sovereign State, Respondent must govern in accordance with international law. Its obligation as Mandatory to promote well-being and social progress, in accordance with the obligations of the sacred trust, do, of course, require that the international law, the international legal norms pertaining to the Respondent's obligations as a sovereign State and as Mandatory, apply *a fortiori* to the Mandate itself. The jurisdiction of the Court to determine the obligations pursuant to international law, the international legal norm for which the Applicants contend, would be founded on, and cognizable under, the compromissory clause of the Mandate.

The Applicants contend that the international standard of non-discrimination and non-separation qualifies as law, qualifies as a legal norm, in accordance with, and pursuant to, the several sub-sections of Article 38, paragraph 1, of the Statute. Such demonstration depends upon acceptance by the Court of the Applicants' contention that formal acts of international institutions in certain circumstances, which the Applicants contend apply here, may and do possess a law-creating effect within the meaning of Article 38, paragraph 1, of the Statute.

By way of introduction to their analysis, the Applicants respectfully depict concisely the relevant international context. In recent times there has been a vastly increased effort on the part of the organized community to achieve general security, peace and justice through collective processes. There has been a consequently great and cumulative process of international action in the generation of norms and standards relevant to increasingly wide areas of social and human concern. There likewise has followed important changes in the processes by which norms and standards are created. In the *Tunis-Morocco Nationality Decrees* case the Permanent Court of International Justice affirmed that the character of basic international obligations reflects the conditions of international

society and that changes in the structure and history of international society have a bearing upon the manner and content of the development of international law. The Court, in that case, stated, at page 24, 1923, *P.C.I.J., Series B, No. 4*:

> "The question whether a certain matter is, or is not, solely within the jurisdiction of the State is an essentially relative question. It depends on the development of international relations. Thus, in the present state of international law questions of nationality are, in the opinion of the Court, in principle within this reserved domain."

The quoted passage reflects the dynamic content of international law and is relevant to an assessment of the difference between the international legal status of Respondent's policies of group separation or discrimination in the Territory in 1920, and the legal status of such policies in the year 1965. Among the developments in international society, which bear upon the character and the evolution of international law, the following appear to be of particular relevance to the issues joined in these proceedings.

In the first place, the diversity and multitude of States comprising the contemporary international order have brought in their wake new concepts and needs regarding the normative process itself. Collective judgments are, at once, more difficult to come by and more important to respect. Special significance is to be attributed, in the face of cultural, ideological and economic diversity of the members of the international community, to the fact that so high a degree of consensus, approaching unanimity, has been achieved regarding the incompatibility of apartheid with contemporary international norms of official behaviour.

Secondly, technological development and the spread of information in the arts of war and of transportation have made international society more inter-dependent. There is increasing awareness that events in one State cannot be isolated from concerns of international society in the maintenance of a system of minimal order. There is ever-increasing awareness that what is going on in the Territory of South West Africa has had great impact upon the welfare of nations and of peoples even in remote areas of the world, and, above all, that the demand increases that something be done in deference to minimum expectations concerning the content of human dignity. The process summarized in the quotation from the *Nationality Decrees* case has not diminished sovereignty, but has recognized the necessity for an awareness on the part of States that enlightened self-interest requires due adaptation to the needs and standards of inter-dependence. Such an awareness should characterize to the highest degree the administration of a mandate, an international institution, the origin and terms of reference of which make abundantly clear the concern of the international community with regard to the protection of the welfare of individual human persons.

As Judge Jessup pointed out in his separate opinion appended to the 1962 Judgment:

> "The mandates system was one of at least four great manifestations in 1919-1920 of the recognition of the interest of all States in matters happening in any quarter of the globe." (*I.C.J. Reports 1962*, p. 429.)

And the learned Judge continued by stating:

> "The conviction registered in the peace treaties at the close of

World War I in regard to minorities, labour, and dependent peoples, was that just as peace was indivisible, so too was the welfare of mankind." (*Ibid.*, p. 431.)

Acknowledgement of inter-dependence is much more of a universal phenomenon than was the case 45 years ago when this Mandate was conferred. The international society has exhibited most profound anxiety that unless the Respondent can be persuaded to adapt its racial policies to the minimum international legal norm, and minimum international standards of the same content, tensions will continue to mount with increasingly dangerous eruptive potential.

Thirdly, the connection between world peace and the protection of human rights in the international sphere has become increasingly manifest. International co-operation in the human rights field has proceeded from this premise with a sense of increasing urgency. It is a trend especially evident in connection with the effort by the organs of the United Nations to deal with Respondent's policies of separation and discrimination. The organized international community insistently proclaims the need to correct perceived abuses of human rights, most particularly where such abuses are implemented as part of authorized government policy.

When these factors are taken into consideration in connection with the assessment of an international function of administration of an international territory subject to international regulations, the status of the territory itself gives authoritative weight to the concern and values of the international community with regard to a basic abuse of minimum standards and a minimum legal norm. International concern that apartheid constitutes a threat to international peace and security, as evidenced in unanimous Security Council resolutions, was discussed by the Applicants during the Oral Proceedings of 17 May.

Fourthly, within the area of human rights the most significant developments have focussed upon the evolution of standards pertaining to matters of racial equality, non-discrimination and non-separation. This subject-matter, as the Court will be aware, and as the record makes clear, has dominated the human rights activities of international institutions, and abuse in this area has been identified with a consensus approximating unanimity as an affront to human dignity, as a serious impediment to individual well-being, and as a grave threat to international peace and security. It is not too much to say that one of the foundation stones of international peace is the establishment and implementation of international standards pertaining to racial discrimination, and this marks a vast advance, as the Court will be aware, from the Covenant of the League to the Charter of the United Nations.

Sixthly, international society lacks legislative organs, and for this reason it has had to rely on other than legislative procedures to change and evolve international standards and norms, and the Applicants will consider shortly the implications of this requirement. The need has grown acute, in the light of expansion of international society and the increasing role of international institutions. For this reason scholars have increasingly urged that suitable and, in appropriate cases, *quasi*-legislative effect be given to official acts of international institutions. Only thus can an important gap in the international legal order be filled.

The absence of a legislative capacity as such in the international order has an important bearing, of course, upon the outlook of international

judicial organs. As Judge Sir Gerald Fitzmaurice has written—and I refer to his article "Hersch Lauterpacht, The Scholar as Judge", 37 *British Yearbook of International Law, 1961*, I quote from pages 14 to 15—

> "Domestic courts can, if they wish, plead with some plausibility as a ground for not going beyond what is barely necessary for a decision that a national legislature exists which can, by legislative action, remedy any gaps or obscurities in the law. In the international field there is at present nothing comparable to a legislature, and the operation of the so-called law-making treaty is both uncertain and leaves many loose ends. The international community is therefore peculiarly dependent on its international tribunals for the development and clarification of the law, and for lending to it an authority more substantial and less precarious than can be drawn from the often uncertain and divergent practices of States, or even from the opinion of individual publicists, whatever their repute."

Seventhly—consideration: closely connected with the need in international society for at least *quasi*-legislative capacity in appropriate situations, is appreciation of the ordering role played by the organs and specialized agencies in the great system of the United Nations itself, of which this Court forms the judicial arm. The same is true of regional institutions in world affairs. The world order attributes increasing importance to the normative functions of international institutions and acknowledges that actors other than States may evolve authoritative international standards as well as international legal norms. Fundamental to such a modernization process is the degree to which a single, recalcitrant State, or a small minority of States, may be permitted to veto or block the emergence of authoritative standards, or legal norms, in international society, and thus paralyse the growth and development of international law itself.

Underlying this question is the extent to which the reality of unanimous sovereign consent is an essential ingredient in the formation of an international legal norm or international standards binding upon all States. The Applicants contend that the Court should confirm the role of international consensus as a source of international law within the meaning of Article 38 of the Statute of the Court and within clear, practical limitations. "Consensus" is used by the Applicants to refer to an overwhelming majority, a convergence of international opinion, a predominance of view; it means considerably more than a simple majority, but something less than unanimity. These words and phrases introduce no ambiguity in the context of this case. There is a virtual unanimity with regard to the practice and policy of apartheid, and the shadings and nuances of language or terminology are irrelevant here.

If the resources of law are not available, only force is left to implement the preponderant will of the international community, most manifest in this case. The use of force, if accepted in the context of a threat to or breach of international peace or act of aggression, is accepted without positing the necessity of the consent of all States. The notion of literal universality should not constitute an impediment to the legal order, to pacific settlement, particularly in the face of governmental policies which have been denounced by the international community to be sources of international tension and even threats to the peace.

The need for judicial settlement by the application of the consensus of civilized States becomes even more compelling in such a situation, and if the use of force itself does not rest upon unanimity the maintenance of peace should rest on no narrower basis.

A substantial increase in the normative function of the organized international community is found in the relaxation of the requirement of unanimous consent in the decision-making procedures of the United Nations in contrast to the procedures obtaining during the lifetime of the League of Nations. Such normative capacities of the General Assembly are relevant to the Applicants' submission that the principle of non-discrimination is an international legal norm: the relevance is established in at least two respects.

First, there has been authoritative definition of the scope, character and applicability to Respondent's policies, of the international legal norm found in Article 55 *(c)* and Article 56 of the Charter, read in the light of the over-all affirmation in the Charter of the connection between human rights and obligations of Members.

Secondly, conclusive evidence is to be found in the many judgments of member States that the standards evolved by the organs in the United Nations do in fact constitute an international legal norm. Further evidence of the law-creating competence of the United Nations is dramatically evidenced by Article 2, paragraph 6, of the Charter:

> "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security."

This provision in itself makes clear the extent to which the international legal order has found it necessary to abandon the strict requirements of universal sovereign consent.

The Applicants turn now to a more detailed analysis of the legal framework in which the international legal norm of non-discrimination and non-separation has evolved, and the reasoning by which it is determinative of Respondent's duty to refrain from the policy and practice of allotting rights and duties, burdens, privileges, and status, upon the basis of membership in a group or race rather than upon individual merit, capacity and worth.

Article 38 (1) *(a)* of the Statute has in a sense been disposed of and covered in connection with the discussion of the development of standards. This material, which was covered in the Oral Proceedings yesterday, would, in the Applicants' submission, be relevant here as well since it falls within the rubric paragraph *(a)* of Article 38 (1) in the context of the development of a legal norm as well as the development of an international standard.

The Applicants have sought to demonstrate that international practice in conjunction with the human rights and non-discrimination provisions and purposes of the United Nations Charter, and of the Constitution of the I.L.O., have evolved authoritative standards of non-discrimination and non-separation; and, as I have said, the same evidence, the same materials, the same sources, support the Applicants' contention that these standard-creating procedures have eventuated in an international legal norm of the same content and scope.

The essence of the position is that the Articles in question, Articles 55

(c) and 56, impose legal duties susceptible of definition by a consensus of the membership of the Organization when such consensus, as in this case, approaches unanimity and, indeed, in many resolutions, actual unanimity but for the sole dissenting vote and voice of the Respondent itself.

Specifically in this context, the formal acts of the constituent organs of the United Nations have produced an authoritative construction of Articles 55 *(c)* and 56 of the Charter, *inter alia*, such that the practice of apartheid is legally impermissible. Thus, the norm of non-discrimination and non-separation emanates from the Charter itself and is binding upon Respondent as a treaty norm within the meaning of Article 38 (1) *(a)*.

With regard to Article 38 (1) *(b)*—international custom, as evidence of a general practice accepted as law—the Applicants respectfully submit the following.

Sub-section *(b)* of Article 38, paragraph 1, says nothing about unanimous consent as a prerequisite to the coming into being of a customary norm. It does not posit that practice must be universally accepted, nor that all States in their sovereign capacity must accept this practice as law. The language of paragraph 1 *(b)* is more in accord with the view that custom of a preponderant majority of States may in appropriate situations generate norms.

In common parlance, a custom may develop and exist despite objection during its period of emergence. So long as international society was highly decentralized it was necessary to rest law-creating procedures on State practice. With the growth of an organized international community, with constituent organs, it is increasingly reasonable to regard the collective acts of the competent international institutions as evidence of general practice accepted as law.

The resolutions of the General Assembly identifying apartheid as contrary to the Charter and to international law are, accordingly, relevant to an appraisal by the Court of the Applicants' contention that Respondent's policies violate an international legal norm of non-discrimination and non-separation.

As was noted in an authoritative work on the Charter of the United Nations, by that title—*Charter of the United Nations* (in the revised edition, at p. 457—this is the well-known work by Goodrich and Hambro):

> "All the various organs of the United Nations will simultaneously be engaged in thus interpreting different provisions of the Charter and will build up the practice which will gradually assume the character of customary law."

Where, as here, there is virtually unanimous agreement among the various organs as to the impermissible and illegal character of Respondent's policy, the views just quoted from the work of these learned authorities assume even more persuasive force.

Another authority, Mrs. Rosalind Higgins, Chatham House, London, in her work—*The Development of International Law by the Political Organs of the United Nations*, published in 1963 by the Oxford University Press, has analysed the point as follows, and I quote from page 1 of her work:

> "Of all these sources, that is to say in Article 38, international custom is the most flexible, the most fluid and as such is exceedingly responsive to the changing needs of the international community.

> Customary international law is therefore perhaps the most 'political form of international law reflecting the consensus of the great majority'."

The criterion advanced in this work is the "great majority" and not "unanimity". All human experience demonstrates that whatever requires regulation by law will be opposed by some who are to be the object of the regulation; a veto power over the process by which customary law emerges undermines the capacity of international society to develop international law to meet developing needs, and the capacity to develop and give effect to international custom is not equivalent, in our view, to endowing the General Assembly with legislative law-making powers or competence.

As the authority just quoted, Mrs. Higgins, in the work cited, further stated:

> "Resolutions of the Assembly are not *per se* binding though those rules of general international law which they embody are binding on Member States, with or without the help of the resolution, but the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence. These resolutions of the Assembly, which deliberately rather than incidentally provide declarations on international law are invariably based on other *quasi* judicial forms of support." (*The Development of International Law by the Political Organs of the United Nations*, p. 5.)

The author here refers to the work of international commissions and agencies, such as the International Law Commission; the foregoing views are applicable to Respondent's policies in South West Africa in a direct and most forceful manner. These policies have been subject to *quasi*-judicial scrutiny over the last decade or more by organs of the United Nations as distinctive as the International Labour Organisation and Committees of the United Nations in various forms, such as the South West Africa Committee itself. It is against this background that the Applicants contend that the international standard of non-discrimination and non-separation has ripened into a norm of customary international law within the language and meaning of Article 38, paragraph 1 *(b)*, of the Statute of the Court.

Respondent argues against the existence of such a norm, largely on the grounds of its own persistent opposition to its emergence. In the Rejoinder, V, page 141, the Respondent invokes the dictum in the *Fisheries* case to the effect that, and I quote from the *I.C.J. Reports 1951*, at page 131, that—

> "The ten-mile rule would appear to be inapplicable as against Norway inasmuch as she always opposed any attempt to apply it to the Norwegian coast."

On the same page of the Rejoinder, Respondent cites an article by Judge Sir Gerald Fitzmaurice, which suggests that a State dissenting from a general norm being formed in the international community may enjoy an exemption therefrom even if the norm is brought into being for international society as a whole. Respondent's reasoning, however, ignores the role and the capacity in which Respondent appears before this honourable Court; it is a Mandatory. Respondent's citation of Judge Sir Gerald Fitzmaurice's apt summary of the traditional doctrine would be rele-

vant only if the subject of this litigation were apartheid within the Republic of South Africa itself. The argument indeed becomes self-incriminating when read in the true light of the posture of the Respondent in this litigation. Thus, the very language of the learned Judge, quoted in the Rejoinder, may be cited as demonstrating that a norm applicable to Respondent as Mandatory could evolve without its consent, and I cite particularly the following language from the learned Judge's article in 30 *British Yearbook of International Law*, at page 25 (1953), the article quoted by Respondent in the Rejoinder to which I have referred, where the learned Judge says:

> "... if (i) at some time in the past ... any other 'dissenting' State had in fact, under international law as it then stood, enjoyed rights wider than those conferred by international law in its present form, and (ii) on the emergence of a new and more restrictive rule, had openly and consistently made known its dissent, at the time when the new rule came, or was in process of coming, into otherwise general acceptance, then the dissenting State could claim exemption from the rule even though it was binding on the community generally and had become a general rule of international law."

If the Applicants analyse this passage correctly, it admits that all that is necessary, to establish a norm governing the interpretation and application of Article 2, exists in this case. Even if Respondent, as a protesting sovereign State, could claim exemption from the norm in respect of the Republic itself, the law-creating process of the international society cannot be paralysed by its veto power as applied to the Mandate, a territory with an international status, over which the Respondent exercises an international control, subject to international accountability. The Applicants contend that Article 2, paragraph 2, is governed on a *per se* basis by existing international legal norms, especially because of the fact that the Mandate itself is an international regime; such contention is reinforced by the special claim to exercise control on behalf of the well-being of the inhabitants, which derives from Article 22, paragraphs 1, 2 and 6, of the Covenant of the League of Nations. A State *qua* Mandatory has no basis for asserting its discretion to violate a norm once it is granted that the Mandate must, above all else, be administered in accordance with international law. If Respondent could veto international rules governing the Mandate, it could effectively destroy the dynamic international character of the institution itself. Traditional doctrine concerning the formation of customary international law, both as it has been formulated by this Court and by international jurists, has encountered a difficulty, already mentioned, arising from the concept that sovereign States are bound only by rules to which they give their consent, either expressly or tacitly—the argument being that custom rests on tacit consent or at least on acquiescence or the absence of protest. Thus, the International Law Commission has stated—I quote from the *Yearbook of the International Law Commission*, Volume I, 1950, at page 275—as follows:

> "The emergence of a principle or rule of custom in international law is generally thought to require presence of the following elements: concordant practice by a number of States with reference to a situation falling within the domain of international relations; continuation or repetition of the practice over some period of time; conception by the States engaged that the practice is not forbidden

> by prevailing international law; and general acquiescence in the practice by States other than those engaged."

Such a formulation clearly is meshed with the emergence of customary international law as a consequence of State practice, rather than as a result of the formal standard and norm-setting processes of the organized international community, acting through its competent organs. As such, the statement just quoted overlooks the centralization of the normative process in international society resulting from the existence and the expanding role and the ever-increasing importance, of a decisive nature, of the international institutions themselves. It is principally in the light of such an expanding role, and its peculiar relevance to the norm contended for by the Applicants that makes it appropriate to judge in these proceedings that a broad interpretation of Article 38, paragraph 1, of the Statute (especially sub-section *(b)*) applies to and governs the establishment of an international legal norm of the character described and which has particular reference to the territory under mandate.

The Applicants conceive that the status of customary international law should be viewed in the perspective set forth recently by Dr. Wilfred Jenks in his work, *The Prospects of International Adjudication*, published in 1964. I quote a brief passage from page 225 of Dr. Jenks' recent work; the opening paragraph of this scholar's chapter on customary international law in relation to the work of the International Court of Justice reads as follows:

> "In recent times a cataclysmic rate of political, economic and social change has produced widespread uncertainty concerning much which was previously thought to be well-established law. In these circumstances the nature and extent of the proof of custom required in international adjudication may have a decisive bearing on the extent to which such adjudication promotes effectively the rule of law in world affairs or is a further unsettling factor which constitutes a new source of uncertainty."

Dr. Jenks urges the view that if the requirements for proving custom are imposed too rigidly by the Court, the relevance of international law to the concerns of men and nations itself is drawn into question. He adds, and I quote from the same page of the work:

> "A number of International Court decisions raise in an acute form the question of the degree of universality and generality of practice of which proof must be afforded to establish the existence of a rule of customary international law; a thorough re-examination of the question of proof of custom is therefore a necessary element in any satisfactory appraisal of the prospects of international adjudication."

The Applicants consider that it may be relevant in this regard to take note of the *Fisheries* and *Asylum* cases, both of which may be said to embody dicta uncongenial to the approach so strongly urged by scholars such as Dr. Jenks. These cases, however, when examined more closely, appear to the Applicants to be irrelevant to, rather than inconsistent with, the contention of the Applicants that a legal norm of non-discrimination or non-separation may be supported by and found in terms of Article 38, paragraph 1 *(b)*, of the Statute of the Court.

In the *Asylum* case, *I.C.J. Reports 1950*, at page 266, as the Court will be aware of course, the subject-matter in dispute involved the existence

of a norm in the field of human rights; there was placed in issue an unreviewable discretion on the part of a State to grant asylum in its Embassy to a political fugitive. The Court held that:

> "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with the constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State." (*I.C.J. Reports 1950*, p. 276.)

Notwithstanding the phrase just quoted, "constant and uniform usage", the Court rejected the claim of customary norm on the ground, and I quote here again, this time from page 231 of the Opinion, that—

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence."

It would be difficult to find a case in which the situation from a factual and legal point of view is more in contrast to this one than the pattern described in the passage just quoted from the *Asylum* case. The *Asylum* case involved an adjustment of directly competing interests of States. On the other hand, indeed to the contrary, the norm of non-discrimination and non-separation involves the promotion of common interests and collective interests of States, and of the organized international community taken as a whole. These are, moreover, common interests which rest upon a widely shared and deeply felt and often eloquently expressed humanitarian conviction. In this respect apartheid corresponds to genocide, and the nature of the law-creating process in response to both has been remarkably similar: one in which the collective will of the international community has been shocked into virtual unanimity, and in which the moral basis of law is most visible. It is precisely because there is an offender that there has been a drive to create a norm. If the offender is allowed to avoid the legal condemnation of his action by stating a protest, then international law is rendered impotent in the face of a grave challenge to the values underlying the international social order.

In the *Fisheries* case the Court affirmed, as I have said, that "the ten-mile rule would appear inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast". But the Court emphasized many other factors as well, including Norway's long historical claims, its peculiar economic dependence on fisheries, the general toleration of other States, and the acquiescence by Great Britain, the other party, itself over a long period of time. Here again the alleged customary norm was a matter of adjusting directly competing or conflicting interests of States differently situated, littoral States versus maritime States; it did not involve the enforcement of a world community

standard against a sole dissenter who is moreover discharging responsibilities on behalf of that very community. The proof of custom appropriate to the evolution of a customary norm of international law of this character is a consensus manifest from the formal acts of the competent organs of the international community. Such a law-creating procedure is a functional requirement of the contemporary order, even given the rudimentary nature of the collective processes now existing. Such a procedure parallels the evolution of custom by State practice, which is ascertained by the inter-action of States. Here it is generated through expressions manifesting a collective judgment, a collective will. The Court in the past has been faced essentially with claims alleging the existence of norms arising out of State inter-action. It is in this respect that the Applicants may perhaps appropriately refer to this case as rare in the annals of this Court or its predecessor, inasmuch as the background of precedents, two of which I have cited, is less relevant than might at first appear from the generality of the language traditionally used by this Court and its predecessor in cases involving the conflicting or competing interests of States and the inter-action of States.

The late Judge Sir Hersch Lauterpacht suggested that concepts of sovereign consent and universality, if taken literally, would impoverish the dynamic possibilities for the growth of international law, as well as undercut much of the law in being. The learned author asked and responded to a revealing rhetorical question—I quote from his work *The Development of International Law by the International Court of Justice*, 1958 edition, pages 191-192, as follows:

> "If universal acceptance alone is the hall-mark of the existence of a rule of international law, how many rules of international law can there be said to be in effective existence? Any such acceptance of the standard of universality as the test of the existence of a rule of international law may be open to the objection that it puts into question the existence of most rules and principles of international law. For this would appear to be the result of a judicial method which declines to treat a widely adopted practice as constituting accepted international law and which elevates the attitude of a small number of States to the authority of a practice entitled to equal—or greater—respect."

Respondent's insistence that its protest should be permitted to obstruct the formation of a legal norm, even in a context in which the world community has an interest as manifest as in the Mandate, would seem to paralyse the dynamic aspects of international supervision by allowing the Mandatory's objection to freeze the content of Article 2, paragraph 2; the core and essence of the sacred trust itself. Such discretion vested in a mandatory must be exercised with appropriate appreciation of the relevance of the will of the organized international community on the issue of whether or not the norm contended for by the Applicants actually exists. Such appreciation, if taken together with Judge Lauterpacht's advocacy of "predominance" rather than "universality" as the measure of general practice and acceptance by nations, makes out an overwhelming case for the Court to acknowledge the existence of the norm of non-discrimination and non-separation as a matter of customary international law, and once so acknowledged, makes its application to the Mandate a *per se* matter, in the Applicants' submission.

Article 38 (1) *(c)*: "... the general principles of law recognized by civilized nations". This third source of international law has concededly a somewhat indefinite scope and application, and yet is helpful as an independent foundation for the Applicants' theory of the case on this branch of this legal theory, with respect to the evolution of an international legal norm of the sort described in the Reply, **IV**, at page 493. This sub-paragraph of Article 38 (1)—sub-paragraph *(c)*—helps not only as an independent foundation for Applicants' theory of the case in the respect relevant here, but also to supplement and reinforce the other explanations advanced by the Applicants to demonstrate the existence and applicability of an international legal norm or international standards that govern the interpretation of Article 2 as a matter of law.

In the jurisprudence of the Court, "the general principles of law" have been generally used to fill in gaps in international law by relying upon private law analogies, based upon legal rules and institutions commonly found in municipal legal systems. As such, Article 38 (1) *(c)* provides a way to enrich international law on the basis of what may be called comparative law research. There is no tradition, as with customary international law, of premising the existence of a general principle of law upon evidence of universality, or the absence of any protest, or upon a sense of obligation with respect to a duty. As such, it is the source of law least closely tied to the ideas of legal obligation associated with the approach of legal positivism. In this regard, Article 38 (1) *(c)* has frequently been identified as the manner by which the perspectives of natural law can be most easily accommodated in a developing international system. But in addition, in relation to Article 38 (1) *(c)*, it would seem most appropriate for the Court to confirm the role of consensus as manifest in the formal acts and proceedings of the competent organs of the international community as a source or basis of international legal norms.

In this respect there would be two ways in which Article 38 (1) *(c)* might establish, or at least strengthen, the Applicants' contention that a legal norm of non-discrimination and non-separation has come into being in international society. The first would be to regard the presence of laws and regulations against racial discrimination and segregation, in the municipal systems of virtually every State, as establishing, by comparative law analysis, an essential precondition for the assertion of the norm of non-discrimination and non-separation as a "general principle of law", within the meaning of Article 38 (1) *(c)*.

The second approach might be to regard the international consensus, as, for example, evidenced in the Reply, **IV**, at pages 493-510, as a general principle of law recognized by civilized nations everywhere in the world. Such an approach would view the interpretation of the sub-divisions of Article 38 in light of the needs of the developing international legal order, giving to Article 38 a dynamic content, and thereby giving full scope to the fact that the Statute of the Court is an integral part of the Charter of the United Nations and is itself capable of, and entitled to, the same flexible principles of interpretation as have been applied to the remaining provisions of the Charter itself. This of course applies with even greater force to the mandate instrument, an international regime. The Statute of the Court, as an integral portion of the Charter, underscores the point that this Court itself is formally constituted as an institutional component of the organized international community, thereby making it highly

appropriate to give effect to the law-creating processes active in other segments of this same international community, of which the Court is the high judicial tribunal.

All legal systems, of course, have evolved from some social consensus on matters of basic social rights and duties. International law has developed and established much of its content by crystallizations of the *jus gentium* or *consensus gentium*, if we may use that phrase, in the period of its growth over the centuries which preceded the formulation of Article 38 of the Statute.

Restrictive approaches to the interpretation of Article 38 (1) *(c)* tend to reflect either jurisprudential attachment to legal positivism or—which amounts to much the same thing—to absolute doctrines of sovereignty which subject *all* international legal obligations to the requirements and strictures of universal consent. Such a perspective would not only deny the functional requirements of an effective international legal system, given the needs and structure of international society as it currently functions and some of the main characteristics of which were shortly and briefly enumerated in an earlier phase of this morning's proceedings by way of introduction, but would also ignore the close association of general principles with the ideas of equity and natural justice, which have been present since 1920. For example, when the Committee of Jurists drafted the Statute of the Court it was present; for instance, one of the leading members of the Committee of Jurists which drafted the Statute of the Court, Baron Descamps, referred to this source of international law in terms of (and I quote from Judge Manley Hudson's book *The Permanent Court of International Justice 1920-1942*, pp. 194-195) "the legal conscience of civilized nations", a phrase reminiscent of Judge Alvarez' reference to the "juridical conscience of the peoples" as a source of international law. M. de Lapradelle, also a member of the same Committee of Jurists in 1920, said, and I quote again from Judge Hudson's book, that "the general principles" would enable the International Court to "judge in accordance with law, justice, and equity".

Mr. Rosenne has come to the following conclusion concerning the character of Article 38 (1) *(c)*:

> "These instances show that the 'general principles of law recognized by civilized nations' are not so much generalizations reached by application of comparative law ... as particularizations of a common underlying sense of what is just in the circumstances. Having an independent existence, their validity as legal norms does not derive from the consent of the parties as such, provided they are norms which the Court considers civilized States ought to recognize." (*The International Court of Justice*, p. 423.)

This, of course, is a conception of Article 38 (1) *(c)* which demonstrates the relevance of general principles of law to *(a)* the acceptance of the consensus of the organized international community as a source of international legal norms, and *(b)* a construction on a *per se* basis of the meaning and intent of Article 2 (2) of the Mandate in question here.

International crimes, such as piracy, evidence processes by which the international community has *acted as a whole* to uphold its *common* interests, making use of norms and standards in those cases to confer an extraordinary power of jurisdiction upon member States and nation

States. In the absence of international institutions, the manner of dealing with common danger historically has been the expansion of the normal competence of States, making each, in this sense, an agent of the whole, and to count upon decentralized actions, unco-ordinated actions, discontinuous actions of self-help to realize the common interest of the world, for example, in the suppression of crimes such as piracy.

Professor Charles Cheney Hyde has an interesting passage in his treatise which almost exactly coincides with or expresses the position of the Applicants in this litigation:

> "... the offence of piracy derives its internationally illegal aspect from the will of the international society. That society, by common understanding reflected in the practice of States generally, yields to each of its members jurisdiction to penalize any individuals who, regardless of their nationality, commit certain acts within certain places." (C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. I, p. 768, second revised edition 1945.)

What of course is relevant is the first part of the passage just quoted. Professor Hyde thus gives Applicants' conclusion with respect to apartheid, in as much as the Applicants contend that "apartheid", in the words of Professor Hyde, "derives its internationally illegal aspect from the will of the international society".

Similarly, the international crime of genocide has come to be accepted as part of the law of nations. Without an extended discussion of this point, the prohibition of genocide rests principally upon generality of practice, reinforced by a moral consensus and by a common set of interests in the suppression of that offence. The Court's Advisory Opinion in the case of *Reservation to the Convention on the Prevention of Punishment of Genocide* states:

> "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 11 December 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)." (*I.C.J. Reports 1951*, p. 23.)

The foregoing passage is relevant to the issues now before the Court.

The Court relied there, in the *Genocide Convention* case, upon a General Assembly resolution to construe the character of an international legal norm presented for consideration, and, furthermore, the Court found it legally relevant to discuss the impact of genocide upon the conscience of mankind, the moral law, and the underlying spirit, purposes and aims of the United Nations itself. Furthermore, it is apparent from the

quoted language that the Court regarded genocide as violative of international law even without the convention then before it. The law-creating process operative in the context of genocide seems clearly, in the opinion of the Court, to have been the manifest will of the organized international community.

It is, of course, true that when the Genocide Convention came before the Court no State was defending the practice of genocide. Respondent, of course, today stoutly defends the practice of apartheid.

The result of making universality a literal precondition of law formation is to make the organized international community incapable *in law* of taking action against an existing practice or policy, notwithstanding the self-evident fact that it is universally condemned.

General principles of law, for reasons set forth in the discussion just now presented to the Court, seem to the Applicants to provide a juridically sound basis for a decision that the international standard of non-discrimination and non-separation does qualify with the status of a legal norm. But even if the Court should reject the international legal norm, as such, as a general principle of international law recognized by civilized nations within the meaning of Article 38, paragraph 1 *(c)*, this source of law, nevertheless, would provide in any event the basis for an interpretation of Article 2, paragraph 2, which would establish the practice of apartheid as a *per se* violation in the light of the international standards for which the Applicants contend, and which are confirmed and demonstrated by precisely the same considerations upon which the Applicants rest their case for the establishment of an international legal norm, as well.

The contention here is that "general principles" should guide authoritatively the interpretation by this Court of a document of an undertaking such as the mandate instrument. It is by recourse to these "general principles" that the Court has consistently read a requirement of equity and justice into its analysis of legal argument, and especially of treaties and other similar documents. Judge Manley O. Hudson in the *Diversion of Water from the Meuse* case, *1937, P.C.I.J. Series A/B, No. 70*, pages 76-77, made the point in detail that the authority of the Court to apply "general principles of law recognized by civilised nations" gives it—and I use the words of the late Judge Hudson—"some freedom to consider principles of equity as part of the international law which it must apply".

In connection with the interpretative act itself the Applicants also cite Judge Lauterpacht's Opinion in the *South West Africa (Voting Procedure)* case.

I would quote briefly from the *I.C.J. Reports 1955*, page 105; there the learned Judge was emphasizing the principle *nemo judex in re sua* in approaching an interpretation of the Mandate, a principle which, given the character of the underlying instruments, provides a solid legal basis for resisting the contention of Respondent that Article 2, paragraph 1, confers a virtually unlimited discretion in the face of contrary claims by the competent organs. And as Judge Lauterpacht expressed it, in the same general context:

> "In so far as the principle *nemo judex in re sua* is not only a general principle of law, expressly sanctioned by the Court, but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a

trust in which equitable considerations acting upon the conscience are of compelling application. This, too, is a general principle of law recognized by civilised States." (*I.C.J. Reports 1955*, p. 105.)

And it is interesting in this context to note the phrase "principle of good faith", of which we have heard much in these proceedings. It is also relevant to regard the recognition of reason and reasonableness as a premise for interpretation.

Reason enters into a determination of whether Respondent, in defiance of an overwhelming consensus in the international community, a consensus approaching unanimity, can continue its policy unilaterally or whether, in the light of its refusal to take account of relevant international standards, it has not committed a *per se* violation of its obligations. In the *Right of Passage* case the honourable Vice-President of the Court, Judge Wellington Koo, called attention to reason and reasonableness as a fundamental source of interpretative guidance by calling attention to Bynkershoek's dictum—"In the law of nations, reason is sovereign".

Finally and briefly, with the Court's permission, I turn to a discussion of Article 38, 1 *(d)*, in the relevant context. The trend toward legitimatizing the normative processes of the organized international community is evidenced not only by the judgments of the international institutions themselves, but also by the writings of international jurists devoted to the evolving needs of international life in the context of the traditional system of rights and duties of States.

In the opinion of scholars, as the Court will be aware, resolutions and formal acts interpreting the Charter were conceived even at San Francisco to have a central role in the development of the law of the Charter. Each organ was expected to interpret those parts of the Charter concerned with its particular functions.

Article 38 of the Statute of the Court represents a compromise between the jurisprudential traditions of legal positivism and natural law, as has been pointed out. One of the most convincing expressions of the relevance of natural law tradition to a construction of the predecessor of Article 38 of the present Statute is the work by Judge Spiropoulos, *Théorie générale du droit international* (1930), and the Applicants cite particularly pages 97 and the following. Natural law sets off the ethical conscience of mankind against the will of a sovereign State; consequently, the collective will of the organized international community becomes endowed with a law-creating competence which can overcome the defiance of a nonconforming State, particularly one which stands alone. Such competence exists *a fortiori* where basic considerations of human well-being are at stake, and again, *a fortiori*, where the nonconforming State is carrying out the functions of a Mandatory under an authorization from the international community itself.

Consequently, the provisions of Article 38 should be interpreted in a broad and flexible spirit. And President Basdevant said, at San Francisco, that despite certain inadequacies in the formulation of the sources in Article 38: "The Court has operated well under it and time should not be spent in redrafting it." (*UNCIO, XIV*, p. 120.)

I have quoted from Mrs. Higgins' work and I refer to it again only because as a major study of the development of international law by the political organs of the United Nations, it is significant to note the opinion expressed. I quote from page 2 of the volume cited:

> "Collective acts by states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law." (*The Development of International Law by the Political Organs of the United Nations* (1963), p. 21.)

The distinguished director of the Legal Division of the United Nations, Dr. Oscar Schachter, has expressed the view that a consensus approaching virtual unanimity, disclosed in resolutions by competent organs, would establish an interpretation of the Charter certainly entitled to great legal weight. In his lectures delivered in 1963 at the Hague Academy, Dr. Schachter said:

> ". . . one might start with the principle that an 'authentic' interpretation of a treaty by the parties is legally binding on them to the same degree as the treaty itself. I believe that it is generally accepted that this conclusion would hold for an interpretation of the Charter adopted by all the Members (or even 'by the overwhelming majority' except for some abstentions) in the General Assembly; the interpretation would be characterized by international lawyers as having the same legal force and effect as the Charter itself." (*Hague Lectures*, 1963, I, p. 186.)

The juristic background for the Applicants' theory of the case has been developed fully and explicitly in the writings of Dr. Jenks, to whom I have already referred, and in our view most clearly and persuasively in an essay by Dr. Jenks entitled "The Will of the World Community as the Basis of Obligation in International Law" in his work entitled *Law, Freedom, and Welfare* (1963). Dr. Jenks' concept of the will of the international community is equivalent to, and analogous to, the Applicants' reliance upon consensus as a basis of international legal obligation. In this regard it may be appropriate to call to the attention of the Court the recent decision by the United States Supreme Court in the well-known case, *Banco Nacional de Cuba* v. *Sabbatino*, 376 United States 398, decided in 1964, which has been the subject, of course, of considerable legal analysis and scholarly writing, even in the short interval since the decision was handed down.

But it is a case, and it is cited here only as, bearing upon the proposition that juridical relevance was accorded to the concept of consensus in construing the existence of an obligation under international law.

Dr. Jenks views the traditional sources of law in the light of the overriding relevance of the will of the world community.

In conclusion of this discussion of the Article 38, paragraph 1, rubrics or sub-sections, I should like to read from the work of Dr. Jenks, *Law, Freedom, and Welfare* published in 1963, at page 93. In the context in which Dr. Jenks was demonstrating the possibilities—as the Applicants perceive the context—for accommodating law-creating by the organized international community within the three main sub-sections of Article 38 (1) of the Statute, Dr. Jenks writes as follows, at the cited page:

> "The will of the community constitutes the basis of obligation but the law of the community comes into being by all the processes of legal development and growth known to mature legal systems. It is the will of the community that principles and rules evolved in accordance with these processes of growth shall be regarded as binding. Treaty, custom, the general principles of law recognized by civilized nations, judicial precedent and the opinions of the most

highly qualified publicists, all fall naturally into place as methods by which, in accordance with the will of the community, the law is developed to meet the changing and growing needs of an evolving society."

This seems to be a fitting place to stop the analysis and now to proceed, with respect, to a brief point-by-point reference to Judge Sir Gerald Fitzmaurice's questions in the series propounded by the learned Judge.

The Applicants have already ventured to respond to questions Nos. 8 and 10. With reference to question 8, a point of further consideration remains which will be considered in a few moments.

Following this next section, of a relatively short order, which will be directed to the remaining question of Judge Sir Gerald Fitzmaurice's series, it will be the intention of the Applicants briefly to respond to the question put by Sir Gerald Fitzmaurice on 13 May with respect to the rights, if any, of the Principal Allied and Associated Powers, following which, the Applicants will undertake to respond to the question propounded by the honourable President with regard to certain facts relating to Article 73 of the Charter of the United Nations. Then, following that, in closing the session, the Applicants will, subject to reservation of rights which will be stated, make their submissions, and will conclude then at the conclusion of the proceedings this morning.

On the basis of the discussion just concluded, it now seems appropriate to offer a series of specific replies to Judge Sir Gerald Fitzmaurice's series of ten questions. It will be noted that the Applicants already have commented upon the language in the preamble to the series of questions, and, in this regard, it may suffice to point out that the Applicants have *sought in their comments concerning* the preamble to establish a context for the specific answers—a context which, as was pointed out, consists of three main aspects.

First, the qualitative element of the obligation embodied in Article 2 of the Mandate; secondly, the authoritative and governing character of the standards and norm developed by the competent organs of the international community; and, thirdly, the apparently logical requirement that the defences of the Respondent are confined, under the legal theories of the Applicants, to disproving the qualitative nature of the allegation, and to showing that the standards and/or norm do not exist or are not applicable.

In the discussion just concluded, the Applicants have sought to vindicate their theory of the case by suggesting to the Court alternative and cumulative *rationales* of a juridical nature, by which the Court could find, on an alternative or cumulative basis, that Respondent's conduct in the sense which has been placed before the Court in the record and in these Oral Proceedings, is to be construed as a violation of Article 2, paragraph 2.

To summarize, the Applicants have sought to show, first, that canons of interpretation, viewed in the mandate setting, provide a basis for the construction of the obligation contained in Article 2, where these canons of interpretation suggest the authoritative relevance of the international standards which are reflected in the overwhelming consensus of the organized international community, upon whom this sacred trust was laid. By such means, the Applicants have sought to give content to the qualitative aspects of Article 2 and to demonstrate the incompatibility between the obligations of the Mandate and Respondent's policies

which are summarized and captioned by the term "apartheid" or "separate development".

This incompatibility is established as a matter of law, in the Applicants' submission, because of the qualitative character of the link between international standards relating to moral well-being and social progress, on the one hand, and the policy and practice of *apartheid* or separate development, on the other.

Subsidiary to this demonstration of Article 2 as what may be called a mandate norm—that is "a rule regulating the mandate", in the words of the Court in 1950—as a provision in an international treaty (that is to say that a mandate norm contained as a provision in an international treaty), is the view expressed at page 329 of the 1962 Judgment, that the Mandate establishes "a new international institution" which exists and which is viable as an autonomous international regime. It is the nature of this regime to establish a means whereby the international community can give effective expression to its overriding intention to set up a political institution, a device, which upholds the welfare of the inhabitants of the Territory; the institution, the regime, has no other purpose. The mandate institution can achieve its overriding purpose only if the competent organs of the international community may translate effectively their judgments on the subject of moral well-being and social progress into authoritative rules which take precedence over inconsistent judgments, no matter how deeply entertained, on the part of the agent of the international community, the Mandatory. It is in this context that the Applicants submit that the purposes of the Mandator must take precedence over the purposes of the Mandatory. To give content to this relationship between the competent organs, speaking for the organized international community, the Mandator, and the Mandatory, the Applicants respectfully urge upon this Court the authoritative application, as a matter of treaty—and conventional interpretation, of international standards of non-discrimination and non-separation.

Alternatively and cumulatively the Applicants have submitted that, given the institutional aspect of the mandate scheme, such standards have evolved into a distinctive normative category, namely that of international mandate rules.

Thirdly, and again alternatively and cumulatively, it is submitted that the international standards have evolved into the quality of international law, and that the Mandatory must be conclusively presumed to have intended, along with the founders of the system, to conduct its Mandate in accordance with international law. This makes it a matter of *a fortiori* application in the interpretation and construction and application of the Mandate itself. The Applicants contend that the material, the evidence, comprised of custom, general principles and the opinions of jurisconsults—that all this is evidence of the proscription of discrimination and non-separation as a matter of international law. If the Court does not accept this contention, it would still remain convincing beyond dispute, in the Applicants' submission, that the same evidence, the same sources and the same considerations establish the international standards even though they may not in the Court's view have attained the quality and status of an international legal norm.

In question 1, Judge Sir Gerald Fitzmaurice asks about the purely juridical basis of the norm of non-discrimination and non-separation for which

the Applicants contend. In the Applicants' respectful view, their attempt to show the emergence of an international legal norm constitutes a juridical exposition responsive, or intended to be responsive, to the learned Judge's basic question. In fact the Applicants feel that their demonstration of the legal effect to be given to the international standards either by way of canons of interpretation, or because of the Mandate as treaty, or because of the special attributes of the mandate institution (in which case it would become a norm of the institution itself—a rule of the institution) also provides the honourable Court with a purely juridical basis upon which to construe and apply Article 2 of the Mandate, viewed as a treaty or as an institution or both.

The Applicants adhere to their original characterization of the norm as a norm of non-discrimination and non-separation, as labelled and defined at page 493 of the Reply, **IV**, although it would seem with respect to have the same operative relevance to this litigation as would the phrase "non-apartheid norm" as used by the learned Judge in his question. The Applicants have stated their reasons for this adherence or, if the Court would prefer, insistence upon their classification or categorization of the policy by the use of the term "non-discrimination" or "non-separation", and we have attempted to state our reasons for that at the verbatim record, page 306, *supra*, and the Court will not be burdened with a repetition of that point here.

In his first question, Judge Sir Gerald Fitzmaurice also calls attention to "the great importance of the humanitarian and sociological considerations involved"; the learned Judge asks also that we, the Applicants, "have regard to the position of the Court as a court of law". The Applicants wish to assert, and take this opportunity to assure the Court, that such considerations as have been put before the Court have been regarded by the Applicants as exclusively relevant to the proper discharge of the judicial function of this Court. Humanitarian and sociological considerations, of course, form part of the international background of this litigation; these factors have played an important role, a formative role, in the crystallization of the very international standards for which we contend in the field of race relations, so much so that they have entered into the process by which the standards have developed the legal quality and status of a rule of international law—a legal norm.

Nevertheless, the Applicants ask the Court in the context here to apply traditional legal canons and principles to the interpretation of the obligations embodied in Article 2, paragraph 2—neither non-juridical or extra-juridical on the one hand, nor innovational on the other—but juridical and traditional. In this regard the Applicants advance a legal theory that is quite independent of the sociological and humanitarian considerations forming the background of the dispute and entering into the development of the judgment of the international community. But the Applicants' submissions depend purely on the interpretation and application of Article 2, paragraph 2, in the light of objective criteria, whether such objective criteria take the form of international standards or international legal norm, or both.

The second question propounded by the learned Judge enquires whether, irrespective of the answer given to question 1, the Applicants contend that, on the language of Article 2 itself, apartheid, as defined by the Applicants, "must necessarily and in all circumstances be illegitimate". In the Applicants' view the authoritative character of the

governing international criteria, whether accepted as standards merely or as a legal norm, necessarily do and in all circumstances make the practice of apartheid, or separate development, incompatible as a matter of law with the obligations contained in Article 2 of the Mandate. As the Applicants have sought to make clear, once the incompatibility exists in the context of an asserted qualitative violation of the Mandate, then enquiry into local circumstances, comparisons with material benefits, good faith considerations of the Mandatory's officials, the scope of discretion in Article 2, paragraph 1—all of these factors are in themselves irrelevant. Testimony or evidence with respect to them would be irrelevant. The demonstration of the violation, according to the Applicants' submission, depends exclusively and solely upon establishing the existence and applicability of objective criteria and the incompatibility therewith of the laws and regulations, and the measures and the methods, of an official nature, the existence of which is conceded by the Respondent.

This theory of the Applicants' case depends upon the link between the criteria and the terms of Article 2, paragraph 2, of the Mandate, as well as upon the entire Mandate setting within which the interpretative acts take place, and all this further within the context of what I have called the mandate jurisprudence which has evolved authoritatively in this very Court during the past 15 years. Hence the violation of Article 2 is not in a strict sense based, in the words of the learned Judge, upon the language of Article 2 itself but rather, in the Applicants' respectful view, is established by the language in its inter-relationship with the appropriate canons of interpretation, and most especially with the need to import evolving international standards into Article 2, paragraph 2, as an indispensable aspect of realizing the overriding purpose of safeguarding the sacred trust.

It is in this respect that the Applicants would, respectfully, emphasize once more that in addition to the fiduciary idea, the fiduciary connotation implicit in the Mandate, the mandates system brought into being a special regime, a novel institution, in the words of this honourable Court, which is to be administered by the Mandatory on behalf of the organized international community upon which the trust was laid, in the words, again, of the 1962 Judgment. And the Mandatory has no other function in the Territory, and the rights which it has are mere tools to enable it to carry out its obligations, again a matter of established mandate jurisprudence with respect to this very Mandate.

Thirdly, the Applicants have tried to answer Judge Sir Gerald Fitzmaurice's third question, in part, by their discussion of his preambular statement. In this question the learned Judge enquires whether "the criterion of compatibility with the Mandate" is the standard or measure as such, or "the actual results of the measure or practice concerned and its concrete effects on the well-being and social progress of the persons affected".

As the Applicants have submitted and would reaffirm, the test of a qualitative violation is whether the practice or measure is compatible or not with governing criteria specifying the quality sought, whether these criteria take the form of international standards or an international legal norm. The Applicants contend that apartheid is inherently incompatible with the objective criteria provided by international organs competent and responsible for giving an authoritative content to the

meaning of well-being and social progress of the inhabitants as, these terms are used in Article 2 of the Mandate, the essence of the sacred trust.

Fourthly, Judge Sir Gerald Fitzmaurice's fourth question asks whether the Applicants are prepared, and whether they propose, to furnish the Court with factual evidence designed to show the actual effects of Respondent's policies, in the words of the learned Judge. The Applicants, of course, are prepared or would seek to be prepared to provide the Court with whatever information or evidence the Court would rule to be relevant in establishing their theory of the case in respect of Article 2, paragraph 2, of the Mandate, or in any other respect. Nevertheless, it is the view of the Applicants that the nature of their legal theory and the sole basis upon which it rests, and has always rested from the earliest pleadings to the present time, renders irrelevant the calling of witnesses or the adducing of other forms of evidence designed to show the so-called "actual effects" of Respondent's policies in the Territory. Factual evidence of this sort would not, in the Applicants' view, have any relevance to or legal bearing upon their submission that apartheid, inherently and *per se*, constitutes a violation of the standards or the norm governing the interpretation of Article 2, or both.

With regard to questions 5, 6 and 7, these deal essentially, as understood by the Applicants, with the position of the Respondent; although of course it is understood that the questions have been propounded to both Parties, this series 5, 6 and 7 are in relation to the views of the Respondent. The Applicants have already sought to indicate their analysis of the Respondent's apparent theory of its obligations under Article 2, especially in connection with their rebuttal arguments and their comments upon the learned Judge's preamble. It suffices here, it would seem, to say in summary form that Respondent's submissions concerning the scope of its discretion, the realities of good faith and the character of the so-called actual effects upon well-being seem to the Applicants to be irrelevant to an assessment whether international standards and/or legal norms of non-discrimination and non-separation exist, and whether they govern the obligations of the sacred trust embedded principally in Article 2 of the Mandate.

The ninth of Judge Fitzmaurice's series of ten questions seems to put into focus the essential disagreement between the Parties as to the character of the obligation embodied in Article 2 of the Mandate, which the Applicants have sought to make clear by the arguments now concluding concerning the reasoning which underlies their distinction between the qualitative and quantitative aspects of Article 2, paragraph 2, obligations. If this case were brought on the theory, which it is not, that the Mandatory had built too few schools or hospitals in the Territory, then it might be appropriate to adopt a balancing approach to determine whether the duties with regard to the promotion of material well-being or other kinds of well-being were upheld. But this case is brought on the premise that Article 2 contains a qualitative element, violation of which is a breach of the Mandate.

The Applicants feel also that the character of the international standards and/or of the international legal norm of the same content, prohibiting discrimination and separation, entails a condemnation of apartheid in such absolute terms that it excludes reasonable possibilities of justifying or extenuating the practice by reference to other considerations which become extraneous as a matter of law, and I include

good faith, local conditions, material progress of a visible, tangible nature or any other kind. A value judgment, in other words, has been incorporated into the international standards and norm; the judgment is built into the standards, it is of the essence of the norm, and the Applicants submit that apartheid is necessarily and in all circumstances incompatible with the promotion of well-being and social progress of human beings and, in this case, *a fortiori* so, because the undertaking is to accomplish these objectives to the utmost.

I turn now to a supplemental response to Judge Sir Gerald Fitzmaurice's eighth question. The Applicants have been requested to give further consideration to the status of the French text of the Mandate. (The citation is to verbatim record, at pp. 264 to 265, *supra*.) The Applicants, in earlier response to this question, adverted to the fact that the English text is authentic and cited the reasons underlying that contention. The situation now appears to be as follows:

As pointed out by the learned Judge, the League Council embodied both the English and French texts in its resolution of 17 December 1920. Accordingly, as was pointed out by the learned Judge, both texts have been treated as official texts. In respect of the legal significance of the Council's action in this regard, it seems to the Applicants that the commentary on the Law of Treaties in the 1964 report of the International Law Commission may be a pertinent consideration. I quote from United Nations document A/5809, which is, as I say, the 1964 report of the International Law Commission:

> "When a treaty is plurilingual, there may or may not be a difference in the status of the different language versions for the purposes of interpretation. Each of the versions may have the status of an authentic text of the treaty; or one or more of them may be merely an 'official text', that is, a text which has been signed by the negotiating States but not accepted as authoritative; or one or more of them may be merely an 'official translation', that is, a translation prepared by the parties or an individual government or by an organ of an international organization."

In this case, as has been pointed out, the French translation was prepared by the Secretariat of the League of Nations, and in the communication covering circulation of the document the English text was stated to be the authentic text. It would seem on the basis of this commentary that the English text has been and remains the authoritative text.

Reference also was made by the learned Judge to the Permanent Mandates Commission; according to the minutes of the First Session, Second Meeting of the Permanent Mandates Commission of 5 October 1921, a member (I think it was Mr. de Vries) enquired "which text of the Mandates should be regarded by the Commission as authentic—the English text or the French text?" The Commission, according to the minutes from which I quote, "were agreed that the French text should be so regarded in the case of the French and Belgian Mandates and the English text in the case of the English Mandates". This is from the *Permanent Mandates Commission Minutes*, First Session, Second Meeting, 5 October 1921, at page 107.

It appears to follow, therefore, from the practice of the Permanent Mandates Commission, that in the case of the Mandate for South West

Africa the English text remains the authentic text, which would be consistent with the communication of the Acting Secretary-General of the League of Nations.

In respect of any question arising concerning possible distinctions between the two texts in terms of meaning or terminological significance with respect to obligational or substantive requirements or interpretation, the Applicants here would respectfully rest their case upon their earlier arguments and submissions with regard to the legal scope, nature and content of Article 2, paragraph 2, as these matters have been dealt with in reference to the English text in other contexts of their response to Judge Sir Gerald Fitzmaurice's series of questions as well as to their general arguments.

It would, in the Applicants' respectful submission, be the same result with respect to the French text, as understood by the Applicants. But we would rest upon the arguments we have made with respect to the English text, authentic in this case and applicable to this area,—arguments and contentions of a legal and substantive nature.

On 13 May, **VIII** (Minutes), page 36, the question was propounded regarding the residual or reversionary rights, interests or title which might revive and become operative, that is to say in relation to the Principal Allied and Associated Powers, in certain eventualities suggested in the question. The Applicants would have perhaps preferred an opportunity to reply to this question following, and in the light of, Respondent's answer to Judge Koretsky's question, which appears to be related in one aspect to the learned Judge's question with respect to the Principal Allied and Associated Powers.

The Applicants respectfully submit their response to Judge Fitzmaurice's question with the realization that it is not within the Applicants' competence, legally speaking, to encompass a full answer of the sort which the importance of the question naturally suggests and brings to mind at once. The law on the subject is far from clear, as the Court will know.

In 1950 the Respondent, appearing before the Court in connection with the Advisory Opinion proceedings, stated as follows—this is from page 276 of the *Pleadings, Oral Arguments, Documents* in the *International Status of South West Africa, I.C.J. Reports 1950*, Dr. Steyn speaking for the Respondent—

> "That, Mr. President, brings us to the crux of the whole question, namely, the effect upon the mandates of the dissolution of the League. In considering this aspect of the matter, it is necessary to recall that the Principle Allied and Associated Powers were *functio officio* after the mandate had been conferred and confirmed. Between the Union Government and these Powers, in their capacity as such, there was no further relationship, affecting the position of the Union Government, in regard to South West Africa. They had fulfilled their function *and had passed out of the picture*, except of course as Members of the League." (Italics added.)

The Rejoinder, V, at page 84, sets out a discussion of the matter which the Applicants will not seek to paraphrase or reformulate, but would respectfully call to the attention of the Court. As understood by the Applicants, there is here a reservation implicit but not explicitly stated, although this again is a characterization with which the Res-

pondent itself might not agree or the honourable Members of the Court might not agree (it is simply an interpretation by the Applicants of the intendment); there appears to be a tentative assertion with respect to the possibility that upon legal lapse of the Mandate, the title of the Respondent might possibly be based upon "rights of conquest". This contention, of course, would affect the possible reversionary interest or rights of the Principal Allied and Associated Powers, and it is in this sense that the Applicants thought they perceived a possible relationship between the question propounded by Judge Sir Gerald Fitzmaurice and the question propounded to Respondent by Judge Koretsky.

The Applicants would take a view contrary to that which is implicitly or tentatively set forth in the Rejoinder, V, at page 84. They would disagree for reasons which are related to the jurisprudence of the Mandate itself. The Court, in 1962, as the Applicants have reminded the Court, declared that the sacred trust was "laid upon the League as an organized international community"—that is from page 329, *I.C.J. Reports 1962*. In the Applicants' respectful view, the power of disposition of the Mandate and the terms of such disposition would either rest with the competent organs of the organized international community upon which the trust was laid, or it would rest upon an agreement between the organized international community and any other powers which might assert an interest, reversionary or otherwise, in the matter. It would appear to the Applicants that considerable difference might be implicit in the circumstances under which the problem might arise, in which organ of the United Nations a problem might arise or develop with respect to this weighty matter and it is only with diffidence, therefore, that the Applicants address themselves to the question at all, impelled by a sense of duty to the Court to do so. It would seem, in view of the fact that the Principal Allied and Associated Powers are all Members of the United Nations, that it is that the United Nations, in the Applicants' view, has replaced the League of Nations as the Mandator, that the United Nations has asserted a continuing interest in the Mandate, to understate the matter, that on these, and many other considerations of a legal nature, it would be difficult to envisage the disposition of this Mandate or even the analysis of its legal position assuming certain contingencies, not now before the Court, without the full expression of view of the United Nations itself. Therefore, the Applicants would respectfully rest on this point their response to the learned Judge's question, fully aware that from a scholarly point of view or from the point of view of legal analysis, it is less than adequate.

Turning to the question propounded to the Parties by the honourable President with regard to Article 73 of the Charter of the United Nations: during the Oral Proceedings of 13 May 1965, the honourable President propounded certain questions to the Parties, requesting that they give consideration to certain facts in connection with the response to Judge Jessup's question relating to the scope of Article 73 of the Charter of the United Nations, particularly with reference to the question whether that Article was intended to, or did, include territories held under Mandate at the time the Charter was drawn. I refer to the Minutes at **VIII**, pages 38 and 40, for the text of the questions propounded by the honourable President.

The Applicants, having made response to the question propounded by Judge Jessup, address themselves now to a consideration of the facts

enumerated in the series embodied in the question of the honourable President, and would request that their comments in response to Judge Jessup's question, in that context, be considered for what they are worth as relevant to the understanding and fuller appreciation of the Applicants' views with respect to the specific factual elements adduced in the question now propounded by the honourable President.

The Applicants would, with the President's permission, commence by reference to an important point of background or interpretation, which may be helpful in explaining or illuminating their approach to the specific questions which have been propounded—that it is a range of considerations which emerges from the practice in the United Nations itself with respect to this matter. The basic reasons appear most clearly from the *Repertory of Practice of the United Nations*, Volume IV, and reference will be made to specific page citations in the context of the brief discussion to follow, all by way of background to specific considerations related to the honourable President's question.

Two basic reasons explain why the United Nations has never treated South West Africa as a non-self-governing territory within the meaning of Article 73 *(e)* of the Charter. The first is that the United Nations was of the view that Article 73 *(e)* did not in law apply to mandated territories, hence, a third system, as the Applicants have ventured to call it, was established; secondly, the United Nations has approached the problem of what constitutes a self-governing territory within the meaning of Article 73 *(e)* of the Charter, not in relation to the *commencement* of the transmission of information in terms of Article 73 *(e)*, but rather within the context of the *cessation* of the transmission of information. The approach of the United Nations never has been to increase the list of non-self-governing territories under Article 73 *(e)* as originally listed in 1946, but consistently to decrease the number of territories on that list; the original list of non-self-governing territories, as I say, has never been increased.

As the *Repertory of Practice of the United Nations*, Volume IV, points out at page 86:

> "The questions relating to the determination of the territories to which Chapter XI of the Charter applies, have been examined very largely in relation to the cessation of information. Aspects of the obverse question have not been formalized."

The *Repertory* states also that apart from the original letter of the Secretary-General of 29 June 1964 addressed to the United Nations Members, with respect to listing territories which they regarded as falling within the coverage of Article 73 *(e)*, "the United Nations members" —and this is quoted from page 87, of the *Repertory*, Volume IV—

> "The United Nations members have not been invited to consider whether by the examination of factors or otherwise, areas under their administration should be regarded as falling within the scope of Chapter XI."

It has been contended on the one hand that the General Assembly had the right "to require other countries to transmit information on non-self-governing peoples under their administration"—that is from page 86, of the *Repertory*, Volume IV. On the other hand, it was argued, according to the *Repertory* that—

> "those who recognized the competence of the General Assembly to decide that the transmission of information should be continued, should also recognize its competence to decide that information should begin to be sent for a territory in respect of which no information had yet been transmitted" (p. 86).

This latter contention was never adopted, as far as the Applicants are aware.

Neither Respondent nor any other administering authority has ever been requested by the United Nations to add their dependent areas to the list of non-self-governing territories. This fact would, in the Applicants' view, demonstrate that the Assembly's reluctance or failure to treat South West Africa as a non-self-governing territory within the meaning of Article 73 *(e)* of the Charter was related to no special considerations such as desire to avoid encouraging the failure to submit a trusteeship agreement, or any other reason of a nature that pertains specially to the Territory. It would seem rather, from the history of the matter and from the discussion in the *Repertory*, as well as independent research concerning the history of the treatment of Article 73 *(e)*, that the Assembly's reluctance to treat South West Africa as a non-self-governing territory—and I use the word "reluctance" here, perhaps improperly—the Assembly's failure to do so was based upon a common practice, a reasoning and approach common to all dependent territories. The only questions that arose for formal consideration, with respect to listed dependent territories were with regard to de-listing, or, more accurately, the cessation of the transmission of information. After 1946, as I have said, the United Nations did not bring any dependent territories within the terms of Article 73, in addition to those that were on the list. This attitude towards the territory of South West Africa, accordingly, is completely consistent and in harmony with the basic approach toward all dependent territories other than those listed. The establishment of the third system, as we have called it, is especially applicable to South West Africa, and moreover appears to confirm that the United Nations has assumed, as a matter of Charter construction, that the Territory was not comprised within the category of non-self-governing territories to which Article 73 *(e)* applies.

Finally, by way of background, it seems essential to add that the provisions of Article 73 *(e)* are inappropriate and inadequate to cover the requirements of safe-guarding the sacred trust, as has been pointed out in the response to Judge Jessup's question. The contrast between the reporting requirements of Article 73 *(e)* and the supervisory functions requisite and essential to the safe-guarding of the sacred trust appears from the following factors, among others which distinguish the two systems.

First, the scope of reporting; Article 73 *(e)* does not provide for political information. It is moreover limited in scope to "statistical and other information of a technical nature". Reports as envisaged under the Covenant and Mandate encompassed the whole performance of the Mandate, in the words of the Hymans report (to which reference has been made on more than one occasion in the earlier stage of these proceedings). The whole performance of the Mandate could not be regarded as falling within the reporting scope of Article 73 *(e)*.

Secondly, no consultative procedures are envisaged in Article 73 *(e)*. Thirdly, no right of petition is provided for in Article 73 *(e)*. Fourthly,

no provision is made or implied in Article 73 *(e)* with regard to the hearing of petitioners. Fifthly, under Article 73 *(e)*, the information transmitted by administering authorities is sent to the Secretary-General for information purposes; it is summarized and analysed by the Secretariat, and recommendations are made only in functional areas and not to particular administering authorities, or in the context of particular dependent territories.

The Respondent itself has, during the course of the Oral Proceedings, well summarized the key elements of the supervisory system which is appropriate to the Mandate. In the verbatim of 14 April 1965 (**VIII**, p. 624) in the context of its discussion that the Court lacked judicial competence to deal with the alleged breaches of Article 2 of the Mandate, Respondent referred to the administrative supervisory system in the following terms:

> "... positive contemplation of the authors of the mandates system that in the functioning of this system mandatories would have the assistance and the collaboration of the Permanent Mandates Commission and the Council of the League—in other words, the assistance of those processes of administrative supervision, as well as the technical assistance, and expert assistance, involved therein which would really constitute a process of continual consultation between the mandatory and those administrative supervisory bodies; a process of consultation which would lead it from step to step in the application of certain policies".

The reporting scope of Article 73 *(e)* has very little in common with these requirements as they have been well-defined by the Respondent itself. As has been pointed out in the answer to Judge Jessup's question, Respondent itself—perhaps for this reason, one does not know—has never regarded Article 73 *(e)* as applying to the Territory. It has never added the Territory to the list of non-self-governing territories. It has maintained throughout this litigation that Article 73 *(e)* does not cover the Territory, and this is common cause between the Parties.

These comments are made by way of background, in order to relate the answers which will now be given to the honourable President's questions, to the context of the broader answers and more comprehensive considerations adduced in the answers to Judge Jessup's questions; this is because of the obvious relevance of these considerations to the facts related in the honourable President's questions, to which I now turn.

The first question relates to the significance to be attached to the fact that the discussion in Committee 4 of Commission II at San Francisco was based upon a working paper, introduced by a number of States, which paper was divided into two sections, namely "A—General Policy" and "B—Territorial Trustee System".

During the Oral Proceedings of 7 May 1965, at pages 135-138, *supra*, the Applicants endeavoured to treat the significance of the Working Paper, which is referred to in the honourable President's first question.

The Working Paper was, of course, based upon several proposals put forward by six States. (*UNCIO*, Vol. 10, pp. 641-655.) The wording of the Working Paper in Part A, and the division of the Paper into General Policy and Trusteeship sections, was based on the proposal orginally submitted by the United Kingdom. (*UNCIO*, Vol. 3, pp. 609-614.)

The several proposals made at San Francisco, the Working Paper itself

and the relevant debates, treated the mandated territories in connection with the trusteeship section of the Working Paper and within the trusteeship context. There was no indication, of which the Applicants have been made aware, that mandates were ever conceived of as falling within the general policy section of the Working Paper—that is, the section which eventually became Chapter XI of the Charter—in reference to Article 73 *(e)*. The practice of the United Nations, to which reference has been made, appears to establish that a distinction must be drawn and should properly be drawn between paragraphs *(a)* through *(d)* of Article 73—principles which govern *all* dependent territories, and Article 73 *(e)*—the reporting requirement—a distraction in regard to which the United Nations practice is highly illuminating, as has been said by way of introduction to the response to these questions.

It appears that of all categories of dependent areas to which the trusteeship system was envisaged to apply, mandated territories were the only clearly defined and identified group of territories in the context of this discussion at San Francisco. The Australian delegation to the San Francisco Conference, as has been pointed out at an earlier stage of these proceedings, was of the view that mandated territories all necessarily had to be placed under the trusteeship system—this was referred to in the verbatim of 7 May 1965, at page 137, *supra*. Although this view did not gain general acceptance, there were no expressions of opinion that the Applicants have discovered that mandates could or would in any event be supervised pursuant to the provisions of what became Article 73 *(e)* of the Charter. The delegates to the Charter Conference do not appear to have connected mandates with the general principles of Part A of the Working Paper, applicable to non-self-governing territories in respect of a supervisory or reporting function.

The second question relates to the fact that the description of territories, to which the declaration which was to become Article 73 was to apply, read as follows:

> "Territories inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world."

These being, of course, the precise words used in Article 22 (1) of the Covenant to describe the mandated territories.

The phraseology just quoted was used in section A of the Working Paper to describe the non-self-governing territories to which the declaration subsequently to be incorporated in Article 73 was intended to apply. Considerations relevant to an appraisal of the significance of the use of such phraseology include the fact that section A, entitled "General Policy", was intended to apply such principles to *all* dependent areas, including mandate and trusteeship areas.

The United Kingdom, in a note concerning its proposal—a proposal upon which the Working Paper was largely based—explained that:

> "His Majesty's Government in the United Kingdom draw a distinction between the *principle* of trusteeship which should guide Colonial Powers in the administration of their dependent territories (and should therefore be of universal application) and the creation of a special system of international *machinery*, to apply to certain specified territories." (*UNCIO*, Vol. 3, p. 611.)

The British proposal and the Working Paper appear to make it clear that the "special system of international machinery", referred to in the note I

have just quoted, was applicable to mandated territories. Thus, the British proposal states that for certain territories "it is desirable to establish special machinery" to ensure the application of the principle of Trusteeship, and that among those territories are—"... territories administered by States Members of the United Nations under Mandate from the League of Nations" (*ibid.*, p. 609).

The Working Paper itself says that the trusteeship system should apply to "territories now held under mandate" (*ibid.*, Vol. 10, p. 678).

The use of Covenant phraseology in the Working Paper therefore appears to have been of a broadly descriptive intendment, contemplating an extension of the principle of the Covenant to *all* dependent areas. As the subsequent history of the treatment of Article 73 by the United Nations makes clear, a distinction has always been perceived between paragraphs *(a)* through *(d)* of Article 73, on the one hand, and paragraph *(e)* on the other. It is significant also in this respect that the Parties, quite independently of each other of course, have treated Article 73 in precisely this way in their pleadings—both have assumed the relevance of Article 73 *(a)* through *(d)* without, of course, attaching the same significance to their relevance, and both have excluded from consideration in their pleadings any thought of the applicability of Article 73 *(e)*.

The third question refers to the fact that the text in the Working Paper remained unchanged up to 9 June 1945. At least as early as 7 June, it became clear that the supervision envisaged for colonial areas was not the same as that provided for by the mandates system. A draft of 7 June of section A of the Working Paper included sub-paragraph *(h)*, which called for statistical and other information of a technical nature to be submitted to the Secretary-General of the United Nations. (Russell, *A History of the United Nations Charter*, pp. 818-819.)

There appears to have been no doubt that the system of supervision of Article 22 of the Covenant was more extensive than the reporting provisions contemplated in the scheme which became Chapter XI of the Charter.

The fourth question relates to the fact that the text was altered for reasons set forth in the report of the Rapporteur of Committee II/4 of 20 June 1945. The Applicants have been unable to find any discussion of this point in the UNCIO record. In *A History of the United Nations Charter*, just cited, at page 816, a comment is quoted by the delegate of Iraq who objected to the Covenant wording on the basis that:

> "Very few countries ... were able to stand alone any more in terms of military or economic self-sufficiency; while among politically dependent peoples were some with a long heritage of civilization, as well as those of primitive culture."

This is the only comment relevant to a possible significance in the change of the text and this would, on its face, relate to reasons of a policy nature, so to speak, in the light of the considerations advanced by the delegate of Iraq in objection to the Covenant wording.

The fifth question relates to the fact that it was noted in the report of the Rapporteur of Committee II/4 that the text of what became Article 73 "would be applicable to all such territories" and to all "States Members of the United Nations having responsibilities for the administration of territories whose people have not yet attained a full measure of self-government". (*UNCIO*, Vol. 10, p. 608.)

The Applicants understand the significance of the foregoing quoted statements to relate to Article 73 *(a)* through *(d)*—the principles. A literal reading of the statements would include trusteeship territories within the coverage of Article 73 *(e)*, as well as mandated territories, if these were given a literal meaning as being applicable to Article 73 *(e)* as well as Article 73 *(a)* through *(d)*.

The sixth question relates to the fact that in the same report there appear certain words, which are quoted in the sixth question.

The considerations relevant to the fifth question appear equally relevant to the sixth, in the Applicants' understanding. The only distinction appears to be that the passage here quoted in the sixth question singles out the issue of "independence", which had been the subject of discussion during the debates. It was pointed out that section A, relating to all dependent territories (including those under trusteeship), was not the appropriate place for reference to "independence".

The principal distinction between sections A and B of the Working Paper was that which related to machinery for international supervision. The general principles applied to all dependent territories; the machinery for international supervision applied, or was designed to apply, to trust territories; mandates then held were the only group of dependent territories specifically defined and identified as coming within the category of potential trusteeship. Mandates were discussed only within the context of those territories which would be subject to the extensive form of international supervision envisaged under the trusteeship system.

The seventh question incorporates a series of citations from Field Marshal Smuts' address introducing the report of Committee II/4 at the San Francisco Conference. In the Applicants' appreciation of the matter, Marshal Smuts' references, in the course of the two passages first quoted, to the "scheme of trusteeships" and the "principle of trusteeship" appear to show that the Marshal was referring both to Chapters XI and XII of the Charter; although of course it is not demonstrable what his intent actually was, this would seem to be a reasonable construction of those words, particularly because they would be consistent with the Working Paper and with the report of the Rapporteur of Committee II/4 that the principles of section A were said, or intended to be said, by Marshal Smuts to be applied to all dependent territories. His address did not, as the Applicants have studied it, touch on the extent of supervision to be exercised under Chapter XI, nor did it refer to mandate supervision under XI.

The third citation from Marshal Smuts' address is consistent also with the assumption that the principles of Article 73—that is, paragraphs *(a)* through *(d)*—were intended to be applicable throughout the entire field of dependent territories, including trusteeship territories, and were of general universal application. Of course, the trusteeship principles also apply in the cases of areas put under trusteeship. The fourth citation from the Marshal's address appears to confirm the assumption that mandated territories were not intended to come under the reporting provisions of Article 73 *(e)*, the references in question being those to "colonial powers" and "colonies", indicating a contrary intention—one which would envisage the extension of a system of international accountability, limited though it was, to colonial areas not yet brought into an international system of any kind; and Marshal Smuts' reference to "that larger extension" indicates that he was speaking of a new development.

which of course would not have been the case in respect of the mandates —it would have been a backward step in terms of the scope and range of coverage.

The sixth and final citation derives from a paragraph of Marshal Smuts' address, which is quoted in the sixth question. The theme of the quoted paragraph is that the new plan differs from the mandates system in that the trusteeship scheme or principle to which he had referred earlier was not to be applied to all dependent areas; the context here would seem to the Applicants to indicate that he did not conceive of mandated territories as falling within the reporting requirements of Article 73 *(e)* although here, as in every other context of his address, he regarded the principles *(a)* through *(d)* of Article 73 as being of general and universal application. This is also borne out by statements made by the Deputy Prime Minister of Australia—reference is made to *UNCIO*, Volume 8, page 135, as well as a speech at the same occasion by Lord Cranborne of the United Kingdom, and reference is made to the same UNCIO document at page 143.

Perhaps the most explicit recognition that mandates were not to fall under the supervisory obligations of Article 73 is contained in the address by Mr. Peter Fraser of New Zealand, to which reference has already been made and which is at page 153.

The ninth and tenth facts to which the Applicants' attention is drawn for consideration, that is to say that the text of Article 73 was finally adopted at the meeting of Commission II on 20 June, that the Charter was signed six days afterwards, and that the text was adopted without dissent—these facts would be consistent with the Applicants' hypothesis concerning the intended scope of Article 73 *(e)*, that is to say, as an extension to colonial areas rather than a cover for mandated territories which might not fall under the trusteeship system.

The conclusion on the point, Mr. President, is that the administrative supervision system for which the Applicants contend is of minimum and essential scope and applicability and, moreover, in connection with this litigation, that the prayers in Submissions 3 and 4 that the Court adjudge and declare that Respondent has the duty to cease the practice and policies complained of in the Territory—that these prayers for relief would be impossible of effectuation unless the Court should be pleased to uphold the Applicants' contention in this regard. These prayers would be impossible of implementation and effectuation, in the Applicants' respectful view, if the requirement of accountability were limited to, and within the confines of, the information reporting requirements of Article 73 *(e)*, leaving wholly apart the fact that such informational reporting requirements have not, in the practice of the United Nations, been devoted to specific areas but to functional areas for analysis by the Secretary-General.

In conclusion, Mr. President, the Applicants would respectfully present their submissions and, subject to reservation of rights which the Applicants respectfully would put before the Court, regard them as their final submissions.

The Applicants, having completed the presentation of their arguments of fact and law, now respectfully present their submissions. In so doing, the Applicants retain the right, pursuant to Article 50 of the Rules of Court, to comment on any evidence given, or to exercise any other right to which they may be entitled by virtue of the Statute or Rules of Court,

or the practice of the Court, including, but without limitation, rights under Article 41 of the Statute and Article 61 of the Rules of Court, as well as the right of amendment of submissions prior to the closing of the hearings.

The Memorials contain submissions, pursuant to Article 42 of the Rules of Court. Such submissions have been supplemented by further submissions in the Reply.

In view of the fact that the submissions, as set forth in the Memorials and as supplemented in the Reply, refer to any allegations of fact and statements of law which might subsequently be adduced before this honourable Court, the Applicants consider it appropriate, for purposes of clarity and convenience, now to bring up to date and to consolidate their final submissions, which they now present to this honourable Court in the following form, that is to say:

Upon the basis of allegations of fact, and statements of law set forth in the written pleadings and Oral Proceedings herein, may it please the Court to adjudge and declare, whether the Government of the Republic of South Africa is present or absent, that:

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

(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 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 the petitions are to be submitted;

(3) 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;

(4) 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;

(5) 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;

(6) Respondent has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to remove all such military bases from within the Territory; and that Respondent has the duty to refrain from the establishment of military bases within the Territory;

(7) Respondent has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that Respondent has the duty forthwith to render such annual reports to the General Assembly;

(8) 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 Respondent has the duty to transmit such petitions to the General Assembly;

(9) 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.

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

This concludes the statement of submissions, and with the President's permission may there be inserted in the record a very brief explanatory note, which will not take more than three minutes?

The following formal interpretations and explanatory comments with respect to the foregoing submissions are respectfully presented to the Court.

(a) The response to the question addressed to the Applicants by the honourable President during the course of the proceedings of 28 April 1965, at page 96, *supra*, is hereby reaffirmed, in the following respects, in particular:

1. The formulation of Submission 4 is not intended in any manner to suggest an alternative basis upon which the Applicants make or rest their case, other than the basis which the Applicants present in Submission No. 3 itself (reference is made to the verbatim record, 30 April, page 61, *supra*); the distinction between Submissions 3 and 4 being verbal only, for reasons which have been set out in the cited section of the verbatim record.

2. The reference in Submission 4 to "applicable international standards or international legal norm, or both" is intended to refer to such standards

and legal norm, or both, in the sense described and defined in the Reply, **IV,** at page 493, and solely and exclusively as there described and defined—reference is made here to the same verbatim record already cited, at page 60, *supra.*

It remains then, Mr. President, to express gratitude on behalf of the Governments which I have the honour to represent, and on behalf of my colleagues, to thank the Court for its patient attention and, subject to the reservation of the rights stated at the outset of these submissions, to rest the case. Thank you, Mr. President.

17. REJOINDER OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 24-27 MAY AND 14-18 JUNE

Mr. President, in presenting this oral rejoinder to the Court in regard to the legal issues which have been argued, I shall have to refer the Court to a number of features of the Applicants' oral reply, to which I now have to offer this further reply or oral rejoinder. However, there are two very general features which I should like to mention straightaway.

The first is that the reply has been a good deal longer than the argument in chief.

The second is, Mr. President, that in almost every important aspect of the case on the legal issues the reply has exhibited a further change of ground, a change of cause of action to some extent, a change of motivation to some extent; whatever one calls it technically, in substance one finds in almost every respect a further, or a new, case made out on behalf of the Applicants, and this at this very late stage of the oral reply. I do not wish to pursue that matter at this stage; the general trend of it would have been evident and obvious to the Court as the oral reply of the Applicants gathered momentum. I shall refer to details later.

The sole purpose of referring to these two features at this stage is to indicate, Mr. President, that in the light thereof our rejoinder will also have to be somewhat longer, will have to take a somewhat longer time than one would normally associate with a rejoinder at this stage of the proceedings; but before any alarm spreads in that regard, I may hasten to assure the Court that we certainly do not intend to make our rejoinder longer than our argument in chief.

In the course of the rejoinder we shall follow the same sequence as we did in our argument in chief. We shall deal firstly with the question whether the supervisory functions previously exercised by the League of Nations passed to the United Nations. Thereafter we shall consider the question whether the Mandate survived the dissolution of the League to any extent at all, and finally we will advert to the interpretation and the effect of Article 2 of the Mandate.

I may point out at once, Mr. President, one of the significant features of the further changes which have come about in the Applicants' case in the course of this oral presentation, and particularly in the oral reply to which I am now offering this rejoinder. The question whether a transfer was effected of supervisory functions to the United Nations now appears to have attained increased importance. It was, of course, always a very important question, both by itself and by reason of its possible influence on the lapse of the Mandate as a whole. But now, Mr. President, in the reply the Applicants appear to have attributed further significance to this issue in the following ways:

They contend, in the first instance, that Respondent's failure to comply with its alleged duty of accountability plays a decisive role in establishing their charges relating to militarization and alleged unilateral incorporation of the Territory. I can refer the Court to the verbatim record of

12 May 1965, at pages 235-241, *supra*, where my learned friend Mr. Gross, on behalf of the Applicants, dealt with this matter.

Secondly, in their contentions to the Court regarding the effect of Article 2, paragraph 2, they rely on the existence of so-called "norms" and/or "standards", and, as we understand them, they seem to have made it clear that their case in this regard now also rests largely, if not exclusively, upon acceptance of their case regarding administrative supervision. I say this guardedly, Mr. President, because it is not absolutely clear to me whether we do understand them correctly. I shall have to revert to this matter in dealing with the case in regard to Article 2, but I may refer the Court to this very significant passage in the record of 13 May—I am sorry I have not got the page at the moment —I will give it to the Court later. They said:

> "The norm and the standards ... embody the results of a universal assessment of the evils inherent in racial discrimination and group separation, as such evils have been found, determined and adjudged by the competent organs of the international community, vested not only with the right but the duty of administrative supervision and safeguarding of the sacred trust."

Mr. President, I emphasize those words "determined and adjudged by the competent organs of the international community, vested not only with the right but the duty of administrative supervision and safeguarding of the sacred trust".

All I wish to point out at the moment is that apparently the Applicants' whole case, as far as the legal issues are concerned and, indeed, the questions of fact which would have to be superimposed upon the legal basis of their case, now appears to stand or fall largely by the Applicants' argument regarding Article 6 of the Mandate.

Now, Mr. President, in regard to administrative supervision itself, which is the first subject to which we direct this rejoinder, the Applicants also dealt at considerably greater length than before with the problems involved in the alleged transfer of supervisory functions to the United Nations. Nevertheless, there are very large areas of the dispute to which they did not refer at all, as far as we could ascertain, in their oral reply; and, seeing that this is the rejoinder which comes at the end, which is not intended to deal with every facet of the whole field of the dispute again in detail, it may be convenient at this stage, at the outset of the argument, to see what the ambit of the reply was, and, in particular, to see what matters were not dealt with in the reply.

May I first point out that the Applicants' argument in chief regarding Article 6 of the Mandate involved, in the main, the following contentions. Firstly, that the mandate documents, properly interpreted, imposed on the mandatory a duty of international accountability, in that wide, indefinite form, which could and did survive the League of Nations. Secondly, that after the dissolution of the League, agreement was necessary for continued operation of supervision under the Mandate, but only for the purpose of providing a new supervisory organ to render the continuing obligation of international accountability capable of practical implementation. And thirdly, that such new agreement was, in fact, reached.

A consideration of these contentions brings about a division of the case regarding Article 6, or a division of the issues regarding Article 6,

into two large parts, or topics. The first one relates to the correct interpretation of the mandate documents in the respect under consideration. It poses the issue which I defined before as the one of international accountability versus the Respondent's contention of accountability to a specific organ of a specific organization. The second large topic is concerned with inferences relative to agreement or consent that can properly be drawn from the events of the transitional period 1945-1946 and thereafter. We gave an analysis of these issues as they stood at the stage of the argument in chief on 31 March, at pages 306 to 320 of the verbatim record, **VIII**.

Now, in regard to the first issue, Mr. President, we contended that the Respondent's obligation was, as I have said, a specific one, namely to report to a specific organ, the Council, of a specific organization, the League of Nations. We based this contention on considerations of language, of context of the relevant instruments, of probabilities, of *travaux préparatoires* and of surrounding circumstances. We dealt with these on 31 March at pages 322 to 331 of the verbatim record, **VIII**, on 1 April, in the whole of that record, and on 2 April, at pages 362 to 370 of the relative record, **VIII**. Now, Mr. President, it is significant that in regard to this whole broad topic no single counter-argument was advanced by the Applicants in reply. It is true that on 12 May, in the verbatim record at page 241, *supra*, they made what one might almost term a formal reaffirmation of their submission in this regard. They said:

> "To the contrary, in the Applicants' respectful submission, the terms of the Covenant establish the essential principle of a basic obligation of international accountability, which inheres in a mandate institution and which must survive so long as the mandate survives."

It is also true, Mr. President, that my learned friend maintained the use of expressions such as "international supervision", "international accountability", and the like. But this merely emphasizes the omission to offer any fresh argument, any answer whatsoever to this extensive detailed review of the whole situation offered to the Court in our oral argument in chief.

The Applicants do not tell the Court which terms of the Covenant (in this quotation to which I referred) they refer in making this respectful submission. They do not tell the Court in which way the terms of the Covenant establish this broad principle for which they contend—this vague, general obligation of international accountability. We are left in the dark, and that, I submit, Mr. President, is a factor not without significance. I need not labour the point.

We find, therefore, that the Applicants' whole reply in regard to administrative supervision was confined to the second leg of their argument, namely their attempt to establish consent on the part of Respondent to a succession of supervisory organs. But even as regards this topic we find that very wide and very important aspects of the matter were not dealt with at all. I can give the Court a list of those which we have noted, and I submit that they, too, are not without significance.

The first one not dealt with at all, was our contention that any consent, not having been given expressly, could be established only on the basis of necessary inference from all the relevant evidence. That matter we dealt with in the verbatim record of 2 April, **VIII**, at pages 371 to 373.

The second one was the fact that in all other cases where a succession or transfer of powers or functions from the League to the United Nations was contemplated detailed and specific provision was made both by the founders of the United Nations and by the Members of the League at the time of its dissolution. That factor we do not find referred to at all by the Applicants. The matter was dealt with in the same verbatim record at pages 382 to 383 and again at pages 387.

The third was the registration of special arrangements and provisions for transfer of functions and powers under Article 102 of the Charter (that we dealt with in the verbatim record of 5 April, **VIII**, at pages 418 to 421, and in the record of 6 April, **VIII**, at pages 422 to 424). That, again, did not elict a reply from the Applicants.

The fourth dealt with in conjunction with the previous factor I have just mentioned, was the treatment of mandates, in contrast with certain other matters, in the report of the Board of Liquidation of the League —the Board appointed at the final session of the League Assembly. We dealt with that matter in the verbatim record of 6 April at pages 423 to 426.

Number 5, Mr. President, we offered a refutation of a statement by the Applicants which they introduced into the matter, in so far as they saw relevance between it and the issues in regard to Article 6. This statement of the Applicants read as follows:

> "In 1935 Respondent put before the Permanent Mandates Commission a proposal for the incorporation of South West Africa as a fifth province of the Union, but when met with a critical attitude by most of the members of the Commission, decided not to go ahead with its plan for incorporation." (**VIII**, p. 139.)

We indicated what the true facts were in that regard, and how signally inappropriate and completely wrong this statement of the Applicants was. This was in the verbatim record of 6 April at pages 445 to 449. We have not heard a further word on that topic.

Number 6: the subject of the non-applicability of estoppel, or preclusion, arising from the fact of Respondent's continued administration of the Territory. That is a subject with which we dealt on 9 April, in the verbatim record, **VIII**, at pages 513 to 517. That did not elicit a reply and yet my learned friend continues with a type of submission to the effect that supervision, international accountability, must continue as long as there is administration of the Territory by Respondent.

Number 7: we dealt with the non-applicability of the *cyprès* doctrine in the same record of 9 April, **VIII**, at pages 524 to 525. That has not been replied to.

Number 8: we dealt with the legal effect of findings in a previous Advisory Opinion or Judgment on Preliminary Objections, in the same record at pages 525 to 526. That has not earned a reply.

Number 9: we offered a detailed and, we submit, with respect, a very relevant analysis of the 1962 Judgment and opinions, in the same record at pages 527 to 538, and again in the verbatim record of 12 April, **VIII**, at pages 538 to 547. That has not been replied to, nor, Mr. President, has Number 10—our analysis of the 1950 Opinion, which we submit to be equally relevant and of equally crucial importance—been replied to in the least. That analysis we offered in the same record of 12 April at pages 547 to 557.

Mr. President, in regard to some of these matters we shall demonstrate in greater detail later that the Applicants, except for a word here or there, or a sentence here or there, have, in fact, not replied to the particular points which we raised. In the case of other points, no demonstration at all is needed and it will not be necessary for me to refer to them at all again in the course of this rejoinder.

But the point I want to emphasize at this stage is that our case was in material respects not met by the Applicants, and, as I shall show, the case upon which the Applicants now rely in regard to Article 6 of the Mandate, although expounded in the Reply at greater length than in the argument in chief, rests on a very narrow and a very limited basis.

Before I pursue that point, however, there are two further matters to which I should like to refer by way of introductory comment.

The first of these is that, in the course of their oral reply, the Applicants at various stages accused us of misrepresentation and even of distortion. For instance, in the record of 13 May, at pages 247-248, *supra*, they said in regard to our rendering of their contentions, that we presented "a parody of the Applicants' case". We were accused in the same record of giving "many mis-statements or misrepresentations of the Applicants' true legal theory and position". We were accused of "attribution of extreme and, indeed, unintelligible contentions to the Applicants". We were accused of holding "Applicants' theory and contentions against a cracked mirror" and of presenting "mis-statements, and one must say distortions" of the Applicants' contentions. These remarks in the record of 13 May which I have just referred to, Mr. President, are related particularly to our argument regarding the interpretation and effect of Article 2, but similar allegations were made in regard to our submissions on administrative supervision. We heard, also, in regard to our interpretation of the official records to be considered in this regard—the official records of the League of Nations and of the United Nations—accusations of injustice to the context of so-called "verbal shredding", of "strained interpretation", of "exercises in semantics", of "killing the spirit by the letter", even of "ignoring both spirit and letter". We heard of our arguments "falling between all stools". We heard of "pressing words" of resolutions so as "to squeeze out the obligations in them", and we heard that we were employing a very "singular technique" in these processes, and so forth. One finds these expressions to which I have referred, spread over the records of 10, 11 and 12 May, Mr. President.

All I should like to say in this connection is that abuse has never been a substitute for reasoning. The Applicants are merely turning upon us complaints which we unfortunately found it necessary to make in respect of certain presentations which they had made to the Court. But, Mr. President, there was a difference. We gave chapter and verse for saying what we did. We indicated why we said it—that certain of our arguments, and certain portions of the record, were not presented to the Court in the manner in which they should have been presented. But the only support which the Applicants could offer for turning these accusations on us would be an analysis of the same kind as that which gave rise to the initial complaints on our part. We shall show that in due course, and I do not want to elaborate on the matter now. I merely want to say that, as far as we could see (and I shall deal with the matter further in detail), the Applicants have not been able to demonstrate that in truth we have, in any way, been unfair either to the substance or to the context of the

records. In so far as they have suggested that, I shall follow up those matters again in the course of this argument.

In regard to the Applicants' own contentions, Mr. President, all I can say is that we certainly did not claim to understand all of them with certainty all the time. We never claimed to be certain beyond all doubt that we knew exactly what all of them meant, nor that we could always keep up with the swift changes in the Applicants' case. We merely tried our best, and we shall continue to do so in this oral rejoinder.

It is unfortunately necessary to make analyses of the contentions, of the way in which they are presented to the Court, and of extracts of the record, in the way in which they are presented to the Court. I may say again, as I did before, that in objecting to the manner in which that is done I am not objecting or raising any objections to persons or their actions. I am analysing in the process, the merits of this case which it is sought to present against us.

Now, Mr. President, that is the first of these introductory matters to which I wanted to refer. The second one is this, that the Applicants have made it plain beyond all doubt that they indeed rely on consent on Respondent's part to the substitution of the United Nations for the League of Nations as the supervisory authority in respect of the Mandate, and they make it plain also that they accept the necessity of having to rely on such consent on the Respondent's part.

In our argument in chief we pointed out what contrary attitudes the Applicants adopted at earlier stages in these proceedings. It is a matter to which I do not intend to refer again in detail. I merely wish to point out broadly that we showed how they first sought to base their case in regard to Article 6 on a theory of succession, how they asked the Court to reaffirm the 1950 Opinion of the Court, and contended that the Court, in that Opinion, attributed to Article 80 (1) of the Charter a "positive quality of 'maintaining rights' to", and how, Mr. President, they contended that "none of the decisive reasons underlying the Opinion of 1950 rests on a premise of 'tacit consent', whether on the part of the Respondent, the League of Nations, or the United Nations". We dealt with those matters in the verbatim record of 30 March, **VIII**, at page 296, and, again, in the record of 31 March, **VIII**, at page 310.

In their oral reply, Mr. President, the Applicants have not contested that they have had to change their case in regard to Article 6 in these vital respects. Indeed, they have now further emphasized that their case rests squarely on consent on the part of the Respondent to the United Nations supervision. The fact that that is so is particularly apparent from a statement which my learned friend, Mr. Gross, made on 12 May 1965, when he stated that—

> "The Applicants would like to clear up any possible lingering doubts . . . which may exist regarding their position relating to the administrative supervision of the Mandate and the basis upon which it has survived and continues to survive as an obligation of the Mandatory." (*Supra*, p. 240.)

My learned friend proceeded to state three propositions by way of summary, when nearing the end of his oral reply, on this aspect of the case. The first two are not directly relevant to present purposes—I shall refer to them later. The important fact is that he made it clear, in the wording of the three propositions, that the third and final one was a

necessary link in the chain. This third, and final, one read as follows:

> "Respondent has acknowledged—at the period when it was of decisive relevance whether it did or not—Respondent acknowledged and manifested its consent to the assumption by the United Nations of supervisory authority over the Mandate." (*Ibid.*, p. 240.)

Now, Mr. President, that point, whatever lingering doubts there may have been, and whatever uncertainties there may have been, is, therefore made clear.

In the Applicants' oral argument in chief they, of course, also contended for such a manifestation of consent on the part of the Respondent. We dealt with their contentions in that regard in the records as from 2 April, at **VIII**, page 376, running on into those of the next few days. We showed, with submission, Mr. President, that the attempt, made by my learned friends in their argument in chief to show such consent on our part, was a completely abortive one.

In these portions of the records which I have just mentioned, we refer to relevant arguments of the Applicants as they had been adduced in their argument in chief. We give the passages and the references and I need not do so again. But I wish to point out how far we really took the matter before reverting to the manner in which the Applicants dealt with it in their reply.

We pointed out, Mr. President, that, far from it being merely a case that the Applicants were unable to establish consent on our part, the record very clearly indicated the absence of such consent. We showed, Mr. President, with submission, that there was an absence, on the part of Respondent, and on the part of all the other Mandatories, of any indication of such consent on their part. We showed that there was, on the contrary, on the part of all the Mandatories, pertinent indications that they were *not* consenting to United Nations supervision over mandates outside of trusteeship. And, Mr. President, we showed that there was overwhelming evidence that other States, which were Members of the two organizations at the time, clearly understood that no such consent was given by any Mandatory. There is no need for us to cover that whole field again, particularly in view of the way in which the Applicants have now narrowed down their line of reply to these contentions on our part, and I therefore wish to revert to the summary which they gave of their contentions on 12 May, at page 240, *supra*, "with a view to clearing up any lingering doubts", as they expressed it. To what I have quoted already, the Applicants added the following:

> "Respondent manifested its consent [that is to United Nations supervision] and acknowledged its submission according to the findings of the Court in 1950 on the basis, *inter alia*, of the statements made before the League of Nations in April 1946, its pledge to the League Assembly, its adherence to and support of [or] vote for the League resolution of 18 April 1946, and as has been referred to often now, the position it took in the Preparatory Commission with respect to the temporary trusteeship machinery, and the reason assigned therefor by Mr. Nichols." (*Supra*, p. 240.)

There is also a statement to a similar effect, Mr. President, in the verbatim record of 10 May at pages 173-174, *supra*, indicating the breadth, or, shall I say, by way of contrast to what we had before, the

narrowness of the path now sought to be trodden by the Applicants in regard to their contention of a manifestation of consent, on the part of Respondent, and the other Mandatories.

The Applicants remark that Mr. Nicholls' statement "has been referred to often now", was indeed an understatement, Mr. President. Somebody in our team counted and found that in the course of my learned friend, Mr. Gross' response on this part of the case, Mr. Nicholls' statement was referred to no less than 30 times on the first two days alone—in other words, in the records of 7 and 10 May—and that is apart from quite a number of further references on the succeeding days.

It certainly took the Applicants a long time to find out that Mr. Nicholls' statement is really the "king-pin" of their whole case against the Respondent regarding Article 6 of the Mandate, but now that this great light has struck them, Mr. President, they are clearly not hiding it under a bushel. They now tell the Court that everything of relevance is to be interpreted in the light of Mr. Nicholls' statement at the time with reference to the proposal for a temporary trusteeship committee in the Preparatory Commission of the United Nations. Everything, as I say, is attributed to and is based on Mr. Nicholls' statement, and the context in which it occurred in the Preparatory Commission—or rather, I should say, on the significance and the meaning attached by my learned friends to Mr. Nicholls' statement and to the context of events in that Preparatory Commission. It does seem to us that when the last word has been spoken on this subject, my learned friends may well wish that they had hitched their wagon to some other star or that there had been some other star to which they could have hitched their wagon in this regard, because it appears on analysis, Mr. President, that the whole basis, the whole foundation, of this super-structure which the Applicants have tried to build up, is a false one; it falls away and, with it, the whole of this argument which they offered in reply in regard to Article 6.

I should like to begin at the beginning—I should like to analyse first how this argument was developed by the Applicants, and what appeared to be the inter-related and the essential links in this argument. I should like to make quite sure first that we properly understand what it is that the Applicants submitted to the Court in this regard, then we can proceed to deal more easily with the merits of that argument.

It seems, Mr. President, that the first contention of the Applicants, and the first necessary link in the case which they offered in reply, is to the effect that Respondent and certain other Mandatories in the course of debates in the Preparatory Commission supported the establishment of a temporary trusteeship committee. We have a number of statements in this regard—I shall refer the Court to some of them. First, there is the verbatim record of 7 May, at page 141, *supra*, where my learned friend said the following:

> "Indeed South Africa, Australia and the United Kingdom, and this is to be marked, these three Mandatory Powers were in favour of the proposal for a temporary Trusteeship Committee."

Next, verbatim record of 7 May, at page 147, *supra*:

> ". . . the temporary Trusteeship Committee idea was favoured by the mandatory powers, including the Respondent—and it was supported by them".

We found a similar statement, which I shall not quote, in the verbatim

record, of 10 May, at page 152, *supra*. Then, we find one on the very next page of the same record which puts it more strongly. The Applicants there referred to "the Mandatory's proposal for a temporary trusteeship committee"—it now becomes "their proposal". (The record gives a singular apostrophe but I take it that the intention was a plural "Mandatories" proposal.) We find in the same record, at page 153, *supra*, the following statement:

> "the proposal for a temporary trusteeship committee made by three mandatory powers including the Respondent".

And still later, in the same record, at page 155, *supra*:

> "Respondent, along with the other mandatories, including the British Government, suggested the establishment of interim machinery to which to report."

So we see, Mr. President, that this contention, like "Topsy", just "growed". It is a feature and a tendency which one saw in regard to other arguments of the Applicants' agent; they begin on a rather modest plane but in the course of time, they grow. Thus, from support for a proposal for a temporary trusteeship committee by three mandatory powers, South Africa, Australia and the United Kingdom, we end up with the Mandatories' proposal for such a trusteeship committee and the Mandatories' suggestion for the "establishment of interim machinery to which to report".

But we are merely analysing now what these contentions amount to. The second, and a very important link in the chain of reasoning, appears to be this: the proposed temporary trusteeship committee was intended by its protagonists to be a body which would, *inter alia*, exercise supervisory functions over mandates even prior to the establishment of the trusteeship system—that is our paraphrase to the best of our ability. I shall refer the Court to the actual wording employed by the Applicants. On 7 May, verbatim record, at page 141, *supra*, they said:

> "The proposal for a temporary Trusteeship Committee indicated the importance attached to international supervision of mandated territories, even prior to the establishment of the Trusteeship Council."

At the same page, we find this:

> "The South African attitude was clearest of all. Mr. Nicholls, the South African delegate, stated that:
>
> '. . . it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report'. "

I shall deal later with the meaning of what Mr. Nicholls actually said in the relevant context, Mr. President. We are merely indicating at the moment how the Applicants are using Mr. Nicholls' statement to support this second contention of theirs, in regard to which they proceeded to state, at the same page of the record:

> "The statement illustrates the importance which the founders of the United Nations generally, and Respondent specifically, attached to international supervision of mandated territories, prior to the conclusion of other agreed arrangements."

These last words which I have emphasized, being the important point made by the Applicants in this link in their chain.

There is some progression in the argument, Mr. President, as we find at the next page of that same record the following:

> "Mr. Nicholls, speaking for South Africa, expressed the view that the mandatory powers were obligated to subject their administration of mandated territories to the supervision of the United Nations. He was so convinced of the fact, as appears from his own statement, that he advocated the creation of an interim United Nations body to undertake such supervision until the establishment of a permanent body." (*Supra*, p. 142.)

Now at the next page, Mr. President, we find a little bit of caution—we find the matter stated this way:

> "The Preparatory Commission debates make clear that at least some of the mandatory powers, including Respondent, certainly Respondent, wanted *United Nations supervision of mandated* territories and asked for it, even before trusteeship agreements were entered into." *(Ibid.)*

There we have, Mr. President, the contention that Mr. Nicholls was of the view that the mandatory powers were obligated to submit to United Nations supervision of mandated territories. We see the suggestion that mandatory powers wanted United Nations supervision of mandated territories and asked for it. As I say, there is some caution here; the statement is limited to at least some of the mandatory powers "including Respondent, certainly Respondent", but definitely "even before trusteeship agreements were entered into". This caution is thrown to the wind some pages later. In the same verbatim record, at page 146, *supra*, we read:

> "There was general agreement that the mandated territories should be under international supervision. The mandatory powers wanted that supervision to be carried out by an interim or temporary body prior to the establishment of the Trusteeship Council."

And then, Mr. President, still in regard to this link in the chain, there are two further passages to which I could refer briefly. One is from the same verbatim record, at page 145, *supra*, where it is said that—

> ". . . the proposals for a temporary trusteeship committee, and for a series of declarations or pledges, were techniques for ensuring continued international supervision of mandated territories."

And we find a statement to a similar effect in the verbatim record of 10 May, at page 153, *supra*, to which I shall refer in another context later.

The point is that in all these statements—some more cautious, some very much less cautious—the idea of interim supervision over mandated territories prior to other arrangements being agreed upon by the United Nations is stated to be a necessary part—a necessary concomitant—of the proposal for an interim trusteeship committee, which was favoured by, or supported by, the mandatory powers or even, as my learned friend suggested, proposed by the mandatory powers.

Now we come to the third contention, the third necessary link in this chain, and that is that the temporary trusteeship committee proposal was rejected for the reason that it might delay the establishment of the Trusteeship Council. In the verbatim record of 19 March, the matters are put very pertinently, as follows:

> "The proposal for a temporary trusteeship committee was not

> adopted by the Preparatory Commission, primarily on the basis of the objections advanced most forcefully by the Soviet Union, to the effect that such a committee might delay rather than accelerate the establishment of a Trusteeship Council." (**VIII**, p. 152.)

And we find statements to the same effect in the verbatim record of 7 May, at page 141, *supra*, where my learned friend referred to this time factor as a pragmatic reason-to-delay factor and again, in the same record, at page 147, *supra*, the same reason is assigned for the action of the Preparatory Commission, and the statement is made that the proposal for a temporary trusteeship committee "was rejected as inadequate, and not as going too far".

Then we come, Mr. President, to the fourth contention—the fourth link in this plan—that is, that by plan and design an alternative method was adopted, namely a system of pledges whereby the Mandatories would, and in fact did, undertake to carry out all the obligations under their respective mandates, including the obligation to submit to international supervision, even before trusteeship agreements were concluded. In the verbatim record of 7 May, the Applicants said in this regard—

> "... the authors of the Charter attached importance to international supervision, even prior to the establishment of the trusteeship system.
>
> The historical record indicates that two basic methods were conceived of by the founders of the United Nations. One was the proposal for a temporary trusteeship committee, interim; the other was a proposal for a set of pledges to be made by each of the mandatory powers. There can be no question that these two proposals were linked to each other, and that each was viewed as a method for ensuring international supervision of mandated territories: this was their purpose." (*Supra*, p. 143.)

And, Mr. President, in regard to this suggestion of pledges as a substitute for the other technique—the technique of the temporary trusteeship committee—for ensuring interim supervision of a mandate, the Applicants argued that two kinds of pledges were envisaged. The first was a type of pledge which, they say, was contemplated by Mr. Peter Fraser of New Zealand when he addressed Commission II of the United Nations Conference at San Francisco on 21 June 1945. The relevant part of Mr. Fraser's speech is quoted by the Applicants in the verbatim record of 7 May, at page 139, *supra*. And they said in this regard that this type of pledge was one which would merely, "acknowledge the authority and the supervision of this Trusteeship Council". At that point they broke off the quotation and they added these words "until other arrangements were concluded". Then they quoted again the words "whatever may happen to the Territory afterwards".

Mr. President, I shall not at this stage analyse what it was that Mr. Fraser really had in mind. I am only pointing to the rendering we have here of what Mr. Fraser said: some of his words are quoted, then follow some words of the Applicants themselves, and then are added again some words of Mr. Fraser. We shall see in due course were this leads one to.

That was the first type of the pledge, then, which Mr. Fraser was said to have had in mind.

Secondly, the Applicants suggest that there was a contemplation of a

type of pledge which, they say, was envisaged by the delegates to the Preparatory Commission. This type of pledge, according to them, "would have required a declaration of willingness, on the part of the mandatories, to place mandated territories under the trusteeship system" (*supra*, p. 144.) And they went on to say, on that page—

> "The delegates at the April session of the League in 1946 made pledges which were more in line with Prime Minister Fraser's conception—to acknowledge the authority and the supervision of the Trusteeship Council when it came to be formed."

They proceed to quote passages from statements made in the Preparatory Commission by representatives of Yugoslavia, New Zealand, the Soviet Union and China (that is in the verbatim record of 7 May, at pp. 145-146, *supra*) in which these States proposed that Mandatories should make declarations of their willingness to place their respective mandated territories under trusteeship.

Then, Mr. President, the Applicants argue as follows—it is a somewhat lengthy passage, but it is important to get at the real foundation of Applicants' argument, and I think I should, therefore, read it to the Court:

> "Thus, the link between the temporary trusteeship committee proposal and the concept of pledges is evident. There was general agreement that the mandated territories should be under international supervision. The mandatory powers wanted that supervision to be carried out by an interim or temporary body prior to the establishment of the Trusteeship Council. Mr. Nicholls said so.
>
> This clearly was Respondent's position at that time. However, other governments feared that this procedure would lead to delay in the establishment of the trusteeship system and pressed for pledges by the mandatory powers to place these under the trusteeship system. What occurred historically, upon the Applicants' careful analysis, was a compromise between these two positions. That is, pledges were made but not pledges to place the mandated territories under the trusteeship system: rather, the pledges were to carry out all the obligations of the mandate, including the obligation to submit to international supervision, the essence of the mandate, until other agreed arrangements could be made." (*Supra*, p. 146.)

Thus, Mr. President, there were not to be pledges to place the mandated territory under trusteeship; not, on the other hand, temporary trusteeship machinery and temporary supervision over mandates not converted into trusteeships, but there was a compromise between these two, it is said, namely pledges to carry out all the obligations of the mandate including international supervision until other agreed arrangements could be made.

Now, Mr. President, how precisely this compromise arrangement on the Applicants' submission came to be made is nowhere stated by them. They repeatedly assert that in the light of the events in the Preparatory Commission, the declarations made by the different mandatories in April 1946—that is, not in these initial stages of proceedings in the United Nations, but later at the time of the dissolution of the League are to be seen as pledges of the nature aforementioned—pledges, therefore, agreed upon as a compromise in the difficulty which arose in the Preparatory Commission of the United Nations.

We find a further development of this argument, Mr. President, or what really amounts to a repetition thereof in other words, in the verbatim record of 7 May, at page 147, *supra*, which I shall not now read to the Court; but it is on the basis of this submission that the declarations by the mandatories in April 1946, including that of Respondent, are now sought to be interpreted, and it is also on this basis that the Applicants seek to interpret the two Chinese draft resolutions which led to the final League resolution on mandates on 18 April 1946.

The Applicants then proceed to state in the verbatim record of 7 May 1965:

> "Viewed in this context, and from this historical perspective, the purpose of the declarations made by the several mandatory powers in April 1946 becomes crystal clear. Pledges had only been made as a means of ensuring the continuance of international supervision, ... The Nicholls' statement of 29 November 1945 and Respondent's declaration of 9 April 1946, a few months later although not so explicit, form part of a consistent pattern of behaviour by the mandatory powers generally, including Respondent. The pattern was to reject the idea of making an unqualified pledge that the mandated territories were [to be placed] ... under trusteeship." (*Supra*, p. 146.)

To round off these quotations from Applicants' contentions, and in order to have a firm understanding of what they mean, may I ask the Court's indulgence to refer to this further passage in the verbatim of 10 May, at page 153, *supra*, where the conclusion is stated as follows:

> "The events and transactions which have been described, including the juxtaposition of the proposal for a temporary trusteeship committee made by three mandatory powers including the Respondent, and the pledging procedures—this juxtaposition sheds light on the true significance also of the League of Nations resolution of 18 April 1946 ..."

The Applicants then proceed to quote paragraph 4 of that resolution in the well-known words, and thereafter to state:

> "The phrase 'expressed intentions' in the resolution of 18 April 1946 refers to pledges, and that word was used in several of the statements made at the time; to the pledges which each of the mandatory powers made pursuant to a plan and design which was chosen in preference to the proposal for a temporary trusteeship committee to which they would have reported until other arrangements had been agreed between them and the United Nations—that was the plan."

That is the end of that quotation and it shows, Mr. President, how the Applicants, building upon their own rendering of the proposal before the Preparatory Commission for a trusteeship committee, and particularly of Mr. Nicholls' statement, now arrive at their result where they claim to have established that—

> "... Respondent acknowledged and manifested its consent to the assumption by the United Nations of supervisory authority over the Mandate ...". (*Supra*, p. 240.)

Briefly stated, Mr. President, the whole of this argument now appears to rest on the following: firstly, a contention that the mandatories,

including Respondent, wanted United Nations supervision of mandates even prior to the conclusion of trusteeship agreements—in the case of Respondent the Applicants went further and said that Mr. Nicholls indicated a consideration, or contemplation, that there was an obligation to submit to such United Nations supervision, but the contentions are not quite so explicit about the other mandatories; secondly, that the Mandatories sought to obtain that supervision via the proposed trusteeship committee, but, thirdly, that by plan and design they, the Mandatories, accepted another method to the same end, namely a method of pledges by which they consented to the assumption by the United Nations of supervisory authority over the Mandates, even prior to other arrangements. That seems to be the gist of this case. I have perhaps analysed it at some excessive length with reference to actual statements made by my learned friends in the course of developing their contentions, but it seemed necessary to do so as a basis for considering the merits of their contention. I have attempted to do full justice to the way in which they have put their case, and that gives us a basis upon which we can proceed to consider the merits of their contention.

For that purpose, Mr. President, it seems necessary to scrutinize a little more closely than we did before some portions of the record of events in the Preparatory Commission and its Executive Committee regarding this proposal for a *temporary trusteeship committee*, and the rejection of that proposal.

The Interim Arrangements which set up the Preparatory Commission in June 1945 are well known to the Court, as are the broad purposes of those arrangements for which the Preparatory Commission was established, namely to get the various organs of the United Nations into operation at their first sessions, to establish the Secretariat, and to convene this Court. As the Court knows, provision was also made in these Interim Arrangements for an Executive Committee which would exercise the powers and functions of the Commission when the Commission was not in session. All that we find in *United Nations Journal*, No. 1, 24 November 1945, at page 5.

Now, for the purpose of carrying out its functions this Executive Committee set up ten sub-committees, and may I mention in passing that South Africa was not a member of this Executive Committee. Therefore, throughout all these proceedings in the Executive Committee, before the matter came first before the Fourth Committee of the Preparatory Commission and thereafter before the Plenary Session of the Preparatory Commission, South Africa had no role in the matter at all. Mr. Nicholls' comment came at a later stage after the matter had had a considerable history in the Executive Committee and its sub-committees.

The terms of reference of Committee 4 of the Executive Committee were the following:

> "This Committee should be concerned with the preparation of the Agenda and appropriate documents for the first session of the Trusteeship Council. It should make recommendations defining the role of the General Assembly and of the Security Council in trusteeship matters and of their respective relations with the Trusteeship Council. [I omit some words, matters of detail, which do not specifically concern our purposes.]
>
> The Committee should prepare recommendations for procedures which might be followed for approving trusteeship agreements, for

examining annual reports, for receiving and examining petitions, for arranging periodic visits to territories and for establishing a questionnaire as a basis for annual reports. It should study the questions arising if the Mandates System were to be wound up and examine the feasibility of providing for such interim arrangements as may be possible, pending the establishment of the Trusteeship Council." (Doc. P.C./EX/113/Rev. 1, 12 November 1945, p. 133.)

Now, Mr. President, the Court will recall that we deal in our Counter-Memorial, **II**, with the work of this sub-committee and we point out that the sub-committee recommended, with certain exceptions and qualifications, the transfer of the functions, activities and assets of the League to the United Nations. Amongst the exceptions were the political functions of the League, and in this regard the sub-committee stated with regard to mandates:

"Since the questions arising from the winding up of the Mandate System are dealt with in Part III, Chapter IV, no recommendation on this subject is included here." (**II**, p. 36.)

When we advert to this other part of the report, we find that the Executive Committee, in accepting the proposals or recommendations of this sub-committee, made the following recommendations to the Preparatory Commission concerning the establishment of the trusteeship system:

"*The Executive Committee,*

Considering that in accordance with Article 86 of the Charter the Trusteeship Council cannot be formed until a number of territories shall first have been placed under trusteeship; and

Considering that it is nevertheless desirable that some interim organ should be established to assist the General Assembly in expediting the constitution of the trusteeship system and, pending the establishment of the Trusteeship Council, in taking such other action in connection with the trusteeship system as may be found necessary:

Recommends: . . ."

and then in the operative part, Mr. President, we find a recommendation for the establishment and composition of such a Temporary Trusteeship Committee, and for the adoption of provisional agenda and the Rules of Procedure for it; and also proposals concerning provisional Rules of Procedure for the Trusteeship Council itself, and for the establishment of the Trusteeship Council as soon as the necessary conditions had been fulfilled.

Mr. President, I had just read out to the Court the recommendation of the Executive Committee of the Preparatory Commission for the establishment of a Temporary Trusteeship Committee, I read out the wording of the preamble giving the reasons, the motivation, as seen by the Executive Committee, and then gave the gist of the actual recommendations. The reference is to the same Preparatory Commission document as before, at pages 7 to 8.

Then, Mr. President, in a footnote to this recommendation we find a recording at page 7 of the same record as follows:

". . . [t]he Czechoslovak, Soviet and Yugoslav Delegations made objection to the proposal for the establishment of the Temporary

Trusteeship Committee, on the grounds that such action is not authorized by the Charter and would be unconstitutional".

That is the only reason given at this stage for the objection to the proposal.

Then, in its relevant report the Executive Committee gave the following explanation for its proposal which further explains what I have already read to the Court from the preamble. I quote from the same document as before, page 55:

"... there are at present no Members of the United Nations administering trust territories; and, therefore, a Trusteeship Council composed as laid down in Article 86 of the Charter cannot yet be formed. Some means of resolving this difficulty must be found, and the Committee submits the following recommendations.

. . . .

The Committee recommends that the General Assembly, acting under Article 22 of the Charter, create a temporary subsidiary organ to carry out certain of the functions assigned in the Charter to the Trusteeship Council, pending its establishment."

I emphasize those words, Mr. President, "to carry out certain of the functions assigned in the Charter to the Trusteeship Council, pending its establishment".

Now, with regard to the functions of this temporary committee, the report stated the following—I quote from the same document, page 56:

"The Temporary Trusteeship Committee would, *inter alia*, perform the following functions:

(i) assist the United Nations in expediting the conclusion of trusteeship agreements by the States directly concerned, and the coming into operation of the Trusteeship System provided for in Chapters XII and XIII of the Charter;

(ii) assist and advise the General Assembly in the discharge of any of its functions with regard to proposed non-strategic areas, including the approval of trusteeship agreements;

(iii) assist the Security Council in such matters as the Security Council might wish to refer to the Temporary Trusteeship Committee in relation to matters mentioned in Article 83 (3);

(iv) advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System."

In other words, Mr. President, here was a full indication of the functions of the proposed committee as then visualized.

With regard to the duration of the Temporary Trusteeship Committee, the Executive Committee recommended—I read from the same document at page 56—that—

"the tenure of the Temporary Trusteeship Committee should cease when, through the conclusion of a sufficient number of trusteeship agreements, the conditions in Article 86 have been fulfilled".

Then, in the same document, at page 58, we find that under a heading "Interim Powers" the following recommendation was made:

"In so far as the Temporary Trusteeship Committee undertakes the functions of the Trusteeship Council, it shall make use of such

rules of procedure, concerning the formulation of questionnaires, the examination of reports from administering authorities, the examination of petitions, arrangements for visits to trust territories, and the method of communicating observations to the General Assembly (or the Security Council) and the administering authority, as it shall have prepared for submission to the Trusteeship Council. The Committee shall perform such other functions as may be provided for in the trusteeship agreements or as may be assigned to it by the General Assembly or the Security Council, including the expedition and consideration of draft trusteeship agreements and the preparation of recommendations thereon for submission to the General Assembly or the Security Council."

Now, Mr. President, I have given the Court everything relevant which we could find in the records of the Executive Committee and its sub-Committees on what was visualized as functions for this Temporary Trusteeship Committee, and it will immediately strike one, Mr. President, that in accordance with the contemplation of its sponsors in the Executive Committee and its sub-Committees, this Temporary Trusteeship Committee was not intended to have any supervisory powers over mandates not brought under trusteeship. There is not a word indicative of any contemplation of that kind in all that I have read to the Court, which is all we could find that is relevant on the subject. And indeed, on analysis of the wording employed, it seems quite clear that such a contemplation was not intended to be included in anything stated. If it was intended, one would have expected something to that effect to have been said. On the contrary, we find that the Committee was intended to carry out "certain of the functions assigned in the Charter to the Trusteeship Council". And while it was foreseen that, in the exercise of its interim powers, it could undertake the functions of the Trusteeship Council regarding supervision of trust territories, there is not a word about mandates not brought under trusteeship.

With regard to mandates, the only function referred to in all this documentation which I have cited, was to advise the General Assembly—

> "on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates System".

That is, then, as far as the formal proposals in the documents are concerned—I am still talking about the stage where the matter is dealt with in the Executive Committee and its sub-committees. Indeed, Mr. President, a study of the documents of the Executive Committee reveals that, with one single exception, no suggestion was made at any stage of its proceedings that the proposed Temporary Trusteeship Committee should be endowed with powers of supervision over mandates not brought into the trusteeship system.

The single exception is an interesting one. It was a suggestion contained in a memorandum submitted by the delegation of the United States of America dated 14 October 1945, and officially referred to as *Document No.* P.C./EX/92/Add. 1. The document is available in the records in the Library—we found it there. My learned friend Mr. Muller, who went into the matter, found it by chance when going through the loose documents, because there is in fact no reference to it whatsoever in any of the recorded proceedings—certainly not in any of the proceedings or

debates. Now, the full text can be referred to in the document. There is a brief introduction, which does not really take the matter further. Then follows the amendment proposed to the recommendation regarding interim arrangements, which, it was suggested should read as follows (it would have become No. (v)):

> "to undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, the functions previously performed by the Mandates Commission in connection with receiving and examining reports submitted by Mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function".

In other words, Mr. President, there was an explicit proposal of the kind to which my learned friends referred which would have had this Temporary Trusteeship Committee exercise the function of supervising administration of mandates prior to other arrangements being entered into in respect of them after the dissolution of the League of Nations. And, Mr. President, the strange thing, the significant thing, is that no effect was ever given to this proposal. In fact, we found that the report of Committee No. 4 of the Executive Committee which contained the proposals of that Committee regarding the Temporary Trusteeship Committee was adopted at the 27th Meeting of the Executive Committee—that is, on 18 October 1945—without any reference whatsoever to this proposal of the United States of America. The meeting was presided over by the United States delegate, Mr. Adlai Stevenson, but no reference to the proposal can be traced in any of the debates of the Executive Committee. It appears as if this was a document prepared with a view to making a proposal, but that, in fact, as far as one can ascertain from the records, for some reason or other which is not explained in the records, the proposal was not made.

Something similar occurred at a later stage—I shall deal with that when I come to it—that is in the further stages of the matter through the Preparatory Commission itself—I shall then deal further with the significance of this situation.

The next stage, Mr. President, after the matter left the Executive Committee, was that it went to the Fourth Committee of the Preparatory Commission itself. Up to this stage, as I have emphasized, there was nothing whatever involving a proposal of the kind discussed by my learned friend—the proposal that this Committee was to exercise functions of supervision over mandates outside of trusteeship. The matter was dealt with in the Fourth Committee of the Preparatory Commission at its Second Meeting on 29 November 1945, and that is the date upon which Mr. Nicholls made the statement now so heavily relied upon by my learned friends. On that occasion the Australian delegate explained the reasons underlying the proposal for a Temporary Trusteeship Committee—one finds the reference in PC/TC/2, pages 2 to 3. Immediately afterwards the delegate of the Soviet Union stated his Government's objection to the proposal for a temporary body, and he is reported to have said, amongst others, the following:

> "... the Charter did not provide for the establishment of any temporary organ on trusteeship. As soon as trust territories existed,

the permanent Trusteeship Council should be established. As there was nothing in the Charter about the establishment of a temporary organ, the creation of the temporary Trusteeship Committee would not be on a constitutional basis. It was true that the General Assembly might create an auxiliary organ, but the temporary Trusteeship Committee as proposed by the Executive Committee would not be an auxiliary but a substitute organ."

I break the quote for the moment. Thus far, there are objections purely on a constitutional basis, the basis of law, that it would be impermissible to have such an organ. Now the objection proceeds on other grounds:

> "Considering that there were at present no territories under the trusteeship system, there would be no work for such a temporary body. In view of the solemn pledge concerning trusteeship in the Charter, the Members of the United Nations administering mandates could inform the General Assembly that they were willing to place them under trusteeship."

And then we find, Mr. President, that further on the delegate also stated "The temporary Trusteeship Committee would in fact delay these provisions of the Charter rather than speed them up". So we see the three factors: firstly, purely a constitutional objection; secondly, partly a legal, partly a factual, contemplation that as long as there were no territories under the trusteeship system, there would be no work for such a temporary body; thirdly, the fact that the Temporary Trusteeship Committee would in fact delay the provisions of the Charter rather than speed them up.

Now one can see also, Mr. President, in what sense this factor of delay was raised here by the Soviet delegate. It is not in the sense suggested by my learned friends, that this body would be exercising supervision over mandates as mandates, outside of trusteeship, and that that would encourage delay on the part of the mandatories to put the mandated territories under trusteeship proper. That is not the sense in which the Soviet delegate spoke of delay at all. The Soviet delegate spoke of delay in the sense that there would be trusteeships, that they would be supervised by a temporary body, and that that factor would be a delaying factor in setting up the proper system of the Permanent Trusteeship Council. The reference, Mr. President, is to the same document as before at page 3.

And we find at the same page that the representative of Yugoslavia expressed agreement with the views of the Soviet Union.

It is then that Mr. Nicholls spoke on behalf of the Union of South Africa. He used the words (quoted by the Applicants in the verbatim record of 7 May, on p. 141, *supra*) in the following context, as recorded in the records of the debate:

> "he had followed the argument against the establishment of a temporary organ most closely. It seemed to him that they were based on the one hand on constitutional grounds, on the other on expediency. The delegate for the Soviet Union might be right, but that was a legal question. The Committee must seek legal judgment on this question if doubt existed among some of the Delegations.
>
> On the question of expediency, it seemed reasonable to create an *interim body as the Mandates Commission was now in abeyance*

and countries holding mandates should have a body to which they could report."

That is from the same document as before, at page 4.

Now, Mr. President, if this statement is read against the background and in the context which I have indicated, then it becomes immediately clear that it could never have the meaning and the significance sought to be assigned to it by my learned friends. In the first place, Mr. President, Mr. Nicholls spoke after South Africa had already indicated, through its representative, Mr. Smit, at the San Francisco conference, what its attitude was in regard to South West Africa and its relationship to the United Nations in that regard. What justification is there under these circumstances to assume that when Mr. Nicholls spoke of mandatories in general, in this particular context, he had in mind the inclusion of South Africa in respect of South West Africa?

In the previous indication given of South Africa's attitude in regard to South West Africa, Mr. Smit had made it clear in the document which is on record, in the Counter-Memorial, **II**, at pages 33 to 34 that:

> "the Delegation of the Union of South Africa therefore claims that the Mandate should be terminated and that the territory should be incorporated as part of the Union of South Africa".

He intimated that the matter would be raised at the later Peace Conference and he added:

> "As stated in the Memorandum, this is not a matter that can be decided here, but I am directed to mention it for the information of the Conference so that South Africa may not afterwards be held to have acquiesced in the continuance of the Mandate or the inclusion of the territory in any form of trusteeship under the new International Organization."

Mr. President, against that background, as I say, what justification could there be for assuming that when Mr. Nicholls was speaking here in general on a question of expediency, not on a question of law, that he had in mind the inclusion of the case of South West Africa? The indications are to the contrary. As a matter of fact, one need not stop at what Mr. Smit had already said at San Francisco. One can refer to what Mr. Nicholls stated later in this very same Fourth Committee of the Preparatory Commission, still in the continuation of the same debate on the same subject-matter. That was at the later stages, before a final decision had to be taken as to whether there was to be a Temporary Trusteeship Committee, or whether other proposals in that regard were to be adopted. There was at that stage already the Yugoslav proposal before this Fourth Committee of the Preparatory Commission, broadly adopted later, which was to the effect that there should merely be a call upon mandatory powers to submit trusteeship agreements as soon as possible, or with expedition.

That was a proposal before the Fourth Committee at the time but, Mr. President, the proposal for a Temporary Trusteeship Committee was still there. The Fourth Committee still had to come to a decision whether to adopt the one or the other or maybe something else. And it is under those circumstances that Mr. Nicholls made the statement of 20 December 1945 which we cite in our Counter-Memorial, **II**, at page 41. He stated there that he—

"reserved the position of his Delegation until the meeting of the General Assembly, because his country found itself in an unusual position. The mandated territory of South-West Africa was already a self-governing country, and last year its legislature had passed a resolution asking for admission into Union. His Government had replied that acceptance of this proposal was impossible owing to their obligations under the mandate.

The position remained open, and his Delegation could not record its vote on the present occasion if by so doing it would imply that South-West Africa was not free to determine its own destiny. His Government would, however, do everything in its power to implement the Charter."

That, Mr. President, was stated as a reservation by the self-same Mr. Nicholls in the later stages of the very same debate. What justification, then, is there for my learned friend to suggest either that Mr. Nicholls thought that there was an obligation on the part of mandatories generally to submit to United Nations supervision, outside of trusteeship, or that he intended, in speaking of this possibility of reporting by mandatories to a temporary body, to include South Africa or the case of South West Africa in that suggestion at all?

The matter becomes, if anything, even clearer when we see what Mr. Nicholls said three days later—three days after this last reservation—when the matter came before the Plenary Meeting of the Preparatory Commission. We quote his statement, made on 23 December 1945, in the Counter-Memorial, **II**, at page 41. The tenor is much the same as the previous one but there is one particular aspect of it to which I should like to invite the Court's attention. I am not reading the whole of it; only the second sentence which reads—

"In view, however, of the special position of the Union of South Africa, which held a mandate over South-West Africa, it reserved its position with regard to the document at present under review, and especially because South Africa considered that it had fully discharged the obligations laid upon it by the Allies, under the Covenant of the League of Nations, on the advancement towards selfgovernment of territories under mandate."

Mr. President, when having that view of the matter, that contemplation of the situation, that South Africa had fully discharged its obligations laid upon it under the Mandate, how could there have been any contemplation on the part of Mr. Nicholls that there was to be any reporting or accounting to a temporary body by South Africa in respect of South West Africa? My submission is that it just does not make sense.

There is not one iota of justification for suggesting that Mr. Nicholls intended to include South West Africa in his remark, whatever his remark was intended to mean.

Next, Mr. President, on the question as to whether Mr. Nicholls considered that there was any legal obligation at all, the question is already partly answered by what I said in regard to the special position of South West Africa and the attitude he took in that regard. How could he have considered that there was any possibility of reservations of the kind indicated if he thought that there was an obligation to submit to supervision on the part of the United Nations, even outside trusteeship? But apart from that, taking Mr. Nicholls' view generally in regard to the

position of mandatory powers in respect of their mandates and with reference to possible United Nations supervision, it should be observed that Mr. Nicholls did not make his suggestion in answer to the contention of the Soviet Union that the establishment of a temporary body would be unconstitutional. In fact, Mr. Nicholls did not purport to take up the Soviet delegate on that point on a legal basis at all. He indicated that if there was uncertainty on that matter then legal opinion or legal judgment had to be obtained in that regard.

He addressed himself specifically to the question of expediency when he made this remark, on which my learned friends so heavily rely, inasmuch as, in his words, "it seemed reasonable to create an interim body" inasmuch as "countries holding mandates should have a body to which they could report".

Now, Mr. President, taking those words "a body to which they could report" alone, that immediately indicates, according to the natural meaning of the words, a possible wish on the part of such bodies to report—a body to which they could report. Furthermore, the mere fact that he said "it seemed reasonable to create an interim body" for such a purpose, in circumstances where there had never even been a proposal that the temporary body was to serve such a purpose, that indicated in itself that he contemplated a need for the creation of special machinery of this kind in order to bring about any obligation at all. Otherwise, why would it be necessary to have the special body for such a purpose, and why should he have referred to that in the context of a debate where there was no formal proposal before the meeting at all to the effect that this body should have powers of that kind?

So, Mr. President, the ordinary and natural explanation which the context suggests for this suggestion of Mr. Nicholls is simply this: that in the case of mandatories who were intending to place the particular mandated territories, or some of them, under their control under the trusteeship system, in those cases it would be reasonable for them to wish to carry on with a system of international accountability and reporting, and they might therefore, in respect of those cases, wish to have a body to which to report. And it would therefore, as a matter of expediency, seem reasonable to create a body of that kind—this in answer, apparently, to the suggestion of the Soviet delegate that outside of the creation of trusteeships there would be no work for such a body to do. But there is nothing, Mr. President, nothing in our submission which suggests any contemplation of an obligation of any mandatory in respect of any territory to do so.

So, Mr. President, that is one of the reasons why I suggested that my learned friend might have wished for a stronger foundation for his case than this, so-often referred to, suggestion of Mr. Nicholls.

But the matter goes very much further when we consider it in its next stage, and that is with reference to the attitudes indicated by other delegates, and, particularly, by other Mandatories. The Court will recall the passages which I read out earlier this afternoon in which my learned friends so strongly relied upon the proposition that other Mandatories, especially mentioning the United Kingdom and Australia by name, agreed with Mr. Nicholls in this regard, that they were favouring the idea of a temporary trusteeship committee with a view to its exercising this interim function of supervision over mandates, even prior to other arrangements being agreed to.

Mr. President, when one looks at the actual records one finds that neither the United Kingdom nor Australia nor any other delegate or country taking part in the debates favoured such a function for a temporary body. The United Kingdom and Australia both spoke in favour of the creation of such a temporary body, that is true, but what they said is on record, and what they said related to the original objects visualized for the temporary body, as set out in the records of the Executive Committee and its sub-committees, to which I referred earlier, without any reference whatsoever to a possible function of supervising mandates outside of trusteeship.

The record of what the United Kingdom and Australian representatives said in the Preparatory Commission—that is when the matter came to the stage of the Preparatory Commission—is in the same document as before—P.C.T.C. 2, page 4, for the United Kingdom, and page 5 for Australia. Both of these countries had taken part in the debates and discussions also at the earlier stage in the Executive Committee. (We could give those references to the Court later—we intended to have them ready.) But, again, on our checking of the situation, we have found that there was not one instance of any of them suggesting that a temporary trusteeship committee was to be created for this purpose—the purpose of supervising mandates outside of trusteeship. What they did indicate, and what seems to have been indicated in general in the course of the debates, was the possibility that there could be supervision of trust areas after certain mandated territories had been placed under trusteeship, but before the trusteeship committee could begin to function. In that sense, then, the temporary committee would be exercising, on a temporary basis, some of the functions contemplated for the permanent body.

So, Mr. President, in these earlier statements, which I read out to the Court, it will be quite evident that the Applicants were wrong when they said, for instance, that "the proposal for a temporary trusteeship committee was made by three mandatory powers, including the Respondent", and when they said that "Respondent, along with the other mandatories, including the British Government, suggested the establishment of interim machinery to which to report" (*supra*, pp. 153 and 155), and when they ended up by saying "the mandatory powers wanted that supervision to be carried out by an interim or temporary body prior to the establishment of the Trusteeship Committee".

It is on this basis (and, I think I have demonstrated, a false basis) that my learned friends have sought to elevate Mr. Nicholls' statement to such tremendous importance in their case, as a basis on which they now build their whole argument regarding consent by Respondent to the United Nations supervision of the Mandate. It is on this basis that they almost challenge us and say Mr. Nicholls has not found any "niche" in Respondent's case. We find them saying that, or words to that effect, on 7 May, at page 141, *supra*. The simple fact is, Mr. President, that it has never been necessary for Respondent to find a "niche" for Mr. Nicholls' statement anywhere in its case before, because this is the first time that we now hear from the Applicants that Mr. Nicholls' statement is to be given this strange significance, and that the other Mandatories are to be associated with that significance in the manner suggested by the Applicants, that is, in such a way that everything that followed afterwards—including all statements on behalf of Mandatories and the final

resolution of the League—is to be interpreted in the light of what was initially suggested by Mr. Nicholls hearing the significance attached to it by the Applicants.

The Applicants, Mr. President, seem to have forgotten that this was not the first time that they referred to Mr. Nicholls' statement. This very statement was also quoted by my learned friends in the 1962 Oral Proceedings, but then, of course, as the Court will recall and as I indicated earlier this afternoon, the Applicants were not attempting to make a case of consent by Respondent to United Nations supervision, they were then contending that the 1950 Opinion was decisive and that consent played no part in the Court's reasoning in that Opinion. And, so, it is quite in keeping with that contention, that we find that their version then of the events in the Fourth Committee of the Preparatory Commission took a completely different line. They did not then associate any of the other Mandatories with the views of Mr. Nicholls. We find in the 1962 Oral Proceedings, **VII**, at page 269, that the following was stated—I think by my learned friend, Mr. Gross:

> "At the same meeting of Committee 4 of the Preparatory Commission South Africa supported the view that creation of an interim body might expedite the establishment of a Trusteeship Council and added a proposal, not discussed by any other delegation, that a Temporary Trusteeship Committee might supervise administration of Mandated territories."

And this we find repeated, Mr. President, at page 271 of that record:

> ". . . the Respondent strongly supported proposals for establishment of a temporary trusteeship committee, and even suggested that it might supervise administration of Mandated territories".

Here we have it very definitely, "a proposal, *not* discussed by any other delegation", which, of course, is true—that is as it was. If my learned friend had only added there that Mr. Nicholls' statement was *not* intended to apply to all mandated territories, then it would hardly have been possible to have had any quarrel with it whatsoever.

Now, Mr. President, not only it is clear that Mr. Nicholls' suggestion was not discussed by any other delegation, not only is it clear that there was at that stage no proposal whatsoever before the relevant bodies (which was in this case the Fourth Committee of the Preparatory Commission), for interim supervision of the kind suggested by Mr. Nicholls, but it appears also, from a further and a closer study of the record, that there is certain very material and crucial evidence, which is not before the Court and which was not before the Court in 1950. In fact, we found that the library record of this Court was, in this respect, incomplete, and we only came to know of the further evidence, to which I should now like to refer the Court, during the course of the Applicants' reply, through certain researches conducted by my learned friends here, which led them *on to the track* of the particular documents and which we eventually obtained from America—from the United Nations records themselves. We have certified copies available for the Court. The matter raises a formal question of documentation.

In the course of studying this matter, my learned friends came across the document PC/EX/92, Addendum I, which is the one from which I quoted earlier—the written proposed amendment by the United States of America regarding the functions of the proposed temporary body,

as already drawn up in October at the stage when the matter was before the Executive Committee and its sub-committees. That document is on record here.

My learned friends also found a part of a document which was numbered PC/TC/11, which appeared to be also a proposed amendment filed by the United States of America at a later stage in the proceedings—this is after the matter had come to the Preparatory Commission itself, in its Fourth Committee. As I say, the document is incomplete—there is only one page of it in the records of the library of this Court—it stops at the end of the first page and it seems to be obviously a document that runs on. We, therefore, obtained the original of this document from the records in America. We have ten certified copies of it available.

We also obtained a certified copy of another document which is missing here, namely PC/TC/30, which was a circulated speech of Mr. Green, the representative of the United States of America, at the Ninth Meeting of the Fourth Committee of the Preparatory Commission, which is a speech which has some bearing upon the matter. The whole of this document is missing from the Court's records and, as I say, part of the former document is missing. I do not know whether the Court would prefer us to go through the ordinary stages of presenting a new document. It rather seems to be just a case of omission in the records. We have a number of certified copies available which could be made available in the library too. Perhaps the formal aspects of it could be discussed later—the Court could indicate to us through the Registrar what it wishes in that regard. We have available ten certified copies of each document for inspection by the Court and by my learned friends.

Mr. President, this first document which is PC/TC 11, is dated 4 December 1945. It is headed "United States Delegation", and it reads as follows:

> "PROPOSED AMENDMENT TO PART III, CHAPTER IV, SECTION 2, PARAGRAPH 4, CONCERNING FUNCTIONS OF THE TEMPORARY TRUSTEESHIP COMMITTEE.
>
> 1. The Report by the Executive Committee makes no provision for any organ of the United Nations to carry out the functions of the Permanent Mandates Commission. In Part III, Chapter IX, dealing with the League of Nations there occurs the following statement:
>
> 'Since the questions arising from the winding up of the Mandates system are dealt with in Part III, Chapter IV, no recommendation on this subject is included here.' (Section 3, paragraph 5, page 110.) No specific reference to the functions of the Permanent Mandates Commission is to be found, however, in Part III, Chapter IV, relating *to the trusteeship system. Section 2, paragraph* 4 of that Chapter (page 56) merely assigns to the Temporary Trusteeship Committee a general advisory function in this field: '(iv) advise the General Assembly on any matters that might arise with regard to the transfer to the United Nations of any functions and responsibilities hitherto exercised under the Mandates system.'
>
> 2. In order to provide a degree of continuity between the mandates system and the trusteeship system, to permit the mandatory powers to discharge their obligations, and to further the transfer of mandated territories to trusteeship, the Temporary Trusteeship Committee (or such a committee as is established to perform its functions)

and, later, the Trusteeship Council should be specifically empowered to receive the reports which the mandatory powers are now obligated to make to the Permanent Mandates Commission. The existing obligations and rights of the parties involved under the mandates system with respect to any mandated territory continue in force until such territory is placed under trusteeship by an individual trusteeship agreement or until some other international arrangement is made. To bridge any possible gap which might exist between the termination of the mandates system and the establishment of the trusteeship system, it would appear appropriate that the supervisory functions of the Permanent Mandates Commission should be carried on temporarily by the organ of the United Nations which is to handle trusteeship matters.

3. In order, therefore, that the report of the Preparatory Commission may be complete in this respect the following amendment is proposed.

4. *Amendment*

Add a new subparagraph (v) to paragraph 4 of Part III, Chapter IV, Section 2, to be worded as follows:

'(v) undertake, following the dissolution of the League of Nations and of the Permanent Mandates Commission, to receive and examine reports submitted by Mandatory Powers with respect to such territories under mandate as have not been placed under the trusteeship system by means of trusteeship agreements, and until such time as the Trusteeship Council is established, whereupon the Council will perform a similar function'. "

This proposal then, Mr. President, was filed on 4 December, five days after Mr. Nicholls' speech of 29 November, in the course of the same proceedings in the Fourth Committee of the Preparatory Commission.

The Court will note a contemplation here, a reference in the second paragraph to the fact that the mandatory powers were then—that was of course before the dissolution of the League—"obligated to make reports to the Permanent Mandates Commission". One sees a contemplation further that as at that stage the existing obligations and rights of the parties involved under the mandates system would continue in force. They would continue in force either until the territory was placed under trusteeship by an individual trusteeship agreement or until some other international arrangement was made—another international arrangement as contemplated at the stage of the writing of this document, including possible arrangements at the dissolution of the League. So one finds that the very next sentence goes on to speak of this problem of the bridging of "any possible gap which might exist between the termination of the mandates system and the establishment of the trusteeship system". And it is for the purpose of bridging that gap that it is suggested that the supervisory functions of the Permanent Mandates Commission should be carried on temporarily by the organ of the United Nations which is to handle trusteeship matters. This goes further, therefore, than all the previous contemplations that this temporary body was to exercise temporarily functions of the permanent body but not that it was to exercise functions of the Permanent Mandates Commission. In this

document, however, there was a specific proposal directed to the end of securing that result.

We found that according to the records this proposal was placed on the agenda of the Fourth Committee of the Preparatory Commission for the Ninth Meeting held on 10 December 1945. That we see in the document PC/TC/31 at pages 21 and 22. But when we come to that meeting, Mr. President, we find that the proposal was not discussed at all. We find that the representative of the United States, Mr. Green, delivered a lengthy address at that very meeting, which is on record, and in that address he did not even mention this proposal contained in PC/TC 11 which I have just read out.

Mr. President, in dealing with the practical advantages of the idea of a temporary trusteeship committee, which idea he was supporting, he showed concern only with regard to territories that might be submitted to trusteeship before the coming into being of the permanent Trusteeship Council. He showed concern that in those cases there would be no organ which could exercise supervision until the permanent Council came into being. So we find, Mr. President, that he posed this question in his own words:

> "Who looks after the territories which have been submitted to trusteeship (in the absence of the Trusteeship Council)?" (PC/TC/31, p. 23, and PC/TC/30, p. 8.)

We have, therefore, this very strange but in my submission very significant situation. Here is a specific written proposal by the United States which went on record and which was intended to be dealt with on the agenda of a particular meeting but when the meeting is held, no mention was made of it at all. It was simply dropped and nothing was said. I submit that the inference is inescapable that there must have been some reason for that, and the most probable reason in the circumstances would be discussion between the United States delegation and other delegations which resulted in the matter being seen in a different light or a proposal of this kind not being proceeded with. In other words, Mr. President, a situation very nearly the same in principle as we found in regard to the first proposal by China at the last meeting of the League Assembly, which after discussion had to be superseded by another proposal, leading to the obvious inference that it was made clear that the first one could not have obtained the necessary support.

It may well be, Mr. President (we are speculating, I do not know, the record does not say), that the other mandatory powers might have said to Mr. Nicholls and might have said to the United States: this is our business; we have to negotiate trusteeship agreements eventually with the United Nations in respect of the territories which we intend to place under trusteeship. For that purpose, we wish to obtain satisfactory terms. If we are to be placed by the United Nations, by our consent beforehand, under general supervision as wide as that which operated in the case of the League system, then our bargaining position may well be affected. It may well be that these mandatory powers indicated to Mr. Nicholls —"you cannot talk for us, when you have excluded yourself from this situation—we do not want it" and it may well be that an attitude of that kind was indicated to the United States of America. I do not know, I am merely pointing to the record which, in my submission, is a very significant one in this respect.

That provides us with the basis, Mr. President, for considering the further suggestion by my learned friends about the compromise which was said to have been entered into between two ideas—the pledges system. Now, it is significant in that regard, first of all, that in the Fourth Committee, that is of the Preparatory Commission, various delegations proposed that instead of having a temporary trusteeship committee, the mandatory powers should make declarations of their willingness to put their respective mandated territories under the trusteeship system. We found that Yugoslavia made that suggestion in PC/TC 4, at page 8; India in PC/TC 32, at page 24, and China in PC/TC 32, at page 26. That was then a suggestion that there should be a decision to the effect that mandatory powers should make declarations of their willingness to place their mandated territories under the trusteeship system, but this suggestion also, as we know, was not accepted because in the end the resolution, which is on record, and which eventually became resolution XI at the first part of the First Session of the General Assembly, in effect, as the Court will recall, merely called upon mandatory powers to expedite the submission of trusteeship agreements, in order to submit them for approval preferably not later than the second part of the First Session of the General Assembly. There was no calling upon them to make any statements whatsoever whether in the final resolutions of the General Assembly or in the resolution eventually adopted for recommendation in the Fourth Committee of the Preparatory Commission or in the Plenary Session of the Preparatory Commission itself, because at that stage already the report of the Fourth Committee, as one sees from PC/TC 41, at page 2, contained what eventually became the Assembly resolution XI with very minor variations in wording.

Now, Mr. President, we find that the reasons why the temporary trusteeship committee proposal was rejected by the Fourth Committee were explained at the Fourth Plenary Meeting of the Preparatory Commission held on 23 December 1945. We find that explanation in the *United Nations Journal*, No. 27, at pages 1 and 2. The first reason given was that the delegations of certain States objected to the proposal for a temporary committee on the ground that the formation of such a body was not authorized by the Charter, and that the establishment of such an organ would therefore be unconstitutional. The second reason was that the delegates were divided on the question whether the proposed temporary committee would have the effect of accelerating or delaying the establishment of the Permanent Trusteeship Council.

The Applicants were therefore, in our submission, clearly wrong when they said, as they did on 7 May in the verbatim record:

> "The proposal was turned down essentially for the pragmatic reason that it might tend to encourage delay in setting up the Trusteeship Council." (*Supra*, p. 141.)

The main argument advanced by the Soviet Union and other States which objected to the establishment of the temporary body was that it would be unconstitutional.

The Applicants' argument, Mr. President, entirely ignores this fact and also ignores the fact that the Soviet Union was the main objector and stated explicitly that until other trusteeship agreements had been concluded there would be no work for such a temporary body, which is entirely in keeping, incidentally, Mr. President, with the attitude

consistently taken by the Soviet Union in this matter, viz., that there was to be no legal continuity between the mandates system of the League and the trusteeship system of the United Nations.

Now, to revert, Mr. President, to these suggestions that there should be a decision or a resolution calling upon Mandatories to state their willingness or their intent to place their Territories under trusteeship, which was not accepted, we find that the Applicants' argument is that by plan and design a different system of pledges was devised as a compromise, namely pledges "to carry out all the obligations of the Mandate, including the obligation to submit to international supervision . . . until other agreed arrangements could be made". That is quoted from the verbatim record of 7 May, at page 146, *supra*. Yet, Mr. President, we have seen that there was no resolution whatsoever to which they could refer, no resolution calling for any statements whatsoever by any mandated powers. Yet my learned friends say, on the one hand—let us see what were the opposing ideas between which this compromise solution was arrived at—"the mandatory powers wanted that supervision [that is of mandated territories] to be carried out by an interim . . . body prior to the establishment of the Trusteeship Council", while, on the other hand, they say "other governments . . . pressed for pledges by the mandatory powers to place these territories under the trusteeship system". So, it was between these two that the compromise was reached. (These quotations are from p. 146, *supra*.)

The system of pledges, Applicants say, was decided upon by plan and design—by plan and design there was to be a system of pledges—although they can point to no resolution in that regard. But that system of pledges was not designed to place mandated territories under trusteeship. It was to be a system of pledges to carry out all the obligations of the Mandate, including the obligation to submit to international supervision until other agreed arrangements could be made.

Mr. President, in the first place the Applicants offer no evidence whatsoever in support of this so-called compromise plan or design, they do not point to any part of the record which shows that there was such a compromise, that anybody was aware of it, that anybody spoke of it, that there is any kind of a record of it whatsoever. Indeed, they cannot point to any evidence, Mr. President, because the whole suggestion is, with the greatest respect and with the greatest submission, a figment of their imagination. It is entirely in conflict with the true history of the events. In any event, Mr. President, before we proceed with the factual record, what kind of a compromise would this have been? In my submission, it does not work out, it does not make sense.

On the one hand, we have mandatory powers, which as suggested by the Applicants, now wished to have a temporary body which could supervise mandatory administration even outside of trusteeship. I have already shown that factually that is a false premise, but let us take it at its face value for the moment. That is not agreed to by the other States because they think that too much delay would be involved through following a process of that kind. Now, we already have inherent in this whole clash of ideas that the Parties are agreed, according to the Applicants, about the ideals and objectives; they are agreed about the objective of having the trusteeship system operating as soon as possible; they are agreed about the objective of having continuity of supervision over mandatory administration. Those are the objectives, but they are dis-

agreed upon the methods which are to be resolved upon with a view to attainment of those objectives. So we have a contemplation, on the one hand, that machinery is to be created—special machinery—in order to provide for this continuity, the contemplation, therefore, that this machinery is necessary, but also a contemplation, from the other side, that it is undesirable to have that machinery and that, therefore, there should be no such machinery.

Mr. President, in those circumstances what sense does it make to say there was nevertheless a compromise to the effect that mandatories would pledge themselves to carry on with *all* their obligations under the mandates system, including an obligation of accountability, until the trusteeship system might eventually come into operation or until other arrangements were made, when by that very same contemplation there would *not* be the necessary element of the provision of machinery for that purpose? The two ideas are so fundamentally in conflict with one another that it shows that the whole suggestion of the compromise plan and design in this respect just does not make sense. But, in addition, as I have said, it is *not* in accord with the actual facts on record.

[Public hearing of 25 May 1965]

Mr. President, I promised yesterday to give the Court references to the participation by the United Kingdom and Australia in the debates of the Executive Committee of the Preparatory Commission on the subject of the proposal for a Temporary Trusteeship Committee. I have here the loose minutes, as they are probably known to the Court, of the Executive Committee in Plenary Session, dated 19 October 1955, and the references are from page 9 onwards. The Court will see that the representatives of the United Kingdom, Professor Webster, at page 10, Mr. Haslock of Australia, at page 11, and the Chairman, who was from the United States, took part in the debates; and then again, at page 12, the representatives of France, Australia, and the United Kingdom. I think those will give a representative indication of the attitudes taken in the Executive Committee.

At the conclusion yesterday, Mr. President, I was dealing with the Applicants' suggestion of a "compromise plan or design" which was said to have been arrived at in the United Nations Preparatory Commission between the mandatories and other States. As the Court will recall, the suggestion was that the mandatories wanted supervision by an interim body, whereas other States wanted pledges by mandatories to place the mandated territories under trusteeship. The compromise was said to be that the mandatories were to pledge themselves to carry out all the obligations of the mandates, including submission to international supervision, until other arrangements were agreed upon.

I submitted, Mr. President, with respect, that this does not make sense, even on the Applicants' own premises, for the reasons which I indicated yesterday; and I promised to demonstrate to the Court, also, that the submission was in any event in complete conflict with the true facts as they emerge from the record.

In the first place, as we have indicated, the Applicants are entirely wrong when they say that the mandatory powers, in supporting the proposal for a Temporary Trusteeship Committee, wanted supervision of their mandated territories before trusteeship agreements were con-

cluded. We have shown, also, what Mr. Nicholls apparently meant in that regard, and we have shown that the other mandatories obviously did not agree even with his limited suggestion. That, in itself, would really dispose of the Applicants' argument.

But, Mr. President, the argument is in our submission further completely controverted by what actually occurred when the proposal for the Temporary Trusteeship Committee was rejected and afterwards. When the proposal was rejected there was also a rejection of the other proposal which I mentioned yesterday, namely that mandatories should be called upon to make declarations of their willingness to submit their mandated territories to the trusteeship system. In place of both these proposals came the proposal that the General Assembly should merely call upon the mandatories to expedite the submission of trusteeship agreements, which proposal was eventually adopted in the General Assembly resolution No. XI of 9 February 1946. (II, p. 43.)

So, Mr. President, in the result there was no calling upon mandatory powers to make any pledges at all. Yet we find that the Applicants speak of pledges which were linked with a speech which the New Zealand Prime Minister, Mr. Peter Fraser, had made at the San Francisco Conference. I referred the Court yesterday to the verbatim record of 7 May, at pages 139 and 143, *supra*, and I read an extract showing the manner in which this point was dealt with by the Applicants. It may be as well to check first on that aspect before referring to the further events which followed those in the Preparatory Commission. We have to go back to the San Francisco speech by Mr. Peter Fraser.

Mr. Fraser in this speech was referring to the provisions of the Charter for the establishment of the Trusteeship Council, and he then said the following:

> "The work immediately ahead is how those mandates that were previously supervised by the Mandate Commission of the League of Nations can now be supervised by the Trusteeship Council with every mandatory authority pledging itself in the first instance as the test of sincerity demands, whatever may happen to the territory afterwards, to acknowledge the authority and the supervision of this Trusteeship Council." (*Supra*, p. 140.)

Now, Mr. President, I would, with submission, say that the natural interpretation of this statement is that Mr. Fraser was enjoining the mandatory powers to place their mandated territories under trusteeship. There are many reasons, quite apart from the text which appears to be clear, why he cannot be understood to have suggested that mandatories should acknowledge the authority and the supervision of the Trusteeship Council in respect of mandated territories not converted to trusteeship. The Court will recall from the record that no mandatory in fact ever gave a pledge to acknowledge the authority of the Trusteeship Council outside of the trusteeship system.

And the Court will further recall from passages which I cited to the Court on the attitude of New Zealand—passages which I cited in my argument in chief—that New Zealand was, on occasion, very emphatic in denying that it owed any duty of accountability to the United Nations outside of trusteeship.

Thus, all the indications—the natural meaning, the context, the probabilities as to what he meant are that Mr. Fraser was simply urging

the mandatory powers to place their territories under trusteeship and, in that sense, and for that purpose, to acknowledge the authority and supervision of the Trusteeship Council whatever might happen to the territories afterwards, "afterwards" meaning after trusteeship.

The impression to the contrary which the Applicants create, Mr. President, is, in my submission, due entirely to the interpolation in Mr. Fraser's speech of the words to which I drew attention yesterday, viz., the words "until other arrangements were concluded", words which occur in the verbatim record of 7 May, at page 143, *supra*, but which Mr. Fraser, in fact, did not use.

But, Mr. President, what is perhaps the most important factor of all to refute the Applicants' suggestion of a compromise plan, or design, is the very fact that declarations were indeed made by the mandatory powers very shortly after the deliberations in the Preparatory Commission, but that these were not declarations or pledges of the nature described by the Applicants. That is perhaps the surest test of all, in order to ascertain whether they are correct in suggesting that there was a basic plan, design, or compromise, in pursuance of which the mandatory powers acted afterwards. Because when that is put to the test, we find that immediately after the matter went from the Preparatory Commission to the General Assembly itself, certain declarations were, in fact, made by mandatory powers. This was in the First Part of the First Session of the General Assembly, when the report of the Preparatory Commission was under consideration.

In our Counter-Memorial, **II**, at pages 41 to 42, we cite extracts from declarations made by certain of the mandatory powers—South Africa, the United Kingdom and France—on this occasion. It is very clear, in our submission, from those statements, that not one of these mandatories had in mind any pledges of the nature contended for by the Applicants.

South Africa's statement, which is to be found at page 41 of that Volume, was a reservation of the same nature as before—a reservation of its whole position regarding South West Africa—for substantially the same reasons as those given before—pending consultation with the people of South West Africa as to the form which their own future government should take. There was therefore no suggestion whatever of a pledge of the nature contended for by the Applicants.

The United Kingdom statement, or the extract therefrom which we cite, is to be found at page 42 of that Volume. That indicated willingness on the part of the United Kingdom to place certain territories under trusteeship, but depending on the negotiation of satisfactory terms. The position regarding Palestine was explicitly reserved pending the report of the Anglo-American Committee of inquiry, and the intention was further expressed to accord independence to Transjordan. Again, Mr. President, there was no reference to carrying on with mandate obligations pending new arrangements, and certainly nothing regarding supervision in the interim.

France, in a statement cited at page 43 of that same Volume of the Counter-Memorial, indicated an intention to enter into trusteeship regarding Togo and the Cameroons, again subject to satisfactory terms being agreed upon. Furthermore, the same remarks apply as in the case of the United Kingdom in regard to the suggested pledge.

The other mandatories also made declarations. To these we refer at page 43 of the same Volume of the Counter-Memorial without, however,

quoting them there. It may be significant to refer to portions of the texts of certain of these declarations.

The representative of New Zealand stated the following (the reference is to the *General Assembly, Official Records*, 14th Plenary Meeting, 18 January 1946, at pp. 226 to 227).

> "The New Zealand delegation has studied with interest the Chapter of the Report of the Preparatory Commission which concerns trusteeship. It welcomes the fact that the Commission did not see fit to proceed with the proposal of the Excutive Committee for the establishment of a Temporary Trusteeship Committee, in order that the trusteeship machinery described in the Charter may be set up. Three steps are necessary for that. The first is that all the Powers having responsibility for the government of dependent peoples should announce their willingness to place their respective territories under trusteeship. The second is that trusteeship agreements should be concluded. The third step is that the Trusteeship Council should be set up."

The representative of New Zealand then announced his Government's preparedness to place Western Samoa under trusteeship. Again, Mr. President, there is not a word of a compromise plan, or design, or of a pledge to submit the Mandate to United Nations supervision outside of trusteeship.

The Australian delegate's speech is to be found in the same record to which I have referred, at page 233. He stated the following:

> "At the Executive Committee stage of the Preparatory Commission's work, my colleague, Dr. Evatt, was responsible for putting forward the first concrete proposals for ensuring the early operation of these chapters [i.e., the proposal for a Temporary Trusteeship Committee]. At the Preparatory Commission itself, the Australian delegation, in a spirit of conciliation, accepted the alternative procedure which has now been recommenced." (*G.A.*, *O.R.*, 14th Plenary Meeting, 18 January, 1946, p. 233.)

The alternative procedure was, of course, that the General Assembly should call upon the mandatory powers to expedite submission of trusteeship agreements, as we noted before.

The Australian delegate proceeded to announce his Government's—

> "... intention of negotiating an appropriate trusteeship agreement with a view to bringing the Mandated Territory of New Guinea under the international trusteeship system ...". *(Ibid.)*

Again, Mr. President, there is no word of a compromise plan, or design, or pledge of any intention regarding obligations pending entering into an appropriate trusteeship agreement.

The representative of Belgium's statement is to be found in the same record, at page 238. I shall read an extract:

> "... the Preparatory Commission has passed a recommendation that the General Assembly should adopt the resolution according to which States administering territories under a mandate from the League of Nations shall be invited, in agreement with the other States directly concerned, to take the necessary measures for putting into effect Article 79 of the Charter which provides for the conclusion

of trusteeship agreements in respect of each territory to be placed under this system. Desiring to promote the application of the trusteeship system at the earliest possible date, Belgium hereby announces her intention to start negotiations immediately with a view to placing under trusteeship the territory of Ruanda-Urundi ..."

Again, Mr. President, the same comment applies as in the case of the previous citations.

In its eventual resolution of 9 February 1945, resolution No. XI, the General Assembly, prior to calling upon the mandatory powers to expedite the submission of trusteeship agreements, also—

"... *Welcome*[d] the declarations, made by certain States administering territories now held under Mandate, of an intention to negotiate trusteeship agreements in respect of some of those territories and in respect of Transjordan to establish its independence". (**II**, p. 43.)

We have here a summary rendering of the gist of the statements of some of the mandatories prepared to negotiate trusteeship agreements. It emphasizes by careful wording that it did not apply to all mandated territories, and also, by omission, the point I have just been making, namely that there was no reference whatsoever to the type of pledge to which my learned friends referred.

Mr. President, in my submission, these declarations in themselves destroy the whole idea of the Applicants' so-called compromise "plan or design", in support of which no evidence whatsoever was tendered by them to the Court.

From this, Mr. President, it follows, if we move along toward the last session of the League Assembly, that the Applicants' whole approach to the declarations made by the mandatories on that occasion is also unsound. There is no support whatsoever for the suggestion that those declarations by the mandatories are to be read as emanating from an *a priori* plan, or design, for pledges to submit to United Nations supervision. On the contrary, that suggestion is in conflict with all the events with which we have just dealt.

It is quite clear, Mr. President, that the Applicants' analysis of these declarations, as they now present that to the Court in their oral reply, indeed proceeds on the basis that their version of the proposal for a Temporary Trusteeship Committee and of the reason for the rejection of the proposal, is correct. We find that they deal with this matter in the verbatim record of 7 May—there is a relevant passage at page 148, *supra*, which confirms what I have just stated, and I need not read that because in the same record of 7 May, at page 150, *supra*, there is a further passage which substantially repeats the earlier one and takes it a little further. It reads as follows:

"The fact that the Preparatory Commission rejected this specific provision for supervisory machinery for obvious reasons of expediency and policy, read in the light of the views of the mandatory powers, including Respondent, that there should be such machinery until other arrangements were concluded, is consistent with the inference that the members of the Preparatory Commission felt that there was no need for special provision and that the United Nations, if it wished and if it became necessary, would assume powers of mandate supervision in residual and exceptional situations, which is precisely

> the case presented by South West Africa and, as I have said, no one ever spoke against United Nations supervision over mandates in 1945 or in 1946; Respondent's representative, to the contrary, Mr. Nicholls, explicitly favoured it. Hence, as we have already noted, the relationship between South African support for the temporary Trusteeship Committee and the South African pledge to the League of 9 April 1946 become very meaningful, and precisely the same pattern may be seen in the pledges made by each of the other mandatory powers."

The importance lies in this last link, "the relationship between South African support for the temporary Trusteeship Committee and the South African pledge to the League", is said to be "very meaningful", and the contention is that precisely the same pattern may be seen in the pledges made by each of the other mandatory powers.

Mr. President, I repeat that this approach to the declarations made at the last League session is untenable for the simple reason that the premises upon which it rests are entirely wrong, the premises being the Applicants' version of the proposal for a Temporary Trusteeship Committee, of the reasons why certain mandatory powers favoured the proposal, and of the reasons why the proposal was rejected. Those matters I dealt with yesterday and made it very clear, in my submission, that those premises of the Applicants are unfounded.

Consequently, the whole basis upon which the Applicants attempt to criticize our analysis and interpretation of the several declarations made by mandatory powers is also, in my submission, without foundation. That attempt to criticize our analysis is to be found in the verbatim record of 10 May, at pages 151-157, *supra*, where it will be observed that this premise of their interpretation of the earlier events of the Preparatory Commission—is the basic feature, the premise upon which the criticism rests and, if that falls away, the whole criticism itself, as now tendered, falls away.

That they carry this false premise through also to the interpretation of the League resolution of 18 April, Mr. President, is evident from a passage in the verbatim record of 10 May, at page 153, *supra*, which I quoted to the Court yesterday—the passage in which they cite paragraph 4 of that resolution, with certain comment.

In the comment they said, *inter alia*, that the word "pledge" "was used in several of the statements made at the time". Mr. President, that is not correct. We checked on it and we found that the word "pledge" was, as far as we could ascertain from the record, used only twice during the whole of the relevant discussions at the last Assembly of the League of Nations. It was used once by the representative of Australia, but not with reference to a pledge with a content such as contended for by the Applicants. It was used quite clearly as referring to Australia's assurance regarding compliance with the substantive provisions of the Mandate, that is, in the words used, "to continue to administer the present mandated territories, in accordance with the provisions of the Mandates, for the protection and advancement of the inhabitants". The context in which the word "pledge" was used, Mr. President, will appear from the following statement which is well-known to the Court because we have cited the whole of it before:

> "In due course these territories will be brought under the trustee-

> ship system of the United Nations; until then, the ground is covered not only by the pledge which the Government of Australia has given to this Assembly to-day but also by the explicit international obligations laid down in Chapter XI of the Charter..." (*League of Nations, Official Journal*, Special Suppl. No. 194, p. 47.)

So the pledge refers to the undertaking, the assurance, the expressed intention to comply with the substantive provisions of the mandate regarding administration of the territory, and it is stated that the ground is further covered by "the explicit international obligations" laid down by the Charter—the point with which I dealt before, viz., the conception of the Australian representative that there would be reporting, or the giving of information, to the United Nations under the provisions of Article 73 *(e)* of the Charter.

The only other occasion on which the word "pledge" was used was during the speech of the delegate of Switzerland, who in the relevant part of his speech spoke solely of the technical activities of the League which were to be transferred to the United Nations. He said:

> "... this last General Assembly is important in so far as it expresses the will to transmit to the United Nations Organization the technical activities in which the League has been engaged, often very successfully: in the social sphere through the International Labour Organization, in the sphere of public health through the Health Organization and in many others referred to just now by M. Paul-Boncour. The instrument of work forged at Geneva, which we are handing over body and mind to the Organization of tomorrow, will constitute a pledge for the future." (*Ibid.*, p. 37.)

It is clear, Mr. President, from the record, that the word "pledge" was, in fact, never used at the dissolution of the League in the sense contended for by the Applicants.

The declarations by the mandatories at the last session of the League Assembly were all made, as the Court will recall, in Plenary Session. Now, apart from statements made by mandatory powers, the only delegates who referred in the debates in the Plenary Session to the question of mandated territories at all, were those of China, India and Egypt, and their statements made it clear that they perceived no pledge on the part of the mandatories as is now contended for by the Applicants.

Dr. Lone Liang of China first spoke in the Assembly in its Plenary Meeting on 9 April 1946; this was even before the first proposal raised by him. He spoke after the United Kingdom had reserved its position with regard to Palestine and had made its declaration of intention regarding its other mandates. He mentioned not a word, Mr. President, about "pledges" or "undertakings" in the sense contended for by the Applicants. After expressing gratification at Lord Robert Cecil's statement in regard to the mandate system, he referred to the institution of the trusteeship system and stated the following:

> "Some of the mandatory States administering these territories have already taken the lead during the first Assembly of the United Nations in answering this call ["this call", if I may interrupt refers to the institution of the trusteeship system]. It is to be hoped that the Trusteeship Council of the United Nations will soon be set up to

receive the torch of freedom and humanity from the League." (*Ibid.*, p. 31.)

Now this same delegate, Mr. President, spoke later in the Plenary Session when he proposed a second draft resolution, a matter to which I have made extensive reference before. We have checked the speech again and it is clear that he made no mention of anything in the nature of a pledge. (We find the speech in the same Supplement at pp. 78-79.)

The representative of India, speaking after the United Kingdom, South Africa, France, New Zealand and Belgium had made their statements, merely said the following:

"The declared intention of several of the present mandatory Powers to transfer most of the territories to the trusteeship system is a good and healthy augury for the future. May I express the hope that the same vision and statesmanship will inspire all the Powers in respect of the mandated territories, and thus eliminate what may well become a potential cause of unrest in various parts of the world." (*Ibid.*, p. 46.)

Again there is no reference to any "pledge" of the nature contended for.

Then there was the representative of Egypt, with whose attitude we dealt before. The Court will recall that his attitude was that the "Mandates [had] terminated with the dissolution of the League of Nations". (II, p. 51.)

So it is clear from the whole debate and from what was actually said by the mandatory powers and the others in response thereto that there was no concept of an *a priori* compromise plan, or design, for pledges to submit to United Nations supervision in an interim period, or at all.

Now Mr. President, the next step in these proceedings is that relating to the two Chinese draft proposals. Here again we find that the Applicants attempt to explain the events purely on the basis of their alleged compromise plan, or design. Thus, they say in the verbatim record, of 10 May, at page 160, *supra*:

". . . the first Chinese draft was, in essence, an attempt to return to the first alternative proposal favoured by mandatory powers in the debates of the Preparatory Commission".

They embroider on this basic submission in more detail at the next page; it is unnecessary for me to read it out to the Court because the way in which the false premise affects the conclusion is so obvious as to require no further elaboration. That, Mr. President, therefore, is the whole basis upon which they approach this matter. The Applicants are so carried away by this false premise that they even go so far as to suggest that Respondent and the United Kingdom would have preferred the first Chinese draft proposal to the second one. We find stated in the verbatim record of 10 May, at page 161, *supra*, and later in the verbatim record of 11 May, at page 189, *supra*, they went so far as to say this:

"It is therefore at least as plausible, in the Applicants' view *more* plausible, to infer that it was perhaps the Respondent or other mandatories or a group of them all acting together who [were] overruled when the Assembly decided not to accept the Chinese draft resolution which would have set up the very machinery the mandatories had proposed in the Preparatory Commission."

I added the word "were" before "overruled"—that seems to be the context and it appears to have been omitted from the verbatim record. But, Mr. President, when regard is had to the true factual position, these suggestions are, of course, entirely ludicrous. The United Kingdom and South Africa had explicitly reserved their positions regarding Palestine and South West Africa, respectively. In both cases they made it clear how uncertain the future was in regard to those territories. Yet the suggestion is that these two States would have preferred the first draft which would have made it obligatory, in respect of all mandated territories to recognize, or submit to, supervision on the part of the United Nations organs.

New Zealand, Mr. President, had in January welcomed the fact that the Preparatory Commission did not see fit to proceed with the proposal to establish a temporary trusteeship committee: that appears from the statement which I read to the Court a little while ago. Yet we still find in this last submission of the Applicants which I read out, the words that the Chinese draft resolution "would have set up the very machinery the mandatories had proposed in the Preparatory Commission". Mr. President, one's greatest amazement is that a submission of this kind could be seriously made. If the mandatories did not oppose the first Chinese draft proposal, who would have opposed it, I might ask? The Court will recall that we deal in the Counter-Memorial, **II**, at pages 46 and following, with the events at the final session of the League Assembly, and we refer to certain facts in that regard which, as far as we know, are entirely undisputed. We say at page 46:

> "The session was scheduled to last less than two weeks, and delegates knew that it would not be possible to discuss the future of the Mandate System at any length in an appropriate Committee. Informal discussions were consequently initiated between those Members of the League most directly concerned, with a view to securing the greatest possible measure of agreement before the matter was officially considered in the Committee."

And then at page 49, we indicate that after the first Chinese proposal had been raised, the informal discussions were renewed, the Chinese delegations also participating therein, and that—

> "*the final outcome was that when the question of Mandates* was reached in the First Committee, on the 12th April, 1946, the Chinese delegate, Dr. Liang, himself introduced a new draft of which Sir Hartley Shawcross of the United Kingdom said, when seconding the proposal, that it—
>
> 'had been settled in consultation and agreement by all countries interested in mandates, and he thought it could, therefore, be passed without discussion and with complete unanimity'." (**II**, p. 50.)

Now, Mr. President, accepting those facts, how could it be imagined that there would have been opposition, as there must obviously have been to this first Chinese proposal, if it did not come from the mandatories—if the mandatories were, as my learned friends suggest, in favour of that proposal, they really wanted such a transfer of supervisory functions, and wanted to be subject to interim supervision, but were thwarted in this intention by an undisclosed attitude on the part of other States?

Surely, Mr. President, if that had been the position, one would have expected one or other of the mandatories to have referred to that, even if only obliquely, in one of their statements in the debates. Surely one would have expected one of them to have said "we would like to go further than what we are stating here, we would like to report in the interim and to subject ourselves to supervision in the meantime, even before new arrangements are agreed upon, but we have been prevented from doing so because there is an unwillingness on the part of some States to do what may be necessary in order to create the necessary machinery".

For instance, it would have fitted very well, Mr. President, in the statement of the Australian representative which we cite in the Counter-Memorial, II, at page 48. In the second sentence of the passage which we cite, the Australian representative stated:

> "After the dissolution of the League of Nations and the consequent liquidation of the Permanent Mandates Commission, it will be impossible to continue the mandates system in its entirety."

Surely, if there had been any intention, any wish, on the part of the mandatory powers to support this first proposal to create machinery to which they could report and account in the meantime, it would have been unnecessary to rest the matter on the basis that it would be impossible to continue the mandates system on its entirety. It would then also, Mr. President, have been very strange that, although we have this contemplation of a pledge on the part of the representatives of the mandatory States and, therefore, also on the part of the Australian representative (this is the basis upon which we argue or on which we analyse the Applicants' contention) the Australian representative should then have gone further and have stated a contemplation that Article 73 *(e)* would govern the situation in the interim period in regard to the furnishing of information. On the one hand there would be a pledge, or contemplation of a pledge, to comply with all the obligations of the mandatory system in the interim period, including an obligation of accountability. Yet, although there was a specific proposal for creating machinery that did not obtain approval, the contemplation still stood. But in spite of that contemplation we find the only explicit reference to furnishing information, or reporting, or anything of that kind, in the interim, was one based on Chapter XI of the Charter, section 73 *(e)*, which my learned friend himself conceded in his argument was an obligation of a much lesser content than that provided for in Article 6 of the Mandate for South West Africa and corresponding Articles in the other mandates.

Yet, Mr. President, that is apparently the inference urged upon this Court that it should draw as to the attitude of the various mandatory powers, and there seems to be a serious suggestion that the Court could, by a process of necessary inference, come to a conclusion favourable to the Applicants' contentions.

I submit, Mr. President, that the more one analyses the record, the more one analyses the successive, varying contentions advanced by the Applicants to the Court in this regard, the more it becomes absolutely clear that there is no basis whatsoever for such a finding in the Applicants' favour.

I may, just by way of summary on this aspect of the case, refer to some of the material facts on the record which stand out as irrefutable

indications that the Respondent did not, either before or at the dissolution of the League, consent to transfer of supervisory authority over the Mandate to the United Nations.

The first of these is the fact that no provision was made in the Charter of the United Nations for supervision of mandates other than by putting mandated territories under the trusteeship system.

The second is the fact that Respondent had, at the earliest opportunity, that is, at the San Francisco Conference, declared its intention to have the territory of South West Africa incorporated in the Union of South Africa, and that it therefore reserved its position with regard to the territory in the terms which I cited to the Court again yesterday.

Thirdly, there is the fact that the proposal for the Temporary Trusteeship Committee, which was intended, *inter alia*, to supervise trust territories prior to the establishment of the Trusteeship Council, was rejected mainly because the step was considered, at least by a certain number of States, as unconstitutional. In conjunction with this we have the written proposal by the United States of America that the functions of the proposed Temporary Trusteeship Council should be extended also to cover supervision of mandates. We have the fact that that written proposal was not even raised by the proposer, the United States, nor even discussed in the debates.

It is only reasonable and logical, Mr. President, in our submission, to assume that if the temporary body with its functions as originally proposed was regarded as unconstitutional, it would *a fortiori* have been regarded as unconstitutional with the proposed extended functions.

Next, Mr. President, we have the reservations made by Mr. Nicholls in the Fourth Committee of the Preparatory Commission on 20 December 1945, and in the Preparatory Commission itself on 23 December 1945, with regard to the position of South West Africa in the terms to which I referred again yesterday. And there was a like reservation by Respondent before the Plenary Meeting of the General Assembly on 17 January 1946. All these indicate quite clearly that there would, as far as Respondent was concerned, be no supervision by the United Nations over South West Africa, either by way of trusteeship or otherwise.

Next we have the first Chinese proposal at the last session of the League which specifically provided for a transfer to the United Nations of the League's supervisory powers over mandates and the very obvious inferences which are to be drawn from the fact that this proposal had to be dropped and superseded by the resolution actually adopted. Our case in that regard has not been affected in any way whatsoever by what has now been offered to the Court by my learned friends, in reply.

Next, there is the fact that the declarations made by the different mandatories—each and every one of them—merely contain an expression of intention regarding continued administration of the respective mandated territories and that some of them contain very pointed indications that there would be no reporting or accounting under the mandates. Again, our analysis of this matter as offered in our argument in chief has in no way been touched by the Applicants' argument in reply. The whole line of attack offered by them in this regard has fallen away because of the false premise upon which it rests.

Next there is the fact that the League resolution of 18 April 1946 merely referred to the "expressed intentions" of the mandatory powers to continue to administer the territories in a certain manner.

Finally, there is the tremendous impact of the difference in the treatment of mandates, on the one hand, and of other matters, on the other hand, where transfers to the United Nations were indeed intended, in the corresponding United Nations and League resolutions, in the registrations under Article 102 of the Charter, and in the actions and the report of the Board of Liquidation.

Upon all this evidence, of which I have mentioned some of the most salient examples (I haven't tried to deal with it all again because it is all on record), but upon this evidence as a whole, Mr. President, the Applicants' contention that the Respondent consented to United Nations supervision of the mandate at or prior to the dissolution of the League must, in our submission, without any doubt be rejected.

That brings us to the argument offered in reply by the Applicants on the question of Respondent's alleged conduct after the dissolution of the League.

In the verbatim record of 10 May the Applicants summarized their contentions in this regard as follows:

> "In summary, up to the autumn of 1947, the South African Government had—
>
> *(a)* recognized that in law the Mandate of South West Africa continued in full force and effect, notwithstanding the dissolution of the League, and this is now common cause;
>
> *(b)* advocated the establishment of interim machinery for the supervision of Mandates pending other arrangements since, in the words of Mr. Nicholls at the Preparatory Commission 'the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report';
>
> *(c)* had taken part in the system of pledges by which each of the mandatory powers in terms undertook to carry out all of the obligations of the mandate until the conclusion of other agreed arrangements;
>
> *(d)* had submitted the issue of the incorporation of the Territory of South West Africa and the termination of the Mandate to the General Assembly as the competent international organization for judgment;
>
> *(e)* had associated itself in a letter to the Secretary-General of the United Nations with a Resolution of the House of Assembly of the Union Parliament, calling for reports to be rendered to the United Nations as heretofore under the Mandate.
>
> Not until September of 1947, did Respondent's Government begin to question openly the supervisory powers of the United Nations and only in 1948, did it for the first time begin to question the legal existence of the Mandate as a whole." (*Supra*, pp. 173-174.)

The summary provides a useful basis on which to base our Rejoinder. We begin with the allegation under *(a)* that Respondent recognized "in law [that] the Mandate of South West Africa continued in full force and effect, notwithstanding the dissolution of the League". We dealt in our argument in chief, Mr. President, with the attitude of the Smuts Government, which remained in power until May 1948, on the question of the existence of the Mandate as such after the dissolution of the League of Nations as distinct from the question of accountability to the United Nations, and it is unnecessary to repeat what we said in that regard.

Our attitude is stated in the verbatim record of 6 April, **VIII**, page 428.

Then, in paragraphs *(b)* and *(c)*, we find a reference again to Mr. Nicholls in the Preparatory Commission, to the system of pledges, which we have fully dealt with. It is unnecessary to refer to those again.

So it remains to deal with the last two on the list, "*(d)*" and *(e)*. *(d)* is that South Africa "had submitted the issue of the incorporation of the territory of South West Africa and the termination of the Mandate to the General Assembly as the competent international organization for judgment", and *(e)* refers to the Respondent's letter of 23 July 1947 to the Secretary-General of the United Nations containing a reference to the resolution of the House of Assembly. I propose to deal with these two matters in turn.

Now in regard to the proposal for incorporation, we have dealt with this matter fully in our oral argument in chief and the references are to be found in the verbatim record of 6 April, at **VIII**, pages 430-448, and again in the record of 9 April, at **VIII**, pages 517-523. Inasmuch as, in our submission, the Applicants have hardly adduced any new argument on this subject, it is not necessary for us to say much in response.

The Applicants repeat their previous argument that there is an essential link between Articles 6 and 7 (1) of the Mandate. This argument rests entirely on the Applicants' proposition that consent to modification of the terms of the Mandate must be "informed consent" and, that being the case, the body from which such consent is to be obtained must of necessity, so they contend, be the body which exercises supervision. The argument is put in that way in the verbatim record of 10 May, at page 165, *supra*,—I need not quote the exact words used, I think I have rendered the effect thereof fairly.

The Applicants then proceed to set out again the so-called two "intolerable situations" which would be created by "the lapse of Article 6 and the consequent falling away of Article 7 (1) of the Mandate". These two intolerable situations would be, and I quote from the verbatim record of 10 May, at page 165, *supra*:

> "... either the Mandate would be frozen in its present form in perpetuity, for reason of the absence of an organ whose informed consent would be required to a modification, or Respondent would have the right unilaterally to modify the terms of the Mandate in the absence of an organ whose consent would have to be obtained before such modification ...".

And on this basis they round off their argument by saying the following —I think this will reiterate the effect of the argument which I mentioned before:

> "The Applicants accordingly see the need for an organ the consent of which is necessary for modification of the terms of the Mandate as evidence of the need for the existence of a supervisory organ. The Applicants think it, and respectfully submit it to be a logical proposition, that if Article 7 (1) must be considered to have remained in effect because of the intolerable alternatives which would follow if it were not; that if, as the Applicants submit, a competent organ must exist whose consent is required to modification, and if that consent must be an informed consent, then the survival of Article 7 (1) has a direct and logical relationship with the question of the survival of Article 6." (*Supra*, p. 167.)

Mr. President, when the argument is put nakedly in this way it becomes very difficult to distinguish it, if that is possible at all, from a legislative argument—an argument as to what the law *ought* to be. It is an argument which one would expect to be raised before a legislative body which has the power of making law or altering the law as it thinks fit: before such a body one might expect an argument of this kind, i.e., that it is very necessary, or very desirable, that if consent is to be given to a modification of a mandate, such consent must be given by the same body as exercises supervisory jurisdiction, i.e., it must be an informed consent; that to have the two things connected with each other in one body is necessary, essential or desirable. But, Mr. President, surely that is not a legal argument directed at interpreting the law as it is; it merely amounts to saying to the Court what the Applicants would like to have the situation to be, and to giving their reasons as to why that would be a desirable result. Even then, the argument rests, in my submission, on two basic fallacies. The first fallacy is that consent can only be an "informed consent" as a result of prior exercise of a supervisory power by the body concerned. This is, of course, not so. It is very often not possible to have a position where the body which is to give consent to an alteration in status, or something similar, would have had the prior opportunity of operating as a supervisory body, and in that manner to have become an informed body. To give an example: the General Assembly of the United Nations was empowered by Article 85 of the Charter to approve of trusteeship agreements—in other words, to consent to the modification of mandates converted to trusteeship—and yet there was no contemplation that when acting in that way the General Assembly would already beforehand have exercised any supervisory power in respect of mandates. It just could not be possible under those circumstances, of course it could not be, but that was the best arrangement that could be made under the circumstances.

The same applied, of course, in respect of territories other than mandates which were brought under trusteeship or could be brought under trusteeship—the colonies or the ex-enemy territories, which are referred to in Article 73 of the Charter, and the following Articles.

Then there is also the role of the Security Council under Article 83 of the Charter regarding strategic areas brought under the trusteeship system. The Security Council would not have been able to inform itself beforehand as to what would be desirable by way of a change of status in those cases through having previously exercised a supervisory power.

Mr. President, it just cannot be possible under all circumstances, and where it cannot be possible then the body which is asked to assist in bringing about a change of status, has to inform itself *ad hoc* for that particular purpose as best it can. In the case of Palestine, whose problem was submitted to the General Assembly for that very purpose, the body concerned, i.e., the General Assembly, informed itself by appointing a special commission which had to go into the facts, into the law and into all attendant circumstances so as to be able to inform the General Assembly as to what it considered to be the best solution. We referred in this regard in our argument in chief (in the verbatim record of 6 April, **VIII,** at p. 431) to the last resolution of the League of 18 April 1946, which contemplated that there could be other arrangements agreed upon between the mandatory powers and the United Nations—there again,

the same applies; the change need not necessarily apply only to conversion of a mandate into a trusteeship.

The Applicants' only argument in this regard, Mr. President, is to fall back on the alleged pledges supposed to have been given by the mandatories in April 1946 (this we find in the verbatim record of 10 May, at page 169, *supra*) and, of course, on the statement of Mr. Nicholls (this we find in the same record at that page), which are matters with which we have fully dealt.

I do not need to take it further, I submit. Although it may be desirable under circumstances where it can be achieved, that a body which is required to give consent to a change of status, should be a body that has properly informed itself through exercising a supervisory function, it is surely not an essentiality in any sense, as contended for by the Applicants.

The second fallacy upon which the argument rests, Mr. President, in my respectful submission, is the Applicants' assumption that if Article 7 (1) has lapsed there would be no means of modifying the terms of the Mandate. Now this assumption is, of course, entirely wrong. We dealt with the matter fully in our argument, which is in the record of 9 April, and I submit that my learned friends have offered really nothing to controvert that argument, nor the support which it derives from the separate opinion of Judge McNair in 1950, as we cited it at **VIII**, pages 519 and 521 of that record.

In principle our submission stands that consent by a collective international body representative of a large number of States may be a very useful means of achieving a change in status, a change in an international situation requiring consent or acquiescence on the part of other members of the international community, but that is surely not the only way in which such consent or acquiescence, where necessary, could be obtained. There are more difficult, more onerous processes possibly, but, nevertheless, processes which are in principle always available in law, and that is exactly the manner in which the point was dealt with also by Lord McNair in his separate opinion in 1950; he came to the conclusion that Article 6 had lapsed, that Article 7 (1) had lapsed, but indicated that it was nevertheless not impossible to bring about an alteration in the status of the mandated Territory or in the terms of the Mandate by processes still available to the Respondent.

Now, in regard to this opinion of Judge McNair, the Applicants advance a contention which, in my respectful submission, puts a rather far-fetched interpretation upon it. The Applicants say in the verbatim record of 10 May at page 167, *supra*:

> "... Judge McNair dealt with the effect of lapse of Article 6 upon the fate of Article 7, paragraph 1, and the learned judge concluded that the lapse of Article 6 'by reason of the ensuing impossibility of obtaining the consent of its [that is, the League's] Council' meant that Article 7 also had lapsed".

In other words, Mr. President, they attribute to Judge McNair this reasoning: that Article 7, paragraph 1, lapsed because Article 6 had lapsed, and that that came about by reason of the ensuing impossibility of obtaining the consent of the Council. But, Mr. President, when one adverts to what the learned judge actually said, one sees that is something entirely different. The words used in the passage from the *I.C.J. Reports*

1950, at pages 162-163, which I quoted to the Court previously, were the following:

> "What then is the effect of the disappearance of the League and the ensuing impossibility of obtaining the consent of its Council? In my opinion, the effect is that the first paragraph of Article 7 of the Mandate has now lapsed."

That is a sufficient quotation for present purposes. In other words, Mr. President, the effect that Article 7 has lapsed, is an "effect of the disappearance of the League and of the ensuing impossiblity of obtaining the consent of its Council" in terms of Article 7 itself. There is no suggestion that Lord McNair first found that Article 6 had lapsed, and then found that because Article 6 had lapsed Article 7 (1) must therefore also be deemed to have lapsed. What is true is that he applied similar reasoning in the two instances—he found that Article 6 had lapsed, and he found that Article 7, paragraph 1, had lapsed, and it is true that his reasoning in both respects was basically the same, but he did not say that Article 7, paragraph 1, had lapsed because of the lapse of Article 6.

The Applicants, in our submission, also give a wrong rendering in this regard of the reasoning of the majority of the judges in 1950. In our argument in chief we pointed out how Applicants in their argument created a misleading impression of the Court's 1950 Opinion in this regard by taking two unrelated passages from the Opinion and putting them together with words of their own. I refer to the verbatim record of 6 April, at **VIII**, pages 441-443, where we dealt with this matter. The Applicants now offer a differently worded argument, but it is to much the same effect. They commence, in the verbatim record of 10 May, at page 164, *supra*, as follows:

> "The Court in 1950, of course, explicitly held that the organ vested with supervisory powers is also the competent international body to determine and modify the international status of a mandated territory."

Now, Mr. President, in our submission this is a rather cryptic way of describing what the Court actually said, which is to be found in the *I.C.J. Reports 1950*, at page 141:

> "Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations for any modification of its terms, brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates."

In other words, Mr. President, the Court merely stated a fact which is self-evident upon reading the mandate instrument itself, that the Mandate brought into operation for this purpose the same organ as it brought into operation for purposes of supervision under Article 6; it did not say, in Applicants' words, as they render it, that "the organ vested with supervisory powers is also the competent international body to determine and modify the international status . . .". The Applicants proceed to embroider on this submission as follows in the verbatim record of 10 May, at page 165, *supra*. They say:

> "The Court evidently took the view that the vesting in the League Council both of a supervisory role and a competence with regard to modification of the terms of the Mandate, was not merely coinciden-

> tal but logical, and the Court suggested that by the same logic the competence of the General Assembly to supervise mandates extended also to the matter of approving changes in the status of the Territory."

And then the Applicants take it a stage further, in the same record of 10 May, at page 168, *supra*, without advancing any reasons for their contention. They say:

> "It would seem clear that the Court in 1950 made no distinction between the international organ competent to determine and modify the status of the mandated territory and the organ competent to supervise the administration of the territory. Not only did the Court make no such distinction, but it indicated the linkage between the two articles, and it would seem fair to conclude that the Court in 1950 at least indicated its view that the two must be one and the same—the organ under Article 7 and the organ under Article 6 should be the same organ."

That is the crux of this contention. In our submission, Mr. President, there is nothing in the 1950 Opinion to justify this conclusion that in the view of the Court the organ under Article 7 (1) must be the same as the organ under Article 6.

The Court dealt separately with Article 6 and with Article 7, paragraph 1. In dealing with Article 6 the Court made no reference in its reasoning to Article 7, paragraph 1. On the basis of a finding of tacit consent on Respondent's part, as we submitted before, the Court held that the League's supervisory powers passed to the General Assembly of the United Nations—that was its holding in regard to Article 6. When it came to deal with Article 7, paragraph 1, it first noted that this Article referred to the same organ as that referred to in Article 6, that is, to the League Council. The Court then referred to its holding that the powers of supervision under Article 6 "now belonged to the General Assembly". Thereupon the Court noted the powers of the General Assembly under the Charter to approve trusteeship agreements, and alterations or amendments thereof, and the Court then said the following (*I.C.J. Reports 1950*, at p. 142):

> "By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System. This conclusion is strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa which is at present the only existing mandatory Power."

Now, Mr. President, in the first place, there is no indication in the reasoning of the Court that there must necessarily be a link between supervision and consent to modification—that is quite obvious from the passage which I have just quoted. Secondly, Mr. President, it is clear that the Court reasoned from Article 6 to Article 7. In other words, it first held that Article 6 was in force, and it relied upon this finding in its reasoning that Article 7 (1) was still in force. It did not approach the matter in the converse way, as the Applicants now do, by using a finding or motivation relative to the existence of Article 7 (1) in support of its reasoning relative to Article 6, or by arguing, as the Applicants appear to do, that, because

there must be a body competent to provide for a change or modification in the status of the Territory, or in the terms of the Mandate, that body must also be a body exercising or holding a supervisory power.

Mr. President, I was dealing with the first of two questions raised by the Applicants in regard to Respondent's attitude subsequent to the dissolution of the League of Nations and prior to September 1947. I virtually concluded with this first one, which is the question of the submission of Respondent's incorporation proposal regarding South West Africa to the General Assembly of the United Nations for judgment, as it was put in a particular statement. And I was dealing with the reliance placed in that regard by the Applicants upon the suggested relationship between Article 6 and Article 7 (1) of the Mandate, and particularly the reliance which they placed upon the 1950 Opinion as supporting their contention in that regard. Our submission is that the Court's Opinion does not support their contention. The Court did not argue, as the Applicants appear to do, from Article 7, paragraph 1, to Article 6.

In particular, Mr. President, the Court discussed Respondent's submission to the General Assembly of its incorporation proposal in the context of its views regarding Article 7 (1) of the Mandate, and it made no mention of anything relative to Article 6. And it did not, in its discussion of Article 6, refer to anything which it said in regard to Article 7, paragraph 1.

Therefore, Mr. President, when the Applicants state the following submission, which I shall read out to the Court, I submit that they do not derive support for it from the Court's Opinion in 1950. The submission is stated by them in the verbatim record of 10 May, at page 168, *supra*:

> "... the Respondent's submission in 1946 of the question of the status of South West Africa to the competent international organ for a judgment, in the words of the submission, clearly evidenced Respondent's recognition of the United Nations as the international body competent to supervise administration of the Territory".

I submit that the argument which we addressed to the Court on this matter in our argument in chief, as to the distinction to be drawn between the two things of submitting to international supervision and utilizing the facility of coming to possible agreement with an international body regarding a possible change of status of the Territory, I submit that that argument stands in every respect and has not been affected by anything adduced by the Applicants.

We then come, Mr. President, to the second of these two matters relied upon by the Applicants in regard to our attitude in the period which I have just mentioned, and that is the letter of 23 July 1947 to the Secretary-General of the United Nations. The Applicants referred to portions of this letter in their argument in chief, in support of their contention that Respondent had recognized the supervisory authority of the United Nations. One finds the references in the verbatim record of 19 March, at **VIII**, pages 158 to 159.

The Respondent dealt fully with this matter in its argument in chief. I could refer the Court to passages in the verbatim record of 6 April, at **VIII**, pages 449 to 450, and again in the record of 7 April, pages 452 to 453 and 462 to 463.

The Applicants have now advanced further argument regarding the significance of this letter, in relation to their contention that Respondent

recognized United Nations supervision over the Mandate. They refer to a fact which we pointed out in our argument in chief, namely that the reference in the Court's 1950 Opinion to a phrase in the resolution of the House of Assembly regarding the rendering of reports to the United Nations was (I quote our words) "not a reference to anything said by, or on behalf of, the Union Government to the United Nations, or in any international context". We pointed out, as the Court will recall, the distinction between something said in a resolution of one of the houses of the Parliament of the Republic of South Africa, or the Union as it then was, and the attitude of the mandatory government itself expressed to international organs, or to the outside world, or in any international context.

But the Applicants with reference to that distinction argue—that—

> "... nowhere, that the Applicants are aware of, [Respondent] adverts to or seeks to explain why this resolution was referred to in Respondent's official communication of July 23, 1947, to the Secretary-General". (*Supra*, p. 172.)

Mr. President, if I have to give an answer to that it is plain. There were many practical reasons why the resolution was referred to, but one consideration in that regard is quite crucial, and that is that if the Union Government at the time thought that the wording of this resolution differed from the attitude which it had already taken in its relationship to the United Nations through the speech of General Smuts the previous year in December, then it would have been hardly likely that the resolution would have been included in this letter at all. I indicated before, Mr. President, in our argument in chief, that there was a link between the four very relevant salient events: Respondent's statement at the dissolution of the League; General Smuts' statement in December 1946 to the Fourth Committee, if I remember correctly, of the General Assembly of the United Nations; then, the next stage, this letter of 23 July 1947, and finally, Mr. Lawrence's statements of September and November 1947.

I pointed out that General Smuts in his statement to the United Nations in December 1946 referred back to the statement which had been made on behalf of Respondent at the dissolution of the League. And he said that if the proposed incorporation was not acceded to that statement would be abided by, and he added something which had not been said before, namely the voluntarily submitting of information for the information of the United Nations in accordance with Article 73 *(e)* of the Charter.

The next stage of communication was this letter, and in its actual text the letter referred to the previous speech by General Smuts, not in so many words, but by stating that the Union Government had already undertaken to submit reports on their administration for the information of the United Nations. So the link there is established.

And, as I pointed out finally, Mr. President, when Mr. Lawrence made his statement in September 1947 there was again a link because he was asked for clarification of a certain document and that document was this self-same letter, which then came before the organs of the United Nations. It was in regard to clarification of what was stated in this letter that he made it perfectly clear that the willingness to submit information for the information of the United Nations, was not based upon any concept of accountability to the United Nations, but that, on the contrary, the

basis would be that there was no such supervisory jurisdiction on the part of the United Nations and that the submission of the information would be entirely voluntary.

So, Mr. President, it becomes very clear, in that context, how this consistent line was taken by the Union Government. In the first place, it is most unlikely that this resolution of the House would have been intended to deviate from that line taken by the Union Government as intimated by General Smuts to the United Nations the previous year in December. In the second place, it is most unlikely that, if the Union Government thought that this resolution intimated anything else than what its consistent attitude had been, the resolution would then have been referred to in these terms in the letter. The mere fact that the resolution is quoted and that the subject of giving information is then referred to in the terms I have just quoted, makes it clear that in the contemplation of the Union Government there was no difference whatsoever between what the resolution urged upon it and what its attitude had already been, and would in future be, toward the United Nations.

Apart from that, there are other very pertinent indications, reasons of fact, why this resolution was quoted in full in that letter. The letter was addressed to the Secreatry-General in response to the invitation of the General Assembly, in its resolution 65 (I) of 14 December 1946, that Respondent "propose, for the consideration of the General Assembly a trusteeship agreement". In this letter the Respondent explained why Respondent was not prepared to propose a trusteeship agreement, and Respondent, for this purpose, again drew attention to the wishes of the inhabitants of the Territory, who wanted incorporation. Respondent stated in the letter that it had "no alternative but to maintain the *status quo* and to continue to administer the Territory in the spirit of the existing Mandate". (Counter-Memorial, **II**, p. 55.)

It is evident, Mr. President, that in this context it was appropriate to refer to the resolution of the House of Assembly, which resolution expressed the "opinion", first, that—

> "the Territory should be represented in the Parliament of the Union as an integral portion thereof, and requests the Government to introduce legislation, after consultation with the inhabitants of the Territory providing for its representation in the Union Parliament". (**II**, p. 56.)

The resolution further expressed the opinion—a matter to which we have referred—that "the Government should continue to render reports to the United Nations Organization as it has done heretofore under the Mandate".

The opinion and the request of the House of Assembly regarding provision for representation of South West Africa in the Union Parliament, "*after consultation with the inhabitants of the Territory*" (italics added), was clearly relevant to the proposal of the United Nations that the territory should be brought under trusteeship. And that affords a major reason why this resolution was quoted in the letter. Respondent in the letter indicated that "steps will therefore be taken in due course to carry out the required consultation". (Verbatim of 10 May 1965, p. 173, *supra*.) In fact, these steps were taken during 1947 when meetings were held throughout South West Africa to acquaint the non-White inhabitants with the General Assembly's resolution 65 (I) inviting a trusteeship

agreement. These meetings showed that the overwhelming majority were still in favour of incorporation. And the South West Africa Legislative Assembly, likewise, on 7 May 1947, unanimously adopted a further resolution urging incorporation. That we deal with in the Counter-Memorial, **II**, at page 56.

The wishes of the people were thereafter again communicated to the United Nations in a special report which we deal with in the same Volume, at page 56.

The letter, as I have said, in referring to the request in the resolution that the Government should continue to render reports to the United Nations, merely stated that "the Union Government had already undertaken to submit reports on their administration for the information of the United Nations". (Verbatim of 10 May 1965, p. 173, *supra*.) The previous statement by General Smuts in the Fourth Committee, to which this referred, read, as the Court will recall, as follows:

> ". . . the Union would, in accordance with Article 73, paragraph *(e)* of the Charter, transmit regularly to the Secretary-General of the United Nations 'for information purposes, subject to such limitations as security and constitutional regulations might require, statistical and other information of a technical nature relating to economic, social and educational conditions' in South West Africa". (**II**, p. 54.)

There is no substance, in our submission, in the Applicants' contentions that, in referring in this letter of 23 July 1947 to the resolution of the House of Assembly, Respondent "intended to make official representations to the Secretary-General in terms of the Resolution itself". (*Supra*, p. 173.)

We find, on the same page, the following submission:

> "The resolution made two requests for action on the part of Respondent's Government; in both cases the requests were carried out by the Government, were treated as *obligations* which the Government would implement or had already carried out . . ."

There is, Mr. President, no reason for saying that the two requests to which I have referred were treated as obligations. Let us take, first, the request regarding consultation of the people of South West Africa and the later introduction of legislation for the representation of South West Africa in the Union Parliament. Surely, there was never any treatment of that subject contemplating any obligation on the Union Government. Respondent did, in fact, consult the people with that purpose, but it was under no obligation to do so.

Nor, Mr. President, can it be said that it ever regarded itself as under an obligation to render reports to the United Nations as if that organization had supervisory powers over the Mandate. The terms of the letter itself make that perfectly clear, in referring back to General Smuts' statement to submit information in accordance with Article 73 *(e)*, and, indeed, the official explanation of the letter given on the very first occasion when it was asked for in the United Nations, made that point explicitly clear.

The Applicants have offered no answer whatsoever to our demonstration that the clarification given on 27 December 1947 was indeed in response to a request to clarify this particular letter and the Applicants have offered no argument in response to the fact that this letter was merely one link in the consistent chain to which I have referred. Nobody

at that time questioned the Respondent's attitude or the explanation which was given by Mr. Lawrence.

Therefore, Mr. President, when the Applicants say, as they do in their verbatim record of 10 May, at page 174, *supra*, that "not until September of 1947, did Respondent's Government begin to question openly the supervisory powers of the United Nations"—that is not a true rendering of the history of events. At no stage up to November 1947 and even for some time thereafter, had anybody contended that the United Nations had supervisory powers over the Mandate in the sense that the United Nations was vested with the powers formally exercised by the League of Nations under the Mandate.

I shall deal presently with the attitude of the United Nations as expressed through its Members, but with regard to the letter of 23 July 1947 I just want to point out further that the Court in 1950 did *not* rely on this letter as evidence of recognition on the Respondent's part that the United Nations had supervisory powers over the Mandate. The Court referred to the letter in support of its finding that the Mandate as such remained in force despite the dissolution of the League—that matter was dealt with in the *I.C.J. Reports 1950*, at pages 135-156. It was only after having made reference to the letter in this context and after having disposed of the question of the continued existence of the Mandate as such that the Court proceeded to deal separately with the question of Article 6 of the Mandate, as it did at pages 136 and following, of the Opinion.

Although the Applicants are, therefore, correct in saying that "In the 1950 Advisory Opinion, this honourable Court regarded the letter under discussion as one of the declarations constituting in the Court's words, 'recognition by the Union Government of the continuance of its obligations under the Mandate' ", they omit to state that the Court was not, in that context, dealing with obligations under Article 6 of the Mandate, which matter was dealt with quite separately by the Court. That is, in truth, how the situation was dealt with by the Court.

In concluding our argument on this aspect of the case, I can only say it is significant that in attempting to prove that Respondent, after dissolution of the League, recognized the supervisory authority of the United Nations, the Applicants rely only on these two matters with which I have just dealt, namely Respondent's submission of its proposal for incorporation to the United Nations and Respondent's letter of 23 July 1947. Apparently these were the only two remaining which were considered of any use to the Applicants' case to refer to, but for the reasons I have indicated neither of these affords any basis for the Applicants' case—certainly, no basis for drawing any necessary inference favourable to the Applicants' contention.

Now, Mr. President, we come to the next phase of the case in regard to Article 6 and that is how Respondent's attitude was understood by the other States concerned, and what attitude was adopted, particularly in the United Nations, in the years of transition and shortly afterwards, on the question whether the United Nations had supervisory power in respect of the Mandate of South West Africa or not, but before dealing specifically with the various aspects of this matter may I make it clear in what context we spoke in our argument in chief, and what context we are still speaking, of a supervisory power *on the part* of the United Nations. It is necessary to draw that distinction, Mr. President, because in

Applicants' argument, in reply, we find that a power or a competence in regard to supervision is spoken of as something which could be derived, for instance, from an article like Article 10 of the Charter of the United Nations, dealing with the competence of the General Assembly. We find also that the Applicants in their argument of 11 May refer to a contention which we advanced to the Court in our argument in chief, when we said that—

> "The Trusteeship Council [to which the first and the only report in accordance with Article 73 *(e)* submitted by Respondent was transmitted] did not consider that it was required to exercise a supervisory power [in that regard]." (*Supra*, p. 192.)

First may I refer to what Applicants stated at that same page:

> "Today, Respondent appears to argue, as understood by the Applicants, that the Trusteeship Council was not at that time seeking to exercise or intending to exercise a supervisory authority. So we understand their contention, and perhaps we are wrong in the way we interpret it."

At the same page, the Applicants indicate on what portion of the record they base this interpretation of our contention. They say—

> "Applicants' statement in this regard reflects the comment made by Respondent in the verbatim record, **VIII**, at page 468, from which I quote: 'The Trusteeship Council did not consider that it was required to exercise a supervisory power in respect of this report.' That refers to the report of 1946, submitted by Respondent to the United Nations."

Now, Mr. President, on this basis the Applicants proceeded to deal for more than a day, if I remember correctly, with an analysis directed at showing that what the Trusteeship Council, in fact, did amounted to the exercise of a supervisory power, and that Respondent at the time complained thereat and offered that as a reason why it would submit no further reports. Applicants made high play of a so-called "conflict" between our present attitude and the attitude adopted at that time. There is, of course, no such conflict whatsoever. It is perfectly true that what the Trusteeship Council actually did in that regard and the attitude taken by the majority of its members as to what it should do in practice, all amounted in effect to the same as what the exercise of a supervisory power would have been. That we never intended to dispute. That indeed we referred to in portions of our record as the reason given by us at the time, and correctly given at the time, why the submission of the reports would be discontinued, and there is no conflict whatsoever between that attitude and the attitude we take now. The misunderstanding, Mr. President, or the reason why our argument and that of Applicants have passed one another is because of an ambiguity in this question of what the exercise of a supervisory power in this context means. For two purposes, both because of the Applicants' references, to which I shall refer again later, to Article 10 of the Charter of the United Nations, and because of the Applicants' treatment of this subject in regard to the Trusteeship Council, it is necessary at the outset to make clear what our contention in regard to a supervisory power means and has always meant. In the Counter-Memorial, **II**, at page 117, we stated the following:

"Although commentators frequently employ the broad descriptive terms 'League supervision' and 'supervisory functions of the League', such phraseology did not occur in the relevant provisions of Article 22 of the Covenant or of the Mandate instruments."

We then examined these provisions of the Covenant and we concluded, Mr. President, at page 118, "It is evident, therefore, that the essence of *League supervision* or *the supervisory functions of the League* was the Mandatories' *obligation to report and account* to the Council of the League in respect of compliance with the substantive obligations pertaining to administration of the territories and protection and development of the inhabitants". We made it clear throughout our further treatment of the subject in the pleadings, and indeed I should have thought I made it clear in the treatment of the subject here in the Oral Proceedings, that that was the sense in which we spoke of supervisory powers, supervisory functions. The problem before the Court is whether supervisory functions in this sense have passed to the United Nations, in other words, whether Respondent is now obliged to report and account to the United Nations as successor to the League of Nations. The essence is the question of an obligation on the part of the Respondent. The supervisory power in the sense in which we discuss, is a counterpart of that obligation, and as the Applicants now concede, such a succession from the League of Nations to the United Nations, in respect of a supervisory power in that sense, required consent on the part of the Respondent. The main issue between the Parties is whether such consent was given. Therefore, Mr. President, when considering the attitude of other States and, in particular, of Members of the United Nations, the nature of this issue between the Parties must be firmly kept in mind. Although, when viewing the matter from the point of view of the United Nations, the question at issue may be posited as being whether the United Nations now possess a supervisory power in respect of Mandates, it must never be forgotten that the expression "supervisory powers" is used in this context in a special sense, viz., as denoting the power that would be exercisable by reason of an obligation on the part of the Respondent to report and account under the Mandate to the United Nations—that is the only sense in which we speak in this context of a supervisory power. Whether the United Nations in fact possesses, or whether some Members consider that it possesses, supervisory powers of a different nature or arising in some different way—that is not directly relevant to the issues before the Court at all. It would be material only to the extent to which it tends to prove or to disprove the existence of a right of supervision under the Mandate in the sense in which I have described it.

One may perhaps, as a matter of words, distinguish in this regard between the concept of a supervisory power of the organization being the counterpart of the obligation on the part of the Mandatory, and, on the other hand, a supervisory competence of a particular organ; meaning that if there should be a power in the organization of the type of which we speak, then a particular organ may or may not be competent to exercise that power on behalf of the organization. That is a constitutional question within the organization itself, but it does not and cannot affect the question whether the organization as such has a supervisory power in the sense in which we speak of it, for the purposes in issue between the Parties.

Mr. President, that this constituted the true issue between the Parties, and that our argument in chief proceeded on that basis, I submit is

perfectly clear. The passage which I cited earlier, an expression which we used in relation to what the Trusteeship Council did in this regard, is of course ambiguous when taken by itself, when taken out of its context, standing all by itself and reading that the Trusteeship Council did not think it was exercising a supervisory power. Of course, the expression "supervisory power" could be an ambiguous expression, taken by itself, but when taken in the context of the argument as submitted to the Court, after the same expression was used throughout, even on both pages on either side of the expression relied upon by Applicants, it must have been perfectly clear what our true contention was.

On 30 March, Mr. President, in commencing the exposition of the issues between the Parties on this aspect of the case, we stated at **VIII**, page 280 of the relative verbatim:

> "... these legal issues are whether the Mandate is still in force and, if so, whether Respondent is obliged to report and account in respect thereof to the General Assembly of the United Nations, as it was obliged to report formerly to the Council of the League, and whether it is obliged for that purpose also to transmit petitions from inhabitants of the Territory to the General Assembly"

—the accent being, Mr. President, on the obligation.

Later on the same day, at page 283, we stated: "The fundamental question is ... whether by some process or principle of law a substitution of supervisory organ has been effected in such a way as to be binding in law on the mandatory, in such a way as to convert the original obligation of the mandatory to report to organ A into as being now a new obligation to report to organ B. That is the fundamental question. The Respondent's submission is that there has been no such substitution of the supervisory organs. The Applicants say that there has been a substitution of the supervisory organ, and that is the fundamental issue with which I have to deal in this first part of my argument."

I can give the Court references to similar statements in the verbatim records of 2 April, at **VIII,** pages 371, 372 and 391, of 5 April at page 391, and of 7 April, at page 459.

Having regard more specifically to the practice of States to the attitude expressed by States, we said in the verbatim record of 30 March, at **VIII,** page 288:

> "... we submit that analysis of the events during the establishment of the United Nations and the dissolution of the League shows clearly a general understanding between the States concerned. The understanding was to the effect that outside of a trusteeship agreement or other special arrangement between a mandatory power and the United Nations, no mandatory would be obliged to report or account to the United Nations regarding compliance with its mandate obligations. We submit that that general understanding emerges very clearly.
>
> We submit further that the understanding is further confirmed by attitudes expressed shortly after 1945-1946, and in particular during the years 1947, 1948 and 1949, by United Nations Members in debates and proceedings of the United Nations. We submit that the analysis further shows that the Respondent itself in fact never agreed, either expressly or by implication, either to a trusteeship agreement or to any other special arrangement involving account-

ability under the mandate to the United Nations. And, Mr. President, it is very important because it bears on the same point, that Respondent was never understood by other interested States as having agreed to such accountability."

That indicates from the start, Mr. President, the context in which we undertook an analysis of the attitudes of the various Staes, and the sense, to which I referred before, in which the expression relied upon by Applicants was used.

On 7 April, in the verbatim, very near this particular statement relied upon by the Applicants—I am not sure whether it was just before or just afterwards—we stated—

> ". . . But as far as immediate reactions were concerned, reactions indicating the manner in which the other governments—the other Members of the United Nations—had understood the Union's attitude, there was absolute unanimous confirmation of what I have been submitting to the Court, namely that outside of trusteeship there would be no obligation on the part of the Union Government to report and account to the United Nations in respect of its administration of South West Africa". (**VIII**, p. 466.)

That, Mr. President, occurred in the middle of page 466 of the record of 7 April, just a few pages before the statement we made that "the very body to which the report referred, namely the Trusteeship Council, did not regard it as such".

I may just point out that it was in this same sense that we went on to state at page 468 of that record:

> "That is the preamble of this very resolution relied upon by the Applicants, a preamble indicating a contemplation exactly in accordance with what I have been advancing to the Court all this morning and part of yesterday, on what the attitude was as expressed by the Union Government to the United Nations." (**VIII**, p. 468.)

Then followed an indication of the original contention of the Applicants in this regard, namely that:

> "Although the Council, in the exercise of its competence, did not agree upon the extent of supervision, there was no doubt as to the legal authority of the Council to examine the report of the mandatory power and submit observations thereon. Notwithstanding the dissolution of the League, it was agreed that the Mandate continued in full force and effect, and that the United Nations was the proper supervisory authority." *(Ibid.)*

That was the question to which we then directed our further analysis, and we said at the very next page:

> "In these circumstances I shall analyse the attitude adopted by each of the member States of this Trusteeship Council in the order I have indicated, i.e., the attitude they adopted with regard to Respondent's obligations to the United Nations in respect of its administration of South West Africa." (**VIII**, p. 469.)

Mr. President, I should have thought that in that context the purpose of the analysis was perfectly clear. It was not to see whether the Trusteeship Council could in some sense, under the particular circumstances, be said to be doing something which in practice would amount to the exercise of supervisory power. The analysis was not related to the question

whether a particular organ of a particular body would have competence to exercise a supervisory power if there was an obligation on the part of the mandatory concerned. It was concerned with an obligation on the Mandatory's part, and more particularly the attitude of the various States on that question of such an obligation. And that is so, was made absolutely clear when we came to the conclusion of our treatment of this topic, i.e., the attitudes of the States in the Trusteeship Council. That conclusion is stated in the verbatim report of 8 April and it read as follows:

> "Not in one single case, therefore, Mr. President, of these members of the Trusteeship Council, do we find an attitude supporting, or corresponding with, that taken up by the Applicants in this case. Not one of them took up the attitude that there was agreement, consent, acquiescence, on the part of the South African Government to a substitution of supervisory organs, and that on that basis the United Nations had supervisory functions or powers outside trusteeship." (**VIII**, p. 486.)

Those were the concluding words of this review. That was the argument to which the Applicants were required to address a reply, if they had any reply. The effect of their treatment of the matter is therefore, Mr. President, that they never addressed themselves in their reply to the real issue between the parties at all. They spent, as I said, more than a day in demonstrating something which never was in issue, demonstrating a situation which, if it in fact occurred, would have been of the same nature in practice as the exercise of the supervisory power. They never addressed themselves to the real demonstration on our part, that as far as an obligation to submit to such supervision outside of trusteeship on the part of the Union Government was concerned, there was no State which could point to any basis of consent, agreement or the like, or could have even attempted to do so, in suggesting that any such obligation did exist, that the greater majority of the States made it perfectly clear as a matter of law that they realized that there was no such obligation, and that in the case of the three States which showed uncertain attitudes in that regard, not one of them based the attitude they took on an allegation of consent on the Respondent's part.

So Mr. President, since the issue between the Parties is whether Respondent is obliged under the Mandate to report and account to the United Nations, it is unimportant to determine which organ of the United Nations would have supervisory competence if such an obligation existed. The crucial issue relates to the powers of the organization, and not to the internal arrangements which would be required if such powers existed. Consequently, a distinction must be drawn between the powers exercisable by the United Nations as an organization, and the powers, or the constitutional competence exercisable by the General Assembly, as an organ of the United Nations. The extent of the powers of the General Assembly can only become of relevance if it has been established, or if it is assumed, that the United Nations has competence in respect of the matter under consideration. We shall show that a confusion between these two concepts apparently underlies the Applicants' argument, particularly as regards the application of Article 10 of the Charter.

And the further element of confusion is the one to which I have referred, namely regarding the sense in which one could speak of super-

vision, or a supervisory power, with respect to what was actually done in a particular body. Where the United Nations has performed certain activities pursuant to a voluntary act, or an *ad hoc* consent on the Respondent's part, such as occurred with respect to the report for the year 1946, the question still remains whether the performance of such activities provides any relevant indications as to the existence of an obligation on Respondent's part to report and account under the Mandate to the United Nations. The mere fact that the activities may or may not appropriately be called supervision is not by itself of any importance. The question is whether such activities involved a contemplation or a claim that Respondent was obliged by virtue of operative consent on its part to report and account under the Mandate.

So I shall demonstrate, Mr. President, in what follows now, in some more detail than previously, that because of this confusion, because of a failure by the Applicants to address themselves to the real question at issue between the Parties, our case in these major respects in truth stands unanswered. The demonstrations by the Applicants on both these matters, viz., on Article 10 of the Charter and on the fact that what was done in the Trusteeship Council in practice amounted to the exercise of a supervisory power, that did not meet our case at all, and our real case stands unanswered.

May I revert first to the effect of Article 10, and the Applicants' argument in that regard? The Applicants say in the verbatim record of 10 May, at page 174, *supra*:

> "The United Nations ... was vested by Article 10 of the Charter with competence to undertake the task of devising special methods for dealing with any mandated territory which might not be brought into the trusteeship system."

With respect, the Court would see that the contention is that Article 10 vested such competence in the United Nations.

And then again, in the verbatim record of 12 May, at page 240, *supra*, they say—

> "The United Nations is endowed by Article 10, it is invested by the Charter with competence to supervise the Mandate."

And we find this contention advanced and developed in other parts of the present Oral Proceedings. I could refer the Court also to the verbatim record of 7 May, at pages 117-119 and 120, *supra*; the verbatim record of 10 May, at pages 173-174 and also page 176, *supra*; the verbatim record of 11 May, at pages 190-214; the verbatim record of 12 May, at pages 220 and 224-227, *supra*.

Now, Mr. President, this contention requires a more specific examination of the purpose and effect of Article 10. I have already indicated in broad outline what our contention is in that regard, but it may be desirable to have brief regard to the whole scheme of the Charter, in so far as it is relevant.

After the Preamble, the Charter is divided into a number of chapters. Chapter I sets out the purposes and principles of the United Nations as an organization. Chapter II deals with the topic of membership of the Organization, and provides for the acquisition, loss and suspension of the rights and privileges involved in such membership. Chapter III enumerates the organs of the Organization. In terms of Article 7, the principal organs are the following:

"... a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat".

The next chapter, Chapter IV, is headed "The General Assembly", and it is followed by Chapter V, which bears the heading "The Security Council".

Chapter IV, dealing with the General Assembly, comprehends Articles 9-22 inclusively. Article 9 is sub-headed "Composition" and, as the heading indicates, sets out the composition of the General Assembly. The next article is Article 10, with which we are now concerned, and the heading of the Article is "Functions and powers", and it reads as follows:

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Article 12, to which reference is made in Article 10, qualifies the wide ambit of Article 10 by limiting the powers of the General Assembly in respect of matters being dealt with by the Security Council—that is a qualification; otherwise the scope is as indicated by the wording of the Article.

It will be clear, Mr. President, in our submission, that both by its wording and by its position in the scheme of the Charter, Article 10 relates only to the functions of the General Assembly as a particular organ of the United Nations. It does not purport to define the functions of the Organization—that is done in Chapter I. Consequently, if a dispute were to arise whether any particular matter falls within the competence of the United Nations, Article 10 could not be of any assistance in resolving such a dispute—that would be a prior question. On the other hand, once it is established that a matter does fall within the competence of the United Nations, and the problem is merely to ascertain which organ could appropriately deal with it, Article 10 would in most instances provide the answer.

Mr. President, what I have just stated is so obvious, in my submission, that one finds as a practical result that commentators generally do not devote much attention thereto. We find that Kelsen in his *The Law of the United Nations* (1950) says, very broadly, at pages 198-199:

"By Article 10 the General Assembly is competent not only to discuss any matter within the competence of the United Nations but also to make recommendations on any such matter."

A very correct, short statement, in our submission, Mr. President—"any matter within the competence of the United Nations", the prior question therefore being posed whether that matter is within the competence of the United Nations.

Goodrich and Hambro say in their *Charter of the United Nations*, 2nd edition, 1949, at pages 151-152 under the heading "Scope of General Assembly's Power":

"Article 10 of the Charter empowers the General Assembly to discuss 'any questions or any matters within the scope of the ... Charter or relating to the powers and functions of any organs provided for in the ... Charter'. The very fact that this Article has

been put at the beginning of the enumeration of the powers of the Assembly suggests the importance to be attached to it. It is the key to the whole role of the General Assembly in the United Nations. The General Assembly has thereby been designated as the open conscience of the world. It is a world forum where all important questions within the scope of the Charter can be discussed."

We submit, Mr. President, that this interpretation was also the one placed on the Article by this Court in the 1950 Opinion. The Court said at page 137:

> "The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations."

In our Counter-Memorial, **II**, at page 143, we said that this statement—

> "is concerned merely with the determination *within the United Nations* of an organ which would be competent to undertake the supervision: but this would have no relevance in the enquiry unless there should be an obligation to submit to United Nations supervision".

And we added that this passage "clearly proceeds on the basis that such an obligation has been affirmatively established by the first three stages" of the Court's reasoning. This construction of the Court's Opinion is, in our submission, the only one which is compatible with the language used by the Court and the language of the Article itself. Indeed, Mr. President, if the Court had considered that Article 10 could in some way authorize the General Assembly to increase the power of the United Nations by imposing a duty upon Respondent to render accounts to that Organization, which duty did not exist by the Respondent's consent, then there would have been no necessity for the Court to refer to any of the other reasons in support of its conclusion; then it would simply have based its Opinion on Article 10—it need not have said anything else. It is quite clear that such a construction of Article 10 would have been completely unjustified, and that it was, in fact, not a construction intended by the Court.

It is not clear from the Applicants' argument whether they agree with this interpretation, or whether they attempt to give a wider effect to the Article. If they invoke Article 10 only as a vehicle for establishing that the General Assembly, as a specific organ, was competent to examine the reports which the Respondent allegedly undertook to submit to the United Nations as an organization, then we would not quarrel with their interpretation of Article 10; our dispute would then be limited to the factual questions whether such an undertaking was indeed given, and whether the General Assembly purported to exercise powers of supervision pursuant to such an undertaking. However, Mr. President, if the Applicants contend (and their repeated references to Article 10 would suggest that they do contend) that Article 10 possesses any wider significance, and can in some way operate to impose an obligation of accountability on the Respondent which the Respondent did not volun-

tarily assume, then we submit, for the reasons I have given, that such a contention would be untenable.

This brings me, Mr. President, to the question of Palestine, as now dealt with in this context by the Applicants in their oral reply. It may be convenient to set out first, briefly, the history of references to this issue. In our printed Preliminary Objections at **I**, pages 334-336, we quoted certain extracts from the Report of the Special Committee on Palestine (U.N.S.C.O.P.) as showing the Committee's—

> "understanding that there was, as from the dissolution of the League, no supervisory authority in respect of the administration of Palestine and no obligation on the part of the Mandatory to submit to any supervision". (**I**, p. 335.)

This was the same formulation of supervisory authority as being the counterpart of the obligation on the part of the Mandatory to submit to any supervision.

This contention we repeated in the Oral Proceedings on the Preliminary Objections, **VII**, at page 90 and in the Counter-Memorial, **II**, at pages 68 to 70. The passages in question read as follows:

> "*(c)* The case of Palestine was investigated and reported upon by a United Nations Special Committee, consisting of representatives of the following eleven Members of the United Nations: Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia.
>
> The following are extracts from the Committee's report dated 3rd September, 1947, all from portions *unanimously* agreed to by the Committee.
>
> 'Following the Second World War, the establishment of the United Nations in 1945 and the dissolution of the League of Nations the following year opened a new phase in the history of the mandatory régime. The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had *no international authority to which it might submit reports and generally account* for the exercise of its responsibilities in accordance with the terms of the Mandate. *Having this in mind*, at the final session of the League Assembly *the United Kingdom representative declared* that Palestine would be administered "*in accordance with the general* principles" of the existing Mandate until "fresh arrangements had been reached".'
>
> After recommending unanimously that:
>
> 'The Mandate for Palestine shall be terminated at the earliest practicable date',
>
> the Committee commented as follows:
>
> '*(d)* It may be seriously questioned whether, in any event, the Mandate would now be possible of execution. The essential feature of the mandates system was that it gave an international status to the mandated territories. This involved a positive element of international responsibility for the mandated territories and *an international accountability to the Council of the League of Nations* on the part of each mandatory for the well-being and development of the peoples of those territories. The Permanent Mandates Commission was created for the specific purpose of assisting the

Council of the League in this function. But the League of Nations and the Mandates Commission have been dissolved, *and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the International Trusteeship System of the United Nations.*

(e) The International Trusteeship System, however, *has not automatically taken over* the functions of the mandates system with regard to mandated territories. Territories can be placed under Trusteeship only by means of individual Trusteeship Agreements approved by a two-thirds majority of the General Assembly.

(f) The most the mandatory could now do, therefore, in the event of the continuation of the Mandate, would be to carry out its administration, in the spirit of the Mandate, without being able to discharge its international obligations in accordance with the intent of the mandates system. At the time of the termination of the Permanent Mandates Commission in April, 1946, the mandatory Power did, in fact, declare its intention to carry on the administration of Palestine, pending a new arrangement, in accordance with the general principles of the Mandate. The mandatory Power has itself now referred the matter to the United Nations.' " (**II**, pp. 68-69.)

Mr. President, I have read the whole of this long quotation again and I have done it for a purpose. The purpose is this: to make it clear that our attitude, which we have stated as from the Preliminary Objections stages already, and consistently throughout these proceedings, about this UNSCOP report on Palestine, is one which is based not on a word here or there, it is not based on a sentence here or there, or a phrase which may be taken out of its context or may be viewed on its own so as to open the door for a retort: well, that is what you rely upon but when you look at all the circumstances and all the aspects of context you are not correct in relying on that view of the report of this Committee. The whole of this portion which I have read to the Court, in three or four passages of different wording, makes the contemplation of this 11-nation Committee so perfectly clear. It makes it so clear that their contemplation was that with the disappearance of the League and with the disappearance of the Permanent Mandates Commission and the Council, there was no other body to which reports could be made.

This is so directly in conflict with any suggestion of an understanding or a contemplation on the part of any of the States concerned that there was a continuing obligation to report and account, because how could that obligation exist or be operative without a body to which those reports could be made?

There are portions of these extracts to which no answer has at any stage been offered by the Applicants in their pleadings or in their oral presentation. The following is one instance:

"The mandatory Power, in the absence of the League and its Permanent Mandates Commission, had no international authority to which it might submit reports and generally account for the exercise of its responsibilities . . ."

That, Mr. President, as far as I can recall, the Applicants have never attempted to reply to in all their dealings with the matter.

Similarly, this other sentence:

"But the League of Nations and the Mandates Commission have

been dissolved, and there is now no means of discharging fully the international obligation with regard to a mandated territory other than by placing the territory under the . . . Trusteeship System."

That was the basis upon which that subject was introduced into these proceedings and, Mr. President, I submit that having regard to all the words that have been spoken since, nothing could reduce by one iota the impact which is made by the contemplation appearing from this document.

Some attempt was made by my learned friends in the 1962 Oral Proceedings to reply to our contention in this regard. I can refer the Court to the record of those Oral Proceedings at **VII**, pages 294 to 295. However, when it came to the written pleadings, after we had taken the matter up again in our Counter-Memorial, nothing was said in the Reply in that regard. Consequently, prior to these Oral Proceedings, the Applicants' attitude towards this question was confined to one of defence. No attempt was made on their part to derive any positive support for their case from the events regarding Palestine.

But in these Oral Proceedings the Applicants went further. They attempted to derive some positive advantage from the facts regarding Palestine, and we find that Mr. Moore said in the verbatim record of *19 March*, at **VIII**, page 161:

"The handling of the Palestine problem by the United Nations shows clearly that the general understanding in 1947 was that not only was the Mandate for Palestine still in effect, but that the United Nations had the authority to supervise the administration and termination of that Mandate."

In support of these last words the Applicants relied on certain recommendations of the Special Committee, and they are dealt with in the verbatim record of 19 March, at **VIII**, pages 161 to 162. But in the course of this argument the Applicants did not give any explanation for the quoted passages (which I read again a few minutes ago) in the report of the Special Committee.

In our submission, the correct position regarding the source of United Nations competence is clear. The Committee considered that the United Nations possessed no supervisory jurisdiction under the Mandate, but the Committee regarded the United Nations as competent to recommend a solution involving temporary United Nations supervision, because the United Kingdom had consented to, and indeed requested, the advice and the assistance of the United Nations. In the words of the Special Committee, "the mandatory power has itself now referred the matter to the United Nations" and that, in our submission, remained the basis upon which the Committee and the United Nations considered it was competent to deal with the matter in the way in which the United Nations wanted it to deal with the matter.

[Public hearing of 26 May 1965]

Mr. President and honourable Members of the Court, I was dealing at the adjournment yesterday with the treatment of what might be called the Palestine question at the United Nations, in so far as that is relevant to the issue between the Parties in regard to Article 6 of the Mandate. I traced the manner in which the question of Palestine came

into the discussion, through the pleadings. I indicated how we first raised it with reference to extracts from the UNSCOP report, how the Applicants' attitude was at first confined to defence, and how they did not attempt to derive positive support from the events regarding Palestine, but how they have tried to do so in these Oral Proceedings, by contending that the handling of the Palestine problem by the United Nations showed that it was considered that the United Nations had authority to supervise the administration and termination of the Mandate.

Our submission in that regard, to which I refer again, is that the whole basis upon which the United Nations could act in the matter, in those respects, was submission of the matter to the United Nations by the mandatory power concerned, the United Kingdom, and that the competence of the United Nations arose from the United Kingdom's consent and request.

Proceeding from there, Mr. President, it is also, in our submission, noteworthy that the recommendations of the Special Committee went very far beyond anything comprehended in the ordinary processes of supervision in respect of mandates. In the verbatim record of 8 April we considered the nature of the recommendations of the Committee and we showed that such recommendations could not have been, and did not purport to be, based on any suggested power of supervision in respect of mandates, but were clearly based on the request of the United Kingdom. I can refer the Court to the record of 8 April, at **VIII**, pages 493-500.

The Applicants in their reply, in the first place, conceded that in order to deal with the exigencies of the situation the United Nations exercised far wider powers than the League of Nations could have exercised under the Mandate. They also conceded that these United Nations activities could not have been undertaken save with the consent and co-operation of the United Kingdom—when I say "these activities" I mean these which went beyond the ordinary confines of supervision. That, I think, appears clearly from what they stated in the verbatim record of 10 May, at pages 179-180, *supra*.

It would therefore seem, Mr. President, to be common cause that the actual activities of the Commission, at any rate in so far as they transcended the exercise of normal supervisory functions, required the consent of the United Kingdom, and the dispute seems to centre around the question of the ordinary supervisory functions. The question is whether there is anything to suggest that, in the absence of specific reference by the United Kingdom, the Committee or the United Nations generally would, in any event, have possessed ordinary supervisory functions under the Mandate.

Now, in our submission, the absence of such functions is clearly indicated by the terms of the Committee's report, which I quoted to the Court again yesterday, and which could hardly be clearer. Despite that very clear tenor of the report (and, as I pointed out yesterday, the Applicants have never in their argument really met the crucial aspects of that report—of those extracts which I read again yesterday), we find that the Applicants nevertheless make statements to the contrary effect, such as: "... the basis of United Nations competence was rooted in the proposition that the United Nations was exercising supervision over a Mandated territory" (p. 176, *supra*). In the same record, at page 179, *supra*, the Applicants stated: "The Assembly was supervising a mandate —that is clear, obvious—but it was doing something much more, in

addition, and the accomplishment of that additional burden and function depended largely upon the co-operation of the Mandatory Power".

In the verbatim record of 11 May, at page 186, *supra*, they said:

"The General Assembly, at all times, evidenced a broad conception of its competence in the Palestine question, a competence which was based on the Assembly's supervisory powers under the Mandate, even though it went far beyond the limits of those powers to meet the exigencies of the problem."

And then, in the same record, at page 187, they stated:

"... references to consent of the United Kingdom, read in the context of the problem itself, merely show that the United Nations was exercising a function which included and was rooted in its supervisory power over the mandate but which, in addition, went far beyond the normal exercise of such administrative authority".

Mr. President, as I have said, my learned friends never made any serious attempt to reconcile statements of this kind with the very clear terms of the report, to which I referred yesterday. The question is whether there was anything else whatsoever to which my learned friends could refer in support of these submissions. They did refer to a number of factors but, in our submission it becomes quite clear, on analysis, that not one of those factors supports them.

They say, first of all, that the mandate was regarded "as still in existence" (p. 177, *supra*). It seems clear, Mr. President, that this was widely accepted, *inter alia*, by the Special Committee, with the reservations which were expressed in that regard and which we noted again yesterday. However, that this acceptance did not entail a view that supervisory functions in respect of mandates had passed to the United Nations, seems equally clear, particularly from the passage of the report which we quoted.

Then, Mr. President, at page 177, *supra*, of the same record of 10 May, there is a reference to the so-called "British pledge". The contention is really put in the negative. I should like to refer the Court to the terms thereof:

"To interpret this as a grant of special power to the United Nations to carry out normal responsibilities of supervision under the Mandate, as if that did not exist without this grant of power, if it may be called one, would seem to me to involve a strange construction indeed of the British pledge and the British position historically."

That was the way in which it was put by my learned friend at the page indicated.

Now, Mr. President, that British statement of April 1946, which is apparently the one referred to as a pledge, seems in itself, with its reference to the general principles of the Mandate, to exclude a contemplation of accountability towards the United Nations, and, when it is read in conjunction with the passages from the UNSCOP report which I read yesterday, the matter becomes clear beyond doubt. This is also a point which has never been met by the Applicants in anything which they have submitted to the Court—i.e., the manner in which that British pledge is dealt with in the UNSCOP report.

Next, Mr. President, they stated in the same record, at page 178, *supra*, that the Committee did not question "or deny the competence of the

United Nations to serve as the international agency for giving effect to the central obligation of submitting to supervision". But, Mr. President, how can it be said that the Committee did not question, or deny this, in the face of the passages from the report which I read yesterday, and which are not met or dealt with?

Then, Mr. President, my learned friends relied strongly on certain discussions in the *Ad Hoc* Committee on the Palestinian Question. That we find in the same record of 10 May, at pages 180-182, *supra*. Nevertheless, it is, in our submission, highly significant that the Applicants can point to no single statement by any delegate which based the competence of the United Nations on any transfer or succession of supervisory powers in respect of mandates. The delegates on that occasion—on the occasion of deciding whether there was to be a request for an Advisory Opinion—were divided into two categories. There were those who held that the Mandate had lapsed and that, for that reason, *inter alia*, the United Nations could not exercise further rights in respect of the Territory. The contrary view, which one can put broadly as being that action by the United Nations was *intra vires*, eventually carried the day. That view was formulated by different speakers on a number of bases.

The delegate of the United States of America, to whom we can refer as an example, stated the following:

> "The mandatory power had requested the United Nations to make recommendations for the future Government of Palestine and had unilaterally declared that it was relinquishing its responsibility. Hence any legal objections to the actions of the General Assembly must be formal in character. The United States delegation would support the proposals of Sub-Committee I which, in its view, met the request of the Mandatory Power." *(G.A.,O.R.*, Second Session, *Ad Hoc* Committee on the Palestinian Question, p. 169.)

Thus the delegate, Mr. President, firmly based the attitude of the United States on the request of the mandatory power and the declaration that it was relinquishing its responsibility.

The importance of the attitude of the United Kingdom Government was also stressed by the Polish delegate. He said, in that same record, at page 160, the following:

> "The situation was that the Mandatory Power had notified its decision to terminate the Mandate and to withdraw from Palestine. It had requested [the mandatory power] the General Assembly to make recommendations for the future government of the country. It had, however, made it clear that it did not wish to participate in the implementation of a solution which did not meet with the approval of both Jews and Arabs. Neither of the plans submitted satisfied that condition and it was highly improbable that such a plan could be drawn up. Since the United Kingdom had stated that it was prepared to transfer its powers only to an organ of the United Nations, the United Nations was obliged to establish such an organ."

This statement came, Mr. President, fairly near the beginning of the speech in which the delegate of Poland was replying to various points which had been raised in regard to the report then under consideration, including the question of the competence of the United Nations to proceed with the matter at all. He started off with the actions of the

mandatory power—its consent, its decision and its reference of the matter to the United Nations—and he proceeded, Mr. President, with regard to the General Assembly's right to make recommendations, to refer to Articles 10 and 14 of the Charter, particularly Article 10. That is in the same record, at page 161.

As we noted yesterday, Article 10 granted competence to the General Assembly only in respect of questions falling within the scope of the Charter. That aspect of the matter was also referred to by the Polish delegate. Following up the question whether this was a matter falling within the scope of the Charter, he took the view that the question to be decided was essentially that of the future government of a territory whose population was not yet self-governing. He therefore regarded the provisions of Article 1 of the Charter and of Chapters XI and XII of the Charter as being applicable: these provisions would then bring the matter within the scope of the Charter, and Article 10 would bring it within the scope of the competence of the General Assembly.

In regard to Article 1, he specifically referred to the objective, or purpose, of specific settlement of disputes endangering general welfare or friendly relations, and in regard to Chapters XI and XII he stated, particularly with regard to Articles 77 and 79, as follows:

> "Those Articles had been included in the Charter for the purpose of emphasizing that the United Nations should assume the responsibilities of the League of Nations in respect of peoples who had not yet become independent." (*G.A.*, *O.R.*, Second Session, *Ad Hoc* Committee on the Palestinian Question, p. 161.)

This, Mr. President, was the expression of a broad view of the competence of the United Nations to deal with a question of this kind—a question which the Polish delegate defined, as I have said, as being, essentially, one of the future government of a territory whose population was not yet self-governing.

Finally, in dealing with the disputed validity of the Mandate, the Polish delegate used the words quoted by the Applicants. They read as follows (at pp. 161-162 of the same record):

> "... that the question had not been examined, but that it was impossible to dispute the validity of the Mandate conferred by the League of Nations and confirmed by the terms of Article 80 of the Charter. Although the functions of the League of Nations had come to an end, that did not mean that all control was thereby abolished. That responsibility now rested with the United Nations." (*G.A.*, *O.R.*, 2nd Session, *Ad Hoc* Committee on the Palestinian Question, pp. 161-162.)

In the light of the whole of this speech, of which I have attempted to give certain salient features to the Court, it becomes clear, Mr. President, in our submission, that the responsibility to which the honourable delegate referred was clearly related to that which he considered to be provided by Chapters XI and XII of the Charter—and particularly by Articles 77 and 79, in the sense which he had ascribed to them—plus, perhaps, the purposes of the organization as set out in Article 1 of the Charter—the purposes relating to specific settlement of disputes.

In the whole of this address therefore, reading it in its proper context, there is nothing to suggest a contemplation on the part of the Polish delegate that, independently of consent on the part of the Mandatory,

there would, or could, be any normal function of supervision of the Mandate, or of mandatory administration by the United Nations.

Then, Mr. President, the Applicants quote, from the debates, further references to Article 10 of the Charter. These references are given in the verbatim record of 10 May, at pages 176 and 182, *supra*. However, as we noted before, Article 10 serves only to grant competence to the General Assembly, as a particular organ of the United Nations, to consider matters falling within the ambit of the Charter. Article 10 does not define which matters fall within such ambit. I dealt with that fully yesterday, and in our submission it is quite clear that Article 10 can never serve to establish United Nations competence in a matter. In the case of Palestine, United Nations competence in respect of the solutions actually proposed could, and did, arise only from the consent of the parties directly interested, as the Applicants indeed concede.

If, in addition, Mr. President, a general power to discuss the future of non-self-governing territories and to make non-binding recommendations thereon, was granted by Chapters XI and XII, as contemplated by the Polish delegate, that grant would also not support the Applicants' thesis, and the same would apply to any recommendations regarding specific settlements of disputes under the purposes contemplated in Article 1 of the Charter. So reviewing the whole of these various attitudes expressed by various delegates with reference to Article 10, it becomes quite clear that they do not, in any way, assist the Applicants' contention. It follows, therefore, that the Applicants have not adduced anything to suggest that the activities of the United Nations regarding Palestine were based on any supervisory power in respect of mandates exercised by the United Nations as a successor to the League of Nations, in the sense that there was an obligation on the part of the mandatory power to submit to such supervision. Their statement, in one of the passages on record which I have read, to the effect that this was a "given"—that the power to exercise normal supervision was a "given" in the situation—is really in our submission a pure *ipse dixit*. It is something which is not established by any material upon which the Applicants could rely or to which they could refer the Court.

Finally, Mr. President, we find that some issue is made of the attitude of the United Kingdom Government; we find that done in the verbatim record of 10 May, at page 183, *supra*, and in the record of 11 May, at page 184, *supra*. In these passages, my learned friends sought to draw a distinction between on the one hand, accepting the sole responsibility and, on the other hand, burden-sharing or acceptance of United Nations recommendations in that regard. They said the attitude of the United Kingdom Government was that it did not want the sole responsibility but it was prepared to accept United Nations recommendations on a basis of "burden-sharing". That, Mr. President, does not, however, invalidate the Respondent's point, which is that the United Kingdom Government reserved the power in certain circumstances not to accept or carry out United Nations resolutions. The principle of that situation is of importance in regard to the issue between the Parties.

Whether the United Kingdom Government was reasonable or unreasonable in reserving its rights as regards particular situations, is a question of policy and is not a matter which affects the issue between the Parties as a question of law. The fact is, that the circumstances which the United Kingdom Government indicated as circumstances under which

it would not accept any resolutions, were indeed wider than those suggested by the Applicants; it was not merely a matter of avoiding sole responsibility. Thus, Mr. President, I can refer the Court to an extract from the speech of Mr. Creech Jones in the *Ad Hoc* Committee, appearing in the records we cited before, at pages 3-4.

> "The United Kingdom Government was ready to assume the responsibility for giving effect to any plan on which agreement was reached by the Arabs and the Jews. If the Assembly were to recommend a policy which was not acceptable to the Jews and the Arabs, the United Kingdom Government would not feel able to implement it. It would then be necessary to provide for some alternative authority to implement it. The United Kingdom Government was not prepared to undertake the task of imposing a policy in Palestine by force of arms. In considering any proposal that it should participate in the execution of a settlement, it would have to take into account both the inherent justice of the settlement and the extent to which force would be required to give effect to it." (*G.A., O.R.*, 2nd Session, *Ad Hoc* Committee on the Palestinian Question, pp. 3-4.)

That makes it perfectly clear, Mr. President, in our submission, that the matter went very far beyond mere concern about having sole responsibility. The matters in respect of which the position of the United Kingdom Government was reserved with a view to not necessarily accepting recommendations, extended far beyond that.

I conclude therefore, Mr. President, in regard to the Palestine question, by saying that what the Applicants have added in their oral reply in this regard, has provided no support for their case and has in no way shaken or altered the firm support which the UNSCOP report provides for Respondent's case in regard to Article 6.

I now proceed to revert to the Trusteeship Council debate on the report for 1946 which was in fact submitted by the South African Government for the information of the United Nations.

As I pointed out yesterday, the contention of the Applicants which gave rise to the review which we gave on this point in our argument in chief, was to the effect that there was in the Council "no doubt as to the legal authority of the Council to examine the report of the mandatory power and submit observations thereon". The quotation proceeds:

> "Notwithstanding the dissolution of the League, it was agreed that the Mandate continued in full force and effect, and that the United Nations was the proper supervisory authority." (**VIII**, p. 160.)

In other words, Mr. President, the topic was introduced by the Applicants in an attempt to establish agreement among members of the Trusteeship Council to the effect which I have just mentioned. The expression "proper supervisory authority" clearly refers to supervisory authority under a mandate in force; that is the context of it: it was agreed that the Mandate continued in full force and effect and that the United Nations was the proper supervisory authority. And in support of this contention the Applicants referred to statements by China, Belgium and the United States of America—that was in their argument in chief, and the reference is to the same record of 19 March, **VIII**, p. 160.

Now, Mr. President, the circumstances under which the South African

report was submitted to the United Nations have been discussed. It will be recalled that the report was dealt with by the United Nations in terms of the General Assembly resolution 141 (II). It will also be recalled that in the preamble to that resolution the Assembly acknowledged, amongst others, that the Union Government had "undertaken to submit reports on its administration for the information of the United Nations", and this was, therefore, the basis upon which the General Assembly authorized the Trusteeship Council "to examine the report on South West Africa recently submitted by the Government of the Union of South Africa and to submit its observations thereon to the General Assembly". The whole basis was that it was a report which had been submitted for the information of the United Nations—a basis clearly so understood on both sides.

In our oral argument in chief we, with submission, completely refuted the Applicants' contention regarding the alleged agreement between the 12 States represented on the Council. After reviewing the attitudes taken by each one of them at the time, both in those debates and in other debates in other organs of the United Nations at the time, we reached certain conclusions which we set out in a summary form in the verbatim record of 8 April, at **VIII**, pages 485-486, and I should like to refer very briefly to the gist of those conclusions with a view to taking the matter further as regards the issues that arose from the reply stage of the Applicants.

Our first conclusion was that there were at least five of these States which took up the attitude that the Mandate had lapsed on dissolution of the League and that there was a sixth State, the United States of America, which, through one of its representatives, stated the contemplation that the Mandate had lapsed and, through another, that it was still in existence, but without accountability.

Secondly, we pointed out, we concluded, that nine States, including the six just mentioned, took up a very clear and unqualified view to the effect that, outside of a trusteeship agreement, there was no supervisory power on the part of the United Nations.

That left only three States—Cuba, the Philippines and Belgium. In the case of Cuba and the Philippines, we submitted in the final summary that their attitude was the following—

> "that, although, in general, there was no supervisory power on the part of the United Nations outside of trusteeship, there was an opportunity for the Trusteeship Council to perform functions similar to those which had been performed by the Permanent Mandates Commission". (**VIII**, p. 486.)

In the case of Belgium, the twelfth State, we submitted that its attitude was the following:

> ". . . on the one hand, that by virtue of Article 80 (1) of the Charter the people of the Territory were entitled to have the Territory supervised . . . but on the other hand, Belgium recognized that there had been no agreement by South Africa to have United Nations supervisory organs substituted for those of the League". *(Ibid.)*

Then, in summary, we said:

> "Not in one single case, therefore, Mr. President, of these members of the Trusteeship Council, do we find an attitude supporting, or

corresponding with, that taken up by the Applicants in this case. Not one of them took up the attitude that there was agreement, consent, acquiescence, on the part of the South African Government to a substitution of supervisory organs, and that on that basis the United Nations had supervisory functions or powers, outside trusteeship." *(Ibid.)*

That, therefore, was the conclusion, Mr. President, to which the Applicants' reply was required to be directed. From the nature of the argument to which we were replying at the time, as well as of the argument which we were presenting, it was quite clear that the examination related to the question whether the Trusteeship Council regarded itself as exercising a power of supervision under the Mandate as a successor to the Permanent Mandates Commission or the League Council a power which would have involved a corresponding duty on the Respondent to report to the Council. This point I also stressed again yesterday. The argument did not deal with the question whether the Council's activities pursuant to Respondent's voluntary transmission of information could or could not appropriately be called supervision, or whether it could or could not appropriately be regarded as amounting to supervision, in practice. That was not the question, that was not the point, as far as the arguments in chief were concerned. Yet, Mr. President, we find that it is to this point that the Applicants chose to address themselves in their reply in the verbatim record of 11 May, at pages 191, *et seq.*, *supra*, and, as I pointed out yesterday, this really means that our real argument on this subject and our real demonstration in that regard stand unanswered.

It is hardly necessary for me to say anything more about the treatment of the matter in the debates of the Trusteeship Council, but I may point out that the Applicants clearly indicated an abandonment of their contention which they originally advanced with reference to some hand-picked statements. They abandoned the contention of an agreement said to have been manifested in the Trusteeship Council that the Mandate continued in full force and effect and that the United Nations was the proper supervisory authority. They did not proceed to attempt to establish that. We are told now, on the contrary, that:

> "... there was confusion and there was considerable discussion of a nature which, looked back upon now in these dusty records, is ambiguous: one reason for the request for the 1950 Opinion". (*Supra*, p. 198.)

In the context, Mr. President, of the argument in the verbatim record of 11 May, at page 198, *supra*, it seems perfectly clear that this statement relates to these very proceedings in the Trusteeship Council—that it at least includes a reference to those proceedings. As it would seem to us from the context, this particular passage relates specifically to those proceedings.

I can also give the Court a reference to page 199, *supra*, of that same record, where the Applicants stated this:

> "... the Iraqi view, as was the case of so many others at the time, does indeed reflect confusion, with all respect to the distinguished delegate of Iraq at the time, confusion and ambivalence".

Mr. President, in my submission, this concession by itself negatives

any possibility that there existed any consensus of opinion amongst the members of the Trusteeship Council of the nature originally relied upon by the Applicants. In addition, Mr. President, in a wider sense, this concession negatives any possibility that it could be said that there was a general understanding in 1945-1946 to the effect that a transfer of League supervisory functions to the United Nations was effected. If there had been such a general understanding, in 1945-1946 as relied upon by the Applicants, why then do we find so soon afterwards, in 1947-1948, this confusion, this ambiguity, this ambivalence in the attitude of so many States so directly concerned with the matter? On the Trusteeship Council were represented the former mandatory powers which had placed their territories under trusteeship, and other States directly concerned, and one would expect that their delegates would have acquainted themselves with the relevant facts at the time. How then could the Applicants, under those circumstances, come to Court and say, on the basis of necessary inference, that there must have been this general understanding or intent in 1945-1946? But the matter does not end there, Mr. President.

In regard to the fact that the Applicants addressed themselves solely to the question whether the activities of the Trusteeship Council could appropriately be called supervision, and whether those activities were regarded as falling within such a concept, it is interesting to note the contention which the Applicants stated in the verbatim record of 11 May, at page 191, *supra*:

> "Compliance with the instructions of the General Assembly, [i.e., resolution 141 (II)] of course, . . . pre-supposed the existence of supervisory functions with respect to the Territory, which is consistent with no other assumption, obviously."

Mr. President, I refer to the words "Compliance with the instructions" and "pre-supposed the existence of supervisory functions with respect to the Territory". Quite clearly there is a play of words here—a play on the inherent ambiguity in the concept of "supervisory functions", in the sense which I explained yesterday. "Supervisory functions"—do they relate to a power of the Organization as being the counterpart of an obligation on the part of the mandatory power, or do they simply relate to some constitutional concept of the competence of a particular body?

Our submission is that in regard to a supervisory power of the first-named kind the Applicants have brought not one iota of evidence that there was a contemplation, either in the resolution or on the part of the Trusteeship Council, that it was intended by the resolution to exercise such a power.

We referred earlier to the terms of resolution 141 (II), and I referred to it again this morning. Quite clearly a compliance with that resolution did not imply any expression of opinion to the effect that authority to supervise the Territory under the Mandate had passed to the United Nations—supervision, that is, in the sense of the counterpart of an obligation to submit to such supervision.

The voluntary submission of a report by South Africa created a practical situation where something had to be done with the report. The fact that the United Nations examined the report, whether or not such examination can appropriately be referred to as supervision, provides no evidence whatsoever that the Members of the United Nations regarded the

Organization as the successor of the League of Nations as supervisory organ in respect of mandates, in the sense which I have just mentioned. Indeed, as we have shown, the majority of the Members did not so regard it, and the Applicants' demonstration that many States, including the Respondent, regarded such an examination as amounting, in practice, to supervision, which, Respondent asserted, was not justified, cannot serve to alter this basic reality—the basic reality that there was no contemplation of a supervisory power in the proper sense to which I have referred—a power binding the mandatory by way of an obligation on its part—nor can it serve to assist the Applicants in any way.

The attempted distinction which the Applicants sought to draw between a wider and a narrower basis of supervision by the Trusteeship Council, does not, Mr. President, help in any way whatsoever in this inquiry—it has no relevance. The wider and the narrower bases of supervision, favoured by various Members of the Security Council, related to what was being done in fact and in practice. They did not relate to the question whether there was a supervisory power on the part of the Organization in the sense under discussion.

The Applicants did not in any way attempt to refute our evidence that not one of the Members of the Trusteeship Council expressed a view that Respondent had, through consent, become obliged to submit to United Nations supervision, and that nine Members were definitely of the opinion that, outside of trusteeship, there was no such obligation. Therefore, Mr. President, to complete the remarks on these debates in the Trusteeship Council it is again a case of the argument in chief which we made out, standing unaltered and unaffected.

That brings us to the list of 25 States. I may here also, for setting and background, refer very briefly to the manner in which this question arose. The basic issue, of course, with which we are dealing, is the question whether Respondent consented in 1945-1946 to accept the United Nations as successor to the League of Nations for purposes of supervision of mandates. In view of the factual situation, it is also relevant to consider whether other Mandatories manifested such consent. It is hardly likely that there would have been any material difference in the attitudes taken by the various Mandatories on this question, and, Mr. President, inasmuch as a consent cannot be given *in vacuo*, a highly relevant further test is whether the other States concerned—the other States present at the final League Assembly in April 1946 and/or the initial Members of the United Nations—understood that such a consent had been given, either by Respondent or by any of the other mandatory powers.

This test of establishing how the situation was understood by the other States concerned, can best be applied by having regard to the attitudes which were expressed by such States immediately after the events of 1945 to 1946—in other words, during the years 1946 to 1949. That was the time when the events of 1945 to 1946 were still fresh in memory, and when the same question of the possibility of United Nations supervisory power outside of trusteeship arose in various practical circumstances with reference to various mandates. The political alignment in each instance was not always the same; there were different practical considerations involved in regard to this question with reference to the manner in which it arose in regard to South West Africa, and in regard to various other Mandates—Palestine, the New Zealand Mandate of

Samoa, and so forth—also the issue which arose in the Security Council about the former Japanese Mandate, and as to the competence of the Security Council in that regard, a matter to which we referred before. There, again, the political questions involved were different, but, Mr. President, it is therefore very significant to see what was the contemplation of the various States in these first years in relation to these various ways in which the question manifested itself.

It is important when embarking upon this examination not to lose sight of its purpose. The purpose must always be to ascertain firstly, whether the mandatories manifested the consent in question in 1945 to 1946 and, secondly, whether such consent involved an undertaking to give effect to Article 6 of the Mandate by rendering reports, as provided for in that Article, to the United Nations as successor to the League of Nations, on a compulsory basis.

Now, Mr. President, to this inquiry no direct answer is provided by various matters which have been introduced into this discussion—matters such as, firstly, the consideration that some States regarded it as desirable, or considered it obligatory, for former Mandatories to conclude trusteeship agreements, does not aid the inquiry whether there was an obligation to submit to United Nations supervision outside of trusteeship, or whether there had been such a consent on the part of the mandatory powers in 1945 or 1946.

Secondly, Mr. President, the consideration that some States regarded Article 73 *(e)* as applicable and binding upon former Mandatories, does not suggest a positive answer to the question whether there was an obligation to report and account under Article 6 of the Mandate, or the corresponding Articles in the other mandates.

And, thirdly, the consideration that some States considered the United Nations competent to examine information voluntarily supplied by a former Mandatory, or to make recommendations and give advice on matters submitted to it by a former Mandatory, again, is an irrelevant one; at least, it does not provide a favourable answer for the Applicants on the real question being investigated.

These matters, Mr. President, cannot by themselves be of relevance to the issues before the Court, save and except to the extent to which expressions of opinion regarding them may bear upon the actual issue, namely whether consents were given whereby former Mandatories were obliged under the mandates to render account to the United Nations.

It was, therefore, in consideration of this question that the Respondent embarked upon an inquiry in the pleadings, an inquiry which was repeated, to a large extent, in the oral presentation. The result thereof is summarized in conclusions stated in the Counter-Memorial, **II**, at pages 140 to 141.

The first element in the conclusion was an important one, and related solely to the first year in which the South West Africa question came to be extensively discussed—the year 1947. We pointed out that, up to the end of that year, 41 States had taken part in debates on South West Africa; we pointed out that South Africa, through its representative, Mr. Lawrence, had in September, and again in November, of that year made explicitly clear its attitude that, outside of trusteeship, there was no accountability on its part to the United Nations.

We pointed out also that New Zealand had adopted in that year a similar view in relation to Western Samoa which was expressed at the

United Nations, and yet one found, Mr. President, that of all those 41 States which took part in the debates, and of all the others which did not take part, not a single one voiced any contradiction to the attitude so explicitly stated by Mr. Lawrence; not a single one.

Then we stated in that conclusion that over the years 1947 to 1949 at least 24 States, Members of the United Nations, other than the Respondent itself, in participating in the debates and proceedings of organs of the United Nations, or in expressing views in its agencies, whether in regard to the Mandate for South West Africa or to other Mandates, demonstrated clearly, either expressly or by clear implication, that in their view, in the absence of a Trusteeship Agreement, the United Nations would have no supervisory powers, in the sense under discussion, over a mandated territory. And we gave the list of those 24 States. I need not repeat the details again.

We pointed out, further, in this conclusion that up to 1949 only five States voiced any contradiction to that proposition. They were Belgium, Brazil, Cuba, India and Uruguay. In the case of the last-mentioned three, we pointed out that their attitudes were inconsistent at various stages, and we pointed out, further, that in no case was the contradiction by any of these five States based upon a suggested agreement or understanding (other than Article 80 (1) of the Charter)—save for that qualification there was no suggestion of an agreement or understanding arrived at during the transitional period of 1945 to 1946.

We pointed out further that up to 1949 there was at no stage any contradiction of the kind under discussion, which was voiced by either of the two Applicant States, Liberia and Ethiopia.

That was the case we made on this point, and that was the case which we substantially repeated before the Court in dealing with the matter in our presentation in chief.

Now let us see, Mr. President, how the Applicants attempted to whittle down the significance of this analysis. First, in their argument in chief, with reference to what we have set out in our pleadings, and before we could deal with the matter in our oral presentation, my learned friend, Mr. Moore, sought to eliminate, firstly, the six States which were included, as they said, merely because they had signed the Palestine report (verbatim record of 19 March 1965, at **VIII**, p. 165). I shall omit comment for the moment, and I shall merely give a summary of what his attitude was at the time.

He proceeded, further, to attempt to eliminate Cuba, India and Uruguay, which, as we had noted ourselves, had taken inconsistent attitudes. They had spoken first in favour of non-accountability under the Mandate, and had later switched their position. That is very clear from the record, as I had understood from my learned friend's contention. There was never any dispute on their part that there was such an inconsistency.

Thirdly, they sought to eliminate the United States of America, which had argued before the Court in 1950 in favour of accountability towards the United Nations. On that basis they sought to exclude the United States.

And, finally, they sought to exclude China and the Philippine Republic on the strength of certain statements made by them, again showing, in their submission, an inconsistency, but not arguing away the original statements on which we had relied when we put China and the Philippine

Republic on our list. That we find in the same record of 19 March at **VIII**, pages 165 to 166.

Now in our argument recorded in the verbatim record of 8 April 1965, at **VIII**, pages 499 and the following, we pointed out the fallacy of this argument of the Applicants, and we demonstrated that the most that could be said in favour thereof was that, in addition to Cuba, India and Uruguay, the Philippines and the United States of America might possibly be regarded as having been inconsistent on the point in issue. On the other hand, it was submitted that Mexico should be included in the list of States which had indicated a positive view that no succession of supervisory functions had taken place. Be that as it may, one major point remained untouched. The major point was that there was no general understanding among Members of the United Nations to the effect that the United Nations would have supervisory powers in respect of mandates not converted into trusteeships, but that the general consensus, whatever figures involved, was to the contrary. In addition, Mr. President, we pointed out that throughout these debates no reference was made to any "pledge" in April 1946, nor, indeed, to any agreement or consent said to have been given anywhere within the period 1945-1946.

In their reply, the Applicants returned to the fray. But we find that here also they now restricted themselves to a very limited objective, compared with the wide scope of the issue between the Parties as dealt with in the arguments in chief. This limited objective was to show the following:

> "... confusion and inconsistency, of course, attended the anomalous situation created by the single, residual Mandate other than Palestine itself, which confronted the United Nations with the necessity for making a decision which it hoped it would never have to make but which it possessed power to make if necessary, and which it did exercise, when it became necessary. And this situation of doubt, confusion and ambiguity, of course, led to the submission by the General Assembly of its request for an Advisory Opinion in 1950 ..." (*Supra*, p. 224.)

Mr. President, this statement by the Applicants, by itself, and on its face, establishes our contention. If there had been a clear understanding in the years 1945 to 1946, as alleged by the Applicants, it seems absolutely incomprehensible that there should have been this doubt, this confusion, this ambiguity about the question in these years 1946 to 1949.

Surely, Mr. President, if an agreement and understanding had arisen by implication, had been in the minds of the parties and was so clear that they found it unnecessary to express it, then surely one or other of the States involved would have said "but the position is so clear, there was this agreement; there was this understanding; why should there be any doubts, or any confusion or any ambiguity about it whatsoever"? On that basis it becomes quite clear that the Applicants cannot, on a foundation of a necessary inference from circumstances, hope to establish their contention. But Mr. President, in fact the matter does not end there.

An examination of the material adduced by the Applicants does not show any support for their theory of consent in April 1946 or in 1945 to 1946 generally, and it does not seem, in any material way, to whittle down our demonstration of the substantial consensus which, in fact, existed in favour of our contention.

The Applicants now attempt to reduce the list of 24 States, or 25 with Mexico, even more than before—perhaps I should say 25 or 26, because South Africa itself now comes into play. We find this attempt of theirs in the verbatim record of 12 May, at pages 220, *supra* and the following.

Firstly, they return to the attack as regards the six signatories of the Palestine Commission, of whom they say that they merely signed that report. Mr. President, surely, for the reasons which we have given, this attack must again be regarded as completely repulsed. The real point, as it appears in the most significant passages of that report, has never been met by my learned friends.

Also Cuba, India and Uruguay are again brought under fire, and the position remains exactly the same as before. They are brought under fire merely because they were inconsistent—that that was so, was conceded by us, but that does not take away the fact that they initially expressed themselves in favour of the Respondent's contention on this legal question, and that they later became inconsistent with themselves in that regard, and that is why we put them on the list. That they did initially express those views, is not and cannot be contested.

In the case of the United States, it is now said that it was not only inconsistent, but that it was always doubtful of the correctness of its statement regarding supervision, and that that doubt, or difficulty was apparently first cleared up when the United States presented an argument to this Court in 1950. May I refer again, Mr. President, to the way in which this matter was now dealt with? I should like to begin by referring to the verbatim records of 11 May and 8 April.

In the record of 11 May my learned friend, Mr. Gross, was dealing with a statement by Mr. Gerig to which we had referred earlier in our oral presentation, and quoting from our previous presentation, he read the following:

> ". . . from this quotation Respondent concludes, quite categorically, and I quote Respondent's statement, that Mr. Gerig—
>
> > '. . . proceeds from the basis that the Mandate is in existence as a clear and explicit view to the effect that the United Nations had no supervisory authority in respect of the Mandate'."

I am reading from page 205, *supra*, of that record of 11 May. My learned friend went on to point out that Mr. Gerig ended up his statement by using the words "its duties under the present Mandate, admitting that it exist", and he indicated that Mr. Gerig "was just doubtful about the whole proposition"—those were the words he used. Now, Mr. President, in the first place there is a mistake here. In the record of 8 April, to which my learned friend was replying, we had referred to two statements of Mr. Gerig, not only to this one. We referred, first, at **VIII**, page 482, *supra*, of the record of 8 April to the statement of Mr. Gerig on 1 December 1947 in the Trusteeship Council. That statement included this sentence, which had, incidentally, been quoted by the Applicants before: ". . . it is a mandated territory, recognized as such by everyone, including the Union of South Africa." (**VIII**, p. 160.) Then I went on to quote the statement by Mr. Gerig of 12 December of the same year, some 12 days after the previous statement, and it was there that Mr. Gerig said:

> "It was said here earlier this afternoon, and I did not hear any member object, that while we all hope—my delegation as much as any delegation feels that way—that there will be a trusteeship

agreement for this territory, we do not, in the absence of a trusteeship agreement, have supervisory functions over this territory. Therefore, I do not think we ought to imply that we do have supervisory functions to ensure that the Union Government discharges its duties under the present mandate, admitting that it exist." (**II**, p. 281.)

I proceeded to point out that there were two speakers on behalf of the United States: the first one had been Mr. Dulles, who had expressed the view that the Mandate had lapsed, and then Mr. Gerig, Mr. Gerig's attitude was contrasted with that view; and then followed the sentence which my learned friend quoted. There is a mistake in the recording of the sentence—I spoke of a speaker proceeding "from the basis that the Mandate was in existence to a clear and explicit view to the effect that the United Nations had no supervisory authority in respect of the Mandate" the "to" unfortunately was rendered wrongly in the record as "as". So, the clear and explicit view did not relate to the question whether the Mandate was in force or not; it related to the fact that the United Nations had no supervisory authority in respect of the Mandate, whether or not the Mandate was in existence—that was the gist of what I stated in regard to Mr. Gerig's attitude in contrast with that of Mr. Dulles.

Now my learned friend says to us that Mr. Gerig, at the end of that address, indicated that there was uncertainty in his mind. I may refer again to the address in the Trusteeship Council. I read the relevant portion of it again to the Court—it is perfectly clear. I may also refer the Court to that same page (505) in the Trusteeship Council records of 12 December 1947, as to how Mr. Gerig began. He began by stating:

> "I am among those who always have believed that the mandate does continue in force, but there are others who do not take that view. Therefore, because of some doubts here, I raised that question."

He was referring back, apparently, to his earlier statement of 1 December. He then made an addition, Mr. President, in the context of replying to a speech by Mr. Liu Chieh of China, who had been the previous speaker—the speech to which I referred before, in which it was suggested that the Council could see whether the Union Government discharged its responsibilities under the Mandate. Replying to that suggestion, he stated:

> "I would add that even if it does remain in force, that thought, namely whether the Union Government is discharging its duties under the mandate, looks as if we have certain supervisory functions to see to it that the Union Government discharges its responsibilities under the mandate."

This, as I have said, was stated by way of reaction to the Chinese statement. Mr. Gerig objected immediately that approaching the matter in the way suggested by the Chinese speaker would look as if the Trusteeship Council had certain supervisory functions and had to see that the Union discharged its obligations under the Mandate. Then followed that statement which we have quoted—"It was said here earlier this afternoon, and I did not hear any member object . . .". So, Mr. President, this was Mr. Gerig's reaction, his immediate reaction: "but surely we have no supervisory functions of that kind." Mr. President, the fact that he then ended up by stating:

> "I cannot help but feel that there are difficulties of this kind which

> we should not take up at this point. I am willing to consider it in June, but I do not now feel clear in my mind that the Trusteeship Council has implied or expressed supervisory functions over that territory. However, I should like to hear the thoughts of the other members of the Trusteeship Council". (*Supra*, p. 206.)

The fact that he said that at the conclusion of his speech surely does not, in the context, indicate that there was any substantial doubt in his own mind. This was merely another way of saying that he certainly could not, at that stage, agree with a view that there was any supervisory power on the part of the United Nations Organization in the sense under discussion, and in the sense suggested by the Chinese delegate, i.e., that such a function should be exercised by the Trusteeship Council. It was another way of putting a view on his part, but to say that that indicated any substantial doubt upon the matter really takes it completely out of context. If there was such a substantial doubt, if this view which had been expressed so explicitly, came under reconsideration at a later stage during those same debates, or at a later stage in similar debates on the South West Africa question, one would at least have expected the United States to have indicated something of the kind at some stage in the debates at the United Nations, but there was no such indication whatsoever at any stage.

Mr. President, I was dealing with the Applicants' attempts in their oral reply to reduce the list of States, 25 or 26, which we said indicated a clear agreement during the years 1946 to 1949, with the proposition that outside of trusteeship there was no supervisory power, in the sense under discussion, on the part of the United Nations over the Mandate of South West Africa, or over mandates in general, and I was dealing more specifically, Mr. President, with the question of the attitude of the United States.

Apart from Mr. Gerig's statement, with which I have again dealt, there is of course still the statement of Mr. Dulles to which, as far as I can recall, the Applicants offered no reply, and with reference to both Mr. Gerig's attitude and to Mr. Dulles' attitude, we certainly do not see any reason why the United States should be taken off that list.

Then, to China, the Philippines, New Zealand and the Soviet Union. The Applicants sought to eliminate them because they expressed the view that the United Nations was empowered to consider the South West Africa report or the matter of Palestine. But, Mr. President, in both cases these were questions which had specifically been referred to the United Nations by the administering powers—the actual South West Africa report for 1946 which came before the United Nations and the specific case of Palestine. And, therefore, there is again here a confusion between the two senses in which one could speak of, say, supervisory competence as a matter of constitutional arrangement, so far as a particular organ is concerned, and a supervisory power in the sense under discussion, implying a right as a counterpart to an obligation to submit to supervision.

Applicants' reference to the attitudes taken up by these States on the question of the South West Africa report, or on the question of Palestine, is therefore not relevant at all to the question under consideration. They do not meet our point. There is no inconsistency between the attitudes taken up by these States in this regard and the attitudes explicitly expressed by them—the reasons why we put them on the list—as

indicating that outside of trusteeship there would be no obligation of accountability.

France, Mr. President, is sought to be excluded because its representative expressed a desire that information should be transmitted. The expression used was "he urged the submission of reports". But, Mr. President, I suppose that other delegates did that too. Some of them said that they were sorry to see that the Union of South Africa decided to send no further reports and that it would be a good thing if they were to do so. But that is no indication of the existence of an obligation on the part of the South African Government to do so. There is no such indication on the part of the representative of France, or any representative of France at any stage, and the real and the clear reasons, which we gave, why France should be put on the list were not touched upon or substantially affected in any analysis of the Applicants. The place where this was dealt with by my learned friends was the verbatim record of 12 May, at page 223, *supra*, and I submit that their attitude in regard to France, therefore, is also without substance.

The Applicants also now refer to a statement by the delegate of Pakistan—that is in the verbatim record of 12 May, at page 222, *supra*. However, Mr. President, reading the passage as a whole, it seems quite clear that the delegate did not seek to convey a view that the United Nations possessed any powers in respect of mandates *qua* mandates. What he said is recorded in the *Official Records of the General Assembly*, Third Session, Part I, 1948, Fourth Committee, page 315. A portion of what he said was quoted by the Applicants in the verbatim record of 12 May, at page 222, *supra*. The point to which I wish to direct the Court's attention occurs in certain words which were not quoted, and I should for that purpose like to read the full passage:

> "The Mandates Commission of the League of Nations had had supervisory powers for twenty years. Reports had been submitted annually by Mandatory Powers and scrutinized with jealous care by the Mandates Commission.
>
> The League of Nations had been replaced by the United Nations, which had taken over the functions formerly exercised by the League."

If I may break there, that was the portion specifically relied upon by my learned friends. The quotation proceeds:

> ". . . several provisions of the Covenant of the League of Nations relating to mandated territories had been included in the Charter. [I come now to the portion that had not been quoted] Article 77 and Article 80, paragraph 2, clearly indicated that there must be no undue delay in the negociation [sic] and conclusion of Trusteeship Agreements. The Union of South Africa claimed that its authority proceeded from the mandate under the terms of which South West Africa could be integrated with the Union of South Africa. However, if the mandate was no longer in existence, neither was the authority proceeding therefrom. The Union Government could not claim its rights and reject its obligations."

And later the delegate said, in a passage which was quoted by the Applicants:

> ". . . the United Nations should retain the responsibility of controlling

the mandated territories, and that the Union of South Africa was in no way justified in defying the repeated recommendations made to it to submit a Trusteeship Agreement".

Mr. President, reading the passages as a whole it seems clear that the delegate regarded Respondent as being under an obligation to enter into a trusteeship agreement; he regarded that as the legal obligation. It was by virtue of the trusteeship system, therefore, that the United Nations had, in his view, taken over the functions of the League regarding mandated territories. It was in that sense that there had been a taking over of functions—not a taking over of functions outside of the trusteeship system. That appears to be the clear purport of the words, and of the passage read as a whole in its context.

There is consequently no warrant for holding that the delegate expressed a view that a duty of accountability existed outside of trusteeship. Indeed, that view would have been clearly inconsistent with the statement made by another Pakistan representative in 1947, which we quote in the Counter-Memorial, **II**, at pages 278 to 279, and which was the reason why we put Pakistan on the list. It is submitted, therefore, that there is no reason for removing Pakistan from the list.

Finally, the Applicants suggest that the often-quoted comment by Mr. Nicholls should serve to disqualify South Africa itself for inclusion on the list. That we find in the verbatim record of 12 May, at pages 222 to 223, *supra*. Mr. President, in view of the very evident collapse of this whole Nicholls story, I think my learned friends may also be relieved if I say that further comment is unnecessary.

Then, in addition, Applicants suggest that in some way "the 25 States which voted against asking the Court for an advisory opinion concerning the competence of the General Assembly with respect to the Mandated Territory for Palestine" should be regarded as having indicated a conviction that there had been a transfer of supervisory powers to the United Nations. We find that argument stated, if we understand it correctly, in the verbatim record of 12 May, at pages 221 and 223, *supra*. However, Mr. President, as we have shown, the competence of the United Nations regarding the Palestine question rested on an entirely different basis.

The Applicants have not attempted to show that, in this regard, any reliance was placed by any State on any alleged consent in 1945 or 1946 to United Nations supervisory jurisdiction. None of these States took up an attitude that on such a basis the United Nations had, in any event, supervisory jurisdiction and that, for that reason, the United Nations was competent to deal with the Palestine question in the form in which it was submitted to the United Nations.

So, Mr. President, to summarize, even acceptance of the Applicants' submission that there existed doubt, confusion and ambiguity as regards the transfer of supervisory powers in respect of unconverted mandates must sound the death knell of the Applicants' contention of a clear, generally understood, pledge in April 1946—or generally in 1945 to 1946—which pledge was, so the Applicants said, the outcome of a planned process which had already commenced in San Francisco in the summer of 1945.

In view of the fact it is for the Applicants to show the existence of such a planned process (such a general understanding, plan, compromise, agreement, call it what you will) by a process of necessary inference

consistent with all the true facts and excluding all other reasonable inferences, the mere fact of the existence of such doubts, confusion and ambiguity, suggested by Applicants, makes it quite clear that they cannot succeed on a contention of that kind. But, in fact, Mr. President, the analysis shows that the case against the Applicants is even very much stronger. There was, in truth, very little, remarkably little, confusion on this crucial question at issue between the parties, the prevailing attitude being acceptance that supervisory functions under the Mandate had not been transferred to the United Nations, and the few States which adopted a different view, did not rely on any agreement in 1945 or 1946.

So, there again, the substance of our case in regard to the attitudes of the States, how they understood the attitudes adopted by Respondent and the other mandatory powers, stands unaffected.

Before leaving this subject entirely—the reaction of the other States, their understanding of the situation—there is still the Applicants' contention to be found in the verbatim record of 12 May, at page 224, *supra*. It reads:

> "Respondent disputes the contention that the General Assembly resolutions 141 (II), 227 (III) and 337 (IV) calling for reports from the Respondent were designed to establish international supervision over the mandated territory."

The truth is, Mr. President, that Respondent never disputed this contention for the simple reason that no such contention was advanced by the Applicants in their argument in chief or at any previous stage. It first came in this form in their oral reply.

What the Applicants did contend in their oral argument in chief—and this was the contention which we disputed—was that:

> "The understanding of the United Nations that the Mandate continued in force and that the obligations of international accountability were owed to the United Nations, thus appears clearly from the General Assembly resolutions 65 (I) of 14 December 1946 and 141 (II) of 1 November 1947, as well as 227 (III) of 26 November 1948, and 337 (IV) of 6 December 1949." (**VIII**, p. 165.)

As the Court will see, this was a completely different contention and the way it was put again, in that same record, at **VIII**, page 165, was as follows:

> "... the view of the United Nations, as a whole, expressed through its resolutions on the subject, demonstrated its understanding that the mandate remained in full force and effect, and that the United Nations had supervisory authority over the Territory".

Those were the original contentions. We dealt with them and in our submission showed that there was no substance in them whatsoever, no justification, no evidence in substantiation for them on the records, properly understood.

Now the Applicants retreat from these original contentions and they put it in this form, they speak now of a contention that these particular resolutions were designed to establish international supervision over the mandated territory, and when we analyse what they say in that regard, it is a contention to the effect that here there was an establishment of a so-called third system, or an establishment of the necessary procedure, in order to exercise supervisory jurisdiction *if* that jurisdiction should exist

by way of a power being a counterpart of an obligation. They deal, in other words, with that question without reference to the crucial question, the question of the obligation of accountability, or otherwise, on the part of the mandatory. In dealing with it in that way, of course, they, in this respect also, with reference to the true significance of the resolutions and the true understanding indicated therein, leave untouched our point, our argument, and our demonstration in that regard in our argument in chief.

But the Applicants go further and they speak of an "acid test" which is to be applied to this matter, namely the reaction of the United Nations in 1949 after the Respondent had decided and announced its intention of sending no further reports on its administration of the Territory. We find this position stated in the verbatim record of 12 May, at page 224, *supra*. The "acid test" is to see how the United Nations reacted under those circumstances.

They then refer to a resolution adopted by a vote of 25 to 15 in the Fourth Committee, a resolution to hear a petitioner from the Territory of South West Africa—to accord an oral hearing to a petitioner. Having quoted the views expressed by a few delegates in the Fourth Committee, the Applicants then concluded, at page 226, *supra*, of that record of 12 May:

> "The system of supervision, accordingly, was actually extended by the United Nations over the territory in the face of Respondent's decision to cease submission of its reports. This, in turn, sheds light on the original purpose of the resolutions of the Assembly, calling for the submission of reports, and in the Applicants' view demonstrates that the General Assembly did indeed attempt through those resolutions to establish a system whereby Respondent's accountability to the United Nations would be made effective."

One sees here, Mr. President, no reference to the question of the obligation on the part of the Respondent to submit to such supervision.

We have never disputed that in 1949 some Members of the United Nations began to express the attitude that Respondent was legally obliged to account to the United Nations in respect of its administration of the Territory, even outside of trusteeship. We included those five States (perhaps there ought to be seven on further analysis) in our oral presentations on the subject—five States who began to voice attitudes of that kind towards the end of 1948 and in 1949. Some of them indeed did so, particularly on this very occasion of which we speak, namely in reaction after the South African Government had indicated that it was no longer sending reports.

But we pointed out, Mr. President, in the verbatim record of 8 April, at **VIII**, page 505, that even "there were very few of them and they then found a basis which did not relate to any consent on the part of the Respondent in the transitional stage".

It is, in itself, in our submission, highly significant that this kind of reaction first came from some States after the Respondent had made known this particular decision—that in itself is highly significant. At a stage when it was thought that the Respondent was contesting its obligation but that it was, nevertheless, submitting certain reports, even though only for the limited purpose of the information of the United Nations, some of these States did not see their way clear, apparently, to

contesting the Respondent's submission that there was no obligation of accountability outside of trusteeship. Some of them went so far as to associate themselves with that submission, but contended for something else which they would have liked to see achieved. However, when the Respondent said: but you (meaning a certain number of States in the United Nations) abused the facility afforded to look at these reports which I sent to you; you acted as if you really had a power of supervision which, in truth, I never conceded to the United Nations, we find this reaction. And, on analysis, it becomes clear, Mr. President, that in substance the reaction was a political one; it was not a legal one; it was not based on any attitude of law which in any substantial sense supports the Applicants' attitude or their contentions in this case.

It becomes clear, on looking more closely into the debate in question leading up to this very resolution relied upon by my learned friends, that the grounds upon which these various delegates relied in supporting the resolution were rather confused, that some of these grounds were not legal grounds at all, and that nobody, even then, sought to ground an obligation on any agreement or consent on the part of the Respondent.

In order to demonstrate this, I propose to refer very briefly to the attitudes adopted by some of the 25 delegates in the Fourth Committee who voted for the resolution. Applicants have quoted the views expressed by four representatives, those of Cuba, Brazil, Thailand and Mexico, but in the passages cited by the Applicants only the representatives of the first two States (Cuba and Brazil) expressed an opinion that the Respondent was obliged to recognize United Nations supervisory jurisdiction over the Territory. The other two did not found their attitude on a legal obligation. It is therefore convenient first to examine the grounds upon which these representatives of Cuba and Brazil based their attitude.

At the 130th Meeting of the Fourth Committee on 21 November 1949, the representative of Cuba, Mr. Pérez Cisneros, explained why he was of the opinion that the Committee was entitled to hear petitioners. He said:

> "No Trusteeship Agreement had in fact been concluded in respect of South West Africa. Attention should be drawn, however, to Article 80 of the Charter which explicitly stated [and then he quoted the contents of Article 80 (1). I need not read that and I will continue with the quotation] It was therefore clear that the situation which had prevailed under the Mandate System should not be changed in the case under discussion. The rights of the people concerned were clearly compromised when the international community ceased to receive information on how they were being administered, and when the people themselves could no longer exercise their right of petition. He considered that the Committee was faced with a flagrant violation of Article 80 of the Charter, a violation which had not yet been sufficiently emphasized in the General Assembly." (*G.A.*, *O.R.*, Fourth Session, Fourth Committee, p. 216.)

It will be observed, Mr. President, that the attitude was a very vague one. It involved a complete reliance on Article 80, paragraph 1, of the Charter, in a sense which the Applicants themselves no longer seek to support in these proceedings.

The same attitude was later expressed by another representative of Cuba, Mr. Lopez, still during the course of the same debates on 23 No-

vember 1949. I need not read the passage to the Court, it is at page 236 of the same record.

We come then to the views expressed by the Brazilian delegate, cited by the Applicants at page 225, *supra*, of the verbatim record of 12 May. All that he said that seems to be pertinent was the following:

> "South West Africa was not a sovereign state but a territory placed under the mandate system of the League of Nations, and consequently, was under the supervision of the community of nations, namely, the General Assembly."

That is from the same record at pages 223-224. A vague, general attitude, Mr. President, is to be observed indicating no precise basis, certainly no basis of alleged consent on the part of the Respondent to a substitution of supervisory organs.

In the case of Thailand and Mexico, the other two States referred to by the Applicants, as I have said already, they did not rely on a legal obligation. I may point out further that Thailand was one of the six countries which abstained from voting on the Guatemalan draft resolution, which was eventually adopted, that a hearing should be granted to petitioners—that appears from page 241 of the record.

During the course of the debate, a number of delegates sounded a warning that the Guatemalan draft resolution in effect prejudged the question which it, the Fourth Committee, had not yet answered in the affirmative and which was proposed to refer to this honourable Court, namely the very question whether Respondent was obliged to submit to United Nations supervision. Perhaps the clearest expression of this attitude was given by the representative of Belgium with whom several other delegates later associated themselves to a greater or lesser extent. That representative, Mr. de Bruyne, spoke in the same record at page 227, and I quote:

> "If South West Africa was still governed by the provisions of the Mandate, those provisions should obviously be applied; in that case, however, there arose a preliminary question, namely, by what right the Fourth Committee substituted itself for the Permanent Mandates Commission of the League of Nations, what its juridical foundations were, and what the source of its legal competence was. Thus, it would seem that reference to the continuation of the Mandate System would not solve the question of hearings of representatives.
>
> A final possible solution might be provided in Chapters XII and XIII of the Charter. Under Articles 80 and 87 of the Chapter, the Trusteeship Council could receive and examine petitions. The obvious fact had to be faced, however, that South West Africa had not been placed under the Trusteeship System, that might be regrettable but it was undeniable.
>
> The question of the status of the territory was precisely what the Commission was trying to solve. Yet those discussing the problem seemed to prejudge the outcome of their discussion. That was a grave mistake."

He sounded this very clear warning about the absence or the possible absence of a legal basis for the Committee to do what was proposed in this proposal before it; a matter on which there was already a proposal to obtain the opinion of this Court.

We find that similar views which, as I have said, to a greater or lesser extent associated themselves with this statement by the Belgian representative, were expressed by representatives of Israel (at p. 229 of the same record), Canada (p. 229), France (pp. 230-231), Greece (p. 232), the United Kingdom (p. 233) and Australia (p. 238). Therefore, Mr. President, we still see this aspect of the matter strongly emphasized even at the stage my learned friend has now chosen as his battle-field or the stage of his acid test, which came at the time when the South African Government said it was no longer sending reports. The most important point, however, is that while 26 countries voted in favour of the draft resolution proposed by Guatemala, the representatives of only five countries expressed a more-or-less firm view that Respondent was obliged to recognize United Nations supervision, and none of them based their view on any agreement or consent by Respondent to do so. I have already dealt in that regard with statements by the representatives of Cuba and Brazil. I can also very briefly note the views of delegates of the other three countries—the Philippines, India and China. They have already been referred to very briefly in earlier stages in another context, but I may, for purposes of completing the record in this regard, refer to them very briefly again. The representative of the Philippines adopted the attitude that Respondent was accountable to the United Nations because of the provisions of Articles 77 and 80 of the Charter; in other words, the provisions relating to the trusteeship system and Article 80. He moreover said that Respondent's decision not to send any further reports was in violation of Article 73 *(e)* of the Charter—that we find in the same record at page 206.

The attitude of Mr. Liu of China was apparently that Respondent was obliged to account to the United Nations because, and only because, it was legally obliged in his view to enter into a trusteeship agreement. That was the attitude then stated by the Chinese representative: there was a legal obligation to enter into trusteeship agreement and on that basis Respondent was to be regarded as obliged to account to the United Nations. One finds that at pages 208 and the following of the same record.

The representative of India, Mr. Shiva Rao, placed a very vague kind of reliance on the 1946 League resolution. After he had indicated in the debate that he agreed with another delegate to the effect that the legal questions were for the Court and the political questions for the United Nations, one finds his attitude stated at pages 210 and 211, and the Court will recall, of course, that in the next year India advanced a submission to the contrary in this respect to this Court.

It may then be asked why 26 States voted for the draft resolution which was eventually adopted if all the representatives concerned were not of the opinion that the United Nations had supervisory authority in respect of the Territory. An answer to the question is suggested by some examples of other attitudes which appear from the remarks made by particular delegates. Of course, I cannot say to what extent they were representative of States which did not explain their vote, but the examples are somewhat significant.

We begin with the remarks made by the representative of Haiti at the 132nd Meeting of the *Fourth Committee, on* 22 *November* 1949. He said the following, at page 228:

"The draft resolution submitted by the Guatemalan delegation

conformed in every way to the noble purposes of the Organization. An absolutely impartial white man wished to speak, in his capacity of clergyman to make the truth known. On procedural or legal grounds, it was proposed to reject the appeal of that defender of populations which had no other means of making themselves heard. If the Committee were to refuse, on purely formal grounds, to ascertain the truth, it would be judged severely by world public opinion and by the conscience of its own members."

At the same meeting, the Liberian representative said the following:

> "Human rights should be respected by all States Members of the United Nations. How could certain populations be prevented from benefiting from those rights merely because they were under foreign administration. The populations of South West Africa should be given an opportunity of being heard by world public opinion." (P. 228.)

So, Mr. President, one sees here a reliance on non-legal considerations which were summarized by Mr. Garreau of France, as follows at page 230:

> "As regards humanitarian arguments, the representatives of Haiti and Liberia had observed that truth and justice came before legal quibbling. When dealing with populations who were thought by some people to be oppressed and deprived of the fundamental rights proclaimed in the Charter, the General Assembly could disregard legal texts and ought to take a humane decision."

That was the interpretation put by the French representative upon those two attitudes.

[Public hearing of 27 May 1965]

Mr. President, at the conclusion yesterday I had very nearly concluded a brief review of attitudes taken up by various States in the debates in 1949 which led to the resolution, passed by the Fourth Committee by a vote of 25 to 15, to hear a petitioner from South West Africa. I had indicated towards the conclusion that certain States, of which I quoted two examples—Haiti and Liberia—indicated attitudes which did not particularly rely upon a certain view of the legal situation. These attitudes amounted to this: that there were factors outside legal considerations which, in the view of the delegates concerned, justified the proposed action. And the action taken by such States did not, therefore, imply any attitude on their part which would be of any relevance to the Applicants' legal attitude in this case regarding the powers or otherwise of the United Nations to supervise administration under the Mandate in South West Africa, or a corresponding obligation on the part of the South African Government to submit to such supervision.

There was one further quotation which I wish to give to the Court—from the speech of the representative of the sponsor of the draft resolution. At the 132nd Meeting of the Fourth Committee, Mr. Mendoza of Guatemala said the following—it is at page 229 of the record to which I referred before:

> "The Committee was faced with a situation that was tantamount to the annexation of South West Africa by another State. In those

circumstances, it was justified in granting a hearing to a representative of the populations of South West Africa, who would state whether or not those populations were in favour of such a situation."

Again, Mr. President, there was on the part of the very sponsor of the resolution eventually adopted, an attitude which was not based upon any legal view affording any support for the Applicants' contention.

It follows, therefore, from this review, that no value can be attached to the Applicants' conclusion as stated in this regard in the verbatim record of 12 May, at page 226, *supra*, to the effect that the adoption of the Guatemalan draft resolution by the Fourth Committee—

> "... sheds light on the original purpose of the resolutions of the Assembly, calling for the submission of reports, and in the Applicants' view demonstrates that the General Assembly did indeed attempt through those resolutions to establish a system whereby Respondent's accountability to the United Nations would be made effective".

I respectfully submit, Mr. President, that there is nothing in the record which supports that conclusion, and that even the "acid test" which my learned friends chose to put in this regard as a whole fails to provide any real support for the Applicants in their issue with Respondent regarding Article 6. It merely affords further confirmation of Respondent's analysis of the situation in the United Nations up to 1949.

So that, Mr. President, concludes the further review of attitudes expressed by various States over the years in question at the United Nations, considered necessary by way of rejoinder for the purpose which I indicated yesterday. Our submission is that nothing which was said at the reply stage has detracted anything from the analysis which we gave to the Court in that regard in the first instance, but that, on the contrary, the further discussion has served to confirm that analysis. It is perfectly clear that, on the whole, there was no understanding to the effect that there was an obligation of accountability on the part of Respondent to the United Nations, and that a substantial number of States were definite in their view that, outside of trusteeship, there was no such obligation.

I refer again, Mr. President, to the summary which the Applicants gave in the form of three propositions—the summary of their contentions regarding Article 6 of the Mandate. The Court will recall that I referred earlier to those three propositions, which were stated by the Applicants as being tendered to the Court for the sake of clearing up any lingering doubts. They were given to the Court on 12 May, at pages 239-240, *supra*. I have dealt with their third proposition, which related to Respondent's alleged consent to assumption of supervisory authority over the Mandate by the United Nations. I promised at the time to revert later to the first two.

The second of the propositions, Mr. President, has also been disposed of, although I did not again revert to it by name. The second proposition read as follows:

> "Secondly, the United Nations has replaced the League of Nations in the capacity as embodying or representative of—it matters not which way it is put—the organized international community upon which the 'sacred trust was laid as a responsibility' in the words of the 1962 Judgment. The United Nations is endowed by Article 10,

> it is invested by the Charter with competence to supervise the Mandate." (*Supra*, p. 240.)

Now, Mr. President, as regards the reference to the "organized international community"—the view taken of the situation, of seeing the United Nations as embodying or representative of the organized international community, we dealt very fully in our pleadings with contentions of that nature on the assumption that they were intended to carry some legal signification. I can refer the Court to our Rejoinder, **V**, at pages 31-53, but, if I understood my learned friends' oral argument correctly, they indicated in a passage occurring in the verbatim record of 22 March, **VIII**, at pages 197-200, that they no longer rely upon this description as having any legal significance in itself. It was merely a broad form of description to cover their real submissions as to the legal situation, based on what had occurred, and, in particular, this form of description did not render it unnecessary for them to rely upon consent on the part of the Mandatory to a substitution of supervisory organs. The only contention of real legal significance contained in this second proposition is, therefore, to be found in the last sentence, which states: "The United Nations is endowed by Article 10, it is invested by the Charter with competence to supervise the Mandate." I have already dealt with the submission, as far as Article 10 was relied on, for saying that the United Nations, as an organization, was endowed with certain powers, as distinct from particular functions having been assigned to an organ of the Organization, the General Assembly, once it had been decided that the Organization was endowed with a power. I need not take that matter any further—I dealt with it fully yesterday.

The sentence, however, also suggests, more generally, that the United Nations is invested by the Charter with competence to supervise the Mandate. Mr. President, in that regard my submission is that the Charter, quite clearly, could *not give to the United Nations* a power which it could not have without the consent of the Respondent, and it has not been so suggested in the Applicants' argument anywhere. In fact it seems to be common cause between the Parties that as far as the provisions of the Charter are concerned they, by themselves, do not provide for an obligation on the part of the Respondent to submit to supervision on the part of the United Nations in respect of the performance of its obligations under the Mandate. At most, this description of the Charter providing for a certain competence or for certain powers on the part of the General Assembly of the United Nations can be taken in that alternative sense of the words "supervisory competence" or "supervisory power". It can only relate to the competence which the Organization would, as a constitutional matter, be able to exercise *if* there were an obligation on the part of the Respondent to submit to its supervision.

That, therefore, takes the matter no further. The crux still lies in the third proposition which alleged consent on the Respondent's part, but this proposition must, in my submission, for the reasons I have given, be taken to have failed.

The first proposition was concerned with the suggested necessity of the element of international accountability, and read as follows in the verbatim record of 12 May:

> "In the first place, administrative supervision as an obligation is an essential part of the mandate system, inescapably linked to

the due performance of the obligations of the Mandatory towards the inhabitants and the organized international community; again, in the mandate jurisprudence of this honourable Court, to exclude the administrative accountability of the Respondent would be 'to exclude the very essence of the Mandate', at page 334, *I.C.J. Reports 1962*." (*Supra*, p. 240.)

Now, Mr. President, I should like to take up, first, this reference to the "mandate jurisprudence of this honourable Court". We submitted in regard to the 1950 Opinion, and we have consistently advanced this submission to the Court in the pleadings and again in our oral argument in chief, that it did not treat the element of accountability under Article 6 as an essential part of the Mandate in the sense that the rest of the Mandate could not exist without it. I need not repeat my argument because it has never been answered, I am merely drawing attention to that. Secondly, as far as the 1962 Judgment on the Preliminary Objections is concerned, it is at least very highly questionable whether this expression referring to the exclusion of "the very essence of the Mandate" was intended to refer to the obligation under Article 6 at all. On the contrary, we submitted to the Court that, on a proper analysis of that judgment, the indications are that its authors were of the opinion that supervision under Article 6 had lapsed, or may well have lapsed, to put it at its very lowest; and that argument on our part has also not been met in any way by the Applicants.

Mr. President, there is also in the proposition a reference to the element of essentiality, and I should like to say something more about that. The Applicants place considerable emphasis on this factor of *necessity* of supervision in respect of the Territory, and they do it in a rather peculiar way. It was, of course, a recurring theme of the Applicants' case at earlier stages of the proceedings, and we have had occasion to point out in the past that the existence of such essentiality could have served to cause the lapse of the Mandate as a whole upon dissolution of the League, but that it could *not* have served by itself to keep the Mandate alive nor *a fortiori* could have served to provide a new supervisory organ to replace the League. For those things new consent would have been necessary. But, Mr. President, we find that in the oral reply, to which we are now offering this rejoinder, the Applicants again relied very heavily on various submissions in regard to necessity of supervision, as an argument why the Court should find that accountability still exists, and they illustrated it with certain new examples. For instance, they ascribed a role to the administrative supervisory organs as being necessary, *inter alia*, for the establishment of the standards to be applied by the Court, which is a point with which we shall deal in the later portion of the case regarding Article 2 of the Mandate. They relied on that necessity for the effectuation and the implementation of any judgment which the Court might deliver in this case. That the Court will find in the verbatim record of 12 May, at pages 232 and 234, *supra*. They rely on it as being necessary for the supervision of the implementation of the Odendaal Commission report—that we find in the same record, at pages 232 to 234. They also rely on such necessity to ensure that the Territory would not become "effectively militarized in two or three days". Those were their words and they are to be found at page 232 of the same record.

Again, Mr. President, our submission is quite simply that these are not legal arguments. They are legislative arguments in the sense which I

ascribed to that term earlier. They do not relate to any basis upon which the Court could decide in accordance with principles of law. At most, they are arguments which show why a particular measure could be considered desirable, depending upon the outlook of the person who has to decide whether it is desirable or not, rather than arguments showing that it is something which exists. We frequently emphasized that this Court is a court of law and not a court of expediency. It may be preferable in many situations of which one can think, to have international control of them; it may well be considered desirable to have supervision in respect of particular territories or particular countries because of what is alleged to be happening in those countries, but that would not justify a court's departing from its legal function of determining whether there does or does not exist a legal arrangement whereby such supervision can lawfully be exercised, or whether there is an obligation on the part of the Government concerned to submit to such supervision. I may refer, as an example, Mr. President, to a rather amusing incident: after we had offered to this Court the invitation to undertake an inspection of the Territory of South West Africa and proposed that there should be an inspection of other territories, we received documents from an organization calling itself "The Ethiopian People's Movement Council", in which there are all kinds of allegations of alleged oppression in the State of Ethiopia. Whether they are true or whether they are not, nobody knows of course, but, nevertheless, that was a reaction which one found. The style of writing is reminiscent, indeed, of the style which one finds in many of the petitions which have been submitted on behalf of inhabitants of South West Africa to the United Nations. Whether the authors are the same, or are related, one does not know; it may be, on the other hand, that this is a perfectly genuine case, and that there are complaints of this nature. The mere fact that one does not know may possibly serve as an argument that it is desirable in circumstances of that kind to have a system of international supervision to probe into the facts—to find out whether such allegations are true or not. But, Mr. President, the Court can take no account of a desirability of that kind, nor even of a suggested necessity of that nature.

Recently, Mr. President, there were reports in the Press about complaints by a certain International Federation of Airline Pilots Associations about allegedly very serious maltreatment of, and denial of human rights to, two of its pilot members in Liberia—that was the gist of the accusation. It was said that that was the result of official action in Liberia, and the Federation took such a serious view of it as to forward the complaints in writing to governments all over the world, including the South African Government. Mr. President, again the same remarks apply: where there are allegations of that kind it may well be desirable, or it may well be argued that it is, or would be, desirable, or necessary to have a system of supervision, but that is not an argument for this Court. I would not suggest that, on the basis of such allegations having been made, this Court ought to find that there is an obligation on the part of those governments to submit to international supervision.

Therefore, Mr. President, I submit that the first proposition of the Applicants, and the way in which they elaborated it in their oral reply, take the matter no further.

That brings me to the 1950 Opinion of the Court. As we have noted, the Applicants did not deal with our analysis of that Opinion with

reference to the question now under discussion, and it is, consequently, not necessary to repeat the basis which we contend the Court adopted in reaching its decision, but there are one or two points which call for comment.

In the verbatim record of 12 May 1965, the Applicants said the following:

> "It came as something of a surprise to the Applicants to learn that any proposition which they could seriously advance could furnish the basis for a reconsideration *de novo* or otherwise of the 1950 Advisory Opinion—we are still at a loss to understand what such a motivation would be grounded upon." (*Supra*, p. 240.)

We did think, Mr. President, that we had made clear which of the Applicants' propositions, advanced in all apparent seriousness, furnished a basis for a reconsideration of the 1950 Opinion—in conjunction, of course, with other factors.

These propositions in the Applicants' contentions were the following:

Firstly, there was the Applicants' admission that, in order to succeed, they were obliged to establish that Respondent had, as a fact, consented to a substitution of the United Nations for the League as supervisory organ in respect of mandates, in the transitional period 1945 to 1946 or thereafter. This admission, is of course, in direct conflict with the interpretation which they formerly placed on the Opinion, particularly in 1962, during the Oral Proceedings on the preliminary objections, when they said that none of the decisive reasons underlying that Opinion rested on a premise of tacit consent.

Consequently, Mr. President, one of two alternatives must be applicable; either the Applicants' 1962 interpretation of the Opinion is correct, and that they consequently now regard the Opinion itself as having been incorrect in the respect in question, or it follows as an alternative that the Applicants' 1962 interpretation of the Opinion was wrong and is now admitted by them to have been wrong.

Secondly, the Applicants' contention that the Court erred in 1950 as regards the correct interpretation to be placed upon Article 80, paragraph 1, of the Charter (that was stated in the verbatim record, 31 March, at **VIII**, p. 303), is a further relevant consideration. In the Oral Proceedings in 1962, however, the Applicants, as the Court knows, contended that Article 80, paragraph 1, played an important role in the Court's reasoning and consequently here again, there are two possibilities inherent in the Applicants' present attitude: their present attitude must be either that the Court was wrong in 1950, or that the Applicants' interpretation was wrong in 1962.

In the result, Mr. President, the Applicants' contentions involve that the Court erred in major respects in its reasoning in 1950, or that the reasoning of the 1950 Opinion is in material respects open to widely divergent interpretations, or both. On any of these bases, their contentions, if seriously advanced, indicate, in our submission, at least a *prima facie* additional need and justification for a thorough re-appraisal of the whole matter: that is, in addition to what we submit to be the real reason why it is desirable to have such a re-appraisal of the situation having regard to the facts which were not before the Court in 1950.

It is significant that the only attempted answer presented by the Applicants to these arguments of ours, which we stated earlier and which are re-stated briefly with a view to noting their reaction, is to be found

in the verbatim record of 12 May at page 240, *supra*, where they said the following:

> "... the Applicants rely upon the 1950 Opinion and consider that it should be followed and if it is possible to make that contention any more clearly than the Applicants have made it, the Applicants welcome this opportunity to assure the honourable Court to that effect".

The Applicants do not, however, Mr. President, tell us upon which basis they rely on the 1950 Opinion; they do not say whether it is on a basis of *res judicata*, or on a basis of "the law of the case", which was one of the expressions they used, or on the basis of "the mandate jurisprudence", which is another of their expressions, or on the principle of *Eastern Carelia*. All of these, Mr. President, have been propounded at some stage or another by the Applicants as the basis for reliance upon the 1950 Opinion. They do not tell us whether they rely on the Opinion for some formal reason or another of this nature, or whether they rely on it on the basis of its reasoning. If the Applicants suggest the reasoning of the 1950 Opinion as forming the basis for their reliance thereon, then the further questions arise: How do they suggest that the reasoning is to be interpreted? Must it be interpreted, Mr. President, as involving a doctrine of succession, or an application of the *cy-près* doctrine? Must it be interpreted as resting on consent on the Respondent's part in 1945 or 1946? Must it be interpreted on the basis that lack of consent in 1945 to 1946 is irrelevant? Is it relied upon, Mr. President, on the basis of its heavy reliance on the positive effect of the "conservatory clause", i.e., the heavy reliance ascribed to it by the Applicants, of course, on Article 80, paragraph 1, of the Charter, or is it relied upon by the Applicants on the basis of ascribing to it a very heavy reliance on Article 10 of the Charter? Is it relied on as being based on what the Applicants call the "international rules regulating the mandate", or on the objective elements of the situation, or on what else? I am not mentioning these things in order to be facetious, Mr. President. The fact is that the Applicants tell us from time to time that this is the basis on which they rely on the Opinion. This is the meaning they ascribe to it and when they run into difficulties they drop that one and they come on to another one.

The Applicants do not tell us clearly or exactly where they now stand when assuring us that they rely on the Opinion. That is very significant, because our attitude has always been a consistent one to the effect that the Opinion rested upon a finding of fact concerning tacit intent on the part of the interested parties during the transitional years. Inasmuch as that was, in our submission, the true basis for interpretation of the Opinion, it becomes so relevant to have regard to the facts which were not before the Court in 1950 and could not therefore have been considered by it in 1950 but could reasonably be expected to have influenced the decision at which the Court arrived eventually, had those facts been before it.

The Applicants have consistently sought to evade this view of the situation. They have tried to minimize or rule out the possible significance of new facts. We find that even in the oral reply to which we are now offering this rejoinder, the Applicants still quote the 1962 Judgment as saying—"all important facts were before the Court in 1950"—that quotation appears in the verbatim record of 11 May, at page 197, *supra*. Nevertheless, it seems that they now, even if only for a brief interlude,

relented somewhat in that rigid attitude. They did that when they found something which they thought could assist them as a new fact, namely this Nicholls' story, the story about Mr. Nicholls' statement and the attendant matters in the Preparatory Commission. And so we find, Mr. President, that they say in the verbatim record of 11 May, the following:

> "A careful reading of the submissions before the Court in 1950, of the arguments before the Court in 1950, shows that there was not an elaborate or even a studied demonstration or representation to the Court in 1950 concerning the actual circumstances within the Preparatory Commission at that time—the Applicants have now endeavoured to lay these before the Court in perspective. It would seem reasonable to assume that if the Court in 1950 had known, for example, about Mr. Nicholls' proposal for the establishment of a temporary machinery to which to report, if the Court had known that other Mandatories had supported a similar procedure, if the Court in 1950 had known that there was substituted for this proposal the technique of the pledging procedure—if the Court had known this in 1950, it seems to the Applicants, far from changing their view with regard to the proper interpretation of the circumstances, they would have regarded their view to be fully confirmed and justified." (*Supra*, p. 188.)

And in the same record, Mr. President, at page 189, the Applicants even went so far as to contend that the two dissenting judges in 1950, Judge Reed and Judge McNair, might then have agreed with the majority judges if they had merely known about these new facts.

Now, Mr. President, that the whole contention about the episode of Mr. Nicholls' speech and attendant circumstances has collapsed—as we submit it clearly has on a proper review of all the relevant facts—one wonders what the Applicants' attitude is now going to be; are they going to withdraw into their shell again and say that there are no new facts which could assist the Court, or which could have affected the judgment of the Court in 1950? We submit, Mr. President, that the still deeper probing into the facts has advanced our contention about the 1950 Opinion considerably further—that there are facts which were not before the Court in 1950 and which could and, in our submission, certainly would have exercised an influence on it had they been known. The further probing into the matter as a result of the Applicants' contention about Mr. Nicholls' speech and about the attitude of the other mandatories in that regard has brought to light the proposal by the United States of America in the Preparatory Commission, the proposal which, although put on the agenda, was eventually not further referred to at all—a further very significant feature, with which I have dealt, and which I need not repeat. We submit that had these full facts, as now put before the Court, been before the Court in 1950—as the Applicants now admit was not the case—then it is inconceivable that the Court in its Advisory Opinion could have come to the conclusion that Respondent consented to United Nations supervision over the Mandate.

That brings me, Mr. President, to the various questions which were put by Members of the Court and to the argument addressed to the Court by the Applicants in regard to the possible applicability, or non-applicability of Article 73 of the Charter to the case of South West Africa. On

14 April 1965[1], the following question was put to the Parties by the honourable Judge Jessup:

> "In the interpretation and application of Article 73 of the Charter of the United Nations, is South West Africa to be considered one of those territories whose peoples have not yet attained a full measure of self-government, as this phrase is used in that Article?"

On 13 May[2], the President asked the Parties to give consideration to certain stated facts, nine in number, in the response which the Parties would make to Judge Jessup's question. This series of questions, Mr. President, raises very important issues, which have, or may have, far-reaching legal and political implications. As the Court is aware, the exact scope and content of the Article have never been defined to the satisfaction of everybody concerned. In this regard, I may conveniently refer at the outset to the facts set out by the honourable President in the questions to which I have referred—dealing, as they do, with events at the San Francisco Conference. With the greatest respect, Mr. President, we have checked on the facts for accuracy and context as you asked us to do, and we say, respectfully, that they are, indeed, as far as we can ascertain, accurate extracts from the record.

It seems clear from facts 1 to 4, inclusive, that the general purpose of Article 73 of the Charter was to extend the main principle of trusteeship, of guardianship, of the mandates system to colonial territories generally. This, of course, does not by itself answer the question whether former mandated territories were intended to fall within the terms of the Article. It was an intent to extend these principles, broadly speaking, to colonial territories generally, but the answer in regard to mandated territories does not automatically follow from that. The intention may well have been to limit Article 73 to colonial territories and to provide for former mandated territories only within the context of the trusteeship system. As a matter of textual interpretation alone there is much to be said for a contention to the latter effect. I may refer the Court in this regard, respectfully, to the oral address to this Court by the South African representative, Dr. Steyn, in the 1950 Advisory Proceedings. That is to be found in the *Pleadings, Oral Arguments, Documents* of those proceedings, at pages 304-312.

As far as the actual discussions at the San Francisco Conference were concerned, it would appear, from the facts numbered 5 to 8 mentioned by the honourable President, that there existed considerable support for the attitude that territories then held under mandate did indeed fall within the terms of Article 73.

However, Mr. President, there also exist strong indications to the contrary about attitudes then taken by various delegates, as was shown by Dr. Steyn in his address, at pages 308 and 309.

This difference of opinion which existed is one factor of difficulty in relation to the question which has been put. A further source of difficulty, Mr. President, in answering the question of Judge Jessup, is that it relates to the present applicability of the Article to the Territory. In order to answer it, Respondent would consequently not only have to consider whether Article 73 was regarded by its authors as applying to

[1] See VIII, Minutes, p. 16.

[2] *Ibid.*, pp. 38-40

territories then held under mandate, but, with a view to assessing the implications of the situation, legally, politically, practically and otherwise, but also have regard to the extent to which subsequent developments may have affected the position. These developments are of a twofold nature. In the first place, the political development of the Territory itself has advanced beyond the stage at which it was in 1945. Secondly, the manner in which Article 73 has been sought to be applied by majorities in the organs of the United Nations has changed to such an extent as to raise the question whether an administering authority, even in a case initially falling under the Article, would not now be entitled to refuse to submit to the obligations under the Article by reason of non-compliance therewith by these very majorities—the majorities holding sway in the organs of the United Nations itself. That is a very important practical and juridical question which would arise if one were to go fully into the question as it has been put to the Parties by the honourable Judge Jessup. As an illustration of this possibility I shall shortly refer the Court to certain of the salient features just by way of example of what has occurred in this regard.

In view of these circumstances, Mr. President, a proper answer to the question put by the honourable Judge would require a great deal of research and thought, and would involve implications of a legal and a political nature stretching very far beyond this case itself. Whereas these considerations would not have deterred us had the question related to a matter directly in issue, we must, with the greatest respect, point out that that is not the position here. The Applicants have not asked the Court to determine that Article 73 is applicable to the Territory, and in view of the provisions of Article 7, paragraph 2, of the Mandate, which are relied upon as the sole source of the jurisdiction of the Court in respect of this case, the Court would, in our respectful submission, possess no jurisdiction to make such a determination if it were formally asked to do so in these proceedings.

The Applicants have not asked the Court to make such a determination, they have indicated an attitude in which they strenuously contest the applicability of the Article. In these circumstances, Mr. President, the question is, therefore, as a matter of law and as a matter of fact, not one which is submitted to the Court for determination. And, in view of all these circumstances, we must regretfully, and with the greatest respect, decline to express a definite point of view on the question put by the honourable Judge Jessup. It is, of course, with great reluctance that we adopt this attitude, but the practical implications, particularly in the light of the examples to which I shall now refer the Court, are such as to leave us, in our judgment, no alternative.

May I, in referring to certain examples of the practical implications, refer to the analysis which the Applicants have ventured in this regard as to the scope of Article 73. In our submission, not only have the Applicants given an incomplete rendering of the historical record with regard to the inception of Article 73, but their analysis of the scope of the Article also calls for comment in the light of actual occurrences at the United Nations.

Firstly, the Applicants made the point that the United Nations does not decide which territories should fall under Article 73 *(e)* of the Charter and does not enlarge the list of such territories, it having been left to the Members to decide which territories should be taken up in such list. That

the Applicants very clearly submitted to the Court in the verbatim record of 19 May, at pages 367-368, *supra*.

Secondly, Mr. President, with regard to the scope of reporting under Article 73 *(e)*, the Applicants made the following submissions:

At page 368 of that record that "Article 73 *(e)* does not provide for political information";

That Article 73 *(e)* "is ... limited in scope to 'statistical and other information of a technical nature' ";

That "no consultative procedures are envisaged in Article 73 *(e)*";

That "no right of petition is provided for in Article 73 *(e)*";

At page 369, "no provision is made or implied in Article 73 *(e)* with regard to the hearing of petitioners";

And this further quotation, from page 369, that—

> "under Article 73 *(e)*, the information transmitted by administering authorities is sent to the Secretary-General for information purposes; it is summarized and analysed by the Secretariat and recommendations are made only in functional areas and not to particular administering authorities or in the context of particular dependent territories".

Now, when the actual record of developments in the United Nations is examined, it becomes clear that there is an enormous difference between this interpretation and application of Article 73, as given by the Applicants, and the present practices in purported application of the Article at the United Nations, practices which, I may say, are enthusiastically participated in by the Applicant States.

To attempt to deal exhaustively with the developments in the United Nations in this regard would, in our submission, be an enormous task. I am, therefore, offering only some very brief illustrative events and aspects—bringing them to the attention of the Court so as to give some indication of the nature of the problem which confronts one.

Let us take the first point made by the Applicants, namely that the United Nations does not decide which territories should fall under Article 73 *(e)* of the Charter. It is true, Mr. President, that no provision was made in Article 73, or anywhere else in the Charter, that any organ of the United Nations would have competence to decide which territories fall under Article 73. And the General Assembly, indeed, initially left it to the Members concerned to determine which territories fell within the category of non-self-governing territories.

Member States, initially, in fact decided for themselves in respect of which territories information was to be transmitted, and they also decided when it was no longer necessary to transmit information. To mention only a few examples, the United States ceased to transmit information on the Panama Canal Zone, the United Kingdom ceased to transmit information on Malta and France ceased to transmit information on a number of territories after 1947, including French Guiana, Guadeloupe, Martinique, Réunion, New Caledonia, French Oceania, and others. The information in this regard, Mr. President, is given in a publication of the United Nations in 1950. It is given the reference number A/915 and it is entitled *Non-Self-Governing Territories: Summaries and Analyses of Information transmitted ... during 1949* (U.N. Pub. 1950, VI.B.1), Volume I, pp. 7-8.

But this position, Mr. President, changed in due course, first gradually and then apace. It would require very considerable research to trace the developments through their various stages, and I do not propose to do so as we have not instituted the necessary full enquiries. Suffice it to say that by 1960 the matter had progressed to a stage where the General Assembly adopted resolution 1541 (XV), of 15 December 1960, which formulated certain "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 *e* of the Charter".

On the very day of the adoption of these "principles" they were applied in fact to a number of Portuguese territories despite Portugal's protest, having been a bone of contention for some time whether Portuguese territories were to be treated under Article 73.

In the very next numbered resolution, No. 1542 (XV), the General Assembly declared that—

> "... an obligation exists on the part of the Government of Portugal to transmit information under Chapter XI of the Charter concerning these territories ...".

That was adopted on the very same day, 15 December 1960.

Later, Mr. President, with regard to Southern Rhodesia, the General Assembly went even further. Although the constitutional provisions applying to Southern Rhodesia quite clearly made that territory self-governing, in the economic, the social and the educational fields at least, the General Assembly adopted a resolution in 1962 in which, in a preamble, it bore in mind that, according to one of the principles stated in the resolution to which I have referred,

> "... the constitution of a Non-Self-Governing Territory giving it self-government in economic and social matters has to be established through freely elected institutions".

Further, in this resolution it relied on "the fact that the indigenous inhabitants have not been adequately represented in the legislature and not represented at all in the government"; and the General Assembly resolved to request the Special Committee on "The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples", which was created in 1961, to consider whether Southern Rhodesia was not a non-self-governing territory. The resolution was No. 1745 (XVI) of the Sixteenth Session, 23 February 1962. That was the request, then, to this Special Committee on implementing the granting of independence to colonial peoples and territories. That Committee was to go into the question whether Southern Rhodesia was not a non-self-governing territory: it was no longer left to the authorities concerned.

And on 28 June 1962 the General Assembly, despite legal objections, affirmed that Southern Rhodesia was a non-self-governing territory within the meaning of Chapter XI of the Charter, and designated the United Kingdom as the administering power. That was resolution 1747 of the Sixteenth Session, 28 June 1962.

It is interesting to note, Mr. President, that Ethiopia was a member of the Special Committee of Seventeen, now known as the Committee of Twenty-Four, namely the Committee on the Implementation of the Declaration of Independence, and that both Applicants, in fact, supported

the development which I have just mentioned, and yet they say to this Court—

> "Neither Respondent nor any other administering authority ever has been requested by the United Nations to add their dependent areas to the list of non-self-governing territories." (*Supra*, p. 368.)

Mr. President, in regard to the second set of points made by the Applicants, concerning the scope of reporting under Article 73 *(e)* and the method of dealing with such reports, there an even more striking change has taken place in the actual practices of the United Nations. I mean here, of course, the various points which the Applicants made about no political information being provided for, nor petitions, nor hearings of petitioners, and about recommendations being made only in functional areas and not with regard to particular authorities or particular territories.

The pressures against this initial situation started very early, and it would again be a tremendous task to trace their various phases of development. From time to time one knows that there were resolutions encouraging and later exhorting Members to transmit political information voluntarily, as it was put in those resolutions. But this concept of "voluntariness", if I may use that word, was dropped after 1959. It disappeared entirely from the resolutions, never to return.

Resolution 1535 (XV), dated 15 December 1960, of the Fifteenth Session, which we noted before, *inter alia*, in paragraph 7—

> "... *notes* with regret that ... the absence of information of a political and constitutional character on a majority of these Territories renders it impossible to assess the extent of their progress towards the goals of the Charter;
>
> 8. *Considers* that a full knowledge of the political and constitutional developments in Non-Self-Governing Territories is essential not only to a proper evaluation of the progress of the Territories towards independence but also to that of their economic, social and cultural advancement;
>
> 9. Urges once again the Administering Members concerned to extend their full co-operation to the General Assembly in the performance of its functions by transmitting information of a political and constitutional character."

By resolution 1700 of the Sixteenth Session, 19 December 1961, the General Assembly broadened the terms of reference of the Committee on Information, and decided that this Committee should examine political or constitutional information as well as information relating to the functional field.

These functions of this examining Committee were linked to those of the Special Committee for the implementation of the granting of independence to colonial peoples and countries. The linking of these functions occurred in resolution 1654 (XVI) of 27 November 1961.

And on 19 December 1961 the General Assembly reacted to Portugal's refusal to transmit information under Article 73 by adopting a further resolution in that regard. That was resolution 1699 (XVI) of the Sixteenth Session, adopted on 19 December 1961 as I have said. A salient feature of this resolution was the establishment of a Special Committee, *inter alia*—

> "... to examine as a matter of urgency, within the context of

Chapter XI of the Charter and relevant resolutions of *the* Assembly, such information as is available concerning Territories under Portuguese administration, and to formulate its observations, conclusions and recommendations for the consideration of the Assembly and any other body which the Assembly may appoint to assist it in the implementation of its resolution 1514 (XV)".

The resolution referred to, Mr. President, was the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the other body was, of course, the Committee appointed for the implementation thereof.

There was here, quite obviously, no longer any limitation to non-political information, or to functional areas. In addition, the General Assembly, in paragraph 5 of that resolution relating to Portugal, authorized the Special Committee "to receive petitions and hear petitioners concerning conditions prevailing in such territories".

The trend was not confined to the reporting provisions of Article 73 *(e)*, but extended also to the substantive provisions of the Article. As Members of the Court may be aware, Article 73 *(b)* and Article 76 *(b)* reflect a compromise in their wording, a compromise which was arrived at in San Francisco whereby the latter article, Article 76 *(b)*, spoke of "development towards self-government or independence", and the former, Article 73 *(b)*, referred only to, "to develop self-government". The word "independence" was not used in Article 73 *(b)* specifically as a result of the compromise arrived at. The history of the matter is dealt with, *inter alia*, by Goodrich and Hambro in *Charter of the United Nations*, revised edition, 1949, especially at pages 410 and 422 to 423.

The idea was that the term "self-government" in Article 73 *(b)* might, but need not necessarily, include independence. Some of the administering powers insisted that this degree of elasticity should be allowed and that insistence on their part became part and parcel of the compromise. It was upheld in the compromise and therefore we find that "independence" is not referred to in so many words in Article 73 *(b)* but is referred to in Article 76 *(b)* dealing with the trusteeship system.

But, Mr. President, as from about 1960 the cry of the majority in the General Assembly was for nothing but independence in relation to Article 73 territories, and then independence of a very special kind. Resolution 1514 (XV) of 14 December 1960 of the General Assembly, that is, the declaration on the granting of independence to colonial countries and peoples, provided, *inter alia*, that—

> "Immediate steps shall be taken, in Trust and Non-Self-Governing Territories, or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."

The special committee for the implementation of this declaration, originally known as the Special Committee of Seventeen and now known as the Committee of Twenty-Four, gradually took over completely from the committee on Information from Non-Self-Governing Territories, and in 1963 the General Assembly formally requested the committee on implementation to take over the functions of the other committee and the latter was then dissolved.

In addition, the same resolution requested the special committee on implementation to study the information submitted by administering authorities and to—

> "take it fully into account in examining the situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples in each of the Non-Self-Governing Territories, and to undertake any special study and prepare any special report it may consider necessary in addition to its activities under *General Assembly resolutions 1654 (XVI) and* 1810 (XVII)" (Resolution No. 1970 (XVIII) dated 16 December 1963).

This special committee, Mr. President, therefore has a very free hand and apparently it exercises it very freely, as the records indicate. It concentrates on examining the situation in specific territories; it receives petitions; it hears petitioners; it sends visiting missions to wherever it wishes. The committee has been deeply concerned when visiting missions have not been granted access to territories which they wished to visit, but they have proceeded to remedy the gap by sending missions or sub-committees to adjoining territories in order to grant audience to political refugees and others, and in this manner the desired information is then obtained. Only this last week-end we read in the press, Mr. President, that the entire committee with officials, constituting a full mission of about 60 strong, was on its way to Africa again. The Committee has further been specifically invited, by the General Assembly amongst others, "To continue to seek the most suitable ways and means for the speedy and total application of the Declaration to all territories which have not yet attained independence" (Resolution 1810 (XVII), 17 December 1962). And all the administering powers have been exhorted to co-operate in the implementation of this task by the committee. We find such exhortation, for instance, in resolution 1956 (XVIII) of 11 December 1963.

Therefore, Mr. President, we find that from a legal situation which was intended to involve very much less than supervision initially, there has now evolved a factual situation extending very far beyond supervision. The protests of the administering States have been to no avail. The whip is cracking for nothing but independence without delay—independence of the special kind of which we have already taken note.

In these circumstances, Mr. President, the Court will, with respect, have little difficulty in appreciating the far-reaching legal and political considerations that would be involved in an attempt to answer fully the question of the honourable Judge Jessup and the considerations which have had a practical bearing upon our decision to decline, with the greatest respect, the offer of an answer to a question which does not form part of the dispute before the Court.

That concludes my reply to the questions put in regard to Article 73 and the arguments offered in that regard by my learned friend. It also concludes what I had to say in regard to the general subject of Article 6 and of the Mandate and matters peculiarly concerned therewith.

It remains for me to offer some brief remarks on the subject of the lapse of the Mandate and to *answer two questions put by Members of the* Court in that regard.

Mr. President, on 22 April, reported in the verbatim record[1], the

[1] See VIII, Minutes, p. 18.

following question, which I read in its translated form, was put to the Respondent by the honourable Judge Koretsky:

"If the Mandate for South West Africa lapsed on the termination of the League of Nations, what, in Respondent's view, is now the legal nature of the right of the Republic of South Africa to administer South West Africa?"

Mr. President, the question, in our respectful submission, arises logically from the Respondent's contention that the Mandate, as a whole, has lapsed. That this is the case, has quite obviously been consistently acknowledged by Respondent in these proceedings. I can refer the Court in this regard to the Oral Proceedings on the Preliminary Objections, at **VII**, page 354, to the Counter-Memorial, **II**, at page 173, and to the Rejoinder, **V**, at pages 82 to 84. However, Mr. President, equally consistently and with the greatest respect, Respondent has also pointed out that the question does not fall to be considered or decided for the purposes of the present case. We did so at these very same places in the record to which I have referred the Court.

In the Counter-Memorial we only stated this fact as being an obvious one. But in the Reply the Applicants' reaction was that, is so doing, the Respondent was "curt" towards the Court. That was the word used by the Applicants in the Reply, **IV**, at page 244, and the manner in which they there dealt with the matter suggested that Respondent had also been evasive in this regard.

Consequently, in the Rejoinder, we went into more detail than before, in order to show that these suggestions on the Applicants' part were unfounded.

At page 82 of the Rejoinder, **V**, we cited a statement of the Applicants in their Reply which read as follows:

"Applicants respectfully submit that . . . there is no basis whatever other than the Mandate itself, for the continued exercise by Respondent of rights of administration, or of any other right, title or interest in or to the Territory."

We continued then to point out, Mr. President, in the first place that if that submission were to be a formal one, in terms of which the Court were asked to adjudge and declare, this Court would unquestionably have to decline jurisdiction to do so.

We pointed out further, that, as far as we could see, the submission could not even indirectly be of assistance to the Court in the decision of the case which was actually before it, the case, namely whether the Mandate existed and, if so, whether it contained an obligation of accountability. We still with the greatest respect maintain this position.

The Applicants' case is not that the Respondent is committing a *trespass* by being in possession of South West Africa and continuing to administer it, or that the Respondent's occupation of the Territory, or its administration of the Territory, is in any way unlawful. If that were the Applicants' case, then the submission in question would, of course, be highly relevant. But, in truth, the Applicants are asking the Court to adjudge and declare that the Respondent is in *lawful* occupation of the Territory, and that it has a *right* of administration—both of these in terms of a Mandate which the Applicants contend to be in existence. But the Applicants ask the Court to adjudge and declare that certain provisions of the Mandate are being violated by the Respondent.

It needs no demonstration that the Applicants' case as it is now before the Court would fall to the ground, without more, if the Court were to hold that the Mandate had lapsed, and these further questions would not arise.

In sum, therefore, the position is as follows: In the first place the dispute before the Court is based, as far as jurisdiction is concerned, upon a clause providing for adjudication of disputes "relating to the interpretation or the application of the provisions of the Mandate". A dispute whether, on the lapse of the Mandate, the Respondent would have any right or title to administer the Territory, and if so, what the source and legal nature of that right or title could be, would clearly be a dispute relating to something outside of the interpretation or the application of the provisions of the Mandate. Consequently the jurisdiction clause does not *in law* permit adjudication upon such a dispute.

Secondly, Mr. President, in keeping with the legal situation, the Applicants' formal submissions *in fact* do not ask for adjudication of such a dispute.

We therefore, still, respectfully contend that the subject raised by the honourable Judge's question does not either legally or factually form part of the case before the Court, although it would, in contexts outside of this case, arise in a logical and a practical way from a finding that the Mandate has lapsed.

It is for this reason that we have not, in the pleadings, dealt fully and systematically either with the factual basis upon which the answer to such a question would have to be sought, if and when it should arise for decision, or with the legal consequences which would flow from such a factual basis.

It stands to reason, Mr. President, that we are still not in a position to offer a full legal argument on that question, and that we must, with the greatest respect, desist from any attempt to do so. The foundations have not been laid; there is no foundation for the proper investigation into all the facts and into the legal questions that would arise, on the pleadings before the Court.

But this does not mean, Mr. President, that the South African Government seeks to evade the question, or that it is unable to render any valid account of its attitude in regard to the question.

In particular, the South African Government has no objection to stating succinctly what its attitude is, as distinct from arguing or canvassing the question as if it were a matter calling for a decision in this case.

In the Rejoinder, V, at pages 83 to 84, the Respondent mentioned some of the facts by reason of which it has never had any qualms as to the validity of its claim to title on the basis that the Mandate has lapsed.

The question enquires about the *legal nature* of the right to administer the Territory. The Respondent says, Mr. President, that the legal nature of its right is such as is recognized in international law as flowing from military conquest. South Africa's right of administration originated in the act of surrender of the German forces in 1915, in pursuance of which the Territory was lawfully governed and administered by the South African Government for several years prior to and until the mandate arrangement, to which the South African Government was, and in law necessarily had to be, a party. There could not have been that mandate arrangement on the basis of what had already occurred, as far as South

Africa's occupation of the Territory was concerned, without the South African Government being a party to that arrangement.

Upon the postulated lapse of the Mandate in 1946—not through any fault on the Mandatory's part, but as a result of something done by general consent of all the interested parties—then in law the *status quo ante* revived, in other words, the same legal right of administration as had existed prior to the mandate arrangement was still held by the South African Government.

In fact the Territory had, under the Mandate, been administered as an integral part of the Union, as between 1920 and 1945, even as it was from 1915. In fact the Territory had because of these developments to a large extent become administratively integrated with South Africa itself, and economically dependent upon South Africa. The South African Government, in these circumstances, in maintaining the legal right as it existed prior to the Mandate, does so subject to the policy of continuing to act in the spirit of the Mandate. In pursuance of this policy the South African Government is engaged upon a positive programme for leading the peoples of the Territory towards self-determination. It considers that this position must endure until the sacred trust which it originally assumed *vis-à-vis* the different peoples of South West Africa, and in the spirit of which the Territory continues to be administered, has been fully discharged.

That concludes the answer to the question put by the honourable Judge Koretsky, and that leads me immediately, Mr. President, to the answer to the question—the question put to both Parties—by the honourable Judge Sir Gerald Fitzmaurice, on 13 May 1965 [1], and reading as follows:

> "What, in the opinion of the Parties respectively, is the present and potential objective legal position relative to the mandated territory of the Powers which, at the end of the First World War, came to be known as the Principal Allied and Associated Powers, namely, (in their then French alphabetical order) the United States of America, France, Great Britain, Italy and Japan? When these Powers, in favour of whom sovereignty over the future mandated territories was renounced under the Peace Treaties, consented to the arrangements whereby the territories were placed under League of Nations mandate, did they thereby divest themselves of all right, title and interest relative to the territories, or did they, as a matter of law, retain a residual right of sovereignty or other right, title or interest which would revive and become operative in the event, for instance, of a dissolution of the League of Nations, or of a termination of the mandate on a basis other than self-government or independence for the territory concerned—and, if so, what is the nature and extent of such right, title or interest and how may it operate?"

Now, Mr. President, it seems to us that there are two postulations towards the end of this question and it will be convenient to deal with them separately.

The first one is to consider the position on the assumption that the Mandate has continued in existence despite the dissolution of the League. In this regard we submitted in the Preliminary Objections, I, at pages 307

[1] See VIII, Minutes, p. 36.

to 308, and in the Counter-Memorial, **II**, at pages 205 to 207, that no function was contemplated for the Principal Powers as such in the operation of the mandate system. We abide by this contention, Mr. President, the validity of which would not, in our submission, be affected by the falling away of League supervision, because on that assumption the Mandate as such would still continue in operation and there was no contemplation, in our submission, of a function for the Principal Powers, in their capacity as Principal Powers, in the operation of the mandates or the mandates system.

Now, that brings us to the second postulation. The answer I have just given does not, of course, necessarily cover the situation if the Mandate as a whole has lapsed. The question of a possible revival of rights on the part of the Principal Powers in such event is a different and a difficult question. From our reply which I have just given to the question of the honourable Judge Koretsky, it will follow that such a possible revival of rights on the part of the Principal Powers, if any, could, at most, constitute some form of qualification to the rights or title which Respondent possesses on the basis to which I referred in that reply. Whether such rights do exist, what their content would or might be are, however, very difficult questions of law and they have practical implications extending far beyond the present case. Apart from the inherent problems involved in an enquiry of this sort, further complications arise from the history subsequent to the grant of the Mandate and, in particular the events of the Second World War and the settlements following thereon. This history very profoundly affected the political and the legal relations between the States which were formerly the Principal Allied and Associated Powers, those relationships amongst themselves and with other powers, including the Respondent.

In order to provide a proper answer to the question put by the honourable Judge, these various matters would require very thorough and very extensive canvassing and consideration. The matter is not in issue; in fact the Applicants have not presented any formal submission on this point to the Court and, in law, it seems that in the light of the compromissory clause they could not properly have done so. In view of these facts, and of the implications which would be involved in the presentation of a more definite answer by Respondent in this regard, we must, regretfully and with great respect, decline to express any view thereon. We arrive at the result with regret and reluctance, but the practical, legal and political implications are such, coupled with the fact that the matter is not presented to the Court for its decision, as to leave us, in our judgment, no alternative.

Mr. President, then in regard generally to the issues between the Parties on the question of the lapse of the Mandate as a whole, the Applicants have, as far as we can ascertain, offered nothing in their oral reply which seems to us to call for a further treatment in addition to what we have already stated in our argument in chief. In particular, we may point out that they have offered no argument in reply to the detailed presentation which we gave to the Court on the proposition that if one assumes that accountability to the League organs was intended to be an essential part of the Mandate, then the result of disappearance of the supervisory organs without more must be the lapse of the whole Mandate and *not*, as the Applicants contend, the survival of the Mandate with accountability to organs not agreed to by the mandatory. We dealt

with that matter very fully in our presentation on 13 April, which is to be found in the verbatim record of that day at **VIII**, pages 577 to 581, and, as far as we could see, no answer to that was offered by the Applicants, nor have they offered any further argument on the proposition which they had advanced earlier to the effect that continued administration, in fact must in law involve continued accountability to some international organ. We, in our respectful submission, refuted that contention in our argument on 9 April, at **VIII**, pages 513 to 517, and we again referred to it on 13 April, and dealt with it at **VIII**, pages 580 to 581, and as I have said, nothing further has been offered by the Applicants in that regard.

The Applicants have maintained that there are in this respect only the two extreme alternatives—either a survival of the Mandate *in toto* with accountability to the United Nations, or a lapse of the Mandate *in toto*, and that there is no possibility of something in between. Mr. President, if that is so, it is not clear to us what has become of one of the Applicants' contentions, offered initially to this Court in its oral presentation as being a basic one, namely that the obligation provided for in Article 6 of the Mandate was to be seen generally as an obligation of international accountability, which obligation could survive even the lapse of the particular supervisory organs.

On the basis of that contention, when the League became dissolved there would have been nothing affecting the obligation of accountability, it would still have existed. But the Applicants suggested that on that basis and on the analogy of the *Barcelona Traction* case the obligation might become a dormant one. That seemed, on the presentation of the Applicants' case initially, to be an inherent possibility lying in between the two extremes, but yet in the Reply it does not seem that they still make provision for that possibility. That is in keeping with the factor to which I referred before, Mr. President, that, apart from a formal reaffirmation of their submission in that regard, the Applicants offer no further argument in reply to our submission that the Mandate obligation under Article 6 related to specific organs and was *not* a general obligation nor a vague one of international accountability.

The Applicants have also, on the basis that one views the matter in the light of the Respondent's contention of an obligation relating to specific organs, not taken the matter any further on the question of whether the obligation was to be regarded as a severable one from the rest of the Mandate provisions, or as an inherent one. The arguments have been repeated as before, but they have been taken no further and the possibilities, the various alternative possible conclusions, at which the Court might arrive in that regard, remain the same as before.

We abide by our contentions, which are set out in a summary form in the verbatim record of 13 April (**VIII**, p. 584). We abide by the contentions as to the various possibilities which exist in regard to the issues as to accountability and as to the existence or otherwise of the Mandate, alternatives which exist for the Court as possible findings on those issues. The alternatives are summarized in that record of 13 April, at **VIII**, pages 582 to 584, and we continue to ask, Mr. President, for a determination in our favour in accordance with the alternatives which we stated in that record, at page 584.

[Public hearing of 8 June 1965]

Mr. President and honourable Members of the Court, it will, with respect, be evident to everybody that a dramatic change has come about the Applicants' case in the whole basis of that case regarding Article 2 (2) of the Mandate. I had occasion to refer to a similar phenomenon in regard to Applicants' case on Article 6 of the Mandate, the issue of international accountability—the lapse or otherwise thereof and issues attendant thereto. In this particular instance the change is, if anything, even more remarkable. In relation to international accountability one could still say that the ultimate effect of the contention remains the same, namely that the accountability is now owed to the United Nations, but that the various grounds upon which it was sought to substantiate that contention changed from time to time. In this instance one cannot even say *that* as a matter of substance. As a matter of form one might still say that the contentions all along have been that there has been a violation of Article 2 (2) of the Mandate through policies applied by the South African Government in South West Africa. That remains the same, Mr. President, but the whole substance of the case has changed: the proposition which is advanced to the Court as to the manner in which obligation has been violated, as to the aspects of policy which may be said to violate the obligation. All that has changed entirely, in substance and not only in form, so that one can really speak here of a totally new case, which has been brought for the first time at the reply stage of the oral presentation of the case in Court.

We shall have occasion in due course to deal fully with this whole matter, with the manner in which this change came about gradually in stages from the inception of the proceedings until now, and we shall suggest to the Court the reasons why the Applicants found it necessary to bring now what is, in effect, an entirely new case. At his stage I only want to raise the matter very briefly and very generally in an introductory way. My sole purpose is to indicate very broadly what the case now is that Respondent is called upon to meet, how it differs from the case initially brought, and how we now propose to meet this case in the altered circumstances. I must emphasize, Mr. President, that I am doing so very broadly, because all the aspects of this matter will have to be subjected to more detailed treatment at a later stage, and I should not like to burden the Court with unnecessary repetition. But it does seem necessary to have some initial reference to this aspect.

My learned friends are fond of referring to what they call the annals of litigation. Mr. President, it might be said that seldom in the annals of litigation can it have occurred that a party has taken such a long time over realizing what its real case is, the case that it wants to bring; that it has taken that party nearly five years to do so; that the party should have had four occasions on which to state its case, four attempts at doing so—in the Memorials, in the Reply, in the oral argument in chief, and then again in the oral reply—and that on each occasion it should come with a new version, until on the last one the wheel has turned full circle and we find something which is virtually the opposite of what was advanced in the beginning.

At this stage I only want to compare in a broad sense the two extremes—the one with which they started, and the one as it now is.

In the Memorials, Mr. President, the Court will recall that the charge

was undoubtedly one of deliberate oppression of the Native inhabitants of South West Africa—it was that and nothing else—and that charge, Mr. President accorded entirely with the previous and subsequent history of the dispute in the United Nations itself. The Court will recall that the previous history of the dispute in the United Nations was relied upon by the Applicants in order to substantiate jurisdiction, in order to show that there was a dispute which had proved to be incapable of settlement by negotiation. For that reason very full reference was made to an earlier dispute at the United Nations, a matter which we shall follow up in due course. All I want to say at this stage is that, when that is done, it will become apparent that that was the type of case made against South Africa at the United Nations—one of deliberate oppression of the Native peoples of South West Africa. And that was the case which was taken over in the Memorials of the Applicants and presented to this Court. There was then no charge based on an alleged norm or standards of the nature now contended for. There was indeed, Mr. President, no mention of such an alleged norm or standards of so-called non-discrimination or non-separation. The norm then relied upon, if one could call it that, was a norm of non-oppression—a simple basic norm to which nobody would have any difficulty of subscribing—and, indeed, Mr. President, a norm which undoubtedly and indisputably forms part of Article 2 of the Mandate itself. Article 2 of the Mandate enjoins the mandatory to promote to the utmost the well-being and progress of the inhabitants of the Territory, of *all* the inhabitants of the Territory, and it stands to reason that if a mandatory pursues a policy of oppressing some inhabitants for the benefit of others, then it must *ipso facto* and *ipso juris* be violating Article 2 of the Mandate. That norm of non-oppression is contained in Article 2 of the Mandate. It was not necessary to hunt about the decision and the activities of an amorphous body called the organized international community in order to find a norm of that kind. But, Mr. President, *that* reliance upon *that* norm required the substantiation of a case *on fact*, a case which established that the policies applied by the South African Government in South West Africa *in fact* amounted to deliberate oppression of the Native peoples. And that was the case which ought to be made in the particularization provided in the Memorials.

That is where the Applicants' difficulties started. We came in the Counter-Memorial and we dealt at length with those charges and we indicated, Mr. President, in what manner they were totally unfounded. Although differentiation was practised in regard to the different population groups of South West Africa—because of their natural condition, because of the fact that they did not at any stage form a unified population but in fact formed separate groups at varying stages of development —it was for that reason, and with a purpose and effect not of oppressing some for the benefit of others, but of uplifting all in accordance with their own needs and capacities, and particular circumstances, that the differentiation was practised.

That was the answer we gave, and we gave chapter and verse for every detailed aspect of it. And that was where the Applicants' difficulties started. They found that it was not so easy in this Court as it was at the United Nations to assert oppression and then to find that it is generally accepted that the assertion is as good as substantiation. They found that in order to make a case here to that effect it was a case that would require

proof, and proof in the face of very strong and very cogent opposition. That was why we found at the Reply stage that the Applicants came to mention a so-called norm of non-discrimination or non-separation, which was then alleged to be binding on the Respondent as a matter of interpretation of Article 2 (2) of the Mandate. But in addition to the norm the Applicants still persisted throughout the Reply, if the Court will recall, with their original charges of improper motives and oppressive conduct on the part of the Respondent, so that the only reasonable interpretation we could give to that Reply at that stage was that the Applicants, although not specifically saying so, were still resting their case on two alternatives—on this norm on the one hand and on the original charges of deliberate oppression on the other hand.

That was the case which the Respondent came to this Court to meet. We came prepared to meet that case, Mr. President, not only by way of legal argument but also by way of a full factual inquiry into Respondent's policies, their purposes, their motives, their effects, their objectives, and their implications, and also the actual results achieved by those policies. In substantiating that case, Mr. President, the Respondent intended to call a number of witnesses to testify with reference to all these aspects which I have just mentioned. But all this has now become unnecessary, because the Applicants have changed the whole basis of their case, with the result that the dispute which the Court is now requested to adjudicate upon is, *in essence, an entirely* new dispute.

The Applicants' case, and their only case now, is that Respondent has acted in breach of a norm of non-discrimination or non-separation and/or on standards of the same content as the norm.

They have made it abundantly clear, and we could give the references to the record to the Court at a later stage, as we develop the argument, to the statements by the Applicants which made it perfectly clear that they now no longer rely on any case in which they allege oppressive conduct, in which they allege improper motives, in which they allege bad faith, in which they allege a wrongful intent or purpose on the part of the Respondent, Mr. President, on the one hand, or on the other hand, in which they allege that, measured according to results, Respondent's policy has contravened and violated Article 2 of the Mandate. We will give those references later.

Mr. President, what I want to point out by way of general comment at the start is this: *that after discovering their difficulties in* respect of substantiating their original case on the facts, the Applicants have sought to meet their difficulties by raising the standard of the norm on which they rely. They elevate that standard from a commonly accepted one of non-oppression to one which is now called "non-discrimination" and "non-separation", but which on analysis, Mr. President, we maintain still amounts to non-differentiation in defined spheres—non-differentiation which results in a position that even if a policy involving contravention of the norm should in fact be intended for the benefit of a population, and should in fact enure to the promotion of well-being and progress of the population, that policy would still be contravening the norm.

The norm therefore, in that sense, Mr. President, is a technical one—technical because it does not invite this Court to find itself that there is anything bad attached to Respondent's policies, that Respondent's policies in fact injure the population or that these in fact have been improper motives attached to them. It is *simply a technical norm against*

which the policy is to be tested because, it is said, the policy differentiates in certain spheres, and that differentiation is illegal, it is contrary to the norm. It will be evident that in order to arrive at that position, it was necessary for the Applicants to elevate the norm to this new plane. That was necessary in order to obviate an enquiry into the facts, the matter with which Applicants found the difficulty. And in order to do so the Applicants ran into new difficulties. They ran into the difficulty of finding justification for saying that that norm or the equivalent standards were standing at this high level and were binding upon the Respondent independently of its consent, and despite the fact of Respondent's vehement and consistent protests.

Mr. President, for the purposes of establishing this case the Applicants have to go very far, and they attempt to do so. They say they rely on standards, and what does their case amount to in essence, in basic substance, in regard to those standards? They say that there is a peculiar relationship between the Respondent and the organized international community, whereby the Respondent as Mandatory is obliged to take orders, as it were, from the organized international community—to be ordered and directed by the organized international community—as to the manner in which it is to seek to achieve the objectives of the Mandate of promoting well-being and progress to the utmost.

They say that that discretion rests with the organized international community, and by virtue of that discretion the organized international community can decide and Respondent is bound in law—it must obey.

That they say, Mr. President, despite the fact that they cannot point to any similar position having obtained in the time of the League, the international organization under which the Mandate was intended to operate. They cannot point to a situation in the League time where supervisory organs, admitted supervisory organs, could lay down standards or norms which would be binding upon the Mandatory, independently of its consent, and despite its opposition. They cannot point to that.

In fact, Mr. President, the situation, as we have shown and as we shall endeavour to show again, was exactly the contrary. They cannot even point to such a situation obtaining in the new regime of the United Nations relative to the trusteeship system. They cannot point to a precedent there, or to a principle there, to the effect that States, administering authorities which have put territories under trusteeship under the auspices of the United Nations, would be bound to comply with directives given to them by the very supervisory organs of the United Nations itself contemplated in the Trusteeship Agreement; that they cannot show. Yet, Mr. President, the effect of their contention is that despite all this the Respondent—who did not place the mandated Territory under trusteeship, and they admit that there was no obligation on the Respondent's part to do so, the Respondent is in the worse position. It is in the position now that the organized international community can order it about—not only the supervisory bodies of the United Nations which supervise administration under trusteeships, and which, it is suggested by the Applicants, are also to have supervisory powers in respect of the Mandate—not only those bodies, Mr. President, can order it, but also other bodies said to represent the organized international community in some way or other, such as the International Labour Organisation. That is the length to which the Applicants find it

necessary to go, in order to substantiate their case as far as standards are concerned.

Now when it comes to the norm, the position is even very much more far-reaching. The norm is alleged by the Applicants to have been established by the "consensus", by the "collective judgment", by the "collective will" of the "organs of the international community". All those words I have stressed are the words actually used by the Applicants in the course of the statement of their argument, in the verbatim record of 19 May 1965. They are all to be found at one page also—page 352, *supra*, of that record.

The effect of this case appears to be, Mr. President, if we understand it correctly, that there is now a kind of a legislative power, quite independently of a mandate arrangement or something similar. There is a legislative power on the part of the organs of the so-called organized international community to bind States that do not agree with that so-called consensus, or collective judgment, or collective will. In other words, Mr. President, we now find a collectivist approach in the organized international community, something in the nature of a legislature or legislation which by a collective will can bind dissidents, can bind people who do not agree with that collective will.

That the proposition is a novel one, and that it is very far-reaching, Mr. President, with implications extending very far beyond this case, is a factor which I need not stress. It will be obvious and patent, with respect, to every Member of this Court. The implications on the whole of the international order, of which this Court forms a part, are indeed of a startling nature. I do not intend to elaborate upon that now. It is enough to say at this stage that they could threaten the very existence of that whole international order. This whole organized international community, all the organization, all the achievement that has gone into the international order up to this stage, stands threatened, Mr. President, by the implications of what is suggested to this Court under this "norm" contention of the Applicants. But I shall leave it there for the moment; it is a matter which will require elaboration at a later stage of the argument.

The Applicants are not unaware of the fact that they are coming here with an entirely novel and almost revolutionary proposition to this Court. They themselves admit, and I quote from the verbatim record of 13 May 1965, at page 262, *supra*, that:

> "... they perhaps rest upon a law-creating process which has not heretofore been considered or passed upon by this honourable Court".

That is the end of that quotation, and in the verbatim record of 19 May, page 352, *supra*, they said they "... may perhaps appropriately refer to this case as rare in the annals of this Court or its predecessor ...".

Mr. President, in the light of the real implication of the contentions which they advance, these may perhaps be called the under-statements of the year. But even taking them on this level of the Applicants' own admission it is rather evident what a long way the Applicants have come from the good old days of the Memorials, in which they said at the very beginning of their statement of the law regarding Article 2 of the Mandate:

> "In the present case, ... the issues of fact and law, and of the application of law to fact, do not involve conjecture. The violation of the duty to promote 'material and moral well-being and social progress' is beyond argument." (I, p. 104.)

That was the note, Mr. President, on which this litigation started. Also, in the Memorials, at I, page 166, also the Court will recall the reference there to the "polar disparity between the duties of the [Mandatory] . . . and its conduct in the administration [of the Territory]". As I say, that was the tone on which we started. We now end up with a tone of law-creating process which has not heretofore been considered or passed judgment upon by this honourable Court.

I do not intend to take this matter further at the present stage. It will be dealt with in detail later, as I have said.

It is sufficient to say that this *volte-face* on the Applicants' part has rendered it unnecessary for us to enter upon their original charges. The only issue before the Court now is whether the norm and/or the standards as contended for by the Applicants exist, and whether they apply in this case. As I have said, I shall in due course give the Court the necessary references to the record which make that clear beyond any dispute.

We therefore no longer have to meet those original charges, and in a way we regret that we have been deprived of the opportunity of putting our full case before the Court in respect of them. But then, Mr. President, as in all courts, the Applicants are the *domini litis*. They, by the charges they bring, and by the charges they alter as they go along, determine the ambit of the dispute. We shall not, as we intended, with respect to the original charges, lead evidence or otherwise canvass a case in answer to charges as raised in the pleadings but now dropped.

We have given serious consideration, Mr. President, to the question whether in these circumstances it would be necessary, or desirable, to have oral evidence at all. For reasons which we shall explain in more detail later, we have considered it desirable to have evidence nevertheless, particularly inasmuch as it may be of assistance to the Court to consider that evidence in answer to the Applicants' contention that a norm (or standards, or both), of the nature suggested by them, exists or is applicable to the administration of Respondent in South West Africa.

We shall, at a later stage, explain the nature and the purpose of the evidence in more detail. That we shall do partly in the course of elaboration of our legal argument and partly in the course of the introductory statement upon the facts which we intend to make at a later stage, i.e., the introductory statement upon the evidence which we intend to lead.

Broadly speaking, Mr. President, one can say that the matter, narrowed down as it now is, falls under two heads. The first concerns the norm and standard creating processes. The question is whether they exist as suggested, i.e., in the form and with the effect suggested by the Applicants and, if so, how such norm and standard creating processes have come into existence, what it is that has elevated them into being binding upon dissenting and protesting States, and what the implications are of those contentions generally.

The second aspect on which we intend to present a case to the Court—and that is mainly where the evidence will come in—is that of the suggested actual application in practice of a norm and standards of the content now contended for by the Applicants. One will have to investigate—and that is largely a question of fact—to what extent such a norm and such standards are indeed so universally or even widely accepted and practised as is suggested by the Applicants. Those are features of the difficulties into which the Applicants have now run and on which we shall have more to say, both by way of argument and by way of presentation

of evidence to the Court at a later stage, quite apart from the other important factual aspect, namely the implications which the application of such a norm will have in circumstances such as pertain in Southern Africa and also in some other parts of the world.

One can say, in effect, Mr. President, that it is now no longer the Respondent's policies that stand in the dock and have to be defended. What has to be analysed here, and what really stands in the dock now, is the suggested norm and suggested standards which form the basis of the Applicants' case. And that will largely be the centre of gravity in the further canvassing of the issues in this case regarding Article 2, paragraph 2, of the Mandate.

Now, before pursuing the matter further with regard to the Applicants' case as now presented to the Court, it is necessary for me to revert, even if only briefly, to the contentions which we advanced to the Court in regard to the proper interpretation and application of Article 2, paragraph 2, of the Mandate, in so far as the issues before the Court are concerned.

Our case in that regard may now be said to have become largely academic in view of the change that has come about in the Applicants' case to which I have just referred. But in some ways, Mr. President, we find that the Applicants seek to build, in support of the case which they are now advancing, contentions of their own on comments which they pass upon our original legal contentions with regard to Article 2 of the Mandate. They pass comments on our argument in that regard; in part they oppose us; in part they agree with us; in part they put a certain interpretation upon those arguments and then, on that basis, they try to build arguments in purported substantiation of the case which they now put to the Court.

For that reason, it may serve some purpose and be of assistance to the Court if I were to revert briefly to what our contentions amount to and to clear up any possible misunderstandings that may have arisen in regard to them. The Court will also recall the questions put to the Parties in regard to their respective contentions by the honourable Member of the Court, Sir Gerald Fitzmaurice on 7 May[1]. To a large extent, many of the questions put to us in that regard have now also largely become academic in view of the factors to which I have referred, but again, in order to clear up any misunderstanding which might have arisen, in order to have complete clarity as to the attitude we took and in so far as that may be of assistance to the Court in regard to the case which is now still before it, it seems desirable to revert very briefly to our attitude.

The Court will recall that our first and main legal contention regarding Article 2, paragraph 2, of the Mandate is that the paragraph was not intended to be justiciable at all, at any rate, not at the instance of a State which has no direct interest in the matter either for itself or through its subjects or citizens. Our alternative contention is that in the total effect of Article 2 no act or omission on the part of the Respondent could constitute a violation of the Article unless that act or omission was actuated by an intention or was directed at a purpose other than one to promote the interests of the inhabitants of the Territory.

Now, Mr. President, in their opening oral argument in this Court the Applicants went into some detail in their attempt to show that our main

[1] See VIII, Minutes, pp. 30 ff.

contention was untenable. We reacted to that by analysing all the arguments adduced by the Applicants and in our submission we showed conclusively that those arguments were devoid of substance. It is perhaps of some significance that in their oral reply the Applicants have not reverted to this sphere of controversy. They have remained singularly silent as regards our main contention which they termed our first alternative contention. In so far as they referred to it at all, the references have been mostly to no greater effect than to register surprise at the fact that the matter is still raised by us at all after the Court's 1962 decision. But those references, of course, omit any indication of the margin by which their decision was reached. They omit any reference whatsoever to the merits of the controversy in that regard and to the analysis which we put before the Court.

On the contrary, Mr. President, as we shall show, the Applicants now adopt attitudes which go very far towards confirming the correctness of our first contention, i.e., by the attitudes which they have put forward in regard to their norms and their standards. The effect of this argument in regard to norms and standards is, of course, that to the extent provided for in the suggested norm and in the suggested standards, the Respondent's obligation under Article 2, paragraph 2, *is* justiciable. But, Mr. President, it is only to the extent provided for by the suggested scope of the norm and of the standards. What is important is that the Applicants have not sought, either in their written or in their Oral Pleadings, to advance or to formulate any general basis upon which the obligation is said to be justiciable, any general basis, that is, upon which it would be possible to adjudge any conceivable alleged violation of the Article. They go only so far as the scope of the norm and the standards. They go no further.

May I illustrate the difficulty with an example? Let us assume, Mr. President, that the Respondent has applied in the Territory a general policy of integration between the various groups, but that purely for the purposes of protecting the Bushmen, an area has been set aside for the sole and exclusive use of the Bushmen an area of which the Bushmen may avail themselves if they wish and in which they need not stay if they do not wish. According to the Applicants' contentions, if I understood them correctly, such differentiation would have been entirely permissible. Now let us assume, Mr. President, that the dispute then comes before this Court under Article 2 of the Mandate, because it is alleged either that this area given to the Bushmen is too small to cater for their needs properly, or that it is too large and takes away too much territory from the other inhabitants of the territory. Let us assume that that kind of dispute comes before the Court. How do the Applicants suggest that a dispute of that kind is to be justiciable under Article 2, paragraph 2, of the Mandate? How does their contention in regard to a norm or standards assist at all with a view to solving a dispute of that kind?

Let us assume, Mr. President, that the Court is merely asked to adjudge that the Respondent has applied a wrong or an antiquated economic policy to the Territory generally, a policy impeding the material progress of all the inhabitants, without any reference to colour policies or to distinctions between groups and so forth. Let us suppose that that is the dispute which comes before the Court—raised by somebody in the interests of the inhabitants—and that it is alleged that the economic policy is antiquated, inadequate and wrong.

Mr. President, how do the Applicants suggest that a dispute of that nature is to be adjudged by this Court? It would be evident that their contention in regard to the norm of non-separation or non-discrimination, or the so-called standards to the same effect, would be of no assistance, for the simple reason that they do not constitute general criteria by which divergent policies and practices can be tested for legality.

Now it may be, of course, that the Applicants may contend that outside this particular norm and these particular standards, there are other norms and other standards governing other aspects of a mandatory's conduct. But, Mr. President, that already begins to throw doubt upon the acceptability, or even plausibility, of this whole approach through the medium of norms and standards settled by the organized international community. Could it really seriously be suggested that the organised international community would have concerned itself with the evolution of norms and standards for each and every aspect of governmental policy and practice in mandated territories or in such territories generally? If the Applicants cannot suggest that the whole field is now covered by such norms, clearly evolved norms, practices or standards, then it is quite clear that the whole field of possible dispute under Article 2 would not be covered by their legal contention at all, and that there would remain a residuum in respect of which Article 2, paragraph 2, is not justiciable at all.

If they do contend, Mr. President, that there are standards, or a norm and standards, for all the spheres, then I have not heard them suggesting that yet. I submit that such a contention would be absurd. If one looks at all the trouble and the difficulty that the Applicants have encountered in trying even to define the content of this single norm and the corresponding standards on which they seek to rely, and in trying to show that it is a matter of general acceptance, one wonders how interminable the disputes would be if they were to try to show that the whole field is covered by relevant and applicable norms and standards.

However, Mr. President, the fact remains that the only counter which has been offered by the Applicants to the Respondent's main contention that Article 2 was not intended to be justiciable, is that based upon their norm and their standards, and it is inadequate to the extent I have indicated. It is also the only counter which is offered by the Applicants to our alternative contention as to the limited basis upon which the Article would be justiciable, if at all.

The field is then narrowed to the questions of the existence, the applicability, and the binding nature or otherwise of the suggested norm and standards, and to the questions whether they have the content ascribed to them by the Applicants, and whether they bind us.

It is in these circumstances that my remarks apply that to deal with our contention, our alternative contention, and the legal arguments and the legal principles involved, would largely be academic; but nevertheless, for the reasons I have indicated, I shall now proceed to deal briefly with the alternative contention, and I propose to start to do so by reference to the questions put by Sir Gerald Fitzmaurice.

The Court will recall that questions 1-4 of that series put on 7 May[1] related to the position of the Applicants. Questions 5-7 related to our position, and questions 8-10 related to the position of both Parties. We

[1] See VIII, Minutes, pp. 30 ff.

shall deal first, Mr. President, with the questions which relate specifically to our position, and which are addressed to us; in other words 5-7 relating specifically to our position, and 8-10 relating to the position of both Parties. Thereafter we shall in general revert to an analysis of the merits or otherwise of the Applicants' case.

Question 5 reads as follows:

> "It is solely on a basis of general principle that the Respondent claims for the Mandatory an absolute discretionary power to determine for itself by what methods Article 2 of the Mandate shall be implemented—subject only to good faith and correct intentions?—or does the Respondent claim that a discretionary power of this kind is to be derived from the language of Article 2 itself?"

Mr. President, it will be noticed that this question as so worded seems to impute to us an abstract legal contention to the effect that as long as the Respondent acts in good faith it has an absolute discretionary power to determine for itself by what methods Article 2 of the Mandate shall be implemented.

With the greatest respect, Mr. President, it seems to us, on analysis, that this would perhaps put too highly what we intended to convey in our argument. Perhaps the mistake is ours; perhaps we did not make it as clear as we should have, what it is that we really and in fact contend for; and, if so, I welcome this opportunity of clearing up any misunderstanding there might be in that regard.

Let us go back to the Rejoinder, V, at page 157, where we said:

> "... the Court can determine whether a legislative or administrative act or policy constitutes an infringement of Article 2, paragraph 2, only by examining whether or not the exercise of a discretion involved in such act or policy, was directed at the purpose of promoting to the utmost the well-being and progress of the inhabitants. Such an examination would, in the circumstances, involve an enquiry as to the good or bad faith of the Mandatory".

I stress the words "in the circumstances", Mr. President, because they have a significance; they refer back to a more extensive treatment of that point, to which I shall return.

We have always endeavoured to indicate in terms of this alternative contention that in theory the Respondent's policies and practices can be tested by the Court in the same manner as administrative acts and decisions are tested by courts in municipal systems, and that this could include a finding of invalidity on bases which are quite independent of bad faith.

But, Mr. President, our contention has always been that in view of the particular circumstances pertaining to the Mandate—the practical circumstances pertaining to the Mandate and the territory—a judgment to the effect that Respondent has abused or exceeded its discretionary power would in practice and effect necessarily amount to a judgment that Respondent has acted in bad faith. That was the effect of what we tried to convey. We did not suggest that good or bad faith could always, in relation to discretionary powers, or in theory, in relation to this particular discretionary power, be the only basis upon which an act, or a policy, or a practice could be invalidated. But we said that, having regard to the particular practical circumstances that was very much the practical result at which one arrived.

We dealt with this matter, for instance, in the Counter-Memorial, **II**, at pages 385 to 389; we dealt with it in the Rejoinder, **V**, at pages 157 to 159; we dealt with it again in our oral argument in chief in the present proceedings, especially in the verbatim record of 14 April, **VIII**, at pages 612 to 621.

There we demonstrated the basic theme that the Respondent's powers in terms of Article 2 of the Mandate were of a discretionary nature. We based our arguments on an interpretation of Article 2 of the Mandate itself, read in the light of Article 22 of the Covenant, and we referred to strong authority in support of our arguments on the basic proposition that the Respondent's powers in terms of the Article were of a discretionary nature.

In their oral argument in chief the Applicants did not dispute our contention that a discretion was conferred upon the Respondent. They joined issue with us only in respect of the manner in which an exercise of that discretion could be tested by the Court. In effect, they said that the Respondent's discretion was curtailed by the norm and by the standards for which they contended. One finds our treatment of the Applicants' attitude in that regard in the verbatim record of 14 April, at **VIII**, pages 623 to 625, and again in that of 22 April, at pages 633 to 639.

But now, in their oral reply, Mr. President, the Applicants adopt what seems to be a new attitude, namely that the Mandate in effect conferred a discretion on the organized international community to decide by what methods the interests of the inhabitants of the Territory should be promoted. And they seem to contend that the Mandatory has to bow to this discretionary power. As I have said, we shall deal with that attitude at a later stage. I am concerned for the moment with an analysis of our contentions in regard to Article 2; I merely wish to point out in passing that the Applicants did not contest the discretionary element in the grant of power.

What I want to emphasize is that the discretionary nature of the power for which we contend is derived from the language of Article 2 itself, read in the light of Article 22 of the Covenant and of the mandate instrument as a whole.

The language reflects a grant of full power of administration and legislation. Those are the words of the grant itself—"full power of administration and legislation". That full power is subjected to a general *limitation* as to purpose or objective, and to a few specific limitations about particular subjects in Articles 3 to 5 of the Mandate.

Inasmuch as that concept, as used in Article 2, viz., a power of administration and legislation, is inherently a discretionary power, and as the limitations are such as merely to circumscribe or qualify the discretionary element, and not to remove it, we say that the discretion follows from the language of the Article itself. It flows from it. It is part and parcel of an explicit grant of power.

However, Mr. President, when we come to the grounds upon, or the circumstances under, which a court can adjudge that Respondent has abused or has exceeded the limits of the discretionary power, then, of course, we rely upon ordinary, or general, principles, of law and logic as recognized in all civilized municipal systems of which we are aware. But, in doing so, we must respectfully point out that here, too, we do not conceive ourselves as proceeding from principles of an *a priori* character,

as is suggested, with respect, in the introductory portion of the question. We do not, in the wording of that introductory portion, postulate an inherent discretionary power in the Mandatory. We submit, with respect, that the power is explicitly granted; it follows from the grant, the discretionary element which is included in the grant, and it therefore follows from the wording of the grant, and not from any *a priori* assumption of something inhering in the Mandatory, independently of the grant.

We say, likewise, Mr. President, that the principles for determining whether a violation of the discretionary obligation has occurred find their application as a result of the language employed. They flow from it. They do not find their application by way of being invoked *a priori* in order to put a forced construction upon the language. We construe, with respect, the language first, and we submit that from the meaning of the words employed, from their significance, there flow certain consequences as regards the discretionary nature of the power granted, certain consequences which then follow in law as to the principles upon which it can be found that the discretion has been violated.

This answer, Mr. President, in our submission, partially answers question 5 put by Sir Gerald Fitzmaurice. In order to formulate a full answer to the whole question it remains to consider the grounds upon which, according to our contention, it would be possible to say, in law, that the Respondent has abused its discretion.

In the course of dealing very briefly with this, Mr. President (I do not want to go into it at any length), I should also like to indicate, with respect, that to say that we lay claim to an absolute discretion perhaps puts the matter too highly. It is not an absolute discretion. It is certainly a discretion which is relative to a certain defined sphere. It is a discretion which is in some way limited by curtailment, by qualifications, but which is then left to operate in a residual field without qualification but still within the limits of that field.

Because of certain remarks made by the Applicants in answer to our contention about the discretionary nature of the power and about the legal consequences which flowed from it, we went into this matter again rather fully before this rejoinder stage. We thought, having regard to some of the Applicants' remarks, that perhaps we might have misunderstood the relevant legal principles in some municipal systems and that it might be necessary for us to check on our own appreciation of those principles, so we went into the matter as fully as we could. We obtained such expert assistance as we could even from a continental professor in administrative law, but, Mr. President, we found that, in the words of Omar Khayam, "in the end we came out by much the same door as in we went".

It seems, with respect, that our exposition of the basic principles has been substantially correct thus far, subject only to a possible misunderstanding that may have arisen from statements which we sometimes used by way of a shorthand description, and which may therefore have created an impression of over-simplification. We dealt with the matter in more detail in other passages of the record and we thought that we had left no room for misunderstanding of the nature manifested by the Applicants in their comments, but it seems that we were wrong in that respect.

In our pleadings and in our oral argument in chief we submitted that it was a logical proposition, inherent in all cases where courts have to decide on the legality or otherwise of the exercise of a discretionary

power, that the Court is not entitled to substitute its own discretion for that of the authority upon which the discretion has been conferred. In other words, we submitted that the Court cannot conclude that such an authority has abused its discretion in a legal sense merely because the Court does not agree as a matter of merit with the decision, or with the steps taken by that authority. If the Court were to do that, we submitted, it would be the very negation of the concept of a discretion.

We submitted, further, that in view of the provisions of Article 2 of the Mandate, no act or omission on the Respondent's part would constitute a violation of this Article unless such act or omission was actuated by an intention, or was directed at a purpose, other than the purpose expressed in the Article, namely to promote the interests of the inhabitants of the Territory. We made it quite clear that in advancing this proposition we were concerned only with the particular situation obtaining under Article 2, and that we were not to be understood as suggesting that in all cases where a discretionary power was conferred upon a person or a body, the possibility of judicial interference with the acts of the holder of the power must necessarily be equally limited. I may refer the Court to certain passages in our pleadings in that regard just for convenience: in the *Counter-Memorial*, **II**, at pages 390-393, in the *Rejoinder*, **V**, at pages 158-162, in the verbatim record of 14 April, at **VIII**, pages 620-622, and again in that of 22 April, at **VIII**, pages 627-628. In these passages we referred to a number of grounds, to which one could perhaps add a few more, on which courts in municipal systems can set aside an exercise, or a purported exercise, of a discretion—grounds of a special nature pertaining to particular circumstances which can find no application in the present case. I can refer to them quickly in passing.

In the first place, we indicated that an act can be set aside if it is not the act of the person or body competent to exercise the discretion in question.

Secondly, powers may have been exceeded in regard to subject-matter, in regard to place, in regard to time, or the like—i.e., of course, if limits were imposed upon the power in regard to subject-matter, place, time, and so forth.

Thirdly, a court may interfere if a body or a person has failed to comply with specified formal requirements before taking a decision, or before taking steps in relation to which a discretion was conferred upon it, for example, if there has been a failure to do something of the nature of a prerequisite, such as sending a letter of demand before taking other action, and so forth.

Fourthly, a purported exercise of a discretion may run counter to a prohibition or restriction of a material or substantive nature, as distinct from a merely formal one, attached to the grant of power. That prohibition, or restriction, may be an express one or it may be an implied one. Such restrictions, we say, are contained in Articles 3 to 5 of the Mandate. We are not here concerned with alleged violation of any of those Articles. Also, the Applicants say that their norm, or standards, constitute a substantive basis of limitation which has been violated by the Respondent's policy and acts. That, too, is a matter which we shall consider at a later stage. But, independently of that, Mr. President—independently of Articles 3 to 5 and Applicants' suggestion as to a norm or standards—we find nothing whatsoever which suggests a curtailment, a prohibition or restriction of a substantive nature attached to the power.

Fifthly, the statute or the treaty conferring the discretionary power may itself prescribe a legal criterion according to which a court may review an exercise of the discretion. We find that in many municipal systems the court is sometimes empowered to set aside an act or a decision if the court is of the opinion that it is unreasonable, grossly or otherwise.

Then, in the sixth place, in the case of bodies exercising judicial or *quasi*-judicial powers there are special requirements relating to observance of the so-called rules of natural justice, for example, the *audi alterum partem* rule in cases where it applies. The reviewing court can interfere where those principles have not been applied. This, too, Mr. President, is a special type of situation which does not apply here.

In the seventh place, a court may interfere if the person or the body concerned has, as a result of an error of law, misconstrued the scope of his or its discretion, or of his or its power, or the limits thereon, or the obligations imposed upon him, or it. In the event of such a misconstruction, which may be entirely bona fide, there may be a failure to exercise the discretion which the legislature intended the holder of the power to exercise. This, too, we suggested, for the reasons we gave, that that did not seem to be of possible practical application to the circumstances of this case. And the same, of course, applies to the whole list which I have now given.

And that brings us back, Mr. President, to the more general criteria applied by courts or by other reviewing bodies in various legal systems in circumstances of this kind. As one might expect, the approach and the manner of formulation of these criteria in various legal systems are not identical. One finds certain differences between various municipal legal systems which are sometimes referred to by writers and commentators. Some commentators give more emphasis to differences, others give less emphasis—less significance—to those. On the whole, however, it seems, on analysis, that those differences relate more to matters of approach, and to practical or technical considerations, than to matters of substance.

As an example we may point out that the law of France developed in this respect around the activities of the Council of State. One finds that there is a much greater inclination on the part of such a reviewing body, which is partly an administrative one, to go into the motives of a particular administrative act and to uncover what it considers to be some trickery or some concealed abuse in the professed exercise of power, than there is on the part of courts of other countries, which are generally reluctant to do the same thing. But the principles applied are still the same, in so far as their basic substance is concerned.

In considering these general principles applied in the various legal systems, we are to keep in mind that we are dealing here with a typical example of a power which is defined with reference to a stated purpose or objective. Apart, then, from the special possibilities which we have excluded, on what grounds, as recognized in these various legal systems, can the exercise of such a power, or an act purporting to be an exercise of such a power, be interfered with?

All the legal systems which we know appear to agree that the appropriate test is whether the purpose of the holder of the power, the purpose with which he acts or with which he inspires his action, is in conformity with the prescribed purpose, i.e., the purpose for which the power was conferred. Those two things have to be compared—the purpose of the

instrument, the purpose for which the power was conferred; and, on the other hand, the purpose of the holder of the power, the purpose with which he acts, the purpose with which he inspires his action. Those are basically the two matters to be compared.

So we find that in the French law there is this exposition by the commentator Walene. I refer to his *Droit Administratif*, the seventh edition, at page 417, and to his exposition of the doctrine of *détournement de pouvoir*, which, if we understand it correctly, is the specific ground of interference in a case where it is said that the motive, or purpose, does not concur with the authorized one. I give our own translation:

> "This case of invalidating administrative acts differs profoundly from all others, in that it does not concern any longer an objective appreciation of conformity or non-conformity of an act to a legal provision, but the making of a double research into subjective intentions: it has to be ascertained whether the incentives or motives [the author uses the word 'mobiles'] which have inspired the author of an administrative act are such as, according to the intention of the legislator, should have inspired him."

In other words, those incentives or motives, the "mobiles", which inspired the author of the act, must be those which according to the intention of the legislator, should have inspired him.

After a few paragraphs the author continues as follows:

> "In order to establish *détournement de pouvoir*, the judge should enquire:
>
> *(a)* for what purpose or object [the word 'but' is used in French] the legislator has conferred a certain power on administrative authorities;
>
> *(b)* for what purpose, in fact, this authority, in the case subject to litigation, has used these powers;
>
> the judge approaches these two purposes in order to ascertain whether the second is in conformity with the first; in more simple terms, the judge enquires whether the administrative authority has used its power in order to achieve a purpose which is among those which the legislator has actually had in mind in conferring such powers."

We find that a similar description is given by Rokham and Pratt in *Studies in French Administrative Law*, at page 37 of the Library edition:

> "The doctrine of *détournement de pouvoir* contemplates a situation in which an administrative agent has accomplished an act within the scope of his powers; he has observed all the forms prescribed by law; but he has performed the act from motives other than those for which the power was conferred."

Then I quote again from pages 37 to 38:

> "But the question of *détournement de pouvoir* presupposes an inquiry into the mind of the agent, into his secret intentions which he has probably made every effort to conceal. Each case thus resolves itself into a twofold inquiry into: (1) the purpose for which the law vested this particular power in the agent; (2) the purpose for which the agent actually exercised it. If the motive fails to measure up to the purpose for which the power was conferred, the act is nullified."

Mr. President, these authors, at least, would have found somewhat misplaced my learned friend, Mr. Gross' suggestion that our argument alternated like a metronome between the purposes of the Mandatory and the purposes of the Mandate. The Court will recall that that expression was used by him quite a few times—in the verbatim record of 28 April at pages 40 and 42, *supra*; of 13 May, at page 253, *supra*, and of 18 May, at pages 311 and 322, *supra*.

We did exactly, Mr. President, with submission, what these authorities require us to do, i.e., to see whether the purposes of the Mandatory, the purposes and intentions of the Mandatory, agree with, correspond to, those which were prescribed for it—the purposes of the Mandate, the purposes which ought to be pursued by the Mandatory. And that this is the basic principle to be applied in cases of this kind, appears not only from French law but in all other legal systems of which we are aware.

I can refer the Court to Dutch law—merely by way of reference, I am not going to read any extracts—to Kranenburg, *Inleiding in het Nederlandsch Administratief Recht*, at pages 50 to 52: and to a note in *Nederlands Jurisprudensie* for 1949, at page 1062. As regards Belgian law I refer to Mast, *Overzicht van het Belgisch Administratief Recht*, pages 388 to 390. As regards Italian law I refer to Galeotti, to a work written by him in English called *Judicial Control of Public Authorities in England and Italy*, at pages 109 to 115. As regards English law, I refer to de Smith, *Judicial Review of Administrative Action*, at pages 190 to 194; to Griffith and Street, *Principles of Administrative Law*, at pages 215 to 217; and to Keir and Lawson, *Cases in Constitutional Law*, second edition, at pages 138 to 139.

As long ago as 1866 Lord Cranworth said in *Galloway* v. *London Corporation*, (1866) Law Reports, 1, House of Lords, page 39, at page 43, in regard to powers exercised under legislation:

> "... the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers".

In *Arthur Yeats Company Proprietary Limited* v. *Vegetable Seed Committee*, a decision in the High Court of Australia, reported in (1950) 72 *Commonwealth Law Reports*, it was said at page 37 with respect to a legislative power:

> "If a power is conferred in terms which require it to be used only for a particular purpose, then the use of that power for any other purpose cannot be justified."

Mr. President, thus far, in dealing with the principles in the various legal systems which involve a comparison of the purpose of the author of an administrative act with the purpose prescribed in the grant of power under which he acts, I have done so without reference to the question of good or bad faith. Thus far it has been in essence a question of comparison of these two purposes. The question then arises how the concepts of good or bad faith enter into the picture at all, and before I attempt to answer that it may perhaps be necessary to clear up some misunderstanding as to the various senses in which the terms good or bad faith might be used, particularly in relation to an enquiry of this kind. One could speak of good or bad faith in the sense of whether the author of the act wishes to achieve a result which he considers to be good—in other words, one might

have the situation where the author of the act knows that there is prescribed for him, a certain objective or purpose which he is allowed to pursue, and that he is not allowed to use his powers for another objective purpose, but he thinks that another objective or purpose is a laudible one and he then uses his powers for that purpose. Or, on the other hand, he might know that the purpose for which he wishes to use his powers is really a bad one; it is a corrupt one and morally bad. It might be possible in some senses of the use of the terms good and bad faith to use that as the criterion for distinguishing between the two, whether in that sense the author of the act has in mind a good or bad purpose, but that, Mr. President, is not the sense—the relevant sense—in which the concept falls into the picture here. It is obvious that if there is merely one authorized purpose and the power is used for a different purpose, even though the author means good in general, then nevertheless his act is an illegal act.

Alternatively, the expression good or bad faith may be used in relation to the question whether the author of the act endeavours to conceal what it is that he is really doing. He may pretend to be using his power for purpose *(a)*, whereas, in fact, he is using it for purpose *(b)*, or he may pretend that he justifies his action on a basis or a *causa (a)*, whereas he, in fact, justifies it on some other basis. That again is a sense in which one can speak of good or bad faith, but again it is not the relevant sense for an enquiry of this kind. Whether a person conceals his action or does not conceal his action does not make any difference in law. It might make the factual enquiry a more difficult one, one might have to go behind the cloak to see what was really there in substance before one could apply the law, but again the concept of good or bad faith in that particular sense is not relevant here. The relevant sense in which good or bad faith arises here is this: it is whether there is a knowledge on the part of the actor that the purpose for which he acts is not the prescribed purpose.

If the actor—the person who acts, the holder of the power—knows the purpose which he is authorized to pursue, and in interpreting that purpose thinks that allows him to do so-and-so but misinterprets the purpose, and then bona fide uses his powers, in fact, for another purpose, his act will still be an illegal one, but he will be acting bona fide in the sense under consideration. If, however, he knows and realizes that what he is doing is to pursue a purpose other than the authorized one, then he is acting *mala fide* in the relevant sense under discussion, and that is the sole sense in which we sought to use the term *mala fide* earlier, and the sole sense in which we suggested it does enter into the picture at all.

Now, all legal systems that we know of seem to agree that, on proof of bad faith or *mala fides* in this sense, the exercise of the discretionary power or the act purporting to be done under the discretionary power is *ipso jure* invalidated. As soon as one establishes that the man acted in bad faith, that he was bribed, or was seeking to achieve an improper purpose, or even if he knew that he was seeking to achieve a purpose which he thought to be a good and a laudible one but which, he knew, was an unlawful one, as soon as it is established that *that* is the basis upon which the person or the body acted, then that in itself is a ground for invalidating the action. We can refer the Court to *de Smith*, in regard to the English law, *at pages 199-200* of the work to which we have referred, to *Hamson*, also the work to which we have referred, *at page 195*, and, in

general (I need not refer to all the authorities) one finds that that is the position recognized in the various legal systems. If one does establish bad faith in this sense it leads to invalidation of the act, but the contrary is not necessarily true.

It is not necessarily true that, in order to invalidate an act on the basis that the purpose is not the authorized purpose, there must necessarily be bad faith in the sense under discussion. I might quote in that regard from *Professor Galeotti*, in the work to which I have referred, *at pages 118-119*.

> "... if it is true that any case of bad faith can be reduced to a *détournement de pouvoir*, the opposite cannot always be true, ... The variance in the purpose set by law and the one pursued by public authority may result not only in a wrongful, fraudulent use of power, as it does when the authority is acting *mala fide*; it may well occur from an authority pursuing *bona fide* an object, which is at variance with that allowed or set by law, without being aware of it. This kind of case may even be said to be (as opposed to *mala fides* cases), the genuine, unsophisticated instance of *détournement de pouvoir*. Indeed it exhibits variance with the purpose prescribed by law, without attempting to conceal it under a pretence and colour of the right use of power, which is, on the other hand, the necessary ingredient in the *mala fides* cases."

The Court will see that this author speaks of the branch of, or species of *mala fides* which concerns the hiding of what has really been done, but, as I have said before, that is not a relevant consideration, as far as I can see, in law under any circumstances, because the court, for legal purposes, lifts the cloak and sees what the real substance is. The author, however, stresses that the *détournement* need not necessarily consist of an act of bad faith.

We find, however, that in municipal legal systems there is a further general ground upon which the courts may interfere with the exercise of a discretionary power; it is one which almost runs into the basic principles of a *détournement*, but in some legal systems we find the two separated from one another. In other legal systems, the English system for instance, there is some difference of classification as to whether all the principles run together or whether they are to be separated.

This ground of challenge occurs every time that an administrative act issues on the erroneous assumption or acceptance that a certain set of facts is existent or non-existent, or when there is a failure to find, or an absence of justification for finding, facts which serve as a necessary pre-requisite or a cause or a *causa* for the exercise of the powers. In this context the French use the word "motif", meaning, as we understand it, the legal cause or the justification for an action, something which is to exist as a pre-requisite for the authority. The holder of the power is to satisfy himself as to the existence of certain facts before exercising his power.

The word "motif" is the one used by Walene in the work to which I have referred, at pages 409-410. The author explains that such a "motif" must be a legal one. And I quote at page 409 (our translation):

> "For example, a functionary may be dismissed, but on condition that he has committed a fault of such a nature as to justify a disciplinary measure; the fault is then the legal motif of the decision."

At page 410, the author proceeds in paragraph 722, headed as follows, to say:

> "*Each decision should rest on a motif*
>
> There must always be a motif for an administrative decision, and above all when it affects the situation of a third person or a public liberty.
>
> Thus, when in the pleadings in an action for excess of power, the minister has been unable to indicate any motive for his decision, this defect alone brings with it the annulment of the decision."

The word "motif" here, Mr. President, is quite clearly used not in the sense in which we use the word "motive" in English. It is used in the sense of being a pre-requisite, a *causa*, a justification for an act. And the principle is that if the reviewing court finds that the necessary *causa* did not exist, then the reviewing authority is entitled to set aside on that ground the action of the authority of first instance. But, Mr. President, this is the important point, the authorities make it clear that a court may not interfere merely because it disagrees with the finding or reasoning of the administrative agency on which its action was based. The finding or the reasoning must be such that *no reasonable person or body could have* arrived at or adopted the same. In other words, the situation must be such that it gives rise to one of two inferences, either that the agency must have acted in bad faith, for an improper motive or for an unauthorized motive, or on the other hand, that it failed to apply its mind properly to its task. The situation must be such an extreme one, on principle, before the reviewing authority will act. That is of course independently of what I mentioned before, viz., a greater readiness on the part of administrative tribunals sometimes to interfere, than would be the case with a reviewing court of law. But that is a matter of inclination, of particular approach: it is not one which affects the principle of the situation.

This again stresses the difference between the concept of review and appeal. It is not for the court to go into the question and say, well, there was some evidence tending one way, there were some facts on which it might have been found that this necessary *causa* or "motif" existed. On the other hand, there was evidence tending the other way, so as to show that it did not exist. The authority of first instance preferred to accept the first-mentioned evidence and found that the *causa* did exist. I, sitting here as a court, going into the evidence again, find that perhaps the balance goes the other way and the authority should not have found that that fact existed. That is not the proper approach for a court under these circumstances—that is what the authorities make plain. The authorities make plain that the court can only interfere when there is no basis upon which the authority could reasonably have acted, whether the court agrees on merit with the authority's finding on that particular point or not.

In the case of the French law, we can make further reference on this point to Jean-Claude Venezia, *Le Pouvoir Discrétionnaire* (1959), at pages 137 and the following, where he stresses that the facts or the appreciation of the facts on the part of the administrative body must have been "obviously wrong". We can refer also to Hamson, in the work I mentioned before, *Executive Discretion and Judicial Control*, at page 197, who says that if the administration has acted on a ground—

> "... which might on *some rational view* possibly be supposed to be a justification for the exercise, the court will not further inquire into the matter ...".

If the court finds that the ground on which the administration acted, might on some rational view possibly be supposed to be a justification for what the authority did, then the court enquires no further; it does not interfere.

We found, Mr. President, that the same attitude has been adopted by the Italian administrative courts. Professor Galeotti, in the work to which I have referred, says at page 130, that this particular ground of which we are speaking,

> "... recurs any time that an administrative act issues on the assumption that a certain set of facts is existent or non-existent, whilst from the material collected, they appear to be unquestionably the other way round".

And he proceeds at pages 132 to 133 to quote the following passage from a decision in *Polenta c. Min. della Educazione Nazionale*:

> "In the complainant's opinion the impugned order would be unlawful on account of absence of the facts upon which it is based; it must be borne in mind, however, that this kind of '*eccesso di potere*' exists only when there is positive evidence of the non-existence of such facts, or, at any rate, when evidence on their existence is totally absent. In the former case there is a contrast between the order and the actual truth; in the latter, there is a contrast between the order and what may aptly be called 'recorded truth' ... This latter case may be said to be equivalent to the former, since both logically and legally, the statement on the truth of a fact cannot be kept apart from actual evidence; henceforth its total and absolute absence makes that statement without any foundation. When, on the other hand, the findings of fact in the administrative process conflict one with another—in the sense that there are circumstances in favour and others against the truth of the facts—the order which takes those facts as true is the result of an appreciation which cannot be but a subjective view. In such a case it is not possible to perceive a contrast in either of the described forms; nor can the judge of the legality of the order ... be allowed to remake the decision which was issued by the administrative agency, nor to substitute his own discretion for that of the public authority."

Clearly I think, Mr. President, this puts the matter, in other words, on the same basis as I attempted to do before.

In regard to the German law we can refer to *Ernst Fortshoff*, *Lehrbuch des Verwaltungsrechts*, 8th edition, Volume I, at page 86. I need not quote from that. The effect is much the same.

In English law the position is similar. If anything the reluctance to interfere is stronger there than on the Continent. Some critics say the reluctance is too strong, it is a matter of appreciation, but the principle is the same.

In *Smith* v. *East Elloe Rural District Council* (1956) 2 Weekly Law Reports 888, at page 905, Lord Reid adopted the following words of Lord Green, the Master of the Rolls, in an earlier case:

> "It is true to say that, if a decision on a competent matter is so

> unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere. That, I think, is quite right: but to prove a case of that kind would require something overwhelming. . ."

It is typical, Mr. President, of other cases, of which Members of the Court may be aware; similar pronouncements were repeatedly made in the English practice in this regard. It is in exact accordance with the law of our own country, as we know it and as we practise it.

In Holland this ground has, together with the others that are applied, been set out crisply but clearly in a number of decisions of the highest court, the Hoge Raad, and, in commenting on one of these decisions, we find that D. J. Veegens says in a note in *Nederlandse Jurisprudensie*, 1949, at page 1063:

> "This ground is not present if the judge, had he sat on the seat of the administration, would have given another decision, . . . but only if the deciding authority, after weighing up the interests to be taken into consideration, could not reasonably have come to that decision, and if this can therefore only be regarded as an arbitrary act . . . As long as the judge must still acknowledge the possibility that the administration could have taken its decision as it stands there, he has to refrain from interfering."

We can refer the Court to three other decisions of the Hoge Raad on the same point; I merely give the references: I want to deal only with the third one. The references are to that on 25 February 1949, reported in *Nederlandse Jurisprudensie*, 1949, at page 1045, and those on 8 December 1961 and 19 January 1962, reported in *Nederlandse Jurisprudensie* 1962, at pages 222 and 417, respectively.

Now this last decision, Mr. President, is of special interest for our purposes because it concerned the application of a treaty, namely the European Convention on Human Rights, which was referred to by the Applicants in their Reply at **IV**, page 509. Article 9, paragraph 1, of this Treaty provides that the nationals of the States parties to the Treaty should have "the freedom, either alone or in community with others and in public or private, to manifest his religion or belief", that is, the freedom of religion or belief, but expressed in this form, he shall have the freedom, either alone or in community with others and in public or private, to manifest his religion or belief.

Now, in terms of Article 9 (2) this freedom may be curtailed by the governments or relevant authorities of the States parties only by such restrictions "as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". This then, provides exempted circumstances where there could be an exception to the main principle, where there may be a curtailment by legislation or otherwise. The question which arose in the case under consideration was whether certain Dutch legislation was in conflict with these provisions of Article 9 of the Treaty. The legislation prohibited, amongst others, the practising of religion by means of a procession along a public road. It said that religion might not be practised by a procession along a public road, and it made that a criminal offence. There was a prosecution and the matter came to the Courts of First Instance, and, eventually, to the Hoge Raad, on appeal. The Hoge Raad held that Article 9, paragraph 2, of the Treaty conferred on the parties thereto

—that is on the State governments—a discretion to determine whether restrictions should, or should not, be placed on the freedom of worship for the purpose of protecting the public order, and so forth, a discretion also to determine whether existing restrictions directed at this purpose should be retained, and, on the basis of finding that there was such a discretion conferred in terms of Article 9 (2), the Court concluded (and I give it in our translation):

> "... that the judge, confronted with the question whether the application of a specific provision, containing a restriction on the freedom to hold public religious meetings outside buildings and confined spaces, is in conflict with Article 9 of the Treaty, may answer that question in the affirmative only if it should be regarded as completely unthinkable that a legislature faced with the necessity of making provision with a view to protecting the public order, could reasonably make or maintain such a provision ...". (*Nederlandse Jurisprudensie*, 1962, p. 421.)

So, here again, Mr. President, the basis of testing the matter where the discretion is found to exist is put on the same plane.

These are, then, the several relevant general grounds upon which municipal courts would interfere in cases which may be said, in the respects I have mentioned, to be similar to the present case.

My learned friend, Mr. Grosskopf, reminds me that we refer also in our Rejoinder, V, at page 158, to a number of authorities. Some of them have again been mentioned in this review I have given; some I have mentioned have been additional, and, in particular, the Court is referred there to a summary of a convenient comparison of laws (I refer to footnote No. 4 at p. 159) of France, Belgium, Luxembourg, the Netherlands, Italy and Germany, in respect of *détournement de pouvoir*, *vide* in Lagrange, *Chronique Européenne*. (The rest of the reference is given there and the page reference also.)

So, Mr. President, when we apply these general principles to the present case with which we are dealing, the promotion of well-being, as prescribed in Article 2, paragraph 2, is, in our submission, to be seen as a prescribed purpose or objective, the "*but*", according to Walene's usage. We submit that the promotion of well-being is that purpose or objective, the "but", rather than a pre-requisite or a *causa* for action, described as the "*motif*". It is an authorized purpose for which an authority may act, and, accordingly, if we are correct in saying that, the only appropriate enquiry would really be along the lines of an alleged *détournement de pouvoir* rather than along the lines of enquiring into an alleged absence of a *motif* or a *causa*.

But, Mr. President, we do not want to be technical about that; we have no objection whatsoever to viewing the matter on the broader basis of assuming that either or both of these approaches could be an appropriate one. Let us then see whether on that basis a bona fide violation could possibly have occurred, in the circumstances of this particular case, regard being had to the provisions of the Mandate, and their practical implications.

If we approach the matter along the lines of an alleged *détournement de pouvoir*, a bona fide violation could have occurred only if there was a wrong concept on the part of the Mandatory—a wrong concept or a misunderstanding of the scope and the purpose of his power, or of his

duties. In the circumstances of this case, where it is so clearly said what the purpose of the power is—the promotion of the well-being and progress of all the inhabitants of the Territory—it hardly seems possible that there could, in any relevant way, have been any misapprehension or misunderstanding on the part of the Mandatory as to what the scope of its powers is. And, therefore, Mr. President, even in the initial formulation of their case against the Respondent—the initial formulation of a case alleging oppression—the Applicants did not suggest that there was any question of a bona fide misunderstanding on the part of the Respondent. The allegation was very firmly one of a deliberate and intentional oppression. That is why we say, approaching the matter along those lines, that it does not seem to us that in a practical sense, as distinct from a theoretical one, there could be any suggestion of a bona fide violation of obligation.

Approaching the matter, now, along the lines of an alleged absence of *causa* or *motif*, the principle is that the court can interfere only if the action of the holder of the power is so unreasonable that it is unthinkable that any reasonable authority, acting honestly and properly in the circumstances and, applying its mind to the matter, could have taken such action. That test puts the matter on a plane where it, in effect, means that the inference from this extreme situation is such that the holder of the power must have had a wrong idea of the purpose of his power; he must have interpreted it wrongly, or he must have had a wrong purpose, knowing that it was a wrong purpose. The only other possibility seems to be that in an arbitrary way he failed to apply his mind to the matter at all; he did not consider it properly, he misinstructed himself in some way or other, or he did not think of it properly at all, and that failure to apply the mind again could possibly have been a bona fide or a *mala fide* one.

Again, Mr. President, having regard to the practical situation with which we are dealing, and in the light of the charges that were brought, in the light of the suggestion that the Mandatory has not been acting properly, or legally, with reference to some of the inhabitants of the territory, as distinct from others, it seems almost impossible to suggest or to think of any example of a case where it could be said that the Mandatory has acted unlawfully in this particular sense, without at the same time realizing that it was acting unlawfully.

We have racked our brains, my colleagues and I, in trying to find examples where it could be said that the Mandatory's conduct is so unreasonable that no reasonable authority would have done this; but then if we look at the practical example it becomes so obvious that it must have been a case then where the Mandatory itself must have realized that it was not serving well-being and progress, and that consequently it is unlawful.

My learned friend liked to refer to the example of genocide, the example of the Mandatory thinking that it might be a good thing for other inhabitants of the territory if it should practise genocide on a particular population group.

Surely, Mr. President, the Mandatory would know under such circumstances that it was acting improperly, that it was acting in conflict with the provisions of Article 2 requiring it to promote to the utmost the well-being and progress of all the inhabitants of the territory, and not to kill some off.

The same applies to other examples. I do not want to claim perfection in this regard. It may be that the Court, or Members of the Court, could think up examples of which I have not been able to think, where it could possibly be said that applying these general principles one could come to a conclusion that the Mandatory has exceeded the line of legality without knowing that he has done so. If the Court, or a Member of the Court, could think of an example of that kind, it still would not invalidate our argument. Our argument is that these basic principles which I have mentioned are the ones which are to govern the approach. They govern only the extreme cases where the Court can find that the purpose has been a different one, or where the Court can find, alternatively, that the action has been so unreasonable that no reasonable authority could have exercised the power in the same manner.

The application of those tests as they stand are sufficient for my purpose. I only add the comment that as far as we can see it must inevitably result in a situation in which it would appear, whether the *Court formally finds it or not*, that the Mandatory must have been acting in bad faith.

The position in that regard might arise in the form that the Mandatory knows beforehand, when he passes a particular law, when he takes a particular administrative decision, or formulates a particular policy, that that policy is not likely to be conducive to well-being and progress. That is one form in which the relevant *mala fides* could exist.

Another form in which it could exist, Mr. President, is that the Mandatory starts completely in good faith and genuinely on a certain policy, with a certain measure, or with a certain line of conduct, thinking that it will serve well-being and progress. And after the matter has proceeded for a certain time, then it becomes quite manifest that that particular measure does not serve well-being and progress—it has an opposite effect. Well, if it becomes so manifest to everybody concerned that the Court could possibly make a finding to that effect, then it must have become obvious to the Mandatory also. Then the Mandatory's persistence in that line of policy, or with that particular measure, after it became convinced of its ill effects, in itself would constitute bad faith.

That, Mr. President, is the background of principle against which our contentions are to be weighed, and that is the background against which we propose to answer Sir Gerald Fitzmaurice's question No. 5.

That question states that—

> "Respondent claims for the Mandatory an absolute discretionary power to determine for itself by what methods Article 2 of the Mandate shall be implemented, subject only to good faith and correct intentions."

For the reasons, Mr. President, which I have indicated in this review, and in order to avoid any misunderstanding in that regard, we would respectfully prefer to re-word the claim which we make for the Mandatory as follows:

> "Respondent claims for the Mandatory a discretionary power to decide upon the measures and methods whereby it seeks to promote well-being and progress, as required by Article 2, paragraph 2. The discretion is subject to the provisions of Articles 3-5 of the Mandate. Decisions made in purported exercise of the discretion may be invalidated

(*a*) if they are not in truth directed at the purpose of promoting well-being and progress, or

(*b*) if they amount to an abuse of power in the sense of being so unreasonable that no reasonable authority could have arrived at them in the interests of promotion of well-being and progress.

In theory a finding under either (*a*) or (*b*) need not necessarily impute bad faith to the Mandatory, but in the practical circumstances it is not conceivable that such a finding could be arrived at save under circumstances where the Mandatory must have been *mala fide*, in the sense of realizing that the decision was not directed at the prescribed purpose."

That is, with respect, the way in which we should prefer to formulate it in order to avoid possible misunderstanding.

Now, Mr. President, with further reference to the question we say, for the reasons which we have already given, that it is on the basis of the wording of Article 22 of the Mandate, read in the light of the mandate instrument as a whole and of Article 2 of the Covenant, that Respondent claims for the Mandatory the discretionary power as just described. And it is also on the same basis that there is rendered applicable certain consequential principles of law and logic, applied in the law of civilized nations, indicating the ambit of possible violation as just described.

I now proceed then to question 6, which reads as follows:

"In so far as it is simply a matter of fact whether in any particular respect there has been a breach of Article 2 or not, do the *intentions* (good or bad) of the Mandatory have any relevance to the question of whether a given practice constitutes a breach of the Mandate; more especially, do the Mandatory's *good* intentions have any relevance, supposing it to be established *as a fact* that the practice is injurious to, or incompatible with, well-being and social progress?"

Mr. President, the last part of this question presupposes that it is established *as a fact*, by the application of some or other criterion, that a particular practice is injurious to, or incompatible with, well-being and social progress. This supposition, we submit, requires further consideration before we can properly answer the question. If the facts are such as to permit of genuine difference of opinion on the question whether this measure does or does not promote progress, or is or is not likely to promote progress; and if the Court and the Mandatory in fact take opposing views on that question, then our submission is, on the principles which I have submitted to the Court, that there would be no legal basis for interference. The fact that the Mandatory in the exercise of its discretionary function genuinely decided, on facts which could reasonably justify the decision, that the measure was likely to promote well-being and progress, and not to be injurious thereto or incompatible therewith, that fact would be decisive, and the different view taken by the Court would, with respect, be legally irrelevant.

But this, of course, is something different from suggesting that "good intentions" would in general be a relevant consideration. For the reasons which I have explained before, intentions are relevant only in so far as they bear on the question whether or not the prescribed objective is pursued. Intentions may be good in another sense; the Mandatory might be thinking it is doing a good thing, but knowing that it is doing a

thing outside the scope of its powers or pursuing a different objective. The good intentions—whether the intentions are good or bad in that sense—could not affect the question of legality at all; it could not be relevant.

On the other hand, Mr. President, if the Court should find that the practice is so obviously and clearly injurious that there cannot possibly be any scope for an honest and reasonable difference of opinion, then the Court would indeed, on the basis of this alternative contention, be entitled to conclude that Respondent has violated the Mandate. As we have indicated, this would almost inevitably mean that the Mandatory must have been *mala fide*, either as at the stage of deciding on the practice, or at the stage of continuing with it after the injurious effect became manifest. This in itself, therefore, excludes a possibility of "good intentions" relative to the prescribed objective, and "good intentions" in any other sense would be irrelevant. The mere fact that the Mandatory must almost inevitably, if the Court arrives at such an extreme finding, be aware of the illegality of its actions, in itself excludes any question of relevance of "good intentions".

Then we come to question No. 7, which reads as follows:

> "The Respondent has contended that, on the correct interpretation of Article 2, the Mandatory's obligation does not extend beyond endeavouring honestly and in good faith to carry out the Article according to its own judgment of what is required for the purpose. Admitting that the Mandatory must possess a certain latitude, can there be more than an initial presumption in its favour? Suppose a prima facie case were made out for the view that certain measures instituted by the Mandatory were in fact detrimental to well-being or social progress—would the Respondent still maintain that the Court was incompetent to assess or pronounce on the matter, except on the basis of the Mandatory's good or bad faith, and the nature of its purposes and intentions, or would the Respondent be prepared to agree, having regard to the language of Article 2, that it must in such an event rebut the allegations on their actual merits?" (**VIII**, p. 32.)

Mr. President, here again, for reasons which we have indicated, the rendering of Respondent's contention in the first sentence of this question may perhaps be said to elevate the subjective element higher than was intended in our contention, and I respectfully refer in this regard to the formulation which I gave in reply to question No. 5. But in regard to the actual question, we find that it refers to the possibility of a prima facie case "for the view that certain measures are in fact detrimental to well-being and social progress".

We respectfully submit, Mr. President, that the same distinction arises here as in our answer to the previous question, No. 6. If a prima facie case were made out for the view that the measures are so clearly and obviously detrimental to well-being and social progress that there could be no room for an honest and reasonable difference of opinion as regards the effect of the measures, Respondent would agree that it must then rebut the case on its merits. But "on its merits" then has a peculiar meaning. In rebutting that case on its merits it is not necessary for Respondent to persuade the Court to agree with its views on the merits of its particular action. It is not necessary for it to walk out in the end

and to say, well, the Court agrees entirely now; that is also what the Court would have decided if it had to take the decision in the first instance.

When weighing the matter in the end, namely the prima facie case together with the rebutting or answering material which the Respondent has put before the Court, the Court would then again have to apply the same basic legal criteria which I mentioned before. Only if the Court is then satisfied, having regard to all the evidence before it, that no reasonable mandatory could possibly have adopted the policies or practices in question, may the Court, with respect, adjudge that there has been a breach of the Mandate.

In the light of our contentions as to the legal situation we do not, with respect, perceive that there could in any other sense be a prima facie case on facts for us to meet.

We hope, Mr. President, that what we have stated will serve as a full answer to Sir Gerald Fitzmaurice's questions Nos. 5, 6 and 7, together with the introductory remarks bearing thereon, and clear up any misunderstanding that may have existed or may have arisen from our previous expositions. If any further lack of clarity should exist, and if we could assist in clearing it up, we should gladly do so.

Then, Mr. President, that leaves questions Nos. 8 to 10, but before we proceed to answer those there are one or two comments of the Applicants which have a bearing on the same subject-matter as questions Nos. 5 to 7, and I think it would be convenient first to revert very briefly to those.

On several occasions the Applicants professed surprise at the fact that we used the words "intentions, or purpose, or good faith" in one breath, so to speak, or in the Applicants' own words, "in juxtaposition". We can refer the Court to the following verbatim records on this point: on 28 April, at page 37, *supra*; on 13 May, at page 253, *supra*; on 18 May, at page 311, *supra*. On 28 April, at page 38, the Applicants insisted on a distinction, saying that—

> ". . . intention or purpose, on the one hand, is clearly a state of mind, a fact, whereas good faith, on the other hand, is a legal character or quality, attributable to a state of mind or intention in a given context".

Mr. President, we do not quarrel with that distinction. What causes us some surprise is the apparent failure on the part of the Applicants to grasp that we use these concepts "in juxtaposition" precisely because, "in a given context", good or bad faith, as the case might be, is "a legal character or a quality attributable" to Respondent's intentions or purposes. It is precisely for that reason that we use them in juxtaposition, where a particular intention would almost inevitably mean also bad faith; or a particular intention to the other effect, viz., directed at an authorized purpose, would mean good faith. Certain intentions or purposes would amount to bad faith in relation to the known objective or purpose which Respondent is obliged to pursue, and I need not spend any further time on that point.

This, Mr. President, really also disposes of the Applicants' suggestion that the Respondent uses the term "good or bad faith" in three different senses: firstly as synonymous with intentions or purposes, secondly in the sense of an authorized purpose, and thirdly in the sense of pursuing an

authorized or unauthorized purpose. We find that contention advanced in the verbatim record of 28 April, at pages 37 and 38, *supra*.

That, of course, is an entirely erroneous rendering, Mr. President. We simply say that in particular circumstances intent directed at an unauthorized purpose would amount to bad faith, and in other circumstances intent directed at an authorized purpose would amount to good faith.

All the other comments by the Applicants to the effect that we use "purpose" in different senses are, in our submission, as simply answerable as this particular one and I need not take up any more of the Court's time in following up all those.

What is more serious, Mr. President, is that apparently on the basis of such word games the Applicants proceeded to attribute to the Respondent a theory which we never propounded, and the Applicants then tried to turn that theory to their own advantage in the advancement of their case, as it is now put before the Court. They attributed to us a contention that the purpose of the Mandate should be ascertained by looking at Respondent's purposes or intentions. That is what is attributed to us. The Applicants say this is wrong only in so far as one should not look at Respondent's purposes or intentions, but one should look at the purposes or intentions of the competent organs of the organized international community. Therefore, Mr. President, by misrepresenting what our argument was the Applicants associate themselves with it and then on that basis they find some support for the argument which they advance in regard to a suggested competence on the part of the organs of the organized international community.

In the verbatim record of 28 April, at page 41, *supra*, we find the suggestion that according to Respondent's theory,

> "The objectives of the Mandate would become, in effect, whatever Respondent, in the exercise of its full power of discretion, defines them to be . . ."

That is what the Applicants attribute to us.

In the verbatim record of 18 May, at page 311, *supra*, the Applicants said:

> ". . . according to the conception which appears to be advanced and which underlies the Respondent's case, the objective of the Mandate is appraised and evaluated in light of the Respondent's intention or purpose or good faith . . .".

And they say in the same verbatim record, at page 322, that Respondent—

> ". . . construes the position which leads to a construction of Mandate purposes in terms of the Mandatory's purposes. The purposes of the Mandate become what the Mandatory says they are, subject only to the outrageous Mandatory test."

Needless to say, Mr. President, these and similar statements contain a wholly unfounded representation of our contention. We never said anything of that kind. The effect of what we said was that the purpose of the Mandate, the purpose for which discretionary powers were conferred upon Respondent, was to be found quite clearly in the Mandate itself and in the Covenant. The purpose is, of course, the promotion of the well-being and progress of the inhabitants of the Territory. No difficult questions of construction or of any kind enter into it: the prescribed

purpose stands there plain and alive for everyone to see—the purpose of promoting to the utmost the well-being and progress of the inhabitants. That is, of course, the purpose of the Mandate.

We said further that the enquiry was whether Respondent had, in fact, exercised its powers for that purpose, in other words, whether Respondent's purpose corresponded with the purpose stated in the Mandate. Now surely, Mr. President, nothing in that contention suggests that the Court should determine the purpose of the Mandate with reference to Respondent's purposes, or that the purpose of the Mandate could change in accordance with Respondent's decisions as to what the purpose ought to be.

It is small wonder, Mr. President, in our submission, that the Applicants should grope around for support for the rather amazing contention that somebody unnamed, at some stage or another, conferred a discretionary power on a mystic entity, the organized international community. We shall say more about that contention later, but for the moment I am merely pointing out that that contention certainly does not derive support from anything which has been said by us.

I can now revert to Judge Sir Gerald Fitzmaurice's questions 8 to 10. By way of introduction we can say that the questions relate to specific aspects of the wording of Article 2. We have already explained that our argument is based upon and emanates from that wording. In developing our argument we referred to a possible ambiguity arising from the wording alone. The wording, purely as a matter of language, could be read either as enjoining that a certain result must be reached, namely the result of promotion to the utmost, or it could be read as enjoining that a certain purpose or objective should be pursued, namely that of promotion to the utmost. Although the language of the Article may be capable of bearing either of these meanings, Mr. President, the latter meaning was, in our submission, the only practicable one, apart from being in accordance with a general trust concept, and being supported by the context of the instrument as a whole, by general principles of law and logic applying all over the civilized world, and by strong authority which we cited to the Court. All those led to the conclusion that what was meant here was not a judgment of the Mandatory's conduct by result, in order to determine its validity or invalidity, but a judgment of its conduct on the criterion of ascertaining whether the purpose or objective corresponds with the prescribed purpose or objective.

Now we find that questions 8 to 10 draw attention to further aspects of the wording of Article 2, aspects which in some instances also involve a possible ambiguity but which in other instances amount to possible indications of intent on questions which may be relevant to the issues as they originally came before the Court. We are therefore, with respect, grateful for the opportunity of replying to these questions because, in our submission, the factors to which they draw attention in many ways serve to support our basic argument, and to refute Applicants' case as based on the norm and the standards.

In question No. 8 we find the differences between the English and the French text of the Mandates referred to. In substance we find that the question has two aspects, namely first, what approach should in law be applied towards any differences which might exist in the two texts; and secondly, what is the result, in the case of the Mandate, of following that approach?

Now, Mr. President, the Applicants dealt with these questions on 13 May, at pages 264 and 265, *supra*, of that verbatim record, and again on 19 May, at pages 364 and 365; and they, if I have understood them correctly, contended that the English text alone is authentic and authoritative, but that in any event, there are no differences of substance or meaning between the two texts. For convenience we shall deal with the two aspects of the question separately.

To take the first aspect then—the general approach in a case where two texts exist:

It seems to be conceded by the Applicants and it seems to be established by the record, with respect Mr. President, that both texts were embodied in the League resolution of 17 December 1920 and both texts were in League practice treated as official. I can refer to the verbatim of 19 May, at page 364, *supra*, where the Applicants dealt with this matter. That would seem to be common cause. We are, therefore, not quite sure what the effect is of the Applicants' contention that the English text is "authentic" or "authoritative". It clearly cannot mean that no regard at all may be had to the French text. Indeed, Mr. President, the attitude of the Permanent Court was directly contrary to any such suggestion. In the *Mavrommatis* case (1924), *P.C.I.J. A/2*, at page 19, the Court stated as follows with regard to Article 11 of the Palestine Mandate:

> "The Court is of opinion that where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft was probably made in English."

It will be noted, Mr. President, that the Court attached relatively limited weight to the fact that the original draft was, as it was put, "probably made in English". We may refer also to comment on this point by Schwarzenberger, *International Law*, 3rd Edition, 1957, at pages 503-504.

The emphasis falls rather on the desirability of attempting first to reconcile any apparent inconsistencies, which is the normal approach of interpretation. This necessity of attempting to reconcile the two official versions of a treaty appears also from the case of the German Reparations under Article 260 of the Peace Treaty of Versailles (1924), 1 *Reports of International Arbitration Awards*, page 429 at page 439, where the following was said:

> "The situation is consequently as follows: there is a clear text—the English text—and a text which is not clear and the meaning of which must be ascertained by an interpretation—the French text. The two texts are authentic. Both have been submitted to the Parties for signature. In such a case, it does not seem permissible to ignore the English text and interpret the French text as if the English text does not exist. On the contrary, the clear text, the English text, furnished the better means for the interpretation of

the French text. The two texts are evidently intended to express the same ideas. If there are two equally clear texts, which do not agree, one could support the view that the text which carries less obligations for the party bound merits preference. But if one of the texts is clear and the other is not, the solution to be arrived at is that of interpreting the less clear text in the light of the other text and in conformity with the meaning resulting from the terms of the latter text."

We can refer also, Mr. President, to the Advisory Opinion on the *Competence of the International Labour Organisation* in the records of the Permanent Court Series B 2/3, page 35, and further to Lord McNair on The *Law of Treaties*, 1961, at pages 434-435. I may say, Mr. President, with respect, this is a difficulty which arises also in South African law, due to the existence of the two official languages and due to the promulgation of Statutes and other official measures in both languages. There is an Interpretation Act to the effect that where there is an irreconcilable conflict between Statutes, then preference is to be given to the one which was officially signed by the Governor-General, now by the State President. They are signed in one or the other language alternatively but that interpretation clause is treated by the courts as a measure of last resort only. It is only in the case of an irreconcilable conflict that it is applied. Before one reaches that stage, one sees first whether the two texts can be reconciled and then it does not matter whether it is the unsigned version or the signed version which assists in the reconciliation. Both are made at the same time, both are intended to be authentic and even if one does not speak of being authentic in a technical sense in a particular instance, one at least finds the same considerations as would apply to any *contemporanea expositio* or *subsecutus observatiae*. There is an authoritative attempt made, a detailed interpretation given in this translation of every aspect of the official treaty or the official instrument, given at the very same time when all concerned can see whether it is a proper one or not, a factor which applies with particular force in the case of the League practice where the League organs dealing with mandates had to deal with them from day to day and where the practice was of the nature that the French text was regarded as authoritative or the one to be used in respect of French territories and the English text in respect of the British Mandatory Territories.

So, Mr. President, whatever technical weight, whatever technical significance one attaches to authenticity or lack of authenticity, one has this factor: that the two texts at least form an aid in the interpretation, the one of the other. My submission is, therefore, that the correct approach would be to have regard to both texts and, in the event of differences, to reconcile them with a view to ascertaining the true intention of the parties.

And it remains to apply that approach to the provisions of the Mandate, particularly to the differences referred to in the question by the honourable Judge. The two differences as we understand them are the following. Firstly, the French version speaks of "increased well-being, etc.", or words having that meaning as against the English version of "to promote well-being", and so forth. Secondly, the French text contains an expression meaning "by all means in its power" or "by all available means" instead of the English "to the utmost".

Mr. President, in comparing the two texts one cannot treat these

two differences separately; they, after all, have a bearing upon one another, they run into each other as it were. It would seem that the French text is, in these particular respects, clearer and more explicit than the English text. The vital element which is emphasized by the French text is the subjective nature of the Mandatory's obligation. The expression "by all available means" or "by all the means in its power" clearly negates any suggestion that the Mandatory's endeavours or results should be measured by any absolute criterion or yardstick. When I say "the subjective nature of the Mandatory's obligation" perhaps that is not a very apt expression. I should perhaps say "the manner in which the performance of the Mandatory is to be seen in relation to its own peculiar circumstances".

That, Mr. President, is a reason why we say that the French text indicates there was no question of applying an absolute criterion on the basis of results, and saying "this is the optimum which could have been achieved by way of promotion and independently of your peculiar circumstances, independently of your particular situation, your resources, your means" and so forth, this is the stage of promotion to the utmost which is required of you by law. The French text makes it clear that in deciding whether the Mandatory has or has not promoted to the degree required of it, regard is to be had to the Mandatory's peculiar situation, its peculiar circumstances, the means at its disposal and the peculiar situation of the mandated Territory itself.

The English text, on the other hand, is in that particular respect, merely as a matter of language, perhaps ambiguous. I stress "merely as a matter of language" because it seems inconceivable to me that one could even, without the aid of the French text, have proceeded to a construction of the English text to the absolute effect that I have mentioned. The words "to the utmost" are even in their immediate context, but merely as a matter of language, capable of more than one meaning. They can either mean "to the utmost of the Mandatory's power or available means" or they can mean "to the utmost degree to which the well-being of the inhabitants could possibly be promoted regardless of the resources, power, available means or other special circumstances of the Mandatory. It is, in our submission, to say the least, unlikely that the words were intended to have this latter meaning. Not only is the first-mentioned meaning, namely "to the utmost of the Mandatory's power or available means", the more likely to have been intended, and therefore one which could have been arrived at in the context purely on the basis of the English text alone, Mr. President, but the correctness of that interpretation is, in our submission, confirmed by the French text.

On the basis of the legal approach which should be followed in cases of this kind with which I have dealt, we accordingly submit that the English text should be interpreted to have the same meaning as the French text; in other words, the Mandatory is obliged to promote well-being by "all the means in its power" or "at its disposal" or "by all available means".

That finishes my answer to question 8, Mr. President.

[Public hearing of 9 June 1965]

Mr. President and honourable Members, I come to question No. 9 of the series put by Sir Gerald Fitzmaurice on 7 May. It reads: "Suppose that certain measures instituted by the Mandatory have had a beneficial

effect but that others have not. In these circumstances, would it be correct to say that if on balance there has been a promotion of, or increase in, the sum total of well-being and social progress viewed as a whole, then the provisions of the Mandate have been complied with, or would it be correct to say that, irrespective of any total increase in well-being and even if there has been such an increase, any particular measures which are or prove to be detrimental constitute *pro tanto* a breach of the Mandate?"

Mr. President, the question postulates again the testing of the validity of measures, or of all measures constituting a policy, as the case might be, on the basis of the effect which the measures in fact have—whether or not they have, or have had, a beneficial effect.

In the light of the narrowing down of the Applicants' case in the manner which I attempted to describe yesterday, it follows that our answers to questions put on the basis of such a postulation are now really, to a large extent, academic in these proceedings. I may point out in passing that the Applicants made that position abundantly clear in respect of this very question; in giving their answer to this question they said the following in the verbatim record of 19 May, at page 363, *supra*:

> "... the Applicants have sought to make clear by the arguments now concluding the reasoning which underlies their distinction between the qualitative and quantitative aspects of Article 2, paragraph 2, obligations. If this case were brought on the theory, which it is not, that the Mandatory had built too few schools or hospitals in the Territory, then it might be appropriate to adopt a balancing approach to determine whether the duties with regard to the promotion of material well-being or other kinds of well-being were upheld. But this case is brought on the premise that Article 2 contains a qualitative element, violation of which is a breach of the Mandate."

As I say, with respect, that makes it clear that the case the Applicants bring is not one of judging by effect, and they make that clear in this passage, *inter alia*, with reference to this particular question. They make it clear with respect to their case as a whole in other passages, to which we shall later refer. But, nevertheless, for the same reasons as I indicated in regard to other questions yesterday, we propose to answer the question as best we can.

The question visualizes a situation in which it can be said, as a matter of fact, that certain measures instituted by the Mandatory have had a beneficial effect, while others have not, and the question then suggests two methods of determining whether there has been a breach of the Mandate in such circumstances.

I should like to deal first with the factual situation visualized, and particularly with the basis upon which it can be conceived that a particular measure has had a beneficial effect or not. In a territory such as South West Africa, which is inhabitated by different population groups standing at different stages of development, good government requires the adoption of policies which take due cognizance of these particular circumstances. Consequently, legislative and administrative measures may then have, as they in fact do, different effects upon the different groups, or even on different members within the group. That applies, Mr. President, whether one applies an approach of differentiation in the measures themselves or not. Even if one applies a non-differentiation

approach in the measures adopted—in the legislative and the administrative practical measures—one will find that the effects would be different for different inhabitants of South West Africa and, particularly, for different groups of the inhabitants of South West Africa, and, also, for individual persons within those groups. Let us take an example. Suppose one should have a law which permits anybody to prospect anywhere within the whole Territory. Such a measure, Mr. President, would, under present circumstances, mainly benefit the Europeans, and perhaps also some members of the coloured community who are interested in prospecting and who have reached a stage of development where they have technical appreciation of what is involved in those operations. One would, on the whole, then, have the situation that, whereas there would be large-scale prospecting within the Native areas by others from outside those Native areas, i.e., by Europeans and, perhaps, by some members of the Coloured community, one would have very little, if any, prospecting by Natives within what is now called the European area, or the White area. Under the system of differentiation which applies there is, however, a special protection of interests of the Natives as far as their own areas are concerned. Therefore, if one takes away that differentiation which applies—if one has a non-differential measure applying throughout the Territory—the operation would be on balance against the interests of the Native population and not in their favour.

If one were to take the same position in regard to, say, farmland, if the whole area—the whole Territory—were thrown open to farming enterprise, so as to allow the purchase of land by anybody anywhere within the Territory for farming purposes, the result would probably be that within a very short while the whole Okavango would become a European-farmed irrigation area, because it is admirably suited for that purpose. But, Mr. President, conversely, one would find that very few Natives would be able to avail themselves of the opportunity of buying land within what might now be called the White or the European area.

One finds, therefore, that an approach of non-differentiation in the measures could, equally within the approach of differentiation, have different results for different population groups and for members within those different population groups.

A law prescribing compulsory education for everybody would certainly, for reasons pertaining to stages of development, stages of interest taken in education, and so forth, result in many more prosecutions amongst the indigenous groups than amongst the European, the Coloured, or the Baster groups.

Now, let us take an example going the other way—an example of a differential law, or a differential body of laws—namely the example of the influx control laws in South West Africa, the laws controlling the influx of Natives—of members of the indigenous groups—into the cities. It is true that they operate generally in respect of the Native people, and not in respect of Europeans and Coloureds, but even amongst the Natives, Mr. President, one finds that the way in which the interests of various people—or the position of various people—may be affected is different. Some of the Natives are settled in Native urban areas and these laws also protect their interests against a flooding of the labour market, against the creation of overcrowded conditions, slum conditions, and associated evils of crime, disease, and so forth. Other Natives are outside the urban areas. Though they may want to enter, the facilities for them are re-

stricted, and the way in which their position is affected is, therefore, different. On the whole, however, the restrictions are beneficial even for them, because it obviates the situation arising where they would come to stay in a city where there may be no livelihood for them, or no housing, or neither of these two.

But no doubt, Mr. President, when one has control measures of this kind it must happen in some instances that there are hard-luck cases which are affected by them. That is why we say that it follows that any particular measure which requires to be scrutinized with a view to its validity, with its compliance or otherwise with Article 2 of the Mandate, might, although it may be intended to have, and in fact has an over-all beneficial effect, have in a particular respect, or with reference to particular persons, a negative, or even a contrary effect. That is the situation which one necessarily finds in a territory like South West Africa where the legislation largely has to take into account a balancing of opposing interests, claims and aspirations.

Now, Mr. President, assuming for purposes of argument that a legal criterion for validity of a particular measure can be the actual effect of that measure, as is postulated in this particular question, it seems to stand to reason that when applying that criterion regard cannot only be had to the negative effect which the particular measure has for some persons, while the positive or beneficial effect which it has for others, or in the over-all picture, is ignored. A weighing-up process is, therefore, probably necessary in respect of every single measure. If that weighing-up process has been undertaken in respect of a particular measure, and if the result should be that the measure is not conducive to progress but has an opposite effect, then, Mr. President, *still postulating that one tests on this* basis, I should find it very difficult to justify a proposition that one could, nevertheless, say that such a measure is in conformity with Article 2 because over-all there has been a promotion of a total amount of well-being and progress. That seems to be one of the incidents of the question. But I say that is a situation which arises if one approaches the matter on this basis of testing according to effect, and if one can find that one measure can be isolated from the whole, and having been weighed as to its possible beneficial, its various, effects in different ways, one then comes to the conclusion that there is nothing to be said for it, i.e., that it is detrimental and not beneficial. It is only on that basis that I say this.

Immediately I have to add that a very important attendant factor arises, and that is that a particular measure in itself may, if viewed in isolation, appear to have no beneficial effect but only a negative or a detrimental effect. But still, it may be unsound to condemn that measure by itself, for the simple reason that it may form a necessary part of a total complex of measures, governing the life of the inhabitants of the Territory, which total complex may have an over-all beneficial effect as compared with the only available alternatives. So that is also a factor always to be borne in mind if one is to test in accordance with effect. One may have to see whether that particular measure for which, if taken in isolation, it might seem that nothing can be said, does not play an important role of linking, a necessary link in the chain of a total complex of legislation which, on the whole, has a beneficial effect.

The field of inquiry would, for purposes of such testing, naturally be a very wide and a complex one, but it seems that it would be one that would necessarily have to be covered on the postulation of testing

according to effect. The very wide ambit of the inquiry which would have to be undertaken by the Court is further demonstrated by the answer which we shall give to Judge Sir Gerald Fitzmaurice's question No. 10, which deals, amongst others, with the power which the Respondent possesses of administering the Territory as an integral portion of South Africa, and of applying the laws of South Africa to the Territory.

It becomes possible, Mr. President, that in the complex of legislative measures which apply to South Africa and the Territory viewed together, the Territory being governed as an integral portion of South Africa—in that whole complex—a particular measure might form a necessary and an interlocking part of the whole. That particular measure might possibly have adverse effects in South West Africa, but it might appear that it could not be severed from the complex which, as a whole, has a beneficial effect for the Territory.

Those are some of the problems which arise when one postulates a test of validity according to result. In view of these considerations it would, in our respectful submission, seem impossible, even on the basis of an effects test, to find that any particular measure constitutes a violation of Article 2 without embarking on an inquiry into the whole complex of laws which are applicable in South West Africa, having regard, further, to the fact that South West Africa is a territory administered as an integral portion of South Africa. The object of that inquiry would be to determine whether the measure, having regard to its part in the whole, has a beneficial effect or not.

This, Mr. President, would in itself seem to be an enormous and an almost impossible task for any court of law to embark upon, particularly when it is borne in mind that that difficulty is complicated and increased by a further factor. Even if it were possible to separate the good from the bad on the basis of the effects which different measures have, or the different effects which the same measure may have, the question arises, how does a court weigh the good against the bad, in an exact manner, in order to determine where the balance lies? What weight is to be given to the effect which the different measures have, or to the different effects which a particular measure may have, in attempting to determine whether on balance there has, in fact and in effect, been a promotion of, or an increase in, well-being and social progress?

The mere posing of these difficulties, Mr. President, as I have stated them thus far on the basis of the postulate that one tests according to effect, demonstrates, in our submission, or goes to support, our contention that a testing on the basis of effect could not have been intended; that apart from our main contention which is also considerably supported by these considerations, viz., that the Court was not intended to adjudicate upon such questions under Article 2 at all. These considerations afford support also for our alternative contention as to the more limited basis upon which a court can test in accordance with what I might call the test of purpose, in the sense which I explained yesterday.

There is in regard to a test on the basis of purpose also a balancing process, a similar balancing process to be taken into account by a court, and then it becomes a feasible proposition. The balancing process is one which is, in the first instance, to be applied by the administering authority, the mandatory: it seems obvious that that is part of its duty. It is, indeed, necessary and essential for it to take those balancing factors into account in the measures which it provides.

Therefore, Mr. President, if a court tests on the basis whether a particular measure could have been decided upon by a reasonable mandatory, i.e., whether it could conceivably have been decided upon by that mandatory as one which was likely to promote well-being or progress, then naturally the same basis of approach is adopted by the court. If a court then, on the basis of this approach, condemns a measure, or decides that it cannot condemn a measure, the court would do so after taking that balancing process into account. But then one will find that only if the result is an extreme or an obvious one, unfavourable to the mandatory, then the court will interfere—if it is extreme in the sense that the court comes to the conclusion that no reasonable mandatory honestly applying its mind to the situation could have come to the conclusion that this measure could possibly be conducive to well-being and progress. If, however, the court finds that the matter, having regard to the need for balancing, falls in a category where there could be difference of opinion, where it comes into a sphere in which exact balancing becomes necessary in order to see where the balance lies, then it becomes obvious that that is a case where the court in law cannot interfere, and the exact balancing process is rendered unnecessary for the court. I may refer again to the wording of one of the authorities on French law to which we referred yesterday, which is so very apt in its description of this type of situation. It appears in Hamson's *Executive Discretion and Judicial Control*, at page 197. There he said that if the administration has acted on a ground—

> "... which might on *some rational view* possibly be supposed to be a justification for the exercise, the court will not further inquire into the matter: ...".

Applying the logic of that, Mr. President, if the court then finds that on applying the balancing process, it becomes a rather neat matter of deciding where the balance lies, then the court will decide: "Well, there is no further function for me; that is the function of the mandatory; the mandatory had to decide that and there was a reasonable basis upon which the mandatory could have decided in the way that it did, whether I agree with it or not." Therefore, that is the difference in principle, in its practical aspects and in its technical aspects, between testing on the basis of effect and testing on the basis of purpose.

If the court were to attempt to weigh in the exact manner which would be required if it were to test on the basis of effect, then it would run counter to the proposition which I read to the Court earlier from the Judgment of the Permanent Court in the *Lighthouses* case (it is mentioned in our Counter-Memorial, **II**, at p. 387), where the matter is so aptly expressed. That function, Mr. President, of weighing exactly and of then deciding where the balance lies, of according exact weight to the counterparts of a situation, would seem to accord entirely with what is said in the *Lighthouses* case. I quote from the said passage in the Counter-Memorial, **II**, at page 387:

> "It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is *alone qualified* to undertake." (Italics added.)

Mr. President, that is readily to be understood with reference to the practical situation with which one has to deal. One may have to weigh in

the realm of education the factor of children being separated in schools according to membership of a race or an ethnic group. One may have to balance that factor against the factor of the total number that may become educated, or of the standards to which they could become educated, by one system as opposed to the other.

The mandatory's appreciation of the situation may be, or the facts of the situation, the demonstrable facts, may be, that by applying a system of separation in education one can educate more efficiently and to a higher standard a much larger number of Native children than would be possible in an integrated school system. That is then a benefit which would accrue from applying a differential system, whereas, on the other hand, the idea may be that one ought not to separate at all; that in itself is a factor to which weight is to be given. But how does one weigh those two factors, the one against the other? Is not that a matter for appreciation of the political implications, political in a broad sense, by the governing authority? And how does the court substitute its judgment as a matter of law for that of the governing authority by saying: "I put more weight on this factor than the governing authority does. I think the factor of separation in itself must weigh more heavily than the factor of educating more children and to a higher degree"?

Let us take another example from those quoted by my learned friend —the mining legislation in South West Africa. Here we have a weighing process, Mr. President, on the one hand of the fact that possibly a few Natives may be affected, may be deprived of an opportunity of employment in certain positions in mines: how many is a matter for evidence. Let us assume it can be shown that the number is relatively small because that is in accordance with the facts as we shall present them to the Court. Mr. President, then we have to weigh on the other side, or the Respondent Government finds it has to weigh on the other hand, certain political and sociological considerations which could arise if that type of legislation was not applied in the mining sphere—difficulties which could arise in the labour force in the mines—difficulties which could affect the whole possibility of having mines running effectively at all. Those are factors of a political nature—again in a broad sense of the word "political"—which have to be taken into account and have to be weighed. Again, Mr. President, how does the Court say "I weigh that in a different way from that in which the Government has done"?

I have taken these examples to show the criteria to be considered, and perhaps they have gone somewhat beyond answering this particular question, but I think it has been important to get to the real basis—the real foundations—as to why we say that not only in a legal sense, but also practical considerations demonstrate that it would not be a feasible proposition and it would not be correct in law, for a court to attempt to test on the basis of effects, the test could at most be a test on the basis of purpose. If one tests on the basis of purpose then this exact balancing becomes unnecessary for the reasons I have indicated. Then a Court need merely go so far as to say whether a mandatory could or could not reasonably have come to its conclusions. If the result is an extreme one then obviously no exact balancing is required to find that. As soon as exact balancing is required, then the Court finds that its function ceases.

That concludes our answer then to question No. 9 and it brings us to question No. 10.

This question concerns the relationship between the first and the

second sub-paragraphs of Article 2 of the Mandate. After referring to the respective provisions of the two sub-paragraphs, the honourable Judge Sir Gerald Fitzmaurice stated "neither sub-paragraph is specifically subordinated to the other", and he then raised the following questions:

> "Should either nevertheless be read as being so subordinated, and if so in what sense and to what extent? If not, and if the two clauses are independent of one another, what is the resulting legal situation?" (**VIII**, Minutes, p. 34.)

Now, Mr. President, as we conceive the position, it is easy to state initially that the two sub-paragraphs are not independent of one another. In terms of sub-paragraph (1) the Mandatory is vested with "... full power of administration and legislation over the Territory ... as an integral portion of the Union of South Africa" and it is empowered "... to apply the laws of the Union of South Africa to the territory subject to such local modifications as the circumstances may require". (**I**, p. 201.)

Sub-paragraph (2), on the other hand, states an obligation, it states the purpose, or the objective, which the Mandatory is obliged to pursue in the exercise of its powers. Sub-paragraph (2), therefore, serves to qualify the powers mentioned in sub-paragraph (1) by reference to a specific purpose which the Mandatory is obliged to pursue, namely that of promoting the well-being and the progress of the inhabitants. In a sense sub-paragraph (1) can, therefore, be said to be subordinate to sub-paragraph (2), but we would prefer to say that it is qualified by sub-paragraph (2) in the sense which I have stated. The word "subordinate" may, perhaps, just as a matter of shade of meaning, create a wrong impression.

In the event of an absolute clash between the power granted in sub-paragraph (1) and the obligation stated in sub-paragraph (2) I suppose the power would have to yield to the obligation—there is that qualifying relationship between the two—but the possible area of clash would appear to be, in our submission, relatively small.

The resulting legal situation, is therefore, that while Respondent is entitled to administer South West Africa as an integral portion of its own territory, and while it may apply its own laws subject to such local modifications as circumstances may require, it is obliged to exercise these powers with a view to achieving the prescribed purpose or objective.

Mr. President, in saying that we agree that in this sense sub-paragraph (1) can be said to be subordinate to sub-paragraph (2), that we prefer to say that it is qualified by sub-paragraph (2), we agree substantially with a conclusion also stated by my learned friend in argument on behalf of the Applicants. He dealt with the matter in the verbatim record of 13 May, pages 265-268, *supra*, and 14 May, pages 268-278, *supra*. He used a number of arguments in order to bring him to this conclusion and when I say that we, to this extent, agree with the conclusion, it does not necessarily mean that we agree with all or any of those arguments. There are some with which we do not agree but it is unnecessary to pursue that question, since the matter really affects only the conclusion at which we arrive.

The obligation of promotion to the utmost, and of having regard all the time to that objective and purpose, is to be observed both in framing separate laws for the Territory—laws, policies and other measures—and in extending the Respondent's own laws to the Territory. But, Mr.

President, there are very important practical aspects bearing upon this obligation as a result of the provisions of sub-paragraph (1) of Article 2.

Firstly, there is the element of discretion in the sense already described, that is, with regard to the particular methods to be adopted in promoting well-being and progress. I need not deal with the significance of that again, I have stressed that before.

Secondly, and this I want to stress on this occasion, there are the implications flowing from the provision and the contemplation that Respondent could and would administer South West Africa as an integral portion of its own territory. Not only does Article 2 of the Mandate say that Respondent may do so, but Article 22 of the Covenant, the Court will recall, in paragraph (6) stated explicitly that the Territory could "*best*" be so administered. That was the formulation used in the Covenant and that is what is referred back to in Article 2 (1). In other words, the intent and the contemplation of the founders of the mandates system themselves were that the Territory could best be administered as an integral portion of the then Union of South Africa.

Doing so would necessarily involve certain inherent advantages for the Territory, it might also necessarily involve certain inherent disadvantages for the Territory as compared with what its situation might have been if it had not to be treated or administered as an integral portion of South Africa. The weighing up of the pros and cons in that regard was already done by the founding fathers when coming to this conclusion that the Territory could best be administered as an integral portion of South Africa.

Treating the Territory as an integral portion of South Africa visualizes a situation in which a whole body of laws, not *the* whole but a whole body of laws, of South Africa would be operative in the Territory and it would be for the Respondent to decide to what extent circumstances in South West Africa required local modification of such laws. It may well be that in extending the over-all benefits of the integrated system to South West Africa certain aspects of, or provisions in the system could be less beneficial in themselves than might have been the position if South West Africa were not, for administrative purposes, integrated with South Africa, but it may also be that those provisions could not practicably be modified in the framework of the integrated system without detrimentally affecting the whole system. One can surely then not look in isolation at a particular measure or a provision which in itself has a less beneficial effect than could possibly have been achieved for South West Africa outside of the association with South Africa and then say that Respondent has failed in its duty merely because, in that respect, South West Africa is now less well off that it would have been outside the association.

It is again a matter, Mr. President, of a taking of the rough with the smooth. A balancing process was necessary there too and, as I said, that balancing process was already completed, was already taken into account, by the founding fathers. So to require the Respondent to eliminate such a particular measure could sometimes mean that the Respondent should be precluded from treating the Territory as an integrated portion of South Africa, in whole or in particular respects, which would have the result that the progress and the well-being of the inhabitants could not on the whole be promoted as it was contemplated that it should be done or, on the other hand, it could mean that the Respondent should, in order to

continue to administer the Territory as an integral portion of South Africa, adapt its laws for application in South Africa itself—one would then have a case of the tail wagging the dog.

If there should be a requirement, as I have said, that a particular measure should be eliminated from the whole complex merely because that measure, when viewed in isolation, might be less advantageous for South West Africa than the position would have been if South West Africa had not been in this association, whereas that measure might well be a necessary link in the whole chain and it might be something which follows essentially from the fact that South Africa is applying its approach and its body of laws, with the necessary modifications, to South West Africa—if that requirement is to be put, Mr. President, then as I have said, one might find one of these two situations: either not treating the Territory as an integrated portion which is contrary to the original contemplation and which would not produce the necessary measure of progress, or otherwise South Africa might be forced to do something in the adjustment of its own laws in order to comply with what it thinks it ought to do in South West Africa.

That this latter position could arise, Mr. President, is well illustrated by the very attitude which the Applicants now adopt in this case. They rely on a norm, or standards, said to have been created by the organized international community and with which, upon the Applicants' argument, the Respondent would be obliged to comply in South West Africa. Respondent must then either apply the norm in South West Africa as well as in South Africa in order to be able to continue to administer the Territory as an integral part of South Africa, or it must cease to administer the Territory as an integral part of South Africa if this approach were to be followed.

This in itself, in our submission, shows how completely untenable it is to suggest that the Mandatory can be ordered by the organized international community to comply with general norms or standards said to be applicable to all mandated territories without variation and without regard to the peculiar circumstances either of the particular territory or of the mandatory itself.

It would be contrary, Mr. President, to the statement by M. Orts at a relatively early stage in the application and operation of the mandates system, which statement as it appears in the Counter-Memorial, reads—

> "The development of primitive peoples could be carried on by different means, and these means would be such as were proper to the native genius, traditions, and the political and philosophical conceptions of each mandatory State... The mandatory States would fail in their task if a system and method foreign to their mentality were imposed upon them." (**II**, p. 388.)

That endorses, Mr. President, the significance of the fact that there is this relationship between sub-paragraph 1 and sub-paragraph 2 of Article 2 of the Mandate; that in adjudging whether the mandatory has complied with its duty of pursuing the prescribed objective, one is not to lose sight of the peculiar implications which arise from the contemplation that that territory may be administered, and was contemplated that it could best be administered, as an integral portion of the Union of South Africa.

That, Mr. President, completes our reply to the questions put by the honourable Judge Sir Gerald Fitzmaurice, subject to any further elucidation we may be able to give, if that should be required, and we would naturally do that with pleasure. That also concludes, subject to the same reservation, our further survey in explanation of our contention as to the true basis of justiciability of Article 2 (2) of the Mandate, if at all, and we now proceed to a further consideration of the case of the Applicants—a more detailed consideration of the case of the Applicants as now brought by them and based upon their suggested norm and/or standards.

First, it is necessary to devote some attention to an exact analysis of what that case is and how it has developed up to the present. That part of the argument, if it pleases you, Mr. President, will be addressed to the Court by my learned friend Mr. Grosskopf.

18. REJOINDER OF MR. GROSSKOPF

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 9 AND 10 JUNE 1965

Now, Mr. President, as my learned senior said, I shall commence the argument dealing with the Applicants' case.

As a convenient point of departure, reference may be made to their Submissions 3 and 4 as they are now formulated. In these submissions the Applicants now ask the Court to adjudge and declare that:

> "3. 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;
>
> 4. 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;". (*Supra*, p. 374.)

On the same day, at page 375 of the verbatim record, Applicants' Agent presented what he called "formal interpretations and explanatory comments with respect to the foregoing submissions". These formal interpretations read as follows, as they are set out at pages 375 and 376:

> "1. The formulation of Submission 4 is not intended in any manner to suggest an alternative basis upon which the Applicants make or rest their case, other than the basis upon which the Applicants present in Submission No. 3 itself ... the distinction between Submissions 3 and 4 being verbal only, ...
>
> 2. The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, in the sense described and defined in the Reply, **IV**, at page 493, and solely and exclusively as there described and defined ..."

The case now brought against Respondent is, consequently, only that of an alleged contravention of this norm and/or standards. Although in their current usage Applicants mention only one "norm", in the singular, otherwise than in the pleadings where they referred to "norms", in the plural, they still retain this reference to "standards" in the plural. However, Mr. President, reference to the Oral Proceedings herein clears

up any ambiguity which might otherwise have existed. Thus, Applicants explained in the verbatim record of 13 May, at page 259, *supra*, that they rely on—"... an international legal norm of the same scope and content as the standards in question...", and they said, on the same day, at page 261:

> "When the Applicants speak of standards governing Article 2 they refer to rules of conduct having a content similar to, but not an equivalent degree of legal authoritativeness of a legal norm."

The same point is made later, on the same page, where they also emphasize that the content of the standards is exactly the same as that of the norm.

So, Mr. President, in effect, the Applicants have now rendered it quite clear: firstly, that both their Submissions 3 and 4 are based upon the existence of a norm and/or standards; secondly, that the content of the norm and standards is identical; but that, thirdly, the norm and the standards differ as regards legal effect.

It will consequently be convenient to consider first the matter which is common ground between the norm and the standards—that is, the alleged content of the rule of conduct which Respondent is alleged to have violated. Thereafter, in the later part of the argument, we shall deal with the manner in which rules of conduct can in law become legally binding upon Respondent, and the manner in which such rules can become justiciable in these proceedings.

Finally, Mr. President, as the final part of our argument, which will be an enquiry which will encompass certain factual elements as well, we shall consider whether any rule of conduct of the nature relied upon by Applicants can be said to have arisen, either as binding upon Respondent, or at all, or as being justiciable in these proceedings.

That brings me, Mr. President, to the first leg of the argument, and that is the contents of the norm and standards, and, as I have noted, they are said to have an identical content. In determining what this content is, the authoritative statement is, of course, that which one finds in the Applicants' submissions. In this regard, reference may be made to Submission 3 as it is now formulated and which objects to Respondent's policy on the ground that the policy "... has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory". I emphasize, Mr. President, the word "distinguished".

The norm and/or standards on which this submission is based must consequently be one which prohibits, at least, distinctions as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory.

That, then, as regards Submission 3, and, of course, any norm, the content of any norm which relates to Submission 3, must be the same as that which relates to Submission 4, because we are told they are both based upon the same norm entirely—the same norm and/or standards.

In Submission 4 they are referred to merely as "applicable international standards or international legal norm", which, in terms of Applicants' formal interpretation, to which I referred earlier, are described and defined in the Reply, IV, at page 493. There the norm is referred to as one of "non-discrimination or non-separation", terms which are defined

on the same page. The definition has been quoted to the Court before, but for completeness I may repeat it just once again:

> "... the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense: stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential: stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of the laws to individual persons as such". (**IV**, p. 493.)

Now, Mr. President, in view of the decisive importance which the norm and/or the standards have now attained as the basis of the Applicants' whole case regarding alleged violation of Article 2 (2), the definitions referred to above, in our submission, merit close scrutiny.

Starting with the definition embodied in Submission 3, one notes that the alleged incompatibility between Respondent's policies and the norm and/or standards would appear to result from three elements in Respondent's policies, namely:

(a) The fact that such policies distinguish between different persons. That is the first element.

(b) The fact that such distinctions relate to the establishment of rights and duties of such persons.

(c) The fact that such distinctions are based upon race, colour, national or tribal origin.

Those are the three elements which one finds in the submission in question.

Now, the feature to which we would draw particular attention at this stage is that the first and basic element in Applicants' contention, as here analysed, is that it relates to the act of distinguishing—that is the word used in the submission—that is, the act of treating people differently, or of differentiating between them. And the only respects in which this act of distinguishing is said to be wrong, are that this act relates to the establishment of rights and duties, and that it is based upon race, colour, national or tribal origin. In particular, Mr. President, the contention, thus derived from the submission, does not involve that the act of distinguishing possesses *any qualitative features*.

In other words, it does not involve that the act of distinguishing was well-intentioned or ill-intentioned, that it was realistic or unrealistic, that it was well-considered or arbitrary, that it was advantageous or disadvantageous, or that it was good or bad. It would follow that the norm and the standards themselves must, then, also prohibit the act of distinguishing in the respects in question whether or not any of these qualitative elements are present.

Mr. President, this feature of the norm and/or the standards as we read them namely that they allegedly prohibit absolutely the act of distinguishing in the respects in question, appears also from the definition at page 493 of the Reply, **IV**, which definition, as I have noted, is incorporated by reference in Submission No. 4. This definition, when read in its ordinary sense, would appear to prohibit firstly, the allotment of status, rights, duties, privileges or burdens and, as a second element, on the basis of membership in a group, class or race. Those are the only two

elements contained in the definition reading it in its ordinary sense.

Once again, therefore, Mr. President, the basis of the norm and also, of course, of the standards, consists in the alleged prohibition on the differential allotment of status, rights, duties, privileges or burdens where the difference is based not upon individual qualities, but upon membership in a group. And, once again, Mr. President, there is no suggestion that the norm prohibits this differential allotment only where the differentiation is inspired by improper motives, or is in its nature unfair, or oppressive, or gives rise to undesirable results, or has any other qualitative aspect of that sort.

So, by reason of the foregoing, this definition having already been found or been inserted in the Reply, we understood the so-called "norm of non-discrimination or non-separation" as there defined as allegedly prohibiting any form of differential allotment of rights, duties, burdens, etc., on the basis of group membership. As a convenient term, we sometimes refer to it as a norm of non-differentiation—a term which, in our view and submission, is not only less clumsy than the one coined by Applicants, but which more appropriately conveys the essential meaning of the norm as it is defined. And we pointed out in the written pleadings, and also herein that no such absolute norm could possibly exist.

As we shall show, Mr. President, Applicants now indignantly deny that their norm does prohibit differentiation as such. However, for a proper understanding of Applicants' attitude in this connection, it will be necessary first to have brief regard to the practical reasons which apparently induced Applicants to introduce their norm theory at the Reply stage and which, in our submission, still provide the key also to the subsequent changes in their case which have now finally culminated in the situation with which we are presented.

It will be recalled, Mr. President, that Applicants' case as initially presented was, largely, a factual one. It dealt with, and I quote from the Memorials at I, page 161, "apartheid . . . as a fact and not as a word, as a practice and not as an abstraction . . . as it actually is and as it actually has been in the life of the people of the Territory . . .". This is a quotation, as I said, at page 161 of the Memorials, in fact, it comes from paragraph 189, which was originally incorporated in Applicants' Submission No. 3. And, in an earlier reference in the Memorials, Applicants said:

> "Since this section of the Memorial is concerned with a record of fact, it deals with *apartheid* as a fact, not as a word. 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 and not as a theoretical abstraction. A sober and objective appraisal of the factual record, as hereinafter detailed, compels the conclusion that *apartheid*, as actually practised in South West Africa, is a deliberate and systematic process by which the Mandatory excludes the 'Natives' of the Territory from any significant participation in the life of the Territory except insofar as the Mandatory finds it necessary to use the 'Natives' as an indispensable source of common labour or menial service." (**I**, pp. 108-109.)

That is the end of the quotation, and the aspects upon which I wish to place particular emphasis are that both these references refer to the factual element, the factual condemnation which the Applicants were

asking the Court to make. And these passages, being of an introductory nature in the Memorials, set the note for the whole general theme which one found in the Memorials themselves and which was to the effect that apartheid, as a fact, was a deliberately oppressive policy designed to benefit the European members of the population at the expense of the Natives. I may refer the Court to passages where we deal with this aspect. They are in the Counter-Memorial, **II,** pages 392 to 395, the Rejoinder, **V,** pages 100 to 107 and the verbatim record of 22 April, at **VIII,** pages 640 to 652.

In answer to these factual averments, we set out, in the Counter-Memorial, full details of the facts and circumstances in South West Africa, and, Mr. President, since then, in our submission, Applicants have been attempting to escape the factual enquiry which they themselves set in train in the Memorials.

Now, in the Reply, various methods were employed in attempting to prevent a full examination of the facts by the Court. The first attempt, the first method, was the introduction of the norm of non-discrimination or non-separation. As we have shown, in the verbatim record of 23 April, **VIII,** at pages 655 to 661, Applicants relied in the Memorials upon norms said to be derived from the Charter, but that those norms really only represented aims to be pursued by Respondent, and consequently did not materially assist Applicants. This new norm of non-discrimination or non-separation introduced in the Reply, was clearly designed to eliminate this weakness. It was designed to establish an objective criterion against which certain admitted features of Respondent's policies could be measured and found wanting, without the necessity of any factual enquiry. And, Mr. President, since in Applicants' apparent strategy the main function of the norm was to eliminate any enquiry into the facts, it follows that also as regards the source and origin of the norm a factual enquiry had to be rendered unnecessary, otherwise it would not have served its purpose. For a proper understanding of subsequent changes in Applicants' case, these aspects, in our submission, have to be kept in mind, since they, as we submit, clearly provide the key to the whole situation. The norm was designed for the purpose of rendering unnecessary any factual enquiry, and consequently Applicants were constrained to define the norm in such a manner as to prohibit absolutely certain policies which were admitted. And, also, it was necessary to exclude circumstances in South West Africa from the material from which Applicants sought to derive their norm.

But, Mr. President, in addition to introducing this norm of non-discrimination and non-separation at the Reply stage, Applicants retained their charges of deliberate oppression. In this regard, however, they also attempted to eliminate the need for any factual enquiry. Now, in our submission, it must be rare in the history of the law that a party which set out to urge the Court to find that conduct was deliberately unlawful, at the same time exerted all its efforts to prevent any reference to the facts. Nevertheless that is what Applicants, in our submission, attempted, and the method employed by them was the so-called "... universally accepted axiom that, in the absence of evidence to the contrary, the predictable consequences of conduct are presumed to be intended". (**IV,** p. 257.)

This axiom, the Court will recall, so it was contended, would enable the Court to determine that Respondent deliberately oppressed the Natives,

but without giving the Court the irksome task to have regard to the facts presented by Respondent, which facts show the charge to be unfounded. That was the purpose for which this axiom was advanced. In some way the contention seemed to be that, by applying this axiom, the Court could have regard only to the facts set out or alleged by Applicants and admitted by Respondent without having regard at all to any further facts or explanations or anything of that sort.

Now, Applicants persisted in invoking this so-called principle in the Oral Proceedings, which was rather strange, since at this stage they denied that their case involved any allegation of intentional or deliberate oppression at all, so that this axiom, which was designed as a measure of facilitating proof, was still relied upon at a stage when the fact which it was said to prove was no longer alleged.

We dealt with this matter, and showed that the axiom could never serve to exclude evidence which is relevant to the question of intent, where intent is in law a necessary element in a given case, and we did that in the verbatim record of 22 April, at **VIII**, pages 640-652. Now, Mr. President, it remains only to note one last reference to this axiom, and that is in the verbatim of 12 May, at page 239, *supra*, where the Applicants said:

> "It might be desirable at this point to say that the Applicants have submitted, and will continue to submit, that Respondent's subjective intent, motive, or purpose, with regard to its performance of its obligations under the Mandate, are wholly irrelevant factors, particularly so with regard to Article 2 (2), inasmuch as a *per se* violation of the international legal norm and applicable international standards is contended for by the Applicants."

And they then continued:

> "With respect to the question of design or plan for use of military installations, or of methods of association between the Territory and the Respondent, here, as in the case of the sacred trust itself, in Article 2, intention, purpose, or plan, is to be inferred on a basis of the Respondent's conduct."

So, Mr. President, we have these two statements; firstly, that the intent, motive, or purpose are wholly irrelevant factors, and, secondly, that they are to be inferred on a basis of the Respondent's conduct. Applicants do not explain why facts which are "wholly irrelevant" are to be inferred on any basis at all, or why the Court should consider at all whether such facts can be inferred. However, in the light of the changes in the issues, and of the full treatment of this matter by us in the pleadings and in these Oral Proceedings, it will not, in our submission, be necessary to say any more about this at all. The only reason for referring to it in the first place was to show the various methods by which Applicants, starting at the reply stage, have sought to eliminate the need for any factual enquiry. Now, at this stage, apparently realizing that their universally accepted axiom cannot assist them for that purpose—for the purpose of eliminating a factual enquiry—they have entirely abandoned their previous effort to persuade the Court to find that Respondent's conduct was intentionally oppressive. The quotation which I have just read is apparently to be explained as a failure to keep up with the changes in argument.

Mr. President, a particular facet of evidence which the Applicants

expressly sought to exclude was that relating to comparisons between circumstances in South West Africa and those in other territories, and in particular with the circumstances in the Applicant States themselves. It may be convenient at this stage to clear up an apparent misunderstanding between the Parties. On 3 May 1965 we said:

> "It is perfectly obvious that the Applicants cannot face up to this factual enquiry, they cannot face up to a comparison of standards of well-being and progress in their own countries and those in South West Africa. They had to find a formula to rule out the whole proposal and, in doing so, they emphasized the fundamental weakness of their case in law, in fact, and in morals." (*Supra*, p. 108.)

This comment, the Court will recall, was made when we were dealing with the application for an inspection, and the "formula" referred to in the quotation related to the attitude adopted by the Applicants as regards that application, that is, the application for an inspection.

In reaction to this statement which I have quoted, on 4 May, at pages 132-133, *supra*, of the verbatim record, the Applicants brought certain aspects of the pleadings to the Court's attention which showed that even at the Reply stage the Applicants attempted to exclude any comparison between circumstances and standards in South West Africa and those in the Applicant countries and other territories in Africa.

Of course, Mr. President, we did not mean to suggest, when we were dealing with the inspection proposal, that it was only then that the Applicants had to adapt their case in order to exclude comparisons with their own States. If they understood us in that sense, then we must say that that was not intended at all. We did not suggest that it was only when the inspection proposal was raised that they attempted to eliminate any comparison between the various territories. In fact we concede readily that they were quite correct in pointing out that this had already commenced in the Reply, a feature to which we drew pertinent attention in the Rejoinder, **V**, at pages 115-116.

Another method which the Applicants also already introduced in their Reply and whereby they sought to prevent an independent appraisal of the facts by this Court, was to enhance the significance to be attached to reports and resolutions of the United Nations, its organs, and its agencies.

In the earlier pleadings, that is, in the Memorials and the Observations, the history of events in the United Nations and the various resolutions of its organs and agencies were adduced as proof of the Applicants' contention that there was a dispute between the Parties and that such a dispute could not be settled by negotiation. I may refer the Court to our treatment of this topic in the Rejoinder, **V**, pages 112-115.

In the Reply, however, Applicants sought to elevate the importance of these resolutions, although, I may add, not to the height to which they have done now. There they said:

> "Applicants respectfully submit that the reports and resolutions of the United Nations and its agencies and organs, in and through which Applicants have sought to settle their dispute with Respondent, are highly relevant to the Court's judicial function in adjudging the legality of Respondent's administration of the Territory, and are entitled to great weight and respect as authority thereon." (**IV**, p. 259.)

I shall deal later with the change in significance which has now in the

Reply stage been attributed to such reports and resolutions. At present we are concerned only to show that, already at the Reply stage, there was a very apparent desire to avoid any independent factual enquiry by this Court—a desire which also led to the changes in the content of the Applicants' alleged norm, which is really the topic directly in issue at the moment.

In the light of the above features in the Reply, to which I have just drawn attention, we said as follows in the Rejoinder, V, page 118:

> "To summarize, Applicants ask this Court to determine an issue of fact by—
>
> *(a)* ignoring all evidence tendered by Respondent in respect of the said issue;
>
> *(b)* giving consideration solely to the evidence tendered by Applicants; and
>
> *(c)* giving effect to the reports and resolutions of a political body which (apart from any other criticism) admittedly has not attempted or had an opportunity for a judicial enquiry into the facts.
>
> In short, Applicants ask this Court for a complete abdication of its judicial functions."

Mr. President, before the adjournment I noted briefly how the Applicants' charge, which in the Memorials was a factual one relating to alleged oppression, as from the Reply stage became in various ways changed, and I pointed out in particular that at that stage they introduced a norm with the object of avoiding a factual enquiry, that, in so far as they still relied on the allegations of oppression, they tried to establish them by applying the so-called universal axiom, and that they attached more significance to reports and resolutions of the United Nations organs and agencies than had been attached to them in their earlier pleadings. And I submitted that the purpose of all these changes was to eliminate the need for any factual enquiry, and, as a particular aspect thereof, to remove the necessity of the desirability of comparing standards in South West Africa with various other territories, and, in particular the Applicant States themselves. Just before the Court adjourned I quoted a certain passage from the Rejoinder in which we summarized these various aspects, and pointed out that the Applicants' purpose apparently was to ask this Court for complete abdication of its judicial functions.

Now, in reacting to this line of argument, the Applicants increased the efforts directed at avoiding a finding of fact by this Court and they did so particularly in the context of trying to eliminate the necessity or desirability of any comparison between circumstances in South West Africa and the Applicant States themselves. This issue, of course, achieved increased importance as a result of our inspection proposal which, as a part thereof, the Court will recall, involved a suggestion that also the territories of the Applicant States should be visited.

Now, right at the outset of the oral presentation, Applicants made it clear that they did not allege any improper or oppressive motives on the part of either Respondent or any of its officials, an attitude which they have since then often repeated. They have now sought to make it abundantly clear, they have said often and repeatedly and explicitly that they do no longer allege any improper motives on the part of any of Respondent's officials or of Respondent itself.

Also, Mr. President, they made it clear, in a lengthy piecemeal process which culminated in the amendment of these submissions and in the formal interpretation thereof, that they now rely only and solely on the norm and the standards and that these norm and standards possess an identical content; that they no longer rely on any standards or principles or theories outside or beyond this norm or standard of non-discrimination or non-separation, as they have called it, and in the manner in which they have defined it. For present purposes it is not necessary to dwell at length on each of the changes in the case—with each part of this lengthy process which finally culminated in the amendment and in the formal interpretation to which I have referred. Nevertheless, something requires to be said regarding the various submissions that have been advanced as to the content of the norm.

Now, Mr. President, as we have noted, the norm was first introduced in the Reply. When I say that, I mean that is the first occasion certainly when Applicants called the norm, or any norm, a norm of non-discrimination or non-differentiation, or the first occasion on which they defined any such norm. It is true that they say, and they said in the verbatim record of 17 May, at pages 281-282, *supra*, that they already had this norm in mind when they drafted the Memorials, and they referred to a paragraph in the Memorials which reads as follows, and I quote from the Memorials, **I**, page 107:

> "It is submitted that the terms of the second paragraph of Article 2 of the Mandate and Paragraph 1 of Article 22 of the Covenant and their stated purposes, read in the light of the terms and stated purposes of Chapters XI, XII and XIII of the Charter, establish clear and meaningful norms marking the duties of the Mandatory."

Now, Mr. President, Applicants say that in this paragraph somehow there is comprehended the norm of non-discrimination and non-separation which they then subsequently formulated in the Reply. Somehow, by some process of second-sight, one should have read into this paragraph such a norm on which they now rely. All we can say, Mr. President, is that if Applicants intended by these words to allege the existence of a norm with a scope, content and origin of the subsequently mentioned norm of non-discrimination and non-separation, they certainly concealed their intentions very well indeed, even to the extent of disguising the norm by referring to it in the plural, and, of course, of saying not a word about non-discrimination, non-separation or non-differentiation, in the list of duties which they said were marked by this norm. That is in the Memorials, **I**, pages 107-108.

The only reference to anything even resembling non-discrimination or non-separation to which they could point, was the quotation of Article 76 of the Charter which was included in some articles from which they purported to extract very clear and meaningful norms, as they then called them.

But Article 76 was only one of the sources, one of a number of Articles upon which they relied and to which they apparently attached equal weight in seeking to derive the norms on which they relied at that stage.

Now, Mr. President, as regards the overriding importance which Applicants now say their reference to Article 76 must be given, some light is perhaps cast thereon if one has regard to the Observations. I should

like to quote from page 462, **I**, of the Observations where this matter was also dealt with. There the Applicants said the following:

> "The words used in Article 2—'material and moral well-being', 'social progress'—are akin to other words such as 'due process' and 'equal protection' which national Courts are frequently called upon to interpret. Such words are broad in scope, but in the context of the society to which they pertain they embody meaningful norms. In the international society, the norms applicable to 'the administration of territories whose peoples have not yet attained a full measure of self-government' reflect the consensus of all the Members of the United Nations. They include the following principle and doctrine."

And, then, Mr. President, follows a quotation from Article 73 of the Charter, which, as the Court is aware, does not deal with any non-discrimination or non-differentiation, or anything of that sort. And, after quoting Article 73, Applicants continue:

> "And in the exercise of Trusteeships which in essence reflect the same international concern as Mandates, Members of the United Nations have agreed that Trust Territories shall be administered so as 'to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world.
>
> It cannot be said, therefore, that the Court in interpreting Article 2 of the Mandate would be engaged in an essentially 'political activity,' whatever Respondent may intend to connote by use of that undefined phrase." (**I**, p. 462.)

As the Court will see, with respect, Mr. President, Article 76 is relied upon only as one of the sources from which a number of meaningful —clear and meaningful—norms were said to be derived in the earlier pleadings. In particular, there was no suggestion at all that in some way Article 76 was to be read as providing the key, or the background, of the purpose against which all the other norms, or all the other duties, which the Applicants quoted or relied upon, were to be read. I should like, in this connection just to read briefly from the verbatim of 17 May, at page 281, *supra*. There the Applicants said, referring to the Memorials, that:

> "The purport, the intention, as would seem clearly to be indicated by the context, and particularly in the light of the introductory paragraphs to which I have referred—the purport and intent of these eight enumerated duties [those are the duties, the Court will recall, which were set out in the Memorials relating to various facets of administration] is to set forth for convenience sake in categories eight general ranges of duties, each of which must be carried out in accordance with the norm and the standards for which the Applicants contend."

I repeat the last words "each of which must be carried out in accordance with the norm and the standards for which the Applicants contend".

Now, Mr. President, if it was the intention of the Applicants to make a suggestion in the Memorials that each of those eight duties was to be read subject to any norm of non-discrimination or non-separation, all we can say is that they certainly concealed the intention very well indeed.

But, be that as it may, Mr. President, the purpose of the norm in its present form is to exclude the necessity for this Court to conduct any independent factual enquiry as to conditions in South West Africa and, in particular, on a comparative basis, which would also involve the Applicants' own States. It follows that in order to serve such a purpose the norm and/or standards must be so defined as to prohibit Respondent's admitted policies without requiring any further factual examination by the Court. If the norm does not serve to exclude factual examination by the Court, it would not have served the purpose for which it was obviously introduced.

On the other hand, the norm and/or the standards must not be defined so as to render illegal certain forms of differential allotment of rights, burdens, etc., which are of unquestionable legality and morality. Those are the two extremes between which Applicants' norm has to fit in if it were to serve their purpose. If, on the one hand, the norm were to be defined so as still to require a factual examination by the Court, it would not have served its purpose, but, on the other hand, if the norm were defined in such a manner that it would, if applied, also affect other forms of differentiation than those practised by Respondent, and, in particular, if it were to be so defined as to prohibit forms of differentiation which everybody would accept and which nobody could condemn, then it would also not have served their purpose. So, it is between these two extremes that Applicants were forced to go and these then represented their Scylla and Charybdis between which they had to steer their course. The course which they steered we shall trace briefly.

Now, Mr. President, as we have said, the norm as defined by the Applicants at page 493 of the Reply, **IV**, prohibited absolutely the official allotment of rights, duties, privileges, etc., on a group basis, and it will also be recalled that in Submission No. 3 the word used by them was "distinguish", which is a neutral word which does not connote any qualitative element of oppression, or discrimination, or anything having a bad connotation in that sense. Nevertheless, after we had in the Rejoinder pointed to the anomalies to which this formulation would lead, the Applicants repeatedly in these Oral Proceedings sought to exclude certain forms of differential allotment of rights, privileges, burdens, etc. They sought to show that although in other instances, in other examples which we quoted, or which they quoted, one could also find a differential allotment of rights, duties, privileges, burdens, etc., on the basis of group membership, in some way such differential allotment was not covered by the norm, whereas, in terms, it of course was.

Now, this matter was brought to a head as a result of a question from a Member of this Court. On 28 April, Judge Sir Gerald Fitzmaurice put a question to the Agent for the Applicants, the first part of which read as follows:

> "... was the Applicants' contention about 'apartheid' to be understood in the sense that a policy of group differentiation is in all circumstances, necessarily and in itself, contrary to Article 2 of the Mandate, irrespective of any other steps taken by the Mandatory for promoting the welfare of the inhabitants of the Mandated Territory?" (**VIII**, Minutes, p. 22.)

Mr. President, this is of course the very nub of the problem as far as the content of the norm and the standards is concerned. To what extent

and in what way does it prohibit differentiation? Is it absolute, or is it qualified? If qualified, what are the qualifications? And since this is to such a large extent the central problem with which I am dealing, I shall unfortunately have to quote at some length from the answer, which was in the same verbatim record. It reads as follows:

> "... a policy which differentiates among individuals as such, or as members of indentifiable groups, would be permissible and indeed desirable in appropriate circumstances. We have in that connection cited the Minorities Treaties, among other examples, in which it is just, prudent, wholly desirable for governments to take account of differences between individuals and between individuals as members of groups, thereby leading to the conclusion that differences are permissible with respect to the treatment of groups as such. There are instances known to all of us in all of our countries of such examples of differentiation of groups, the protection of minors, the protection of other segments of the population, arranged in accordance with their choice, normally—sometimes by reasons of other considerations, in which their choice were possible, plays a very important and, indeed decisive role—their choice as individuals.
>
> The problem, therefore, in the Applicants' respectful submission, is not summarized in terms of, or is it answerable in terms of, the expression 'group differentiation' except in a sense which is mutually understood between the questioner and the responder. There is, in this case, no submission on the part of the Applicants which condemns or attacks, or criticises, differentiation between individuals as such, or as members of groups, in, for example, the aspects which I have mentioned as illustrations." (*Supra*, pp. 44-45.)

If I may pause there for a moment, Mr. President, the learned Agent for the Applicants merely refers back to certain examples which were given. As yet, he does not essay any attempt at definition.

If I may then continue the quotation:

> "Respondent has paraphrased, ostensibly for the convenience of itself or for the convenience of the Court, the characterization of the legal norm for which the Applicants contend as a norm of non-differentiation, in Respondent's phrase.
>
> The Applicants' formulation does not rest upon the use of that word at all. The Applicants' formulation relates to the policy of discrimination and separation and the distinction is more than a verbal one between those words and the general concept of differentiation." (*Supra*, p. 45.)

If I may pause again for a moment, Mr. President; the distinction is sought to be drawn between, on the one hand, discrimination and separation and, on the other, a general concept of differentiation.

I continue the quotation:

> "Members of churches, organizations of various kinds—I have mentioned minors, those of non-age and so forth, as groups, are differentiated among and within themselves frequently, in terms of the protection which they are offered as a matter of good government and decent society. This is just part of the human condition and human experience." (*Ibid.*)

Now, again interrupting the quotation, Mr. President, this part of the answer which I have read up to now, although it does make clear that mere differentiation *per se* is not contrary to the Applicants' alleged norm and standards, nevertheless does not seem to provide any assistance in showing which are the elements which allegedly render differentiation either legitimate or illegitimate. Certain examples are quoted, which the Applicants say are quite in order even although they involve differentiation and the differential allotment of rights and burdens, but, apart from the quoting of examples, no formulation is given, no criteria are suggested, no elements are laid down which would bear on the distinction.

In particular, very little, if any, guidance is furnished as to what are the appropriate circumstances—to use the Applicants' phrase—in which it would be "just, prudent, wholly desirable for governments to take account of differences between individuals and between individuals as members of groups". Also, Mr. President, very little, if any, guidance is provided as to what are the elements in the distinction between, on the one hand, differentiation and, on the other, discrimination or separation. In the passage just quoted no answer at all is given to this question. All that is done is that certain examples are supplied of instances in which the Applicants say it would be in order, it would be desirable, it would be just, to differentiate.

However, these examples may be read as supplying certain hints as to the features which might distinguish between official discrimination, which is not permissible, and official differentiation, which is. And in particular, in that answer the following formulation may have been intended to be of general application as defining the elements which rendered differentiation permissible. I quote the words which I have already read to the Court:

> "... the protection of other segments of the population, arranged in accordance with their choice—normally, sometimes by reason of other considerations, in which their choice, where possible, plays a very important and, indeed, decisive role—their choice as individuals".

Now, Mr. President, if this formulation was intended to be a definition of what is permissible, then I would only wish to point out that the two elements which it comprises are the element of choice and the element of protection. Those are the two elements which my learned friends apparently suggest could, in a fit case, make differentiation legal or legitimate, or even desirable. At a later stage we shall make further reference to those two elements.

First, however, I should like to complete the quotation which the Applicants gave to Judge Sir Gerald Fitzmaurice's question, because in the next part of the answer they purport expressly to define the essential elements of impermissible discrimination or separation. This is actually the part where they set out to explain what are the elements which distinguish between permissible conduct and impermissible conduct in the field of allotment of rights, burdens, etc., on the basis of group membership. Thus they say, at page 45, *supra*, of the same verbatim record:

> "A policy of differentiation, however, which allots rights, burdens, status, privileges, and duties on the basis of membership in a group by reason of race, colour or other circumstance of a similar nature,

whether called ethnic, tribal or otherwise, on such a basis, which does not pay regard to the individual quality, capacity, merit or potential is, in the Applicants' view, an impermissible premise and an impermissible policy at all times, under all circumstances and in all places."

Reading this passage at its face value, it would appear that the important element in the Applicants' case is the fact that the distinction is on the basis of membership in a group by reason of race, colour, or other circumstances of a similar nature, whether called ethnic, tribal, or otherwise. Those appear to be the essential elements in this definition which the Applicants gave.

In other words, this passage would appear to indicate at its face value that the distinction between permissible forms of differentiation and impermissible forms thereof does not lie in the quality of the differentiation, but in the nature of the groups between or among which the differentiation takes place. That would appear to be the *prima facie* meaning of this passage.

Therefore, if we read this passage correctly, it would mean that a government would be entitled to allot rights on the basis of membership of, say, for example, age groups, sex groups, income groups, or religious groups, but not on the basis of racial groups, colour groups, ethnic groups, or tribal groups.

However, Mr. President, if this is really the element on which the Applicants rely in their case, it would follow, for instance, that the minorities provisions which were concluded after the First World War and which allotted privileges and rights on an ethnic or a tribal basis, would be unlawful in terms of this definition. It would also mean, Mr. President, that provisions in the Mandates regarding the supply of liquor to Natives or the protection of Native land, would also be unlawful because they allot rights, burdens, privileges upon the basis of membership in an ethnic, or a racial, or what-have-you, group, and not on any other group.

And, of course, finally, such a formulation would be much narrower than the wide ambit of the norm of non-discrimination or non-separation as it is defined in the Reply at **IV**, page 493, and on which the Applicants still rely in their submissions. There the words used are, "the basis of membership in a group, class or race"—the wide terms "group, class or race"—not limited to groups based upon circumstances of race, colour, or tribal origin.

So that, summing up, Mr. President, the answer to the question put by Sir Gerald Fitzmaurice would clearly not solve the Applicants' problem of properly defining the norm so as to make it applicable to Respondent's policies, and only to Respondent's policies.

In their oral reply, the Applicants again indignantly denied that their norm of non-discrimination or non-separation could appropriately be referred to as a norm of non-differentiation. Thus, right at the outset of a portion of their argument dealing with what they call—

"... certain potentially misleading aspects of Respondent's repeated imputations to the Applicants of positions which do not in fact or in law reflect the Applicants' contentions or theories" (*supra*, p. 246),

in dealing with these "misleading aspects of Respondent's ... imputations", the Applicants say (I quote from the same page):

> "A cardinal, though by no means exclusive, misinterpretation of the Applicants' theory of the case is implicit in Respondent's repeated references to the norm and standards under the designation of 'norm of non-differentiation'. This is, of course, more than a mere matter of semantic distinction. On the contrary, it strikes at the very heart of the true significance of the Applicants' designation of the norm and standards."

The Applicants object very violently to the norm being called a norm of non-differentiation, because they say in truth it is one of non-discrimination, or non-separation, and the distinction is more than a merely verbal one.

Later they say, in the verbatim record of 18 May, at page 338, *supra*—

> "... the misconception which arises from the false equation of differentiation, as such, with discrimination or separation which, of course, are forms of differentiation but happen to be impermissible forms of differentiation".

Again, Mr. President, the distinction between differentiation as a wide concept, and which includes as part of it separation or discrimination, which are impermissible parts of the whole, but there again, no attempt is made to define the distinguishing line. However, Mr. President, when they do make an attempt at distinguishing between discrimination or separation, which is impermissible, and differentiation, which is not, Applicants remain, in our submission, completely obscure. Thus, they say in the verbatim of 13 May, at page 247, *supra*:

> "... prudent and fair governments, as well as international institutions, often recognize the need for protection of individual persons *in their quality as members of a class or group*. Civilized social orders obviously and necessarily differentiate minors or incompetents from adults or competents, and accord them protection as individuals on that basis.
>
> The question at issue is much more fundamental than so axiomatic a premise of the social order itself. The legal issue is whether the differentiation in question is based upon, or determined by, an official policy which allots burdens, privileges or status on the basis of membership in a group, class or race, rather than on the basis of individual quality or capacity. This type of differentiation is impermissible."

It may be noted in passing, Mr. President, that here Applicants revert to the wide formulation of group, class or race, which would suggest that the conclusion reached earlier—that the norm is limited to racial, colour, ethnic or tribal groups—was not correct, but that indeed the norm has a much wider effect. Here the distinction again appears to be between, on the one hand, the allotment of rights, privileges, duties, etc., on members of a group and, on the other hand, the protection of members of the group. The allotment of rights is wrong, the protection of members is right, but, as we have had occasion to mention previously, these two concepts are, of course, not opposites. On the contrary, it is difficult to imagine how any form of group protection would be possible without the allotment on a group basis of rights, privileges, duties, and so forth, on members of the group to be protected, as well as the group against which the protection is to operate.

We have quoted various examples, for instance, the prohibition on the

supply of liquor, which one finds in the Mandate. It clearly is a burden, it may be a right, it may be a privilege, but all these things are allotted on a group basis. For the man who would like to buy liquor, is not able to do so, and the man who would want to supply him, may not, and all this on a group basis regardless of the individual qualities of the persons affected one way or the other.

Now, Mr. President, this confusion which is inherent in distinguishing between concepts which are clearly not distinguishable appears also from a further passage of the same verbatim, where the Applicants say:

> "The minorities treaties, for example, of course involve permissible differentiation on the basis of ethnic, [and I emphasize the words 'on the basis of'] linguistic, national or religious groupings. The minorities treaties do so, however, not upon the basis of allotting rights, privileges, burdens on the basis of group classification but for the reason—the essential reason—of protecting the individual member of a group, which normally he chooses to adhere to, from suffering adverse consequences by reason of his membership in the group, which, as I say, he is normally free to quit." (*Supra*, p. 247.)

If I may summarize it, it involves permissible differentiation on the basis of grouping, it does so not on the basis of allotting rights to differential groups, but for the reason of protecting. In other words, the distinction lies between the basis of allotment, on the one hand, and the reason for allotment, on the other, which, of course, are entirely different things—they are concepts which are not comparable. An allotment of rights on a group basis does not cease to be such because the reason for the allotment is of a particular nature; it is still an allotment. The reason for the allotment could possibly, in an appropriate case, affect its morality, its legality, its justifiability, but it could never affect the nature of the allotment as being based purely on group membership. Similarly, the fact that the group is a voluntary one does not affect the question whether as a fact certain rights, burdens, privileges, what have you, are allotted to members of such a group purely on the strength of their membership. So that, whether the group be voluntary, whether the reason be a laudable one or not a laudable one, whatever these features may be, the fact still remains that the allotment is on the basis of the group, and that is the element that Applicants continually say is wrong, is impermissible—it is that allotment which, they say, renders differentiation discrimination, which is an illegal policy.

Mr. President, it is not necessary to quote more examples. The Court will recall that throughout the oral reply the Applicants insisted that their norm prohibits discrimination and separation, as a distinct type of differentiation, whilst at the same time, they still clung to definitions which in terms would prohibit any group differentiation in the official allotment of rights, burdens, privileges, etc. Awkward examples, such as the minorities, or the provisions in the Mandate, or the position of minors or women, such awkward examples are simply brushed away, in the manner which we have noted, by pointing to the laudable reasons which may exist for differentiation, or by pointing to the normally voluntary nature of such grouping.

However, Mr. President, although Applicants did not appear in the oral argument to appreciate the difficulties which they had in that regard, it is now clear that they must have been aware of the weakness

of their position and have now altered their argument in conformity, or rather, altered the argument to eliminate such weakness. The concession that there may, in suitable cases, be sound reasons for the official allotment of rights, etc., on the basis of group membership, and that in such cases the allotment would be legitimate, naturally presented very difficult problems. Such a concession necessarily affected the absolute nature of the norm and the standards which, for the reasons we have said, they could not afford to abandon. As soon as they formally abandoned the absolute nature of the norm, they would in effect be back where they were—they would have either to define it in such a way, *with some exactitude, which would then affect or might not affect* other forms of differentiation, or to define it in such a way that it would not affect other forms of differentiation, and then they would be back at a factual enquiry, which they want to avoid. It is extremely difficult, I should imagine, and as appears from the course which the proceedings have taken, to define discrimination in such a way that it does not affect also provisions such as the minorities provisions, while at the same time excluding a factual enquiry by the Court. If they were to define discrimination as being something oppressive, something unequal, something having oppressive intent, or having undesirable consequences, then they would be right back where they started and they would still have to persuade this Court that Respondent's policy is, in fact, discriminatory in that sense. On the other hand, as was made clear, if they define it as prohibiting any form of differential allotment, purely differential without any of the other undertones or overtones, then they strike at all sorts of differential practices which exist in every State in the world. And, in particular, as we have seen, Mr. President, the minorities provisions presented them with great difficulties. Frequent reference was made to the minorities provisions, and they were then distinguished in the manner which I have demonstrated above.

This commenced already early in the Applicants' oral presentation, when they attempted to explain away these minorities provisions and to distinguish them on the basis that they entailed "protection as distinguished from coercion". (**VIII**, p. 263.) In our oral argument, on 23 April, at **VIII**, pages 664-666, we showed that this formulation in fact did not assist Applicants; if one were to adopt the general principle that *one may protect without coercion, it still left unresolved the question* as to who would decide as to the need for and the methods of protection. There would still have to be a discretion somewhere in somebody to decide that a particular group needed protection, to decide upon appropriate measures of protection for such a group, and as against whom or against which other group, or even whether such a group did not require protection against its own weakness. Also, we showed that protection and coercion are not mutually exclusive concepts, that the former—that is protection—very often required some form of coercion, particularly either where a group is protected against its own weakness or its own backwardness, or in other circumstances where there are various groups to be protected one against the other.

During the argument on the application for an inspection, the Applicants attempted to explain more fully why the minorities provisions would not be covered by the terms of the norm. They did this, however, not by contrasting the minorities provisions with the terms of the norm, but by showing what the difference was between apartheid, as they

understood it, and the minorities provisions, and their argument in this regard and which may be found in the verbatim record of 3 May, at page 87, *supra*, and the following pages, may be summarized as follows:

(a) Applicants regard the individual as the basic social unit, whereas Respondent regards the group as the basic social unit.

(b) The minorities treaties were perceived as a means of assuring that the individual does not suffer by reason of his membership in a group.

(c) Under the minorities treaties, a member of a group can, as an individual, normally quit his group.

(d) Under apartheid, on the other hand (Applicants say, and I quote from p. 88, *supra*, of the verbatim of 3 May) "the individual person is subject to burdens ... because of his membership in a group—a group, moreover, of which he is made an irrevocable life member", and this position is not altered even if the burdens are imposed for the protection of the group or groups. (That is also at p. 88 where Applicants render it clear that even if such burdens were imposed for the protection of the groups, that would not answer the objection.)

Now, all this is summed up in the following passage:

> "Under the minorities treaties, as has been said...an individua may claim protection of his individual rights, if they are thwarted by reason of his membership in an ethnic, religious, linguistic or other group, which he normally is free to disclaim. Under apartheid, by definition, the individual's membership in a group largely determines his rights ..." (*Supra*, p. 89.)

Now, Mr. President, it must be borne in mind that, although the purpose of this argument was to show why the minorities provisions did not fall within the terms of the norm, the method whereby it was presented was by comparing the minorities provisions with apartheid, and in the result, the differences between the minorities provisions and apartheid, as appreciated by Applicants, would appear to be: firstly, that the purpose of the minorities provisions was to protect the individual, whereas the purpose of apartheid is to protect the group; and, secondly, that under the minorities provisions, an individual is normally free to quit his group, whereas under apartheid he normally is not.

Whether or not, however, Mr. President, these propositions indeed accurately reflect the differences between apartheid and the minorities provisions, the important point is that, for present purposes, they could not serve to take the minorities provisions out of the wide terms of Applicants' norm, so that even if there are these differences between the minorities provisions, on the one hand, and apartheid, on the other, which we do not concede, that does not assist Applicants because that still does not show why these differences would have the effect that the one would be covered by the norm and the other not.

They are differences which do not bear upon the definition of discrimination as given by Applicants at all; they would appear to be entirely irrelevant to the questions whether and why the minorities provisions are covered or are not covered by the definition, because, Mr. President, the terms of the norm as defined do not permit the differential allotment of rights, duties, privileges, etc., even where the purpose of such allotment is the protection of the rights of the individual member of the group.

There is nothing in the definition which says that allotment of rights would be in order if it were imposed for protection: that is not a part of Applicants' definition. It is also no part of their definition that differential allotment of rights, burdens, etc., would be unlawful only if it related to groups which were not voluntary. There is no element of voluntariness or lack thereof in Applicants' definition, and, indeed, the Applicants usually use the phrase "a group which an individual is normally free to quit", so that even when giving examples they do not suggest that the ability of an individual to quit his group must necessarily be present before an allotment of rights to such a group could be justified. They always qualify it by the word "normally".

So that in the result, Mr. President, our submission is that even if Applicants were to be correct in their analysis of the basic differences between apartheid and the minorities provision, that does not assist them to show that the latter are not covered by their norm. It may also, in passing, be noted that many groups do not possess the qualities claimed for the minorities and yet are the subject of permissible, or at least widespread, differentiation. One thinks, for instance, of minors, or women—one could hardly say that women are normally free to quit their group, or that minors are normally free to quit their group; nevertheless, there are protective measures and differentiating measures in many or most countries of the world. And of course, Mr. President, we do not concede that our policy is aimed only at protecting the group. We say that it is designed to protect the individual as much as, or more so than, the group of which the individual forms a part, so that that distinction which Applicants seek to draw between apartheid and the minorities provision is, in our submission, a false one.

That Applicants' norm did in terms cover the minorities provisions, and that it was impossible for them to re-define it so as to exclude these provisions without at the same time excluding Respondent's policies, was apparently realized by the Applicants, because after pointing to the above alleged differences between apartheid and the minorities provisions, which Applicants said also reflect differences between the Parties, they continued to say, at page 88, "accordingly, Mr. President, the perspectives of the Parties to these Proceedings clash, attempted legal definitions blur". That seemed to be the basic problem with which the Applicants were faced, viz., that the attempted legal definitions always included things they did not want included and excluded others that they wanted to include, so that, as a result, in the oral reply, Applicants have now finally abandoned all attempts to find a general definition which would distinguish between the forms of differentiation which are permissible and those which they term discrimination and separation.

After repeating the definition of the alleged norm of non-discrimination or non-separation, as set out in the Reply, IV, at page 493, the Applicants said, in the verbatim record of 13 May:

> "However, the Applicants attach no particular significance either to the designation or to the precise words used in the definition of the norm and of the international standards having the same content and scope. What is relevant, and what is essential to an understanding of the Applicants' case, is the submission that such international standards and such an international legal norm exist; that they have been found and declared by those responsible for its creation as being applicable to Respondent's policies of group

separation in the Territory. Respondent's policy of apartheid, indeed, has outraged the organized international community to an extent which has generated its unanimous—but for Respondent itself—repeated and authoritative use of all normative processes at its disposal to bring the standards and the legal norm into being. In view of so indisputable a reality, there is no reasonable basis for Respondent's denial that such standards and norm are of uncertain application to the Territory. Almost any standards or legal norms have instances of uncertain application, but that fact does not provide a basis of attack upon their validity so long as they clearly cover the phenomena to which they are addressed.

The Applicants have tried to exclude this extraneous issue by their contention that the minimum content of the norm is the prohibition of apartheid; that if a norm of non-discrimination or non-separation exists, it applies, and clearly so, to the policies of group separation or apartheid applied by Respondent in the Territory." (*Supra*, p. 246.)

I may just for emphasis repeat two parts of this quotation, Mr. President. The first is the following:

"... the submission that such international standards and such an international legal norm exist; that they have been found and declared by those responsible for its creation as being applicable to Respondent's policies of group separation in the Territory".

And later in the passage there is the proposition that "the minimum content of the norm is the prohibition of apartheid". So that, Mr. President, when analysed, this passage would appear to say, firstly, that the organized international community has created a norm and/or standards which it is not necessary to define in precise terms because the organized international community has itself declared that this norm and/or these standards apply to Respondent's policies, and indeed that the organized international community created this norm and/or these standards specifically for the purpose of rendering Respondent's policies illegal, so that in effect, Mr. President, there is no longer any norm, there is just a specific prohibition or, putting it in another way, there is this undefined norm which has been declared applicable to Respondent's policies, by a purely *ad hoc* process.

But, Mr. President, the Applicants went even further than that. In a passage following on the one just quoted they said:

"An analogous consideration likewise should be noted, lest it confuse the central legal issue under discussion. The Applicants do not rest their case upon the degree to which the norm-creating process at work in international society has been correct or fair in its appraisal of the incompatibility between apartheid as practised by Respondent and the material welfare of the inhabitants of the Territory." (*Supra*, p. 246.)

And later they said in the same verbatim record:

"Standards relevant to interpretation of legal instruments or institutions are not to be attacked as based upon faulty appraisal of the underlying facts; once the standards are established by the competent organs, then in the Applicants' view the Court should

> accept them as part of 'the legal given' and not as themselves subject to judicial redetermination." (*Supra*, p. 255.)

This argument was illustrated by Applicants' Agent by referring to our contention that this Court should make its own determination whether Respondent's policies are, as has been alleged in international circles, based on a concept of racial superiority or racial hatred. Applicants' comment was, in our submission, illuminating. Applicants' Agent said, at page 256, *supra*, of the same verbatim record, "the Applicants respectfully disagree", that is, Mr. President, they disagree with our contention that this Court should itself determine whether racial hatred is the motivating force behind Respondent's policy. With this proposition the Applicants say they respectfully disagree, and they then continue:

> "... the competent organs have perceived and characterized Respondent's policies of group separation as based upon a concept of racial superiority or racial hatred, and have done everything within their competence to indicate the incompatibility of apartheid with international standards governing the Mandate and with international law itself.
>
> What more could the organized international community do by way of characterizing Respondent's policies and practices as impermissible under the Mandate and as illegal under international law? What more could they have done or said?" (*Supra*, p. 256.)

And that, Mr. President, is now the central theme of Applicants' case which they repeat time and again. The theme is that the organized international community has laid down a norm and/or standards; it is not necessary to define this norm and/or standards because the organized international community has itself declared that they apply to Respondent's policies. In so far as such declaration involves a factual inquiry, Applicants say that the organized international community has spoken the last word about the facts.

In short, Mr. President, the organized international society is, in Applicants' argument as now presented, legislator, witness, judge, jury, rolled into one, and it does not need any charge sheet because it convicts purely by fiat. What then, Mr. President, is the role of the Court in this process which Applicants have described to the Court?

Applicants themselves assign the following role to this Court in the verbatim record of 13 May, where they say:

> "Although the Applicants have no doubt that the norm-creating process was fair and correct in its evaluation of the policy complained of, the Applicants do not ask the Court to say so. Nor do they suggest that the Court undertake the task of second-guessing the competent international organs responsible for the development of the norm. There is no question of the Court rubber-stamping the judgments of the competent international organizations, in Respondent's phrase, any more than the Court can properly be expected to veto such judgments, even though they are explicitly directed at conduct complained of in these cases.
>
> If the standards and the legal norm for which the Applicants contend do exist, as a matter of law, then they should be applied by the Court as part of its duty to decide this dispute in accordance with international law, and in accordance with the international rule regulating the mandate institution itself." (*Supra*, p. 246.)

And they said later, Mr. President, in the verbatim record of 18 May:

> "... there is a structural and functional interrelationship between administrative supervision on the one hand and judicial protection on the other; that the applicability of criteria in the judicial form necessarily depends upon and presupposes their formulation in the administrative organ; that this Court, and no court, by reason of the very nature of the judicial process, has the facilities or the responsibilities to reach judgments, to formulate standards, of the sort which are uniquely within the competence of administrative organs and which reflect political and moral and social considerations of which they are specially competent to judge and evaluate". (*Supra*, p. 326.)

So that, Mr. President, summarizing, it would appear that, on the Applicants' latest theory, the Court has only a limited, if not, indeed, an insignificant, function. Its duty, according to the Applicants, is to apply the norm and/or the standards as formulated by the organized international community. The norm and/or the standards, as we have attempted to demonstrate, do not consist only of objective legal principles, or of one objective legal principle, which could be applied to facts determined by the Court, but these norms and standards also already include the determination that Respondent's policies violate the legal principles which are applicable, and the Court is not entitled, in Applicants' phrase, to "second-guess" such a determination.

It follows, Mr. President, that the Court's only function, according to Applicants, is now to determine whether the administrative organ, whether the organized international community, has spoken, and then to record such a fact. Thereafter, in Applicants' view, the organized international community will take over again.

Once the Court has recorded the facts that the organized international community has spoken, the Court will be *functus officio* and on Applicants' theory the organized international community would once more take over the future process.

In this regard, Applicants said in the verbatim of 12 May, at page 232, *supra*: "... effectuation and implementation of such an adjudication and declaration [that is, by the Court] ... evidently would necessitate the effective functioning of a competent international administrative organ, vested with powers adequate to the purposes". So that, the Court once having spoken, the matter should be returned to the organized international community to give effect to it.

Consequently, as we have said above, the organized international community in Applicants' contention would now combine the functions of legislature, witness, judge and jury, and to this we should perhaps add, in view of this last passage, also that of executioner. The Court is interested only in the mechanical function of signing the warrant. Needless to say, Mr. President, this insignificant mechanical role which the Applicants now ascribe to the Court, represents a very major change in their whole case and it is instructive to note how Applicants' views in this regard have changed.

In the Memorials, Applicants did not fully set out their submissions regarding the role to be played by the Court and its relationship with administrative supervisory organs. However, they clearly contemplated that the Court would have some sort of a role of judicial supervision. In this regard they said in the Memorials:

> "Judicial supervision is an indispensable feature of the Mandates System, since, if administrative supervision should fail, as in this case, there is no other method of enforcing the sacred trust which the mandatory power has assumed on behalf of civilization." (**I**, p. 91.)

That is the end of that quotation and a further one at the same page reads: "If the Mandate is in force, judicial supervision must likewise be in force, since the former is empty without the latter." Of course, Mr. President, the supervisory role which was then ascribed to the Court was tied up with the nature of the finding which the Applicants requested the Court to make—a finding which, at that stage, was to the effect that Respondent's policies amounted, as a fact, to intentional oppression. Clearly, as long as they ask the Court to make a finding of that sort, they must contend that the Court would have the capacity to make such a finding. However, if the Court's only function is to ascertain whether, in fact, the administrative supervisory authorities have condemned a particular policy and if the Court were then to be asked only to declare that such a condemnation has occurred, it is difficult to see how such a function could be appropriately described as involving supervision of any sort at all. One can hardly imagine that a function of that sort can be supervisory in any sense of the word; i.e., if the Court were only to have regard to what has been said by the administrative organs and then only to declare that that has been said. And also, of course, one does not appreciate how such a function of the Court could be of any importance and I quote ". . . if administrative supervision should fail . . .", which was what Applicants said at that stage. Moreover, it is difficult to see why such a function should be an indispensable feature of the system or why the Mandate should be empty without it. If the Court's function is a purely mechanical one of this nature, a purely formal one, why then should the Mandate be empty without it? Why should it be an indispensable feature of the system? Exactly the same effect could, in our submission, have been achieved simply by the direct method of rendering pronouncement of administrative supervisory authorities binding upon the Mandatory in the same way as Orders of Court. If that were the position, then one would not have had to go to court at all; and that would certainly have been a preferable course than to give the Court powers which amount only to the function of recording whether something has or has not been said by administrative organs.

That then, Mr. President, was the position as it existed in the Memorials. The whole question as to the function to be exercised by the Court and its relationship with administrative supervisory organs has, however, more pertinency as the result of the Preliminary Objections. In their Observations the Applicants were at pains to emphasize the important role played by the Court and, of course, this emphasis was part of the argument which they employed towards persuading the Court that the compromissory clause must have survived. Prior to this approach, Applicants stated explicitly that the compromissory clause could clearly exist in the absence of any supervisory authority at all and consequently, of course, that this Court could exercise its functions even if there were no supervisory administrative authority at all.

Thus they say, in their Observations:

> "Respondent does not appear to make the argument that because,

in its opinion, Article 6 is not in force, Article 7 is not in force. Indeed, such an argument would be untenable." (I, p. 428.)

There, Applicants said it would be untenable to argue that because administrative supervision had lapsed therefore the functions of the Court would also have ceased. It was an argument which they then considered to be entirely untenable. Nevertheless this would appear to be exactly the effect of their present argument, at any rate, as far as alleged violations of Article 2 are concerned. As regards such allegations, they now say that the Court must depend on the judgments which the administrative organs have already pronounced.

In a later passage in their Observations Applicants showed a specific contemplation of the possibility that the Court might be asked to come to a different finding than that reached by the administrative supervisory authorities. The Court will recall that that sort of problem was considered quite extensively at the Preliminary Objection stage. The question was then asked what would happen, for instance, if a Member of the League were to bring an action against the mandatory in respect of a matter on which the Council had already expressed an opinion? And, in terms of Applicants' present argument, such a problem would, of course, present no difficulty at all. In terms of the present argument, once the organized international community had spoken, this Court would be bound by it, so that in that hypothetical case which exercised the minds of the Parties and the Court at the Preliminary Objection stage, if another Member of the League were to come to Court after the Council had sanctioned certain conduct, there would have been no problem. The Court would simply have had to say "We are obliged to apply the law as declared by the Council, by the organized international community". But that, of course, was not the answer which Applicants gave in 1962. At that stage it suited them to ascribe a much wider significance to the functions exercised by the Court. Then they said in their Observations:

> "Respondent expresses concern that hypothetically a Mandatory might 'satisfy' the Mandates Commission, yet be attacked judicially on the same point. This argument merely underlines the importance of judicial jurisdiction in order to obviate unresolved disputes between the Mandatory, on the one hand, and member States on the other. If the Mandatory's position in such a dispute were to be based upon decisions or policies of the Council and Commission, the Court would no doubt give due weight to such a record." (I, p. 461.)

At that stage, Mr. President, the Applicants said the Court would only give due weight to such a record. According to the present argument the Court must attach decisive significance to such a record and may not depart from any such decision or finding or policy expressed by the Council and Commission.

So that, at that stage, no suggestion was made that any binding standards were laid down by administrative supervisory organs. Indeed, the standards which the Applicants relied upon at that stage were of quite a different order and arose in quite a different way. Then they said, in their Observations:

> "Article 7 empowers the Court to adjudicate cases relating to the interpretation and application of *all* of the provisions of the Mandate; it makes no distinction between Article 2 and other Articles. While

Article 2 is broad in scope, it must be remembered that in interpreting and applying it the Court would have the advantage of the particular standards set forth in other Articles of the Mandate and in the Covenant. These standards were the distillation of a century or more of experience in colonial administration and were included in the constitutional documents of the Mandates System because the ideals they expressed were being put into practice by the System itself. The Court, therefore, would have in interpreting and applying the Mandate, a framework of law, doctrine, and practice upon which to rely." (**I**, pp. 461-462.)

Mr. President, I would emphasize that the standards then relied upon were the standards set forth in other Articles of the Mandate and in the Covenant. Those were the standards which Applicants then said the Court could apply in exercising its judicial functions. For the rest, Applicants relied only on certain norms, said to be embodied in Articles 73 and 76 of the Charter, in the light of which, the Court will recall, they asked this Court to interpret the Mandate. But at no stage did they suggest that the administrative supervisory organs possessed any competence to lay down norms or standards which would bind the Court. That was not their case, and they did not suggest it at any stage.

[Public hearing of 10 June 1965]

Mr. President, during yesterday's hearing I pointed out that the Applicants' Submissions Nos. 3 and 4, as now formulated, rest upon an alleged norm and/or standards, both having the same or the identical content, and the question with which I was dealing is, what the content of this norm and/or these standards is.

In this regard I submitted, Mr. President, that, firstly, no norm or standards of this type were relied on at all in the Memorials. Although the Applicants attempted in these Oral Proceedings to show that they did indeed rely on such a norm, my submission is that such a suggestion is clearly untenable, even if regard is had only to the Memorials themselves, and that its untenability appears even more clearly by reference to the Observations, in which this topic was also dealt with. And indeed, Mr. President, our submission is that the case of the Applicants as initially presented to this Court was purely a factual one alleging oppression—deliberate oppression by the Mandatory.

However, Mr. President, as from the Reply stage this case was gradually changed: although at first Applicants retained their charges of oppression, they sought to establish them by an axiom, by legal fiction, which would in some way have eliminated reference to the evidence which Respondent had adduced—or at any rate, that was the contention of the Applicants. And the evidence which they apparently particularly sought to exclude was comparative evidence regarding the circumstances, on the one hand, in the Applicants' States and, on the other hand, in the Territory of South West Africa. However, when it became apparent that this contention, this universally accepted axiom as they called it, would not serve its purpose, that it could never serve to exclude consideration of all relevant evidence by this Court, the charges of oppression by Applicants were completely abandoned.

The norm with which we are concerned at the moment was introduced in the Reply. By its terms, and according to its definition, it entailed an absolute prohibition on the differential allotment of rights, burdens, obligations, etc., on the basis of group or class or race. As we showed, this leads to ridiculous results and consequently various attempts were made by Applicants to define the norm in terms which would exclude such ridiculous consequences. However, Mr. President, these attempts at definitions, as I sought to show yesterday, invariably failed and as a last resort Applicants have now abandoned their attempts to define the norm, and now they contend that the norm, although undefined, exists and that it is applicable, so that now its applicability to the case before the Court depends not upon its definition and an application of such definition to facts established to the Court's satisfaction, but purely on the basis that the norm has allegedly been declared applicable by the organized international community.

This attitude, Mr. President, is in sharp contrast to the attitude expressed by Applicants earlier, and in this regard I should, with the Court's permission, like to refer to a passage which I did not quote yesterday and which, in my submission, clearly points to the contrast between the attitude adopted earlier, the approach adopted earlier, and the submissions which are now presented to the Court. The passage occurred during the argument on the inspection application and one can find it in the verbatim record of 3 May. It reads as follows:

> "The Applicants are aware that the nature, scope and content of such an international legal norm and international standards must be defined by them to the satisfaction of the Court if their submissions are to prevail. The argument is still in progress on legal issues, Mr. President, in which the Applicants are anxious to address themselves to these very questions and this phase of the proceedings has been suspended by reason of Respondent's injection for the proposal of inspection. The Applicants accordingly confront some difficulty in addressing themselves to Respondent's query for clarification concerning the nature, scope and the content of the international legal norm and the international standards, for which the Applicants contend." (*Supra*, p. 91.)

So that even at the stage of the inspection proposal, Mr. President, the Applicants expressly acknowledged that it was encumbent upon them to define the nature, the scope and the content of this international legal norm and the international standards to the satisfaction of the Court if their submissions were to prevail; and they then clearly indicated that they were still busy with that process of definition. However, Mr. President, we have now reached the stage where these attempts have been abandoned; there is no attempt any more to define the norm in general terms at all, and the only contention which the Applicants put before the Court is that the applicability of the norm has already been decided by the organized international community, and that this Court is bound by such decision.

By the same stages in which the content of the norm was changed, as I have indicated, the Applicants necessarily enhanced the significance of United Nations resolutions. In their first pleadings these resolutions were relied upon as showing that negotiations had taken place between the Parties, that there existed a dispute between the Parties and that

such dispute could not be solved by negotiation. In the Reply stage these resolutions were said to constitute authority entitled to great weight. Now, however, Mr. President, we have reached the stage where they have been upgraded to the position where they possess normative capacities, where these resolutions establish legal norms, or legal standards, which are binding upon the Court. They are not only authority but are actually binding rules from which the Court, as Applicants contend, would not be entitled to depart.

These arguments naturally led to the question as to what the role of the Court would now be, and our submission is that the role which the Applicants now assign to the Court, is that of merely recording what the organized international community has already decided. It merely records that a norm of undefined content has been created, and that such norm has been declared applicable to the circumstances of the Territory. And then Applicants say that after that the Court is *functus officio* and the organized international community must take over again.

Just before the adjournment yesterday I was showing that this conception of the Court's function was entirely different from that previously contended for. I pointed out that in the Memorials and in the Observations no suggestion was made that where the Council had ruled upon a particular matter that would be decisive. The Court will recall that that formed the subject of some debate during the Preliminary Objections proceedings. Also, I showed that the standards which the Applicants relied upon at that stage were entirely different ones. They were standards which were said to be contained in the Charter and in the Covenant. They were said to be a distillation of a century of colonial experience, and were standards said to be existent as at the stage when the Mandate was conferred. They were not the present standards, which are said to have arisen subsequently.

I also showed that in the Memorials the Court's function was described as one of supervision, and that this supervisory function was said to be an essential part of the Mandate. But Mr. President, that could hardly be said of the function which is now being attributed to the Court.

Also in the Observations, in keeping with the relationship suggested then by the Applicants as existing between the administrative supervisory organs and the Court, Applicants still emphasized that the Court's function was essentially a supervisory one, and they still emphasized that that was an essential part of the Mandate and an essential function for the Court to perform. Thus they said, *inter alia*, the Respondent's contention, and I quote from the Observations at I, page 440, "... misconceives the purposes of Article 7 and the importance of judicial supervision in the scheme of the Mandates System ...".

And later in the Observations, at page 443, they said the following:

> "Administrative and judicial supervison of the Mandatory by the international community, as has been noted by Applicants, is a key feature of the Mandates System. It represents the 'securities for the performance of this trust' required under Article 22 of the Covenant of the League of Nations. Necessarily, the framers of the Mandates System entrusted such supervision to the appropriate international institutions created at the time the System itself was devised. Thus administrative supervision was entrusted to the League of Nations and judicial supervision was entrusted to the Permanent Court of International Justice. The judicial supervision was to be

accomplished through the invocation of the compromissory clause of the Mandate instruments by States which had become Members of the organized international community by joining the League . . ."

Again, Mr. President, the emphasis is on supervision as an essential part of the Mandate, and the same feature can be found in the Observations at **I**, pages 458 to 459 and at page 471. This whole concept of judicial supervision was also defended and argued in the 1962 Oral Proceedings. At page 324 **(VII)** of the Oral Proceedings Applicants said:

"Counsel stresses the fact that the League Covenant makes no explicit mention of judicial supervision over the Mandate. That is true, but he draws the conclusion that therefore it is, in his words, 'unlikely' that 'Article 7 of the Mandate was intended to establish a form of judicial supervision'. But, as we attempt to show, at pages 49 to 55 of our Observations, judicial and scholarly authority combine to refute this inference."

Again, Mr. President, this theme, which in the early stages was found in the whole of Applicants' argument, that one has a system of judicial supervision which necessarily, of course, implies some considerable power, or authority, or jurisdiction, on the part of the Court.

But even in the Reply, Mr. President, the Applicants did not advance the contention that binding norms and/or standards could be laid down by the organized international community. Even in the Reply they did not seek to reduce the Court's function to a merely mechanical one as they have now done.

Then, again, turning their minds to the bearing of decisions of the administrative supervisory organs on the Court's function, the Applicants said:

"Respondent argues also that if its obligations toward the inhabitants were covered by the clause [that is the compromissory clause], the Permanent Court would have been in a position to overrule decisions of the Council approving the manner in which the Mandatory performed its obligations; the drafters could not have intended this result. This also begs the issue. It assumes that the obligations of the Mandatory were not legal in nature, hence that they were for the Council to decide rather than for the Court." (**IV**, p. 545.)

This argument, which had been raised before Applicants say, "begs the issue because it assumes that the obligations of the Mandatory were not legal in nature, hence that they were for the Council to decide rather than for the Court".

Now, as we noted in the Rejoinder, Mr. President, in **V**, page 96, this line of reasoning is not particularly clear. One does not understand exactly what the Applicants mean by it. It may be read as suggesting that since the Respondent's obligations were legal in nature, therefore only the Court and not the Council could decide disputes arising from such obligations. That is a possible reading, in our submission, of this passage. On the other hand, it may be read as suggesting that the legal nature of the obligations necessarily entailed that the Court should be entitled to overrule a decision of the Council on allegations of violations of such obligations. In one way or another, the Applicants sought to attach importance to the fact that the obligations were of a legal nature, and the fact that they were of a legal nature, in their submission, gave

the Court some function; either a function of alone deciding whether there had been a violation or else, on an alternative reading of this passage, the function of overruling the Council if and when the Court thought that the Council had made a mistake. But, Mr. President, the important point for present purposes is that whichever of these two constructions may be correct, this passage is in direct conflict with the contention now advanced, namely not only that the Council was empowered to decide upon alleged violations of the Mandate, but that its decisions created standards binding upon the Mandatory and the Court. The attitude in the Reply was that the Court must either be entitled or able to overrule the Council or, alternatively, that it alone can decide. Whichever of those two meanings was intended by the Applicants, they certainly did not say, and neither of these meanings would be compatible with any contention, that the Council was empowered not only to decide but finally to lay down binding standards from which the Court would not be able to depart under any circumstances. Certainly that contention would be entirely inconsistent with this passage from the Reply.

Now, in consonance with the quotation I have just given the Court, Applicants, in the Reply, also suggested a wide field of material from which the Court could derive standards or bases for adjudicating on alleged violations of Article 2 (2). In this regard they said:

> "... courts have found no difficulty in dealing with political, economic or humanitarian issues, even when formulated in general terms.
>
> When passing upon issues of this character, courts—both international and national—customarily apply knowledge extracted from experience, from social, physical and political sciences, and from all other sources from which man derives guidance in the conduct of his life and relationships with others.
>
> ... international tribunals have often derived their judgments from sources, and upon the basis of considerations, which Respondent would characterize as 'social, ethnological, economic and political'." (**IV**, p. 485.)

And also in the Reply they said:

> "It is, of course, in the highest traditions of courts in all civilized systems to draw upon humane, moral and political standards in deriving the sources of law." (*Ibid.*, p. 487.)

If I may quote one further passage from the Reply, Applicants listed what they called "relevant evidence" in support of a proposition "That Respondent's policy and practice of apartheid fails to promote the well-being and social progress of the inhabitants". (*Ibid.*, p. 277.)

The evidence which they listed, and which they presented to the Court in support of such a proposition, consisted of four categories, including the judgments of qualified persons, the official views of governments in all parts of the world, and "expressed, *inter alia*, through the United Nations, ... as well as through findings and resolutions of the United Nations itself". *(Ibid.)* Further evidence adduced by them included the weight of scientific authority and the history and character of homelands.

Now, Mr. President, in this regard we wish to place particular emphasis on the fact that these official views of governments, which they said were "expressed, *inter alia*, through the United Nations, as well as through findings and resolutions of the United Nations itself", that

these views were then not regarded as laying down standards which were binding upon the Court or norms from which the Court could never depart, even though the Court might feel that they are wrong. Then all this was adduced only in support and only as relevant evidence for, the proposition that Respondent's policy and practice of apartheid fails to promote the well-being and social progress of the inhabitants. What was then purely evidence has now, in Applicants' submission, become the sources or the manifestations of binding standards and norms, and I have already referred to the further submission presented in the Reply to the effect that the resolutions of the United Nations, its organs and agencies, were merely authority possessing great weight.

In sum, therefore, Mr. President, in the Reply the Applicants were still concerned to offer the Court a wide scope of enquiry. They invited the Court to have regard to a wide range of topics in deciding the case before it, and, Mr. President, this attitude persisted even up to the Oral Proceedings. In their main argument—in their first argument—in these Oral Proceedings Applicants contended that the Court was intended to exercise a type of review jurisdiction—that was the word they used—and they likened it to the activities of tribunals applying the minimum international standards to the treatment of aliens; they also compared it to the activities of the Permanent Court in regard to the minorities treaties, and to the Court's position in regard to the International Labour Organisation Constitution and the Conventions. I may in this regard refer to the verbatim record of 24 March, **VIII**, page 240, where the Applicants, when describing the function which they submitted the Court should exercise, said the following:

> "The concept of judicial review of international obligations was familiar to the founders of the mandates system. One illustration among many is to be found in the area of State responsibility for denial of justice.
>
> This legal doctrine often had been applied to policies and practices of executive and legislative authorities, as well as to decisions of judicial tribunals.
>
> Inasmuch as the doctrine of denial of justice applies to treatment of aliens, international statal responsibilities often are involved in the application of the doctrine. International judicial review of governmental policies and actions with respect to aliens involves considerations of law and justiciability analogous in important respects to governmental policies and practices affecting inhabitants of mandated territories."

And also as regards minorities, reference may be made to the same verbatim record at page 241 and as regards the International Labour Organisation to the same verbatim record, at page 242.

After referring to all these examples, Applicants summarized their contentions regarding the role assigned to the Court and the basis upon which the Court should adjudicate the disputes now before it in the following words:

> "In the premise then, Mr. President, it is not at all surprising, giving the numerous examples and wide knowledge and acceptance of the principle of international judicial review of governmental policies, including those encompassing political, economic and technical aspects, that the authors of the mandates system, not only

should have bestowed a like power upon the Permanent Court, but that they did so without objection and even without discussion." (**VIII**, p. 243.)

Now, Mr. President, it hardly needs argument to show that this function of judicial review which the Applicants attributed to the Court at the inception of these Oral Proceedings has nothing in common with the function which they now assign to it, of merely recording condemnations by the organized international community and nothing more.

As to the sources which the Applicants contended should be applied in exercising such a power of review, they also on the very first day of the argument cited the *Brown* case in the United States of America and other authorities as—

> "... confirming that the judicial process in civil law systems, as well as other systems, draws upon humane, moral, political and scientific standards as sources of law, and does so particularly where legal rights and duties are broadly formulated". (*Ibid.*, p. 119.)

Later they said:

> "It is our submission, Mr. President, that Respondent's legal obligations under Article 2, paragraph 2, of the Mandate, are to be measured by legal norms which are derived, *inter alia*, from political, social and scientific sources and standards. This is the correct relationship in the concepts of standard and norm, in the appreciation of the Applicants.
>
> Among such sources of legal norms are the standards established by competent organs of the United Nations and by the International Labour Organisation.
>
> As I have pointed out, the Applicants likewise rely upon the views of authorities, including those of governments, of social and political scientists and other experts, as and among the sources contributing to and illuminative of the generally accepted international human rights norm ..." (*Ibid.*, pp. 259-260.)

The point to be emphasized here, Mr. President, is that the standards established by the competent organs of the United Nations are here included in a whole mass of material from all of which the Court was then asked to derive sources for its judgment.

In an earlier reference, in the same verbatim, the Applicants said:

> "The Applicants conceive that legal principles and legal norms are based upon, and reflect, human experience and the human condition. In the celebrated maxim: 'experience is the life of the law.'
>
> The standards referred to in the Reply are of course of a political, moral and scientific character. They are set out with numerous illustrative examples in the Reply, in the following contexts." (**VIII**, p. 247.)

Applicants then proceed to refer to views of governments and to contemporary scientific authority. The point here again we wish to emphasize is that the standards in Applicants' submission were, of course, of a political, moral and scientific character.

Now, Mr. President, in the light of the above propositions, and in the light of the Applicants' case thus presented, we submitted that the Applicants had made it clear—

"... that, when they speak of standards in that regard, they derive those standards from the spheres of the political and social sciences—from the weight of scientific authority, from the practices of governments and from the standards currently operative in modern society in regard to methods of government, fairness, equity and so forth ...". (*Supra*, p. 102.)

That, Mr. President, is how we understood their case, and I submit that that is what their case actually was.

Now Applicants no longer want the Court to venture on to all these terrains, they only want the Court to give effect to the judgment and the condemnation already reached and given by the organized international community. Consequently, they no longer agree with this summary of what we said the argument was. The now say:

"Such a misunderstanding of the Applicants' position arises from a confusion between the evidence used to demonstrate the existence of standards and the content of the standards themselves. ... Theories of experts and views of governments are indicative of the social facts which give rise to the standards but they do not constitute the standards themselves." (*Supra*, p. 260.)

Now, Mr. President, what is the explanation of this change of attitude on the Applicants' part? In our submission it may well lie, *inter alia*, in the following passage in our argument, which we presented to the Court on the application for the inspection, where we contended that if Applicants wished to avoid a factual enquiry, Applicants' Agent would—

"... have to make clear ... that in support of his norm he no longer relies upon what he calls the 'overwhelming weight of scientific authority', because that is an aspect upon which again, ... there is a vital dispute of fact between the Parties on the record as to what is the overwhelming weight of scientific authority in this regard". (*Supra*, p. 81.)

Mr. President, we pertinently drew attention to the fact that Applicants could not rely upon norms having a factual basis or being derived from factual material unless they were prepared to enter into a consideration and an examination of the facts.

We continued to say:

"If my learned friend relies on factual justification for his norm, then obviously we would like to bring in that evidence on our side and that evidence may well be very vitally illustrated by examples and by what one can see in South West Africa and in other parts of Africa." (*Supra*, p. 81.)

Mr. President, pointing out that feature to the Applicants may well have been one of the reaons why they have now discarded all this other material as sources of the norm and standards.

In addition, of course, once the Applicants contend that the norm and standards need not be defined because they have been declared applicable by the organized international community—once that becomes their attitude in order to escape the difficulties of definition, then they are obviously also forced to the contention that the organized international community can in law lay down legally binding standards. The one necessarily involves the other, and that contention again logically leads

to the position that there would be no necessity, and that there would even be no justification, for looking at any other possible sources of the norm or standards. If the organized international community can say the last word, and if its judgments are final and decisive, then clearly the Applicants are forced to the position that nothing else is relevant; that one does not have to have regard to anything else, and that all other sources or norms or standards, that all this other material which they invited the Court to have regard to, becomes entirely irrelevant.

It is interesting to note, Mr. President, that by this circuitous route, which I have sketched above, the Applicants have now substantially reached the same conclusion as that consistently contended for by Respondent, namely that this Court was not intended to adjudicate at all on alleged violations of Article 2 (2) of the Mandate. They now use words and express themselves in ways which are almost identical to what we have been saying all along. I may refer to a passage in the verbatim record of 17 May, the Applicants say:

> "For if the Respondent is upheld in its claim of inherent discretion of a breadth for which Respondent contends, or appears to contend, the only way the Court could pass judgment on asserted breach of Article 2, paragraph 2, would be to make a choice between the Respondent's conception of well-being, moral and material well-being and social progress, and that of the Court's.
>
> Such a decision, whatever the outcome, could not rest upon authoritative or objective criteria. It would not possess the juridical attributes properly to be associated with the tradition of this honourable Court." (*Supra*, p. 299.)

I may say, of course, Mr. President, that the gloss or the interpretation which the Applicants place upon our argument is entirely erroneous. As my learned senior pointed out yesterday, our contention involves quite different considerations altogether, but the point I wish to emphasize is that Applicants now concede that to make a choice between the Respondent's conception of moral and material well-being and social progress, and that of the Court's, is not a function which a court can assume; that "Such a decision, whatever the outcome, could not rest upon authoritative or objective criteria" (in their words), and that such a decision, such a comparison between the Court's conception of well-being and Respondent's conception of well-being "would not possess the juridical attributes properly to be associated with the tradition of this honourable Court". This is a contention, of course, Mr. President, which we have advanced all along, but it is interesting to note that Applicants themselves have now reached the same situation and the same position.

Later, Mr. President, they contended in the verbatim record of 18 May:

> ". . . that this Court, and no court, by reason of the very nature of the judicial process, has the facilities or the responsibilities to reach judgments, to formulate standards, of the sort which are uniquely within the competence of administrative organs and which reflect political and moral and social considerations of which they are specially competent to judge and evaluate." (*Supra*, p. 326.)

Mr. President, I would emphasize their contention that it is especially within the competence of administrative organs and not the Court's to

reach judgments and formulate standards which reflect political, moral and social considerations.

Now, this attitude stands in sharp contrast to the attitude adopted in the Reply, to which reference has been made, and even to the attitude adopted in the early stages of these Oral Proceedings. I would just refer to one passage in the Reply, **IV**, at page 485, where the Applicants said that—

> "... courts have found no difficulty in dealing with political, economic or humanitarian issues, even when formulated in general terms".

They "found no difficulty".

At page 491 of the Reply, **IV**, the Applicants said:

> "The second fallacy is [in Respondent's contention] that, for reasons unexplained, Respondent appears to assume that it is not as difficult for a political body to deal with a generally stated obligation, or with one based upon economic, social or political considerations, as it is for a court. Human experience, both in respect of national and international parliamentary bodies, belies such an assumption."

In the Reply, courts found it *easier* to deal with these things than administrative bodies. Now, in the oral reply in these proceedings, courts cannot deal with these at all, only administrative bodies can do it. I may also refer in this regard, Mr. President, to the separate opinion of Judge Jessup in 1962 as an indication, not only of the view held by the learned Judge, but also of the light in which he saw Applicants' case as then formulated, particularly for the latter purpose. He said, at page 429 of the *I.C.J. Reports 1962*:

> "There is no reason why this Court should be unable to determine whether various laws and regulations promote the 'material and moral well-being and the social progress of the inhabitants' of the mandated territory.
>
> If courts can pass on such questions, there is no reason why two governments should not discuss them (and such discussion would constitute a negotiation) and reach agreement that the measures were improper; or that the deficiencies alleged to exist were not established; or failing agreement, resort to this Court."

Here is a clear indication, Mr. President, of the light in which the Applicants' argument was seen and the view held by the learned Judge as to the issues which were then before the Court.

Now, Mr. President, these various contrasts in attitudes are not shown for any derogatory purpose, they are in fact, in our submission, significant as emphasizing that the Applicants no longer rely on any supervisory function or any right of review which should be exercised by the Court, and, indeed, that they now concede that such a function or such a power could not have been intended for the Court. They now concede that the Court was not intended and would not have been intended to exercise such a power.

It would follow that if their contentions were now taken to their logical conclusion, the only basis on which the authors of the Mandate could have intended the Court to adjudicate on alleged violations of Article 2 (2) would be if the League organs were empowered to lay down

legislative standards or norms binding on the mandatories and the Court.

If I may amplify that for a moment, Mr. President, their case now is, apparently, that a court has no general power, no general function to consider and weigh up humanitarian, social, political, economic factors in order to come to a decision thereon. They say that the Court cannot express a view as to what does or does not promote well-being and progress. All that the Court can do, they say, is to give effect to the norms and the standards, the judgments and the condemnations which have already been reached by the organized international community. If that is the function of the Court *now*, then surely that must always have been the function of the Court. And that must also have been the function of the Court in 1920—the function which the authors of the Mandate must have considered or intended the Court to exercise. That, in turn, necessarily entails that the authors of the Mandate must then have intended the expressions of view or the expressions of opinion of the organized international community to be binding on the mandatory *even then*, because if they were not binding *then*, if the Court did not have jurisdiction for such purpose *then*, how could the Court's jurisdiction have been increased in the meanwhile? It is a position which, in our submission, logically follows from the attitude which the Applicants now adopt. It logically follows that the Court would have had no jurisdiction unless the intention was that the supervisory organs, the administrative supervisory organs could, even in 1920, have laid down binding standards and binding norms which would bind the exercise of the Court's function.

If, Mr. President, no such power was intended for the League organs, if the League organs were not intended to possess power to lay down such binding standards, it follows, in our submission, that no jurisdiction as regards breaches of Article 2, paragraph 2, was intended for the Court at all, which, of course, accords of course with our main submission on this point. And, since, as we have already demonstrated and we shall again show the Court, the legal position was indeed that the League organs possessed no power to lay down binding standards or binding norms or binding interpretations of Article 2, paragraph 2, it clearly follows that the Court was indeed not intended to possess such a jurisdiction. That, in our submission, must necessarily be so, Mr. President.

As soon as one accepts the position, which we submit to be clear, that the organs of the League were not empowered to lay down such standards or norms which could bind the Court, as soon as that position is accepted and also, in the light of Applicants' admission which they now make, that the Court cannot decide on the facts whether provisions promote or do not promote, then what possible jurisdiction could have been intended for the Court in 1920 as regards Article 2, paragraph 2? In our submission, none at all. And if no jurisdiction as regards Article 2, paragraph 2, was intended as at that stage, how could such jurisdiction have arisen subsequently? Certainly, Mr. President, not without the consent of the Party bound thereby, namely the Respondent.

No subsequently arising norms, standards or customs could have altered this basic fact. The only thing that could have effected an alteration or a change or an enhancement of the Court's jurisdiction in that regard could have been the consent of the Mandatory and no case whatsoever is made by Applicants on the basis that the Mandatory, that is, the Respondent, ever consented to accept an increased obligation or ever consented to an increased jurisdiction of that sort.

Now, in conclusion, Mr. President, to summarize briefly what I have said, the Applicants commenced with a case based upon deliberate oppression. After receipt of the Counter-Memorial, they realized that they could not succeed on that basis, or on any other basis which would involve an independent enquiry by the Court as to the circumstances in South West Africa and, particularly, as to the circumstances in South West Africa compared with those in other territories in Africa, so that, by degrees, they abandoned these charges of deliberate oppression.

First, they went half-way and sought to establish them by some sort of legal fiction which would eliminate the necessity of looking at facts, but when they saw that that one would not run, they abandoned the charge altogether. So that, consequently, by degrees and as a result of practical necessity, the Applicants were forced back on to their norms and standards. However, difficulties in defining these norms and standards so as, on the one hand, to avoid a factual enquiry but, on the other hand, to exclude unassailable forms of official differentiation, have now forced them to the contention that they need not define the norms and standards—that the organized international community has not only established the norm but declared it applicable to the circumstances of South West Africa.

This contention entails, of course, that there is, at the moment, no definition of the norm. The definition which the Applicants said, during the inspection proposal, that they were obliged to furnish in order to establish their case, has not been forthcoming. All that there is, is a general formulation which applies to a wide variety of subjects, some of which are entirely unassailable on any basis and then, in addition, certain exceptions conceded by the Applicants which they explain on an *ad hoc* basis without, however, taking them out of the wide ambit of the norm. Therefore the net effect, Mr. President, is that we really have no proper definition of the norm. And the only basis on which it can be declared applicable, the only basis on which they seek to declare it applicable to South West Africa, is to say that it has been declared so by the organized international community.

Following on this change of the content of the norm, Applicants naturally also were obliged to limit the sources from which the norm and standards are sought to be derived, and such limitation of sources also serves the useful purpose for them of eliminating any factual enquiry which might have been required for proper consideration of the sources originally relied upon. The wide field, the wide nature, the wide class of sources which they originally suggested, has now fallen by the wayside.

In conclusion, Mr. President, I might just say that the purpose of this argument is not to criticize the Applicants or their legal representatives or to be derogatory in any other sense; the purpose is purely to show the bearing of all this on the merits of the Applicants' argument as now advanced. It must, in our submission, be unique, Mr. President, in the annals of this Court that an Applicant has, at so late a stage as its oral reply, raised and propounded and advanced an entirely new case to this Court. If that is not unique, Mr. President, they must at least have set a new precedent by presenting a new case every time they expressed themselves—firstly in the Memorials, then in the Reply, then in their oral statements and then in their oral reply—a new case on basic aspects each time.

Where, as we shall show in more detail later, their case now rests largely

on international custom, it is, in our submission, at least worthy of comment that it has taken them five years and four expressions of view, before they decided to back this particular horse. It has taken them five years to realize that this international custom, this consensus, of which they speak with such enthusiasm now, exists. If it exists, the Court may well ask why did not the Applicants realize it earlier? Why do they only present it now? And also, Mr. President, it must be significant, in our submission, that these changes in their cases, this raising of a new case at the very last stage of the Oral Proceedings, was occasioned not by a new insight or a new view or a new idea which the Applicants have suddenly obtained, but that, as I have shown, these various changes and this final change culminating in the amendment of their submissions, have been induced only by considerations of expediency; that it has been only for practical reasons, for practical reasons of drafting, of definition and of truth, that they have been forced to change their case to this very narrow basis on which they now rest.

I thank you, Mr. President, my learned senior will continue.

19. REJOINDER OF MR. DE VILLIERS

COUNSEL FOR THE GOVERNMENT OF SOUTH AFRICA AT THE PUBLIC HEARINGS OF 10-15 JUNE 1965

Mr. President, honourable Members of the Court, before I proceed to a more detailed consideration of the merits of the Applicants' case as now advanced, there are, I am afraid, certain further aspects of analysis which have still to be put to the Court. I am afraid it is a long drawn-out process and parts of it may be tedious but it seems to us to be absolutely necessary, in the circumstances which have arisen, where, as my learned friend, Mr. Grosskopf, has just stressed to the Court again, we are faced with a substantially new case—one which developed by degrees from something else which was earlier before the Court. It is necessary, therefore, to obtain absolute clarity as to what this case now is and what it is not.

I promised, in that respect, in my opening address to the Court on Tuesday, to furnish references to the record which make it perfectly clear that the Applicants now rest their case only on the contentions in regard to an alleged norm and/or standards, and that they do not bring a case on either of the only two alternative possible cases that could have been brought on the basis of Article 2, paragraph 2, of the Mandate—the only two other possibilities that have been mentioned in the discussions at all, namely either a case on the basis of purpose or on the basis of the effects of the Mandatory's policies.

We have already drawn the Court's attention to the Applicants formal Submissions, numbers 3 and 4, as they are now reformulated and redefined. My learned friend, Mr. Grosskopf, read them again to the Court yesterday and I do not intend to read them out to the Court in detail now, but I should like to refer to certain salient aspects of the wording as it now stands as distinct from what the wording was before.

The original wording of Submission No. 3, the Court will recall, in both cases contained a reference to "the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof ...". Those were the words of Submission No. 3. And then in Submission No. 4 we found something similar, although not identical, "by virtue of ... [various] policies ..., which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof ...". In both cases, these words I have quoted have now been omitted from the reformulated submissions. As Submission No. 3 is reformulated, it is now said that Respondent, "by laws and regulations and official methods and measures which are set out in the pleadings herein has practised *apartheid* ...". And then there is a definition of apartheid, concurring entirely with the content of the norm and of the standards now relied upon. In other words, it reads "... i.e., has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory", making it clear, Mr. President, that that is the sole basis upon which this adjudication is now asked for.

It is significant, I might point out, with respect, that in this context the expression apartheid itself has now changed its significance. It was

formerly defined in consonance with the Applicants' case as it was apparently then seen. It was defined in the Memorials in terms which attributed deliberate oppression to the Mandatory government. It is now formulated in terms which relate only to one aspect, viz., to the allotment of rights and obligations, privileges, and burdens, on the basis of membership in a race, group or class.

So that position has been made clear even by the wording, quite apart from the official explanation which followed and which emphasized that aspect.

Again, in Submission No. 4, where formerly the reference was to "*the* economic, political, social and educational policies applied within the Territory", and as more particularly set out in Chapter V and summarized in paragraph 190, we now find omission of the word "the". It is now "by virtue of economic, political, social and educational policies applied within the Territory"; and then these words are inserted, "by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein"; and then further words are inserted, "has in the light of applicable international standards or international legal norm or both failed to promote to the utmost . . .".

Again, this is wording which is on its face designed to narrow down the case merely to the basis of the standards and the norm, except that this wording does not explicitly say which standards or which norm is being relied upon.

The Applicants, however, make that explicitly clear in the formal interpretation provided by them. I refer to page 375, *supra*, of the verbatim record of 19 May where Applicants provide: ". . . the following formal interpretations and explanatory comments with respect to the foregoing submissions . . .". It is made perfectly clear there that ". . . Submission No. 4 is not intended in any manner to suggest an alternative basis upon which the Applicants make or rest their case other than the basis upon which the Applicants present in Submission No. 3 itself"; and it is said further, specifically: "*the* distinction between the two Submissions 3 and 4 being verbal only, for reasons which have been set out in the cited section of the verbatim record".

Then, in the next paragraph of this formal interpretation and explanatory comment, the norm and the standards referred to in Submission No. 4 are unmistakably indentified. It is said that "The reference in Submission 4 to 'applicable international standards or international legal norm, or both' is intended to refer to such standards and legal norm, or both, as described and defined in the Reply at IV, page 493, and solely and exclusively as there described and defined . . .".

So, Mr. President, that is made very clear in the re-formulation of the submissions by itself and read with this formal interpretation and explanatory note.

Now, the Court will recall that the allegations in the pleadings related to improper motives, to wrongful intent or purpose on Respondent's part, to oppressive conduct towards the Natives, and failure to promote well-being or progress in any significant degree whatever. We now find that the submissions as now defined, and particularly in the light of the significance of the amendments as compared with what they referred to before, make positively clear that the Applicants found their case purely and exclusively on the basis of the norm and/or the standards, and negatively, that these earlier bases, or possible bases, of their case,

suggested by the wording of the pleadings, are not relied upon by the Applicants any more. That is made clear by these submissions and explanatory interpretation or official explanation.

But it is made clear also in another way, Mr. President. It is made clear by specific and explicit statements bearing on both those aspects, both on the positive aspect that that is the Applicants' only case, and on the negative aspect that no case whatsoever is being brought any longer on the basis of either motives or effect of the policy. I say "any longer"; that accords with our interpretation of what the position was before, since we submit to the Court that there very clearly was a case to that effect before. The Applicants say, of course, that in fact their case has always rested, and has always been intended to rest, on the norm and the standards alone, and that they have now only sought to avoid misunderstanding by the amendment of their submissions, coupled with the explanatory note.

Be that as it may, we find these statements, we find them in the record, and they make that position in our submission abundantly clear.

Now, I begin by referring the Court to the verbatim record of Tuesday, 27 April. I shall take these in chronological sequence as far as possible. If I remember correctly, this was at the stage of debate on the proposal for an inspection. At page 17, *supra*, of the verbatim record for 27 April, my learned friend, Mr. Gross, stated:

> "The Applicants' contention that such policies and practices violate Respondent's obligations in accordance with and pursuant to the relevant provisions of the Covenant and of the Mandate does not place at issue Respondent's motive or state of mind and such submissions do not, explicitly or implicitly, request the Court to take such motive or state of mind into account, nor to adjudge and declare with respect thereto. On the contrary, as the Applicants repeatedly have sought to make clear, the basis of their case with respect to the alleged breaches and abuses of these articles renders any such considerations irrelevant and foreign to the cause of action truly embodied in their submissions."

It hardly seems that one could be more explicit in making clear that the submissions, the contentions, do not rest on any case brought with reference to purpose or motive.

At page 20, *supra*, of that same record we find this:

> "The Applicants have made clear that their purpose of setting forth in considerable detail the facts concerning the measures of implementation, the laws, regulations, administrative practices—none of which is in dispute, and if any is in dispute, the Applicants do not rely upon them—that these facts, systematically applied, in the Applicants' submission, do establish a violation of the international legal norm, for which the Applicants contend, if the Applicants' views in that respect are not correct, if the Applicants' case upon its own theory is not made, the result must be obvious."

That is not what we said, Mr. President. That is what the Applicants said.

Then, at page 23, *supra*, of that same record of 27 April we read:

> "The Applicants likewise repeat and reaffirm that neither their Submissions 3 or 4, nor the legal conclusions, which I have just quoted from the Memorials, nor any other statements or arguments

made by Applicants, that neither Submissions 3 or 4, nor the legal conclusions which flow from the undisputed facts of record, directly or indirectly, explicitly or implicitly, place in issue Respondent's motive, purpose, objectives or state of mind or that of any of Respondent's officials from time to time in office."

Even more extensive and explicit, if that were possible, the Applicants contend at page 28, *supra*, of that record—

"... that all facts relevant or necessary to adjudication upon its submission are not only in the record of the proceedings but are, indeed, undisputed. That I have sought to make clear."

I proceed to give some quotations (I could give more but I think these should suffice) from the record of the next day, 28 April 1965:

"It is the Applicants' case [my learned friend stated], rightly or wrongly, that the policy and practices complained of as a matter of the international legal norm, and the universally accepted standards upon which that legal norm is based and which it reflects, that such a policy cannot inherently promote the welfare of individual inhabitants of the Territory. Any contention to the contrary is an attack upon the norm itself. Of course it is permissible for the Respondent to question the validity, existence and content of the legal norm, that is a principal issue joined in these proceedings. But any conception that would lead to a doubt or an inference or an assumption that promotion of the welfare and progress of an individual is compatible with the allotment of the rights, burdens, duties and privileges, upon the basis of his membership in a group rather than upon his quality, merits and potential as an individual person is impermissible, inconsistent and such a policy is repugnant to the legal norm which we assert covers the situation.

The condition of the individual's health, his happiness, ostensible happiness, or other factors which are frequently referred to, do not in these circumstances, have a relevance to the validity and content of the norm if it exists, as the Applicants respectfully submit that it does.

In view of the fact that the practice and policy complained of is inherently incapable of promoting the welfare and progress of the inhabitants, that it inherently and *per se* is repugnant to and violates the international legal norm; this makes it necessary to conclude that the phraseology 'irrespective of any other steps taken by the Mandatory for promoting the welfare of the inhabitants of the Territory' does not, in our respectful analysis, have any bearing." (*Supra*, pp. 45-46.)

If I may pause there for a moment, the quotation of the words "irrespective of any other steps taken by the Mandatory for promoting the welfare of the inhabitants of the Territory", it will be recalled, was taken from a question in this regard by the honourable Member of the Court, Sir Gerald Fitzmaurice, and it was in response to that question that the Applicants stated that that consideration could not, "in [their] respectful analysis, have any bearing".

I proceed with the quotation:

"It [in other words, that phraseology] would seem to rest on the assumption that considerations of the promotion of the welfare

of the inhabitants of the Territory must be and can be evaluated in some manner other than against the admitted conduct as applied to the norm contended for."

Again, Mr. President, this makes it clear in another way how this "norm contention", as it was then called (the Applicants have since made it clear that they include standards in that connection), is the only basis upon which they bring a case—that anything falling outside of that would not be relevant to the case at all.

Then at pages 47-48, *supra*, of that record of 28 April 1965, we find the following:

> "No standard of achievement anywhere in the world would be high enough or low enough, as the case may be, to justify and extenuate the policy of apartheid, in the Applicants' submission. The international legal norm and standards which exist are not subject to, or conditioned by, or affected in any manner by, any question concerning standards of achievement. A contention to the contrary does not and cannot be asserted in extenuation or explanation of the policy and practice of apartheid. Rights, duties, burdens, obligations, cannot be allotted on the basis of race, tribe or membership in a group, without regard to individual merit, capacity or quality."

The words I want to emphasize, Mr. President, are "the international legal norm and standards . . . are not subject to", and not "conditioned by, or affected in any manner by, any question concerning standards of achievement". In other words, results also are foresworn as being the basis upon which the violation of Article 2 is said to have occurred.

At page 56 of that record we read:

> "The Applicants are either correct or incorrect, they are either right or wrong, in their submissions with regard to what the international legal norm applicable to this case stands for, what its content is."

I proceed to page 57 of that same record:

> "There can be no question of promotion of welfare that could be relevant to the practices and policies which are complained of and which are the subject of the undisputed factual content of this record."

May I pause, Mr. President? It seems that the Applicants almost came to a point of despair in these following words:

> "How many times is it necessary to repeat that is the heart and soul of the Applicants' case, and if the Applicants are wrong, they will be told so, of course, by this honourable Court in due course?"

I pause again: that which "is the heart and soul of the Applicants' case" is this contention: that "no question of promotion of welfare could be relevant to the practices and policies which are complained of and which are the subject of the undisputed factual content of the record. And the next sentence in this record makes it clear why that submission is advanced, because here the Applicants said:

> "The Applicants have confidence in the legal propositions upon which they rest their submissions and will, it goes without saying, Mr. President, endeavour to clarify those submissions to the fullest

extent of their capability to do so. But on the basis of the submissions, as the Applicants intend and respectfully present them—on the basis of the undisputed facts of this record, the Applicants respectfully submit, and accordingly through the Court advise the Respondent, that the Applicants rest their case upon the propositions asserted, and that the acceptance of these propositions would make irrelevant, unnecessary, for all the reasons the Applicants have endeavoured to explain, the introduction of further evidence, either at the seat of the Court or elsewhere . . ."

That takes us to the next stage, the record of 30 April.

Mr. President, proceeding then with these extracts from the verbatim records indicating the scope of the Applicants' case as they themselves conceived of it and explained it to the Court, I refer to the verbatim record of 30 April, at pages 64 and 65, *supra*. There they quoted a passage from our Rejoinder and they stated that it "removes any vestige of doubt that Respondent clearly understands the basis of the Applicants' case" (p. 64). They proceeded to quote this passage from the Rejoinder and the crucial portion of it as it stands in that quotation is found at page 64 of that record, and it reads as follows:

"If indeed Article 2 of the Mandate must be read as containing an absolute prohibition on 'the allotment, by governmental policy and action, of rights and burdens on the basis of membership in a "group" ', Applicants would sufficiently establish a violation of the Article by proving such an allotment, irrespective of whether it was intended to operate, or does in fact operate, for the benefit of the inhabitants of the Territory."

There again, they were indicating in another way how the issue is now confined.

Going to the record of 3 May, we read:

". . . Applicants have stated explicitly that the . . . laws and regulations, the official methods and measures by which they are effectuated, . . . constitute a *per se* violation of the relevant provisions of the relevant Article of the Mandate. It necessarily follows that the Court is not requested by the Applicants to pass an adverse 'value judgment' either as to the purpose or as to the effect or as to both, of the Respondent's policies in South West Africa." (*Supra*, p. 92.)

Again, Mr. President, one could hardly have it more explicit.

Then at the same page of that record, the following passage appears:

"If the phrase 'an enquiry whether such a norm is a factually valid and a justified one' is intended to suggest that the Court should conduct an enquiry, or hear expert testimony, as to whether the norm and standards are 'justified', then the Applicants, respectfully, disagree."

I could quote many more passages, Mr. President. I do not want to overload the record with these quotations but I think they are important. I have a few more to show that this line was consistently taken right up to the end, leading up to the amendment of the submissions on the final day, 19 May. First I quote an extract from the verbatim of 12 May:

"It might be desirable at this point to say that the Applicants have submitted, and will continue to submit that Respondent's subjective intent, motive, or purpose, with regard to its performance

of its obligations under the Mandate, are wholly irrelevant factors, particularly so with regard to Article 2 (2), inasmuch as a *per se* violation of the international legal norm and applicable international standards is contended for by the Applicants." (*Supra*, p. 239.)

The verbatim of 13 May has some relevant passages. First, there is one at page 248:

"... as the Applicants have sought to make clear repeatedly, they do not seek to establish improper motives on Respondent's part; they regard the subjective intentions of Respondent's officials who may be in office from time to time as irrelevant to the basic legal proposition presented to this Court by the Applicants".

Again at page 253 of that verbatim record, Mr. President, there is the following passage:

"As the Applicants have sought to make clear ... the Applicants suggest that the intentions or purposes of Respondent's officials, who may be in office from time to time, are irrelevant to the question of the legal ... [validity] of the administration of the sacred trust."

Then at the same page we read:

"The Applicants have ... insisted and do now reaffirm [their] insistence that they reject the good faith test, notwithstanding Respondent's warning that the Applicants cannot hope to prevail in this litigation unless they follow the road indicated by the passage I have quoted from **II**, page 391, of the Counter-Memorial."

Again at page 299 of the verbatim record of 17 May 1965 it is stated that:

"The Applicants contend that international standards and an international legal norm of an *a priori* character exist which provide authoritative criteria of an objective nature for the interpretation of Article 2, paragraph 2, of the Mandate and of Article 22 of the Covenant. This theory of the case, if sustained, eliminates extra-judicial considerations. It has never been part of the Applicants' case that the Court make a subjective evaluation of Respondent's policies of discrimination and separation."

On 14 May in the verbatim at page 273, it is stated: "As was said yesterday, the good faith test in any event is irrelevant legally in the Applicants' view ..."

We come now to the last three days. I quote from the verbatim of 17 May, at page 299:

"It has never been part of the Applicants' case that the Court make a subjective evaluation of Respondent's policies of discrimination and separation."

I proceed to 19 May, the very last day. There are just two passages. The first is at page 363 of the verbatim:

"Nevertheless, it is the view of the Applicants that the nature of their legal theory and the sole basis upon which it rests, and has always rested from the earliest pleadings to the present time, renders irrelevant the calling of witnesses or the adducing of other forms of evidence designed to show the so-called 'actual effects' of Respondent's policies in the Territory. Factual evidence of this sort would not, in the Applicants' view, have any relevance to or legal

> bearing upon their submission that apartheid, inherently and *per se*, constitutes a violation of the standards or the norm governing the interpretation of Article 2, or both."

And the other is at the same page:

> "It suffices here, it would seem, to say in summary form that Respondent's submissions concerning the scope of its discretion, the realities of good faith and the character of the so-called actual effects upon well-being seem to the Applicants to be irrelevant to an assessment whether international standards and/or legal norms of non-discrimination and non-separation exist, and whether they govern the obligations of the sacred trust embedded in Article 2 of the Mandate . . ."

So, Mr. President, that was the basis upon which the Applicants proceeded to state their submissions and the formal interpretation of the submissions, in the terms to which I have already referred, on that same day, at the conclusion of their argument before they rested their case.

Mr. President, when a party makes it so clear that that is his case and nothing else, then however inconsistent that might be with what he has said before it would seem that the other party, being called into court in order to answer a case made against it, has no alternative but to accept that that is the situation. That, in practice, is now the dispute between the Parties which the Court is called upon to adjudicate.

Article 38 (1) of the Statute, as the Court will recall, refers to the Court's function as one which is "to decide *in accordance with international* law such disputes as are submitted to it". As the honourable Judge Morelli pointed out in his dissenting opinion in the 1962 proceedings concerning the Preliminary Objections, the question whether there is in such a practical sense a dispute between parties can be said to be one that is even more fundamental than jurisdictional questions. And in truth it must be so.

If one looks purely at the submissions and, in so far as may be necessary, at the official interpretation given to them, it becomes manifest that the Applicants have at least made clear, whatever other uncertainty there may be in their case, that they do not rest their case on either of the two other possibilities that have been raised in discussions as to the basis upon which a case could possibly have been made under Article 2, paragraph 2, namely a case on the basis of either Respondent's purposes or the effects of the Respondent's policies.

That was already made clear in the formal expositions, and if we further read the repeated explanations given in different contexts and for different purposes, we find that the Applicants absolutely confirm that in what they say to the Court. It would seem to us—we considered the matter very carefully—that *that attitude of Applicants now defines* the limits to the dispute which we are called upon to face in this Court, whatever the dispute may have been initially. And that is the basis upon which we intend to proceed.

We shall proceed on the assumption that the dispute is now so limited. I know that there is no way in which the Court can give us advice on this subject and that we shall have to read the situation as best we can. In a municipal court I may have asked the court for what we call "absolution from the instance", which is a testing, at the stage where an applicant or a plaintiff rests his case or closes his case, of the position

whether there is any case at all which the respondent or defendant is called upon to meet at all. It does not seem to us that there is provision for that type of procedure in the Rules and the Statute of the Court, and the Court has already given a general ruling as to the manner in which the case is to proceed.

No doubt if we proceed on a mistaken basis as to what the dispute really is then there is some way of informing us of that, even if it is by way of questions put to the Parties. But, Mr. President, that is the way in which we see the situation at the moment, and that is the way in which we intend to proceed.

We shall direct our further argument and evidence to the merits or otherwise of this case, which we understand to be the sole one which the Applicants are making against us now. The Applicants are the *domini litis*, they control what is to be the scope of the dispute. We assume and we submit that the view which will be taken of the matter will be a practical one, and that regard will be had both to the submissions and to the formal explanation given for the submissions. These really suffice for this particular purpose, whatever other uncertainty there may be as to the case which the Applicants are actually bringing. Those uncertainties persist, but there is no longer, it seems to us, any uncertainty on the question that the sole case is as there defined that outside of the suggested norm and standards as now defined the Applicants do not bring any case against us regarding Article 2, paragraph 2, of the Mandate.

And so we come to an analysis of the merits of the contentions regarding the norm and/or standards, and we begin with the standards. Here again, I am afraid that some further initial analysis is necessary, in order to see what exactly the Applicants' case is or appears to be before we can properly answer it on its merits. But in that way we shall gradually be coming to grips with this contention as to its suggested merit.

When we consider a concept of standards, the Applicants immediately start with this disadvantage, that they have to admit that standards as an ordinary concept would not *per se* have any binding effect in law. That they realize this is made clear by certain portions of the record. They themselves distinguished between the standards on which they rely and upon the norm for which they contended in the following terms in the verbatim record of 13 May, at page 261, *supra*. There they spoke of standards as "rules of conduct having a content similar to, but not an equivalent degree of legal authoritativeness of a legal norm". And then at the same page they said that the standards differ from the legal norm—

> "... only in the respect that adherence to them may not itself be a matter of independent legal duty pursuant to an international legal norm".

So at least, Mr. President, that fundamental consideration seems to be common cause between the Parties.

Obviously, if the standards are not general legal rules of conduct, as is very clearly the case, they cannot in themselves have any binding force. It was therefore necessary for the Applicants to find some formula —some basis—upon which to contend that the standards, not being legal rules in themselves, could nevertheless be said to be legally binding upon Respondent in the circumstances of this case. The Applicants did this by importing the standards into the mandate instruments by a process

which they called "interpretation". But, as we shall show, this process (called "interpretation" by them) underwent a remarkable change from the stages of the written pleadings and the Applicants' opening oral argument to the stage of their oral reply.

The Court will recall that both in their written Reply (the pleading called the Reply) and in their oral argument in chief in these proceedings, the Applicants stressed the following (I quote from the Reply, **IV**, at p. 515, a passage which was taken over in the verbatim record of 18 March, at **VIII**, p. 118):

> ". . . the judicially perceived necessity to interpret broadly-formulated, constitutional-type obligations, on the basis of current standards, rather than on the basis of the presumed 'intentions of the parties' at the time the obligations were conferred and accepted".

The Court sees that a contrast was here drawn—a distinction was drawn and a contrast postulated—between interpreting these obligations on the basis of current standards, and interpreting them on the basis of the presumed intentions of the Parties. There was an antithesis postulated and advanced there between those two concepts. This is, as I say, at the stage of the written Reply and of the opening oral argument.

At page 514 of the Reply, **IV**, the Applicants said the following: "The obligations created by Article 22 of the Covenant and the Mandate must, accordingly, be construed in the light of current standards . . ."

We pointed out, Mr. President, in the Rejoinder, **V**, at page 135, that in these contentions, as then advanced by the Applicants (that was at the stage of the written Reply), there was a basic confusion between the concepts of interpretation and application. We also demonstrated, in principle and with reference to a number of authorities—amongst others with reference to the principle of contemporaneity, or the more general principles of inter-temporal law—that an instrument is to be interpreted to bear the meaning which it would have borne as at the stage of its execution and that that meaning never changes—the meaning of the norm as distinct from the way in which it is to be applied to facts that may be changing as time goes on. We dealt with that in the Rejoinder, **V**, pages 120 and following.

However, Mr. President, the Applicants advanced exactly the same contention as before in their oral argument in chief in this Court, virtually ignoring in effect what we had said in that regard in the Rejoinder, and so it was necessary for us *in our own oral argument in chief to come* back to this subject and to revert to these basic principles concerning interpretation and application of written documents, and in particular also of the so-called broadly formulated constitutional type documents.

In doing so, Mr. President, in our oral argument in chief we cited further authorities which, in our submission, offered more than convincing support for our arguments and refuted the suggested approach of the Applicants. We can refer the Court to the argument put by us on that subject in the verbatim records of 13 April, at **VIII**, pages 584-594, of 14 April, at **VIII**, pages 594-595 and of 22 April, at pages 634ff.

It is not necessary for us to go into the details again, Mr. President. It is sufficient to reiterate our basic contention, namely that by no valid process of interpretation—certainly no process of that kind relied upon by the Applicants up to the stage of the oral argument in chief—can the

Mandatory's obligations be said to be governed by current standards. Interpretation, properly so-called, cannot lead to that conclusion, and there was no process of interpretation, properly so-called, on which the Applicants in fact, on analysis, relied up to that stage, which could be said to lead to such a result.

The standards referred to by the Applicants, in the way in which they referred to them up to that stage, could, however, in terms of the contention as we addressed it to the Court, conceivably have been considered as part of evidence bearing upon the question of fact, whether a specific measure or a complex of measures could have been intended to enure, or could possibly in fact enure, to the promotion of well-being and progress. In other words, such standards may, in this sense, be relevant as regards the application of the Mandate, having regard to the fact that the duty of promoting well-being and progress has to be complied with over a period of time in which circumstances may change. Consequently new methods and new approaches may possibly be required, as time goes on, in the application of a Mandatory's duty because of changed circumstances or changes in the general factual situation in which the duty is to be complied with. This does not, however, mean that the duty itself in any way changes.

In their oral reply, Mr. President, the Applicants did not see fit to deal with the authorities which we had cited in support of our arguments. The Court will recall that these authorities included extracts from articles by Sir Gerald Fitzmaurice, a discussion by Schwarzenberger, an Opinion of the Permanent Court, a judgment of the Privy Council, and an extract from the separate opinion of the honourable President in the *Expenses of the United Nations* case. And in the Rejoinder we had also, in addition to some of these, referred to various other judgments and opinions of this Court, for instance, those in the *Morocco* case, in the *Minquiers* case and in the *Right of Passage* case.

The Applicants did not refer to these at all. Instead, in the verbatim record of 18 May, at page 321, *supra*, they professed to have been completely "baffled" by the "purported distinctions sought to be drawn between interpretation and application", and, as a reason for being so "baffled", they merely cited a passage from Judge Cardozo's *The Nature of the Judicial Process*. When one looks at that passage, Mr. President, one finds that the learned Judge dealt with the so-called "mighty phrase" of Chief Justice Marshall that "it is a constitution we are expounding". And the central theme of Judge Cardozo seems to have been found in these words "A *constitution* states or ought to state ... principles for an expanding future"—*principles for an expanding future*. In this way then he contrasted a constitution with an ordinary type of statute, which may have exact rules, which may have to be changed in different circumstances. A constitution's function, however, is to state these broad principles which can find altered application in accordance with altered facts, and it was in this context that the learned Judge proceeded to speak of what he called "interpretation" "adopted to modern conditions". He referred, for instance, to a French Chief Justice who had spoken of such interpretations in relation to what was, apparently, as far as we can make out, the Napoleonic Code. As the Court would know, these codes of Continental Europe are perhaps even more broad in their formulation of general principles than one finds in constitutions, and it is of course a task of application, as one goes along, of broad principles to new and

ever-varying circumstances. That is the task of the law and of the courts.

It seemed perfectly clear what the Judge meant in speaking of "interpretations" in this context. He used that word, in my submission, with the greatest respect, in a somewhat loose sense but which was not misleading whatsoever in that context. What really alters is, as we have submitted, the application of the basic principle to the changing facts, and that is the point which was made so clear in these various authorities to which we referred and to which the Applicants offered no reply whatsoever.

Why, therefore, Mr. President, this reference to the passage from the writings of Judge Cardozo should have baffled the Applicants, in the light of the very clear expositions in the authorities which we cited, is, in turn, somewhat puzzling to us—unless, of course, our learned friends preferred to be baffled.

But it seems unnecessary for us to go again into this very real distinction between interpretation and application because we find that perhaps even that argument has now become academic in that the Applicants here also have brand new contentions about the type of interpretation on which they rely.

Let us go back to the Rejoinder, V, at page 140, where we stated the following:

> "The only basis upon which *interpretation* of the relevant texts could produce a result whereby current norms govern the content of the Mandate, would be if Article 2 was *ab initio* subject to some qualification such as: 'The Mandatory shall, when exercising its full power of administration and legislation, give effect to such standards or norms as may at the time of such exercise be generally applied by other States'."

That, we suggested, would have to be found by a process of interpretation as having formed part, right from the start, of Article 2 of the Mandate. That would have been a broad principle, then, which would have been capable of this type of ready application to the facts of a changing situation. The original obligation, the law or the norm, as originally prescribed in the mandate instrument itself, would provide in advance for the binding nature of standards as they may come into force in future time, and the Mandatory would, by his consent to the mandate arrangement, bind himself in advance, then, to having such standards binding upon him. But that would, therefore, in our submission, have been the necessary basis upon which a contention of this kind would have to rest. Applicants would have to get such a qualification into the Mandate in some way or other—by normal processes of interpretation or implication.

We then proceeded to state, still at the same page of the Rejoinder:

> "Inasmuch as no such qualification was included in the express terms of the Mandate instrument, Applicants would then have to contend that it must be read into the Mandate as a necessary implication."

We then pointed out, Mr. President, that it was unthinkable that the authors of the Mandate would have decided upon, and that the Mandatories would have consented to the imposition of such an obligation, and we concluded:

"Since Applicants do not rely on such an implication, and no material has been adduced to suggest the existence thereof, Respondent will not devote any further consideration thereto."

We reverted to this matter in our oral argument in chief in the verbatim record of 22 April, at **VIII**, page 638, and there we pointed out that the Applicants in their opening oral argument had declined to state whether or not they contended that the mandate instrument did contain such an implied obligation. We pointed out further that, in the verbatim record of 24 March, at **VIII**, page 261, the Applicants had quoted this statement for the Rejoinder, and they had then said that they found it unnecessary to comment further on it.

In the oral reply of the Applicants, Mr. President, this however, became another story. In the verbatim record of 18 May, at page 319, *supra*, the Applicants once again quoted this statement from the Rejoinder, and they said that "Except for the last clause" the statement was precisely what the Applicants contended for. They proceeded to say:

"in essence, that Article 2, paragraph 2, must be interpreted and read as if it did explicitly state *ab initio* and include the qualification that 'The Mandatory shall . . . give effect to such standards or norms as may at the time of such exercise be generally applied by other States'—I would substitute for 'other States' the 'competent international organs' ".

That is the way my learned friend then put it: that that was precisely what they contended for with only the one alteration. To get it perfectly clear then let us read it all in one piece as now intended by the Applicants: their contention is then that, on a proper interpretation of the Mandate, Article 2 is subject to this qualification:

"The Mandatory shall, when exercising its full power of administration and legislation, give effect to such standards or norms as may at the time of such exercise be generally applied by the competent international organs."

That seems, on the basis of what the Applicants themselves said, to be what they contend for, as something to be found in the Mandate by interpretation, as they say, of the mandate instrument.

Now, Mr. President, such a so-called interpretation can obviously be based only on the intentions of the authors of the Mandate, and indeed, we find that the Applicants say that it is their contention, that it is based on what they call the presumed intentions of the authors of the Mandate. They started with this topic right at the beginning of the record of 18 May. On the very first page of the text of the argument, which is page 311, *supra*, of that record, my learned friend, Mr. Gross, stated this:

"Mr. President and Members of the honourable Court, the Applicants will commence discussion of the relevant international standards with certain general observations."

So he was commencing the subject of the standards now, as distinct from the norm. He continued:

"These observations are designed to demonstrate why accepted canons of interpretation, especially as applied to treaties and conventions, support the Applicants' basic contention that the international standards generated by the competent organs of the

international community govern the interpretation of Article 2, paragraph 2, of the Mandate by providing authoritative, objective and relevant criteria which should be accepted and applied by this honourable Court."

So, Mr. President, we find that in this argument interpretation plays a role in three ways. First there is the interpretation of the basic mandate instrument so as to contain a qualification of the nature I have just referred to. Then on the basis of that interpretation, effect is given to such standards as might come into existence by interpretation of the mandate provisions by the organs of the organized international community. That is the second stage of interpretation. Those organs interpret, and their interpretation becomes authoritative. Then we come back to the Mandate, and when we again interpret the mandate instrument, the authoritative interpretation is said to apply, to govern the interpretation of Article 2 of the Mandate.

It all rests, as the Court will see, on this basis of first getting this initial qualification into the basic instrument, the Mandate itself.

At pages 315 and 316, *supra* of the record of 18 May, the discussion on this point, the discussion which had started off from the accepted canons of interpretation in this context, was further developed. There was further reference to the presumed intentions of the authors of the mandates system; and then at page 317 of that record the Applicants stated the following:

> "The founding fathers of the mandates scheme, the Respondent itself as mandatory in undertaking the obligation, must conclusively be presumed to have undertaken the obligation of a content, scope and nature which the Applicants contend for."

At page 318 they proceeded:

> "The mandate instrument must, as I say, be interpreted in accordance with the intentions of the Parties in 1920 but it must be interpreted thus in the light of its nature, spirit and purpose. When Respondent undertook in 1920 the obligation to 'promote to the utmost' the well-being and 'the social progress' of the inhabitants of the Territory of South West Africa, Respondent thereby undertook an obligation to apply evolving and developing standards in the light of modern conceptions and knowledge with regard to the well-being and development of dependent peoples, as appreciated by the international organs vested with the duty of supervision as a *safeguard* to effectuate the purposes of the sacred trust."

The Court will recall this quotation is from page 318 of this record. It then runs on, until we come to page 319, where the qualification to which I have referred as one sought to be read into the Mandate by so-called interpretation is explicitly formulated, and where the Applicants explicitly say that that is exactly what they contend for.

Now, Mr. President, the passage which I have just read is a long one. Perhaps I should stress again certain features of the passage which I submit are significant. The emphasis is very definitely on the intentions of the Parties in 1920, as being the basis on which the Mandate must now be interpreted. It must be interpreted thus in the light of its nature, spirit, and purpose, the Applicants said, but basically in accordance with the intentions of the Parties in 1920. The interpretation then is that Respondent undertook this peculiar type of obligation which would render

binding the standards to be laid down in future by organs of the organized international community.

Now, may I point out in the first place that in that respect the Applicants are very far removed from the stages which lasted up to the oral address in chief in this Court, when they spoke of the necessity of interpreting the mandate instrument on the basis of current standards *rather than* on the basis of the presumed intentions of the Parties at the time of the execution of the instrument—where they stated those two things as standing in antithesis to one another.

The two concepts are now linked, and it seems, Mr. President, that the Applicants have come around to accepting that it is necessary for their contention to link them in this way, and that the only way in which they could make those standards binding would be first to lay the foundation by way of ordinary interpretation of the mandate instrument.

In the second place, the reference in this last passage to the "international organs vested with the duty of supervision" seems to give specific content to the phrase "the competent international organs" which the Applicants used in their re-formulation of the qualification which we suggested they would have to read into Article 2 of the Mandate.

The Court will recall that in that qualification, as re-worded by the Applicants, it was stated that the Mandatory must give effect to such standards or norms as may at any particular time be generally applied by "the competent international organs". Now, in the passages I have just read to the Court, there the reference is to "the international organs vested with the duty of supervision as a safeguard to effectuate the purposes of the sacred trust".

It therefore seems that these two concepts are intended to be equated with one another, that by speaking of the competent international organs the Applicants mean the organs vested with the duty of supervision of the Mandate. I emphasize that that *seems to be the position*, because we run into difficulties later if our assumptions about questions of that kind are too absolute.

There are other statements made by the Applicants during the course of their oral reply, which also appear to confirm this understanding of their latest contention. So, in the verbatim record of 17 May the Applicants said this:

> "There must be applied to the process of interpretation of the mandate, treaty or institution, the current body of internationally binding and valid rules, crystallized in the overwhelmingly accepted judgments of the competent supervisory international organs and embodied in what the Applicants have called 'international standards'." (*Supra*, p. 307.)

So there again, the concept is the competent supervisory international organs.

At page 310 of the same record is the following:

> "The standards which, likewise of course, have the same content which similarly relates to non-discrimination and non-separation, govern the interpretation and application of Article 2 of the Mandate as authoritative interpretation by the competent international organs responsible for supervision of the Mandate, and which form a part of the network of protection of which the principal links are

> the administrative organ and the judicial body in this honourable Court."

Again, "competent international organs responsible for supervision of the Mandate" are mentioned.

Then, in the verbatim record of 18 May, at page 315, *supra*, the Applicants submitted that Respondent, as the so-called "agent of the international community ... is obliged to defer to international standards". The Applicants immediately proceeded to make it clear what they meant by "international standards". They said, still on page 315:

> "In particular, the Applicants contend that the organs of the United Nations, the supervisory agency, if the Applicants' legal theory is sustained—which is based upon that of the Court's holding in 1950 and, in our submission, reaffirmed by necessary implication in 1962—the organs of the United Nations, with such supervisory authority, have competence to define the standards of well-being which provide authoritative criteria for the interpretation of Article 2."

So, again, there is mention of the United Nations as the supervisory agency. Now, I further draw attention to the expression here "competence to define the standards". The Court will recall that, in the reformulation of what we suggested the Applicants would have to read into Article 2, the word used was "applied" in the phrase "standards *applied* by the competent international organs", but here the word is "competence to *define* the standards". It is interesting to see what other terms the Applicants use in this regard to indicate what this competence of the organs in fact amounts to. In the record of 18 May they stated:

> "... it is imperative that international supervision is able to translate itself into obligations of the Mandate by means of the standards formally set forth by the competent international organ and the capacity of the competent international organs to do so, under the scheme of the Mandate, rests in this Court's hands". (*Supra*, p. 319.)

This is a statement which perhaps requires some examination on its own, but it would take us off at a tangent if I were to pursue that now, so I shall come back to it at a later stage.

For the moment I refer to the concept of international supervision being "able to translate itself into obligations by means of standards formally set forth by the competent international organ".

Then at page 325, *supra*, of the same record, the Applicants spoke of:

> "... the judicial role in applying the standards and judgments evolved by the competent administrative organ to which the Mandatory is accountable and upon which the sacred trust is laid".

The same tenor we find in the following passage, from the same record, at page 317:

> "The very concepts of moral well-being and social progress demand and cry out for objective determination on the part of the competent international organs whose responsibility, rather than whose right, is fixed by the mandate itself ..."

So, Mr. President, it seems that this qualification, which one would have to read into the mandate instrument, is to be read in the light of these various expressions as to what was the nature of the competence which was intended by the mandatory and by the founding fathers at

the time when the mandate arrangement was arrived at. It was variously described as a competence to apply currently applicable standards, as a competence to *define* those standards, of translating supervision into obligations for the mandatory, of setting forth those standards formally, of evolving standards and judgments, and of objective determination of the obligations of the mandatory. All those concepts, in their various differences of meaning, the mandatory must be taken to have agreed to in advance as being functions of the competent organs, whose exercise of these functions would then be binding upon the mandatory and upon this Court.

These passages make it clear then that the Applicants' contention is that on a proper interpretation of the Mandate, based on the intentions of its authors, the Respondent is bound to give effect to standards defined or prescribed (or any of these other verbs), by the competent supervisory organs.

Now, in support of this contention, and I am not sure whether it is an alternative or just a supporting argument, the Applicants would seem to rely also on the so-called "quality of the Mandate as a constitutional type document". It would, however, seem, Mr. President, that this contention is also based upon the presumed intentions of the authors of the mandates system, and that it is therefore just an additional argument proceeding on that same basis. I can refer to a few passages which would seem to indicate this position.

In the verbatim record of 18 May the Applicants said the following:

> "It is not only from the expressed terms of the Mandate that Applicants derive the Respondent's duties to conform to modern standards, as objectively determined, in promoting to the utmost the well-being and social progress of the inhabitants, it is also because of the quality of the Mandate as a constitutional type document, . . ." (*Supra*, p. 320.)

Then, at that page of that verbatim record, there is a passage which reads as follows:

> "For if, as the Court said in its 1962 Judgment, at page 329, the mandates system involves, *inter alia*, 'the recognition of a "sacred trust of civilization" laid upon the League as an organized international community', then it necessarily follows that that community requires the competence and possesses the responsibility for specifying the dynamic content of well-being and moral and social progress by the establishment of authoritative standards—how else could it carry out its competence?"

Mr. President, I am not sure that I fully understand Applicants' contention, but it would seem to amount to one of two things—either it is purely a legislative argument—legislative in the sense that it depicts what would be a desirable position and then asks the Court to find that such a position exists. Otherwise it means that, on the basis of the original intentions of the founders of the system, as interpreted by the Court in 1962 (i.e., as amounting to a recognition of a sacred trust of civilization laid upon the League as an organized international community), it follows by way of implication, that there must have been an intention to bestow a competence and a responsibility on the supervisory organs, the competent organs, to specify the dynamic content of well-being and progress, and to establish authoritative standards.

So it would seem that either the argument is purely legislative and therefore not intended for this Court at all, properly speaking, or it must relate also to the basic question of interpretation or implication, based upon intentions, presumed or otherwise, of the founders of the system.

At page 322 of the same record we find this further passage:

> "*In summary then*, whether one interprets the Mandate agreement in accordance with the intentions of the Parties at the time when the agreement was entered into, or whether the Mandate is interpreted and/or applied in accordance with contemporary standards, the result is identical. Respondent's obligations under Article 2, paragraph 2, are to apply and to carry out the recognized and accepted minimum international standards of non-discrimination and non-separation, . . ."

That comes as a summary towards the end of this discussion of 18 May, which started off on the premise of applying the accepted traditional canons of interpretation to the situation.

So, Mr. President, in both these two variants of the argument whether one regards this reference to the constitutional-type document as something alternative, or as something just in support of the main argument, it all does seem to rest on the same basis.

It seems, therefore, that the Applicants now accept the necessity of relying basically upon the intentions—real or supposed—of the authors of the mandates system for the interpretation, and the ultimate result contended for by them. That, in our submission, could hardly be otherwise. How else, Mr. President, could standards which, by the Applicants' own definition, could not be binding *per se*, how else could they be said to be binding upon the Mandatory unless one finds by some construction that the Mandatory consented to be bound? There is no allegation that the Mandatory consented specially at the stage when the standards came into existence or thereafter—in fact it seems to be common cause that there was no such consent on the Mandatory's part—so how else could they be binding upon the mandatory *qua* standards unless the Mandatory were found by a process of interpretation to have agreed initially to be bound in that way?

The only other alternative would be that there has been a law-creating process operating independently of the Mandatory's consent and that the Mandatory is, nevertheless, bound by the results of that law-creating process. That argument, however, in so far as it is relied upon by the Applicants, would seem to fall under their norm contention and not under their standards contention because, if I understand them correctly, they say that their contention as to standards is the one at which they arrive via the mandates instrument, while the contention as to the norm is one at which they arrive independently of the mandates instrument. And the latter involves, by definition, also the creation of a norm which is *per se* binding on us and upon others, independently of an instrument like a mandate or something similar—it is different in concept in that regard from standards. May I refer the Court in that regard to the verbatim record of 17 May, where my learned friend stated:

> "The only difference between the two kinds of governing objective criteria, standards on the one hand, the legal norm on the other, arises from whether they would be binding on Respondent in-

dependently of the Mandate or because of the Mandate..." (*supra*, p. 305),

and, as he went on to explain, if I understood him correctly, the standards became binding *because* of the Mandate, the norm became binding *independently* of the Mandate.

Now, Mr. President, if the understanding of Applicants' standards contention is correct, i.e., that they find it necessary to rely on the intentions of the founders of the mandate system, including the Mandatory, three issues would crisply arise.

The first is, does the mandate instrument contain an implied or tacit provision to the effect that the Mandatory is bound to give effect to standards to be defined or prescribed by supervisory organs? Secondly, have such organs defined standards of non-discrimination and non-separation with the content ascribed to them by Applicants? And, thirdly, are Respondent's policies and practices in conflict with such standards as may have been laid down? These would be the clear crisp issues arising if one could, in an unqualified way, understand the Applicants' contentions in the manner which I have been expounding them thus far.

Mr. President, perhaps it was hoping for too much to think that there could be so much clarity about the position because, when one starts having regard to the implications of the contention of the Applicants and the sources from which the standards are said to emanate, the apparent clarity which we have obtained rather disappears again in somewhat of a smokescreen. If the position was, as I have just put it, that the Applicants rest basically and exclusively for the standards contention on the presumed intentions of the authors of the Mandate, then two implications would necessarily follow. The first is that the whole case regarding standards would fall to the ground if this honourable Court were to hold that Article 6 of the Mandate has lapsed and that it was not replaced by any similar obligation to report and account to any supervisory organ at all. That is an implication which would follow from the whole way in which the contention was formulated as we have understood it thus far.

The second implication would be that only the General Assembly of the United Nations Organisation which, according to the Applicants, possesses the supervisory jurisdiction over the Mandate would have, at present, the competence to prescribe new standards. To this could, perhaps, be added subsidiary organs of the General Assembly acting on its specific authority for that purpose, as distinct from merely acting in an advisory capacity, subsidiary organs which report back to the General Assembly so as to acquire its sanction. That would seem to be the total ambit of competent supervisory organs in this context. Standards to be defined by other organs, any other international organization or organ, would therefore be completely irrelevant in this context. Standards defined by such other organs and organizations might, of course, conceivably be relevant as evidence of the existence of the norm for which the Applicants contend but, as I have said, we are concerned for the moment only with the standards. And that is where we are truly baffled. How do these other organs come into the picture in respect of the standards argument? And yet the Applicants bring them into the picture in that regard. They bring them into the picture and it is in both of the respects I have just mentioned that we arrive at confusion as soon as we

look at the sources from which the standards are alleged to emanate.

In the verbatim record of 18 May, at page 326, *supra*, the Applicants announced that they were turning to "... an elaboration of the processes by which the relevant standards have evolved ..." and then they went on to say this, at page 327:

> "The standards by which Respondent's obligations should be measured are the authoritative judgments which have evolved principally within the context of the United Nations Charter on the one hand and the Constitution of the International Labour Organisation on the other, of both of which organizations the Respondent has been a member."

And in the discussion following on these remarks, the Applicants went on to cite or to refer to, *inter alia*, provisions of the United Nations Charter and the I.L.O. Constitution, and resolutions and Conclusions of the General Assembly, the Security Council, the Committee on South West Africa, the Trusteeship Council and the Committee on Non-Self-Governing Territories, as well as conventions of the International Labour Organisation, resolutions of the Governing Body of the International Labour Office and the reports of the Committee on Questions concerning South Africa. All those are referred to.

Now, Mr. President, on the basis of a contention so explicitly and repeatedly stated, that Respondent is legally bound to give effect to standards prescribed by the competent supervisory organ, namely the General Assembly, what can the relevancy be, of, for example, the resolutions of the Security Council or the Governing Body of the International Labour Office?

As far as we know, Mr. President, nobody has ever suggested that either of these organs, the Security Council or the Governing Body of the I.L.O., enjoy supervisory authority in respect of the Mandate. Even the Applicants, which have been most ingenious in bringing startling propositions to the Court, have, as far as we know, not suggested that. But Applicants do not even stop at resolutions, decisions, reports and so forth of organs of the United Nations and the International Labour Organisation. In the verbatim record of 19 May, at page 341, *supra*, the Applicants said that further sources of their standards are set out in the Reply, **IV**, at pages 493 to 510, that is, the written Reply, the pleading. On reference, Mr. President, to those passages, we find that these sources include, amongst others, a number of regional treaties and declarations such as the Charter of the Organization of American States and a draft declaration prepared by the Inter-American Juridical Committee. But the Applicants failed to explain the link between these regional organizations and the competent supervisory organ, or any link making any such non-binding standards specially binding upon the Respondent (apart, of course, from the norm contention with which I shall deal subsequently).

Surely the Applicants could not have had such organizations in mind when they spoke of the applicability of, "... standards ... prescribed by the organized international community, which is vested with the responsibility and which bears the burden of supervision and safeguarding the sacred trust ..." as they did in the record of 13 May, at page 363, *supra*, or when they said that the standards govern the Mandate: "as authoritative interpretation by the competent international organs responsible for supervision of the Mandate ..." (*Supra*, p. 310.)

Now, Mr. President, how must one explain this, the reliance of the Applicants on all these various sources as regards the existence and applicability of their standards, which are said to be binding upon the Respondent as standards and without having attained the status of a norm? It seems to us that there is only one possible basis upon which they could all be brought under the umbrella and that is, by assuming that the Applicants' contention means that the Mandate bound the Mandatory to give effect from time to time to such standards as may be prescribed or defined by the so-called organized international community in general. The standard-creating body would then be, not the competent supervisory organ as such, but the so-called organized international community in general, which could apparently be just as wide as the Applicants choose to regard it.

After all, Mr. President, the organized international community in the sense in which the Applicants want to use that expression in their argument (i.e., not by way of general reference which is quite justifiable), has no Charter; it has no constituent instrument other than the conception of it which happens to suit the Applicants' contention for the moment. Mr. President, whether the Applicants indeed intended to advance such a contention as to what is to be read into the Mandate, alternatively and/or cumulatively or otherwise as they said, we, of course, do not know. They have not told us, nor have they told the Court, but this would seem to be the only basis which would make sense whereby the reference to all these resolutions and all these organizations could be brought under the same umbrella of the Applicants' contention in regard to standards.

[Public hearing of 11 June 1965]

Mr. President and honourable Members of the Court, before the adjournment yesterday I was analysing the Applicants' contention in regard to standards, and we concluded that the Applicants were relying upon reading into the Mandate, by applying ordinary principles of interpretation (they said traditional principles of interpretation) a basis whereby standards to be laid down by organs of the so-called organized international community would be rendered binding upon the Respondent as Mandatory.

On analysis, it seemed, on the one hand, that the Applicants were relying in this regard on something relating to standards to be laid down by competent organs, competent in the sense that they were to exercise supervisory jurisdiction. But, then, again, having regard, on the other hand, to the various organs of the so-called international community, of which it was said that they played a role in laying down these standards which are now to be applied, one finds that organs are brought into the picture of which it is not even suggested that they exercise or have any supervisory jurisdiction at all.

So it would seem that this qualification which the Applicants attempt to read into the mandate instrument is to be taken as relating to standards to be laid down, either by competent supervisory organs and/or by the organized international community generally. That is the basis on which we shall deal with their submission, although of course we cannot be

absolutely sure that as regards this latter part we are interpreting it correctly.

The Applicants do say something which lends colour to this understanding of their submission, in the verbatim record of 17 May, at page 304, *supra*. There they said that it was in the context of the legal criteria "which apply in governing the interpretation of Article 2 of the Mandate" that they invoked "the judgments of the competent organs of the international community with respect to the practice of apartheid in the territory". The Applicants proceeded to state that "the judgment of the competent organs which are moreover endowed, in the case of the United Nations, in the Applicants' legal theory, with the supervisory responsibility over this particular Mandate". One sees there, therefore, Mr. President, that the general phrase "the competent organs", is used apparently in the context of the organized international community, of which, in the case of the United Nations, they are moreover endowed, in the Applicants' theory, with supervisory responsibility, so that "competent" would appear, on the one hand, to relate to an organ endowed with supervisory authority, but, on the other hand, not necessarily so.

So, Mr. President, as I say, we shall deal with the Applicants' submission as if it were related to two alternatives in this respect: the competent organs in the sense of supervisory organs and/or the organized international community generally. Even on this basis, it is very difficult to see how they bring in some of the declarations or resolutions or organizations to which they refer, such as, for instance, the American Declaration on the Rights and Duties of Man. The Conference of American States which produced this declaration may conceivably be described as *an* organized American community, but surely not as *the* organized international community.

Nevertheless, before we conclude this analysis of the Applicants' case on standards, and before dealing with it further on its merits, there is one further aspect to note.

In the verbatim record of 13 May the Applicants contended as follows:

> ". . . Respondent's consent to the organic law of the United Nations and the International Labour Organisation Constitution likewise entail consent to the processes of such institutions for giving authoritative, evolving and dynamic content to the provisions of a constituent charter, or ordinances, of such institutions". (*Supra*, p. 262.)

Now, this passage, Mr. President, was linked with a discussion of the norm contended for by the Applicants, in this particular place where it occurs, but its relevancy to standards is shown by other passages—for instance, this one in the verbatim record of 17 May:

> "Both the norm and standards . . . are derived from the same sources and identical contexts. Both emerge, *inter alia*, from the authoritative interpretations given to the United Nations Charter and to the constitution of the International Labour Organisation by the member States thereof by an overwhelming consensus approaching unanimity. Both the standards and the legal norm contended for likewise emerged from authoritative interpretations of Article 2 (2) of the Mandate itself by the competent organs of the international community over the years." (*Supra*, p. 309.)

So one sees this argument, Mr. President, based on the membership

of the Respondent. Respondent's consent to the constitutions in question, is applied specifically also to the case on standards. And in the verbatim record of 18 May the Applicants said that reports, resolutions and conclusions of the International Labour Organisation—

> "... form authoritative interpretations of the Constitution and, as has been said, if they are authoritative interpretations of a convention or constitution to which the Respondent has adhered—an organization of which it has been a Member—then such interpretations provide an authoritative basis for the interpretation and application of the standards embodied in the mandate instrument itself ..." (*Supra*, p. 340.)

So, Mr. President, on analysis of these contentions I have just referred to, it would seem that the Applicants contend that the Respondent is bound not only by standards emerging from so-called authoritative interpretations of the Mandate itself, but also by standards emerging from so-called authoritative interpretations of the United Nations Charter and the Constitution of the I.L.O.

We have already noted on what basis, according to the Applicants, so-called interpretations of the Mandate by the supervisory organ or by the organized international community are relevant. But, Mr. President, why should these authoritative interpretations of the Charter and the I.L.O. Constitution be binding on the Respondent as Mandatory? Why must we go so far afield to see what the mandate instrument means, and what its legal effect is? The Applicants say: because Respondent, by becoming a Member of these Organizations, consented to be bound by the provisions of the Charter and the Constitution in question, and also to authoritative interpretation thereof as regards Respondent's obligations as a Mandatory. Or, to put it in another form, they say Respondent has consented to regard the provisions of the Charter and the Constitution, and authoritative interpretations thereof, as governing the interpretation of the Mandate. So why, therefore, Mr. President, must one read the consent to the qualification being read into the mandate instrument?

The argument seems to amount to this: that Respondent became a party to, firstly, the Mandate, secondly, the Charter, and, thirdly, the Constitution of the International Labour Organisation. Now, all of these, the Applicants say, are interpreted (so-called interpreted) by attitudes taken by majorities in these bodies from time to time. That, they say, is to be seen as interpretation and it does not matter whether it is on the basis of political or similar views that these majority attitudes are taken, or whether they are really and genuinely attempted as serious legal interpretations of what the provisions of the constitutions may be.

In the end, Respondent's obligation under the Mandate is then to be ascertained by looking not at that instrument and seeing what it means by ordinary processes of interpretation in its context, but at this long subsequent history of what has happened in these various organs of the organized international community, as my learned friends put it, and seeing to what lengths they have gone with their so-called processes of interpretation. Mr. President, if that is the law, then it would indeed be a strange law which this Court is asked to apply.

In regard to the United Nations Charter the Applicants have another trump card up their sleeve. They say that the resolution of the League of Nations of 18 April 1946, which referred to Chapters XI, XII and

XIII of the Charter, "... is in itself a clear indication of the relevance to and applicability of Charter provisions to the mandates scheme". That we find in the verbatim record of 18 May, at page 329, *supra*. And they say that this resolution made it clear that the Mandate was to be interpreted in the light of the provisions of the Charter, whatever that phrase might mean, and on this basis they speak of—

> "... the interpretation ... and application of the terms of the obligations under the Mandate which must be read in light of the Charter ...". (*Supra*, p. 336.)

Mr. President, after all this it seems to us that we could reasonably and safely summarize the Applicants' basic contention in regard to their case on standards in these terms: firstly, that on a proper interpretation of the Mandate, Article 2 is subject to the qualification that Respondent is obliged to give effect to standards that may be defined or prescribed by firstly, the competent supervisory organ, and/or secondly, the organized international community in general. Secondly, that by becoming a Member of the United Nations and the International Labour Organisation, the Respondent consented to be bound by the Charter and the International Labour Organisation Constitution and so-called "authoritative interpretations thereof", and somehow these are to be seen as governing authoritatively also the interpretation of the Mandate. And thirdly, the Mandate is in any event to be interpreted in the light of the Charter. So at last we can begin to come to grips with these contentions and we intend to deal with them in that order.

In regard to this first contention, as to the basic qualification to be read into the mandate instrument, we propose to deal first with the competence sought to be assigned to the alleged supervisory organ, and thereafter with the competence sought to be assigned to the so-called organized international community in general. Our arguments addressed to the first of these aspects, Mr. President, will, in our submission, be more than sufficient to cover also the whole of the Applicants' contention in regard to the second of these alternatives, but we shall in regard to that second alternative advance additional grounds which, in our submission, further show conclusively that the contention is a completely untenable one.

Now, it will be recalled, Mr. President, that this contention rests, as the Applicants say, upon an interpretation of Article 2 of the Mandate, an interpretation apparently sought to be based on the intentions of the authors of the mandate instrument. This is the attitude they now take in contrast to what their attitude was before—that they first came with this attitude in the oral reply in this Court. The development of this argument is to be found in the verbatim record of 18 May, particularly as from page 316, *supra*, onwards. The Applicants commenced by saying that the determination of the presumed intentions of the authors of the Mandate could most convincingly be appraised by the application of the traditional concept of giving words their natural and ordinary meaning: that basic canon of interpretation the Applicants said they were applying to this argument.

And they went on to say, in that verbatim record:

> "In this case, it would seem that the normal and ordinary and natural meaning of the words used in the Covenant—in paragraphs 1 and 2 of Article 22, in the concept of the safeguards in paragraphs

> 6, 7 and 8 of Article 22, in the words of the mandate instrument itself, in the language of Articles 2 through 5, which constitute the core, of course, of the sacred trust—would exclude a good faith test. But the spirit, the purpose and the context of the instrument imperatively lead to the judgment that these words mean what they say." (*Supra*, p. 316.)

Now, Mr. President, that contention somewhat puzzled us. One sees that the first long sentence is directed at the proposition that the Articles and provisions referred to would exclude a good faith test; in other words, it is directed at our contention which we advanced to the Court, it is not directed at furthering the Applicants' contention at all.

The last sentence in that quotation is directed at the furthering of the Applicants' contention and it simply tells us that these words mean what they say. So we are still left entirely in the dark as to the assistance which the Applicants seek to derive from this canon of construction. They do not tell us what it is that these words say, and which words mean what they say—which words the Applicants say, are in any way helpful at all to their suggested qualification which is to be read into the mandate instrument. Instead of quoting and analysing the words of the instrument itself, Mr. President, the Applicants proceeded to quote certain words used by the Court in 1962, where the Court spoke of "a régime of tutelage for each of such peoples to be exercised by an advanced nation as a 'Mandatory' 'on behalf of the League of Nations' ". That is in the same record at the same page as before, page 316. And the Applicants said that that was the context in which the Court further said the following:

> "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."

That is all perfectly correct; that is what the Court said, but one wonders what bearing it has on this particular contention advanced by the Applicants, which is sought to be founded on the principle of giving to words of an instrument their ordinary and natural meaning.

Parenthetically, the Applicants went on and asked:

> "Is the Respondent to be heard to say that the purpose of the tool is to be determined by its intention as to how the tool should be used?" (*Supra*, p. 317.)

Mr. President, we, of course, never advanced such a contention, that the purpose of the mandate instrument or of the powers given to the Respondent are to be determined by the Respondent's intention as to how the tool should be used. I dealt with that matter earlier; I need not go into the detail of that again.

But leaving that aside, it is very difficult to see how this line of reasoning supports the Applicants' contention whatsoever—the Applicants' contention here under consideration—that the Mandate authorized the supervisory organ and/or the international community to lay down standards binding upon the Mandatory as to the manner in which the tool is to be used. As we shall see, Mr. President, to that question the Applicants give no answer. They never answer the question as to what words they rely upon which bring them anywhere as far as this contention is concerned.

They proceed, Mr. President, at the very same page, to cite further from the Court's Judgment in 1962 the following:

> "The fact is that each mandate constitutes a new international institution, the primary overriding purpose of which is to promote the well-being and development of the people of the territory under mandate." (*Supra*, p. 317.)

These words, the Applicant said, mark "the spirit, the purpose and the context of the clause or instrument in which the words are contained, as the Court said in 1962", and the Applicants proceeded "... 'the spirit, purpose and context' is one of the highest standards of fiduciary responsibility toward the inhabitants of the Territory, on the one hand, and toward the organized international community, on the other". (*Supra*, p. 317.)

So, Mr. President, what have we got so far, along this process of giving a meaning to words of an instrument? We find that the Court said that the overriding purpose of this new international institution, the mandate, is to promote the well-being and development of the inhabitants. That is obviously true; secondly, that the Court said that these words marked the spirit, purpose and context of the clause or instrument in which they are contained. Again this is an obvious statement, but still the relationship with the argument under consideration is obscure. Finally, Mr. President, the point is made that this spirit or purpose is one of the highest standards of fiduciary responsibility towards the inhabitants of the Territory and the organized international community. Now, Mr. President, again it would be perfectly true to say that by assuming the obligation to promote to the utmost the Respondent indeed assumed what may broadly be termed a fiduciary responsibility towards the inhabitants of the Territory. Whether the reporting obligation, the obligation of reporting to the Council or, as my learned friend says, to the organized international community, could also be fitly described as a fiduciary responsibility towards those institutions, that is a different question, but still it is a matter of words as far as this argument is concerned, Mr. President. Assuming that, for the moment, that could also be regarded as a fiduciary responsibility—and I shall have more to say about that at a later stage—the point is that one still does not see how it established the Applicants' contention that it was the intention of the authors of the mandate that the supervisory organ and/or the international community should have any competence, exclusive or otherwise, to make a binding determination as to what methods the Respondent should adopt in its administration of the Territory. Even if the relationship is fiduciary, as is that of a trustee towards the beneficiaries under a trust (the beneficiaries under a trust in ordinary municipal law may be major persons perfectly capable of looking after their own interests, but still the trustee does not take orders from these beneficiaries unless there is some specific provision in the trust instrument to that effect), one does not know even by giving that label to the situation how this helps the Applicants at all, especially on the basis of seeing what the words of an instrument mean, because we do not yet know which words of the instrument are the words on which the Applicants rely.

But, Mr. President, that this factor leads to the Applicants' conclusion of such a competence on the part of supervisory bodies or competent

bodies, that is exactly what the Applicants go on to say, that leads to the result. The words in which they put this argument require some close scrutiny for I must say that we find them somewhat mystifying in more ways than one.

We find that passage, which seems to be an important one, in the verbatim record of 18 May at page 317, *supra*, and I should like to invite the Court's attention to the contents so as to give them close scrutiny and to see, with respect, whether they could in any way be said to relate to the Applicants' contention, or to assist it or to support it, because we find the connection extremely obscure. The passage reads:

> "And the presumed intentions of the authors of the Covenant and of the Mandate, must, it seems to the Applicants, be read in this light. 'The international regime' was the way this Court has described the Mandate itself."

One does not know, Mr. President, whether the word "regime" was the one fastened upon by the Applicants, perhaps in a literal sense conveying that the regime must import into itself some concept of being able to order, or authority which can be enforced upon somebody else. Of course, if that were to be so it would be interpreting the word "regime" as used by the Court and not any word used in the instrument at all and it would, with respect, be taking that word "regime" entirely out of the context intended by the Court because the Court never, anywhere, indicated that it intended that word to have a meaning or a connotation of that kind. But be that as it may, this is mere speculation because the Applicants nowhere suggest that it is on the word "regime", as such that they fasten for an implication of this kind. The quotation proceeds:

> "The character of such a regime must conform to the changing needs of international life, as objectively determined, not as determined by the wishes, the will, or the whim of administrators or governors, who may be in office from time to time. This would be an intolerable standard for application by the international community. It would be inconceivable."

Now, Mr. President, here again, what do we find? The character of the regime must conform to the changing needs of international life, not those of the population of the mandated territory—the changing needs of international life. Mr. President, where do we find anywhere in the instrument any words which suggest a concept of that kind, any words of which it could be said that their ordinary and natural meaning leads to a conclusion of this kind?

Then the passage goes on to say that those "changing needs of international life" must be objectively determined, "not by the wishes, the will, or the whim of administrators or governors, who may be in office from time to time" because that would be an "intolerable standard for application by the international community. It would be inconceivable". Mr. President, the Respondent, as far as I know, never claimed the right to interpret the changing needs of international life for the organized international community and then to tell the organized international community, those are your changing needs, and I tell you so.

But even taking that element out of it, let us assume that the Applicants really intended to speak here of the changing needs of the population of the mandated territory. Then it is still a caricature of the Re-

spondent's argument to say that we contended that those changing needs are to be determined by the wishes, or by the will, or by the whim, of the administrators or governors who may be in office from time to time.

It is perfectly clear, Mr. President, that in giving full effect to the discretionary element in the Respondent's powers, an action on the basis of mere wishes, or a mere will, or a mere whim, would surely rank as an arbitrary one if not, under particular circumstances, as a *mala fide* one, and would therefore be a violation of the obligation undertaken by the Mandatory. It would clearly be so, on our own construction. Whether that violation is one which was intended to be determined by a court, or whether it was one to be determined solely by the supervisory organs then contemplated, Mr. President, that of course is a matter dealt with in our first contention, our main contention, as regards the justiciability or otherwise of Article 2 and it is a matter which I need not take any further. But the fact of the matter is, whichever of those two views we take, viz., that it was for the Court to adjudicate or only the administrative supervisory organs to do so, the fact remains that in law an action merely by way of a wish, or a will, or a whim, would be a violation of obligation. Yet this appears to be attributed to us as the argument, and then it is said that this would be "an intolerable standard for application by the international community. It would be inconceivable". Still, Mr. President, we see no connection whatsoever with words used in an instrument of which it is said that the ordinary meaning is being given to them.

The statement proceeds: "The concept of moral well-being and social progress involves the determination and the protection of internationally determined criteria and objectives."

Mr. President we are not told where this comes from—why the concept of moral well-being and social progress involves the determination and the protection of internationally determined criteria and objectives. It is, as far as we can see a pure *ipse dixit*; there is nothing by way of argument or supporting material which goes to support it at all.

Then this part of the statement follows:

> "Each man's notion of moral well-being and of social progress is a reflection of his own subjective attitude toward life, toward the role of the individual, toward the role of the group, and the relationship of both to the social order. How could an individual's state of mind, or purpose or intent, be marked in any other manner than by his personal appreciation and evaluation of his own role toward the social order. The very concepts of moral well-being and social progress demand and cry out for objective determination on the part of the competent international organs whose responsibility, rather than whose right, is fixed by the mandate itself . . ."

Mr. President, again one is puzzled. How can this be said to be interpretation of anything at all? Is it not rather something in the nature of an address in a body which considers what would be desirable in the international order, rather than one which is to determine what the law is?

My learned friend seems to be entirely at large with these arguments which he uses, whatever their merit may be. They are not arguments directed at the determination of an intent of authors of an instrument or directed at seeing what the instrument says. They seem very much

more to be arguments which might have been appropriate in an address to, say, a study group, on the need for reforming the international order.

Nevertheless, let us see what they amount to, Mr. President, whether they could have any bearing on a process of interpretation or construction.

The steps in the argument seem to be these: firstly, the Court has described the Mandate as "an international regime"; secondly that being so the Mandate must conform to the needs of international life; thirdly, the Respondent not being the international community cannot objectively determine these needs of international life, and fourthly, the needs can, on the contrary, be objectively determined only by competent international organs. From these steps the jump is taken to the *quod est demonstrandum*, Mr. President, viz., the Mandate must be taken to have bestowed on the competent organs the exclusive power to make an objective determination of these needs, and consequently to prescribe standards with which the Mandatory is obliged to comply.

I have pointed out already, Mr. President, that why one has to refer to the needs of international life instead of to the needs of the inhabitants of the Territory, I do not understand. Even if one makes this correction, even if one regards the contention as being intended to be directed at the needs of the inhabitants of the Territory rather than at the needs of international life, then one still finds, Mr. President, that there are no words whatsoever in the instrument to be considered as going to support any such notion that it is the organized international community or any international organs rather than the Mandatory itself which has to determine what those needs are.

The mandate instruments, Mr. President, on the contrary, contain words which very clearly confer a full power of government and legislation upon the Mandatory and they say that the Mandatory is obliged to promote the interests of the inhabitants. Article 2 says so very specifically. If the words used in the Article have any meaning at all, they oblige the Mandatory, not any supervisory body, to have regard to the needs of the inhabitants, not to the needs of international life; for obviously, if the Mandatory does not have regard to such needs, it can hardly promote the interests of the inhabitants. But according to the Applicants' argument, the Respondent's primary obligation is to have regard, not to the needs of the inhabitants, but to the needs of international life as objectively determined by the supervisory organs. Presumably, Mr. President, this must be so even if the needs of international life as "objectively determined", clash with the needs of the inhabitants, and that may be a very important consideration. And why do the Applicants say so? Simply because the Court in 1962 spoke of "the international régime" which, as I have said, was a perfectly fit description in the context of what the Court was describing, but is taken out of its context here in the way in which the Applicants seek to apply it. In any case, their argument does not relate to any words or language used in the instrument which, it is said, is being construed.

Now, Mr. President, as I have said, even if one now takes the argument as relating to the needs of the inhabitants of the Territory rather than the needs of the organized international community or of international life, let us see whether there is anything in the words, or in logic or in probability, which could be said to support this argument that the standards for dealing with those needs are to be laid down internationally

by international organs and are not to be determined by the Mandatory itself in the exercise of its discretion in determining what the needs are and how it is to deal with them.

The argument, Mr. President, as I have said, does not rest on words in the instrument but it seems to rest on this notion that different people have different ideas as to how social progress especially, social progress and moral well-being are to be achieved, and that seems to lead my learned friend to the conclusion that there must therefore be international determination of the approach and not determination by a particular Mandatory.

Mr. President, is not the logical inference directly the opposite when we look at the presumed intentions of the authors of an instrument? Is not the inference this—that just as individual persons may differ in their outlook as to how the problem of moral well-being and social progress is to be dealt with, just so different States would differ in their outlook as to how such a problem is to be dealt with? Now those different States constitute the international bodies—they are the members of those international bodies. They come there with their different, their opposing, ideas as to how the problem is to be tackled. Must they now, in debate and with one another, must they now decide how the problem is to be dealt with in mandated territories generally or in a particular mandated territory? What if they cannot agree, Mr. President? What if they are so divided amongst themselves that no answer can be obtained according to the voting procedures in the particular organisation? What, Mr. President, if they are substantially divided but there is a majority one way or the other? Must the majority then decide? Or what if, as so often happens in international life as a constructive feature of it, they arrive at a compromise between different ideas—a compromise which now satisfies everybody? Can one under those circumstances be satisfied that that is the most effective way of dealing with the needs of particular people in a particular territory? Would not the approach rather be the other way? That one says, here is a Mandatory which I, the international organization, trust—I trust it as a trustee. He can report to me from time to time so that I see what he does and so that I can criticize him if he does not do his work, but the manner in which he is to do it, that I leave to him, because I think that he is the most suitable mandatory for this particular task, so that I do not have this possibility of a complete clash of views as to how these problems are to be tackled. I know that I have entrusted it to that particular trustee and he, or that nation, in accordance with its particular outlook, will tackle those problems. I shall not interfere with the manner in which it exercises that discretion even if I might feel that in some way or other I might have dealt with it differently. I shall certainly make suggestions to the Mandatory—I shall certainly indicate to the Mandatory that I should like it to do this or I should like it to do that. But, I cannot say to the Mandatory that I am to enforce my will upon it—I, being an international organization composed of these various States with their various possible views upon the matter.

The analogy, Mr. President, is complete with the situation of a trustee in ordinary municipal law, a trustee which may have to report to some governing body from time to time, as in the case of church congregations which, as very commonly happens, organize their affairs in such a way that their business matters, i.e., property transactions, financial trans-

actions and so forth, are handled for them by a trustee or by a board of trustees, two or three of them. Let us suppose that that trustee or board of trustees must report, as would very commonly be the position, from time to time on their administration to the governing body of the congregation, which may be the Church Council or the general meeting *of the congregation itself.*

Then surely, Mr. President, that exact situation obtains. The purpose of the reporting is to enable the supervisory body to see whether the trustee is doing his work, whether he is setting about it properly, whether he is setting about it honestly, whether the whole situation appears to be in order, and whether he keeps within the limits of whatever instrument there may be defining his powers and his obligations. If, for instance, that instrument would say to him "you may invest surplus funds only on first mortgage and in shares of building societies", then Mr. President, the supervisory body would see to it that there is no investment, for instance, in the shares of an ordinary company, other than a building society, or that there is no other form of investment of a type not authorized.

But, Mr. President, when that trustee exercises his discretion in deciding that he is to invest with building society "A" and not with building society "B", then surely this governing body does not interfere with his discretion and tell him "you should have acted otherwise". If it did he would turn round and say "No, that was a matter for me to appreciate". There may be suggestions to him, of course, but there could not, in this situation, be a suggestion of a binding power in law on the part of the supervisory organization—not ordinarily. There may be exceptionally a particular stipulation of that kind but that would not be the ordinary position. And that, Mr. President, is surely the analogy which applies here, and if one gives such force, as my learned friend does, to the fact that different people would have different approaches as to dealing with this problem, then I submit, Mr. President, the logical answer is that that supports the conception that the task would have been left to one trusted trustee rather than being assigned to an international supervisory body composed of different elements where there may be opposing and clashing views on the subject.

That, Mr. President, is indeed what the words of the instrument indicate. The words of the instrument do not, in any way, assign any function or any power to a supervisory body to lay down standards in this respect which would be binding upon a Mandatory. Nowhere is anything said of that kind. On the contrary, the grant of power and of discretion is to the Mandatory—the obligation of the trust nature is laid upon the Mandatory and it is said that the Mandatory has to report once a year, as to the manner in which it has acted in regard to its trust, to a supervisory body.

Those words, for the reasons I have endeavoured to indicate, make sense. And therefore, Mr. President, when one has regard to words used in an instrument, and gives to them their natural and their ordinary meaning, and has regard also to the question whether they do make practical sense, whether they could or could not have been so intended, then the argument goes all one way, Mr. President. The argument for the Applicants is not even based on any words on which they can rely.

Now we find, Mr. President, that the Applicants do seek to place reliance on some particular words which they extract from the instru-

ment. So, for instance, the words "social progress" in Article 2, are relied upon as denoting something fluid, since they say society itself evolves and changes constantly, while progress is, again in the Applicants' words, "... by its terms ... not a constant but a variable, and predicates the natural processes of dynamic change ...". That we find in the record of 18 May 1965, at page 317, *supra*.

The Applicants then proceeded to cite a passage from the Reply, **IV**, at page 512, where they said (that is in their written Reply in the pleadings):

> "discharge of the obligation to *promote* well-being and social progress necessarily involves continuous dynamic and ascending growth". (*Supra*, p. 318.)

That is the end of the quotation. Now, Mr. President, admitting all this, it is still very difficult to understand, it is completely obscure how this can be said to indicate that the dynamic aspect is to be taken into account and to be given effect to by organs of an international body, rather than by the Mandatory itself which is charged with the task of promotion, of well-being and social progress. Nothing relied on in this argument indicated that there is to be that preference. But the Applicants say that Article 22 of the Covenant speaks of a safeguard, and they suggest that that solves the problem. That, at any rate, is how we understand their argument as they put it, in the verbatim of 18 May 1965, at page 318, *supra*, and I quote this passage to the Court:

> "When Respondent undertook in 1920 the obligation to 'promote to the utmost' the well-being and 'the social progress' of the inhabitants of the Territory of South West Africa, Respondent thereby undertook an obligation to apply evolving and developing standards in the light of modern conceptions and knowledge with regard to the well-being and development of dependent peoples, as appreciated by the international organs vested with the duty of supervision as a *safeguard* to effectuate the purposes of the sacred trust. The stress, Mr. President, is on the word 'safeguard'—that is embodied and embedded in the Covenant itself."

So, Mr. President, the word "safeguard" in the Covenant is apparently now fastened on as being the word to which effect is to be given in its ordinary and natural meaning in the context. What is that meaning in the context Mr. President? We have, of course, never denied, if I may go back to this passage which I have just read, that the Mandatory is to have regard to ever-changing and evolving circumstances and so forth, changing with the times, in the exercise of its discretionary power, and in complying with its obligation. That we have never denied, but Mr. President, why the word "safeguard" in Article 22 should mean that the Mandatory is in that respect to be bound by standards prescribed by supervisory bodies, that is something which again we do not understand. Let us see where that word occurs in Article 22. It occurs, Mr. President, in paragraph 6 dealing with the C Mandate. That paragraph reads:

> "There are territories such as South West Africa and certain of the South Pacific Islands, which owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory,

subject to the safeguards above mentioned in the interests of the indigenous population."

So we look back, Mr. President, to see where there is a previous reference to "safeguards". And we find that previous reference in the immediately preceding paragraph 5, dealing with the B Mandated territories, in terms which are well known to the Court, where it was said that:

"... the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion". [I am sorry, I said the word "safeguards" is found there. The word is not found there, but the concept is found there.]

And it goes on about the prohibition of abuses, such as the slave-trade, the arms traffic, the liquor traffic, and so forth.

So those, obviously, Mr. President, in this context, are the "safeguards above mentioned in the interests of the indigenous population". There is nothing else which conforms to that concept whatsoever, anywhere, in what has gone before. And what is important, Mr. President, is that in what has gone before, in Article 22, no concept of reporting whatsoever comes in, no concept of reporting or accountability to a supervisory body or of any power on the part of a supervisory body, because after all the reference is to the "safeguards above mentioned", and as I say in the above-mentioned portion there is nothing of the kind. It is only in the next paragraph following on this one, namely paragraph 7, that provision is made for a report to be rendered by the Mandatory to the Council, an annual report in reference to the territory committed to its charge.

So, Mr. President, again, in so far as my learned friend seeks to rely on the word "safeguards" as supporting his argument, it would seem to have nothing whatever to do with it.

These, as far as we can see, are the only essential arguments produced by the Applicants in attempted support of the proposition which is now under consideration, the proposition that the Mandate itself is to be seen as being subject to the qualification that the Mandatory, in the exercise of its functions to promote progress and well-being, is bound to comply with standards to be laid down by either supervisory bodies or by the organized international community in general. There are, of course, certain passages of repetition, there are certain assumptions stated sometimes, certain *ipse dixit*, but Mr. President, on a close search of the record, we could find no other arguments which seemed to be intended to serve the purpose of advancing this proposition.

In the result we find that not a single one of these arguments which we have now very closely scrutinized, not a single one of them, can bear any scrutiny whatsoever. The plain fact is that there are no words which could possibly bear the meaning of such a qualification. There are no words which can be construed as bearing that meaning. Applicants could not possibly rely upon an interpretation, properly so-called. They would have to rely on an implication, and as we have indicated before, a qualification, or any term or provision can be implied into an agreement, particularly a written document, only if it is a necessary inference, to *the exclusion of all other reasonable inferences* which one can draw, that the parties to the document, in fact, intended that such a provision was to govern their relationships. It must have been a case, we as indicated

before, where the understanding between them was so clear that they did not trouble to express it.

Now, Mr. President, one finds that the Applicants do not even address themselves to an enquiry of this kind with a view to seeing whether they could justify this suggested qualification to be read in the mandate instrument; and that is small wonder, because when one does approach the matter along the lines necessary for such an enquiry, one finds that all the available evidence as to the probable intent of the founders of the system goes one way, and that is certainly not in favour of the Applicants' contention; it is in directly the opposite direction.

Let us turn first, Mr. President, to the actual provisions of the relevant instruments read in their context. The first question which strikes one, then, is that if the authors of the Mandate did indeed have the intention attributed to them by the Applicants, why didn't they give explicit effect to their intention? Why didn't they say so, instead of merely saying that there is to be a report to the Council of the League? Wouldn't it have been a natural thing for them to say that the Council is here, quite exceptionally in international life after all, that the Council is to have a special and a peculiar power in respect of the Mandatory. Surely it would have been the most natural and the easiest thing in the world to have inserted an appropriate clause in the mandate instrument. Perhaps it would even have had to be foreshadowed in the Covenant itself in order to have been taken up in the mandate instrument; but nevertheless the nature of the clause, or the wording of the clause, could have been somewhat along these lines:

> "The Mandatory will be obliged to give effect to decisions of or to standards prescribed by the Council, either by a majority vote or by a unanimous vote save for the Mandatory, in regard to methods to be adopted for promotion of the well-being and progress of the inhabitants of the Territory."

That, Mr. President, would have been a very easy clause to have inserted if there had indeed been any intent of that kind.

If we look at the provisions of the Covenant in order to see to what extent any provision whatsoever is made for States to be bound, independently of their consent, to decisions or resolutions that might be arrived at by League organs, we find, Mr. President, that that matter is treated as being one of an exceptional character. In the whole of the Covenant it occurs very sparingly, and if it does occur, and where it does occur, very explicit words are used with a view to giving expression thereto.

In the first place, the Court may recall that the outstanding example of this type of provision was in Article 15 of the Covenant, with reference to that most important consideration of peace-keeping, the Article dealing with a reference to the Council of disputes likely to cause a rupture. There, the Court will recall, provision was made for a report to be drawn up by the Council in certain circumstances, and the relevant portion of Article 15 provided:

> "If a report by the Council is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report."

That, Mr. President, is one of the exceptional cases where a decision of the Council could also bind other Members of the League, although those Members of the League had not given their assent to the particular decision; but that was explicitly provided for in these terms, as we see.

We find in Article 5 there is the other well-known exception, the one relating to procedure. There it is provided:

> "All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council, and may be decided by a majority of the Members of the League represented at the meeting."

So there was an exception to the unanimity principle; a majority could bind a minority, but purely on questions of procedure.

Then, in regard to the Secretariat, the expenses of the Secretariat, there was the basic provision in Article 6, of course, where the Members undertook that "The expenses of the Secretariat shall be borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union". *That in itself was an agreement* between all the Members of the League, but the Council was given a power in respect thereof in Article 24, referring to International Bureaux, where the last portion of the provision was to this effect: "The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League."

The power is, again, very circumscribed, Mr. President. Only in the cases where those bureaux were placed under the direction of the League could the Council take the decision that their expenses were to be included in the total pool to be apportioned.

Then there was one other provision; I think Article 7 provided that "The Council may at any time decide that the Seat of the League shall be established elsewhere", elsewhere being elsewhere than at Geneva.

Finally, there is one portion of Article 22 itself, namely paragraph 8, which may be construed—there may be possible differences of opinion—as authorizing the Council to take a decision which may be binding even on States that have not agreed thereto. That is the well-known one, that "The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council". The question is whether even that could be made binding upon Mandatories without their consent. There are various possible views about it, but there is the possible view that here was authority in advance given to the Council to make a binding determination of that kind, but again, closely within the framework of the substantive provisions of Article 22 which had gone before.

By way of contrast we find, in the very important matter relating to armaments in Article 8 of the Covenant, that provision is there made for plans for production of armaments to be drawn up by the Council, and then comes this provision:

> "After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded, without the concurrence of the Council."

So here, Mr. President, in this very important matter, even though

the Council was given the function and the power to draw up these plans after taking all the factors into account, the plans were yet first to be submitted to the several governments concerned, to be adopted by them before there was to be any binding nature in the determination made by the Council in respect of these plans.

That, Mr. President, was obviously the general basis upon which this Covenant was drafted. It was a basis of proceeding by consensus, consensus in the proper sense of the term, i.e., there was to be unanimity. Where an exception was intended, where a State was to be bound by a decision of any organ of the League, by any particular voting procedure which would make it possible for that State to be bound without having given a further consent, there were these explicit and very careful provisions in these exceptional cases.

Mr. President, I was dealing with the argument that all the indications afforded by the wording of the relevant basic instruments—the mandate instruments themselves and the Covenant of the League—militate very strongly against any suggestion that mandatories were to be bound, against their will and independently of their consent, by any instructions that might be given them by a supervisory body, or by any standards to be laid down for them by a supervisory body—if there was any suggestion of anything of that kind. I had just dealt with the strong indications afforded by the Covenant itself in that regard.

I turn to the provisions of the instruments themselves—the mandate instruments—but, let me turn, first, more particularly, to Article 22 of the Covenant under which the mandate instruments were issued. The whole scheme which one finds there, Mr. President, again refutes entirely the idea which is suggested here, of a power being conferred upon a supervisory body to take decisions binding upon a Mandatory, against the will of that Mandatory and without its co-operation.

Paragraph 1 of Article 22 of the Covenant speaks of the principle that the well-being and development of peoples of the colonies and territories concerned form a sacred trust of civilization. And, then, paragraph 2 proceeds to state:

> "The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience, or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

That is where the League comes in, Mr. President—that the tutelage is exercised by these advanced nations "as mandatories on behalf of the League", but the tutelage itself is entrusted, according to these express words, not to the League; it is entrusted to the "advanced nations" themselves, and for specific reasons: by reason of their resources, by reason of their experience, by reason of their geographical position—those reasons which bring about that they, in the words of this provision, "can best undertake this responsibility". The words could hardly have made the situation more clear.

We go on, Mr. President. In paragraph 4 of Article 22, we see that, where the A mandated territories are dealt with, the role of the Mandatory is seen as that of "the rendering of administrative advice and

assistance by a Mandatory until such time as they [the communities] are able to stand alone".

Again, Mr. President, the advice and assistance are to be rendered by a Mandatory. There is no suggestion here that the Mandatory in rendering that advice and assistance is to comply, in its turn, with instructions to be given to it by a superior body, in the form of standards, or in whatever form it may be—that the Mandatory is to be bound in that respect.

Then we go on to the much more explicit wording, in this context, of paragraphs 5 and 6, relating to B and C Mandates.

First, paragraph 5 reads: "Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions ..." Again, there are the explicit words "the Mandatory must be responsible for the administration of the territory", and the same is contemplated in the wording of paragraph 6, even to a further degree. There the position is stated to be that, owing to the various considerations mentioned with respect to particular territories, including South West Africa, these "can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned ...".

So, Mr. President, again the position is rendered so absolutely clear: it was the Mandatory that was to exercise this task, this function of government, or administration, and not a council or any other body superimposed upon it to give it instructions.

The provision which gives rise to the situation of accountability to a supervisory organ is in paragraph 7 of Article 22, which simply says that "In every case of Mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge".

As we have said before, if that was to carry with it the contemplation that the Council could, on receipt of such reports, deal with them in such a way that it could, without the concurrence of the Mandatory, give instructions to it or lay down binding standards for it, then one would surely have expected that to be said.

Mr. President, the wording is given added significance if recourse is had to the history leading up to the compromise which went into Article 22 of the Covenant. We dealt with that at length in our argument in chief and it is unnecessary for me to enter into that matter in any detail at all at this stage. I can refer the Court to the record of 1 April which deals with it over a number of pages, but, particularly, at **VIII**, page 351 of that record we summarized the situation with reference to the records of that time on this particular point—that the original ideas, which existed on the part of certain of the leading personalities and States that took part in the discussions of the Peace Conferences, the idea which related to the possibility of control or anything of the nature of powers of government being vested in the League; that the League was to give out the Mandates on that basis (revocable mandates, revocable at the pleasure of the League); that the Mandatory could, for instance, be a national agency and need not necessarily be a State, and that sort of thing, all that gradually developed into a new concept during these discussions and because of the practical objections raised to notions of that kind. It developed into a new concept, namely that the Mandatories would be responsible and the League's function would be one of super-

vision, the control would, however, be in the Mandatories, as such. The supervision would be of the relatively lesser kind, it would be confined to the questions whether the legal obligations laid down in the mandates, or the legal limits to powers, had been observed, and, further, it would merely be a matter of co-operating with the Mandatory, of giving it advice and assistance, but not of instructing a Mandatory how it was to exercise its discretion.

As I have said, that portion of the record deals with the matter very clearly and explains the compromise, and all that evidence goes to refute the Applicants' suggestion that there was to be read into the instruments this contemplation of a power of laying down binding standards on the part of a supervisory organ.

The mandates, themselves, Mr. President, are of course to be read in the light of Article 22 of the Covenant and many of the features which appear in Article 22 of the Covenant apply to the mandate instruments themselves. We find that there is an express grant of power to the Mandatory, but no express grant of power, whatsoever, to the League or to an organized international community or to anybody other than the Mandatory.

There is an express obligation placed upon the Mandatory "to promote to the utmost", but no obligation placed upon anybody else in that regard. The discretion is to be that of the Mandatory, as flows from the wording, and the Applicants' suggestion is really that one is to read the grant of power and the grant of discretion as being subject to a further limitation, one which is not expressed at all and one which runs counter to the whole tenor and the whole scheme of the instrument.

Let us have a look at that scheme again as one finds it, for instance, in the Mandate for South West Africa. Apart from the grant of power and the laying down of the broad obligations "to promote to the utmost", we find Articles 3-5 containing those specific obligations, which we noted before, Article 6 containing the obligation to report, and Article 7 (1) contemplating a consent as between Mandatory and the Council of the League with a view to modification of the terms of the Mandate.

The wording of Article 6, Mr. President, indicates that what is contemplated by way of a supervisory function is something which looks backward at what the Mandatory has done, not forward at what is to be done by the Mandatory in the future, which, after all, is laid down in the basic instrument. The Mandatory's powers and obligations have been defined. It is not for the Council to define them again. It is for the Council to see, in terms of this contemplation, this particular wording, what measures have been taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

Article 6 contemplates that:

> "the Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5".

Now, Mr. President, let us test the scheme of the Mandate, taking Articles 3 to 5 into account in conjunction with Article 7, paragraph 1, on the basis of the Applicants' contention, the contention that there was intended for the Council a role of determining standards as time goes on,

those standards then to be binding upon the Mandatory and to be applied for the benefit of the population.

If that was so, Mr. President, the question arises, why was it necessary to have Articles 3 to 5 at all? Why was it then necessary to have a specific provision of this kind, that the supply of intoxicating spirits and beverages to the Natives shall be prohibited? I choose that one, Mr. President, because it relates in practice to something about which conceptions might very easily change as time goes on. Why does the Council in determining the terms of this Mandate, tie its own hands as well as that of the Mandatory—tie its own hands in the sense that if it wants to alter that provision, because it is now specifically stipulated here, it would have to act under Article 7, paragraph 1, and obtain the Mandatory's consent? Why does not the Council simply reserve to itself the position of dealing with that matter by way of a standard being laid down and being adapted and altered as the Council pleases as time goes on?

One could cite other examples here of matters in respect of which conceptions could change with time, as time goes on. Take, for example, the whole scheme of prohibition against militarization except to the limited extent allowed for by Article 4. One knows that by the time when it came to a question of trusteeships those conceptions had already changed. But the same argument applies here, Mr. President. Why did the Council tie its own hands as well as those of the Mandatory? And one could cite various other examples from Articles 3 to 5 which demonstrate that same point.

Looking at mandates in general, Mr. President, and looking at their wording against the background of the compromise history, surely the suggestion of the Applicants would destroy the whole basis of that compromise. In line with the argument I have just addressed to the Court, the Court will recall the history of the concern on the part of France to have a special stipulation in regard to the training of Natives, in particular those of the mandated territories. If there was a contemplation that the Council could chop and change as it wished in regard to laying down standards and so forth, why was France so meticulous about this? Why did France insist, in terms of what it said was a previous compromise idea, that that should go explicitly into some of the mandate instruments, as in fact it did, in order to make her position perfectly clear for the future?

Mr. President, the suggestion of a Council which could overrule all that by further standards to be laid down, simply does not fit in either with the history or with the wording.

Now let us look at evidence which is virtually contemporary, evidence as to how the matter was viewed in practice in the League circles. I should like to refer the Court to the report by M. Hymans, which has been referred to so often for various purposes in these Oral Proceedings, the report of September 1920. This was even before the mandate instruments had been completed and issued. One finds the report as a whole in the League of Nations *Official Journal* of September 1920, No. 6, as from page 334. The heading given to this portion of the *Official Journal* containing this report is a very significant one. The heading is this, "Obligations falling upon the League of Nations under the terms of Article 22 of the Covenant (Mandate)". So, Mr. President, the name already indicates, by referring to obligations falling upon the League under the terms of Article 22, that if there was any contemplation of a competence

on the part of the League of the nature contended for by my learned friend, this would be the place where it would be dealt with: because this, as the Court will recall, was a very comprehensive report, indicating to the organs of the League what was considered necessary, what steps were to be taken, in order to bring this mandates system into operation, how it would operate, and what the respective roles would be of different organs of the League and of the mandatories themselves. So one would certainly expect that that very important contemplation of a function on the part of supervisory organs, to lay down standards as time goes on, would at least be mentioned in this report.

But, Mr. President, one not only finds that it is not mentioned, one finds the very opposite contemplation indicated, as I shall show. The first page is introductory, referring to the provisions of the relevant articles of the Treaty and of Article 22 of the Covenant. Then the question is put in paragraph 2 at page 335 of this *Journal*: "What are the measures to be taken to ensure the observance of Article 22 and to apply the mandatory system?", again indicating the broad scope of this report.

At page 337 of this *Journal* M. Hymans then dealt with steps to bring the system into operation. There we come to a section headed "Determination of the terms of the Mandates", and in that we find this passage:

> "The degree of authority, control or administration is so far as 'B' or 'C' Mandates are concerned, a question of only secondary importance.
>
> In the former case, as in the latter [that is, as I understand it, in the case of B as well as of C mandates], the Mandatory Power will enjoy in my judgment a full exercise of sovereignty, in so far as such exercise is consistent with the carrying out of the obligations imposed by paragraphs 5 and 6 [paragraphs 5 and 6, of course, of Article 22]. In paragraph 6, which deals with 'C' Mandates, the scope of these obligations is perhaps narrower than in paragraph 5, thus allowing the Mandatory Power more nearly to assimilate the Mandated territory to its own. I, therefore, conclude that it is not indispensable that 'B' and 'C' should contain any stipulation whatever regarding the degree of authority or administration."

Mr. President, of course the learned author of the report indicated later, as I shall quote to the Court again, that it was a controversial matter as to where the full concept of sovereignty in the traditional sense of the word would lie, and his remark about sovereignty here is to be read, of course, subject to that observation. But even then he says that in his judgment the mandatory power will enjoy "a full exercise of sovereignty" —the concept of the exercise of sovereignty, that is to be vested in the mandatory. If there had been any contemplation on the part of this author that in regard to the exercise of sovereignty there was to be a reservation or a qualification, in the sense that part of that would be vested in the Council, as the supervisory body, which could lay down binding standards for the mandatory as to how it was to set about its civilizing mission, then surely, Mr. President, that would have been said and this statement would not have been made in this unqualified form.

But the matter does not end there. I turn over a page or two and I come to the section headed "The Extent of the League's Right of Control", control here in the context, as commentators have indicated,

clearly meaning supervision, used in that sense. Let me refer to the actual wording here. But before I do so, Mr. President, here again, if there had been any contemplation of the type of function seen for the Council by my learned friend's contention, surely one would have expected it to have been dealt with here. But we find that in the very first paragraph the very opposite is indicated:

> "I shall not enter into a controversy—though this would certainly be very interesting—as to where the sovereignty actually resides. We are face to face with a new institution. Legal erudition will decide as to what extent it can apply to this institution the older juridical notions. In the same way, whether the League of Nations is responsible in respect of the Mandatory Powers appears to be a moral rather than a legal question. For there is no legal responsibility except in respect of another person."

I pause there for a moment. It seems that that sentence is intended to indicate that one cannot speak of a legal responsibility, a legal obligation, unless it is an obligation in respect of another person. The theme appears to be that that is a factor which indicates that, as far as the League was concerned, one could speak only of a moral obligation and not of a legal obligation. In fact, the author proceeds to make that point explicitly. I quote again:

> "Now, the responsibility of the League of Nations could only occur in respect of the populations who are under Mandatory rule. But it is difficult to see in what way this responsibility would be organised or what measures could enforce it. *Quis custodiet ipsos custodes?* The responsibility of the League before the public opinion of the civilised world will in point of fact be a moral one."

So, Mr. President, here is direct refutation of this suggestion that the real trust obligation in law was conferred upon the League as an organized international community or as *the* organized international community. The author specifically says in his contemplation, "the responsibility of the League before the public opinion of the civilized world will in point of fact be a moral one".

We proceed and come to a passage which has often been quoted to the Court, in these proceedings also, for different purposes, but the passage is significant for present purposes and therefore I should like to refer to aspects of it. The author states:

> "The practical and positive question appears to me to be the following:
>
> What will be the responsibility of the Mandatory Power before the League of Nations, or in other words, in what direction will the League's right of control be exercised?"

Here, especially, we come to the stage where, if that relationship between the League and the mandatory power would involve for the League this standard-creating competence, this is where one would expect it to be stated. But what does the author proceed to state? He concerns himself only with the two questions referred to before, namely—

> "Is the Council to content itself with ascertaining that the Mandatory Power has remained within the limits of the Powers which were conferred upon it, or is it to ascertain also whether the Mandatory Power has made a good use of these powers, and whether

its administration has conformed to the interests of the native population?

It appears to me that the wider interpretation should be adopted. Paragraphs 1 and 2 of Article 22 have indicated the spirit which should inspire those who are entrusted with administering peoples not yet capable of governing themselves, and have determined that this tutelage should be exercised by the States in question as Mandatories and in the name of the League [an interesting way of expressing that concept 'in the name of the League']. The Annual Report stipulated for in Article 7 should certainly include a statement as to the whole moral and material situation of the peoples under the Mandate. It is clear, therefore, that the Council also should examine the question of the whole administration. In this matter the Council will obviously have to display extreme prudence so that the exercise of its right of control should not provoke any justifiable complaints, and thus increase the difficulties of the task undertaken by the Mandatory Power."

This is wording, Mr. President, indicating that what is spoken of here as a right of control, or a right of supervision, is to relate to the whole administration—to the question of what the Mandatory has done—whether it *has* remained within the limits of the powers, and also whether it *has* made a good use of these powers, and intimating in this latter respect that extreme prudence is to be exercised by the Council in the exercise of its function.

So, Mr. President, that, I submit, is the most pertinent evidence one could have, almost exactly contemporaneous, indicating the total absence of any such contemplation as is contended for by the Applicants, and, indeed, a very opposite contemplation, viz., that there was to be no legal responsibility on the part of the League.

Shortly afterwards, Mr. President, in the League time, we find the practice of the actual supervisory organs again throwing further very significant light on the contemplations in this particular respect. The matter is dealt with by the well-known commentators Quincey Wright, Duncan Hall, and Norman Bentwich, but we did not find the Applicants referring to any of these, or any single authority, in support of this contention, Mr. President, for the simple reason that, as far as we could ascertain, there is none which even contains a vestige of support for what the Applicants are urging upon this Court.

We dealt fully with an earlier attempt which the Applicants had made to rely upon a passage in Quincy Wright, in our argument in chief in the verbatim record of 26 April, at **VIII**, pages 684-685, and we pointed out there that what emerges very clearly is that the author quoting what had been said by the various organs of the League, spoke of the functions of supervision consisting of two parts—one of criticism by law, in which no hesitancy was shown at all—in other words, seeing whether the Mandatory complied with the specific provisions and obligations laid upon it—and, secondly, the other function of co-operating with the Mandatory; there the field of possible action was a much wider one, but the attitude displayed was a much more reticent one, and we find that the author specifically states that for that purpose standards were laid down from time to time, but purely as non-binding suggestions—in other words, standards in the ordinary sense of the term—standards, as the author himself stated, *for the guidance of the organs themselves*

and subject to modification by experience. That, I think, Mr. President, is a very fair reflection—as fair as we can make it—of what Quincy Wright *explicitly* states in this regard, and we have had no answer to that in the oral reply.

Our main addition now, seeing the nature of the contention which has now been advanced to the Court in the oral reply, will refer to Duncan Hall, *Mandates, Dependencies and Trusteeship*, and I refer to the following passages at pages 48-49, to commence with:

> "4. The Mandates Commission and its Procedures
>
> An effective international supervision over the working of the mandates was secured largely though the Permanent Mandates Commission. An important feature of this supervision was that it was exercised long after the event, through it could affect, and often did, the existing and future action and policy of the administration of a territory."

If I may break there, Mr. President, the author went on to explain how it came about that the report might cover a particular year and it might be a long period, six to twelve months, which might elapse before the report was considered and he mentioned extreme cases that might occur:

> ". . . in the extreme case the Commission might not actually examine a situation which occurred in January, 1935, until June or October, 1936".

He proceeded to state:

> "By the time it had received and examined answers to its questions in the next annual report a further six to twelve months might have elapsed. Therefore the supervision exercised by it was essentially *supplementary*; since during the actual course of the year supervision had already been exercised by the national government and parliament of the mandatory power as in the case of any normal dependency.
>
> Not even the outbreak of a world war could deflect the Commission from its rule that it was precluded from enquiring into the events of the current year unless the accredited representatives chose to supply data in advance of the annual report. The Commission's report to the League Council on its last (thirty-seventh) session in December, 1939, under the heading 'The Mandated Territories and the War', stated:
>
> > 'The Commission has deliberately refrained from anticipating the events of 1939 by examining the situation created by the present war in connection with territories placed under the mandate of belligerent Powers. It will do so in the light of the information with which these mandatory Powers supply it when they give an account of their stewardship during 1939.' "

Then, Mr. President, at page 51, after further discussion upon these lines, towards the bottom of the page and running on to the next page, the author stated a conclusion, as follows:

> "In practice its main rôle [that is the main role of the Commission] tended to be of an Old Testament character. It was the keeper of the Ten Commandments of Article 22 of the Covenant. It looked on itself as charged with bringing to light breaches and urging their

rectification. It was zealous, though very diplomatic, in the exercise of its legal powers. But it was reluctant to step outside these powers and to offer positive suggestions to the mandatory powers as to how the territories should be administered and developed. In short, its attention was fixed mainly on judging past events and particular situations, rather than upon prescribing future action."

The practical importance of this attitude, Mr. President, is stressed further by these remarks, which run on to page 52:

"Its reports to the League Council (as Lord Hailey, one of its members, has pointed out) usually consisted of 'requests for further information, or in expressions of hope that the next annual report will indicate an improvement in an unsatisfactory situation'. Thus few, if any, of the many important positive developments that took place in Africa in the way of increasing self-government, health measures, sanitation, education, the application of science to the problems of the African environment, labour legislation, and many others that are chronicled in *An African Survey*, were due to any direct initiative on the part of the Mandates Commission."

These remarks are entirely in keeping, Mr. President, with the submission I stated to the Court before—a contemplation that the Mandatory was to be trusted with tasks of that kind. The Mandatory was to see what the needs of a particular people and a particular territory were. The Mandatory was to minister to those needs thus ascertained. This is something entirely in conflict with the suggestion of the nature made by the Applicants that there are to be general standards laid down by international bodies which are sitting overseas, as far as the mandatory territories are concerned, making general rules of an *a priori* character to be applied to the administration of mandated territories generally.

Then, in the same work by Duncan Hall, a further reference to the attitude, not only of the Commission, but also of the Council of the League, is made at page 206. There the author referred to a reaction which came about in the Council in 1926, when it was thought that there were signs that the Permanent Mandates Commission might be assuming to itself too many powers, or powers of a too far-reaching nature, in respect of supervision of mandatory administration. I quote from page 206:

"Warnings given from time to time in the Council that it must not seek to enlarge its powers and play a political rôle culminated in the storm over the enlarged questionnaire when the latter came before the Council in 1926."

The Court will recall the suggestion of an enlarged questionnaire which came from the Permanent Mandates Commission itself. The quotation proceeds:

"The Council on that occasion not only had before it the new *questionnaire*, which increased the number of questions put to governments from 60 to nearly 300, but also the suggestion of the Commission (in its report on Syria) regarding the possibility of hearing petitioners in person. Sir Austen Chamberlain (Great Britain) objected in the Council that the questionnaire was 'infinitely more detailed, infinitely more inquisitorial', than the previous one and that there was a tendency on the part of the Commission 'to extend its authority to a point where the government

would no longer be vested in the mandatory Power but in the Mandates Commission'."

May I break off there for a moment. That tendency, which was thought to be perceived in the actions of the Permanent Mandates Commission, was firmly resisted in the Council. The passage proceeds:

"The South African representative, Mr. Smit (who again represented his country at the trusteeship discussions at San Francisco in 1945), said that 'the impression had grown in the mandated territory . . . that the more it developed constitutionally the greater the assumption by the Permanent Mandates Commission of power to direct the government in the territory'. All the representatives of the mandatory powers at the Council opposed the enlarged questionnaire, and their governments, to whom the question was referred by the Council, supported them."

Now, the next passage is a significant one. It reads this way:

"This episode in some ways marked a turning point in the history of the Commission. The continuity of its membership gave it ample time to store up and reflect upon its experience. The result was that it settled down to a steady line of policy well calculated to give the maximum results. That policy was one of collaboration with the governments, combined with a firm adherence to the principles of the mandates system. The classical passage in its proceedings, in which it laid down this line of policy at its eighth session, reads as follows:

'The task of the Commission is one of supervision and of co-operation. It is its duty, when carefully examining the reports of the mandatory powers, to determine how far the principles of the Covenant and of the Mandates have been truly applied in the administration of the different territories. But at the same time it is its duty to do the utmost that lies in its power to assist the mandatory Governments in carrying out the important and difficult tasks which they are accomplishing on behalf of the League of Nations, and on which they render reports to the Council'."

We pause there for a moment to stress the author's reference to the same dual aspect of the function as referred to by Quincy Wright.

The quotation from the report of the Permanent Mandates Commission itself, continues to read as follows, and this part seems to me, with submission, to be particularly significant:

"Supervision and co-operation are functions which, though neither incompatible nor in conflict with one another, may yet be accompanied with genuine difficulties when they have to be carried out simultaneously. If the task of the Mandates Commission were merely to supervise the administration of the mandated territories, it would be natural that, in all difficult cases, it should propose to visit these territories itself, or should recommend the holding of enquiries on the spot. If, on the other hand, the rôle of the Mandates Commission were merely to facilitate the task of the mandatory Power, it should offer it lavish encouragement and abstain from passing any critical judgments which, if conveyed to the population under mandate, might create embarrassment and render the task of the Government more difficult of execution."

Mr. President, if I may pause there again for a moment, this interrelationship which the Commission saw between the two aspects of its functions, seems to be of the utmost importance. Even in its function of criticizing in accordance with law, supervising in that respect, the Commission saw that it was to exercise tact and discretion; but the Commission said that if it were to fulfil that function in all detailed aspects, it would probably have to do more than it was doing at this stage; it might have to visit the territory and conduct enquiries on the spot. But that, Mr. President, would militate against what was seen as the function of the Mandatory Power in which this Commission was supposed to co-operate. The Mandatory Power might then be embarrassed in its relationship to the population of a territory; and therefore, even in that respect, this Commission was to exercise reticence. If it was exercising that reticence even in regard to its admitted functions of seeing whether the provisions of the mandate instruments and the obligations laid down by the Covenant were properly complied with, if it was exercising reticence in that respect, Mr. President, how much more would it not have exercised reticence in respect of a suggested function, such as underlies the Applicants' contention—a function of ordering the Mandatory as to the way in which it was to proceed in its discretionary field—a function of laying down standards intended to be binding in that respect. One could just imagine what the reaction of the Mandatory Powers would have been.

The author proceeds to discuss, at page 207, the manner in which the Commission proceeded:

> "It felt its way forward cautiously and with restraint; working, as the Covenant intended it to work, on the basis of the annual reports; trailing therefore necessarily six to eighteen months after events; keeping up a steady pressure of skilful questions; rarely criticizing, and where it criticized, not failing to commend the action of the mandatory powers where commendation seemed called for; and still more rarely making recommendations which had a bearing on the future. So carefully had the Commission succeeded in avoiding political rôles that when in 1939 it was called upon to express an opinion on the British White Paper on Palestine (which it proceeded to do), Professor Rappard drew the attention of the Commission to the significance of the request. The Commission was asked, he pointed out in substance, to give its views on a political intention, on a program of future action."

I think that is sufficient from Duncan Hall, Mr. President, to emphasise the limit which was set to the supervising functions in practice; a very far cry from the extension to the wording of the instruments contended for by my learned friend.

In the last place I should like to refer just to a brief passage from Bentwich's *The Mandatory System*, at page 116. He states:

> "The Commission, however, has been at pains to make it clear that it is not concerned itself, and that the Council of the League is not concerned, with the administration of the mandated territory, which is the exclusive function of the Mandatory Power. Thus, in dealing with a report on Samoa in 1927, after there had been trouble in the island due to an agitator who aroused the people with stories that the Council of the League would interfere on their behalf,

the Commission stated emphatically that the Mandatory alone is responsible for law and order."

So, Mr. President, that gives a picture—clearer I submit it could hardly be—of how the matter was viewed and put into practice in the time of the League, entirely contrary to this submission of the Applicants.

That being so, Mr. President, surely the whole bottom falls out of this contention of the Applicants. Where can they go beyond the League time, in the absence of finding that the law and the practice as at that stage showed support for their contention?

We submit, of course, that with the dissolution of the League the supervisory function—the supervisory powers—the obligation of accounting at all to a supervisory authority—fell away and if we are correct in that respect, Mr. President, as we submit we are, then it seems that the whole basis upon which the Applicants still argue, that the Respondent is standing in some relationship to an organized international community which would require it to take orders from that community, would fall away altogether.

But let us for the moment, for purposes of argument, view the matter on the basis upon which the Applicants put it, namely that there is accountability now owed to the United Nations. They rely in that respect on the finding of this Court in the 1950 Opinion, and they ask the Court for reaffirmation of that Opinion.

Now, the Court will recall that, towards the end of dealing with this question of supervision, at page 138 of the 1950 Opinion, there occurs a statement which led to two further requests in the 1950s for advisory opinions. That statement came in this passage at page 138:

"It follows from what is said above that South-West Africa is still to be considered as a territory held under the Mandate of December 17th, 1920. The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations are particularly applicable to annual reports and petitions."

That is the whole passage in its context. One sees, Mr. President, as far as that middle sentence is concerned, the two ideas: "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System." This relates back to the previous sentence to the effect that South West Africa is still to be considered to be a territory held under the Mandate.

So the basic idea here appears to be this, Mr. President, that this was a continuation of a situation which had existed in law under the mandates system. There was a difference of opinion later whether it related to the actual practices in some respects or to the legal situation as it stood then, but for the purposes of my argument that difference of opinion is not relevant. I am only concerned with that idea of continuing with a situation as under the Mandate.

Now, Mr. President, we analysed the situation as under the Mandate, and as it is necessary for my learned friend to take that as his basis for moving from the Mandate to the new regime of the United Nations, how could he possibly hope to contend for this power on the part of suggested supervisory organs within the United Nations?

So, Mr. President, the argument I have just addressed to the Court, in my submission, conclusively shows that there is no justification whatever for reading into the Mandate the suggested implications, even only in respect of supervisory bodies and *a fortiori* in respect of an organized international community or the organized international community in general.

I turn nevertheless, Mr. President, to the United Nations regime in regard to trusteeship, because it is significant in furthering the refutation of the Applicants' suggestion. Do we there find the powers contended for by the Applicants on the part of the supervisory bodies, even in respect of trusteeship? The answer, Mr. President, is again—having regard to the wording of the relevant provisions and the practice and comment in that respect—very clearly in the negative—that is, despite the fact that these trusteeship agreements all contained a provision in terms of which the administering authority bound itself "to collaborate fully with the General Assembly of the United Nations and with the Trusteeship Council in the discharge of all their functions as defined in Article 87 of the United Nations Charter".

That is an innovation, of course, which did not find its place in the mandates system and nevertheless, there was no suggestion in practice, which I could find or on the part of commentators or authorities, that there was any binding authority given to supervisory organs in respect of their supervision of trust territories.

On the contrary, the commentators emphasized that there was no binding nature in the resolutions which could be taken by the supervisory authorities in that regard. We find the relevant provisions of the various trusteeship agreements cited by Kelsen, in the *Law of the United Nations*, at page 630, in footnote 8. The author specifically addresses himself in the text to the question of the precise effect of actions of the General Assembly and the Trusteeship Council in the sphere of trusteeships, and he states at that page, 630:

> "As pointed out, the supervision of the trusteeship administration is exercised by actions of the Organisation determined—with respect to those within the competence of the General Assembly and the Trusteeship Council—by Articles 87 and 88 of the Charter. What is the nature of these actions relating to the administering authority? Do they have the character of mere recommendations or are the unilateral acts binding upon the administering authority? Chapters XII and XIII do not contain a provision referring to this question which can be answered only in accordance with a trusteeship agreement by which the respective competence is conferred upon the Organisation."

Having examined the various agreements, Mr. President, the author then concludes as follows, at the same page: "None of the trusteeship agreements establishes a strict obligation of the administering authority to comply with a unilateral decision of an organ of the United Nations." That is the end of the quotation from Kelsen.

An occasion on which judicial consideration was given to this matter was when the opinion was requested of this Court in the *Voting Procedure* matter in regard to South West Africa in 1955. There, this very same view as was expressed by Kelsen, which I have just read to the Court, was expressed very forcibly by Judge Lauterpacht in his separate

opinion, and with reasoning and quotation of relevant material in support of that view. He concluded that resolutions of the General Assembly normally referred to recommendations: "... whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation appears to be no more than a moral obligation." That is in the *I.C.J. Reports 1955*, at page 116. Then follows, Mr. President, this significant passage at the same page:

> "This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administration of trust territories. The Trust Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus there is no legal obligation, on the part of the administering authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure. The legal obligation resting upon the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council. This is so as a matter both of existing law and of sound principles of government. The Administering Authority, not the General Assembly, bears the direct responsibility for the welfare of the population of the Trust Territory. [May I pause there for a moment, still basically the same position as in the case of the League with regard to the Mandate.] There is no sufficient guarantee of the timeliness and practicability of a particular recommendation made by a body acting occasionally amidst a pressure of business, at times deprived of expert advice and information, and not always able to foresee the consequences of a particular measure in relation to the totality of legislation and administration of the trust territory. Recommendations in the sphere of trusteeship have been made by the General Assembly frequently and as a matter of course. To suggest that any such particular recommendation is binding in the sense that there is a legal obligation to put it into effect is to run counter not only to the paramount rule that the General Assembly has no legal power to legislate or bind its Members by way of recommendations, but, for reasons stated, also to cogent considerations of good government and administration." *(I.C.J. Reports 1955.)*

Therein is an exact endorsement, with respect, Mr. President, of the argument I have addressed to the Court this morning with reference to the League System. The quotation proceeds:

> "In fact States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council as approved by the General Assembly. That right has never been seriously challenged."

Examples are then given, Mr. President, which are rather interesting, at pages 116-117 of this report. There was one concerning Tanganyika, a British Mandate where there had apparently been a suggestion that "... the existing tribal structure in Tanganyika is an obstacle to the political and social advancement of the indigenous inhabitants ...".

The Administering Authority rejected this on the ground that—I quote at page 117—"the great mass of the people everywhere are strongly attached to their tribal institutions and in most cases offer strong resistance to any suggestions of serious modification". One might say, Mr. President, there is a suggestion there of an application of something like a standard of non-differentiation seriously opposed by the administering power.

Then there was an example in regard to Western Samoa where there was a recommendation for the introduction of a system of universal suffrage applicable to all inhabitants of Western Samoa. The Administering Authority informed the Council that—

> "it would be entirely wrong to force on the Samoans any radical change in their customs since the introduction of universal suffrage at this stage would be incompatible with that respect for Samoan culture to which it and the Government of Western Samoa are equally urged by the Trusteeship Council".

The next example related to a case in Nauru where the Australian Government, as the Administering Authority, explained that it was unable to act upon a recommendation regarding investment of funds; and the last one concerned the Pacific Islands Trusteeship Agreement in respect of which the United States was the Administering Authority. There, the recommendation was the reconsideration of a head tax in the Pacific Islands. The Administering Authority explained why, in its opinion, this was a satisfactory and desirable form of tax under the economic and political conditions prevailing in the Trust Territory.

Mr. President, having referred to these examples, the learned judge proceeded to state that while administering authorities are not bound to give effect to a resolution or recommendation, they are at least bound: "to give it due consideration in good faith" (p. 119). The relevant passage thereafter reads as follows:

> "Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust Territories or territories assimilated thereto, is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith ... Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the

legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction." (*I.C.J. Reports 1955*, p. 120.)

Again, Mr. President, I may just say by way of comment, that that concurs completely, in our submission, with the argument we have addressed to the Court on situations of this kind—a difference between acting illegally automatically and an element of fact which can be taken into account in order to see whether a discretion has been used lawfully or whether it has been abused.

[Public hearing of 14 June 1965]

Mr. President and honourable Members, the Court will recall that at the conclusion of my address on Friday I had just finished quoting to the Court a rather lengthy extract from the separate opinion of Judge Lauterpacht in the *Voting Procedure* case in 1955. The context of it, the Court will recall, was that of our answer to the Applicants' contention relating to standards as distinct from norms. The Court will recall that the Applicants' "standards" contention is to the effect that standards could be laid down either by the organized international community in general, or by specific supervisory organs in respect of mandatory administration, and that those standards would then be binding upon the Mandatory in its administration of the territory; they would constitute authoritative interpretations binding upon the mandatory and binding upon the Court in regard to the interpretation and application of Article 2, paragraph 2, of the Mandate.

The Applicants started with a basic difficulty in that standards, as a matter of notion or as a matter of concept, are in themselves never binding rules. The Applicants therefore had to find a basis for saying that standards could in this context nevertheless be said to be binding in law upon the Mandatory, and they attempted to find that by reading a qualification into the mandate instrument itself, a qualification to the effect that in its administration of the Territory the Mandatory would be bound by standards laid down either by the organized international community or by specific supervisory bodies. We pointed out, Mr. President, that that contention was said to rest upon an interpretation of the mandate instrument, but that, in truth, it could not rest upon interpretation because there were no words, no provisions whatsoever, in the mandate instrument or in the attendant, basic instrument, Article 22 of the Covenant, which could lend any colour whatsoever to that contention—no words which could be interpreted to that effect. Therefore the argument had to rest upon an implication in the basic instruments, an implication based on necessary inference from all the relevant evidential material as to the probable intent of the founders of the mandates system. We dealt with the whole field in that regard, and indicated that the evidence and the relevant indications all tend one way and one way only, and that is not in favour of the Applicants' contention; it is directly contrary to that contention. We dealt with the wording of the relevant instruments and the indications afforded by them and, also by the Covenant of the League as a whole. We dealt, Mr. President, with the relevant antecedent history, with the compromise history of Article 22 of the Covenant and with the pertinent indications that it afforded. We dealt with the virtually simultaneous, or contem-

poraneous exposition in the report of Mr. Hymans. We dealt with the indications afforded by the actual practice of the League supervisory organs, as stressed by those organs themselves according to the relevant records and by commentators upon their activities. That brought us, then, to the end of the League period.

We came to the regime of the United Nations relative to the trusteeship system, and also relative to possible supervision of the Mandate for South West Africa on the basis of assuming, for purposes of argument, as the Applicants do, that the Opinion of the Court in 1950 on that question was correct. And we pointed out that there also the contemplation of the commentators and the relevant instruments very clearly tended directly against the Applicants' contention, and in no way lent any colour to it whatsoever. It was in that context that we cited the extracts from the separate opinion of Judge Lauterpacht in 1955, in the *Voting* case—extracts which, as the Court will recall, also referred to very pertinent attitudes taken up by various administering authorities, States administering trusteeships under the regime of the United Nations trusteeship system, that is, instances where the administering authorities very firmly took up the attitude that they were not bound by recommendations made by the supervisory bodies, and that they would, in the particular instances, decline to follow them because they did not regard them as being in the best interests of the inhabitants of the respective territories.

I proceed then, Mr. President, to the separate opinion of Judge Klaestad in those same proceedings and in the same context. If anything, his view to the same effect was stated even more emphatically. I quote from the *I.C.J. Reports 1955*, at pages 87-88:

> "Article 18 [that is, of the Charter] does not make any distinction between 'decisions' and 'recommendations'. It refers to 'decisions' as including 'recommendations'. These decisions of the General Assembly on 'important questions' are of different categories. Some are decisions with a final and binding effect, such as, for instance, the election of members of the various organs of the United Nations or decisions approving the budget of the Organization by virtue of Article 17. Some other decisions are recommendations in the ordinary sense of that term, having no binding force. Recommendations adopted by virtue of Article 10 concerning reports and petitions relating to the Territory of South-West Africa belong in my opinion to the last-mentioned category. They are not legally binding on the Union of South Africa in its capacity as Mandatory Power. Only if the Union Government by a concurrent vote has given its consent to the recommendation can that Government become legally bound to comply with it."

Mr. President, in the other opinions given in those proceedings—the Opinion of the Court, and, I think, the only one other separate opinion, that of Judge Basdevant—there were no views in conflict with these expressed by the two learned judges whom I have cited, Judge Lauterpacht and Judge Klaestad. It was apparently, on the view which the other judges took of the situation, unnecessary for them to enter into this aspect of the matter in any detail at all. The Court will recall that all the judges came to the same conclusion ultimately in the matter which was put to the Court for its advisory opinion. I may refer the Court to

a passage in the Opinion of the Court itself, at page 76, which indicates, without going into this measure of detail, a broad concurrence of view in this particular respect. The passage begins by stating:

> "It is to be recalled that the Court, in its previous Opinion, stated that 'The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations'."

That is the end of the quotation from the previous Opinion, and the passage proceeds:

> "Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter. While, in exercising that supervision, the General Assembly should not deviate from the Mandate, its authority to take decisions in order to effect such supervision is derived from its own constitution.
>
> Such being the case, it follows that the General Assembly, in adopting a method of reaching decisions in respect of the annual reports and petitions concerning South-West Africa should base itself exclusively on the Charter."

The general statement of principle is then specifically directed to that question which was in issue before the Court, namely the question of voting procedure, but I submit, Mr. President, the Court made the general *contemplation perfectly clear—that what the Assembly would be* doing here would be acting exclusively, as far as its authority was concerned, as an organ of the United Nations; it would be acting in terms of the authority given to it in Article 10 of the Charter, which is an authority to make recommendations and nothing more.

So, Mr. President, having regard to all the evidence stretching over a period of 45 years and more of the history of the basic instruments, of practice within the time of the League in the League organs, of comment on that practice, of practice within the United Nations thereafter, and of comment on that practice, we find that after all this time there is not one shred of evidence or of comment which favours this suggestion of the Applicants, of an implication to be read into the basic mandate instrument.

Surely if there was any suggestion of even a possibility of a tacit agreement on that point, of a general understanding which was so clear that the parties to it did not trouble to put it in writing because it was too clear, somebody over all these years would have raised that point, and said: "But these powers of the supervisory organs are not so limited at all: after all, we all perfectly understood tacitly, although we did not say so, that these supervisory organs would be able to lay down binding standards upon the mandatory". We do not find a word, Mr. President, over all these years. Surely if a party is driven to these lengths in an argument which was not just put to the Court in passing, but was put to the Court repeatedly over a number of days—this argument of the Applicants based on standards and based on this suggested interpretation of the mandate instrument—if a party is driven to such lengths and there is not a shred of evidence of supporting material for that contention.

and that is the position in a case which started off on a note of being beyond argument, then surely there is only one conclusion and that is that the writing must be on the wall.

One must, then, begin to expect, as one indeed finds, that all the alternative arguments on this theme about standards and a norm have, in truth, no greater merit than this one, because this one is stretched to its greatest possible limits and yet one finds nothing in support of it.

I proceed, Mr. President, from this contention, relative to the standards part of the Applicants' case, to consider an alternative. The contention which I have considered thus far has been specifically directed to the role to be played by supervisory organs as such. As I pointed out, the Applicants had an alternative in that very contention, the alternative relating, on the one hand, to the supervisory organs as such, and, on the other hand, to a so-called organized international community in general, or *the* organized international community, as it was put by the Applicants. Now, Mr. President, since I demonstrated that there is nothing whatever in the contention with reference to the supervisory organs as such, then *a fortiori* there can be nothing in it with reference to this nebulous concept, the organized international community.

If it was unthinkable, Mr. President, that the authors of the mandates system could bestow upon the supervisory organ the exclusive competence to bind Respondent by defining or prescribing standards, then surely it would be absurd to suggest that it could have been their intention to bestow such competence upon a vague concept such as the organized international community.

As far as we have been able to ascertain, this expression "organized international community" was one which was not used or known in the League time at all, even in non-legal connotations. We may be wrong, but we never came across it as having been used in that period at all. It seems to have first reared its head in the United Nations time, towards the end of the 1940s, as far as we could ascertain. It may be that we overlooked something somewhere. But be that as it may, the documents to be interpreted speak only of specific supervisory organs. We have shown to the Court before that the wording of the documents in that respect is in entire accord with the practical contemplation of the parties at the Peace Conference, before the documents were drafted, and that it was a matter of practical importance for them that those specific supervisory organs should be the supervisory organs, and no other.

We have shown, Mr. President, in the argument which I have just concluded, that it could not have been the intention of the authors of the Mandate to bestow the competence under consideration on this specific supervisory organ. How could it then seriously be suggested that they nevertheless intended to bestow this competence on an undefined international community, which would not receive reports, which would not consider reports, which would not be in possession of all the relevant facts?

We might ask, Mr. President, what is comprised in this concept "the organized international community"? The Court will recall that we had occasion to deal fully with the matter in the Rejoinder, V, at pages 49 to 53, in the light of the contention which was advanced by the Applicants in their written Reply regarding the question of the survival or otherwise of international accountability, as they put it, after the dissolution of the League. The Applicants appeared to attach (for the

purpose of that contention of theirs) legal significance to this concept about which they were talking, viz., the organized international community, and we pointed out in this portion of the Rejoinder that such legal significance could not possibly be attached to such a concept. We pointed to the contradictions and the inconsistencies in the Applicants' attempt to give some legal content to this contention—that we find in the passage to which I have referred—and we concluded, Mr. President, especially at V, pages 52 to 53, by showing how absurd it was in a practical sense to speak of what happened in the time of the League as being supervision by an entity to be called "the organized international community", on the one hand, vis-à-vis mandatory powers, on the other hand.

May I cite from page 53:

> "In fact, Applicants' whole concept of the 'organized international community' is in conflict with the most basic principles of International Law. In order to argue that the 'organized international community' possessed legal rights and interests, and granted legally effective commissions or Mandates, Applicants would be constrained to contend that it was a legal *persona*."

That is, Mr. President, in so far as they contended that this organized international community held rights distinct from the rights of the Members comprising the Organization, and that that Organization as an entity could then grant legally effective commissions, impose obligations, and so forth. I now proceed with the quotation:

> "However, it is still an open question whether even the League of Nations, a specific international body with a constitution and with defined corporate functions, ever possessed legal personality. *A fortiori* the 'organized international community', an undefined and amorphous concept, could hardly, at any rate at the time of creation of the Mandate System, have been accepted as a legal *persona*."

If I may interrupt there, we proceeded then to deal with this practical aspect of the matter to which I have just referred:

> "Finally, the picture of an 'organized international community' acting as something distinct from the Mandatories and imposing its will on them, is an entirely unrealistic one. In fact, on any conception of the 'organized international community' (including that of the Applicants), *the Mandatories largely dictated the policy pursued by it* with respect to Mandates. Thus, whether as Allied Powers, or as Members of the Council of the League, or as Mandatories, France, Japan, Belgium and Great Britain and its Dominions played vital roles in the creation and operation of the Mandate System."

We then referred, Mr. President, to a quotation from Duncan Hall about the conferences, the debates, in which the various Dominions stated their attitudes on the proposals regarding the future of the German colonies. The quotation reads:

> "It was the governments taking part in this debate that, by their agreement, created the mandate system. It was they that drafted the self-imposed limitations of the mandate charters. It was they that put the system into operation, weakened though it was by the absence of the United States."

Duncan Hall continues by stating that it was these governments—

> "... that sustained it [i.e., the Mandates System] and made it effective by their loyal cooperation with the central organs of the League during the twenty-six years of the League's life".

The text of the Rejoinder proceeds at **V**, page 53:

> "For the whole period of the League's existence, the learned author points out, the relationship between the League and the Mandatory Powers remained as described by Mr. Balfour in the Eighteenth Session of the Council, when he said [again a quote from Hall]:
>
> '... " mandates were not the creation of the League, and they could not in substance be altered by the League". *He further pointed out that "a Mandate was a self-imposed limitation by the conquerors on the sovereignty which they exercised over the conquered territory.* In the general interests of mankind, *the Allied and Associated Powers had imposed this limitation upon themselves,* and had asked the League to assist them in seeing that this general policy was carried out, but the League was not the author of it ..." '."

Mr. President, after that demonstration in the Rejoinder, the Applicants, if I understood them correctly, desisted in their oral argument in chief in this Court from again attempting to assign legal significance to this phrase "an organized international community" or "the organized international community", although still using it for certain descriptive purposes. But now, when it comes to their oral reply, and in this new and novel formulation of their case, we find that this concept "organized international community" creeps in more insistently and it plays an ever-increasing and a more and more important part of the suggested legal significance in the statement of the Applicants' case, both in regard to standards and in regard to the norm contention to which I shall come later. That is why I think it worth while to devote some attention to it at this stage in connection with the standards contention.

Mr. President, let us analyse these various concepts "an organized international community" and "the organized international community". The Court in 1962 used the expression "an organized international community" with reference to the League of Nations; if I may say so, with respect, that is a perfectly legitimate description, provided one bears in mind that it is a description and nothing more. It has no particular legal significance apart from indicating that here is a community of States—a group of States—forming an international organization with a constituent instrument and, therefore, Mr. President, having an institutional existence, and, as such, being able to act as a unit—institutional either in the sense of being a legal persona or in the sense of being an association of subjects of international law of the nature of an unincorporated association, but, nevertheless in that sense, forming a unit, an institution, and being capable of acting as such.

Granted that an organized international community is a fit description, then, of the League of Nations, and granted that that may also be a fit description of the United Nations, what brings my learned friend to the length of saying that both of these represented *the* organized international community, and that, in fact, the real institution (that seems to be the suggestion of the argument), the real entity with which we are dealing, has remained the same, having merely a different manifestation

now from what it had in the League time? How does my learned friend come to that?

The League and the United Nations are examples of organized international communities in that sense, contractually established, as I have tried to describe. *The* organized international community has never been contractually established, it has no institutional existence, it has no constituent instrument, it can never be said to be something of the nature of an artificial person, or an unincorporated association of persons. It could, perhaps, be said to be something in the nature of a social concept; perhaps one could speak of it as a sociological phenomenon, and in that sense speak of it as being something real, but if it is not something real in that sense, Mr. President, then it must be either just a dream or nothing. It certainly is not something lying in between being nothing and being a sociological phenomenon. It is certainly not, legally speaking, either an artificial person or an unincorporated association of persons, something having an institutional existence in that sense and being able to act as an institution, as is possible in the case of *an* organized international community such as the League and the United Nations.

When writers like the late Judge Lauterpacht speak of the international community—we find that is a phrase very often used by writers—then they are speaking metaphorically of the aggregate of sovereign States; they are not speaking of something in an institutional sense. I should like to refer the Court, in that regard, also to comment, first, that on the part of an author, Karl Strupp. It is in the Hague Academy *Recueil*, Volume 47 (1934 I), at pages 323 and 324, and the following is our translation of the passage from the French. He states that as regards the international community of nations or similar concepts—

> "If one is content to speak about the community of nations in the political sense it can only be applauded . . .
>
> But, if one runs through the literature, one easily finds that the definitions are not clear and that they lack juridical precision. That is not surprising, in view of the absolute lack of precision of the term and the absence of a real legally *tangible* international community. [I skip some lines and the learned author proceeds] But at the moment that one passes, as is done, from the notion of the *political* domain to that of *law* in order to infer consequences as to the problem of sources of international law, one ought, in the actual circumstances (I repeat this) to protest against such alteration of facts, whether one calls it community of nations or rather, which reminds one of the famous European concert with its permanent disagreements, family of nations, nothing can mislead as to the fact that, juridically, a community which has not been organized can never create valid juridical norms. The contrary notion is no more than a pious vow."

I wish to refer the Court also to the work of the honourable Member of the Court, Judge Morelli, *Nozioni di diritto internazionale*, at pages 3-4, that is in its sixth revised edition, and the following is our own translation into English of the relevant passage under the heading *International Community*:

> "The co-existence of several similar entities, which find themselves in relationship one with another—a relationship resulting from the

link (whether of conflict or of solidarity), between their respective interests—constitutes what is called a *society* [that is, then, the co-existence of the several entities which find themselves in relationship, that constitutes a 'society']. The recognition of the existence of a number of States possessing interests, amongst which there developed the relationships that have been analysed, thus leads to the notion of a *society of States*, or an *international community*.

This society had, during the medieval epoch, a hierarchical structure. The so-called *Republic of Christian Peoples* (the Holy Roman Empire), was, in fact, the result of a complex of political units which, in addition to being bound one to another by relationships of a feudal character, were all subordinate to two supreme authorities: on the one hand, to the authority of the German Emperor, the successor to the Roman Emperors and the temporal head of Christianity, and, on the other hand, to the authority of the Pope, the spiritual head of Christianity. But, later, this twofold relationship of subordination disappeared. On the one hand, the States asserted their independence of the Emperor *(civitates superiorem non recognoscentes)*; and, on the other hand, even the authority of the Pope declined, above all as the result of the Protestant Reformation, which shattered religious unity. There thus occurred a profound transformation in the structure of the international community—a transformation which it is the custom to trace back to the Thirty Years War (1618-1648), and more precisely to the Treaties of Münster and Osnabrück (1648), commonly known as the Treaties of Westphalia, which put an end to that war. The international community assumed, that is to say, the structure of a society no longer hierarchically organized but paritative, the members of which, not being subordinate to any power superior to them, found themselves one towards another in a simple relationship of co-ordination. This is the structure which the international community still retains, notwithstanding the current and ever-growing tendency towards the organization of groups of States."

Again, here, Mr. President, the contrast—the distinction—is drawn between, on the one hand, the international community in that sense, with no hierarchical structure superior to it, the units in a relationship of parity, of equality to one another, a simple relationship of co-ordination without being organized by any constituent instrument into an institution and being able to act as such, and, on the other, to the notion of the organization of groups of States.

So, Mr. President, that brings us back then to the way in which my learned friend in his contention juggles around with these notions of *an* organized international community, *the* international community, and the international society. If one does not keep these distinctions very clearly in mind, from a legal point of view, this juggling may create a misleading impression, and it may involve what one might call a mystification with all kinds of unforeseeable consequences.

Let us apply that in a practical sense to the way in which my learned friend seeks to advance his contention.

My learned friend refers, in effect, not to *an* organized international community, nor to *the* organized international community, nor *the* community as a unit, or as an entity. He appears to refer to an aggregate of what might be called organized international communities in the

sense of institutions, or organizations having an institutional existence.

And, so, he refers, Mr. President, to the United Nations, he refers to Specialized Agencies, he refers to the International Labour Organisation, he refers to Regional Organizations such as the Organization of American States, and so forth. One wonders where the line is to be drawn. Should one refer also to other international organizations, such as the International Lawn Tennis Federation, or the Olympic Organization? Should one refer to scientific organizations?

Mr. President, this last question is not entirely facetious. Scientific international organizations can and do lay down standards, or attempt to lay down standards in their particular spheres of scientific knowledge. Does my learned friend suggest that those are also part of the organized international community, that they can also lay down standards, and that those standards would be binding upon the Mandatory? If not, why does he exclude those? Does he say that the organized international community is to be seen merely as a politically organized international community, and, if so, Mr. President, why are the political forces in the world to be so much stronger in the normative processes of law which are to be binding upon the Mandatory and upon this Court than the other forces creating standards in the world?

The whole contention, Mr. President, makes no sense, and, as I have said, if one concludes, as I submit we have conclusively shown that one must, that there was no contemplation whatsoever of a laying down of binding standards by the supervisory bodies, as such, then *a fortiori* this whole suggestion of a nebulous body like the organized international community being endowed with that power must have even less substance.

That brings us, then, to the Applicants' second contention in regard to standards. The Court will recall the first one merely rested on these two legs, the organized international community and specific supervisory bodies. We come to the second one which is advanced in the alternative, and that is to the effect that by becoming a Member of the United Nations and the International Labour Organisation, the Respondent bound itself to give effect to standards embodied in the Charter and in the Constitution of the International Labour Organisation, and, Mr. President, to authoritative interpretations of the Charter and of the International Labour Office Constitution—authoritative, so it is suggested by reason of having been given by organs of those associations, very often by a mere majority vote, although my learned friend suggests that the majority vote often approached unanimity. We come to those degrees of refinement at a later stage.

I want to make plain, first, that we are not now dealing with a suggestion that we are to look at particular treaty obligations defined for the Respondent in the Charter and in the International Labour Organisation Constitution—obligations which the Respondent accepted conventionally by becoming a member of those two organisations. These obligations are, of course, the basis of a contention upon which the Applicants rely; they rely upon them, if I understand them correctly, in regard to their norm contention particularly—they say that there are certain provisions in the Charter and in the I.L.O. Constitution which impose relevant obligations upon the Respondent when they are properly interpreted; that they in themselves must be taken as establishing standards or a norm of the kind contended for by the Applicants.

That is a matter, Mr. President, which goes to the particular content of the norm and the standards and the suggested content of specific provisions of the Charter and of the I.L.O. Constitution. I do not propose to deal with those now. I shall deal with those in relation to the norm contention, although what I shall say in that respect will be equally applicable to the extent that the Applicants regard this as relevant to their standards contention.

For the moment, I am concerned with the more general question of how, assuming any content, it does not matter, what any content for particular provisions of the Charter and of the I.L.O. Constitution, are those provisions and authoritative interpretations of them brought into relationship with the obligations of the Respondent under the Mandate? That is the question to which I want to address myself first, because that is the important bridge which the Applicants also had to cross for the purposes of their standards contention.

If one supposes, Mr. President, that there were certain provisions of the Charter and of the I.L.O. Constitution that were interpreted, applied in practice, by the organs by majority resolutions and so forth, how do the Applicants see those as being related to the Respondent's obligation under the Mandate? If we understand them correctly, they say that those authoritative interpretations are to be seen as laying down standards which, in their turn, are then governing and are authoritative with regard to the interpretation of the Mandate.

I can read from the verbatim record of 18 May, at page 340, *supra*. There the Applicants said that reports, resolutions and conclusions of the International Labour Organisation—

> "... form authoritative interpretations of the Constitution and, as has been said, if they are authoritative interpretations of a convention or constitution to which the Respondent has adhered—an organization of which it has been a Member—then such interpretations provide an authoritative basis for the interpretation and application of the standards embodied in the mandate instrument itself ...".

Mr. President, that is, with respect, rather a mouthful. The whole argument is a very strange one. Here, the Court is concerned with the interpretation and application of a particular instrument, call it a treaty or convention, call it an instrument of a different kind; it is an international legal instrument. That is the task before the Court; the Court derives its jurisdiction from a provision which authorizes it to decide disputes in regard to the interpretation or the application of the provisions of the Mandate. Now my learned friend comes in and says "yes, but there are the provisions of other instruments—you became a party to those instruments. Those have been interpreted and now all those are to be relevant to the performance of your obligations under this first instrument, the Mandate".

Mr. President, surely, unless my learned friend can bring about, can establish, that there is some link between the first instrument and these later ones, which bring the provisions of the later ones, as it were, into the provisions of the earlier one, where does that get him—either as a matter of substance, of saying that the obligations of the mandate instrument have been violated, or as a matter of jurisdiction, of bringing the matter within the clause which provides for adjudication by the Court?

Let us take an example, Mr. President. Suppose a Mandatory, having entered into the mandate arrangement, at some stage or other, sees fit to enter into a defence pact, another international agreement, with other States, because it thinks under the circumstances that that would be entirely in accordance with the interests of the mandated population—it would be a good thing, for the mandated people, for the inhabitants of the territory it would serve to protect them. The years go by and eventually the Mandatory finds that circumstances have changed and that the honouring of this defence pact may indeed imperil the continued existence of the whole of the mandated population. Under those circumstances, then, the Mandatory decides not to honour its obligations under the later agreement. Could it then ever be said that, although that is a violation of the later instrument, it must also be seen as being a violation of the obligations of the Mandatory under the mandate itself, when the very reason for not complying with this later obligation is the desire to comply with the obligations of the mandate instrument of promoting well-being and progress to the utmost?

I have taken an example of that kind in order to demonstrate to you what would seem to be an obvious proposition, Mr. President, that if instruments, in which obligations are accepted, stand in no relationship to one another, if they do not provide a necessary link whereby the provisions of the later ones are, as it were, incorporated into the earlier ones, then the question whether the later one is complied with or not, can have no bearing whatsoever upon the question whether or not there has been a violation of the provisions of the first instrument. It can have no bearing upon a question pertaining to the interpretation and the application of the provisions of the first instrument.

So let us then see whether my learned friend succeeded in establishing any such necessary link between the mandate instrument and these later conventions. In regard to the United Nations Charter, the Applicants did make an attempt to establish such a link. The Court will recall that in the Memorials they relied upon a contention of *in pari materia*. In the Memorials, **I**, at page 106, they stated—

> "... that Chapters XI, XII and XIII of the United Nations Charter are *in pari materia* with Article 2 of the Mandate and Article 22 of the Covenant and, therefore, that the terms of the Charter may be employed in construing Article 2 of the Mandate and Article 22 of the Covenant".

Mr. President, we dealt with that contention in our Counter-Memorial, **II**, at page 395, and we pointed out the following—we said:

> "It is understandable that where a particular conference adopts a number of similar conventions, the terms of one of them may be of some assistance in interpreting another. To assert, however, that a convention concluded in 1945 can be used as an aid to ascertain the intentions of the parties to a convention concluded between different States in 1920, is, in Respondent's submission, so obviously absurd as not to warrant serious consideration."

With respect, Mr. President, and with submission, I reiterate that that is so. If it is a matter of interpreting, of finding the probable intent of authors of an instrument, and those same authors made different instruments more or less at the same time and expressed themselves more

or less in the same type of language, then of course the one may assist on a *pari materia* basis in interpreting the other, either by reason of contrast or by reason of similarities or the like. But surely when an instrument is entered into 25 years after the other, how could there be any basis for an argument of this kind? The Applicants apparently realized this difficulty because we found that in their written Reply they did not advert to this matter at all again.

Again, Mr. President, we did not understand them to advance such a contention in their oral argument in chief in this Court but now, when it comes to the oral reply, in presenting the case now in this last modelled form to the Court, we find there is a reversion to this *pari materia* suggestion, although this time it is not relied upon in itself. The suggestion, if I understand it correctly, is that it really finds its basis in another consideration which is really relied upon as the link and that is, the resolution of the League Assembly on 18 April 1946. The Applicants say, in the verbatim of 18 May, at page 327, *supra*, after referring again to Chapters XI, XII and XIII of the Charter—of their *in pari materia* contention in that regard—that the resolution of the League of Nations of 18 April 1946 noted, *inter alia* [and they quoted from the resolution]:

> "that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League"—

and they proceeded to contend, at page 329, *supra*, of that same record, that this resolution—

> "... is in itself a clear indication of the relevance to and applicability of Charter provisions to the mandates scheme. Respondent itself is not only a party to the Charter of the United Nations, but supported and voted for the resolution of 18 April 1946, which on its face establishes the relevance of the provisions of the Charter to the mandates system".

Now, Mr. President, this is not an entirely new argument either. It first reared its head in the written Reply, with which we dealt in the Rejoinder, V, at page 139, and we pointed out there that in the League resolution—

> "The word 'principles' is not synonymous with 'detailed provisions', and 'corresponding' does not mean 'identical'. The League resolution consequently did not purport to convey that Article 22 must be interpreted as containing all the provisions of Chapters XI, XII and XIII of the Charter, and such a suggestion would indeed have been absurd. The resolution did not purport to 'note' any more than that the basic principles underlying the said Chapters of the Charter are similar to those found in Article 22 of the Covenant."

The Applicants in their oral argument in chief in this Court, offered no answer whatever to this. They completely ignored this passage from the Rejoinder. Nevertheless, when it comes eventually to their oral reply, they simply reiterate the same contention as before, and they still ignore this passage in the Rejoinder. They do not deal with it; they do not attempt to meet it in any way. Surely, Mr. President, with respect and with submission there is no answer to what we stated in the Rejoinder. By referring to the fact, by noting the fact, that those chapters of the Charter embody principles corresponding to those referred to in Article 22

of the Covenant of the League, what is this that the Applicants are suggesting that this resolution of the League accomplished? Surely, principles corresponding to, do not mean provisions identical with. Surely the mere fact that those were the cautious words he used indicated that there was no intent whatsoever to indicate that there was to be an identity—that the provisions as such were being taken over into the Charter, or conversely, that the Charter was to be read as now being "a re-definition" of what was originally stated in Article 22 of the Covenant, which is really the effect of the contention.

If we look at the actual provisions of those particular chapters of the Charter, we find that, in fact, they embody underlying principles of the same nature as those contained in the mandate system. But their provisions are very very far from being identical. One finds deviations in all kinds of respects of which I could give some examples to the Court. If one looks at the nature of the supervisory organs, they are completely different in ways which I have explained to the Court before—I need not enter into the details again. If one looks at specific things, which may be done in the course of supervision, one finds that Article 87 of the Charter makes specific provision that the General Assembly may provide for periodic visits to the respective trust territories, something which never occurred in the mandate system, or in any of the provisions relating to the Mandate.

We find that Article 81, quite apart from the supervisory aspect, provides that "the administering authority may, *inter alia*, be the organization itself"—not a State, not an advanced nation, acting as a Mandatory on behalf of the League, acting as a guardian in tutelage for the particular population, but an international organization itself—again something entirely foreign to the agreement which eventually went into Article 22 of the Covenant.

So, Mr. President, I still do not understand, with respect and with submission, how this resolution of the League could in any way be said to have provided a link to the effect contended for by the Applicants, which would in order to assist them have had to have the effect that the provisions of the Charter are now to be read as being incorporated in the mandate instruments and in Article 22 of the Covenant; and probably then as governing the mandate instrument itself; a link which would make them provisions relating to the interpretation and the application of the Mandate. That link, Mr. President, in my submission, has no substance whatsoever.

And what other links are there? We find in the oral reply the manner in which this case has been set out for the Applicants; we find not one single further reference to any suggested link; this was the only one relied upon there. It is true that at one stage the Applicants attempted to rely on Article 103 of the Charter—that was in the Reply, IV, at page 517, but, Mr. President, we dealt with that matter fully in the Rejoinder, V, at pages 138 to 139. And after we dealt with it there, that point never raised its head again in the Oral Proceedings, or anywhere in the proceedings. At page 138 we quoted the wording of Article 103, which reads as follows:

> "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

We proceeded to state:

"The effect of this Article would be that Article 73 [that was the Article then relied upon in the Reply by the Applicants], if applicable to Mandated territories, would prevail over any inconsistent provisions of the Covenant, or the Mandate (that is, assuming that the Mandate is an 'international agreement'). Such inconsistent provisions of the Covenant or the Mandate would then fall away, leaving Article 73 of full force and effect. Article 103 would, however, not have the effect of amending the Mandate by substituting the provisions of Article 73 for any inconsistent provisions in the Mandate.

Since the present action is brought in terms of the compromissory clause in Article 7 of the Mandate, it would accordingly not avail Applicants to show that Article 73 of the Charter (which is not covered by the compromissory clause) is applicable, and not Article 2 of the Mandate (which, it is assumed for present purposes, is so covered)."

That is the way in which we stated it in the Rejoinder, and, as I have said, after that the contention never reared its head again. Surely, Mr. President, it must be as stated. The Charter provision, Article 103, is an agreement between the parties to the Charter. It provides for what effect is to be given to their agreement, as contained in the Charter, and the effect of it is, briefly, that no part of this agreement between the parties to this instrument will be invalidated by reason of conflict with a prior engagement by any of the parties under any other instrument. It affects therefore the position as under the Charter. It does not purport to effect the situation as it might obtain under other instruments which might not even have been entered into between the same parties. It could not have intended, and in any event it could not assist the Applicants in establishing a contention to the effect that provisions of the Charter were now intended to be read into the Covenant or the mandate instrument. This is what they would have to contend in order to get over the difficulty already mentioned.

That, then, Mr. President, relates to the suggested links between the Charter and the mandate instruments. In regard to the Constitution of the International Labour Organisation, we scrutinized the verbatim record from one side to the other and from beginning to end, but we simply could not find that any link whatsoever has been suggested anywhere in the argument.

To be sure, the Applicants said more than once that the Constitution of the International Labour Organisation is relevant to an interpretation of the Mandate, but we are still waiting to hear why that is so, and, we submit, with respect, that the Court must still be waiting to hear why that would be so. They never sought to establish any link such as they would have to establish in order to come anywhere with this particular contention. It would not, of course, avail the Applicants to say that the I.L.O. Constitution is relevant because it embodies standards defined by the organized international community—that would pertain to their other a gument, which I have dealt with and disposed of already; I am dealing with *this* argument, Mr. President, which takes this form that, by becoming a party to the International Labour Organisation Constitution, the Respondent thereby came to be bound by authoritative

interpretations of that Constitution which, in some way, are to be seen as authoritative interpretations of the Mandate itself.

Consequently, Mr. President, this argument—either as pertaining to the International Labour Organisation Constitution or as pertaining to the Charter—must fail for this reason, and for this reason alone—the absence of the necessary link, in the sense in which I have been dealing with it.

As I have said, there are other reasons why we submit that those provisions of the two Constitutions do not assist the Applicants at all—reasons going to the real substance of the Applicants' case, as a matter of fact—reasons which pertain to the actual suggested content of the Applicants' standards and norm, and, as compared there, with the actual content of the particular provisions of those Constitutions. We submit, and we shall later elaborate on that submission, that, in truth, the Applicants' case in that respect is also totally unfounded. There is nothing in those provisions which supports the Applicants' contention as to the content of their standards and the content of their norm—a content which is then posed as in conflict with the Respondent's obligations under the Mandate, as contended for by the Respondent. But that, as I said, is a different matter with which I shall deal later; it is common to the Applicants' case both on the norm and on the standards, and I shall deal with it when we come to the norm.

Summarising then, Mr. President, in regard to the standards we say that, quite apart from these further considerations, which we shall deal with when we come to the norm contention, the considerations which I have advanced so far are abundantly sufficient to indicate that the Applicants' case on standards is without any substance: firstly, because on a proper interpretation of Article 2 of the Mandate, read in the light of Article 22 of the Covenant, and having regard to all factors bearing on the intent of the authors of the mandates system, express or tacit, it is abundantly clear that neither Article 2 of the Mandate nor any corresponding provision of any of the other mandate instruments was intended to be subject to any qualification that the mandatory would be legally obliged to give effect to standards prescribed or defined by either a supervisory organ or by the organized international community, whatever that term might signify. That, Mr. President, as we stressed, is further confirmed by the analagous position which applies under the Charter in respect of trusteeship. This revolutionary innovation, which the Applicants contend for, of a power on the part of supervisory organs to impose binding standards upon a Mandatory or an administering authority, would therefore if accepted, not, hit at South Africa alone, it would also hit at the remaining administering authorities under trusteeship agreements with the United Nations.

Secondly, Mr. President, we contend that, in so far as provisions of the I.L.O. Constitution and provisions of the Charter are relied upon, whatever their content may be, they cannot assist the Applicants' contention in regard to standards, for the simple reason that no link has been established between those instruments and the Mandate which could make those provisions themselves or, *a fortiori*, interpretations thereof binding upon the Mandatory, or authoritative for, or even relevant to, the interpretation of the Mandatory's obligations under the basic mandates instrument.

That then, Mr. President, subject to arguments which are common to

both the norm contention and the standards contention, concludes the portion of the argument in reply to the Applicants' case on standards, and I proceed to deal with the case relied upon in regard to the alleged norm.

It may be useful to begin by referring again to the distinction which, as we understand it, the Applicants sought to draw between their standards contention and their norm contention. They sought to render their standards binding upon the Mandatory via the mandate instrument, via a peculiar relationship which they said was created through the mandate instrument between the Mandatory and either the supervisory organs or the organized international community. That was the manner of seeking to make usually non-binding standards, binding upon mandatories.

In the norm contention there is again an argument to the effect that standards are to be taken as binding upon the Respondent, in particular, and I take it that that would have had to apply to mandatories in general and to administering authorities under trusteeship in general. Here, that contention takes a different form: it is to the effect that those standards have, quite independently of the original instrument, developed into a norm of general binding application in international law—binding not only mandatories and administering authorities under trusteeship but States in international law in general. And, for that reason, it is said that the norm must be binding upon the Respondent also in relation to this case.

Mr. President, again it will be appreciated that, quite apart from the merits of the rather startling contention that, by the processes as described by the Applicants, these standards have become binding norms generally in international law, the Applicants have to face the same difficulty here, that if that contention should be sound, how do they relate that norm and questions pertaining to the violation of that norm—or alleged violation of the norm—to questions pertaining to the interpretation and the application of the Mandate, and again, in both respects to the question whether there has been a violation of the mandate instrument, as such, or of obligations undertaken under the mandate instrument, and to the question of the Court's jurisdiction?

I should like to begin again by referring to the Applicants' difficulties in this regard, and from that I shall go over to the more substantive aspects of the suggestion that these standards have become a norm to the question whether they have been crystallized into a norm in international law at all.

It is significant to note, firstly, that the Applicants do not contend that this alleged norm existed as at the stage when the Mandate was granted. They say in the verbatim record of 17 May:

> "Forty years ago Respondent's theory that its racial policies lie within the ambit of its discretion conceivably might have been arguable, although even then, in the Applicants' view, not convincing[ly. The record says 'convincing', I take it that that is just an error.] But the proposition is no longer debatable. With respect to Respondent's policies of racial discrimination and group separation, international standards and an international legal norm of non-discrimination and non-separation have achieved authoritative status during the very lifetime of the Mandate, so authoritative, indeed, that it is appropriate, in the Applicants' submission, to

> make them applicable as a matter of law *per se* to the interpretation of Article 2, paragraph 2, of the Mandate." (*Supra*, p. 302.)

I stress, Mr. President, that it is said here that those standards and that norm "have achieved authoritative status during the very lifetime of the Mandate". So, however grudging the Applicants are in their first admission or qualification that it might have been arguable 40 years ago, that it lay in the Respondent's discretion to decide this matter, although "not even convincingly", nevertheless, they are forced to make this full admission that this norm, upon which they rely, did not come into existence prior to the formation of the Mandate. It came into existence "during the very lifetime of the Mandate", and then, not of the mandates system which was operating in the League's time, but of *this* Mandate, because, on analysis, one finds that the events upon which my learned friends really rely for the establishment of their norm occurred even after the mandates system, as such, in a practical sense, had ceased to exist.

Mr. President, in regard to the Applicants' case based on the suggested norm, we pointed out that the Applicants do not contend that the norm was in existence at the stage when the Mandate was granted, and from the passage I read to the Court it seems that they admit that the highest at which they can put it, is that it came into existence during the very lifetime of the Mandate, but they go on to contend, towards the end of that passage, that those standards became crystallized into a norm which obtained authoritative status, so authoritative indeed that it is appropriate, in the Applicants' submission, to make them applicable as a matter of law *per se* to the interpretation of Article 2, paragraph 2, of the Mandate.

Mr. President, this passage I have just read is presumably intended to be an answer by the Applicants to a very basic and a very fundamental contention and exposition which we gave to the Court, first in the Rejoinder and then later, also, in our argument in chief, the oral argument in chief in this Court. In the Rejoinder, **V**, page 127, we briefly put the contention as follows:

> ". . . the Mandate System, by its very terms as well as its underlying philosophy, according to the contemplation of its authors, the policy of the Permanent Mandates Commission, and the practical application of the system by Mandatory Powers, permitted and indeed required differentiation among various ethnic, linguistic or cultural groups, and, consequently, among their individual members, on the very basis of membership in such a group".

In the argument in support of this contention, Mr. President, in the Rejoinder we indicated that the differentiation there referred to related to this very field about which the Applicants' standards and norms are said to be concerned, the field of the allotment of rights, burdens, privileges, and so forth, on the basis of membership in a race, class or group. We dealt with these contentions fully in support of this contention in the Rejoinder, **V**, at pages 119-127, and we briefly repeated those contentions and we elaborated them in some respects in the Oral Proceedings, our oral argument in chief—that is to be found in the verbatim record of 23 April, at **VIII**, pages 667 to 673, and we need not repeat that argument. The Court will recall its basic substance—the very terms contained in the mandates system and in Article 22, in the Mandate

itself relating to the liquor trade, military training, slave trade, traffic in arms and ammunition and so forth; the terms in the various "B" Mandates, relating to tribal lands; the differentiation between the various the mandates system, and so forth, making it perfectly clear that there was not only contemplated but prescribed a system of differentiation, and types of mandates; the various types of communities. in Article 22 of one finds in practice, in the practice of the mandatory powers and of colonial powers at the time, that differentiation was practised as a matter of ordinary, current practice to the full knowledge of the supervisory organs and with their encouragement in all the various spheres.

The Applicants, Mr. President, have not attempted to contest this part of our argument, and, indeed, it becomes quite clear that they cannot contest it, and that is why we get this admission from them to which I referred, although it is in these rather grudging terms. They do not tell us why it might merely have been arguable in 1920 that the policies lay within the ambit of the Respondent's discretion; why that could not have been convincingly argued at that stage. That they certainly do not tell us; they do not try to do so with reference to the aspect of the matter which we stressed in the contention to which I have referred. In other words, in substance they have offered us no answer at all, but they admit that the highest at which they can put it, is that the norm originated in the lifetime of the Mandate.

In effect, therefore, Mr. President, their contention must amount to this: that not only did the Mandatory—the Respondent—not consent to this norm being made binding upon it, but in fact this norm is directly in conflict with that which was decided upon in agreement between Respondent and the other founders of the system in 1920; it is in conflict with certain of the explicit provisions of the instrument, provisions which required Respondent to act in a manner which differentiated between the various groups and their members on the basis of membership in the group, and in many respects contemplated that the Respondent was to do so.

Now, Mr. President, the contention of the Applicants therefore as to the existence of this newly arisen norm immediately raises the question whether, assuming that contention to be valid, assuming that such a norm did come about in international society in general, the allegation that Respondent is contravening that norm amounts to an allegation of violation of the Mandate, and consequently, whether this Court would possess jurisdiction to determine disputes with regard to alleged violation of such a norm, assuming it to exist? We have frequently emphasized that Article 7, paragraph 2, of the Mandate bestows jurisdiction only to disputes regarding the interpretation or application of the provisions of the Mandate, and that is why this question arises for pertinent decision by the Court.

The Applicants again make an ingenious attempt at providing a link between such a norm, such a suggested norm, and the provisions of the Mandate, and we find that in the verbatim record of 17 May. The passage reads as follows:

> "If the standards, for which the Applicants contend, have achieved the status of an independent rule of international law, an international legal norm, they, of course, would be controlling, with respect to the Mandatory, on the simple proposition that the Mandatory, in undertaking this arrangement obviously must be conclusively

presumed to have undertaken and agreed to comply with international law in the exercise of the Mandate ..." (*Supra*, p. 302.)

And then, finally, we find in the verbatim record of 19 May, the following:

"Even as a sovereign State, Respondent must govern in accordance with international law. Its obligation as mandatory to promote well-being and social progress, in accordance with the obligations of the sacred trust, do, of course, require that the international law, the international legal norms pertaining to the Respondent's obligations as a sovereign State and as mandatory, apply *a fortiori* to the Mandate itself. The jurisdiction of the Court to determine the obligations pursuant to international law, the international legal norm for which the Applicants contend, would be founded on, and cognizable under, the compromissory clause of the Mandate." (*Supra*, p. 342.)

What does this amount to, Mr. President? It would seem to be this: that although this norm is said to have come into existence long after the Mandate, and quite independently of the Mandate for purposes of this "norm" contention; although the Applicants admit that there was no agreement on the part of the Respondent at all in respect of this norm, let alone any agreement to bring it into the Mandate, they say the Respondent must be taken to have agreed initially, in undertaking its mandate obligations, to administer the mandated territory in accordance with international law, and that in that way an obligation to comply with international law is now to be seen as an obligation of the Mandate itself.

Mr. President, the fallacy of this contention immediately becomes apparent on analysis, on two bases. Let us first consider, what does international law mean in this context? We must remember that we start off on a basis that the Applicants say that this is international law to which they admit that the Respondent has not agreed specifically; they admit that the Respondent has, on the contrary, protested against its coming into existence. Nevertheless, this is international law which the Respondent is said to be obliged to comply with in the administration of the Mandate. Mr. President, surely international law, when used in a context of that kind, becomes ambiguous. One speaks of customary international law, of binding international relationships in general, covering the whole field, applying as between all subjects of international law. But then one also knows that there are international legal relationships (whether one can or cannot properly call them relationships of international law is a matter of verbiage, but very often they are referred to as relationships of international law), although they apply only between a limited circle or group of subjects of international law. It could be a treaty relationship between two particular States. It could be a regional relationship between a number of States in a particular region, having originated either by custom or by treaty. It could be a multipartite treaty, but again regulating relationships only between the parties to that treaty, and yet that regulation of relationships could in a sense be said to be a regulation in international law.

So, Mr. President, where one could say in municipal law that if I undertake a cartage contract for somebody and I have to cart things from outside a town into a town, in terms of my contract, there is a contemplation that I would, in performing that contract, be bound by

law, but, of course, the law which one contemplates in that respect would be municipal law which would be *ipso facto* binding upon a subject. It would not be possible for me to ignore the traffic regulations as I was going into town; I would have to observe them. If I do not observe those traffic regulations, if I drive through a red robot, then I act in conflict with the law, but that is because that law is binding upon me in the way it is in a collectivist municipal society where the law is made by a law-giver which imposes its will upon the subject.

Even then, in that example, one would not say that by driving through the red robot the cartage contractor is breaking his contract of cartage. He is offending against the law. He might be doing so because he is in a hurry to deliver on time, so he is making his best endeavours to comply with his contract. He could never be sued for a breach of contract because he does that, but he could of course be prosecuted for breaking the law.

In international societies it is not so simple and it may be rather misleading to say that there is a contemplation that a Mandatory is to act in accordance with international law. What international law, one might ask? Is it international law which would in the ordinary course become binding upon the Mandatory because of its consent, or because of being such a principle of customary law that it is binding upon all subjects of international law? If that is so, Mr. President, then why would it be necessary for the Mandatory to undertake specially to comply with that law in the mandate arrangement, in accordance with my learned friend's contention?

If, on the other hand, this expression "international law" relates to international law which would not in the ordinary sense become binding upon the Mandatory but would on ordinary principles of international law be binding only as between other States and other subjects of international law, then it would be a rather unusual contemplation, and an unusual agreement to enter into at the time of the mandate arrangement, that the Mandatory would, not withstanding its lack of consent, notwithstanding its possible opposition, notwithstanding what it may regard about it, notwithstanding the fact that ordinarily it would not be bound in international law, nevertheless subject itself to international law which might come into existence between other States, between other subjects of international law. Surely that would be a most unusual contemplation and one would have to bring a very cogent case in order to say that necessarily as a matter of inference, that must have been the contemplation between the parties to the mandate instrument, to the mandate arrangement.

My learned friend has brought no case whatsoever, Mr. President, apart from an *ipse dixit.* He says, "of course"—that is the expression he used:

> "Its obligation as mandatory to promote well-being and social progress, in accordance with the obligations of the sacred trust, do, of course, require that the international law, the international legal norms pertaining to the Respondent's obligations as a sovereign State and as mandatory, apply *a fortiori* to the Mandate itself." (*Supra*, p. 342.)

It sounds very nice, Mr. President, when it is said quickly, but when its implications are analysed one finds that it really hides an absence

of any substantiation for the proposition which is actually adduced to the Court.

Now, Mr. President, quite apart from the fact, that international law might have a connotation of something which would not in the ordinary course become binding upon the Mandatory itself, let us take international law of a nature which would become binding upon the Mandatory. Then still the contention does not make sense, as I have said, for the simple reason that it would be unnecessary to make a special agreement about it if it would become applicable to the Mandatory in any case. But the difference would be this; other international law might become applicable to the Mandatory quite independently of the mandate arrangement, and in the same way as in the type of example which we cited to the Court earlier this afternoon in relation to the Applicants' standards contention.

Let us here assume this set of facts. We assume that the Mandatory concludes a treaty with State X, which is not a Member of the League. Upon reconsideration it appears to the Mandatory and it can be established as a fact that compliance with that convention would be detrimental to the interests of the inhabitants. Nevertheless, then, on the Applicants' contention, the Mandatory would be bound in terms of the mandate to carry out its obligations under the later treaty. If the Mandatory were to refuse to carry out its obligations under the later treaty then another Member of the League which is not a party to that treaty, but which has an interest in the mandate arrangement, would be able to invoke the jurisdiction of the Court. The Court then, on the Applicants' theory, would be bound to compel compliance with the treaty, with this later treaty, even though the Court might be perfectly satisfied that such compliance would work to the detriment of the inhabitants of the territory. That is the effect of this contention of the Applicants, applied to a case where international law becomes binding in the ordinary course upon the Mandatory at a later stage.

Mr. President, that absurdity, in the Applicants' contention, appeare from this very case which they are now bringing to this Court, a cass which asks this Court to hold that a contravention of their suggested norm would constitute a contravention of the Mandate, even if the Court were to be satisfied on the facts that application of the norm would lead to disastrous results for the well-being and progress of inhabitants of mandated territory. That is the implication which they accept in this contention which they are advancing to the Court.

Our submission is that it would not be sufficient for the Applicants to show that there now exists a rule of law which the Respondent has violated, quite apart from the question which arises *a priori*, namely whether a rule of law has come into existence which is binding upon the Respondent in international law generally. Assuming that, assuming that one has come into existence and is binding upon the Respondent, it is not sufficient for them to show violation by Respondent of that rule. In order to bring the matter within the jurisdiction of the Court, they would have to show that the rule falls within the description "the provisions of the Mandate", and this they can do only by showing that the rule was intended to amend the Mandate or that it has in some way become incorporated in the terms of the Mandate.

Whether or not a rule of law can arise without the consent of a State which is sought to be held bound thereby, is a point to which we will

advert later. It seems clear in our submission that *no amendment of the* Mandate could have been effected without the Respondent's consent. That was the contemplation in the mandate instrument itself, in the whole mandate arrangement, that there could not be an amendment of the provisions of the Mandate without the Respondent's consent. That is quite independently of the question whether outside of the Mandate other rules of law could come into being—could bind the Respondent.

It was expressly held by the Court in the 1950 Opinion, that the Mandate could not be amended without the co-operation of the Mandatory. That was in the part of the 1950 Opinion which dealt with the competence to modify the international status of the Territory. The Court will recall that that matter is dealt with in the 1950 Opinion at pages 141 to 143, and the whole discussion was based upon the provision in Article 7, paragraph 1, relating to amendment or modification of the provisions of the Mandate, and the conclusion eventually stated by the Court at page 143 was in these terms:

> "On the basis of these considerations, the Court concludes that competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations." (*I.C.J. Reports 1950*, p. 143.)

Mr. President, that is why we say that if the Applicants want to bring this suggested norm of theirs into the Mandate they have to show that it happened by way of an amendment of the provisions of the Mandate. That could not have happened without the consent of the Respondent, and for that reason alone we submit that there is no basis in law for their reliance upon such a norm in these proceedings before this Court.

In other words, it would not be enough for the Applicants to show that the Respondent has consented to the imposition of a new obligation: they would have to go further and show that there existed an intention *to incorporate that obligation in the Mandate.*

Therefore, Mr. President, for these reasons alone, even if the suggested norm were to exist, we submit that the Court would not possess jurisdiction to adjudicate on alleged violation thereof. That is, however, not the only basis upon which we want to rest our case in this regard. We want to proceed, Mr. President, independently and alternatively, to show that in its substance this case of the Applicants, based on the norm, cannot succeed; that it is totally unsubstantiated. We shall deal with that matter in various phases.

We shall deal first with the processes by which the Applicants suggest that such a norm could have come into existence in international law so as to be binding upon the Respondent: that is, on the basis of any norm, whatever its suggested content. We shall deal first purely with the legal question of the processes which the Applicants suggest were sufficient to bring this norm into being as a binding norm upon Respondent. Thereupon, we shall proceed to consider the suggested *content of this norm*, and to see whether, quite apart from its application to the Respondent or other aspects of the matter, such a norm can be said to have come into existence in international law at all.

I proceed, therefore, to deal with the matter on the basis first indicated, i.e., with reference to the processes by which the Applicants say such a norm could have come into existence.

The Applicants approach the matter by stating in the verbatim record of 17 May, at page 303, *supra*:

> "The Applicants' effort will be to demonstrate the existence of the international legal norm in terms of the sources of law enumerated in Article 38 (1), paragraphs *(a)-(d)*, of the Statute of the International Court of Justice."

And then at page 342 of the verbatim record of 19 May they stated:

> "The Applicants contend that the international standard of non-discrimination and non-separation qualifies as law, qualifies as a legal norm, in accordance with, and pursuant to, the several subsections of Article 38, paragraph 1, of the Statute."

They state in general, Mr. President, in regard to their contention, at the same page of that same record, the following:

> "Such demonstration depends upon acceptance by the Court of the Applicants' contention that formal acts of international institutions in certain circumstances, which the Applicants contend apply here, may and do possess a law-creating effect within the meaning of Article 38, paragraph 1, of the Statute."

The Court will see this is basic, this is fundamental. Their case, their successful demonstration of what they contend for depends upon this acceptance—acceptance of the contention that certain formal acts of international institutions in certain circumstances have the law-creating effect within the meaning of Article 38, paragraph 1.

Now, Mr. President, of course, Article 38, paragraph 1, does not in terms list "formal acts of international institutions" as one of the sources to be applied by the Court. Indeed, as we have pointed out elsewhere, the Applicants conceded that in making their case they perhaps rest upon a law-creating process which has not heretofore been considered or passed upon by this honourable Court.

It is, therefore, significant to note, Mr. President, that the Applicants commence this demonstration of theirs, not by showing that this law-creating process does exist but by showing why it should exist. This they do by purporting to show "the relevant international context" (that is an expression they used in the verbatim of 19 May, at p. 342, *supra*, and also "developments in international society, which bear upon the character and the evolution of international law" (same record, at p. 343, *supra*). Now, they speak of these "developments in international society" and they list them as follows: Firstly, they speak of "the diversity and multitude of States comprising the contemporary international order", and they say that has brought "in their wake new concepts and needs regarding the normative process itself". *(Ibid.)*

Secondly, they say "technological development and the spread of information in the arts of war and of transportation have made international society more inter-dependent". That we find at page 343, *supra*, of that same record.

Thirdly, they say "the connection between world peace and the protection of human rights in the international sphere has become increasingly manifest" (same record, at p. 344).

Fourthly, they say that "within the area of human rights the most significant developments have focussed upon the evolution of standards

pertaining to matters of racial equality, non-discrimination and non-separation" (same record, at p. 344).

Fifthly, they say "international society lacks legislative organs, and for this reason it has had to rely on other than legislative procedures to change and evolve international standards and norms" (same record, at the same page).

All this culminates in two consequences flowing from this lack of legislative organs.

Firstly, the Applicants say, and I quote from that record at the same page: ". . . scholars have increasingly urged that suitable and, in appropriate cases, *quasi* legislative effect be given to official acts of international institutions".

Then there is the second consequence at the same page: "The absence of a legislative capacity as such in the international order has an important bearing, of course, upon the outlook of international judicial organs."

So what does all this amount to, Mr. President? The whole discussion is introduced, not by saying what is the international law, what are the processes of norm creation in international law, but what they ought to be in modern circumstances, regard being had to the suggested alterations and changes which have come about in international society and its implications, and it ends then on this note that the scholars are urging—and have increasingly urged—that "*quasi*-legislative effect" should, "in appropriate cases", "be given to official acts of international institutions", and that courts apparently should now support this notion, this urging by scholars.

Mr. President, with respect, whether or not the developing needs of international society require some legislative or *quasi*-legislative international organization, or some *supra*-national parliament, and, if so, what the composition and the procedure and the powers of such a body should be, are certainly very interesting questions; they are very debatable questions, they are questions worthy of discussion; and much has been said about them, much has been written about them, and much more can be said and can be written. But, surely, with the greatest respect, that is not a topic for introduction into a court of law whose function it is to decide a case in accordance with international law. It is an argument about the need for reform in the international law, rather than an argument as to what the international law is, the law which this Court is required to apply in accordance with its function and in accordance with its Statute.

Assuming, Mr. President, the need for such an organization, do the Applicants seriously suggest that the United Nations Organization should now be considered fit to fill this gap, despite the fact that such a function was never initially intended for the United Nations Organization? Do they suggest that the Court is now to regard the United Nations Organization, although created for different purposes and not for the purpose of fulfilling such a function, as being capable of fulfilling that function and of being able to do it properly, with a view to its constitution and its manner of functioning? We know that the authors of the United Nations by deliberate design refrained from bestowing legislative or *quasi*-legislative powers upon the United Nations. Do the Applicants now contend that by some undefined process, by the need for a *quasi*-legislative body, that that, by itself, has altered the basic nature of the

United Nations? Surely, Mr. President, such a contention would be completely untenable. And even more untenable is this suggestion, that the Court has in some way a *quasi*-legislative function in order to minister to these needs of international society in the changed circumstances to which the argument refers.

The Applicants attempt to bolster this aspect of their argument with reference to an extract from an article by the honourable Member of the Court, Sir Gerald Fitzmaurice. The extract is to be found in the verbatim record of 19 May, at page 345, *supra*. It is unnecessary for me to read it again, Mr. President, because on the most cursory reading it will be absolutely evident that it does not support the Applicants' contention whatsoever. The point made by the learned author is, with respect, perfectly clear. He stresses the desirability that international tribunals, in giving decisions in particular cases, should not be too reluctant to pronounce in general upon questions of law—international law—which require clarification and which are under discussion in the particular case, even if that might mean going somewhat beyond the limits of what would be strictly necessary for deciding what is before the Court in a particular case. And the learned author suggests that that would be an appropriate function for international tribunals to a greater extent than it would be for municipal tribunals. That is the effect of the point stated there. There is no suggestion whatever that in giving such decisions or any other decisions the Court should apply concepts or draw on sources other than those traditionally recognized in international law and assign to itself a *quasi* legislative function of giving effect to new processes of norm creation in international law.

The reason why the Applicants contend for an increase in the powers of the United Nations and of the Court has already been mentioned, but it again appears very clearly from a passage in the record of 19 May:

> "The Applicants contend that the Court should confirm the role of international consensus as a source of international law within the meaning of Article 38 of the Statute of the Court and within clear, practical limitations. 'Consensus' is used by the Applicants to refer to an overwhelming majority, a convergence of international opinion, a predominance of view; it means considerably more than a simple majority, but something less than unanimity." (*Supra*, p. 345.)

This, then, is the purpose of the Applicants' case—to establish the proposition that international legal obligations may be imposed upon a State without its consent by giving effect to such an "overwhelming majority", such a "convergence of opinion", such a "predominance of view", inappropriately, in our submission, called "consensus". The manner in which they seek to do it is to request the Court to go beyond its normal judicial functions so as to declare that the so-called organized international community, in particular the General Assembly of the United Nations, possesses normative capacity which it was not intended by its creators to possess. And it is in two respects that the Applicants contend that the normative capacities, so-called, of the General Assembly are relevant. They sum them up themselves as follows, both of them in the verbatim record of 19 May, at page 346, *supra*:

> "First, there has been authoritative definition of the scope, character and applicability to Respondent's policies of the inter-

national legal norm found in Article 55 *(c)* and Article 56 of the Charter, read in the light of the overall affirmation in the Charter of the connection between human rights and obligations of Members.

Secondly, conclusive evidence is to be found in the many judgments of Member States that the standards evolved by the organs in the United Nations do in fact constitute an international legal norm."

Therefore, Mr. President, one sees that those are the elements on which stress is laid. It is the over-all affirmation of certain aspects of the Charter—certain suggested aspects and consequences of the Charter; it is a matter of giving effect to many judgments of member States, that standards evolved by organs in the United Nations do in fact constitute an international legal norm. And, therefore, their argument is directed to the avowed purpose of establishing that the norm relied upon by them arose without the Respondent's consent because, as they say, the fundamental question is—

> "the degree to which a single, recalcitrant State, or a small minority of States, may be permitted to veto or block the emergence of authoritative standards, or legal norms, in international society, and thus paralyse the growth and development of international law itself". (*Supra*, p. 345.)

That, they say, is the fundamental question.

Quite independently of the question which I shall take up later, Mr. President, whether this is a true description *in fact*—the description of a single recalcitrant State or a small minority of States—the fundamental question they say is whether such a small minority may be permitted to veto or block the emergence of authoritative standards or legal norms in international society. We have to turn, therefore, to a revolutionary contention to the effect that this preponderance of votes could, in itself, be normative, and we do so on the basis, which I have explained, that in a sense the whole topic is purely academic because no legal norm created in the teeth of our protests could possibly be regarded as falling within the provisions of the Mandate for the purpose of the compromissory clause. In any event, we shall present that argument in two stages: we shall first consider the general effect of the various provisions of Article 38 (1), and thereafter we shall consider their practical application to this case.

We begin with sub-paragraph *(a)* of Article 38 (1), which, the Court will recall, authorizes the Court to apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States". The particular conventions relied upon by the Applicants are again the United Nations Charter and the Constitution of the International Labour Organisation, which we find referred to in the verbatim record of 19 May, at page 346, *supra*.

Of course, the Respondent was a party to both these conventions and would consequently be bound by any legal norms created by them. But, Mr. President, it soon becomes clear that the Applicants do not rely on the meaning of the conventions as they were originally formulated. Their case cannot be substantiated from those provisions, and it seems quite clear that they realize that. They go further. Their case is based on the following propositions which we find in the verbatim record of 19 May:

> "... international practice in conjunction with the human rights

and non-discrimination provisions and purposes of the United Nations Charter, and of the Constitution of the I.L.O., have evolved authoritative standards of non-discrimination and non-separation; and . . . the same evidence, the same materials, the same sources, support the Applicants' contention that these standard-creating procedures have eventuated in an international legal norm of the same content and scope". (*Supra*, p. 346.)

They go on to say, on the next page, that—

". . . the formal acts of the constituent organs of the United Nations have produced an authoritative construction of Articles 55 *(c)* and 56 of the Charter, *inter alia*, such that the practice of apartheid is legally impermissible". (*Supra*, p. 347.)

As I have said before, I am dealing with the matter now without having any regard to the content of the particular Articles cited; I am dealing with the contention in the light of the normative process here relied upon, and the normative process here is said to be that the international practice, the formal acts of the constituent organs of the United Nations, are said to constitute an authoritative construction of the relevant Articles. That is the particular matter to which I should like to direct attention.

The Court will recall, and we have repeatedly pointed out, that, in the words of Judge Sir Gerald Fitzmaurice, which we quoted in the Rejoinder, V, at page 121:

"The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded."

We dealt with the subject of the Principle of Contemporaneity in our Rejoinder, V, at pages 121-122.

That is the basis upon which the interpretation—the concept of interpretation—is, in our submission and in accordance with the regular practice of this Court, to be understood. But now it is said, Mr. President, that an authoritative interpretation evolves from practices of organs of international bodies.

In a particular sense it could be true that the practices in international bodies could, to some extent, serve a purpose of interpretation; they can, theoretically, be of relevance to the extent to which they can bear upon the meaning of the instruments or the intent of their authors as it existed at the time of their conclusion. That is so in *theory*. The question as to what extent that could happen in particular cases *in practice* is a different matter. That is not the sense in which the Applicants seek to rely upon the practices of bodies as being a matter of interpretation. They rely upon those practices, Mr. President, as stating eventually propositions which run very far away from what was originally contained by the clear wording in the provisions of the particular instruments. That is, on analysis, the process of interpretation that they seek to rely upon.

I suppose that an authoritative interpretation *could* arise if the parties to an instrument were to agree that a particular organ was to have the right to make authoritative interpretations and that, whether the parties agreed or did not agree with those interpretations, they would

be binding upon the parties. But, Mr. President, that would be an exceptional situation and there would have to be special provision to that effect in the particular organs or in the particular constitutive instruments.

If we take the normal position in municipal law—let us take that first as an analogy or an example. Suppose there is a committee of a voluntary association which puts a certain interpretation upon the constitution—the rules of that association—and that interpretation affects a particular member. Suppose the large majority of the members of that association agrees with the interpretation put upon it by the committee—maybe all of them agree except this particular member, and this member insists that his interpretation is so and so and if the committee interprets this constitution the other way, then this infringes the particular member's rights. Surely, Mr. President, that is a matter which may have to be determined by a court of law if the dispute goes so far, or by arbitration, in accordance with law, if there is such a provision in that particular instrument. The adjudicator, be it the court or an arbitrator or an arbitration court, would have to decide in accordance with law. It would have to decide whether Mr. A's interpretation is correct, or whether the committee's interpretation is correct—the interpretation of the large majority—and if it finds that Mr. A is correct, then it says so, and it says that the interpretation of the majority is *ultra vires*. Alternatively, it might find that neither of them is correct and that the correct interpretation is something else, but the point is that the court is not bound by these majorities—the court is never bound as a matter of law by what ever might be the size of the majority on a particular point unless, as I have said, there may be special stipulations to the contrary.

Now, why should the approach in international law be different in the international organs that have come about by agreement between sovereign States? Why should it be possible for organs of those international bodies to run away with a so-called interpretation, which can bind individual sovereign States although they do not agree with it, and although, on analysis, one finds that the so-called interpretation is no longer an interpretation, it is really running into practices which are in conflict with, and outside the clear limits of the provisions of, a particular instrument?

It is relevant in this regard to refer to the fact that, at the time of the framing of the Charter of the United Nations at San Francisco, it was decided as a deliberate act not to include in the Charter any provision regarding how the Charter should be interpreted. One finds the reference to this matter in the UNCIO report of the Rapporteur of Committee IV/2, document 933 IV/2/42 (2), pages 7-8. It is document XIII, pages 709-710. There was a discussion of the question by this sub-Committee 2 of Committee IV as to how and by what organ or organs of the Organization the Charter should be interpreted. But, Mr. President, the final result was, as I have said, that there was to be no particular provision on that subject in the Charter.

In the course of the preparation of the relevant provisions of the Charter, this question was discussed at considerable length and a significant statement was included in the final report of this Committee. This statement was quoted to the Court in the proceedings preceding the Opinion regarding *Certain Expenses of the United Nations*, and one finds it in the *Pleadings, Oral Arguments and Documents* of those proceedings,

at page 221, in a footnote to the written statement of Canada, and the following passages are relevant in the present case:

"If two Member States are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty."

Then, again, a further quotation:

"It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment."

This, Mr. President, was the final paragraph of the report of the Rapporteur of Committee IV/2, which was eventually approved by the Committee, and it contemplates, as the Court sees, that there may be differences of opinion and that these interpretations made by an organ or by a committee of jurists would not necessarily be generally acceptable, and if not they would be without binding force, and in such circumstances it might be necessary to have recourse to proceedings for amendment.

The words "generally acceptable", read in their context, here clearly mean acceptable without dissent—in other words, without a dispute arising about it between various Members of the Organization. But the Applicants would appear to contend that the Respondent is bound to give effect to standards, based upon an interpretation, even if Respondent dissociated itself from such an interpretation and without there having been any formal amendment of the Charter, "accomplished by recourse to the procedure provided for amendment".

In an article, "The Interpretation of the Charter", in *The British Yearbook of International Law for 1946*, the author, writing under the pseudonym of Pollux, referred to this report of the sub-Committee, and proceeded to make it clear that, in his view, a State would not be legally bound by an interpretation of the Charter by other States with which it did not agree. The author stated, amongst others:

"No State can reasonably be expected meekly to accept an interpretation of the Charter which it considers completely wrong, however large the majority in favour of such an interpretation may be."

In a footnote to this passage, the author stated:

"This remark does not apply to an interpretation given by the International Court of Justice or other bodies which may be authorized to give a binding interpretation."

All that is at page 57 of that Yearbook.

But, Mr. President, the Applicants would appear to say that the Respondent must meekly accept interpretations of the Charter by organs of the United Nations and the International Labour Organisation, which organs have *not* been authorized, either by the Charter or by the Respondent itself, to give such binding interpretation. The Court will recall

that this matter was pertinently discussed and considered in the proceedings in relation to the Advisory Opinion of the Court in *Certain Expenses of the United Nations*. In the separate opinion of the now honourable President of the Court, the suggestion was dealt with that an interpretation of the Charter by a majority of States is to be accepted as the correct interpretation, or alternatively, as evidence of the true meaning of the Charter. Having said that he could not agree with "... a view sometimes advanced that a common practice pursued by an organ of the United Nations, though *ultra vires* and in point of fact having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation", the learned President continued:

> "The legal rationale behind what is called the principle of 'subsequent conduct' is I think evident enough. In essence it is a question of evidence, its admissibility and value. Its roots are deeply embedded in the experience of mankind.
>
> A man enters into a compact usually between himself and another. The meaning of that compact when entered into whether oral, or in writing, may well be affected, even determined, by the manner in which both parties in practice have carried it out.
>
> That is evident enough. Their joint conduct expresses their common understanding of what the terms of their compact, at the time they entered into it, were intended to mean, and thus provides direct evidence of what they did mean.
>
> That conduct on the part of both parties to a treaty should be considered on the same footing is incontestable. It provides a criterion of interpretation.
>
> It is however evident enough—despite a flimsy and questionable argument based upon what appears in *Iranian Oil Company* . . .—that the subsequent conduct of one party alone cannot be evidence in its favour of a common understanding of the meaning intended to be given to the text of a treaty." (*I.C.J. Reports 1962*, p. 190.)

And then the opinion proceeded, passing on to multilateral compacts, to state the following:

> "In the case of multilateral treaties the admissibility and value as evidence of subsequent conduct of one or more parties thereto encounter particular difficulties. If all the parties to a multilateral treaty where the parties are fixed and constant, pursue a course of subsequent conduct in their attitude to the text of the treaty, and that course of conduct leads to an inference, and one inference only, as to their common intention and understanding at the time they entered into the treaty as to the meaning of its text, the probative value of their conduct again is manifest. If however only one or some but not all of them by subsequent conduct interpret the text in a certain manner, that conduct stands upon the same footing as the unilateral conduct of one party to a bilateral treaty. The conduct of such one or more could not of itself have any probative value or provide a criterion for judicial interpretation.
>
> Even where the course of subsequent conduct pursued by both parties to a bilateral treaty or by all parties to a multilateral treaty are in accord and that conduct permits of only one inference it provides a criterion of interpretation only when, as has already been indicated, the text of the treaty is obscure or ambiguous."

That is at page 191 of the same report. And then, from that page and continuing on to the next one:

> "... it is not evident on what ground a practice consistently followed by a majority of Member States not in fact accepted by other Member States could provide any criterion of interpretation which the Court could properly take into consideration in the discharge of its judicial function. The conduct of the majority in following the practice may be evidence against them and against those who in fact accept the practice as correctly interpreting a Charter provision, but could not, it seems to me, afford any in their favour to support an interpretation which by majority they have been able to assert."

That is the end of the quotation. The opinion then proceeded to deal with the alternative contention that the practice followed by organs of the United Nations Organization in interpreting their functions under the Charter has a certain probative value and it concluded as follows, at page 195:

> "Apart from a practice which is of a peaceful, uniform and undisputed character accepted in fact by all current Members, a consideration of which is not germane to the present examination, I accordingly entertain considerable doubt whether practice of an organ of the United Nations has any probative value either as providing evidence of the intentions of original Member States or otherwise a criterion of interpretation. As presently advised I think it has none."

Now, Mr. President, on that, with respect, very clear statement of principles applicable in a situation of this nature and the analysis of the difficulties of application of the principles with which one is confronted, difficulties in face of a contention such as is being advanced by the Applicants in this case, we find that the Applicants, nevertheless, advance to the Court the contention that although unanimity has not been reached but only what they call a preponderant view on a particular situation, that should nevertheless be regarded as being binding upon those who did not consent. They do not cite a single authority in support of this contention and, Mr. President, that is small wonder.

It is true that at one stage when discussing their norm, they referred to a passage from a lecture delivered by Dr. Schachter, but this passage certainly does not bear out the contention under consideration. This we find in the verbatim record of 19 May. Dr. Schachter said the following:

> "... one might start with the principle that an 'authentic' interpretation of a treaty by the parties is legally binding on them to the same degrees as the treaty itself. I believe that it is generally accepted that this conclusion would hold for an interpretation of the Charter adopted by all the Members (or even 'by the overwhelming majority' except for some abstentions) in the General Assembly; the interpretation would be characterized by international lawyers as having the same legal force and effect as the Charter itself." (*Supra*, p. 358.)

Now, Mr. President, it seems quite clear on its face from this passage, that Dr. Schachter did not have in mind an interpretation adopted against the will of one or more States when he spoke of "all the Members (or even 'by the overwhelming majority' except for some abstentions)".

If he did, it would be difficult to understand his reliance upon the principle of authentic interpretation of a treaty by, as he himself says, "the parties" thereto. In our submission, there can be no doubt that Dr. Schachter was merely saying that an interpretation of the Charter adopted by the overwhelming majority, except for some abstentions, but without any express dissent, would be legally binding. In those circumstances, one could, in some situations, look upon a situation of an interpretation, without express dissent, as if it were an interpretation by all the parties concerned, but whether that would be so in a particular instance, would be a question of fact. That is, it seems to us, the limit to which Dr. Schachter takes the situation and he, therefore, does not bear out the Applicants' contention. There is no authority cited by them, or any which we could find, which in any way bears out their contention.

[Public hearing of 15 June 1965]

Mr. President and honourable Members of the Court, we were dealing towards the conclusion yesterday with the Applicants' argument about the creation of a binding norm. We dealt particularly with that part of their argument which sought to bring their norm under the heading of Article 38 (1) *(a)* of the Statute of the Court, namely international conventions, general or particular, establishing the rules expressly recognized by the contesting States.

We dealt with the Applicants' contention in that regard, and we are still in the process of doing so, by having regard to the norm-creating processes which are said to be involved in that contention, irrespective, for the moment, of what the content is that is sought to be ascribed to the particular norm. We assume for purposes of argument that any content be ascribed to it. Call it a content X, and then we see whether a norm of a content X could be generated in law by the processes which the Applicants suggest in their argument.

Now, the particular argument with which we were dealing yesterday was this one, that the norm relied upon by the Applicants was created by formal acts of constituent organs of the United Nations which, so the Applicants say, have produced a so-called authoritative interpretation of particular provisions of the Charter. The implication in this contention is quite clear, and the Applicants also make it clear, as I shall show later, that they realize that they are thus relying upon something which extends beyond the meaning of the provisions as they stand in the Charter. They do not rely purely upon the provisions as they stand; they rely upon something more. They realize for the purposes of this contention that they have to rely on something more, something which has come about by a process of extension, and consequently they rely on these formal acts which, they say, have produced an authoritative interpretation that has now to be read as constituting an obligation on the part of the Respondent—as something falling under the provisions of Article 38 (1) *(a)*. That would seem to be the effect of the contention.

Now, Mr. President, we dealt with the history of the Charter relative to this contention. We pointed out that the founders of the United Nations deliberately refrained from giving special powers of authoritative binding interpretation to organs of the Organization, apart, of course, from the general position which obtains in regard to rulings or inter-

pretations by this Court which may, in certain circumstances, be binding and authoritative.

We dealt, further, Mr. President, with authorities on the question of the power or lack of power on the part of the organs of the United Nations to give binding interpretations. We referred to authorities on general principles about subsequent conduct, i.e., in which way the principles relating to subsequent conduct of the parties could or could not play a role in this regard. And we referred to very pertinent passages from the separate opinion by the honourable President in the *Expenses of the United Nations* case, showing how impossible it is for a majority in organs of an organization, however large or however persistent that majority may be, to impose its interpretation in a binding way on a minority which contests that interpretation. That was the stage to which we came yesterday, Mr. President, and I should like now to give some further attention to the *Expenses of the United Nations* case, both in regard to its antecedents and in regard to what one might call its aftermath. Its purpose is to illustrate in the very practical implications which have arisen from a tendency, a tendency to which attention has been called by several commentators, on the part of majorities in organs of the United Nations to attempt to enforce a so-called interpretation against the objections of a minority.

When I do so, Mr. President, I do so with full realization that the particular matter at issue in regard to these expenses of the United Nations is a controversial one, that as far as the merits of the recriminations are concerned it is not a matter in which I should like to take part, i.e., the recriminations by one State against another, that it has been responsible, or against this or that group of States, that they have been responsible for departing from the strict letter of the Charter—from the provisions of the Charter—which has ended in a position now which has created difficulties for the Organization. I do not want to enter into the merits of that kind of dispute. I merely wish to refer to the fact that in the course of sorting out the difficulties which have now arisen for the United Nations, of discussing the crisis which is on hand because of this very question, various speakers, taking various political points of view in this situation, have emphasized that the important matter is to abide by the provisions of the Charter and not to seek to depart from those provisions by these so-called processes of interpretation, which in truth do not amount to interpretation but amount to the imposition, or attempted imposition, of new obligations on parties which have not agreed to them.

I should like to refer first, Mr. President, to the *Pleadings, Oral Arguments, Documents* in relation to that case, *Certain Expenses of the United Nations*, and I should like to refer to the very pertinent attitude taken up and expressed on behalf of the Soviet Union in the written argument and the oral presentation to the Court. I cite first from the written Memorandum of the Soviet Government at pages 273 to 274 of that record:

> "It should be added that the resolutions of the U.N. General Assembly, as it is stipulated in Article 10 of the Charter, are of the nature of recommendations and are not binding upon States. The U.N. Member States themselves determine their attitude to these resolutions. All measures that follow from the General Assembly resolutions are also of only recommendatory nature and cannot establish legal obligations for the Member States of the Organization."

I refer next to the oral statement of Mr. Tunkin, reported as from page 397 onwards, and I wish to refer only to two brief passages—the first one is at page 397, about the middle of the page:

> "It is universally recognized in international law that none of the parties to a treaty is obliged to bear more responsibility than was assumed by it according to this treaty. For the States Members of the United Nations such a treaty is the Charter within the limits of which they bear their responsibility."

Then another brief statement at page 403:

> "The competence of each organ of the United Nations is determined by the provisions of the United Nations Charter. The Charter is a treaty concluded between States, and no organ of the United Nations can amend it except according to the provisions described by the Charter itself."

Next, Mr. President, I should like to refer to debates in the Special Committee on Peace-Keeping Operations—debates which occurred from about April to June this year—debates which, as the Court would know, related particularly to this very issue and concerned the further consequences of the Opinion given by the Court and the further attention in the United Nations to the issue and to the crisis which has now arisen. And I should like to refer to the attitudes expressed by some of the speakers exactly on the implications of this matter, of whether there was to be a so-called dynamic approach to the interpretation and application of the provisions of the Charter. Some took up the attitude that the approach was to be a static one, some said it was to be a dynamic one; some said it should not be either, it should be partly one and partly the other. But from all sides came the warning in very strong language, and the diagnosis, that this crisis was to a large extent due to a departure from the provisions of the Charter and to attempted reliance upon interpretations of this kind which were not binding in law. I should like to refer first to the remarks of the representative of Venezuela in the Committee.

They are in a special document of the United Nations General Assembly A/AC121/PV5, 29 April 1965, at page 36, and read:

> "As a point of departure, we must agree that the juridical foundation of the United Nations structure is to be found in the multilateral treaty signed at San Francisco on 26 June 1945. The United Nations Charter is thus a treaty that can be revised only through the special procedures laid down in the Charter itself and accepted by all of the signatories. This procedure is the one outlined in Chapter XVIII. There is no provision in the Charter for any procedure for its interpretation, nor is there any organ competent to take final decisions on questions of interpretation of the Charter. Therefore, in the event of a fundamental divergence of views on the interpretation of specific Articles of the Charter, only a unanimous consensus could provide a final solution to any problem of interpretation.
>
> Obviously the strict application of the legal principles that I have just set forth would rule out any interpretation that we might describe as a dynamic interpretation of the Charter and would require us to accept a static concept which would prevent us from

> shaping and adapting it so as to respond to the rapid changes in political and economic life that constantly occur in a world which is undergoing a dizzying process of evolution. We have favoured ['we' apparently meaning the delegation of Venezuela] the acceptance of a dynamic concept of the Charter, but we realize that when fundamental divergences of view arise, as in the present case, only an adequate revision of the Charter in accordance with the procedure outlined in Chapter XVIII, as was very wisely pointed by our colleague from Brazil, or else a unanimous consensus on a specific interpretation of the existing Articles, can solve the problem."

After referring further to attempts at dynamic interpretation and their value, the representative concluded, at page 37:

> "Still we cannot draw from these facts the conclusion that the General Assembly may legally, on the basis of resolutions, alter the Charter or impose interpretations which in actual fact would amount to revision of the Charter. We repeat that in the absence of unanimous consensus no modification by way of interpretation is possible."

These remarks have somehow been quoted out of order, Mr. President. I am going back to 22 April where we find attitudes stated by the representative of the Soviet Union, Mr. Fedorenko.

I read from page 6 of U.N. document A/AC.121/PV2, 22 April 1965:

> "The Soviet delegate believes that it is necessary again to draw attention to the fact that the Charter of this Organization provides all the necessary means for strengthening the effectiveness of the United Nations as a tool for the preservation of international peace and security, but in many cases these possibilities have not been exhaustively used or have not been translated into life. They have not been used because, as is well known, the line followed by the United States of America and some other Western Powers generally consisted of attempting to by-pass the Charter and not at all to implement the Charter. It is precisely for this reason that it is appropriate to say that the real possibilities provided by the Charter for strengthening the effectiveness of the United Nations as a tool for the maintenance of peace and security are far from having been used exhaustively. Our task is to utilize those provisions and to translate them into life."

If I may pause there for a moment. As I have said, this type of political recrimination, or applying the principles to the particular situation, does not concern me. I do not intend to enter into the merits of that. The importance of the Soviet representative's attitude lies in remarks of the following nature, as his statement proceeds:

> "To strengthen the effectiveness of this Organization as a tool for maintaining peace and security means, first of all, to put an end to violations of the Charter, to free the Organization from all the strata which have been superimposed upon it in the past, and to create in the United Nations a proper atmosphere for equal participation and co-operation of all States."

At page 21 of this report, Mr. President, the representative of Poland spoke to similar effect.

Then at page 32 there is a statement by the representative of Mexico to which I should like to refer briefly. It reads:

"The acceptance of the facts of life, which without being contrary to the Charter, become customary rules, can be achieved through the express agreement of all parties. Moreover, these customary rules make it possible for the Member States to take refuge at any moment behind the written word.

Quite properly, for a number of years now we have been witnessing the birth of a new kind of international operation which, under the aegis of the United Nations are destined to maintain peace [the speaker here taking the opposite political point of view]. The provisions of the Charter are clear and remain inviolate: all actions provided in Chapter VII and the primary responsibility of the Security Council are not called into question. On the other hand, we have to appraise a new form of customary law which so far has not received the general acceptance of Member States either in its formation, execution or even in its meaning.

The work of the Special Committee of Thirty-three comes down to ensuring that the new realities are accepted by all Member States and that the conviction shall prevail that it has been possible to link the strict provisions of the Charter with the realities of operations designed to maintain peace, and that all Members willingly accept the idea that in conceiving and carrying out these operations there is no violation of the Charter but rather that the Charter is even strengthened thereby."

Here, Mr. President, was an attitude desiring an opposite result in the political or practical sense, but realizing the need for co-operation on the part of all concerned in order to achieve that, because otherwise it would be, in the words of the speaker, a case of relying on something which has "not yet received the general acceptance of Member States, either in its formation, execution or even in its meaning".

Then, I may just mention the fact that there were statements by the representative of Hungary, at pages 51 and 52 of this record, which also bear on the subject. I need not read them.

I come to 23 April—a statement by the representative of France, Mr. Seydoux, at page 16 of U.N. document A/AC. 121/PV 3, 23 April 1965:

". . . in our opinion, it would be illusory to try to attain that objective by combining ideas borrowed from various theses accepting the views of some on one point and views of others on another point, building up out of the whole cloth, in the guise of a compromise, a new theory . . . as if in this respect our hands were completely free. There is one common denominator [the speaker talks of a 'common denominator' with a view to solving the difficulty] on which the Members of the United Nations can reach a meeting of the minds beyond any question, it is the United Nations Charter . . . the Charter which we have signed or to which we have adhered, the Charter which, until it has been amended or revised in accordance with the procedures that it provides for that purpose, remains binding law for us all. It is because there has been a departure from the Charter that the difficulties and conflicts weighing today on the Organization have arisen; it is only by reverting to that incontestable

source, and not by the invention of new artifices, that we can put an end to the differences of opinion which are paralysing us."

And, yet, my learned friends urge upon the Court, apparently, the adoption of exactly such "new artifices".

I refer next to the record A/AC.121/PV4, 27 April 1965, to a statement therein by the representative of India. I cite two very brief extracts, the first at page 2:

"Past experience has proved beyond doubt that a resolution of the General Assembly which does not conform to the provisions of the Charter cannot solve a problem. This would be true even if such a resolution were to be supported by all the great Powers."

Another one at page 3/5:

"Much of the difficulty has, however, arisen because of an attempt to extend the *provisions of the Charter through resolutions of the* General Assembly."

I may refer, further, Mr. President, to a statement by the representative of Brazil, at pages 28/30-34/35, which is pertinent. It was along much the same lines as the previous statement by the representative of Mexico.

Then, there is a statement by the representative of Australia, from which I would like to read a brief extract, at page 37:

"On the further realities which we conceive to be involved, I would now like to refer to some of the observations which were made by the Foreign Minister of Australia, the Honourable Paul Hasluck, in the General Assembly on 11 December last year. He referred to the fact that while the text of the Charter has not been revised, it has been interpreted and the interpretations have been more often political than juridical. We all turn to the Charter as the basis for our efforts here, but where there are points of difference they result from differences of interpretation."

The representative accepted very frankly, Mr. President, the position that these attempted interpretations have been more often political than juridical, and that in the juridical sense they do not have the value attempted to be assigned to them.

In the record of 6 May (A/AC.121/PV6, 6 May 1965) there is a relevant statement by the representative of the Argentine, at pages 26 and 27—I should like to start at page 26:

"It has been argued that the evolution that has taken place in the international community since the Charter was signed twenty years ago requires flexibility of interpretation and periodic dynamic adjustments to the new circumstances. We do not disagree with those views, which, it is only fair to state, were anticipated by those who drafted the Charter when they included Chapter XVIII, which is specifically designed to keep the Charter up to date by the legal means of amendment. We recognize that the amendment of the Charter may be an arduous task, but there is nothing to prevent us from uniting our will so as to establish certain provisional operative standards which will later assume institutional form, in accordance with Articles 108 and 109, after a vital procedure which will enable us to ascertain how efficiently they function."

At page 27, this passage appears:

"Experience has shown, on the other hand, that excessive flexibility in interpreting the clearly laid down standards of the Charter represents the fundamental origin of the problem now before us.

The point of view is maintained by my delegation in spite of the fact that a flexible interpretation of the Charter might have given the small and medium-sized countries the illusion that by strengthening the competence of the Assembly in peace-keeping operations, we gave satisfaction to our strong conviction of the legal equality of States."

Then, at page 28/30, the representative applied his general attitude to the particular problem with which the Committee was dealing. I am not concerned so much with that as with the general view expressed in this passage:

"The resolution called 'Uniting for Peace', adopted in 1950 with the abstention of the Argentine delegation, represented the most extreme example of that flexible approach to the interpretation of the Charter. While it gave to the small countries the illusion of the affirmation of the concept of the legal equality of States in considering and deciding upon problems that endangered peace, at the same time it sowed the seeds of future discord precisely because, with that resolution, we removed ourselves too far from the straight legal interpretation of the standards of the Charter."

The discussion continued, Mr. President—new ideas came along, they were taken up, and they were discussed again. I do not want to be exhaustive on the subject, but there are a few more pertinent statements by representatives of States on this point.

On 17 May the representative of France—the same one as before—spoke again and I wish to give two brief extracts at page 3 of the relative record (A/AC.121/PV 7, 17 May 1965):

"I have already had the opportunity of explaining the reasons why the evolution to which reference has been made could not supersede the normal interpretation of the unequivocal provisions of a treaty."

I pause there to repeat the words: "why the evolution to which reference has been made could not supersede the normal interpretation of the unequivocal provisions of a treaty." In that respect I think the best I can do is to refer to a passage from the statement made by the representative of Venezuela on 29 April, that is the same one that I have read to the Court before. Then, later at that same page the French representative added:

"The present crisis in the United Nations shows, moreover, what happens when attempts are made to circumvent one of the basic principles on which the authors of the San Francisco Treaty farsightedly decided to base the Charter."

The representative of the Soviet Union returned to the fray on 25 May 1965. I refer to a brief passage at page 3 of the relevant record (A/AC. 121/PV8, 25 May 1965):

"The Soviet Union, along with other States, became a Member of the United Nations under certain specific conditions, which are clearly stated in the United Nations Charter. During the twenty years of the existence of the United Nations the Soviet Union has

> unswervingly adhered to the *provisions* of *the Charter. Any attempts* to force upon the Soviet Union essentially new conditions for membership in the United Nations ... constituting a violation and distortion of the wise principles of the Charter ... are not going to succeed.
>
> We also wish to point out that it is not only the States Members of the United Nations that signed the Charter in San Francisco twenty years ago which are obliged to follow unswervingly the provisions of the Charter. All the young countries which have become Members of the United Nations in recent years, and whose acceptance as Members has greatly strengthened the United Nations and made it more representative and more viable, must also be guided by the provisions of the Charter. As is known, in becoming Members of our Organisation, those countries gave a solemn promise to respect the United Nations Charter, which is the basic law governing the activities of the Organisation. The trouble is not to be found in the fact that the Charter is not perfect; rather, it is to be found in the fact that the possibilities contained in the Charter have thus far not always been utilized and implemented."

Then, finally, Mr. President, we revert to the representative of Mexico, because of the attitude which he expressed after all this debate in proposing a draft resolution to this body. This was on 2 June 1965. I think I should start at the page headed 13/15 of the relative record (A/AC.121/PV 9, 2 June 1965). Towards the bottom of the page he said:

> "Paragraph 4 [that is, of the draft resolution] emphasizes strict respect for the Charter ... not just any interpretation of it, but the Charter itself as the embodiment of the spirit of international solidarity."

Then, at the top of the next page, headed 16, we find this statement:

> "Judge Spender, in his individual opinion on the financial problem of the Organisation, stated that the Charter: '... is a multilateral treaty. It cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority' ...
>
> This stress and the very meaning of the Mexican proposal are ideas that must be kept in mind."

At the next page, 17, there is this further passage:

> "Judge Spender, in his separate opinion, was quite correct when he said that the Court limits itself to giving an interpretation of an Article of the Charter and there its function ended; that it is not competent to deal with the political consequences flowing from such an opinion. It is precisely the Assembly that is competent to do such a thing."

Mr. President, I refer to these attitudes in order to demonstrate that the processes of norm creation here urged upon the Court by the Applicants have their practical implications stretching very far beyond the confines of this particular case.

I referred the Court before to the so-called dynamic interpretation and

application of the provisions of Article 73 of the Charter, with reference to non-self-governing territories—to the process by which the original compromise which went into that Article, was entirely counteracted by the eventual practical results arrived at by the processes of this so-called dynamic interpretation and application. That is one matter in respect of which dangerous implications have arisen which have been pointed out by commentators. The one to which I have just referred now is another one which commentators have used as an occasion for issuing a warning as to the implications of processes of a kind which are urged upon the Court by the Applicants.

The international society, particularly members of that society, large and small, have made it clear to what extent they treasure their sovereignty—to what extent they insist that if they co-operate in an international organization, they do so upon the terms that have been agreed to, and that other terms and conditions are not to be enforced upon them against their will. Failure to heed that warning would appear to imperil the whole of the international order which has been brought about so painstakingly up to this stage.

The Applicants, Mr. President, do not appear to pretend that this process of dynamic interpretation on which they rely, was merely an interpretation of what stands there, of what is to be found in the particular provisions of the Charter on which they rely. If they merely relied upon those provisions of the Charter one would have expected them to read out the provisions and to say: "that is what the words mean", or in so far as the words are not clear, "we have later interpretations which assist in clearing up the ambiguities or obscurities that there might be".

But that is not what they relied upon. They came here with the fruits of this so-called dynamic process, and they said: "these are what the Court is to apply as the authentic interpretation of the particular provisions of the Charter, and therefore also as standards governing the interpretation of the Mandate."

We find that this appears to be acknowledged in a passage such as the following which appears in the verbatim record of 19 May:

> "... the articles in question, Articles 55 *(c)* and 56, impose legal duties susceptible of definition by a consensus of the membership of the Organization ..." (*supra*, p. 346),

and Applicants go on in that same passage, Mr. President, to make it clear that they speak here of consensus in the sense in which they use that term, inappropriately in our submission, as not referring to unanimity, but as referring to something less than unanimity and in the face of admitted opposition. That is what they call consensus, and they say that that process of consensus, in which there is opposition, and in which the consensus amounts to less than unanimity, can have some legal bearing on the problem, that it is to be regarded as a definition which is not to be found in the Articles as they stand.

We need go no further, Mr. President, in my submission, to show that an attempted reliance on this so-called process of interpretation is untenable as a means of bringing the Applicants' case under the heading of Article 38 (1) *(a)*.

The alterations, the additions, or the extensions involved for the provisions concerned, as compared with their meaning as originally formulated, can never be justified by interpretation. Those extensions,

alterations, or additions could only be justified by a further normative process.

That normative process is here referred to by the Applicants as definition by consensus. The explanation which they themselves give of what they regard as definition by consensus makes it clear, in my submission, that that is not a process which could ever fall under Article 38 (1) *(a)*. It is not treaty-making, with the consent of the parties involved. It is not following the prescribed methods of amendment of a treaty which, when they have been put in operation, could be said still to be part and parcel of the conventional process operating within the contemplation of Article 38 (1) *(a)*. It is neither of those; it is rather something of the nature of quasi-legislation, in the nature of a majority insistent enough and preponderant enough to impose its will, in the Applicants' submission, on that of a contesting minority.

So it follows, Mr. President, that in our submission, and for these reasons, it becomes clear that Article 38 (1) *(a)* does not apply at all to this case sought to be made by the Applicants.

Thus far, I have dealt with this contention about so-called authentic interpretation only with reference to the Charter. With reference to the Constitution of the International Labour Organisation, the very same considerations apply, as I have just stated, except that there is a particular provision of the International Labour Organisation Constitution which underlines and emphasizes our answer to the Applicants' contention. It is Article 423 of the Constitution, which reads as follows:

> "Any question or dispute relating to the interpretation of this Part of the present Treaty or of any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice."

Of course, in terms of Article 37 of the Statute that would now refer to the present Court.

So it is quite clear, therefore, Mr. President, that questions relating to interpretation of the Constitution itself and of conventions concluded by Members in pursuance of the provisions of the Constitution, are to be referred to the Court for judicial determination. There is therefore no suggestion that organs of the International Labour Organisation could themselves authoritatively interpret these documents so as to render them binding upon the Court or upon parties.

It follows, therefore, Mr. President, that in neither case can this so-called authoritative interpretation bring the matter under contemplation of Article 38 (1) *(a)* of the Statute. We shall later consider to what extent the provisions of the two Constitutions, i.e., the human rights provisions in the Charter particularly, and certain provisions of the I.L.O. Constitution, to what extent they can be relied upon, to bring the matter within the purview of Article 38 (1) *(a)*. But that is an argument relating to the content of the suggested norm. Naturally, as a process of norm creation, if those provisions do contain the norm contended for by the Applicants, then, of course, by becoming a party to the Constitutions concerned, viz., the Charter and the I.L.O. Constitution, the Respondent would have incurred international obligation in accordance with such a norm. Whether it would be a question for determination in a case concerning the interpretation and application of the

Mandate, is, of course, a different matter, but that would then at least be a matter falling within the purview of Article 38 (1) *(a)*.

But, Mr. President, that concerns, as I say, the question of the suggested content of the norm. One would then have to analyse those provisions themselves and see whether their content corresponds with the content of the suggested norm. That is a matter with which I shall deal when I come to the part of the Applicants' case concerning the suggested content of the norm.

Finally, Mr. President, before leaving Article 38 (1) *(a)* and merely in the context of the *norm-creating process*, it may be pertinent to point out that the Applicants' argument as presented to the Court in the oral reply in regard to this Article, appears to be a complete afterthought, possibly inspired by the form of the questions put by Sir Gerald Fitzmaurice, because if we look at the verbatim record of 18 March, which the Court will recall was the opening day of the Oral Proceedings, we find that my learned friend, Mr. Gross, in giving an exposition to the Court of what his case was going to be, dealt particularly with his case regarding suggested violation of Article 2, paragraph 2, of the Mandate. He referred then particularly to the bearing of Article 38 (1) of the Statute upon his case. But, in this reference, he omitted all reference to subparagraph *(a)*. He stated in that record:

> "In their written pleadings, the Applicants have sought to demonstrate that disputes concerning the interpretation and application of Article 2, paragraph 2, of the Mandate are justiciable (may I refer to our Reply, **IV**, at pages 483 and following).
>
> Such disputes, it is respectfully submitted, are justiciable and in accordance with, and on the basis of, international custom, as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, and judicial decisions and teachings of qualified publicists of the various nations. In short, Mr. President, justiciability of disputes concerning the interpretation and application of Article 22 of the Covenant and Article 2, paragraph 2, of the Mandate is supported by reference to the application of Article 38, paragraph 1, of the Statute of this honourable Court." (**VIII**, p. 117.)

The Court will see that in referring to paragraph 1 of Article 38, only contents of subparagraphs *(b)*, *(c)* and *(d)* are mentioned, viz., international custom, general principles of law and judicial decisions and teachings of qualified publicists but the contents of the very first one which are now relied upon, are not mentioned at all. And no wonder, Mr. President, because on analysis, as we say, as far as the norm-creating process is concerned, the Applicants had to base their case on this very *flimsy foundation* of the so-called authoritative interpretations whereby a large and insistent majority can bind an opposing minority.

That, Mr. President, concludes my consideration of Article 38 (1) *(a)* as encompassing a possible norm-creating process relevant to this case, apart, of course, from the argument as to the content of the suggested norm and consideration of the particular provisions of the Charter and the I.L.O. Constitution which will come at a later stage.

We can now turn to the Applicants' attempted reliance on Article 38 (1) *(b)* which mentions, as a source to be applied by the Court, "international custom as evidence of a general practice accepted as law".

Now, it is instructive first to see in what manner the Applicants seek to establish this customary norm of non-discrimination or non-separation on which they rely as falling under this particular head.

In the verbatim of 19 May, at page 347, *supra*, they said the following: "In common parlance, a custom may develop and exist despite objection during its period of emergence." May I just pause there for a moment, Mr. President. That would seem to meet the Applicants' crucial difficulty or rather, it would seem to be an attempt made to meet the Applicants' crucial difficulty. That is the crucial point at issue in these proceedings. The Applicants, in trying to rely on the first major source, Article 38 (1) *(a)*, ran into this difficulty that they could not find words, they could not find provisions in treaties which support their contention in regard to the existence of such a norm. They therefore had to attempt to rely on this process of so-called authoritative interpretation with all the inherent difficulties in it. Now they try to rely on custom where, as it is, they have to admit that for the purposes of treaty law, of conventional law, of the creation of obligations by way of treaty or convention, it is necessary to rely upon the consent of the parties sought to be bound. Here they try to circumvent their difficulty by saying that in regard to the generation of an international customary law, that consent is not necessary and they take it to the extreme of saying that a custom may develop and exist despite objection during its period of emergence. That, as we shall show, is the very crucial issue between the Parties.

The passage in the verbatim of 19 May continues:

> "So long as international society was highly decentralized it was necessary to rest law-creating procedures on State practice. With the growth of an organized international community, with constituent organs, it is increasingly reasonable to regard the collective acts of the competent international institutions as evidence of general practice accepted as law."

So, Mr. President, one sees here in this passage already that when they say they rely upon the generation of a rule of international customary law they do so in a very peculiar sense—they do so, not by relying upon the normal processes to which regard is to be had when a question arises as to the generation of a customary principle or a customary rule; they seek to rely upon the activities of States not in their inter-State practice but within organisations of the so-called organized international community or society. This becomes clearer when we proceed to the next passage in the record of 19 May:

> "... Respondent's policies in South West Africa ... have been subject to *quasi* judicial scrutiny over the last decade or more by organs of the United Nations as distinctive as the International Labour Organisation and Committees of the United Nations in various forms, such as the South West Africa Committee itself. It is against this background [this background, Mr. President, of the so-called *quasi* judicial scrutiny] that the Applicants contend that the international standard of non-discrimination and non-separation has ripened into a norm of customary international law within the language and meaning of Article 38, paragraph 1 *(b)*, of the Statute of the Court." (*Supra*, p. 348.)

So that is the evidential field on which the Applicants choose to rely. And, Mr. President, they proceed to make it clear even that they seek

to rely on that exclusively, without referring to the rest of the standard and traditional field of evidence to be considered in order to see whether a rule of customary law has become generated. In the verbatim record of 13 May they say:

> "The issue before the Court ... is whether the processes of the organized international community have or have not eventuated in international standards or an international legal norm or both." (*Supra*, p. 256.)

So, Mr. President, the question is to what extent and in what manner can this so-called organized international community generate rules of customary law? Or to put it in another way, the crux of this issue: can organs or members of the associations which are said to comprise the organized international community, in their participation in the activities of those organizations, add to or supplement the terms of their Constitutions, or can they bring about legal consequences outside the limits indicated by those Constitutions? That would seem to be the crux of the matter. The Applicants would seem to admit that the consequences for which they contend, fall outside the scope and limitations indicated in those constituent instruments themselves, but they would appear to suggest that the gap has been bridged by a custom, which applies this concept of theirs of a consensus approaching unanimity, and to which effect is to be given despite protests of a minority.

That would seem to be the effect of their contention. They would have to bridge this gap between the limits indicated in the Constitutions themselves, as to instances in which individual States can be bound by collective action, and where they want to come with this contention of theirs. We have seen in the first place that they cannot do so by the process of so-called authoritative interpretation. We have seen that they could bridge the gap if there should have been new treaties or if there should have been formal amendment of the relevant international instruments. But they do not rely upon any such suggestions of formal amendment or of new treaties, and the question then is whether by some process falling under the concept of generation of rules of customary law, they can bridge this gap. That there is a gap is perfectly clear, and it would seem to be admitted by the Applicants.

Neither the United Nations nor the International Labour Organisation, as organizations, possess legislative, *quasi*-legislative, or normative functions. As far as the United Nations is concerned, the Applicants said in the verbatim record of 19 May:

> "... the capacity to develop and give effect to international custom is not equivalent, in our view, to endowing the General Assembly with legislative law-making powers or competence". (*Supra*, p. 348.)

In other words, they do not suggest that the General Assembly is to be regarded as being endowed with legislative law-making powers or competence—they want to disassociate themselves from a contention of that kind. They proceeded to quote with approval an extract from a work by one Mrs. Higgins—and that is at the same page of the same record—and that extract commenced with the words: "Resolutions of the Assembly are not *per se* binding ...", so it would seem, Mr. President, that that is a common cause basis from which we can proceed to deal with the argument in regard to which the issue arises. I should, nevertheless, like to refer briefly, because I think it may be of significance, to

certain aspects of the scheme, the ratio of this basic situation which appears to be admitted by the Applicants, the *ratio* of this very arrangement whereby the powers of these international organizations and their organs are limited to the extent that they are.

In the first place, I should like to refer to the general position as summarized by Oppenheim in his *International Law*, the Eighth Edition, 1955, Volume I, at page 28:

> "Since the Family of Nations is not at present a State-like community, there is no central authority which can make law for it in the way that Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is by the members of the Family of Nations concluding treaties in which certain rules for their future conduct are stipulated."

We can refer the Court also to the book by the honourable Member of the Court, Judge Jessup, *A Modern Law of Nations*, at page 135, where the honourable author accepts that the United Nations is not a world legislator and where he speaks of certain possible developments as having to await the creation of an actual world legislator. And then later, at the same page again, he suggests that certain developments could "pave the way to the development of an actual system of international legislation under which an international body would have the legal authority to prescribe rules binding the community as a whole", accepting, therefore, that in the law as it stands there is no such international legislator with those powers.

Dealing now, Mr. President, with the specific organs of these two main bodies, the United Nations and the International Labour Organisation, let us begin with the Security Council of the United Nations. We find that Article 25 of the Charter provides that the Security Council has power to make decisions; other provisions, of course, empower the Security Council to make recommendations in particular circumstances, but it can go to the extent of making decisions only under certain circumstances. Point number one that is important is that those are decisions relating to *ad hoc* situations; they are not decisions relating to a normative process, a legislative process of making law in general for the future. That is a factor stressed by Kelsen in his *Law of the United Nations*, at pages 293 to 295.

Mr. President, what is further important in this situation is the very fact of the narrow limits within which the Security Council can even make those decisions. Its power to do so and to bind individual Members of the organization, even without their concurrence in the particular decision, derives of course from the explicit agreement by Members to be so bound, as it is found in Article 25 of the Charter. Article 25 states that specifically. The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter, but, Mr. President, just as in the case of the Covenant of the League of Nations, to which we referred the other day, we find that, in broad principle, the same position applies in that the compass within which this can occur, is a very limited and a very definitely circumscribed one. It is, of course, not exactly the same as it was in the case of the Council of the League, but it is also a circumscribed one.

Broadly speaking, if one has regard to the various provisions of the

Charter which are relevant in this regard, they would seem to fall under only one or two heads. Perhaps the two are to be assimilated, perhaps they are not, but the two that come to mind are situations of actual or threatened breaches of the peace, as contemplated in Article 39 of the Charter and the provisions which follow on that, and a situation as contemplated in Article 94 of the Charter, in which a party fails to carry out a judgment of this Court in a contentious proceeding. Such is the narrow circumscription of the circumstances, Mr. President, and then, added to that, one finds that the composition of the Security Council and the voting procedure in the Security Council are so circumscribed as very strongly to reduce the possibility of the making of such binding decisions in various situations. The mere fact that there is required a positive vote of seven Members of the Council, consisting of 11 coupled with the veto rights given to the great Powers on the Council (those aspects of it are well known to the Court, so I need not stress them), in themselves have the practical effect of *reducing* the probable scope within which there could be decisions of the Security Council, binding upon States which have not agreed to those particular decisions.

That is the general scheme, which is a very carefully checked and balanced one, as the authors of the Charter saw it.

In the case of the General Assembly, one knows that the basic position is that its powers are only recommendatory except in the case of certain specific matters such as provisions for approval of the budget, admission of Members, and so forth. The situation was dealt with in the opinions of Judges Lauterpacht and Klaestad, an extract from which I read to the Court on Friday, so I need not dwell upon that. I should like to point out, Mr. President, that, as far as the sphere of making recommendations is concerned, and even having regard to the exceptional cases where binding decisions may be taken, it is again perfectly clear, as appears from the comment of the various commentators, that the General Assembly is *not* vested with legislative powers. Oppenheim uses that expression explicitly in his 8th edition, Volume I, at page 424. I can refer the Court to further comment on the situation in Kelsen, pages 193-194; Goodrich and Hambro, *Charter of the United Nations*, 2nd edition, pages 151-152; Goodrich, *The United Nations* (1959), page 207, and L. Delbez, *Les principes généraux du droit international public*, 3rd edition, 1964, at pages 414-415. I do not want to read *in extenso* from the comment, but I should like to point out certain pertinent features.

The last author, Delbez, says explicitly—"It [the General Assembly] has in respect of Member States neither normative powers nor individual powers of decision".

Most of the commentators, Mr. President, give as the rationale for the situation that the General Assembly was intended to exercise a *political* influence, and *not* to play the role of a law-giver or an interpreter of the law, or of in any way laying down the law. Its function is *political* and *not* juridical.

I should like to refer to the comment of Kelsen on this particular point, at pages 199-200 of the work to which I referred:

> "... it is important to note that the main competence of the Assembly, as determined by Article 10, has a political, not a legal character. The intention was to establish the General Assembly as town meeting of the world, the open conscience of humanity—that is to say, as a deliberative and criticising organ. Hence, legal functions of the

Assembly are to be considered as exceptions and require special provisions in the Charter."

Again, in Goodrich, the work to which I referred, at page 207, there is a general statement which I should like to cite:

"Since both the General Assembly and the Security Council lack authority to take legally binding decisions in the realm of peaceful settlement and thus must seek to achieve their objectives by persuasion, what these two organs actually do is usually determined by an estimate of the course of action which under all the circumstances is most likely to achieve the desired result. If the purpose of action is to get an immediate settlement or adjustment based on the consent of interested parties, the course followed will presumably be that which is most likely to identify and eliminate present differences and achieve an agreed settlement. If, on the other hand, the purpose of action is to gain a propaganda advantage in the 'cold war' or build up pressure on one of the parties to accept a particular programme, then the course followed will be that which at the same time serves the interests of the major proponents and is acceptable to an impressive majority."

Mr. President, I thought it fit to refer to this comment as to the rationale of the situation, because it seems to me to be eminently relevant to the suggestion that activities within a body such as the General Assembly and the Security Council, acting in this particular way, can be said to establish customary international law at all, when their purpose *is so essentially different, when their purpose is not directed at* acts of States, when their purpose is not directed at indications whether there is a legal obligation or not, in the ordinary course of events. There may be exceptions, but the basic essential function of these organs is so foreign to that which is suggested as being necessary in a process of generating a norm of customary law.

In the case of the Trusteeship Council, the position can be stated very shortly. It is quite clear that in terms of Article 87 the Trusteeship Council cannot have wider powers than the General Assembly—it assists the General Assembly, and its functions are limited and directly prescribed, the scope relates essentially to supervisory functions regarding trusteeship administration. There again, one finds no purpose of laying down norms which may be binding in the future.

Finally, we come to the Constitution of the International Labour Organisation. As far as we could study that document, Mr. President, it seems clear that the functions of that Organisation are intended to be non-normative. The Organisation may prepare draft conventions, but those draft conventions then again require ratification by the States concerned. This emphasizes that that power of binding without the consent of the States concerned was *not* intended to be given to the Organisation. And then there are certain other functions relating to investigation of specific complaints and so forth, but again a limited compass relating to investigation of particular complaints and not normative in a general sense at all.

It is against that background, Mr. President, of what we find in the constituent instruments, what we find by way of contemplation of the nature and the extent of the powers of these various organized bodies and organs, that the two questions arise which are relevant to the issue now

under consideration: firstly, can a norm arise by custom in the processes of these Organizations, and, secondly, would such a norm be binding upon a dissenting State?

Mr. President, for the purposes of considering whether a rule of customary law has been generated by the processes suggested by the Applicants, it is necessary first to consider the basic principles which apply, as enunciated by various authorities and by various commentators. My learned friend, Dr. verLoren van Themaat, has specially conducted some research into this matter, and with your leave, Mr. President, I should like to ask him to present a brief survey of relevant authorities to the Court.